

DAVID B. BARLOW
United States Attorney
JOHN K. MANGUM
Assistant United States Attorney

MICHAEL G. PITMAN
LINDSAY L. CLAYTON
Trial Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 683
Ben Franklin Station
Washington, D.C. 20044-0683
Telephone: (202) 305-7938
(202) 307-2956
Facsimile: (202) 307-0054
michael.g.pitman@usdoj.gov
lindsay.l.clayton@usdoj.gov

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

Arlin Geophysical & Laura Olson,

Plaintiffs,

v.

United States of America,

Defendant & Counterclaim Plaintiff,

v.

John E. Worthen; *et al.*,

Counterclaim Defendants.

Case No. 2:08-cv-414-TS-BCW

ORDER GRANTING STIPULATED
MOTION TO AMEND AND AMENDED
SCHEDULING ORDER

Honorable Ted Stewart

Magistrate Judge Brooke C. Wells

The Court, having read and considered the Revised Joint Motion to Amend Scheduling Order (docket #325), and for good cause shown, hereby GRANTS the Motion. It is hereby ORDERED that the following matters are scheduled and may not be changed without Court approval.

RULE 26(a)(2) REPORTS FROM EXPERTS DATE

Plaintiff	4/17/2012
Defendant	4/17/2012
Counter reports	5/4/2012

OTHER DEADLINES DATE

Discovery to be completed:

Fact discovery	4/23/2012
Expert discovery	5/11/2012
Dispositive or potentially dispositive motions	5/18/2012

SETTLEMENT/ALTERNATIVE DISPUTE RESOLUTION DATE

Evaluate case for Settlement/ADR	4/20/2012
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TRIAL AND PREPARATION FOR TRIAL TIME DATE

Rule 26(a)(3) Pretrial Disclosure

Plaintiff	08/24/12
Defendant	09/07/12
Special Attorney Conference on or before	09/21/12
Settlement conference on or before	09/21/12
Final Pretrial Conference 2:30 p.m.	10/09/12
Trial Length: Bench Trial 5 days 8:30 a.m.	10/22/12

DATED this 14th day of February, 2012.



David Nuffer

U.S. Magistrate Judge

In the United States Court of Federal Claims

No. 03-200T

(Filed: February 15, 2012)

IRA H. BARRY, ET AL.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant,

Tax Equity and Fiscal
Responsibility Act (TEFRA);
AMCOR; refund suit; *Prati*;
I.R.C. § 6229; I.R.C. § 6621;
Motion for Reconsideration

Thomas E. Redding, Houston, TX, for plaintiffs.

Paul G. Galindo, United States Department of Justice, Tax Division,
Court of Federal Claims section, Washington, D.C., with whom were *John A.
DiCicco*, Principal Deputy Assistant Attorney General, and *Mary M. Abate*,
Acting Chief, Court of Federal Claims section for defendant.

OPINION AND ORDER

BRUGGINK, *Judge.*

This action is one of a number of related proceedings brought pursuant to the Tax Equity and Fiscal Responsibility Act of 1982, 26 U.S.C. §§ 6221–6234 (2006) (“TEFRA”), by investors in a series of limited partnerships organized by American Agri-Corp., Inc. (“AMCOR”). These actions are brought by individual investing partners who are challenging assessments by the IRS flowing from an adjustment at the partnership level. The AMCOR partners assert three common claims for refund: (1) that the tax assessments were untimely due to the passage of the limitations period, (2) that tax-motivated interest penalties were improper, (3) and that interest should have been abated. These common claims were decided by representative cases,

which were eventually dismissed for lack of jurisdiction. A dismissal order was entered in this case, but plaintiffs later asserted that they alleged facts different from the common claims, and thus complete dismissal was inappropriate. Accordingly, this court vacated the dismissal in this case in part, allowing plaintiffs to pursue unique claims not addressed by the AMCOR representative cases.

Before the court is plaintiffs' motion for reconsideration of two interim orders entered in this docket. The first order, dated April 18, 2008, dismissed the common AMCOR claims. The second order, dated March 29, 2011, confirmed the dismissal of the common AMCOR claims, but vacated the first order in part to allow plaintiffs to pursue only their unique individual claims. The case thus remains pending, and the motion is therefore brought under Rule 54(b) of the Rules of the United States Court of Federal Claims ("RCFC"), which deals with reconsideration of interim orders.

Plaintiffs contend that the orders, insofar as they call for dismissal of the common claims, are incorrect and can and should be reconsidered on the merits. Defendant contends that the first order, which was appealed to the Federal Circuit and affirmed, was not vacated with respect to dismissing the common claims. The rulings on the common claims, it contends, are therefore not open to review. Defendant further argues that plaintiffs have not met their burden to demonstrate that reconsideration is warranted. The matter is fully briefed and oral argument is deemed unnecessary. For the reasons explained below, we deny plaintiffs' motion for reconsideration.

BACKGROUND¹

In the 1980s, AMCOR, acting as general partner, organized a series of limited partnerships to serve as investment vehicles marketed to high-income professionals. The announced goal of these partnerships was to buy farmland and grow crops. AMCOR raised \$206 million dollars from 3,000 investors. Due to the structure of the partnerships, the front-loading of expenses, and corresponding deductions, investors were saving as much in taxes as they were investing, and sometimes even more. By the late 1980s, however, the

¹ The following facts are derived from *Prati v. United States*, 81 Fed. Cl. 422 (2008), and *Prati v. United States*, 603 F.3d 1301 (Fed. Cir. 2010), and are common to all AMCOR partners unless otherwise noted.

AMCOR partnerships were the target of an IRS audit and investigation. The IRS believed that the AMCOR partnerships were illegal tax shelters.

The IRS examined the AMCOR partnerships and issued a final partnership administrative adjustment (“FPAA”) to the tax matters partner of the AMCOR partnerships, adjusting the partnerships’ deductions. Representatives of the AMCOR partnerships challenged the FPAA’s in partnership-level proceedings before the United States Tax Court. One of the issues in that partnership-level proceeding was whether the adjustments were untimely based on the statute of limitations created by I.R.C. § 6229.² The AMCOR tax matters partner in the Tax Court proceeding executed a “Stipulation to be Bound,” in which the AMCOR partnerships agreed to be bound consistent with the Tax Court’s findings of fact and law relating to the statute of limitations issue in an AMCOR test case. In that test case, *Agri-Cal Venture Associates v. Commissioner*, 80 T.C.M. (CCH) 295 (2000), the Tax Court rejected the statute of limitations defense.

While the partnership-level proceedings were pending at the Tax Court, some AMCOR partners, including plaintiffs in this case, chose to settle their partnership items with the IRS. The settlement was effectuated in 1999 by execution of Form 870-P(AD). The partners who settled at this stage in the AMCOR litigation were known as “settled partners.” Other AMCOR partners did not settle with the IRS and were referred to as “non-settling partners.”

In 2001, the IRS moved under Tax Court Rule 248(b)³ for entry of decision in the non-settled partnership cases. The IRS represented that it and the tax matters partner for the AMCOR partnerships had reached a contingent agreement with respect to the disputed partnership items. Accordingly, the Tax Court entered stipulated decisions on July 19, 2001.

The IRS subsequently assessed additional interest against settling and non-settling partners under I.R.C. § 6621(c), which, at that time, provided for a special interest penalty for substantial underpayments of income tax

² All I.R.C. references are to the Internal Revenue Code of 1986, as amended, contained within Title 26 of the United States Code, unless otherwise noted.

³ Tax Court Rule 248(b) allows the IRS to move for judgment based on a settlement or consistent agreement entered into with the tax matters partner.

attributable to tax motivated transactions. AMCOR partners then filed administrative refund claims with the IRS, which were denied. Thereafter, many individual AMCOR partners filed tax refund suits in this court. In total, 129 AMCOR-partnership refund suits were filed here; 77 of those cases, including the instant case, were deemed by the parties to be legally and factually similar.

On March 28, 2003, the parties filed a joint motion to stay the instant case. The joint motion noted that, because the instant case “presents the same issues of fact and law as the [other AMCOR cases], the parties request that proceedings be suspended pending a final decision in the representative cases.” Joint Mot. to Stay 3-4. Judge Yock, to whom the case was then assigned, granted the motion to stay and observed that, “The parties have selected three representative cases in which proceedings will go forward: [*Isler v. United States*, No. 01-344]; [*Scuteri v. United States*, No. 01-358]; and [*Prati v. United States*, No. 02-60].” *Barry v. United States*, No. 03-200 (Fed. Cl. Apr. 2, 2003) (order granting stay). The parties later added additional representative cases: *Hinck v. United States*, No. 03-865, *Keener v. United States*, No. 03-2028, and *Smith v. United States*, No. 04-907.

In February 2005, Judge Allegra, to whom AMCOR cases had also been assigned, decided *Hinck v. United States*, 64 Fed. Cl. 71 (2005). In *Hinck*, Judge Allegra held that we lack jurisdiction to consider plaintiffs’ interest abatement claims under I.R.C. § 6404 because such authority rests within the discretion of the Secretary and is not subject to judicial review in this court. *Id.* at 84. The AMCOR plaintiffs appealed to the Federal Circuit, which affirmed, holding that the Tax Court is the exclusive forum for interest abatement claims under I.R.C. § 6404. 446 F.3d 1370 (Fed. Cir. 2006). The Supreme Court granted *certiorari*, 549 U.S. 1162, and affirmed the Federal Circuit. 550 U.S. 501 (2007). Thus, after *Hinck*, the remaining common AMCOR claims related to untimely assessment under I.R.C. § 6229(a) and tax-motivated interest under I.R.C. § 6621(c).

On April 20, 2006, the instant case was reassigned to Judge Block, and it remained stayed pending the outcome in the remaining representative cases. Meanwhile, Judge Allegra decided *Keener v. United States*, 76 Fed. Cl. 455 (2007). In *Keener*, Judge Allegra held that we lack tax refund jurisdiction over AMCOR plaintiffs’ statute of limitations and tax-motivated interest claims because such claims were partnership-level items and, as such, needed to be addressed in the partnership-level proceeding. *See id.* at 470.

On April 16, 2008, Judge Block decided *Prati v. United States (Prati I)*, 81 Fed. Cl. 422 (2008). He held that this court lacks jurisdiction to hear AMCOR plaintiffs' I.R.C. § 6229(a) limitations claims and I.R.C. § 6621(c) tax-motivated interest claims because both were partnership-level items that, under TEFRA, needed to be challenged at the partnership-level proceeding, which, in this case, was at the Tax Court. *See id.* at 436. Additionally, relying on *Hinck*, Judge Block also dismissed plaintiffs' interest abatement claims under I.R.C. § 6404. *Id.* at 440. Thus, *Prati I* foreclosed the I.R.C. §§ 6229(a) and 6621(c) claims, which were the only common AMCOR claims remaining. The net effect, therefore, of *Hinck* and *Prati I* was to dismiss the common AMCOR claims in their entirety. On April 18, 2008, Judge Block entered judgment under RCFC 58 dismissing all remaining claims for lack of jurisdiction, including those of the plaintiffs here.

On May 2, 2008, plaintiffs here filed a motion for reconsideration and to alter or amend the judgment dismissing their case. Plaintiffs argued that, although *Prati I* dismissed the I.R.C. §§ 6229 and 6621 claims, complete dismissal was not appropriate because some of the AMCOR plaintiffs, including certain plaintiffs in this case, asserted a cause of action not covered by the *Prati I* opinion. Pls.' Mot. Vacate 1, ECF No. 24. For example, the Boggs, plaintiffs in the instant case, asserted that the one-year limitations period of I.R.C. § 6226(f) barred the assessment. Plaintiffs' counsel requested that the judgment be vacated and either stayed pending the *Prati* appeal, or that plaintiffs be allowed to pursue their action not subject to the holding of *Prati*. Plaintiffs' counsel requested, and Judge Block granted, that the motion be deemed filed in all of Judge Block's AMCOR cases.

On July 1, 2008, Judge Block vacated the April 18, 2008 order in *Prati I. Prati v. United States (Prati II)*, 82 Fed. Cl. 373 (2008). In *Prati II*, Judge Block held that "The Motion for Reconsideration is DENIED in each of the 77 cases covered by the [*Prati I*] opinion[.]" i.e., relating to the I.R.C. §§ 6229 and 6621 claims. *Id.* at 379. Judge Block did vacate judgment, however, "for the limited purpose of allowing plaintiffs to pursue any unresolved, case-specific claims that may still be outstanding" in fifteen of the cases, including the present one. *Id.* at 379. On November 21, 2008, upon a joint request by plaintiffs' counsel and defendant, Judge Block issued an order in *Isler* staying the instant case pending appeals in *Keener v. United States*, 76 Fed. Cl. 455 (2009), and *Prati. Isler v. United States*, No. 01-344 (Fed. Cl. Nov. 21, 2008) (order granting stay).

On January 8, 2009, the Federal Circuit issued its decision in *Keener v. United States*, 551 F.3d 1358 (Fed. Cir. 2009), and affirmed this court's holding that it lacked jurisdiction over AMCOR plaintiffs' I.R.C. §§ 6229(a) and 6621(c) claims. Rehearing en banc was denied on March 18, 2009. The Supreme Court denied *certiorari* in *Keener* on October 5, 2009. 130 S. Ct. 153 (2009). On May 5, 2010, the Federal Circuit issued its opinion in *Prati*, affirming Judge Block's dismissal of the I.R.C. §§ 6229(a) and 6621(c) claims. *Prati v. United States (Prati III)*, 603 F.3d 1301 (Fed. Cir. 2010). Rehearing en banc was denied on August 3, 2010. The Supreme court denied *certiorari* in *Prati III* on January 10, 2011. 131 S. Ct. 940 (2011).

On January 31, 2011, the parties in *Isler* filed a status report proposing how the remaining AMCOR cases, including this one, should proceed. Plaintiffs' counsel requested that the instant case and other AMCOR cases be transferred to Judge Lettow for consolidation with *Epps v. United States*, No. 06-615. Alternatively, plaintiffs' counsel requested that the cases be consolidated with *Isler*. Defendant requested that the cases proceed independently of each other for the sole purpose of resolving the case-specific claims.

On March 29, 2011, Judge Block denied all of the motions to transfer. He noted that fourteen cases, including the instant one, were originally dismissed for lack of jurisdiction by *Prati I. Isler*, No. 01-344 (Fed. Cl. Mar. 29, 2011) (order denying transfer). Moreover, *Prati II* vacated judgment in certain cases covered by *Prati I*, but only to the extent of permitting plaintiffs to "pursue unresolved, case-specific claims that may still be outstanding." *Id.* at 2. The order plainly did not resurrect the common refund claims that were dismissed by *Prati I*: "In further proceedings before this court . . . plaintiffs may not relitigate claims that were fully adjudicated more than three years ago and were dismissed by the court for lack of jurisdiction." *Id.* Because the common claims had already been adjudicated and only taxpayer-specific claims remained, Judge Block denied the request for consolidation and transfer. He therefore lifted the stay of litigation in the individual cases and ordered the parties to file separate joint status reports in each case setting forth proposed procedural courses to resolve any outstanding taxpayer-specific claims. *Id.* at 3-4.

On March 31, 2011, this case was transferred to the undersigned. The parties filed a joint status report on May 24, 2011, stating that "the only claim remaining unresolved is the backdated assessment claim pleaded in paragraph

24.a of plaintiffs' complaint." Joint Status Report 2, ECF No. 35. The claim in paragraph 24.a relates to the one-year statute of limitations claim made by the Boggs. Plaintiffs' counsel further stated, however, "the Boggs no longer wish to pursue and intend to dismiss this claim. Once that is done, there will be no unresolved claims in this case." *Id.* The joint status report also indicated that plaintiffs' counsel intended to move yet again for reconsideration of the April 18, 2008 Order and Opinion (*Prati I*) and would move for reconsideration of Judge Block's March 29, 2011 order. That motion is before the court now and the matter is ready for disposition.

DISCUSSION⁴

Because a final judgment has not been entered against all plaintiffs with respect to all issues, this motion is interlocutory in nature and thus governed by RCFC 54(b). We possess the inherent power to modify our interlocutory orders, and, under common law principles, we may reconsider a prior decision, subject to the law of the case doctrine. *See Wolfchild v. United States*, 68 Fed. Cl. 779, 784-85 (2005). We may depart from the law of the case, however, upon, *inter alia*, the discovery of new evidence, intervening changes of legal authority, or to prevent manifest injustice. *See id.* Interlocutory reconsideration is thus warranted "as justice requires." *See L-3 Commc 'ns Integrated Sys., L.P. v. United States*, 98 Fed. Cl. 45, 48 (2011). Although the contours of interim reconsideration are imprecise, there remains a "a good deal of space for the court's discretion." *Cobell v. Norton*, 224 F.R.D. 266, 272 (D.D.C. 2004).

Plaintiffs' motion for reconsideration asserts three broad points of error: (1) vacating the April 18, 2008 judgment reinstated plaintiffs' limitations and penalty interest claims (the I.R.C. §§ 6229(a) and 6621(c) claims); (2) even if those claims have been dismissed, *Prati I* is not the law of the case here; and (3) even if the common claims have been dismissed and *Prati I* remains the law of the case, *Prati I* was wrongly decided. We hold that plaintiffs' untimely

⁴ Plaintiffs' counsel has filed similar motions for reconsideration in other AMCOR cases: *Corkill v. United States*, No. 07-147; *Fournier v. United States*, No. 06-933; *Northcutt v. United States*, No. 06-860; *Boland v. United States*, No. 06-859; *Donaldson v. United States*, No. 03-2875; *Martin v. United States*, No. 03-2272. All the motions for reconsideration have been denied. *See infra* note 5.

assessment and tax-motivated interest claims were clearly dismissed and not reinstated, the *Prati* decisions control, and reconsideration of *Prati I* is not appropriate.

- I. Plaintiffs' untimely assessment and tax-motivated interest claims were not reinstated, and are otherwise controlled by *Prati I*, *II*, and *III*

Plaintiffs ask this court to decide whether the common AMCOR claims were reinstated when Judge Block vacated his April 18, 2008 dismissal order in part. The April 18, 2008 order stemmed from his April 16, 2008 opinion in *Prati I*. Plaintiffs contended that the instant case was never formally consolidated with the other AMCOR cases, including *Prati*. We disagree. The instant case was conspicuously listed in footnote two of *Prati I*, and Judge Block, based on the representations made by plaintiffs' counsel there, who is also instant plaintiffs' counsel, clearly included the cases listed there within the ambit of his opinion. Moreover, the Federal Circuit affirmed Judge Block's opinion, holding that we lack jurisdiction over the timeliness and tax-motivated interest claims. *See Prati III*, 603 F.3d at 1308-09.

While *Prati I* was pending at the Federal Circuit, several AMCOR partners, including plaintiffs here, asserted in a motion for reconsideration facts different from those common with *Prati* and moved to alter or amend the judgment. Judge Block denied the motion with respect to the underlying common AMCOR claims (including the untimely assessment and tax-motivated interest claims), but expressly vacated *Prati I* only "for the limited purpose of allowing plaintiffs to pursue any unresolved, case-specific claims that may still be outstanding." *Prati II*, 82 Fed. Cl. at 379. In other words, *Prati II* vacated plaintiffs' judgments for the limited purpose of allowing only case-specific claims to proceed, because "the parties requested that the Court first resolve the jurisdictional issues arising in the AMCOR tax partnership cases and that for such a purpose [*Prati I*] should serve as a representative case." *Id.* at 374. Judge Block reiterated this in his March 29, 2011 order denying transfer: "The court's [April 18, 2008] order to vacate judgment in [*Barry* and other cases] did not, as plaintiffs seem to assume, vacate the dismissal of these common claims." *Isler*, No. 01-344, 3 (Fed. Cl. Mar. 29, 2011). Judge Block could not have been more clear. It is plain, therefore, that he did not reinstate plaintiffs' timeliness and tax-motivated interest claims under I.R.C. §§ 6229(a) and 6621(c). Accordingly, the common AMCOR claims relating to I.R.C. §§ 6229(a) and 6621(c) have been resolved.

