

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GERALD STONE,

Plaintiff,

v.

INTERNAL REVENUE SERVICE,

Defendant.

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CIVIL ACTION NO. 3:11-CV-2263-B

STATUS REPORT ORDER

In accordance with Rule 16(b) of the Federal Rules of Civil Procedure, counsel are directed to confer for the purpose of submitting a **JOINT** status report in this case.

No meeting under Rule 26(f) is required. *See* FED. R. CIV. P. 26(f). Also, the parties are not required to submit a written report to the court outlining a proposed discovery plan. *See id.*

However, when the parties confer for the purpose of submitting a joint status report in this case, they shall discuss their views and proposals concerning the issues contained in Rule 26(f)(2)-(4). *See id.*

The report shall be **FILED** (*not mailed*) no later than **Friday, March 9, 2012**, and shall address in separate paragraphs each of the following matters:

- (1) A brief statement of the nature of the case, including the contentions of the parties;
- (2) Any challenge to jurisdiction or venue, including any procedural defects in the removal, if this case was removed;
- (3) Any pending motions;
- (4) Any matters which require a conference with the court;

- (5) Likelihood that other parties will be joined;
- (6) (a) An estimate of the time needed for discovery, with reasons, and (b) a specification of the discovery contemplated;
- (7) Requested trial date, estimated length of trial, and whether jury has been demanded;
- (8) Whether the parties will consent to trial (jury or non-jury) before a United States Magistrate Judge per 28 U.S.C. § 636(c);
- (9) Prospects for settlement, and status of any settlement negotiations;
- (10) What form of alternative dispute resolution (*e.g.*, mediation, arbitration, summary jury trial) would be most appropriate for resolving this case and when it would be most effective (*e.g.*, before discovery, after limited discovery, at the close of discovery);
- (11) Any other matters relevant to the status and disposition of this case.

Any differences between counsel as to the status of any of the above matters must be set forth in the report.

Plaintiffs' counsel is responsible for initiating the status conference and for filing the status report. All counsel must participate in the conference.

Failure to timely submit the status report may result in the imposition of sanctions, including dismissal without further notice. *See* FED. R. CIV. P. 16(f).

Unless otherwise stipulated or directed by order, the disclosures required by Rule 26(a)(1), must be made within **30 days** of the date of this order. *See* FED. R. CIV. P. 26(a)(1).

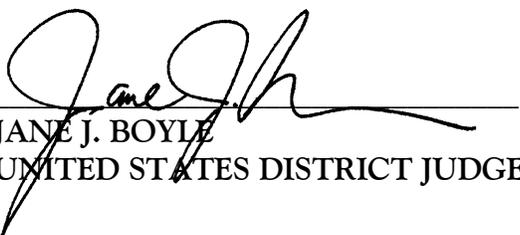
No portion of the joint status report, including the signatures, shall be faxed. In addition, no facsimile banners shall appear on any page of the joint status report.

All questions regarding this order or any scheduling matters should be directed to **Judge Boyle's court administrator (214/753-2740)**.

Status Report Order

SO ORDERED.

SIGNED February 17, 2012



JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

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

THOMAS W. DAVIS,

Plaintiff,

v.

PRELIMINARY PRETRIAL
CONFERENCE ORDER

UNITED STATES OF AMERICA,

11-cv-651-bbc

Defendant and Counterclaim Plaintiff,

v.

THOMAS W. DAVIS and BRUCE T. DAVIS,

Counterclaim Defendants.

This court held a telephonic preliminary pretrial conference on February 14, 2012. Plaintiff appeared by Steven Anderson. Defendant appeared by Erin Lindgren. Counterclaim defendant did not appear. The court set the schedule for this case and advised the parties that their conduct throughout this case is governed by this pretrial conference order and the attachments to it.

The parties and their attorneys must at all times treat everyone involved in this lawsuit with courtesy and consideration. The parties must attend diligently to their obligations in this lawsuit and must reasonably accommodate each other in all matters so as to secure the just, speedy and inexpensive resolution of each proceeding in this matter as required by Fed. R. Civ. Pro. 1. Failure to do so shall have consequences.

1. Amendments to the Pleadings: April 13, 2012

Amendments to the pleadings may be filed and served without leave of court not later than the date set forth above.

2. Disclosure of Liability Experts: Proponents: August 10, 2012

Respondents: September 10, 2012

All disclosures mandated by this paragraph must comply with the requirements of Rule 26(a)(2). There shall be no third round of rebuttal expert reports. Supplementation pursuant to Rule 26(e) is limited to matters raised in an expert's first report, must be in writing and must be served not later than five calendar days before the expert's deposition, or before the general discovery cutoff if no one deposes the expert. Any employee of a party who will be offering expert opinions during any phase of this case must comply with all of these disclosure requirements.