II. Reconsideration of *Prati I* is not warranted

Plaintiffs argue that even if *Prati I*, *II*, and *III* apply, reconsideration is warranted because of factual differences relating to the distinction between settled and non-settled partners and subsequent changes in the law. They offer the affidavit of their tax matters partner (“TMP”), Frederick H. Behrens. Mr. Behrens provides information concerning the negotiations leading to the entry of the stipulated decisions in the Tax Court. Mr. Behrens asserts that his understanding and intent were that: (1) in his capacity as an individual partner, he could settle only those partnership, non-partnership, and affected items regarding himself; (2) in his capacity as TMP, he could bind other partners only to partnership items; and (3) that neither he nor the Tax Court had authority to bind other partners to any non-partnership item under his contingent agreement with the IRS. Pls.’ Mot. Recon. App. 4. Plaintiffs argue that these new allegations prompt reconsideration.

The arguments made by plaintiffs are not novel to this motion for reconsideration. Plaintiffs’ counsel has advanced similar arguments in support of motions for reconsideration in the other AMCOR cases. The judges of this court uniformly have denied those motions,⁵ and we find their reasoning persuasive. We adopt in full Judge Wheeler’s rationale set out in *Fournier v. United States*, 2011 WL 6187094 (Fed. Cl. Dec. 13, 2011), and for the reasons expressed there, we deny plaintiffs’ motion for reconsideration of the decision in *Prati I*.

CONCLUSION

For the reasons stated above, we deny plaintiffs’ motion for reconsideration. Because plaintiffs’ counsel represented to the court in the May 24, 2011 status report that plaintiffs did not desire to pursue any case-specific claims, we dismiss the claim in its entirety. The clerk is directed to enter final judgment for defendant and dismiss the case accordingly. No costs.

⁵ See *Northcutt v. United States*, 2012 WL 300410 (Fed. Cl. Jan. 31, 2012); *Donaldson v. United States*, No. 03-2875 (Fed. Cl. Jan. 6, 2012) (unpublished); *Corkill v. United States*, 2012 WL 251987 (Fed. Cl. Jan. 6, 2012); *Fournier v. United States*, 2011 WL 6187094 (Fed. Cl. Dec. 13, 2011); *Martin v. United States*, 2011 WL 6035557 (Fed. Cl. Dec. 5, 2011); *Boland v. United States*, No. 06-859 (Fed. Cl. Nov. 17, 2011) (unpublished).

s/ Eric G. Bruggink
ERIC G. BRUGGINK
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.	)	No. 08-3282
)	
IRVING COHEN, THE WINDSOR)	
ORGANIZATION, INC., and 3-B)	
STORES, INC.,)	
)	
Defendants.)	

OPINION

RICHARD MILLS, U.S. District Judge:

The Court now considers the following motions in limine: the Plaintiff’s motion for judicial notice of the alleged fact that Liechtenstein and the British Virgin Islands are widely regarded as tax havens [d/e 182]; the Plaintiff’s motion for judicial notice of certain matters of public record [d/e 183]; Defendant Windsor Organization’s motion for judicial notice of various State Department documents [d/e 188]; and the Plaintiff’s motion for judicial notice of the Schengen Agreement of 1985 [d/e 195].

I. Motion for Judicial Notice of Fact that Countries are Tax Havens

(A)

Plaintiff United States of America has filed a motion for judicial notice of the fact that Liechtenstein and the British Virgin Islands are widely regarded as tax havens. It notes that Defendant The Windsor Organization, Inc. claims that it is wholly-owned by a British Virgin Islands corporation, TI&M Services, LTD. Moreover, Defendant Irving Cohen and Windsor both allege that Cohen had in-person meetings with Markus Kolzoff, a citizen of Liechtenstein and alleged member of TI&M's Board of Directors. The Plaintiff claims that, because Kolzoff refused to be deposed and refused to produce any documents at the hearing before the Principality of Liechtenstein's Princely Court of Justice, the United States was unable to take any discovery from TI&M or Kolzoff. The Plaintiff thus requests that the Court take judicial notice at trial of the fact that both the Principality of Liechtenstein and the British Virgin Islands are widely regarded as "tax havens."

The Federal Rules of Evidence require that the Court take judicial

notice of an adjudicative fact “if a party requests it and the court is supplied with the necessary information.” See Fed. R. Evid. 201(c)(2). A court may take judicial notice of a fact not subject to reasonable dispute in that it: “(1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Judicial notice may be taken at any stage of the proceeding. See Fed. R. Evid. 201(d).

In support of its motion, the Plaintiff notes that the Organisation for Economic Co-Operation and Development (“OECD”) has defined “tax haven” as follows:

[A] tax haven is a jurisdiction that imposes no or only nominal taxes itself and offers itself as a place to be used by non-residents to escape taxes in their country of residence. A tax haven can offer this service because it has laws or administrative practices that prevent the effective exchange of information on taxpayers benefitting from the low-tax jurisdiction.

See Slemrod & Wilson, Tax Competition with Parasitic Tax Havens, NBER Working Paper Series (May 2006), p.2 (available here: <http://www.nber.org/papers/w12225>). The Plaintiff asserts that the OECD published criteria that qualified a country as a “tax haven” in its 1998

report, Harmful Tax Competition: An Emerging Global Issue. See <http://www.oecd.org/dataoecd/33/0/1904176.pdf>. In 2000, the OECD published a list of 41 tax haven countries that met the 1998 criteria: the list identified both Liechtenstein and the British Virgin Islands as tax havens. See Towards Global Tax Co-Operation: Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs, OECD 2000 (available here: <http://www.oecd.org/dataoecd/9/61/2090192.pdf>).

The Plaintiff further asserts that the National Bureau of Economic Research (“NBER”) has noted that Liechtenstein and the British Virgin Islands are tax havens as defined by the OECD, as well as under the more narrowly-tailored Hines-Rice text. See Dharmapala & Hines, Which Countries Become Tax Havens?, NBER Working Paper Series (December 2006), p. 34 (available here: <http://www.nber.org/papers/w12802>). Moreover, the Tax Justice Network has identified Liechtenstein and the British Virgin Islands as tax havens. See Identifying Tax Havens and Offshore Finance Centres, Tax Justice Network, (July 8, 2007), p. 8

(a v a i l a b l e h e r e :
http://www.taxjustice.net/cms/upload/pdf/Identifying_Tax_Havens_Jul_07.pdf).

The Plaintiff contends that even William Reed, the former president of Asset Protection Group, Inc.–the entity Cohen hired to incorporate Windsor in Nevada–recognized Liechtenstein and the British Virgin Islands as tax havens. In his book, Bulletproof A\$\$et Protection, Reed wrote, “The BVI has a good infrastructure and would always make my short list of best offshore havens.” See William S. Reed, Bulletproof A\$\$et Protection, p. 145. As for Liechtenstein, Reed states, “Liechtenstein still has some of the best bank secrecy laws in the world,” and “[i]n spite of this waiver, Liechtenstein is still one of the best offshore havens in the world.” See id. at 153-54.

The Plaintiff contends that Defendants put the countries of Liechtenstein and the British Virgin Islands at issue by virtue of the defense they have asserted: that Cohen met with a citizen of Liechtenstein to discuss investing in the property, and that the purported owner of Windsor

is TI&M, a British Virgin Islands corporation. The Plaintiff further asserts that, because of Windsor's and Cohen's defense and because the United States was unable to take any discovery about Kolzoff's or TI&M's actual interest in the Springfield property, the issue of Liechtenstein's and British Virgin Islands' status as a tax haven is relevant.

Based on the foregoing, the Plaintiff claims there can be no reasonable dispute that Liechtenstein and the British Virgin Islands are widely-regarded as tax havens. Accordingly, it asks the Court to take judicial notice.

(B)

In its response, Windsor asserts that the parties had reached an agreement as to a possible protective order and a potential location of Markus Kolzoff's deposition (Switzerland), when the Plaintiff filed its motion for issuance of Letters Rogatory to the Principality of Liechtenstein, which ended the possibility of obtaining Kolzoff's voluntary deposition. Windsor questions the Plaintiff's assertion that it has been foreclosed from obtaining discovery from TI&M, the sole shareholder of Windsor, when the

Plaintiff did not, either through a Letter of Request through this Court or the Liechtenstein Court, pursue the matter further and did not seek an appeal of the Regional Court's ruling that "[t]he refusal to give testimony of witness, Dr. Markus Kolzoff, is legitimate."

Windsor further asserts that Plaintiff's assertion is subject to reasonable dispute and is not known within the territorial jurisdiction of this Court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Windsor notes that, in support of the Plaintiff's motion, it has cited persuasive authority consisting of William Reed's book, Bulletproof A\$\$et Protection, in addition to Committee Reports of an international organization, a national non-profit research organization and a research and advocacy committee launched in the British Parliamentary. According to Windsor, these documents are not proper subjects of judicial notice and fail to satisfy the standard of Rule 201. Moreover, Windsor has objected to the admissibility of Reed's book and other marketing tools in its first motion in limine. Additionally, Windsor contends that some of the documents that Plaintiff

has relied on were not properly disclosed.

Windsor further alleges that Plaintiff has not explained NBER's and OECD's connection to their role with the federal government and their role in obtaining the information cited by the Plaintiff. Moreover, Windsor claims that much of the information cited is purported expert opinion which was not disclosed, and hearsay. Additionally, Windsor asserts that Plaintiff has not established foundation for admission of the contents of the documents.

(C)

Windsor has raised a number of issues pertaining to the admissibility of the documents on which the Plaintiff relies. The status of Liechtenstein and the British Virgin Islands as alleged tax havens appears to be relevant. However, “[j]udicial notice merits the traditional caution it is given, and courts should strictly adhere to the criteria by the Federal Rules of Evidence before taking judicial notice of pertinent facts.” Doss v. Clearwater Title Co., 551 F.3d 634, 640 (7th Cir. 2008).

The language of the rule makes it clear that courts must use caution

in taking judicial notice of adjudicative facts. “In order for a court fact to be judicially noticed, indisputability is a prerequisite.” See Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344, 1354 (7th Cir. 1995).

Because it is unable to determine that the issue is beyond “reasonable dispute,” the Court declines at this time to take judicial notice of the alleged fact that Liechtenstein and the British Virgin Islands are widely regarded as tax havens. The parties may litigate the issue through the introduction of any admissible evidence at trial.

Therefore, the Court will Deny the Plaintiff’s motion in limine. The motion may be renewed at an appropriate time. See Fed. R. Evid. 201(d).

II. Motion for Judicial Notice of Public Records

Plaintiff United States has filed a motion for judicial notice of matters of public record relating to William Reed and the Asset Protection Group, Inc. This includes two civil cases against Reed and Asset Protection Group. See FTC v. Neiswonger, Civil No. 96-2225-SNL (E.D. Mo. Nov. 13, 1996); United States v. Reed, Civil No. 07-1471 (E.D. Mo. Aug. 20, 2007). It also includes the recent criminal indictment against William Reed and Wendell

Waite, CPA. See United States v. Reed et al., 11-cr-00247 (D. Nev. July 5, 2011). The Plaintiff further asks the Court to take judicial notice of the lawsuit against Defendant Irving Cohen, Marvin Rosenbaum, and Herman Schwartzman in Morley v. Cohen, 610 F. Supp. 798, 804 (D. Md. 1985), as well as the jury verdict entered against Cohen in that case. See Morley v. Cohen, 888 F.2d 1006, 1008 (4th Cir. 1989).

(A)

In support of the motion as to William Reed and the Asset Protection Group (APG), the Plaintiff states that Irving Cohen hired Reed's company, APG, to incorporate Defendant The Windsor Organization, Inc. in Nevada. Reed served as the nominee President of Windsor, which meant that APG served as the registered agent. The Nevada Secretary of State would see Reed's name as officer and director. The Plaintiff notes that Reed testified that he sold "privacy" as one of the benefits of a Nevada corporation, and that clients who wanted "total privacy" would ask Reed to serve as the nominee. Based on the foregoing, the Plaintiff asserts that the services provided by Reed and APG are relevant to the question of whether Cohen

created Windsor to hold the Springfield Property as his nominee.

The Plaintiff further claims that, starting in 2006, Reed and APG came under scrutiny for its involvement with Reed's business partner, Richard Neiswonger. In April of 2007, the Eastern District of Missouri found Reed and APG in contempt for violating a 1997 permanent injunction against Neiswonger. See FTC v. Neiswonger, 494 F. Supp.2d 1067 (E.D. Mo. 2007). Subsequently, the Department of Justice sued to permanently enjoin Reed from promoting fraudulent tax schemes. See United States v. Reed, Civil No. 07-1471 (E.D. Mo. Aug. 20, 2007). In October of 2007, Reed consented to the entry of a permanent injunction against him. See id., Docket No. 5.

Although Windsor does not dispute these matters, Windsor asserts that these cases and their holdings are irrelevant under Rules 402, 403 and 404 of the Federal Rules of Evidence. Thus, it alleges these are not proper subjects of judicial notice. Windsor contends the fact that Neiswonger, Reed and APG were found to have violated an injunction entered in 1997 (five years before the incorporation of Windsor) in a case brought by the

Federal Trade Commission is completely irrelevant to whether Windsor is holding property in Springfield as the nominee or alter ego of Irving Cohen. Moreover, Reed's alleged misleading marketing of business opportunities sold by APG in no way helps establish what Cohen's motive, opportunity or intent was when he used APG to incorporate Windsor.

Windsor further asserts that the allegations made by the Plaintiff in a prior suit against Reed, such as that "Reed has established thousands of Nevada Corporations for customers to use as nominees to hide their income and assets," are subject to reasonable dispute, which Reed did dispute and would dispute if named as a party in this case. Windsor states that those allegations were not admitted by Reed and were never proven by the Plaintiff in that case. See Reed, 07-1471, Stipulated Order of Permanent Injunction (E.D. Mo. Oct. 11, 2007) (stating "Defendant, without admitting any of the allegations in the complaint except as to jurisdiction, waives the entry of findings of fact and conclusions of law.").

The Plaintiff further notes that Reed, along with Neiswonger and Windsor's CPA, Wendell Waite, were indicted by a federal grand jury in

Nevada for crimes arising from their participation in APG. See Reed, et al., 11-cr-00247. Windsor states that this criminal matter is set for trial on May 8, 2012. Accordingly, Windsor claims that the unproven allegations made against these Defendants are contested and are not the proper subject of judicial notice.

Windsor contends that factual assertions made in other cases are not proper subjects of judicial notice because they are subject to reasonable dispute. It further asserts that some of these matters are irrelevant and admissible and are the subject of Windsor's motions in limine. Windsor alleges that Plaintiff cannot circumvent the Rules of Evidence by having this Court take judicial notice of evidence which is not admissible.

(B)

The Plaintiff further alleges that David Morley and several other plaintiffs filed suit against Cohen and over one dozen co-defendants for their promotion of a tax shelter scheme in the 1970s that failed to yield the tax advantages promised. See Morley, 610 F. Supp. at 803. The plaintiffs named Herman Schwartzman, Windsor's purported expert on New York

trust law, as one of Cohen's co-defendants in that case due to his law firm's preparation of promotional materials for the tax shelter scheme. See id. at 804. Marvin Rosenbaum, the accountant who issued a tax opinion for the tax shelter scheme, was also named as a defendant. See id. Cohen successfully quashed the subpoena to compel his attendance at trial and was tried in absentia. See Morley v. Cohen, 888 F.2d 1006, 1009 (4th Cir. 1989). The Plaintiff notes that the jury entered a verdict against Cohen for Civil RICO, common law fraud, breach of contract, conversion, and breach of fiduciary duty. See id. Pursuant to Cohen's motion, the court modified the damages to \$265,940, trebled under the Civil RICO statute only. See id.

The Plaintiff contends that this background is relevant to the allegations in this case. Because it has alleged that Cohen hid his property interest in the Springfield Property to avoid detection and collection by the IRS, the Plaintiff claims the fact that Cohen had other outstanding judgments against him is relevant as evidence of additional motive for Cohen to hide assets. It further asserts that Cohen's promotion of other tax

shelters—in addition to the shelter that gave rise to the I.R.C. § 6700 penalties in this case—is relevant to Cohen’s sophistication and familiarity with complex corporate transactions and structures.

Windsor alleges that, for the reasons provided in its second motion in limine, Morley is inadmissible because the evidence related to Morley is irrelevant and improper character evidence to prove Cohen, Herman Schwartzman and Marvin Rosenbaum’s conformity therewith. All counts against Schwartzman and Rosenbaum were dismissed. Windsor asserts it is improper for the Court to take judicial notice of facts of a case in which no verdict was entered against those defendants. Moreover, it is wholly irrelevant to the determination of the issues in this case that “disgruntled” plaintiffs filed a civil case against Schwartzman and Rosenbaum, which was dismissed.

(C)

To the extent that Windsor argues that the Court cannot take judicial notice of allegations in another lawsuit simply because they were disputed, the Court disagrees. In Pirelli Armstrong Tire Corp. Retiree Medical

Benefits Trust v. Walgreen Co., 631 F.3d 436 (7th Cir. 2011), the United States Court of Appeals for the Seventh Circuit took judicial notice of a complaint in another lawsuit. See id. at 443. This Court did the same thing in Floyd v. Excel Corp., 51 F. Supp.2d 931, 934 n.3 (C.D. Ill. 1999). However, the existence of public records such as court documents cannot be used to establish any disputed facts. See Independent Trust Corp. v. Stewart Information Services Corp., __ F.3d __, 2012 WL 32066 (7th Cir. Jan. 6, 2012), at *11. The Seventh Circuit explained:

The district court was reciting the long procedural history of this case. The Hargrove indictment, the Capriotti plea agreement, and Fidelity v. Intercounty are documents in the public domain that further that procedural narrative. The district court took judicial notice of the indisputable facts that those documents exist, they say what they say, and they have had legal consequences. The district court did not rely on the documents as proof of disputed facts in any other sense.

Id.

Some of the information which is the subject of the Plaintiff's judicial notice request appears to potentially be relevant. The Plaintiff asks the Court to take judicial notice of the following alleged facts:

(1) On November 13, 1996 the Federal Trade Commission filed

suit against Richard Neiswonger for falsely promoting training and business opportunity programs. In 1997, Neiswonger stipulated to the entry of a permanent injunction against him.

(2) On April 23, 2007, the Eastern District of Missouri found Reed and APG in contempt for acting in concert and participating with Neiswonger in violation of the 1997 permanent injunction against Neiswonger.

(3) On August 20, 2007, the Department of Justice sued to enjoin Reed from promoting fraudulent tax schemes that helped his customers evade the assessment and collection of federal tax liens.

(4) On October 11, 2007, Reed stipulated to an order of permanent injunction barring him from promoting tax-fraud schemes.

(5) On July 15, 2011, a grand jury in the District of Nevada indicted Reed, Neiswonger, and Waite for their involvement in the “APG scheme” to conceal assets and income through

disguised corporate ownership services. The indictment contains thirty-two counts, including Conspiracy to Defraud the United States, Attempt to Evade or Defeat Tax, and Money Laundering Conspiracy.