Failure to comply with these deadlines and procedures could result in the court striking the testimony of a party's experts pursuant to Rule 37. The parties may agree between themselves to modify these deadlines and procedures .

3. Deadline for Filing Dispositive Motions: October 12, 2012

Dispositive motions may be filed and served by any party on any date up to the deadline set above. All dispositive motions must be accompanied by supporting briefs. All responses to any dispositive motion must be filed and served within 21 calendar days of service of the

motion. Any reply by the movant must be filed and served within 10 calendar days of service of the response. The parties may not modify this schedule without leave of court.

If any party files a motion for summary judgment, all parties must follow this court's procedure governing such motions, a copy of which is attached to this order. The court will not consider any document that does not comply with its summary judgment procedure. A party may not file more than one motion for summary judgment in this case without leave of court.

Parties are to undertake discovery in a manner that allows them to make or respond to dispositive motions within the scheduled deadlines. The fact that the general discovery deadline cutoff, set forth below, occurs after the deadlines for filing and briefing dispositive motions is not a ground for requesting an extension of the motion and briefing deadlines.

4. Settlement Letters: February 1, 2013

Not later than this date, each party must submit a settlement letter to the clerk of court at clerkofcourt@wiwd.uscourts.gov. The letter should contain the terms and conditions upon which the party would this case. Such letters should be marked "Under Seal" and should not be sent to opposing counsel. Such letters will not become part of the record in this case. Upon receipt of the letters, the clerk of court will initiate settlement discussions with counsel.

5. Discovery Cutoff: February 8, 2013

All discovery in this case must be completed not later than the date set forth above, absent written agreement of all parties to some other date. Absent written agreement of the parties or a court order to the contrary, all discovery must conform with the requirements of

Rules 26 through 37 and 45. Rule 26(a)(1) governs initial disclosures unless the parties agree in writing to the contrary.

The following discovery materials *shall not* be filed with the court unless they concern a motion or other matter under consideration by the court: interrogatories; responses to interrogatories; requests for documents; responses to requests for documents; requests for admission; and responses to requests for admission.

A party need not file a deposition transcript with the court until that party is using the deposition in support of some other submission, at which time the entire deposition must be filed. All deposition transcripts must be in compressed format. The court will not accept duplicate transcripts. The parties must determine who will file each transcript.

A party may not file a motion regarding discovery until that party has made a good faith attempt to resolve the dispute. All efforts to resolve the dispute must be set forth in any subsequent discovery motion filed with this court. By this order, the court requires all parties to a discovery dispute to attempt to resolve it quickly and in good faith. Failure to do so could result in cost shifting and sanctions under Rule 37.

This court also expects the parties to file discovery motions promptly if self-help fails. Parties who fail to do so may not seek to change the schedule on the ground that discovery proceeded too slowly to meet the deadlines set in this order.

All discovery-related motions must be accompanied by a supporting brief, affidavit, or other document showing a *prima facie* entitlement to the relief requested. Any response to a discovery motion must be served and filed within seven calendar days of service of the motion. Replies may not be filed unless requested by the court.

6. Rule 26(a)(3) Disclosures *and* all motions in limine: February 8, 2013

Responses: February 22, 2013

The first date is the deadline to file and serve all Rule 26(a)(3) disclosures, as well as all motions in limine, proposed voir dire questions, proposed jury instructions, and proposed verdict forms. All responses in opposition are due by the second date. The format for submitting proposed voir dire questions, jury instructions and verdict forms is set forth in the Order Governing Final Pretrial Conference, which is attached.

The parties must submit courtesy copies of all these submissions to chambers.

7. Final Pretrial Conference: March 7, 2013 at 4:00 p.m.

Lead counsel for each party must appear in person. Any deposition that has not been filed with the Clerk of Court by the date of the final pretrial conference shall not be used by any party for any purpose at trial.

8. Trial: March 11, 2013 at 9:00 a.m.

Trial shall be to a jury of seven and shall be bifurcated. The parties estimate that this case will take three days to try. Absent further order of this court, the issues to be tried shall be limited to those identified by the parties in their pretrial conference report to the court.

This case will be tried in an electronically equipped courtroom and the parties shall present their evidence using this equipment. Counsel shall ensure the compatibility of any of their personal equipment with the court's system prior to the final pretrial conference or shall forfeit their right to use any personal equipment that is not compatible with the court's system.

9. Reporting Obligation of Corporate Parties.

All parties that are required to file a disclosure of corporate affiliations and financial interest form have a continuing obligation throughout this case promptly to amend that form to reflect any changes in the answers.