The Plaintiff also requests that the Court take judicial notice of the following alleged facts pertaining to Morley v. Cohen:

(1) Morley and other plaintiffs filed suit against Cohen and other defendants regarding their promotion of a tax shelter involving mining rights in Kentucky.

(2) Cohen, Schwartzman and Marvin Rosenbaum were all named as individual defendants in the suit.

(3) The jury returned a verdict against Cohen on counts of Civil RICO, common law fraud, breach of contract, conversion, and breach of fiduciary duty. The Court modified the damages to \$265,940 trebled under Civil RICO statute only.

The fact that some of this information appears to be relevant does not necessarily mean it is admissible. In determining whether to take judicial

notice of a fact under Rule 201, the Court will have to consider any other applicable Federal Rules of Evidence in determining admissibility. See Doss, 551 F.3d at 640. Some of the rules which may be applicable include, but are not limited to, Rule 401, Rule 402, Rule 403 and Rule 404. Until some evidence is presented, however, it is difficult for the Court to determine whether the information which is the subject of the motion is admissible. The Court notes that judicial notice may be taken at any stage of the proceeding. See Fed. R. Evid. 201(d).

The Court will defer ruling on the motion for judicial notice of public records.

III. Motion for Judicial Notice of Documents

Windsor has filed a motion requesting that the Court take judicial notice of the United States Department of State (“Department”) documents evidencing that Switzerland and Liechtenstein extend visa-free entry and exit to United States citizens staying in Switzerland and Liechtenstein for up to 90 days. The Department advises United States citizens to “make sure you obtain a stamp in your passport from the police

office in Buchs” if you wish to stay in Liechtenstein for a longer period of time.

In support of the motion, Windsor alleges that the information is capable of accurate and ready determination by resort to the Department’s website providing information to United States citizens regarding travel abroad. See http://travel.state.gov/travel/cis_pa_tw/cis/cis1034.html.

Windsor claims that the Department maintains the website for the benefit of American citizens and the information therein cannot reasonably be questioned for accuracy.

The Plaintiff claims that the issue of whether Irving Cohen actually traveled to Liechtenstein in late 2001 or early 2002 is relevant to whether TI&M invested in the Property, and to Cohen’s credibility generally. The Plaintiff notes that Cohen produced a copy of his passport during discovery. It has several stamps that show Cohen entered Spain, England, and Switzerland. However, Cohen’s passport does not show any entry stamps anywhere in Europe in late 2001 or early 2002.

Although the Plaintiff does not object to the Court’s taking judicial

notice of a printout from a Department of State website that discusses entry and exit requirements for U.S. citizens traveling to Switzerland, the Plaintiff contends that Windsor is citing the document to mislead the Court to accept Windsor's conclusion that Cohen's passport should not contain a stamp from his late 2001 or early 2002 visit to Liechtenstein. The Plaintiff claims that the Court should reject Windsor's "specious conclusion."

The Court will take judicial notice of the requested documents. At this time, the Court is not drawing any conclusions based on the documents.

IV. Motion for Judicial Notice of Schengen Agreement of 1985

The Plaintiff has filed a motion for judicial notice of the Schengen Agreement of 1985 and the 1990 Convention implementing the Schengen Agreement as they have been adopted and implemented by the European Commission.

(A)

The Schengen Agreement was a treaty signed on June 14, 1985,

between Belgium, France, Luxembourg, the Netherlands, and West Germany. See Regulation (EC) No. 562 of 2006, Official Journal of April 3, 2006, L 105, p. 1. On June 19, 1990, the same five countries signed a Convention implementing the Schengen Agreement, which created the “Schengen Area.” See European Commission Official Website, Schengen: Europe without internal borders (available here: http://ec.europa.eu/home-affairs/policies/borders/borders_schengen_en.htm). The Convention abolished border controls for travel within the Schengen Area, and provided common rules on entry from outside the Schengen Area. See id.

The Plaintiff states that the Schengen Agreement and the implementing Convention were incorporated into the main body of European Union law (the “*acquis communautaire*”) as part of the October 1997 Treaty of Amsterdam. See Treaty of Amsterdam, October 2, 1997, Official Journal of November 10, 1997, C 340, p. 1, 37 I.L.M. 56. The Plaintiff alleges that, on May 20, 1999, the Council of the European Union adopted the “Common Manual,” which was established to execute the provisions of the implementing Convention to the Schengen Agreement.

Twenty-five European countries are now included in the Schengen Area. See European Commission Official Website, Schengen: Europe without internal borders (available here: http://ec.europa.eu/homeaffairs/policies/borders/borders_schengen_en.htm). The Plaintiff notes that Switzerland is a party to the Schengen Agreement, even though it is not a member of the European Union. See id. The United Kingdom and Ireland are not parties to the Schengen Agreement. See id.

The Schengen Agreement “allows for free travel within a multi-country zone of Europe.” See Docket No. 153-6. “Within the Schengen area, you do not show your passport when crossing country borders.” See id. However, the Plaintiff claims that the purpose of the Schengen Agreement was to abolish border controls within the Schengen Area, while strengthening border control for entry into the Schengen Area from outside. See European Commission Official Website, Home Affairs, Crossing Borders (available here: http://ec.europa.eu/home-affairs/policies/borders/borders_crossing_en.htm).

The Plaintiff claims that the European Commission maintains a strict policy of stamping the travel documents of all third-country nationals (travelers from outside the Schengen Area countries):

Article 10: Stamping of the travel documents of third-country nationals

1. The travel documents of third-country nationals shall be systematically stamped on entry and exit. In particular an entry or exit stamp shall be affixed to:
 - (a) the documents, bearing a valid visa, enabling third-country nationals to cross the border;
 - (b) the documents enabling third-country nationals to whom a visa is issued at the border by a Member State to cross the border;
 - (c) the documents enabling third-country nationals not subject to a visa requirement to cross the border.

See Regulation (EC) No. 562 of 2006, Official Journal of April 3, 2006, L 105, p. 1. The Plaintiff alleges that the Common Manual, which member states established to execute the provisions of the implementing Convention to the Schengen Agreement, contains an almost identical directive. See Common Manual No. 313 of 2002, Part II, Point 2.1.1, Official Journal of December 16, 2002, C 313 pp. 97, 107. The relevant portion, Point 2.1.1: Practical procedures for checks, Affixing Stamps, was not modified until December 13, 2004. See Regulation (EC) No. 2133 of 2004, Official

Journal of December 16, 2004, L 369, p. 5.

The Plaintiff contends that the strict policy of stamping the passports of foreign travelers has been in place since at least May 20, 1999, which is when the European Commission formally adopted the Common Manual. See Decision No. 1999/435/EC, OJ L 176L, p.1 of 10.7.1999.

Based on the foregoing, the Plaintiff asks the Court to take judicial notice of the Schengen Agreement of 1985, and the 1990 Convention implementing the Schengen Agreement, as they have been adopted and implemented by the European Commission. Specifically, the Government asks the Court to take notice of the European Commission's strict regulations regarding the systematic stamping of travel documents of foreign nationals, which have been in place since at least May 20, 1999.

(B)

Windsor claims that Switzerland did not implement the Schengen Agreement until December 12, 2008, and Liechtenstein has not yet acceded to the Schengen Agreement. See http://www.eda.admin.ch/eda/en/home/rep/nameri/vusa/ref_visinf/visusa.

html; Europa, Press Release, European Commission Welcomes Switzerland
 t o t h e S c h e n g e n A r e a ,
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/081955>; Greek
 E m b a s s y , S c h e n g e n C o u n t r i e s ,
<http://www.greekembassy.org.uk/Contact/SchengenCountries.aspx>; see also
 Docket No. 195, p. 3 (text within the map states, "Liechtenstein is expected
 to join by the end of 2011"); European Commission, Home Affairs –
 Policies – Borders & Visas – Schengen, [http://ec.europa.eu/home-
 affairs/policies/borders/borders_schengen_en.htm](http://ec.europa.eu/home-affairs/policies/borders/borders_schengen_en.htm).

Windsor further alleges that travelers to Liechtenstein who arrive by
 air must fly into Zurich, Switzerland, as Liechtenstein does not have any
 airports. See Liechtenstein Travel Guide,
<http://wikitravel.org/en/Liechtenstein>. Moreover, until at least the time of
 Switzerland's accession to the Schengen Agreement, there were no border
 controls on the forty-one kilometer border separating Switzerland and
 Liechtenstein. See Border Controls with Liechtenstein to cost Switzerland
 millions, http://www.swissinfo.ch/eng/politicsSchengen_arrangements_for

[_Liechtenstein_agreed.html?cid=6945042](#).

Windsor contends that, because many Member States of the Schengen Agreement were failing to systematically stamp passports of third-country nationals, the Council of the European Union passed Council Regulation (EC) No 2133/2004 on December 13, 2004. See Council Regulation (EC) No. 2133/2004, Official Journal L 369, 1 (16/12/2004). It asserts that the Convention was necessary because the lack of clarity of the E.U. Convention Implementing the Schengen Agreement resulted in divergent practices in the Member States and made it difficult to check whether the conditions related to duration of stay of short-term travelers were fulfilled. See id. Moreover, the Convention created an obligation on Member States to “stamp systematically third-country nationals’ travel documents on entry and exit at external border crossings.” Id. “Although European Union regulations require that non-E.U. visitors obtain a stamp in their passport upon initial entry to a Schengen country, many borders are not staffed with officers carrying out this function.” Craig Hemberger, Global Entry & Exit Requirements: U.S. Department of State Citizen

Travel Information, (2008), available at http://travelogue.travelvice.com/postfiles/2008-06-01_global-entry-exit-requirements.pdf.

Windsor contends that Rule 201 of the Federal Rules of Evidence only governs judicial notice of adjudicative facts and the law of foreign nation is not a proper subject of judicial notice. “Judicial notice of matters of foreign law is treated in Rule 44.1 of the Federal Rules of Civil Procedure.” See Fed. R. Evid. 201, Adv. Comm. Note, Subdivision (a).

Rule 44.1 provides:

A party who intends to raise an issue about a foreign country’s law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court’s determination must be treated as a ruling on a question of law.

Fed. R. Civ. P. 44.1. The Advisory Committee Note provides in part:

The new rule refrains from imposing an obligation on the court to take “judicial notice” of foreign law because this would put an extreme burden on the court in many cases; and it avoids use of the concept of “judicial notice” in any form because of the uncertain meaning of that concept as applied to foreign law. . . . Rather the rule provides flexible procedures for presenting

and utilizing material on issues of foreign law by which a sound result can be achieved with fairness to the parties.

Fed. R. Civ. P. 44.1, Note 1966 Adoption.

Windsor claims that the Court should not make a determination of foreign law as the Plaintiff presents it because the Plaintiff has inadequately researched Liechtenstein and Switzerland's accession to the Schengen Agreement. Specifically, it alleges that Plaintiff "presented the Agreement in such a partisan manner that Plaintiff failed to state that neither Liechtenstein nor Switzerland were signatories to the Schengen Agreement on the years in question, namely in 2001 or 2002, or 2004 when Cohen testified he traveled to Liechtenstein, via Switzerland, to meet Kolzoff."

Windsor notes that Cohen's passport does contain 2009 Swiss entry and exit stamps, after Switzerland's accession to the Schengen Agreement.

Windsor claims this corroborates Cohen's testimony regarding his visits to Liechtenstein to meet with Kolzoff after the Plaintiff filed its lien.

Windsor further alleges that, even if the Schengen Agreement is a fact of which the Court can take judicial notice, a fact must first be admissible.

Windsor contends that the Schengen Agreement of 1985 is irrelevant to the

issues because, at the relevant times, in 2001, 2002 and 2004, Liechtenstein and Switzerland were not members to the agreement. Thus, it asserts that evidence of the Schengen Agreement does not make any matter before the Court more or less probable, including the factual issue of whether Cohen traveled to Liechtenstein to meet Kolzoff. Windsor claims the Plaintiff cannot dispute that Cohen's passport contains a stamp evidencing his visit to Switzerland in 2009 which corroborates Cohen's testimony that he met with Kolzoff at such time. It alleges that evidence of Switzerland's application of the Schengen Agreement after 2008 is needless presentation of cumulative evidence.

(C)

At this time, the Court will Deny the Plaintiff's motion for judicial notice of the Schengen Agreement of 1985. Of course, the Plaintiff may renew its request at any time during the trial. See Fed. R. Evid. 201(d). Consistent with Rule 44.1 of the Federal Rules of Civil Procedure, the Court concludes that Plaintiff has provided notice of its intent to raise an issue of foreign law.

Windsor has raised certain issues pertaining to the relevance of the evidence which is the subject of the Plaintiff's motion. Therefore, the Court is unable at this time to take judicial notice of the Schengen Agreement of 1985.

V. CONCLUSION

For the foregoing reasons, the Plaintiff's motion for judicial notice of the alleged fact that Liechtenstein and the British Virgin Islands are widely regarded as tax havens will be denied.

The Court will defer ruling on the Plaintiff's motion for judicial notice of public records pertaining to notice of the two civil cases against William Reed and Asset Protection Group; the recent criminal indictment against Reed and William Waite; the lawsuit against Cohen, Marvin Rosenbaum, and Herman Schwartzman; as well as the jury verdict against Cohen in that case.

The Court will allow Windsor's motion for judicial notice of United States Department of State documents. However, the Court draws no conclusions from those documents at this time.

The Plaintiff's motion for judicial notice of the Schengen Agreement of 1985 will be Denied.

The parties may renew any motions for judicial notice after a proper evidentiary showing is made. The Court must take judicial notice in such circumstances if a party requests it. See Fed. R. Evid. 201(c)(2). Moreover, the Court is authorized to take judicial notice on its own. See Fed. R. Evid. 201(c)(1).

Ergo, the Plaintiff's Motion for judicial notice of the fact that Liechtenstein and the British Virgin Islands are widely regarded as tax havens [d/e 182] is DENIED.

The Court hereby DEFERS ruling on the Plaintiff's Motion for judicial records [d/e 183], until such time as the Court determines whether the records are admissible.

The Motion of Defendant Windsor Organization for judicial notice of certain United States Department of State documents [d/e 188] is ALLOWED, to the extent provided in this Order.

The Motion for judicial notice of the Schengen Agreement of 1985

[d/e 195] is DENIED.

ENTER: February 15, 2012

FOR THE COURT:

s/Richard Mills
United States District Judge

Below is an Order of the Court.


TRISH M. BROWN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

In re) Case No. 11-30410-tmb7
Louis Diaz)
)
) ORDER, DRAFTED ON: 02/13/12,
) RE: RELIEF FROM (Check ALL that apply):
) DEBTOR STAY CODEBTOR STAY
) CREDITOR: PNC Bank, National Association
Debtor(s)) CODEBTOR: _____

The undersigned, Jesse A. P. Baker, whose address is 4375 Jutland Drive Suite 200
P.O. Box 17933; San Diego, CA 92177-0933, Email address is jbaker@piteduncan.com,
Phone No. is (858) 750-7600, and any OSB # is 100017, presents this Order based upon:

- The completed Stipulation of the parties located at the end of this document.
- The oral stipulation of the parties at the hearing held on _____.
- The ruling of the court at the hearing held on _____.
- Creditor certifies any default notice required by pt. 5 of the Order re: Relief from Stay entered on _____ was served, and that debtor has failed to comply with the conditions of that order.
- Creditor certifies that no response was filed within the response period plus 3 days to the Motion for Relief from Stay that was filed on 01/27/12 and served on 01/27/12.

IT IS ORDERED that, except as provided in pt. 4 below, the stay existing pursuant to 11 USC §362(a) shall remain in effect as to the property described below (hereinafter "the property"):

Personal property described as (e.g., 2001 Ford Taurus):

Real property located at (i.e., street address):
3980 Carman Dr, Lake Oswego, Oregon 97035

[Optional UNLESS In Rem Relief Granted] Exhibit A attached hereto is the legal description of the property.

IT IS FURTHER ORDERED that the stay is subject to the conditions marked below:

1. Regular Payment Requirements.

a. Debtor(s) shall deliver regular monthly payments in the amount of \$_____ commencing _____ to Creditor at the following address:

b. The Chapter 13 trustee shall immediately pay and disburse to Creditor the amount of \$_____ per month from funds paid to the trustee by Debtor(s), and continue each month until the plan is confirmed, at which time the plan payment terms shall control. Payments made by the trustee under this order shall be deemed to be payments under the plan for purposes of the trustee's collection of percentage fees.

c. Debtor(s) shall pay to the trustee any and all payments required to be paid under the terms of the Chapter 13 plan.

2. Cure Payment Requirements. Debtor(s) shall cure the post-petition default of \$_____ consisting of

(e.g., \$_____ in payments and \$_____ in late charges for April - June, 2002), as follows:

a. In equal monthly installments of \$_____ each, commencing _____ and continuing thereafter through and including _____.

b. By paying the sum of \$_____ on or before _____, and the sum of \$_____ on or before _____.

c. Other (describe):

3. Insurance Requirement(s). Debtor shall maintain insurance on the property at all times as required by the security agreement, naming _____ as the loss payee.

On or before _____ Debtor(s) shall provide counsel for Creditor with proof of insurance.

4. Stay Relief and Codebtor Stay Relief without Cure Opportunity.

a. Upon default in the conditions in pt(s). _____ Creditor may file and serve a certificate of non-compliance specifying the default, together with a proposed order terminating the stay to allow Creditor to foreclose on, and obtain possession of, the property to the extent permitted by applicable nonbankruptcy law, which the Court may grant without further notice or hearing.

b. The stay is terminated to allow Creditor to foreclose on, and obtain possession of, the property to the extent permitted by applicable nonbankruptcy law, provided that a foreclosure sale shall not occur prior to _____.

c. Creditor is granted relief from stay effective _____ to foreclose on, and obtain possession of, the property, to the extent permitted by applicable nonbankruptcy law.

d. Creditor is granted relief from stay to foreclose on, and obtain possession of, the property, to the extent permitted by applicable nonbankruptcy law.

e. If a Creditor with a senior lien on the property is granted relief from stay, Creditor may file and serve a certificate identifying the senior lien holder and a proposed order terminating the stay, which the Court may grant without further notice or hearing.

f. Creditor is granted relief from stay to _____

g. Creditor is granted "in rem" relief from stay with respect to the real property described above and in Exhibit A. This order shall be binding in any other case filed under 11 USC purporting to affect such real property filed not later than two (2) years after the date of the entry of this order unless the bankruptcy court in the subsequent case grants relief from this order. Any governmental unit that accepts notices of interests or liens in real property shall accept a certified copy of this order for indexing and recording.

h. Creditor is granted relief from the codebtor stay, as it applies to the codebtor(s) named in the caption above, to enforce the terms of the contract and collect the deficiency balance.

5. **Stay Relief with Cure Opportunity.** Upon default in the checked condition(s) in pt(s). 1 - 3, Creditor shall serve written notice of default on Debtor(s) and Attorney for Debtor(s) that gives Debtor(s) _____ calendar days after the mailing of the notice to cure the default. If Debtor(s) fails to cure the default in accordance with this paragraph, then Creditor shall be entitled to submit a proposed order terminating the stay, which the Court may grant without further notice or hearing.

a. The notice of default may require that Debtor(s) make any payment(s) that becomes due between the date the notice of default is mailed and before the cure deadline.

b. The notice of default may require Debtor(s) to pay \$ _____ for the fees and costs of sending the notice.

c. Only _____ notices of default and opportunity to cure are required per year (calculated from date of entry of this order), during the remainder of this case, or (describe):

6. **Amended Proof of Claim.** Creditor shall file an amended proof of claim to recover all accrued post-petition attorney fees and costs and (describe):

7. **Miscellaneous Provisions.**

a. If Creditor is granted relief from stay, the 14-day stay provided by Fed. Rule Bankr. Proc. 4001(a) shall be waived.

b. Any notice that Creditor's counsel shall give to Debtor(s)/Codebtor, or attorney for Debtor(s)/Codebtor, pursuant to this order shall not be construed as a communication under the Fair Debt Collection Practices Act, 15 USC §1692.

8. A final hearing on Creditor's motion for relief from stay shall be held on _____ at _____ in _____.

9. Other:
Movant may offer and provide Debtor(s) with information re: a potential Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss Mitigation Agreement, and may enter into such agreement with Debtor(s), provided that any modification of the mortgage obligation must be approved as required by law. However, Movant may not enforce, or threaten to enforce, any personal liability against Debtor(s) if Debtor(s) personal liability is discharged in this bankruptcy case.

PRESENTED, AND CERTIFIED, BY: _____ ###

/s/ Jesse A.P. Baker, Esq

IT IS SO STIPULATED:

Creditor's Attorney:

Debtor(s)'s Attorney:

Name: _____
OSB#: _____

Name: _____
OSB#: _____

NO OBJECTION TO ORDER BY CASE TRUSTEE:

Codebtor's Attorney:

By: _____

Name: _____
OSB#: _____

Below is an Order of the Court.



ELIZABETH PERRIS
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In re) Case No. 11-30383-elp11
)
 Lori D. Diaz,) ORDER GRANTING DEBTOR'S MOTION FOR
) AUTHORITY TO DISMISS LITIGATION (Docket
 Debtor-in-Possession.) No. 451)

Based on Debtor's Motion for Authority to Dismiss Litigation ("Motion") (Docket No. 451), the Notice of Motion for Authority to Dismiss Litigation("Notice") (Docket No. 452) (a copy of which is attached to this Order), the Affidavit of Non-Receipt of Objections on file herein and the Court being otherwise fully advised, it is

ORDERED that Debtor's Motion is granted and Debtor may dismiss her complaint against Martin Lettunich, Stefan Matan, Atira Technologies, LLC, XSLENT Energy Technologies, LLC, XSLENT, LLC, XSLENT Technologies, LLC, XET Holding Co., LLC, and Does 1 - 20 (collectively "the XET Defendants") filed and currently pending before the Superior Court of the State of California for the County of Santa Clara (Case No. 1-09-CV-156600).

///

IT IS FURTHER ORDERED that, notwithstanding dismissal of such complaint, Debtor retains her right to pursue her claims for return of the cash deposit of \$30,000 placed with the Superior Court of the State of California for the County of Santa Clara on or about September 24, 2010 by the Debtor.

###

PRESENTED BY:

/s/Robert J Vanden Bos
Robert J Vanden Bos OSB #78100
VANDEN BOS & CHAPMAN, LLP
319 S.W. Washington, Suite 520
Portland, Oregon 97204
Telephone: (503) 241-4869
Fax: (503) 241-3731

First Class Mail:

Lori D. Diaz
3491 SW Hillsboro Hwy
Hillsboro, OR 97123

Of Attorneys for Debtor-in-Possession

Electronic Mail:

The foregoing was served on all CM/ECF participants through the Court's Case Management/Electronic Case File system.

Below is an Order of the Court.


ELIZABETH PERRIS
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In re) Case No. 11-30383-elp11
)
Lori D. Diaz,) ORDER GRANTING DEBTOR'S MOTION FOR
) AUTHORITY TO DISMISS LITIGATION (Docket
Debtor-in-Possession.) No. 451)

Based on Debtor's Motion for Authority to Dismiss Litigation ("Motion") (Docket No. 451), the Notice of Motion for Authority to Dismiss Litigation("Notice") (Docket No. 452) (a copy of which is attached to this Order), the Affidavit of Non-Receipt of Objections on file herein and the Court being otherwise fully advised, it is

ORDERED that Debtor's Motion is granted and Debtor may dismiss her complaint against Martin Lettunich, Stefan Matan, Atira Technologies, LLC, XSLENT Energy Technologies, LLC, XSLENT, LLC, XSLENT Technologies, LLC, XET Holding Co., LLC, and Does 1 - 20 (collectively "the XET Defendants") filed and currently pending before the Superior Court of the State of California for the County of Santa Clara (Case No. 1-09-CV-156600).

///

IT IS FURTHER ORDERED that, notwithstanding dismissal of such complaint, Debtor retains her right to pursue her claims for return of the cash deposit of \$30,000 placed with the Superior Court of the State of California for the County of Santa Clara on or about September 24, 2010 by the Debtor.

###

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Telephone: (503) 241-4869
Fax: (503) 241-3731

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Lori D. Diaz
3491 SW Hillsboro Hwy
Hillsboro, OR 97123

Of Attorneys for Debtor-in-Possession

Electronic Mail:

The foregoing was served on all CM/ECF participants through the Court's Case Management/Electronic Case File system.

to proceed without prepayment of fees, and dismiss Plaintiff's complaint without prejudice and with leave to amend (the "F&R"). In his F&R, Magistrate Judge Puglisi concluded that: (1) Plaintiff had no right to present evidence or be called as a witness before a grand jury considering his indictment; (2) contrary to Plaintiff's contention that the DOJ has no power to represent the IRS and the U.S. Attorney's Office is not authorized to present charges to the grand jury, the DOJ and the U.S. Attorney's Office have broad powers to prosecute claims on behalf of the federal government and its agencies; (3) Plaintiff failed to identify the administrative remedy that the IRS allegedly failed to exhaust before initiating a grand jury investigation; and (4) Plaintiff's claims against the DOJ, IRS, and prosecutors from the U.S. Attorney's Office acting within their authority, are barred by the doctrine of sovereign immunity.^{2/}

^{2/} In the F&R, Magistrate Judge Puglisi also instructed Plaintiff that if he chose to file an amended complaint, he was required to write a short, plain statement telling the court: "(1) the treaty, constitutional right, or statutory right Plaintiff believes was violated; (2) the name of the defendant who violated that right; (3) exactly what the defendant did or failed to do; (4) how the action or inaction of that defendant is connected to the violation of Plaintiff's rights; (5) what specific injury Plaintiff suffered because of that defendant's conduct; and (6) whether the basis for this court's jurisdiction is either federal question or diversity." F&R, at 14. Further, the F&R cautioned that failure to affirmatively link the conduct of each named defendant with the specific injury Plaintiff allegedly suffered will result in dismissal for failure to state
(continued...)

On May 31, 2011, this Court issued an Order Adopting As Modified Magistrate Judge's Findings and Recommendations (the "May 31, 2011 Order"), and granted Plaintiff leave to file an amended complaint correcting the deficiencies in his current complaint.

Plaintiff filed an amended complaint on July 1, 2011 (the "Amended Complaint"). Although it is difficult to decipher the factual allegations, the Amended Complaint appears to be based upon Plaintiff's allegation that Defendants have deprived him of his civil rights and used a federal grand jury to cause him injury. (Am. Compl., ¶¶ 1-6.) Plaintiff alleges that the IRS owes Plaintiff tax refunds for 2008 and 2009 in the amount of \$1,130,914.00, and \$601,196.00, respectively. Id. at ¶ 3. Plaintiff further alleges that IRS agent and named Defendant Rylon Oshiro met with Plaintiff's boss at Plaintiff's place of work and asked questions about Plaintiff and others, causing an unnecessary strain between Plaintiff and his boss. Id. at ¶¶ 11, 37.

Additionally, Plaintiff contends, in or about the beginning of 2001, the IRS recruited the DOJ to commence a federal grand jury investigation in which Plaintiff was to be one of the government's targets. Id. at ¶ 12. During the course of

^{2/} (...continued)
a claim. Id.

this investigation, Plaintiff alleges, named Defendants Florence T. Nakakuni and Leslie E. Osborne were the U.S. Attorneys conducting the grand jury investigation. Id. at ¶ 13. After Plaintiff learned that he was the target of an investigation from friends who appeared before Federal Grand Jury Panel No. 10-I-66, Plaintiff allegedly contacted Defendant Osborne by mail and asked to appear before the federal grand jury to present his side of the story. Id. at ¶ 17. However, the DOJ, along with Defendants Nakakuni and Osborne, allegedly refused to allow Plaintiff an opportunity to face his accusers before the federal grand jury panel. Id. at ¶ 18.

Plaintiff asserts seven claims against Defendants in the Amended Complaint: (1) Abuse of Process; (2) Eleventh Amendment Violation; (3) Breach of Fiduciary Duty; (4) Civil Conspiracy; (5) Defamation; (6) Fraud; and (7) Negligence. Id. at ¶¶ 19-40.

In what appears to be his Prayer for Relief, Plaintiff references emancipation of slavery and seeks a "bounty" in the amount of "\$150 million dollars plus any amount of public debt accrued by the private party(s) in such a contractual agreement" See Am. Compl. at 6. In the alternative, if no such "agreement" can be reached, Plaintiff seeks \$5 million in monetary damages and an additional \$250 per hour or any part of an hour spent by Plaintiff. Id.

On October 6, 2011, Defendants filed a Motion to Dismiss the Amended Complaint. In their supporting memorandum, Defendants assert that this Court should dismiss the Amended Complaint on two grounds: (1) this Court lacks subject matter jurisdiction because the claims against the Defendants are barred by the doctrines of sovereign immunity, absolute prosecutorial immunity, and qualified immunity; and (2) the Amended Complaint fails to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). Furthermore, Defendants argue that dismissal with prejudice is appropriate in light of Plaintiff's failure to correct the deficiencies in the original Complaint for which Plaintiff was afforded a full and fair opportunity to amend.

On February, 2012, Plaintiff submitted a document entitled, "Judicial Notice for A Amendment In Jurisdiction And Request For Transfer For Want Of Jurisdiction" (the "Opposition"). While not entirely clear, Plaintiff's filing appears to raise the following issues: (1) this Court lacks jurisdiction because the "district court of the United States" is the proper court for Plaintiff's case; (2) Defendants improperly "operated" a grand jury in the "United States District Court" because said court is a "territorial court"; (3) the proper court for the IRS to file suit is the United States Tax Court; and (4)

the February 13, 2012 hearing before this Court should be postponed until the case is placed in a court of proper jurisdiction.

Defendants responded to this statement on February 3, 2012 (the "Reply Memorandum"). In the Reply Memorandum, Defendants urge the Court to disregard Plaintiff's Opposition as "totally frivolous and irrelevant," and also request that the court deny Plaintiff's request to postpone the February 13, 2012 hearing on the Motion to Dismiss the Amended Complaint. Id. Defendants contend that Plaintiff, despite having had ample time to prepare a written opposition to the Motion to Dismiss, has submitted a document that "completely fails to address or rebut any of the multiple grounds for dismissal of the Amended Complaint." Reply Memorandum at 2. Accordingly, Defendants ask this Court to grant the Motion to Dismiss the Amended Complaint with Prejudice.

Because Plaintiff has failed to file a proper motion for a transfer of venue, the Court declines to entertain this request.^{3/}

^{3/} The Court briefly notes that the Opposition bears no connection to Defendants' Motion to Dismiss and in no way addresses or counters any of the arguments asserted therein. Although it is not entirely clear, Plaintiff's Opposition appears to request a transfer to a court of "proper" venue, and names such court as the "district court of the United States as defined in 28 USC section 610." As Defendants correctly state in their Reply Memorandum, the "district court of the United States" does
(continued...)

Pursuant to Local Rule 7.2(d), the Court finds that the Motion is suitable for disposition without a hearing.

LEGAL STANDARD

I. Motion to Dismiss for Failure to State a Claim

Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") permits dismissal of a complaint that fails "to state a claim upon which relief can be granted." Under Rule 12(b)(6), review is generally limited to the contents of the complaint. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001); Campanelli v. Bockrath, 100 F.3d 1476, 1479 (9th Cir. 1996). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007); see also Weber v. Dep't of Veteran Affairs, 521 F.3d 1061, 1065 (9th Cir. 2008). Further, although Fed. R. Civ. P. 8 does not demand detailed factual allegations, it demands "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Ashcroft, 129 S. Ct. at 1949.

On a Rule 12(b)(6) motion to dismiss, all allegations of material fact are taken as true and construed in the light

^{3/} (...continued)
not exist, and this Court concludes that all four arguments in the Opposition are irrelevant, frivolous, and without merit.

most favorable to the nonmoving party. Fed'n of African Am. Contractors v. City of Oakland, 96 F.3d 1204, 1207 (9th Cir. 1996). However, conclusory allegations of law, unwarranted deductions of fact, and unreasonable inferences are insufficient to defeat a motion to dismiss. See Sprewell, 266 F.3d at 988; Nat'l Assoc. for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1049 (9th Cir. 2000); In re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996). Moreover, the court need not accept as true allegations that contradict matters properly subject to judicial notice or allegations contradicting the exhibits attached to the complaint. Sprewell, 266 F.3d at 988.

As the Ninth Circuit has stated, "[t]he issue is not whether a plaintiff's success on the merits is likely but rather whether the claimant is entitled to proceed beyond the threshold in attempting to establish his claims." De La Cruz v. Tormey, 582 F.2d 45, 48 (9th Cir.), cert. denied, 441 U.S. 965 (1979). The court must determine whether or not it appears to a certainty under existing law that no relief can be granted under any set of facts that might be proved in support of a plaintiff's claims. Id.

In summary, to survive a Rule 12(b)(6) motion to dismiss, "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption

that all the allegations in the complaint are true (even if doubtful in fact)." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citations and quotations omitted). "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." Id. (internal citations and quotations omitted). Dismissal is appropriate under Rule 12(b)(6) if the facts alleged do not state a claim that is "plausible on its face." Id. at 570.

II. Motion to Dismiss for Lack of Subject Matter Jurisdiction Based Upon Immunity Grounds

A court's subject matter jurisdiction may be challenged under Federal Rule of Civil Procedure 12(b)(1) ("Rule 12(b)(1)"). "A party invoking the federal court's jurisdiction has the burden of proving the actual existence of subject matter jurisdiction." See Thompson v. McCombe, 99 F.3d 352, 353 (9th Cir. 1996). Under the doctrine of sovereign immunity, the United States is immune from suit unless it has waived its immunity. Dep't of Army v. Blue Fox, Inc., 525 U.S. 255, 260 (1999). If the United States has not consented to be sued on a claim, a court lacks subject matter jurisdiction over that claim pursuant to Fed. R. Civ. P.

12(b)(1). McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1998). Furthermore, a lawsuit against an agency of the United States or against an officer of the United States in his or her official capacity is considered an action against the United States. Sierra Club v. Whitman, 268 F.3d 898, 901 (9th Cir. 2001).

Significantly, a waiver of immunity cannot be implied, but rather "must be unequivocally expressed." Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985) (citing United States v. Shaw, 309 U.S. 495 (1940)); see also Balser v. Dep't of Justice, 327 F.3d 903, 907 (9th Cir. 2003) (statutory waivers of sovereign immunity are not to be liberally construed).

Furthermore, absolute immunity attaches to a "government attorney's initiation and handling of civil litigation in a state or federal court . . . [when] the government attorney is performing acts 'intimately associated with the judicial phase' of litigation." Shiraishi v. United States, Civ. No. 11-00323 JMS-BMK, 2011 WL 4527393, at *5 (D. Haw. Sept. 27, 2011).

To determine whether a prosecutor is entitled to absolute immunity, the court applies a functional analysis, looking "at the nature of the function performed, not the identity of the actor who performed it." Thomas v. County of Hawaii, Civ. No. 07-00251 JMS-LEK, 2008 WL 4483792, at *4 (D.

Haw. Oct. 1, 2008) (citing Buckley v. Fitzsimmons, 509 U.S. 259, 269 (1993)). "[T]he critical factor" is "the nature of the challenged policy and whether it falls within a prosecutor's judicial function or, instead, is part of a prosecutor's exercise of administrative or investigative functions." Thomas, 2008 WL 4483792, at *4 (citations omitted). If the challenged action was part of the judicial process, the prosecutor is entitled to absolute immunity. Id. (citing Broam v. Bogan, 320 F.3d 1023, (9th Cir. 2003) (finding prosecutors absolutely immune for presentation of evidence at a probable cause hearing)).^{4/}

The Ninth Circuit has held that filing charges and initiating prosecution are "functions that are integral to a prosecutor's work. Because '[e]xposing the prosecutor to liability for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment,' absolute immunity protects these acts." Mishler v. Clift, 191 F.3d 998,

^{4/} Applying a functional analysis, courts have construed the following egregious allegations as being barred by absolute immunity. See, e.g., Imbler, 424 U.S. at 430 (holding a prosecutor enjoys absolute immunity from a suit alleging that he maliciously initiated a prosecution, used perjured testimony at trial, and suppressed material evidence at trial); Genzler v. Longanbach, 410 F.3d 630, 642 (9th Cir.2005) (extending absolute immunity to supervisory defendants who allegedly knew that district attorneys had granted a witness immunity in exchange for perjured testimony favorable to the prosecution); Ashelman v. Pope, 793 F.2d 1072, 1078 (9th Cir. 1986) (holding that an alleged conspiracy between judge and prosecutor to predetermine the outcome of a judicial proceeding does not pierce prosecutorial absolute immunity).

1008 (9th Cir. 1999) ("Filing charges and initiating prosecution are functions that are integral to a prosecutor's work."). This Circuit has also recognized that a prosecutor may be entitled to absolute immunity for claims arising from the initiation of grand jury proceedings. Milstein v. Cooley, 257 F.3d 1004, 1012 (9th Cir. 2001).^{5/}

Addressing IRS agents, courts in this Circuit have found that such individuals are entitled only to qualified immunity where unconstitutional acts are alleged. See Uptergrove v. United States, 2008 WL 2413182 (E.D. Cal. June 12, 2008). As a general rule, government officials performing discretionary functions are shielded from liability if their conduct does not violate "clearly established statutory or constitutional rights

^{5/} The Court notes that the Ninth Circuit, in Milstein v. Cooley, 257 F.3d 1004, 1012 (9th Cir. 2001), did not expressly hold that prosecutors are entitled to absolute immunity for any claims arising from the initiation of grand jury proceedings. In fact, in that opinion the court found that a prosecutor's efforts to indict before a grand jury, rather than efforts to investigate a crime, are subject to immunity. The Milstein court did not discuss the exact scope of absolute immunity for acts performed by prosecutors before grand juries, concluding that it need not reach that conclusion because the plaintiff's allegations in that particular case focused on defendant's efforts to indict, rather than investigate crime, the former being "consistently . . . identified as a function within the prosecutor's role as an advocate," and accordingly protected by absolute immunity. Id. at *1012. Plaintiff has failed to provide enough facts for this Court to determine whether Plaintiff is asserting claims against Defendants Nakakuni and Osborne for actions related to efforts to indict, or to investigate crime. However, the Court need not address this as it is dismissing all claims against Defendants Nakakuni and Osborne based upon failure to state a claim upon which relief can be granted.

of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Government officials are immune from damages claims "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. Anderson v. Creighton, 483 U.S. 635, 638 (1987). The Supreme Court has held that a right is clearly established if "the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. at 640. This qualified immunity protects government officials "from suit rather than [serving as] a mere defense to liability." See Saucier v. Katz, 533 U.S. 194, 200-01 (2001) (emphasis in original). Further, qualified immunity provides far-reaching protection to government officers. See Wright v. United States, Civ. No. S-00-077WBSDADPS, 2001 WL 1137255, at *6-7 (E.D. Cal. Aug. 21, 2001).