Entered this 15th day of February, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

INDEX
to
PRELIMINARY PRETRIAL CONFERENCE PACKET
IN CASES ASSIGNED TO JUDGE CRABB

Mandatory Electronic Filing Page 1

Order in Non-Jury CasesPage 30

Order Regarding Timely Presentation of Witnesses and Evidence Page 34

Procedures Governing Final Pretrial Conference Page 10

Settlement Before Trial Page 29

Standard Jury Instructions. Page 14

Standard Voir Dire Questions. Page 12

Summary Judgment Memorandum to Pro Se Litigants.Page 3

Summary Judgment Procedures Page 5

Summary Judgment Tips Page 2

Trial Exhibit Procedures. Page 11

Witness Procedures. Page 23

MANDATORY ELECTRONIC FILING OF ALL COURT DOCUMENTS

Electronic Case Filing is the standard way of doing business with the District Court in the Western District of Wisconsin. Effective January 22, 2008, electronic filing is mandatory in all civil and criminal case pending the newly filed.

Information on electronic filing and the court's administrative procedures are available on our website: www.wiwd.uscourts.gov under CM/ECF News. Resources include Administrative Procedures, Frequently Asked Questions, User Manual, and contact information.

Each lawyer must complete and sign a Lawyer Registration Form, which can be accessed at <http://attorneyreg.wiwd.uscourts.gov>. The registration form requires the Filing User's name, address, telephone number, and Internet e-mail address. Upon completion of the electronic registration form, the lawyer prints a copy, signs the form and mails it to the clerk's office. The clerk's office will retain this signed registration on file. To ensure that the clerk's office has correctly entered a registering lawyer's e-mail address in the System, the clerk's office will send the lawyer an e-mail message which will include a login and password.

HELPFUL TIPS FOR FILING
A SUMMARY JUDGMENT MOTION
IN CASES ASSIGNED TO JUDGE BARBARA B. CRABB

Please read the attached directions carefully – doing so will save your time and the court’s.

REMEMBER:

1. All facts necessary to sustain a party’s position on a motion for summary judgment must be explicitly proposed as findings of fact. This includes facts establishing jurisdiction. (Think of your proposed findings of fact as telling a story to someone who knows nothing of the controversy.)

2. The court will not search the record for factual evidence. Even if there is evidence in the record to support your position on summary judgment, if you do not propose a finding of fact with the proper citation, the court will not consider that evidence when deciding the motion.

3. A fact properly proposed by one side will be accepted by the court as undisputed unless the other side properly responds to the proposed fact and establishes that it is in dispute.

4. Your brief is the place to make your legal argument, not to restate the facts. When you finish it, check it over with a fine tooth comb to be sure you haven’t relied upon or assumed any facts in making your legal argument that you failed to include in the separate document setting out your proposed findings of fact.

5. A chart listing the documents to be filed by the deadlines set by the court for briefing motions for summary judgment or cross-motions for summary judgment is printed on the last page of the procedures.

MEMORANDUM TO PRO SE LITIGANTS
REGARDING SUMMARY JUDGMENT MOTIONS
IN CASES ASSIGNED TO JUDGE CRABB

This court expects all litigants, including persons representing themselves, to follow this court's Procedures to be Followed on Motions for Summary Judgment. If a party does not follow the procedures, there will be no second chance to do so. Therefore, PAY ATTENTION to the following list of mistakes pro se plaintiffs tend to make when they oppose a defendant's motion for summary judgment:

- Problem: The plaintiff does not answer the defendant's proposed facts correctly.

Solution: To answer correctly, a plaintiff must file a document titled "Response to Defendant's Proposed Findings of Fact." In this document, the plaintiff must answer each numbered fact that the defendant proposes, using separate paragraphs that have the same numbers as defendant's paragraphs. See Procedure II.D. If plaintiff does not object to a fact that the defendant proposes, he should answer, "No dispute."

- Problem: The plaintiff submits his own set of proposed facts without answering the defendant's facts.

Solution: Procedure II.B. allows a plaintiff to file his own set of proposed facts in response to a defendant's motion ONLY if he thinks he needs additional facts to prove his claim.

- Problem: The plaintiff does not tell the court and the defendant where there is evidence in the record to support his version of a fact.

Solution: Plaintiff must pay attention to Procedure II.D.2., which tells him how to dispute a fact proposed by the defendant. Also, he should pay attention to Procedure I.B.2., which explains how a new proposed fact should be written.

- Problem: The plaintiff supports a fact with an exhibit that the court cannot accept as evidence because it is not authenticated.