Under the doctrine of qualified immunity, a government officer performing acts in the course of official conduct is insulated from damage suits only if (1) at the time and in light of all the circumstances there existed reasonable grounds for the belief that the action was appropriate, and (2) the officer acted in good faith. See Mark v. Groff, 521 F.2d 1376, 1379-80 (9th Cir. 1975).

III. Special Considerations for a Pro Se Litigant

A pro se litigant's pleadings must be read more liberally than pleadings drafted by counsel. Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004); Eldridge v. Block, 832 F.2d 1132, 1137 (9th Cir. 1987). When a plaintiff proceeds pro se and technically violates a rule, the court should act with leniency toward the pro se litigant. Draper v. Coombs, 792 F.2d 915, 924 (9th Cir. 1986); Pembroke v. Wilson, 370 F.2d 37, 39-40 (9th Cir. 1966). However, "a pro se litigant is not excused from knowing the most basic pleading requirements." American Ass'n of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1107-08 (9th Cir. 2000) (citations omitted).

Before a district court may dismiss a pro se complaint for failure to state a claim upon which relief can be granted, the court must provide the pro se litigant with notice of the deficiencies of the complaint and an opportunity to amend it if the deficiencies can be cured, prior to dismissal. Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992); Eldridge, 832 F.2d at 1136. However, the court may deny leave to amend where amendment would be futile. Flowers v. First Hawaiian Bank, 295 F.3d 966, 976 (9th Cir. 2002) (citing Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc., 911 F.2d 242, 247 (9th Cir. 1990) (per curiam)); Eldridge, 832 F.2d at 1135-36.

DISCUSSION

I. Motion to Dismiss for Failure to State a Claim

A. Abuse of Process (Count I)

Plaintiff asserts that the IRS owes him a debt for nonpayment of tax refunds for the years 2008 and 2009. Am. Compl. ¶ 19. Further, Plaintiff states, the IRS sought to deprive Plaintiff of these refunds, as well as his rights and liberty, by recruiting the DOJ and improperly using a federal grand jury. Compl. ¶ 20. Plaintiff argues that the IRS failed to follow procedures in that it: (1) was required to bring Plaintiff before an Administrative Hearing to address their complaint against Plaintiff first; and (2) improperly failed to file a civil suit under Fed. R. Civ. P. 2, which states that there is "only One Form of Action." Compl. ¶¶ 21-22. Plaintiff claims that this failure to follow procedure is a violation of Plaintiff's right to due process of law. Id. at 23.

Contrary to Plaintiff's contention, Fed. R. Civ. P. 2 does not govern the United States' ability to initiate criminal investigations and conduct grand jury proceedings. To the contrary, the Federal Rules of Civil Procedure "govern procedures in all civil actions and proceedings in the United States district courts." Fed. R. Civ. P. 1. Moreover, Rule 2, which states that there is only "one form of action - the civil action"

- was intended to address the antiquated distinction between actions at law and suits in equity. See Fed. R. Civ. P. 2, Cmmt. 1.

To the contrary, the Federal Rules of Evidence provide that federal investigative agencies such as the IRS may refer criminal matters to the DOJ for initiation of grand jury investigations or prosecutions, and specify that the DOJ is authorized to initiate and conduct criminal investigations, including grand jury proceedings. See 28 U.S.C. § 515(a) (granting Attorney General or any other officer of the DOJ or specially appointed attorney to conduct "any kind of legal proceeding, civil or criminal, including grand jury proceedings") (emphasis added); 28 U.S.C. § 516 ("the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General.")

Moreover, Plaintiff does not provide any legal authority - and this Court is not aware of any - to support his claim that the IRS is required to first conduct an Administrative Hearing prior to commencing a grand jury investigation. See In re Goldman, 331 F. Supp. 509, 510 (W.D. Pa. 1971 ("It is the opinion of the court that 26 U.S.C. § 7602 is not the exclusive method for investigation by the government into income tax

affairs and that the same was not intended to limit the powers of a grand jury. The attorneys conducting this grand jury were particularly authorized to inquire into internal revenue matters as well as other violations of Federal Criminal Laws.").^{6/} Accordingly, the Court concludes that Plaintiff has failed to state a claim upon which relief can be granted.

B. Eleventh Amendment Violation (Count II)

Although it is not entirely clear, Plaintiff appears to argue that Defendants DOJ, Nakakuni, and Osborne are not authorized to bring suit against Plaintiff based upon the Eleventh Amendment, and claims that these Defendants' actions have sought to deprive Plaintiff of his rights under the color of law. Am. Compl. §§ 24-25. Moreover, Plaintiff argues, Defendants are not entitled to immunity. As an initial matter, Plaintiff does not provide any details in the Amended Complaint to establish that any of the Defendants have even brought a suit against Plaintiff.

^{6/} See also In re Kadish, 377 F. Supp. 950 (N.D. Ill. 1974) (rejecting taxpayer's petition to quash grand jury subpoena based on argument that grand jury was being misused to investigate criminal tax matters in order to deprive taxpayer of right to administrative procedures available in connection with civil tax investigations under 26 U.S.C. §7602); In re William H. Pflaumer & Sons, Inc., 53 F.R.D. 464 (E.D. Pa. 1971) , 405 F. Supp. 854 ("Unquestionably, the grand jury is empowered to investigate alleged violations of the tax laws . . .").

Moreover, the law is clear that Defendants, as federal prosecutors under the employ of the United States Attorney's Office for the District of Hawaii, are authorized to initiate and conduct criminal investigations and grand jury proceedings. See 28 U.S.C. §§ 515(a), 516. Furthermore, Plaintiff provides no explanation as to how the Eleventh Amendment - which addresses state sovereign immunity - prohibits the United States from bringing a suit against a private individual. Additionally, it is a well-settled principle of law that any claim asserted against a United States agency, including the DOJ and the IRS, must be considered a claim against the United States. See Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 260 (1999) (suits against an agency of the United States are barred by sovereign immunity, unless there has been a specific waiver of that immunity); see also Hawaii v. Gordon, 373 U.S. 57, 58 (1963).

Plaintiff has provided no support for an argument that the DOJ, the IRS, or the individual Defendants acting in their official capacities, have waived immunity in this lawsuit. Accordingly, the Court concludes that Plaintiff has failed to state a claim upon which relief can be granted.

C. Breach of Fiduciary Duty (Count III)

In Count III, Plaintiff appears to argue that Defendants DOJ, Nakakuni and Osborne breached a fiduciary duty in

their apparent representation of the IRS in connection with the alleged grand jury investigation of Plaintiff. However, Plaintiff does not provide any basis for a breach of fiduciary duty claim, and fails to establish the fiduciary duty that Defendants allegedly owe to Plaintiff. Furthermore, Plaintiff provides no support for his argument that the IRS is not an agency that falls under the DOJ, and his allegations that the IRS is domiciled in Puerto Rico - and thereby the IRS is not under DOJ jurisdiction - are without merit. Plaintiff has failed to state a claim for which relief can be granted.

D. Civil Conspiracy (Count IV)

Plaintiff alleges that Defendants DOJ, Nakakuni and Osborne conspired against Plaintiff and intended to do him harm by "the unlawful, misapplication, and improper use of the Federal Grand Jury process." Am. Compl. ¶ 33. Although Plaintiff does not elaborate with any details of this alleged conspiracy, the Court notes that Plaintiff alleges in his general factual allegations that Defendants DOJ, Nakakuni and Osborne purportedly refused to allow Plaintiff the opportunity to face his accusers at a federal grand jury panel. *Id.* at ¶ 18. Assuming that this is the basis for Plaintiff's conspiracy allegation - which is far from clear in the Amended Complaint - the Court notes that "an accused has no right to be called as a witness before the grand

jury that is considering his indictment." United States v. Salsedo, 607 F.2d 318, 319 (9th Cir. 1979).

The Federal Rules of Criminal Procedure further specify the individuals who have a right to be present before the grand jury; the target of a grand jury investigation is not one of them. See Fed. R. Crim. P. 6(d)(1) (listing the following individuals as those who have a right to be present: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or operator of a recording device). Plaintiff does not state a claim to relief that is plausible on its face; Count IV is an "unadorned, the-defendant-unlawfully-harmed-me accusation." Ashcroft, 129 S. Ct. at 1949. This claim is legally frivolous, and Plaintiff has failed to state a claim upon which relief may be granted.

E. Defamation (Count V)

Plaintiff asserts a claim for defamation against Defendant Oshiro in connection with an interview that Defendant Oshiro allegedly conducted with Plaintiff's boss at his place of work. Am. Compl. ¶¶ 9-10. Plaintiff asserts that Defendant Oshiro caused "an unnecessary strain on the work relationship between Plaintiff and his boss," and spread lies and rumors about Plaintiff, thereby defaming Plaintiff's character. See Am. Compl. ¶¶ 5, 37. Plaintiff has not alleged any facts to

establish a claim for defamation, and his vague allegations fail to state a claim for which relief can be granted.

F. Fraud (Count VI)

Plaintiff's claim for fraud must also be dismissed. Plaintiff contends that all Defendants committed a fraud on the Court through their "unlawful, misapplication, and improper use [sic] the Federal Grand Jury." Am. Compl. ¶ 38. In the Amended Complaint, Plaintiff does not provide any factual support for this allegation, other than one sentence vaguely referring to Defendants' allegedly improper use of the Federal Grand Jury. Plaintiff's fraud claim cannot survive a Rule 12(b)(6) motion to dismiss because Plaintiff has not provided factual allegations to raise a right to relief above the speculative level, and fails to state a claim that is plausible on its face. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

Additionally, the Court notes that Plaintiff has failed to comply with Fed. R. Civ. P. 9(b), which requires that, when fraud or mistake is alleged, "a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). Furthermore, "averments of fraud must be accompanied by the who, what, when, where and how of the misconduct charged," and

Plaintiff must explain why the alleged conduct or statements are fraudulent. See Prim Ltd. Liability Co. v. Pace-O-Matic, Inc., Civ. No. 10-00617 SOM-KSC, 2012 WL 263116 (D. Haw. Jan. 30, 2012) (citing Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009)).

G. Negligence (Count VII)

Finally, Plaintiff asserts a claim for negligence against all Defendants, vaguely asserting that Defendants' "participation in this scheme of the IRS is at best Negligent." Am. Compl. ¶ 40. Plaintiff provides no facts whatsoever to substantiate this allegation, describing neither the alleged "scheme" nor Defendants' purported "participation" therein. Accordingly, because Plaintiff's claim is devoid of any facts to establish negligence on the part of any of these Defendants, this count is dismissed for failure to state a claim upon which relief can be granted.^{7/}

II. Motion to Dismiss for Lack of Subject Matter Jurisdiction Based Upon Immunity Grounds

In addition to the substantive analysis detailing Plaintiff's failure to state a claim for any of his seven counts against Defendants, the Court concludes that Plaintiff's claims

^{7/} Furthermore, this claim must also be dismissed based upon Plaintiff's failure to follow the administrative procedure required to sue a United States agency in tort. See 28 U.S.C. §§ 2401(a) and 2675(a).

must also be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction based upon immunity grounds.

A. Sovereign Immunity

Plaintiff has asserted claims against the DOJ and the IRS, both of which are agencies of the United States. A lawsuit against an agency of the United States or against an officer of the United States in his or her official capacity is considered an action against the United States. See Sierra Club v. Whitman, 268 F.3d 898, 901 (9th Cir. 2001).

Because Plaintiff's suit involves allegations against Defendants Nakanuni and Osborne while conducting their official duties with the U.S. Attorney's Office, Plaintiff's Amended Complaint can be construed as an official capacity lawsuit. See Shiraishi v. United States, Civ. No. 11-00323 JMS-BMK, 2011 WL 4527393, at *4 (D. Haw. Sept. 27, 2011). This is not a case where the individual Defendants' actions are "wholly unrelated to or outside of [their] official duties." Shiraishi, 2011 WL 4527393, at *6. Even when liberally construing Plaintiff's pleadings, this Court concludes that the allegations against Defendants Nakakuni and Osborne are clearly in conjunction with their involvement in a criminal investigation and commencement of grand jury proceedings, and therefore are related to and within Defendants Nakakuni and Osborne's official duties as prosecutors with the U.S. Attorney's Office.

Moreover, to the extent Plaintiff is asserting a state law fraud claim, such a claim is also barred by sovereign immunity. See 28 U.S.C. 2680(h) (waiver of sovereign immunity does not extend to tort claims arising out of misrepresentation or deceit). Thus, this Court lacks jurisdiction to address plaintiff's federal tort claim of fraud, if that is in fact what Plaintiff is asserting in the Amended Complaint.

B. Absolute Prosecutorial Immunity

Defendants Nakakuni and Osborne may also be entitled to absolute immunity from suit. The Supreme Court has reasoned that prosecutors' activities are absolutely immune from suit when they are "intimately associated with the judicial phase of the criminal process." Imbler v. Pachtman, 424 U.S. 409, 430 (1976); see also Burns v. Reed, 500 U.S. 478, 490-91 & n.6 (1991) (noting that there is widespread agreement among the Courts of Appeals that prosecutors are absolutely immune from their conduct before grand juries).

Plaintiff has failed to provide any details in the Amended Complaint as to whether Defendants Nakakuni and Osborne allegedly violated his rights in the process of investigating crime or performing a function 'intimately associated with the judicial phase' of litigation." Shiraishi v. United States, Civ. No. 11-00323 JMS-BMK, 2011 WL 4527393, at *5 (D. Haw. Sept. 27,

2011). However, in light of the case law in this Circuit and beyond addressing a prosecutor's function in initiating grand jury investigations, the Court concludes that Defendants Nakakuni and Osborne may be entitled to absolute immunity from suit for their actions in allegedly initiating grand jury proceedings against Plaintiff; however, the Court need not reach this question as it is dismissing all claims against Defendants Nakakuni and Osborne based upon failure to state a claim upon which relief can be granted.

C. Qualified Immunity

Individual Defendants Nakakuni, Osborne, and Oshiro are also protected by the doctrine of qualified immunity, which shields government officials from liability for civil damages arising out of the performance of discretionary functions, so long as their conduct does not violate a clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). As discussed above, a government official is immune from liability even if his conduct violated other non-constitutional standards such as regulations or guidelines. Davis v. Scherer, 468 U.S. 183, 194-96 and n. 12 (1984). The Ninth Circuit has recognized that an IRS agent is entitled to qualified immunity (rather than absolute immunity) in the performance of his

official duties, like most executive officials. See Fry v. Melaragno, 939 F.2d 832, 838 (9th Cir. 1991).

Moreover, "when a prosecutor performs the investigative functions normally performed by a detective or police officer," that prosecutor - although not entitled to absolute immunity - is nevertheless still entitled to qualified immunity. Tomel v. Hawaii, Civ. No. 12-00047 LEK-BMK, 2012 WL 300567, at *6 (D. Haw. Jan. 31, 2012).

In the case of Defendants Nakakuni, Osborne, and Oshiro, Plaintiff has flatly failed to provide any facts to support a conclusion that these Defendants' conduct violated any clearly established statutory or constitutional right of which a reasonable person would have known. Accordingly, all three of the individual Defendants are shielded from liability for money damages under the doctrine of qualified immunity.

D. Immunity Under the Federal Tort Claims Act

Plaintiff's defamation claim against Defendant Oshiro is also barred by sovereign immunity. As Defendants correctly state in their Motion to Dismiss, although the Federal Tort Claims Act ("FTCA") provides a limited waiver of sovereign immunity for certain torts of federal employees acting within the scope of their employment, such waiver has not been extended to claims involving defamation. See 28 U.S.C. § 2680(h); see also Maron v. United States, 126 F.3d 317, 321-22 (4th Cir. 1997)

(noting that the United States has not waived its sovereign immunity); Cox v. United States, Civ. No. C-07-235, 2007 WL 1795711 (S.D. Tex. June 20, 2007) (plaintiff's claim for defamation is excluded from the FTCA).^{8/} Plaintiff also provides no facts to support his assertion that Defendant Oshiro has no authority to operate or investigate within the 50 states, or that he improperly represented himself as an agent for the federal government. Accordingly, Plaintiff's defamation claim against Defendant Oshiro must also be dismissed on immunity grounds.

In conclusion, although this Court is dismissing all seven of Plaintiff's claims against all Defendants for failure to

^{8/} The Court also notes that Plaintiff's claims may be dismissed for Plaintiff's failure to file the administrative claim required by 28 U.S.C. § 2675(a). Section 2675(a) provides that an action shall not be instituted against the United States for money damages "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. § 2675(a). This requirement to file a claim under Section 2675(a) is jurisdictional. See Frantz v. United States, 29 F.3d 222, 224 (5th Cir.1994) (presentation of the plaintiff's claim to the appropriate federal agency is "a jurisdictional prerequisite to bringing a lawsuit under the Federal Tort Claims Act"). To satisfy the requirements of Section 2675(a), the plaintiff's administrative claim must "giv[e] the agency written notice of [plaintiff's] claim sufficient to enable the agency to investigate and ... plac[e] a value on [plaintiff's] claim." Id. In this case, Plaintiff has not established that he filed the required administrative claim, nor that he made any effort to exhaust his administrative remedies. Although the Court has dismissed Plaintiff's claims for the reasons set forth above, the Court notes that in the alternative, Plaintiff's failure to file the required administrative claim also constitutes grounds to dismiss this lawsuit.

state a claim upon which relief may be granted pursuant to Rule 12(b)(6), the Court notes that in the alternative Defendants are entitled to dismissal of all claims based upon lack of subject matter jurisdiction due to immunity from suit.

III. Dismissal With Leave to Amend

Dismissals for failure to comply with Rule 12(b)(6) should ordinarily be without prejudice and "leave to amend should be granted if it appears at all possible that the plaintiff can correct the defect." See Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1107 (9th Cir. 2003). Courts may deny a proposed amendment due to (1) undue delay, bad faith, or dilatory motive on the part of the movant; (2) repeated failure to cure deficiencies by amendments previously allowed; (3) undue prejudice to the opposing party of the proposed amendment; and (4) futility of the proposed amendment. Leadsinger, Inc. v. BMG Music Publishing, 512 F.3d 522, 532 (9th Cir. 2008).

The Court has already instructed Plaintiff about the deficiencies of his claims and granted Plaintiff leave to amend these claims once. Because Plaintiff has not heeded the Court's advice, and because any further amendment would be futile, the Court dismisses Plaintiff's claims II through VII with prejudice. See Flowers v. First Hawaiian Bank, 295 F.3d 966, 976 (9th Cir. 2002); Eldridge v. Block, 832 F.2d 1132, 1135-36 (9th Cir. 1987)

("The district court's discretion [to dismiss a complaint without leave to amend] is particularly broad . . . where a plaintiff has previously been granted leave to amend and fails to add the requisite particularity to her claims."). In sum, Plaintiff has not provided the requisite who, what, when, and how necessary to establish claims II through VII.

As to Count I - Abuse of Process - the Court concludes that it is possible that Plaintiff could file an Amended Complaint setting forth facts sufficient to make a claim regarding the refund that Defendants allegedly owe to Plaintiff for tax returns in 2008 and 2009. Recognizing the important obligation to provide a pro se litigant with notice of the deficiencies of the complaint and an opportunity to amend it - if the deficiencies can be cured (See Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992)) - the Court will dismiss this count without prejudice, with regard to Plaintiff's claim that Defendants owe him a refund for tax returns in 2008 and 2009. The Court will dismiss all other allegations in this count with prejudice.