Solution: Procedure I.C. explains what may be submitted as evidence. A copy of a document will not be accepted as evidence unless it is authenticated. That means that the plaintiff or someone else who has personal knowledge what the

document is must declare under penalty of perjury in a separate affidavit that the document is a true and correct copy of what it appears to be. For example, if plaintiff wants to support a proposed fact with evidence that he received a conduct report, he must submit a copy of the conduct report, together with an affidavit in which he declares under penalty of perjury that the copy is a true and unaltered copy of the conduct report he received on such and such a date.

NOTE WELL: If a party fails to respond to a fact proposed by the opposing party, the court will accept the opposing party's proposed fact as undisputed. If a party's response to any proposed fact does not comply with the court's procedures or cites evidence that is not admissible, the court will take the opposing party's factual statement as true and undisputed. You'll find additional tips for making sure that your submissions comply with the court's procedures on page 9 of this packet.

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

PROCEDURE TO BE FOLLOWED ON MOTIONS FOR SUMMARY JUDGMENT

I. MOTION FOR SUMMARY JUDGMENT

A. Contents:

1. A motion, together with such materials permitted by Rule 56(e) as the moving party may wish to serve and file; and
2. In a separate document, a statement of proposed findings of fact or a stipulation of fact between or among the parties to the action, or both; and
3. Evidentiary materials (see I.C.); and
4. A supporting brief.

B. Rules Regarding Proposed Findings of Fact:

1. Each fact must be proposed in a separate, numbered paragraph, limited as nearly as possible to a single factual proposition.
2. Each factual proposition must be followed by a reference to evidence supporting the proposed fact. The citation must make it clear where in the record the evidence is located. If a party is citing an affidavit of a witness who has submitted multiple affidavits or the deposition of a witness who has been deposed multiple times, that party should include the date the cited document was filed with the court. For example,
 1. Plaintiff Smith bought six Holstein calves on July 11, 2006. Harold Smith Affidavit, filed Jan. 6, 2007, p.1, ¶ 3.
3. The statement of proposed findings of fact shall include ALL factual propositions the moving party considers necessary for judgment in the party's favor. For example, the proposed findings shall include factual statements

relating to jurisdiction, the identity of the parties, the dispute, and the context of the dispute.

4. The court will not consider facts contained only in a brief.

C. Evidence

1. As noted in I.B. above, each proposed finding must be supported by admissible evidence. The court will not search the record for evidence. To support a proposed fact, you may use:
 - a. Depositions. Give the name of the witness, the date of the deposition, and page of the transcript of cited deposition testimony;
 - b. Answers to Interrogatories. State the number of the interrogatory and the party answering it;
 - c. Admissions made pursuant to Fed. R. Civ. P. 36. (state the number of the requested admission and the identity of the parties to whom it was directed); or
 - d. Other Admissions. The identity of the document, the number of the page, and paragraph of the document in which that admission is made.
 - e. Affidavits. The page and paragraph number, the name of the affiant, and the date of the affidavit. (Affidavits must be made by persons who have first hand knowledge and must show that the person making the affidavit is in a position to testify about those facts.)
 - f. Documentary evidence that is shown to be true and correct, either by an affidavit or by stipulation of the parties. (State exhibit number, page and paragraph.)

II. RESPONSE TO MOTION FOR SUMMARY JUDGMENT

A. Contents:

1. A response to the moving party's proposed finding of fact; and
2. A brief in opposition to the motion for summary judgment; and
3. Evidentiary materials (See I.C.)

- B. In addition to responding to the moving party's proposed facts, a responding party may propose its own findings of fact following the procedure in section I.B. and C. above.
1. A responding party should file additional proposed findings of fact if it needs them to defeat the motion for summary judgment.
 2. The purpose of additional proposed findings of fact is to SUPPLEMENT the moving party's proposed findings of fact, not to dispute any facts proposed by the moving party. They do not take the place of responses. Even if the responding party files additional proposed findings of fact, it MUST file a separate response to the moving party's proposed findings of fact.
- C. Unless the responding party puts into dispute a fact proposed by the moving party, the court will conclude that the fact is undisputed.
- D. Rules Regarding Responses to the Moving Party's Proposed Factual Statements:
1. Answer each numbered fact proposed by the moving party in separate paragraphs, using the same number.
 2. If you dispute a proposed fact, state your version of the fact and refer to evidence that supports that version. For example,

Moving party proposes as a fact:

"1. Plaintiff Smith purchased six Holstein calves from Dell's Dairy Farm on July 11, 2006. Harold Smith Affidavit, Jan. 6, 2007, p.1, ¶ 3."

Responding party responds:

"1. Dispute. The purchase Smith made from Dell's Dairy Farm on July 11, 2006 was for one Black Angus bull John Dell Affidavit, Feb. 1, 2007, Exh. A."

3. The court prefers but does not require that the responding party repeat verbatim the moving party's proposed fact and then respond to it. Using this format for the example above would lead to this response by the responding party:

"1. *Plaintiff Smith purchased six Holstein calves from Dell's Dairy Farm on July 11, 2006. Harold Smith Affidavit, Jan. 6, 2007, p.1, ¶ 3.*

"**Dispute.** The purchase Smith made from Dell's Dairy Farm on July 11, 2006 was for one Black Angus bull." John Dell Affidavit, Feb. 1, 2007, Exh. A."

4. When a responding party disputes a proposed finding of fact, the response must be limited to those facts necessary to raise a dispute. The court will disregard any new facts that are not directly responsive to the proposed fact. If a responding party believes that more facts are necessary to tell its story, it should include them in its own proposed facts, as discussed in II.B.

E. Evidence

1. Each fact proposed in disputing a moving party's proposed factual statement and all additional facts proposed by the responding party must be supported by admissible evidence. The court will not search the record for evidence. To support a proposed fact, you may use evidence as described in Procedure I.C.1. a. through f.
2. The court will not consider any factual propositions made in response to the moving party's proposed facts that are not supported properly and sufficiently by admissible evidence.

III. REPLY BY MOVING PARTY

A. Contents:

1. An answer to each numbered factual statement made by the responding party in response to the moving party's proposed findings of fact, together with references to evidentiary materials; and
 2. An answer to each additional numbered factual statement proposed by the responding party under Procedure II.B., if any, together with references to evidentiary materials; and
 3. A reply brief; and
 4. Evidentiary materials (see I.C.)
- B. If the responding party has filed additional proposed findings of fact, the moving party should file its response to those proposed facts at the same time as its reply, following the procedure in section II.
- C. When the moving party answers the responding party's responses to the moving party's original proposed findings of fact, and answers the responding party's additional proposed findings of fact, the court prefers but does not require that the moving party repeat

verbatim the entire sequence associated with each proposed finding of fact so that reply is a self-contained history of all proposed facts, responses and replies by all parties.

IV. SUR-REPLY BY RESPONDING PARTY

A responding party shall not file a sur-reply without first obtaining permission from the court. The court only permits sur-replies in rare, unusual situations.

MOTION FOR SUMMARY JUDGMENT

Deadline 1 (All deadlines appear in the Preliminary Pretrial Conference Order Sent to the Parties Earlier)	Deadline 2	Deadline 3
moving party's motion		
moving party's brief	non-moving party's response brief	moving party's reply brief
moving party's proposed findings of fact	non-moving party's response to moving party's proposed findings of fact	moving party's reply to non-moving party's response to moving party's proposed findings of fact
	non-moving party's additional proposed findings of fact	moving party's response to non-moving party's additional proposed findings of fact, if any.

CROSS MOTIONS FOR SUMMARY JUDGMENT

Deadline 1 (All deadlines appear in the Preliminary Pretrial Conference Order Sent to the Parties Earlier)	Deadline 2	Deadline 3
defendant's motion		
defendant's brief	plaintiff's response brief	defendant's reply brief
defendant's proposed findings of fact	plaintiff's response to defendant's proposed findings of fact	defendant's reply to plaintiff's response to defendant's proposed findings of fact
plaintiff's motion		
plaintiff's brief	defendant's response brief	plaintiff's reply brief
plaintiff's proposed findings of fact	defendant's response to plaintiff's proposed findings of fact	plaintiff's reply to defendant's response to plaintiff's proposed findings of fact

PROCEDURES GOVERNING FINAL PRETRIAL CONFERENCE
IN CASES ASSIGNED TO JUDGE CRABB

1. The preliminary pretrial conference order tells the parties what documents must be submitted for the final pretrial conference and what the deadlines are for submitting them.

2. The court's standard voir dire questions and standard jury instructions are attached to this order and will be asked in every case. The parties should not duplicate the standard questions or instructions.

3. A party must submit to the court an electronic copy of any proposed additional voir dire questions, proposed form of special verdict and proposed jury instructions in full electronic text (that is, not just by citation) by e-mailing them to chambers in WordPerfect or Microsoft Word format to wiwd_bbc@wiwd.uscourts.gov. **The subject line of the e-mail sent to chambers must include the case number and the phrase Final Pretrial Submissions.**

4. Proposed jury instructions shall be submitted in the following form:

- A. Pattern instructions are to be requested by reference to the source (e.g., court's standard instruction or Devitt & Blackmar, § 18.01); and
- B. Special instructions or pattern instructions, whether modified or not, must be presented double-spaced with one instruction per page, and each instruction shall show the identity of the submitting party, the number of the proposed instruction, and the citation of the pattern instruction, decision, statute, regulation or other authority supporting the proposition stated, with any additions underscored and any deletions set forth in parentheses. **The e-mail version of a party's proposed instructions must follow this format.**

5. The court retains the discretion to refuse to entertain voir dire questions, special verdict forms, or jury instructions not submitted in accordance with this order or the preliminary pretrial conference order unless the subject of the request is one arising during trial that could not reasonably have been anticipated prior to trial.