This Order details the deficiencies in Plaintiff's Amended Complaint. Should Plaintiff desire to pursue this case further, he is directed to consider the Order carefully in crafting his second amended complaint. The Court notes that the

assistance of counsel would likely aid Plaintiff in correcting the defects in the Complaint.

CONCLUSION

For the foregoing reasons, the Court: (1) GRANTS, As Modified, Defendants' Motion to Dismiss the First Amended Complaint; (2) DISMISSES Counts II, III, IV, V, VI, and VII with prejudice; and (3) DISMISSES Count I with prejudice, except as to Plaintiff's claims for tax refunds, which are dismissed without prejudice.

IT IS SO ORDERED.

DATED: Honolulu, Hawai'i, February 15, 2012.



A handwritten signature in black ink that reads "Alan C. Kay".

Alan C. Kay
Sr. United States District Judge

Fowlers v. U.S. Dep't of Justice, et al., Civ. No. 11-00178 ACK-RLP: Order Granting, As Modified, Defendants' Motion to Dismiss the Amended Complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable R. Brooke Jackson

Civil Action No. 11-cv-00274-RBJ-MEH

UNITED STATES OF AMERICA,

Plaintiff,

v.

LAURENCE R. GOODMAN;
COUNTY OF GILPIN, COLORADO;
COLORADO DEPARTMENT OF REVENUE;
PATRICK MAXWELL;
JAN INGEBRIGTSEN.

Defendants.

ORDER

This matter is before the Court on plaintiff and counterclaim defendant, United States of America's ("United States") Motion to Dismiss defendant and counterclaim plaintiff, Laurence R. Goodman's Counter Complaint (#21). On January 4, 2012, Magistrate Judge Hegarty issued a Report and Recommendation, recommending that the motion be granted (#43, 44)¹. On January 18, 2012 Mr. Goodman, proceeding *pro se*, filed a timely objection to the Magistrate Judge's recommendation (#46).

Facts

On February 2, 2011, the United States commenced this action pursuant to 26 U.S.C. §§ 7401, 7402 and 7403(a) to "reduce outstanding federal income tax assessments to judgment and to foreclose federal tax liens on real property." Complaint, Doc. #1, ¶¶1, 2. The United States

¹ Magistrate Judge Hegarty's Report and Recommendation appears at both Docket #43 and 44. Docket #44 is a duplicate amended to correct a document number on page 11.

alleges that Mr. Goodman has failed to pay federal income taxes, penalties, and interest in the amount of \$1,327,761.31. *Id.* at ¶14.

The United States alleges that the tax assessments against Mr. Goodman for tax years 1997, 1998, 1999, and 2000 create statutory liens attached to Mr. Goodman's property rights in favor of the United States. *Id.* at ¶¶12, 16. Mr. Goodman owns real property in Golden, Gilpin County, Colorado. *Id.* at ¶10. The County of Gilpin, Colorado, the Colorado Department of Revenue, Patrick Maxwell, and Jan Ingebringsten are named as defendants as necessary parties pursuant to 26 U.S.C. §7403, because the United States believes they may have an interest in Mr. Goodman's Golden property. *Id.* at ¶¶6-10.

In his answer and counter complaint, Mr. Goodman requests monetary relief for violations of his constitutional rights and criminal statutes. Doc. #13. Mr. Goodman alleges that the United States committed fraud by filing the original complaint and included the other named defendants for the sole purpose of creating defaults. *Id.* at ¶ A. Mr. Goodman further alleges that the United States has brought a fraudulent action for the purpose of a "FRAUDULENT SEIZURE OF PROPERTY WITHOUT FAIR COMPENSATION IN WILLFUL DEPREVATION (sic) OF THE DEFENDANT/COUNTER PETITIONERS Laurence R. Goodman's FOURTH AMENDMENT RIGHTS...IN VIOLATION OF 18 U.S.C. §§ 242 and 1581." *Id.* at ¶ D. Mr. Goodman requests \$3 million in compensation.

On June 10, 2011 the United States filed a Motion to Dismiss the Counterclaims arguing (1) the Court lacks subject matter jurisdiction because the United States has not waived its sovereign immunity, and that (2) Mr. Goodman's counter complaint fails to state a claim upon which relief may be granted. Doc. #21.

Mr. Goodman filed an objection on June 27, 2011. Doc. #23. In his objection, Mr. Goodman contends that he did not receive a full copy of the Motion to Dismiss; he argues that he only received the first and third pages of the United States' Motion. *Id.* at ¶1. Mr. Goodman also argues that the Court does have subject matter jurisdiction over his counterclaims. *Id.* at ¶2. The United States filed a Reply stating that Mr. Goodman did receive a full copy of the motion through the mail. Doc. #24. The United States also points out that Mr. Goodman did not contact counsel inquiring into the missing pages. A copy of the original Motion to Dismiss was attached as Exhibit 1. Mr. Goodman filed a "counter reply" on July 18, 2011 maintaining that he did not receive a full copy of the original motion. Doc. #25.² Mr. Goodman also argues that the United States "has failed to produce even one piece of evidence...that is not self-created and self-serving that can be independently verified outside of the Internal Revenue Service for there to be even a prima facie case in this Court, or for this Court to even have Subject Matter Jurisdiction." *Id.* at p.2.

Standard of Review

Recommendation of the Magistrate Judge

Following the issuance of a magistrate judge's recommendation on a dispositive matter the district court judge must "determine *de novo* any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). The district judge is permitted to "accept, reject, or modify the recommended disposition; receive further instruction; or return the matter to the magistrate with instructions." *Id.* To be proper, an objection must be both timely and specific. *U.S. v. One Parcel of Real Property*, 73 F.3d 1057, 1060 (10th Cir. 1996). An

² Although Mr. Goodman did not request permission to file a surreply, Magistrate Judge Hegarty considered the surreply in his analysis because Mr. Goodman alleged that he did not receive a complete copy of the Motion. Doc. #44, p. 4, n.4. Because Mr. Goodman received a full copy of the motion with the United States' Reply, Magistrate Judge Hegarty found that Mr. Goodman was not prejudiced by allegedly not having a complete copy of the motion when it was originally filed.

objection is timely if it is filed within fourteen days of the issuance of the Magistrate's recommendation. Fed. R. Civ. P. 72(b)(2). To preserve an issue for *de novo* review, the objection must be specific enough to "focus the district court's attention on the factual and legal issues that are truly in dispute." *One Parcel*, 73 F.3d at 1060. The Federal Magistrates Act does not "require any review at all, by either the district court or the court of appeals, of any issue that is not the subject of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985).

Pro Se Plaintiff

When a case involves a *pro se* party the court will "review his pleadings and other papers liberally and hold them to a less stringent standard than those drafted by attorneys." *Trackwell v. U.S. Government*, 472 F.3d 1242, 1243 (10th Cir. 2007). However, "it is not the proper function of the district court to assume the role of advocate for the pro se litigant." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). A broad reading of a pro se plaintiff's pleadings "does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based...conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based." *Id.* Pro se parties must "follow the same rules of procedure that govern other litigants." *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994) (citing *Green v. Dorrell*, 969 F.2d 915, 917 (10th Cir. 1992)).

Motion to Dismiss: 12(b)(6)

In reviewing a motion to dismiss, the Court assumes that the facts in plaintiff's complaint are true. *Estelle v. Gamble*, 429 U.S. 97, 99 (1976). However, a complaint must set forth a plausible, not merely a possible, claim. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Atwell v. Gabow*, 311 F. Appx. 122, 125 (10th Cir. 2009). "To survive a motion to dismiss, a complaint must contain factual matter, accepted as true, to 'state a claim to relief that

is plausible on its face.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570).

Motion to Dismiss: 12(b)(1)

Under Rule 12(b)(1) a court may dismiss the complaint for “lack of subject matter jurisdiction.” Fed. R. Civ. P. 12(b)(1). If a court determines that it lacks jurisdiction, it “must dismiss the cause at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking.” *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). As the burden of establishing subject matter jurisdiction is on the person asserting jurisdiction, Mr. Goodman bears the burden in this case. *See id.* Proper subject matter jurisdiction must be determined “from the allegation of fact in the complaint, without regard to mere conclusory allegations of jurisdiction.” *Groundhog v. Keeler*, 442 F.2s 674, 677 (10th Cir. 1971).

Conclusions

The United States argues that Mr. Goodman’s counterclaims lack subject matter jurisdiction because the United States has not waived its sovereign immunity. Although Mr. Goodman contends that the United States has not produced any evidence that this Court has subject matter jurisdiction, by asserting counterclaims Mr. Goodman is invoking the jurisdiction of this Court. As this Court cannot consider Mr. Goodman’s counterclaims without proper subject matter jurisdiction, the Court will address this argument first. The United States may only be sued directly in limited circumstances: “[t]he United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court’s jurisdiction to entertain the suit.” *U.S. v. Sherwood*, 312 U.S. 584, 586 (1941) (internal citations omitted). Sovereign immunity prohibits suits against the United States “except in those instances in which it has specifically consented to be sued.” *In re Talbot*, 124 F.3d

1201, 1206 (10th Cir. 1997). Consent can only be given by an unequivocal expression of intent to waive sovereign immunity in statutory text. *See id.* (citing *United States v. Nordic Village, Inc.*, 503 U.D. 30, 33 (1992)).

Mr. Goodman's counterclaims assert violations of his Fourth Amendment rights and criminal statutes 18 U.S.C. §§242 and 1581. Mr. Goodman has not indicated, or argued, that the United States has waived sovereign immunity. The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person..." 26 U.S.C. §7421(a). The Tenth Circuit has described the intent of the statute to be "the protection of the government's need to assess and collect taxes as expeditiously as possible without preemption of judicial interference and to require that disputed sums of taxes due be determined in suits for refund." *Lowrie v. U.S.*, 824 F.2d 827, 830 (1987). "Nor can one avoid statute by raising constitutional claims." *Id.* (citing *Alexander v. Americans United, Inc.*, 416 U.S. 752, 759 (1974)). Thus, Mr. Goodman's inclusion of Fourth Amendment claims does not overcome the doctrine of sovereign immunity. Waiver of sovereign immunity is only available to third parties in wrongful levy claims, not to the person challenging tax assessments against themselves. *See* 26 U.S.C. §7426 (stating that a claim may be brought by anyone "other than the person against whom is assessed the tax out of which such levy arose."). In addition, criminal statutes 18 U.S.C. § 242 and 1581 do not provide a private civil cause of action.

Even under the less stringent *pro se* standard, Mr. Goodman has not demonstrated that the United States has waived sovereign immunity. Without such a waiver, this Court lacks subject matter jurisdiction over Mr. Goodman's counterclaims and must dismiss the claims.

Basso, 495 F.2d at 909. Without subject matter jurisdiction this Court need not address the sufficiency of Mr. Goodman's pleadings.

Order

Based on the foregoing, the Court AFFIRMS the Magistrate Judge's Recommendation (#43 & 44). Accordingly, the United States' Motion to Dismiss Counter Complaint is GRANTED (#21).

DATED this 15th day of February, 2012.

BY THE COURT:

A handwritten signature in black ink, appearing to read "R. Brooke Jackson", written in a cursive style. The signature is positioned above a horizontal line.

R. Brooke Jackson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN J. GRIFFIN, ET AL.,

Defendants.

Civil Action
No. 10-5589 (JBS/KMW)

ORDER

This foreclosure matter having been resolved on consent judgment of foreclosure, and reopened with an order entered providing for private sale of the subject property on November 28, 2011 [Docket Item 21]; neither party having provided the Court notice of any problem with the scheduled sale or reason for the case to remain open; and for good cause;

IT IS this 15th day of **February, 2012** hereby

ORDERED that this case is **ADMINISTRATIVELY TERMINATED.**

s/ Jerome B. Simandle
JEROME B. SIMANDLE
Chief U.S. District Judge

FILED
Clerk
District Court

FEB 15 2012

For The Northern Mariana Islands
By _____
(Deputy Clerk)

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS**

HONG KONG ENTERTAINMENT
(OVERSEAS) INVESTMENT, LTD., AND
RIFU APPAREL CORPORATION, CNMI
CORPORATIONS, FOR THEMSELVES
AND FOR CERTAIN OF THEIR
SIMILARLY SITUATED CURRENT
AND FORMER EMPLOYEES,

Case No.: 10-CV-00019

CASE MANAGEMENT
SCHEDULING ORDER

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

This matter came before the Court on February 14, 2012 for a scheduling conference. Plaintiffs were represented by their lead counsel, Ms. Alexis Fallon, Esq., who appeared telephonically. Defendant was represented through its counsel, Trial Attorney Andy R. Camacho from the U.S. Department of Justice, who also appeared telephonically. In accordance with Fed. R. Civ. P. 16(b) and based on the stipulation of the parties (Dkt. No. 12), the Court hereby ORDERS as follows:

1. All parties are to be joined on or before May 15, 2012.
2. All motions to amend and supplement the pleadings shall be filed on or before May 15, 2012.

- 1 3. Pursuant to Fed. R. Civ. P. 26(a)(1)(C), all disclosures under Fed R. Civ. P. 26(a)
2 and 26(c) shall be made within 14 days of the date of this order.
- 3 4. The cutoff date for written discovery shall be May 15, 2013.
- 4 5. All discovery motions shall be filed on or before May 22, 2012.
5 The following discovery documents and proofs of service thereof shall not be
6 filed with the Clerk until there is a motion or proceeding in which the document
7 or proof of service is in issue and then only that part of the document which is in
8 issue shall be filed with the Court:
 - 9 a. Transcripts of depositions upon oral examination;
 - 10 b. Transcripts of deposition upon written questions;
 - 11 c. Interrogatories;
 - 12 d. Answers or objections to interrogatories;
 - 13 e. Requests for production of documents or to inspect tangible things;
 - 14 f. Responses or objections to requests for production of documents or
15 to inspect tangible things;
 - 16 g. Requests for admission; and,
 - 17 h. Responses of objections to requests for admission.
- 18 6. Experts: All experts shall be disclosed no later than May 31, 2013. Rebuttal
19 experts shall be disclosed no later than July 1, 2013. All expert discovery shall be
20 served no later than August 30, 2013.
- 21 7. All dispositive motions shall be filed no later than July 31, 2013.
- 22 8. All dispositive motions shall be heard on September 26, 2013, at 9:00 a.m.
- 23 9. A status conference shall be set on August 30, 2012, at 9:00 a.m.
- 24 10. A settlement conference shall be set on May 23, 2013, at 9:00 a.m.
- 25 11. The final pretrial order, jointly prepared pursuant to Local Rule 16.2CJ.e.9, shall
26 be filed with this Court by November 29, 2013.
- 27 12. All motions in limine shall be filed no later than January 31, 2014. Any
28 opposition shall be filed no later than February 10, 2014. Any reply shall be filed
no later than February 17, 2014.
13. The parties shall file proposed findings of fact and conclusions of law no later
than February 28, 2014.

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14. A final pretrial conference and hearing on all motions in limine will be held on February 28, 2014, at 9:00 a.m.

15. The bench trial in this case shall begin on March 14, 2014, at 9:00 a.m.

This case has been assigned to the Complex Track.

IT IS SO ORDERED this 15th day of February, 2012.


RAMONA V. MANGLONA, Chief Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LARISA A. HUMPHREY,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

CIVIL ACTION FILE

NO. 1:11-CV-1647-SCJ

ORDER

This matter is before the Court on the Motion to Withdraw as Counsel of Record for plaintiff Larisa A. Humphrey by Juhi Kaveeshar, Kim T. Phipps and W. Calvin Bomar of the firm Bomar & Phipps, LLC [Doc. No. 13]. No objections have been filed thereto by either plaintiff or defendant. Plaintiff's counsel having complied with the rules of this Court concerning withdrawal of counsel, the motion is **GRANTED** and **IT IS HEREBY ORDERED** that Juhi Kaveeshar, Kim T. Phipps and W. Calvin Bomar of the firm Bomar & Phipps, LLC be allowed to withdraw as counsel for plaintiff in this case.

Plaintiff is hereby **ORDERED** pursuant to Local Rule 83.1E(4) to notify this Court in writing within twenty (20) days of the date of the docketing of this Order of her new counsel or of her intention to proceed *pro se*. Plaintiff must also provide the Court with the current telephone number and address of new counsel or of her

current telephone number and address if she is proceeding *pro se*. Local Rule 83.1E(4) provides that failure to comply with this Rule shall constitute a default by the party.

The Clerk is hereby **DIRECTED** to send a copy of this Order to plaintiff Larisa A. Humphrey at her last known address: 3110 Emden Trail SW, Snellville, GA 30030.

IT IS SO ORDERED, this 15th day of February, 2012.

s/Steve C. Jones
STEVE C. JONES
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

United States of America

Plaintiff,

-vs-

Case No. 8:10-cv-2415-T-26TBM

**Maria L. Ippolito, Maria L. Ippolito as the
Personal Representative of the Estate of Robert
C. Singleton, Charlie's Seafood Enterprises, Inc,
Richard H. Ulvestad**

Defendants.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment is entered in favor of the Plaintiff, United States of America.

Date: February 15, 2012

SHERYL L. LOESCH, CLERK

By: s/C. Davis, Deputy Clerk

Copies furnished to:

Counsel of Record
Unrepresented Parties

CIVIL APPEALS JURISDICTION CHECKLIST

1. **Appealable Orders:** Courts of Appeals have jurisdiction conferred and strictly limited by statute:
 - (a) **Appeals from final orders pursuant to 28 U.S.C. Section 1291:** Only final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. Section 158, generally are appealable. A final decision is one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983). A magistrate judge’s report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. Section 636(c).
 - (b) **In cases involving multiple parties or multiple claims,** a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b), Williams v. Bishop, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys’ fees and costs, that are collateral to the merits, is immediately appealable. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 201, 108 S. Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); LaChance v. Duffy’s Draft House, Inc., 146 F.3d 832, 837 (11th Cir. 1998).
 - (c) **Appeals pursuant to 28 U.S.C. Section 1292(a):** Appeals are permitted from orders “granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions...” and from “[i]nterlocutory decrees...determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed.” Interlocutory appeals from orders denying temporary restraining orders are not permitted.
 - (d) **Appeals pursuant to 28 U.S.C. Section 1292(b) and Fed.R.App.P.5:** The certification specified in 28 U.S.C. Section 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court’s denial of a motion for certification is not itself appealable.
 - (e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); Atlantic Fed. Sav. & Loan Ass’n v. Blythe Eastman Paine Webber, Inc., 890 F.2d 371, 376 (11th Cir. 1989); Gillespie v. United States Steel Corp., 379 U.S. 148, 157, 85 S.Ct. 308, 312, 13 L.Ed.2d 199 (1964).

2. **Time for Filing:** The timely filing of a notice of appeal is mandatory and jurisdictional. Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P.4(a) and (c) set the following time limits:
 - (a) **Fed.R.App.P. 4(a)(1):** A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD - no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.
 - (b) **Fed.R.App.P. 4(a)(3):** “If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.”
 - (c) **Fed.R.App.P.4(a)(4):** If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.
 - (d) **Fed.R.App.P.4(a)(5) and 4(a)(6):** Under certain limited circumstances, the district court may extend the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time may be extended if the district court finds upon motion that a party did not timely receive notice of the entry of the judgment or order, and that no party would be prejudiced by an extension.
 - (e) **Fed.R.App.P.4(c):** If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution’s internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. Section 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

3. **Format of the notice of appeal:** Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. See also Fed.R.App.P. 3(c). A pro se notice of appeal must be signed by the appellant.

4. **Effect of a notice of appeal:** A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).

Rev.: 4/04

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

FORD T. JOHNSON, JR.