6. Each party shall be represented at the final pretrial conference by the lawyer who will actually try the case unless the party is proceeding pro se, in which case the pro se party must appear. A party represented by counsel shall also be present in person unless

- A. Counsel has been delegated the full authority to settle the case; or
- B. Attendance in person is impossible and arrangements are made for communication by telephone during the entire duration of the conference for the purpose of acting upon settlement proposals.

PROCEDURES FOR TRIAL EXHIBITS
IN CASES ASSIGNED TO JUDGE CRABB

Before trial, the parties are to label all exhibits that may be offered at trial. Before the start of trial, the parties are to provide the deputy clerk with a list of all exhibits. Exhibits for use at trial are not subject to the electronic filing procedures, but are to be filed conventionally. Counsel are to retain the original exhibits following trial.

1. Each party is to label all exhibits.
2. If more than one defendant will be offering exhibits, that defendant should add an initial identifying the particular defendant to the label.
3. Each party is to submit a list of their exhibits. The party should state to whom the exhibits belong, the number of each exhibit and a brief description.
4. Each party is to provide the court with the original exhibit list and a copy of each exhibit that may be offered for the judge's use.
5. As a general rule, the plaintiff should use exhibit numbers 1-500 and the defendant should use exhibit numbers 501 and up.
6. Each party is to maintain custody of his or her own exhibits throughout the trial.
7. At the end of trial, each party is to retain all exhibits that become a part of the record. It is each party's responsibility to maintain his or her exhibits and to make arrangements with the clerk's office for inclusion of the exhibits in the appeal record, if there is an appeal.
8. Each party should be aware that once reference is made to an exhibit at trial, the exhibit becomes part of the record, even though the exhibit might not be formally offered or might not be received.

Any questions concerning these instructions may be directed to the clerk's office at (608) 264-5156.

Entered this 19th day of May, 2006.

BY THE COURT:

BARBARA B. CRABB
District Judge

COURT'S STANDARD VOIR DIRE QUESTIONS
IN CASES ASSIGNED TO JUDGE CRABB

1. Statement of the case. (A very brief, concise description of the plaintiff(s)' claims and the defendant(s)' defenses.)

Has any one of you ever heard of this case before today? How? When? When you heard about it, did you form any opinion concerning the case? Do you believe that your ability to serve impartially as a juror in this case has been affected by what you have heard about it?

2. The trial of this case will begin _____ and will last _____ days. Is there any one of you who would be unable to serve as a juror during this time?
3. Ask counsel to stand and tell the jury where they practice and with whom. Ask panel whether anyone knows counsel or their associates or partners.
4. Ask counsel to introduce the parties. Ask panel whether anyone knows any of the parties. (If any party is a corporation, have counsel identify the nature of the corporation's business, its major subsidiaries, or its parent corporation, and where it conducts business. Ask whether anyone on the panel is stockholder of corporation or has had business dealings with it.)
5. Question to each prospective juror.

Please stand up and tell us about yourself.

Name, age, and city or town of residence.

Marital status and number of children, if any.

Current occupation (former if retired).

Current (or former) occupation of your spouse or domestic partner.

Any military service, including branch, rank and approximate date of discharge.

How far you went in school and major areas of study, if any.

Memberships in any groups or organizations.

Hobbies and leisure-time activities.

Favorite types of reading material.

Favorite types of television shows.

6. Question to panel regarding prior experience with court proceedings:

- a. Have any of you ever been a party to a lawsuit? Describe circumstances.
- b. Have any of you ever been a witness in a lawsuit?
- c. How many of you have served previously on a jury?
- d. Of those of you who have sat on a jury, were you ever the foreperson on a jury? Describe your experience.
- e. Do any of you know any of the other persons on the jury panel?

7. Question to panel in personal injury cases:

In this case the plaintiff is alleging that he suffered injuries [describe in summary fashion, for example, he was burned, or he suffered a broken leg and ankle] in an [automobile, horseback riding, industrial, farm, etc.] accident.

- a. Has any one of you ever suffered similar injuries? Describe. Do you have any residual effects of your injury?
- b. Do you have close friends or relatives who have suffered similar injuries?
- c. Were you ever in an accident involving [an automobile, farm machinery, industrial machine, etc.)?]
- d. Do you have any close friends or relatives who have been in an accident of this kind?

8. Question to panel. At the end of the case I will give you instructions that will govern your deliberations. You are required to follow those instructions, even if you do not agree with them. Is there any one of you who would be unable or unwilling to follow the instructions?

9. Question to panel. Do any of you have opinions, whether positive or negative, about people who go to court to obtain relief for wrongs they believe they have suffered?

10. Question to panel. Do you know of any reason whatsoever why you could not sit as a trial juror with absolute impartiality to all the parties in this case?

STANDARD JURY INSTRUCTIONS – CIVIL*

*These instructions are used in cases before the Honorable Barbara B. Crabb, District Judge

I. INTRODUCTORY INSTRUCTION

Members of the jury, we are about to begin the trial of the case. Before it begins, I will give you some instructions to help you understand how the trial will proceed, how you should evaluate the evidence, and how you should conduct yourselves during the trial.

The party who begins the lawsuit is called the plaintiff. In this action, the plaintiff is _____ . The parties against whom the suit is brought are called the defendants. In this action, the defendants are _____ .

[Describe claims and basic legal elements of claims and defenses]

The case will proceed as follows:

First, plaintiff's counsel will make an opening statement outlining plaintiff's case. Immediately after plaintiff's statement, defendants' counsel will also make an opening statement outlining defendants' case. What is said in opening statements is not evidence; it is simply a guide to help you understand what each party expects the evidence to show.

Second, after the opening statements, the plaintiff will introduce evidence in support of his claim. At the conclusion of the plaintiff's case, the defendants may introduce evidence. The defendants are not required to introduce any evidence or to call any witnesses. If the defendants introduce evidence, the plaintiff may then introduce rebuttal evidence.

Third, after the evidence is presented, the parties will make closing arguments explaining what they believe the evidence has shown and what inferences you should draw from the evidence. What is said in closing argument is not evidence. The plaintiff has the right to give the first closing argument and to make a short rebuttal argument after the defendants' closing argument.

Fourth, I will instruct you on the law that you are to apply in reaching your verdict.

Fifth, you will retire to the jury room and begin your deliberations.

You will hear the term "burden of proof" used during this trial. In simple terms, the phrase "burden of proof" means that the party who makes a claim has the obligation of proving that claim. At the end of the trial, I will instruct you on the proper burden of proof to be applied in this case.

The trial day will run from 9:00 a.m. until 5:30 p.m. You will have at least an hour for lunch and two additional short breaks, one in the morning and one in the afternoon.

During recesses you should keep in mind the following instructions:

First, do not discuss the case either among yourselves or with anyone else during the course of the trial. The parties to this lawsuit have a right to expect from you that you will keep an open mind throughout the trial. You should not reach a conclusion until you have heard all of the evidence and you have heard the lawyers' closing arguments and my instructions to you on the law, and have retired to deliberate with the other members of the jury.

Second, do not permit any third person to discuss the case in your presence. If anyone tries to talk to you despite your telling him not to, report that fact to the court as soon as you are able. Do not discuss the event with your fellow jurors or discuss with them any other fact that you believe you should bring to the attention of the court.

Third, although it is a normal human tendency to converse with people with whom one is thrown in contact, please do not talk to any of the parties or their attorneys or witnesses. By this I mean not only do not talk about the case, but do not talk at all, even to pass the time of day. In no

other way can all parties be assured of the absolute impartiality they are entitled to expect from you are jurors.

Fourth, do not read about the case in the newspapers, or listen to radio or television broadcasts about the trial. If a newspaper headline catches your eye, do not examine the article further. Media accounts may be inaccurate and may contain matters that are not proper for your consideration. You must base your verdict solely on the evidence produced in court.

Fifth, no matter how interested you may become in the facts of the case, you must not do any independent research, investigation or experimentation. Do not look up materials on the internet or in other sources. [do not visit the site of the incident] [or perform any kind of experiment.] Again, you must base your verdict solely on the evidence produced in court.

Credibility of Witnesses

In deciding the facts, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, part of it, or none of it. In considering the testimony of any witness, you may take into account many factors, including the witness's opportunity and ability to see or hear or know the things the witness testified about; the quality of the witness's memory; the witness's appearance and manner while testifying; the witness's interest in the outcome of the case; any bias or prejudice the witness may have; other evidence that may have contradicted the witness's testimony; and the reasonableness of the witness' testimony in light of all the evidence. The weight of the evidence does not necessarily depend upon the number of witnesses who testify.