*

Plaintiff,

*

v.

*

Case No. WDQ-98-3050

UNITED STATES OF AMERICA,

*

Defendant.

*

* * * * *

REPORT AND RECOMMENDATION

Before the court is the United States’ Motion for Installment Payment Order (“Motion”) pursuant to the Federal Debt Collection Procedures Act of 1990, 28 U.S.C. § 3204. (ECF No. 45.) Currently pending are the United States’ Motion (ECF No. 45) and Memorandum in Support of Motion for Installment Payment Order (“Memorandum”) (ECF No. 46), plaintiff’s Opposition to the United States’ Motion to Impose Installment Payment Order (“Opposition”) (ECF No. 62), and the United States’ Reply Memorandum in Support of Motion for Installment Payment Order (“Reply”). (ECF No. 63.) The United States seeks an order compelling the judgment debtor in this action, Ford T. Johnson, Jr. (“plaintiff”), to make monthly installment payments in the amount of \$400 to the United States until the total judgment debt of \$1,498,004.01, plus the accrued post judgment interest and the 10 percent surcharge imposed by 28 U.S.C. 3011(a),¹ has been satisfied.² (ECF Nos. 45, 46.) Plaintiff opposes the United States’

¹ Section 3011(a) provides, in pertinent part:

[The United States may] recover a surcharge of 10 percent in the amount of the debt in connection with the recovery of the debt, to cover the cost of processing and handling the litigation and enforcement under this chapter for the claim of such debt.

Motion, contending that a \$400 monthly installment payment order is neither appropriate nor reasonable because it “would impose an undue hardship” on plaintiff and his family “without meaningfully reducing” the overall judgment. (ECF No. 62 at 2.)

Judge Quarles referred this case to the undersigned pursuant to 28 U.S.C. § 636 and Local Rules 301 and 302 to hold a hearing and to make recommendations regarding the United States’ Motion. (ECF No. 49.) Accordingly, a hearing was held in open court before the undersigned on February 7, 2012, at which plaintiff testified and counsel were heard. For the reasons discussed herein, I respectfully recommend that the United States’ Motion for Installment Payment Order (ECF No. 45) be GRANTED and that plaintiff be ordered to make monthly installment payments to the United States in the amount of \$400 until the total judgment debt of \$1,498,004.01, plus the accrued post judgment interest and costs, has been satisfied.

I. BACKGROUND

Plaintiff commenced this action on September 4, 1998 to recover \$15,435.50 that the Internal Revenue Service (“IRS”) had withheld from his 1995 personal tax return. Johnson v. United States, 203 F. Supp. 2d 416, 417 (D. Md. 2002). The IRS counterclaimed that plaintiff was liable for \$887,726.78, plus interest and statutory penalties, in unpaid employee withholding taxes for Koba Associates, Inc.³ On January 28, 2002, the court granted the United States’

28 U.S.C. § 3011(a).

² The amount due as of December 1, 2010 is \$2,474,531.50. (ECF No. 46.)

³ Plaintiff was the president, chairman of the board, and majority shareholder of Koba Associates, Inc., “a small company engaged in, among other things, community planning and economic development in the District of Columbia.” Johnson, 203 F. Supp. 2d at 417. The IRS contended that plaintiff was liable for 100 percent of the unpaid taxes because he was a “responsible person” who willfully failed to pay employee withholding taxes within the meaning of 26 U.S.C. § 6672. Id.

Motion for Summary Judgment, ordered a judgment of \$1,498,004.01 plus interest against plaintiff, and directed the Clerk to close the case. (ECF No. 37.)

On April 12, 2011, the United States moved to reopen the case to permit consideration of its Motion for Installment Payment Order. (ECF No. 42.) Plaintiff opposed the Motion to Reopen Case. (ECF No. 52.) On April 20, 2011, Judge Quarles referred the case to the undersigned to hold a hearing and make recommendations regarding the United States' Motion and Memorandum. (ECF No. 49.) On May 18, 2011, the undersigned suspended review of the instant motion until resolution of the United States' Motion to Reopen Case. (ECF No. 54.)

On October 7, 2011, the court granted the United States' Motion to Reopen Case "to permit consideration of the motion for an installment payment order." (ECF Nos. 59, 60.) Accordingly, the undersigned resumed review of the instant motion on October 11, 2011. (ECF No. 61.) On October 28, 2011, plaintiff filed his Opposition (ECF No. 62), and on November 14, 2011, the United States filed its Reply. (ECF No. 63.) On February 7, 2012, in accordance with 28 U.S.C. § 3204(a), a hearing was held in open court. Present at the hearing were plaintiff and plaintiff's counsel, Alexei M. Silverman, Esq. Gerald A Role, Esq., and Melissa Dickey, Esq. appeared on behalf of the United States. At the hearing, counsel were heard and plaintiff testified and introduced his 2011 Form 1099 and attached schedule into evidence. (ECF No. 67.)

II. DISCUSSION

The United States seeks an order pursuant to 28 U.S.C. § 3204 compelling plaintiff to remit \$400 monthly installment payments to the United States until the total judgment debt, plus accrued interest and costs, has been satisfied. (ECF Nos. 45, 46.) The central dispute is whether ordering plaintiff to make monthly installment payments to the United States is appropriate, and, if so, what amount is reasonable. The United States maintains that an installment payment order

is appropriate pursuant to § 3204 because the post-judgment interrogatories it propounded to plaintiff show plaintiff “is believed to receive substantial non-exempt disposable earnings from self-employment that are not readily subject to garnishment,” and that plaintiff “is not subject to any present writ of garnishment with regards to his judgment liability in the present case.” (ECF No. 46 at 2.) The United States asserts that “[m]onthly payments of \$400 are reasonable considering the substantial income believed to be earned by [plaintiff], his reasonable living expenses, and the size of the judgment” and “there is nothing about [plaintiff’s] financial situation that indicates that monthly payments of \$400 would impose an undue financial hardship on him.” (Id.)

Plaintiff’s primary contention is that no installment payment is appropriate because it “would impose an undue hardship on [plaintiff], and by extension, his wife and children,” without meaningfully reducing the outstanding judgment. (ECF No. 62 at 2.) At the hearing held in this case, plaintiff also maintained that the amount of the monthly installment payment that the United States seeks, \$400, is unreasonable.

The Federal Debt Collection Procedures Act (“FDCPA”), 28 U.S.C. § 3001 et seq., “provides the exclusive civil procedures for the United States ... to recover judgment on a debt.” 28 U.S.C. § 3001(a)(1). Section 3204(a) of the FDCPA authorizes a court, if appropriate, to order the judgment debtor to make installment payments to the United States:

[If] it is shown that the judgment debtor (1) is receiving or will receive substantial nonexempt disposable earnings from self employment that are not subject to garnishment; or (2) is diverting or concealing substantial earnings from any source, or property received in lieu of earnings; then upon motion of the United States and notice to the judgment debtor, the court may, if appropriate, order that the judgment debtor make specified installment payments to the United States.

28 U.S.C. § 3204(a). Under the procedure set forth by § 3204(a), a hearing must be held to determine the appropriateness of the relief requested. 28 U.S.C. § 3204(a). In addition, an

installment payment order may only be issued with respect to “nonexempt disposable earnings” of the debtor and may not be issued “against a judgment debtor with respect to whom there is in effect a writ of garnishment of earnings issued under [the FDCPA] and based on the same debt.” 28 U.S.C. § 3204(c).

The parties do not dispute that plaintiff is a self-employed debtor within the meaning of § 3204(a)(1) or that plaintiff is not presently subject to a writ of garnishment with regard to his judgment liability in the present case. (ECF Nos. 46, 62, 63.) The parties also agree that plaintiff’s earnings consist solely of his 1099 Miscellaneous Income (“1099 income”), as shown by plaintiff’s 2011 Form 1099, which plaintiff introduced into evidence at the hearing. Plaintiff’s 2011 Form 1099⁴ shows that he earned \$63,787.00 in 2011, which plaintiff testified was to compensate him for work performed as president of Koba Institute, Inc. (“Koba”),⁵ and represents the total amount of rent and penalties for late payments of rent under the lease that Koba paid in 2011 for the home that he shares with his wife, son, niece, and sister-in-law.⁶

⁴ When the United States filed its Motion, plaintiff’s 2010 Form 1099 represented the most recent earnings data available for plaintiff. Plaintiff attached his 2010 Form 1099 and Koba payment schedules to his Opposition as Exhibit 1, which showed that plaintiff earned \$75,000 in 1099 income in 2010. (ECF No. 62, Ex. 1.) Plaintiff testified that this income represented rental payments for his home and payments for life insurance premiums. Plaintiff testified his earnings were lower in 2011 than 2010 because, in 2011, payments for life insurance premiums were allocated to his wife.

⁵ Plaintiff testified that Koba is a closely-held corporation that provides residential care services to children at five group homes in the Washington metropolitan area. Plaintiff further advised that he and his wife are the co-founders of Koba and that his wife is the sole shareholder and owner. Plaintiff is the president of Koba, and his wife serves as the vice president and human resources director, and also manages admissions and collections.

⁶ Plaintiff attached a payment schedule generated by Koba’s data system to his 2011 Form 1099, which he testified showed the \$5,250.00 monthly rental payments and \$157.50 penalty payments for late rent. (ECF No. 67.)

The parties dispute whether an installment payment order is appropriate and whether the amount that the United States requests is reasonable. Plaintiff maintains that an installment payment order is not appropriate, in part because it would impose an undue hardship on him and his dependents. (ECF No. 62 at 2.) Plaintiff testified that he financially supports his 24-year-old adult son who has Asperger's Syndrome. Plaintiff advised that, if a \$400 monthly installment payment was taken out of his 1099 income, he would not be able to pay the rent due on his home. He further noted that, if his family was forced to relocate as a result, it would have a destabilizing effect on his son. Plaintiff also testified that, in his position as president, he makes the final decisions regarding the salaries of all Koba employees. Plaintiff advised that he and his wife reached a "mutual decision" that his compensation would be paid solely in the form of rental payments for the family home in the total amount of \$63,787.00, but that his wife would be paid a salary of approximately \$130,000.00-140,000.00. He testified that their primary consideration in making these decisions was maintaining the stability of their family, and that they decided the "best way" to do that was for plaintiff not to receive a salary.

The United States argues that an installment payment order as to plaintiff's earnings is a "fair, efficient, and statutorily authorized means to ensure that [plaintiff] begins to meet his legal obligation to the United States with respect to the [outstanding judgment]." (ECF No. 46 at 2-3.) The United States notes the large amount of plaintiff's debt, \$2,474,531.50 as of December 1, 2010, and observes that plaintiff has not made a single payment on the debt.⁷ (ECF Nos. 46, 63.)

⁷ The United States further notes that the court awarded the judgment in the instant case because it found that plaintiff was liable for willfully failing to pay withholding taxes of employees of Koba Associates, Inc., Johnson, 203 F. Supp. 2d at 417-418, and that plaintiff and his wife are now subject to another proceeding in this court for similar unpaid withholding tax liabilities for Koba Institute, Inc., which they founded the day after Koba Associates, Inc. filed for bankruptcy. (ECF No. 63 at 2 (citing Johnson v. U.S. Dep't of Treasury, No. 08:09-cv-0787-DKC (D. Md.).)

At the hearing in this case, the United States argued that plaintiff, in his role as president, is in control of Koba's corporate structure, and has organized it in such a way as to avoid making any payments on his debt by electing not to receive a salary, which he recognizes would be subject to garnishment. Instead, the United States maintains, plaintiff is channeling earnings from Koba to be paid to his wife, who is not subject to the judgment at issue here.

Based upon a review of the record and the testimony and evidence offered at the hearing, the undersigned finds that the United States has shown that plaintiff has "substantial nonexempt disposable earnings from self employment" under § 3204(a)(1), \$63,787.00 in 1099 income, and those earnings are "not subject to garnishment" within the meaning of § 3204(c).⁸ 28 U.S.C. § 3204(a)(1), (c). The fact that plaintiff has caused the income he earns as president of Koba to be paid directly to the lessor of his residence and taxed as 1099 income does not alter the essential character of that income. That income constitutes "substantial earnings" within the meaning of the FDCPA. See 28 U.S.C. § 3002(6) ("Earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise"). Accordingly, the undersigned finds that an installment payment order is both authorized and appropriate under 28 U.S.C. § 3204.

The United States requests that the court order plaintiff to make a \$400 monthly installment payment. (ECF Nos. 45, 46, 63.) At the hearing, plaintiff contended that the amount

⁸ At the hearing in this case, the United States stated that, although it was proceeding against plaintiff pursuant to § 3204(a)(1), an analysis under § 3204(a)(2) may apply here because plaintiff is "diverting earnings" to his wife within the meaning of § 3204(a)(2). The undersigned concludes, however, that § 3204(a)(1) sets forth the appropriate analysis for this case. See 28 U.S.C. § 3204(a)(1).

the United States seeks is unreasonable, but did not offer an alternative amount.⁹ Section 3204(a) provides:

[I]n fixing the amount of payments, the court shall take into consideration after a hearing, the income, resources, and reasonable requirements of the judgment debtor and the judgment debtor's dependents, any other payments to be made in satisfaction of judgments against the judgment debtor, and the amount due on the judgment in favor of the United States.

28 U.S.C. § 3204(a). Although the § 3204(a) factors focus the court on the “requirements of the judgment debtor and the judgment debtor's dependents,” the evidence in this case clearly establishes that plaintiff and his wife share the family's financial obligations. The undersigned notes that plaintiff's son is not plaintiff's dependent alone and that, as he testified, plaintiff is not supporting any dependent beyond paying rent on the family home. It is also worth noting that plaintiff's testimony revealed that his wife's annual salary, which is used for all household expenses with the exception of rent, is approximately double that of plaintiff's, even though she works substantially fewer hours than plaintiff.¹⁰

⁹ Relying on NLRB v. Potential School for Exceptional Children, at al., 1999 U.S. Dist LEXIS 19172, at *16 (N.D. Ill. 1999), plaintiff argues that a \$400 monthly payment is unreasonable because it would “impose an undue hardship on [plaintiff and his family] without meaningfully reducing the large judgment sought to be collected by the United States.” (ECF No. 62 at 2.) The undersigned is not persuaded by this argument as the facts of Potential School are substantially different from the present case. In Potential School, the judgment debtor's sole source of income was \$1,096.00 in monthly social security payments, only \$16,736.37 of the \$130,777.00 obligation remained outstanding, and an arrangement had been reached to satisfy the outstanding balance of the debt. Potential School, 1999 U.S. Dist LEXIS 19172, at *2, 5-6. The court denied the Government's motion for an installment payment order pursuant to § 3204 because it found the Government had not shown that an order was authorized under § 3204(a) and that such an order was prohibited by § 3204(c) because a writ of garnishment existed on earnings on the same debt. Id. at *16.

¹⁰ Plaintiff testified that his wife earned a salary of approximately \$130,000.00-140,000.00 in 2011 and that she generally works from the hours of 9:00 a.m. to 5:00 p.m. five days per week. Plaintiff earned \$63,787.00 in 1099 income in 2011, and testified that he works Monday through Friday from approximately 6:30 a.m. until 6:30 p.m. or later, and Saturday and Sunday from 8:30 a.m. to 5:00 or 6:00 p.m. Plaintiff's suggestion that his wife is compensated at a higher rate because she is the sole owner of Koba is unpersuasive.

At the hearing, plaintiff argued that he will be unable to pay rent if a portion of his 1099 earnings are diverted toward a \$400 monthly installment payment. The undersigned is not persuaded by this argument, especially in view of the fact that plaintiff, who testified that he has complete control over the allocation of salaries of Koba employees, has selected this method and manner of compensation. The fact that plaintiff chose to have the full amount of his earnings applied toward the rental obligations of his family's residence does not have a significant bearing on the question of whether sufficient funds exist to meet installment payment obligations. The undersigned concludes that the intent of § 3204 cannot be circumvented by plaintiff's decision to structure his compensation as he has. Accordingly, the undersigned finds that plaintiff has not shown that monthly payments of \$400 would impose an undue financial hardship on him or that the monthly installment amount that the United States requests is unreasonable.

III. CONCLUSION

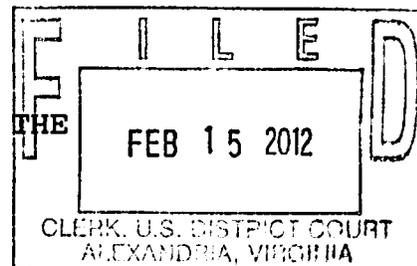
Based upon a review of the record, the testimony and evidence elicited at the hearing, and a consideration of the factors set forth by § 3204(a), the undersigned concludes that an installment payment order as to plaintiff's earnings is appropriate and that the \$400 monthly installment amount requested by the United States is not unreasonable.¹¹ Accordingly, for the reasons discussed above, the undersigned respectfully recommends that the United States' Motion for Installment Payment Order (ECF No. 45) be GRANTED and that plaintiff be ordered to make monthly installment payments in the amount of \$400 to the United States until the total judgment debt of \$1,498,004.01, plus the accrued post judgment interest and the 10 percent surcharge for costs pursuant to 28 U.S.C. § 3011(a), has been satisfied.

¹¹ Twelve \$400 monthly installment payments yield a total of \$4800.00 in payments per year, representing approximately 7.5 percent of \$63,787.00, the amount of plaintiff's 2011 earnings.

Any objections to this Report and Recommendation must be served and filed within fourteen (14) days, pursuant to Fed. R. Civ. P. 72(b) and Local Rule 301.5.b.

Date: 2-15-12

/s/
Beth P. Gesner
United States Magistrate Judge



IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division

UNITED STATES OF AMERICA)
v.) 1:10cv255 (LMB/JFA)
KEVIN R. KELLY, et al.,)
Defendants.)

ORDER

On January 20, 2012, defendant Diane Kelly filed an objection to the Government's report of sale and noticed a hearing on that objection for February 24, 2012. The Government indicated that it did not oppose the relief sought by Ms. Kelly and submitted a revised proposed order in which Ms. Kelly would receive certain proceeds from the property sales at issue. The Court issued an Order Directing Distribution of Sale Proceeds on January 30, 2012, as proposed by the Government [Dkt. No. 60]. Because there appear to be no further issues which require a hearing, it is hereby

ORDERED that the hearing currently scheduled for Friday, February 24, 2012 be and is CANCELLED.

The Clerk is directed to forward copies of this Order to counsel of record and to defendants, pro se.

Entered this 15th day of February, 2012.

Alexandria, Virginia

1s/ LMB
Leonie M. Brinkema
United States District Judge

In the United States Court of Federal Claims

No. 07-625T
(Filed: February 15, 2012)

KISLEV PARTNERS, L.P., *
by and through NESIM BAHAR, *
a Partner Other than the Tax Matters *
Partner, *

Plaintiff, *

v. *

THE UNITED STATES, *

Defendant. *

ORDER

On February 14, 2012, the parties filed a joint status report advising the Court that settlement negotiations are ongoing and suggesting the Court require a joint status report on or before **April 16, 2012**. Accordingly, the parties shall file a joint status report on or before that date.

s/Mary Ellen Coster Williams _____
MARY ELLEN COSTER WILLIAMS
JUDGE

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

<p>UNITED STATES OF AMERICA, Plaintiffs, vs. JOSEPH J. LIPARI, EILEEN H. LIPARI and EXETER TRINITY PROPERTIES, L.L.C., Defendants.</p>	<p style="text-align: right;">No. 3:10-CV-08142 JWS</p> <p style="text-align: center;">ORDER</p> <p style="text-align: right;">Honorable John W. Sedwick</p>
--	--

Upon Motion of the Defendant Exeter Trinity Properties, L.L.C., [“Exeter”] and good cause appearing,

IT IS ORDERED:

1. Exeter’s Motion for Leave to File Supplemental Statement of Facts is granted.
2. The Supplement to Statement of Facts by Defendant Exeter Trinity Properties, LLC, filed February 15, 2012, may be accepted by the Clerk and included in the Court file.
3. On or before March 15, 2012, the Plaintiff, United States of America, may file a Response to Exeter’s Supplement to its Statement of Facts, or may supplement its own Statement of Facts.
4. There shall be no further filings by either party regarding the pending Motions for Summary Judgment, unless requested by the Court.

ORDERED that the deadline for the Debtor to file the Rule 2015 Report for January 2012 is extended to and including February 27, 2012.

###

PRESENTED BY:

FARLEIGH WADA WITT

By: /s/ Tara J. Schleicher

Tara J. Schleicher, OSB #954021
tschleicher@fwwlaw.com
(503) 228-6044
Of Attorneys for Debtor

cc: Interested Parties

ORDERED that the deadline for the Debtor to file the Rule 2015 Report for January 2012 is extended to and including February 27, 2012.

###

PRESENTED BY:

FARLEIGH WADA WITT

By: /s/ Tara J. Schleicher

Tara J. Schleicher, OSB #954021
tschleicher@fwwlaw.com
(503) 228-6044
Of Attorneys for Debtor

cc: Interested Parties

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ALAN PESKY AND WENDY PESKY,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 1:10-CV-186-WBS

**ORDER GRANTING JOINT MOTION
TO EXTEND STAY**

Before the Court is the parties' joint motion for an extension of the stay of proceedings under 26 U.S.C. § 7422(e). Based on this motion, and for good cause shown, IT IS ORDERED that this motion is hereby GRANTED. This case shall remain administratively closed and shall be stayed until Plaintiffs move the Court for leave to file an amended complaint, or upon other request and application of the parties and order of the Court. This extension of the stay is without prejudice to the rights of the parties, including the right of the United States to bring a counterclaim under 26 U.S.C. § 7422(e).

IT IS SO ORDERED.

DATED: February 15, 2012



WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:	)	Bankr. No. 11-10244
	)	Chapter 7
MICHAEL ALLAN JOHNSON)	
aka Mike Johnso)	
SSN/ITIN xxx-xx- <input type="text"/>)	
)	
and)	
)	
MARILYN KAY J)	
SSN/ITIN xxx-xx- <input type="text"/>)	
)	
Debtors.)	
)	
MICHAEL ALLAN JOHNSON	)	Adv. No. 12-1004
and MARILYN KAY JOHNSON)	
)	
Plaintiffs)	
)	
-vs-)	
	)	ORDER SETTING TELEPHONIC
UNITED STATES OF AMERICA,	)	INITIAL PRE-TRIAL CONFERENCE
acting by and through the)	
Internal Revenue Service)	
)	
Defendant.)	

Upon consideration of the record before the Court, and for cause shown; now, therefore,

IT IS HEREBY ORDERED an initial pre-trial conference will be held March 22, 2012 at 9:45 a.m. (Central) with counsel for all parties. The conference will be telephonic. The Court will initiate the telephone call.

So ordered: February 15, 2012.

BY THE COURT:



Charles L. Nail, Jr.
Bankruptcy Judge

On the above date, a copy of this document was mailed or faxed to the parties shown on the Notice of Electronic Filing as not having received electronic notice.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota

NOTICE OF ENTRY
Under Fed.R.Bankr.P. 9022(a)

This order/judgment was entered on the date shown above.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE DISTRICT OF PUERTO RICO

IN RE:

JOSE ARIEL ZARAGOZA URDAZ

XXX-XX

Debtor(s)

CASE NO. 11-05771 ESL

Chapter 13

FILED & ENTERED ON 02/15/2012

ORDER GRANTING RESCHEDULE

The motion filed by debtor requesting continuance of the pretrial hearing scheduled for 2/17/2012 (docket #58) is hereby granted. The pretrial conference is hereby rescheduled for MARCH 09, 2012 AT 09:30 A.M. The hearing of 2/17/12 is vacated and set aside.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 15 day of February, 2012.

Enrique S. Lamoutte Inclan
U.S. Bankruptcy Judge

CC: DEBTOR(S)
NILDA M. GONZALEZ CORDERO
ALEJANDRO OLIVERAS RIVERA
CHRISTOPHER D BELEN (IRS)
& ALL CREDITORS

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE DISTRICT OF PUERTO RICO

IN RE:

JOSE ARIEL ZARAGOZA URDAZ

CASE NO. 11-05771 ESL

Chapter 13

XXX-XX-

FILED & ENTERED ON 02/15/2012

Debtor(s)

ORDER

The motion filed by CHRISTOPHER D BELEN (IRS) requesting telephonic appearance for hearing scheduled for 2.17.2012 (docket #0) is moot. The hearing has been rescheduled for 3/09/2012 at 09:30 a.m.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 15 day of February, 2012.



Enrique S. Lamoutte Inclan
U.S. Bankruptcy Judge

CC: DEBTOR(S)
NILDA M. GONZALEZ CORDERO
ALEJANDRO OLIVERAS RIVERA
CHRISTOPHER D BELEN (IRS)

1 **(A), (B) and (C) and shall include all information required thereunder.** Failure to designate
2 experts in compliance with this order may result in the Court excluding the testimony or other
3 evidence offered through such experts that are not disclosed pursuant to this order.

4 The provisions of Fed. R. Civ. P. 26(b)(4) and (5) shall apply to all discovery
5 relating to experts and their opinions. Experts must be fully prepared to be examined on all
6 subjects and opinions included in the designation. Failure to comply will result in the imposition
7 of sanctions, which may include striking the expert designation and preclusion of expert
8 testimony.

9 The provisions of Fed. R. Civ. P. 26(e) regarding a party's duty to timely
10 supplement disclosures and responses to discovery requests will be strictly enforced.

11 **VI. Pre-Trial Motion Schedule**

12 All non-dispositive pre-trial motions, including any discovery motions, shall be
13 filed by no later than 4:00 p.m. on 1/9/2013, and heard on or before 2/6/2013. Non-dispositive
14 motions are heard on Wednesdays at 9:30 a.m., before the Honorable Sheila K. Oberto, United
15 States Magistrate Judge in Courtroom 7. **Counsel must comply with Local Rule 251 with**
16 **respect to discovery disputes or the motion will be denied without prejudice and dropped**
17 **from calendar.** In scheduling such motions, the Magistrate Judge may grant applications for an
18 order shortening time pursuant to Local Rule 144(e). However, if counsel does not obtain an
19 order shortening time, the notice of motion *must* comply with Local Rule 251.

20 The parties are advised that unless prior leave of the Court is obtained, all moving
21 and opposition briefs or legal memorandum in civil cases before Judge Oberto shall not exceed
22 thirty (30) pages. Reply briefs by the moving party shall not exceed ten (10) pages. These page
23 limitations do no include exhibits. Briefs that exceed this page limitation, or are sought to be
24 filed without leave, may not be considered by the Court. In addition, all pleadings shall be filed
25 by no later than 4:00 p.m. on the due date.

26 ///

1 Counsel may appear and argue non-dispositive motions by telephone, provided a
2 written request to so appear is made to the Magistrate Judge's Courtroom Clerk no later than five
3 (5) court days before the noticed hearing date. In the event that more than one attorney requests
4 to appear by telephone, then it shall be the obligation of the moving part(ies) to arrange and
5 originate a conference call to the court. Telephonic hearings are not likely to be granted with
6 regard to motions to compel in the context of discovery disputes.

7 All dispositive pre-trial motions shall be filed no later than 3/1/2013, and heard no
8 later than 4/17/2013, in Courtroom 7 before the Honorable Sheila K. Oberto, United States
9 Magistrate Judge. In scheduling such motions, counsel shall comply with Fed.R.Civ.P 56 and
10 Local Rules 230 and 260.

11 **Motions for Summary Judgment or Summary Adjudication**

12 Prior to filing a motion for summary judgment or motion for summary
13 adjudication the parties are ORDERED to meet, in person or by telephone, and confer to discuss
14 the issues to be raised in the motion.

15 The purpose of the meeting shall be to: 1) avoid filing motions for summary
16 judgment where a question of fact exists, 2) determine whether the respondent agrees that the
17 motion has merit in whole or in part, 3) discuss whether issues can be resolved without the
18 necessity of briefing, 4) narrow the issues for review by the court, 5) explore the possibility of
19 settlement before the parties incur the expense of briefing a summary judgment motion, and 6)
20 arrive at a joint statement of undisputed facts.

21 The moving party shall initiate the meeting and provide a draft of the joint
22 statement of undisputed facts. **In addition to the requirements of Local Rule 260 the moving**
23 **party shall file a joint statement of undisputed facts.**

24 In the notice of motion, the moving party shall certify that the parties have met
25 and conferred as ordered above or set forth a statement of good cause for the failure to meet and
26 confer.

1 **VII. Pre-Trial Conference Date**

2 May 29, 2013, at 2:00 p.m. in Courtroom 7 before Judge Oberto.

3 The parties are ordered to file a **Joint Pretrial Statement pursuant to Local**
4 **Rule 281(a)(2)**. The parties are further directed to submit a digital copy of their pretrial
5 statement in Word Perfect X3¹ format, directly to Judge Oberto's chambers by email at
6 SKOorders@caed.uscourts.gov.

7 The attention of counsel is directed to **Rules 281 and 282 of the Local Rules** of
8 Practice for the Eastern District of California, as to the obligations of counsel in preparing for the
9 pre-trial conference. The Court will insist upon strict compliance with those rules. In addition to
10 the matters set forth in the Local Rules the Joint Pretrial Statement shall include a Joint
11 Statement of the case to be used by the Court to explain the nature of the case to the jury during
12 voir dire.

13 **VIII. Trial Date**

14 July 16, 2013, at 8:30 a.m. in Courtroom 7 before the Honorable Sheila K. Oberto,
15 United States Magistrate Judge.

16 A. This is a Court trial.

17 B. Counsel's estimate of trial time: 5 days.

18 C. Counsel's attention is directed to Local Rules of Practice for the Eastern
19 District of California, Rule 285 for preparation of trial briefs.

20 **IX. Settlement Conference**

21 A Settlement Conference is scheduled for 10/11/2012, at 10:00 a.m. in Courtroom
22 9 before the Honorable Dennis L. Beck, U.S. Magistrate Judge.

23 Unless otherwise permitted in advance by the Court, **the attorneys who will try**
24 **the case** shall appear at the Settlement Conference **with the parties** and the person or persons

25
26 ¹ If WordPerfect X3 is not available to the parties then the latest version of WordPerfect
27 or any other word processing program in general use for IBM compatible personal computers is
28 acceptable.

1 having **full authority** to negotiate and settle the case **on any terms**² at the conference.

2 CONFIDENTIAL SETTLEMENT CONFERENCE STATEMENT

3 At least five (5) court days prior to the Settlement Conference the parties shall
4 submit, directly to Judge Beck's chambers by e-mail to DLBorders@caed.uscourts.gov, a
5 Confidential Settlement Conference Statement. The statement **should not be filed** with the
6 Clerk of the Court **or served on any other party**, although the parties may file a Notice of
7 Lodging of Settlement Conference Statement. Each statement shall be clearly marked
8 "confidential" with the date and time of the Settlement Conference indicated prominently
9 thereon. The parties are urged to request the return of their statement if a settlement is not
10 achieved, and if such a request is not made, the Court will dispose of the statement.

11 The Confidential Settlement Conference Statement shall include the following:

12 A. A brief statement of the facts of the case.

13 B. A brief statement of the claims and defenses, i.e., statutory or other
14 grounds upon which the claims are founded, a forthright evaluation of the parties' likelihood of
15 prevailing on the claims and defenses, and a description of the major issues in dispute.

16 C. A summary of the proceedings to date.

17 D. An estimate of the cost and time to be expended for further discovery,
18 pretrial and trial.

19 E. The relief sought.

20 F. The party's position on settlement, including present demands and
21 offers and a history of past settlement discussions, offers and demands.

22
23 ² Insurance carriers, business organizations, and governmental bodies or agencies whose
24 settlement agreements are subject to approval by legislative bodies, executive committees, boards
25 of directors or the like shall be represented by a person or persons who occupy high executive
26 positions in the party organization and who will be directly involved in the process of approval of
27 any settlement offers or agreements. To the extent possible, the representative shall have the
28 authority, if he or she deems it appropriate, to settle the action on terms consistent with the
opposing party's most recent demand.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA – FRESNO DIVISION

UNITED STATES OF AMERICA,

1:11-cv-01697 LJO SKO

Plaintiff,

NEW CASE NUMBER:

v.

1:11-cv-01697 SKO

NINA V. TOLMACHOFF, et.al.,

Defendants.

ORDER REASSIGNING CASE

_____ /

All parties having executed consent forms, it is ordered that this matter be reassigned from the docket of United States District Judge Lawrence J. O'Neill, to the docket of United States Magistrate Judge Sheila K. Oberto, for all purposes including trial and entry of Judgment.

To prevent a delay in documents being received by the correct judicial officer, the new case number listed below should be used on all future documents.

1:11-cv-01697 SKO

IT IS SO ORDERED.

Dated: February 14, 2012

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

UNITED STATES OF AMERICA,	)	CV-11-6-H-CCL
)	
Plaintiff,)	
	)	DEFAULT JUDGMENT
-vs-	)	AGAINST SHAWN TONEY,
	)	d/b/a H & L DRILLING, INC.
KENNETH N. THOMPSON, JUDY)	
R. THOMPSON, LEWIS AND)	
CLARK COUNTY OFFICE OF)	
TREASURER, STATE OF)	
MONTANA DEPARTMENT OF)	
LABOR, STATE OF MONTANA)	
DEPARTMENT OF REVENUE,)	
and SHAWN TONEY, d/b/a H & L)	
DRILLING, INC.,)	
)	
Defendants.)	

In this action, Defendant Shawn Toney, d/b/a H & L Drilling, Inc., having been duly served with a copy of the Summons and First Amended Complaint in this action, has failed to appear, and his default has been duly entered by the Court on December 19, 2011.

Plaintiff has now filed a Motion for Entry of Default Judgment under Rule 55(b)(2) of the Federal Rules of Civil Procedure, the Court has granted Plaintiff's motion, and so ordered entry of such judgment.

IT IS ADJUDGED that Defendant, Shawn Toney, d/b/a H & L Drilling,

Inc., has no interest in the subject property sought to be foreclosed upon by Plaintiff against Defendants Kenneth N. Thompson and Judy R.

Thompson, more specifically described as two parcels of real property upon which Kenneth N. Thompson resides and operates a business known as Silver City Saloon, a bar and restaurant located at 6042 Lincoln Road West, Helena, MT 59602; and, the residential property upon which Kenneth and Judy Thompson reside located at 7223 Birdseye Road, Helena, MT 59602.

Dated this 15th day of February, 2012.

PATRICK E. DUFFY, CLERK

By: /s/ Darlene E. DeMato
Deputy Clerk



Below is an Order of the Court.



FRANK R. ALLEY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

<p>In re WHITSELL MANUFACTURING, INC., Debtor.</p>	}	<p>CASE NO. 09-65831-fra11 STIPULATED ORDER GRANTING FIRST-CITIZENS BANK & TRUST COMPANY'S MOTION FOR ORDER GRANTING ACCESS TO PROPERTY</p>
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Based upon the stipulation of the parties, the Motion for Order Granting Access to Property (ECF No. 315), filed by First-Citizens's Bank & Trust Company ("First-Citizens"), is hereby GRANTED. First-Citizens, through its employees, agents, inspectors, appraisers, and contractors, is permitted to access the real properties, including the buildings and structures on those properties, located at 51715 Highway 97, Dorris, CA 96023; 32910 E Saginaw Road, Cottage Grove, OR 97424; and 89186 Old Mohawk Road, Springfield, OR 97478, for purposes including environmental evaluations and appraisal inspections. This authority to access the real property listed above will continue for the duration of the debtor's bankruptcy case, until the real

property is no longer property of the estate, or until the claims of First-Citizens are otherwise satisfied, whichever is earliest.

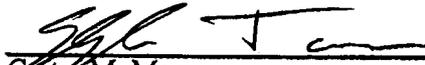
The Unopposed Motion for Expedited Consideration of First-Citizens Bank & Trust Company's Motion for Order Granting Access to Property (ECF No. 316), also filed by First-Citizens, is STRICKEN. The hearing scheduled for February 16, 2012, at 1:30 pm to hear the Motion for Order Granting Access to Property is also STRICKEN.

###

Presented by:

LANE POWELL PC

By

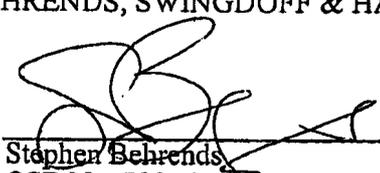

Carter M. Mann
OSB No. 960899
mann@lanepowell.com
Skyler M. Tanner
OSB No. 101589
tanners@lanepowell.com
601 SW 2nd Avenue, Suite 2100
Portland, OR 97204
Telephone: 503.778.2100

Attorneys for First-Citizens Bank & Trust Company

Stipulated as to relief:

BEHRENDTS, SWINGDOFF & HAINES

By


Stephen Behrends
OSB No. 79016
1445 Willamette Street, Suite 9
Eugene, OR 97401
Telephone: 541.344.7472

Attorney for Whitsell Manufacturing, Inc.

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 WWA17, LLC

7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

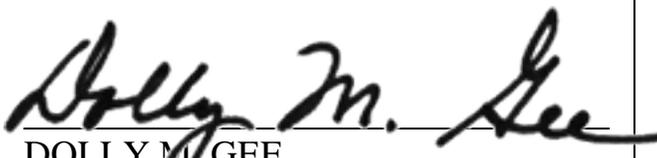
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11 WWA17, LLC,
12 Plaintiff,
13 v.
14 UNITED STATES OF AMERICA,
15 Defendant.

Case No. 2:11-cv-05822-DMG-CWx
**ORDER GRANTING LEAVE TO
FILE AMENDED PETITION [18]**

16 Having considered Plaintiff's Unopposed Motion for Leave to File Amended
17 Petition, IT IS HEREBY ORDERED as follows:

18 Plaintiff is granted leave to **manually** file the Amended Petition that has been
19 lodged with the Court.

20
21 DATED: February 15, 2012


DOLLY M. GEE
United States District 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 WWA17, LLC

7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

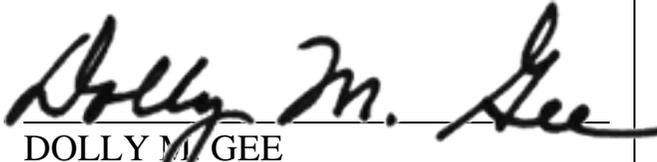
10
11 WWA17, LLC,
12 Plaintiff,
13 v.
14 UNITED STATES OF AMERICA,
15 Defendant.

Case No. 2:11-cv-05822-DMG-CWx
**ORDER GRANTING LEAVE TO
FILE AMENDED PETITION [18]**

16 Having considered Plaintiff's Unopposed Motion for Leave to File Amended
17 Petition, IT IS HEREBY ORDERED as follows:

18 Plaintiff is granted leave to **manually** file the Amended Petition that has been
19 lodged with the Court.

20
21 DATED: February 15, 2012


DOLLY M. GEE
United States District Judge