Depositions

During the course of a trial the lawyers will often refer to and read from depositions. Depositions are transcripts of testimony taken while the parties are preparing for trial. Deposition testimony is given under oath just like testimony on the trial. You should give it the same consideration you would give it had the witnesses testified here in court.

Objections

During the trial, you will hear the lawyers make objections to certain questions or to certain answers of the witnesses. When they do so, it is because they believe the question or answer is legally improper and they want me to rule on it. Do not try to guess why the objection is being made or what the answer would have been if the witness had been allowed to answer it.

If I tell you not to consider a particular statement that has already been made, put that statement out of your mind and remember that you may not refer to it during your deliberations.

Questions

During the trial, I may sometimes ask a witness questions. Please do not assume that I have any opinion about the subject matter of my questions.

If you wish to ask a question about something you do not understand, write it down on a separate slip of paper. If, when the lawyers have finished all of their questioning of the witness, the

question is still unanswered to your satisfaction, raise your hand, and I will take the written question from you, show it to counsel, and decide whether it is a question that can be asked. If it cannot, I will tell you that. I will try to remember to ask about questions after each witness has testified.

Notetaking

The clerk will give each of you a notepad and pencil for taking notes. This does not mean you have to take notes; take them only if you want to and if you think they will help you to recall the evidence during your deliberations. Do not let notetaking interfere with your important duties of listening carefully to all of the evidence and of evaluating the credibility of the witnesses. Keep in mind that just because you have written something down it does not mean that the written note is more accurate than another juror's mental recollection of the same thing. No one of you is the "secretary" for the jury, charged with the responsibility of recording evidence. Each of you is responsible for recalling the testimony and other evidence.

Although you can see that the trial is being reported, you should not expect to be able to use trial transcripts in your deliberations. You will have to rely on your own memories.

Evidence

Evidence at a trial includes the sworn testimony of the witnesses, exhibits admitted into the record, facts judicially noticed, and facts stipulated by counsel. You may consider only evidence that is admitted into the record.

In deciding the facts of this case, you are not to consider the following as evidence: statements and arguments of the lawyers, questions and objections of the lawyers, testimony that I instruct you to disregard, and anything you may see or hear when the court is not in session even if what you see or hear is done or said by one of the parties or by one of the witnesses.

Evidence may be either direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what the witness said or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. You are to decide how much weight to give any evidence.

Contradictory or Impeaching Evidence

A witness may be discredited by contradictory evidence or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness's present testimony.

If you believe any witness has been discredited, it is up to you to decide how much of the testimony of that witness you believe.

If a witness is shown to have given false testimony knowingly, that is, voluntarily and intentionally, about any important matter, you have a right to distrust the witness's testimony about other matters. You may reject all the testimony of that witness or you may choose to believe some or all of it.

The general rule is that if you find that a witness said something before the trial that is different from what the witness said at trial you are to consider the earlier statements only as an aid

in evaluating the truthfulness of the witness's testimony at trial. You cannot consider as evidence in this trial what was said earlier before the trial began.

There is an exception to this general rule for witnesses who are the actual parties in the case. If you find that any of the parties made statements before the trial began that are different from the statements they made at trial, you may consider as evidence in the case whichever statement you find more believable.

Drawing of Inferences

You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts you find have been proved, such reasonable conclusions as seem justified in the light of your own experience and common sense.

Experts

A person's training and experience may make him or her a true expert in a technical field. The law allows that person to state an opinion here about matters in that particular field. It is up to you to decide whether you believe the expert's testimony and choose to rely upon it. Part of that decision will depend on your judgment about whether the expert's background of training and experience is sufficient for him or her to give the expert opinion that you heard, and whether the expert's opinions are based on sound reasons, judgment, and information.

During the trial, an expert witness may be asked a question based on assumptions that certain facts are true and then asked for his or her opinion based upon that assumption. Such an opinion is of use to you only if the opinion is based on assumed facts that are proven later. If you find that the assumptions stated in the question have not been proven, then you should not give any weight to the answer the expert gave to the question.

II. POST-TRIAL INSTRUCTIONS

Introduction

Ladies and Gentlemen of the Jury:

Now that you have heard the evidence and the arguments, I will give you the instructions that will govern your deliberations in the jury room. It is my job to decide what rules of law apply to the case and to explain those rules to you. It is your job to follow the rules, even if you disagree with them or don't understand the reasons for them. You must follow all of the rules; you may not follow some and ignore others.

The decision you reach in the jury room must be unanimous. In other words, you must all agree on the answer to each question.

Your deliberations will be secret. You will never have to explain your verdict to anyone.

If you have formed any idea that I have an opinion about how the case should be decided, disregard that idea. It is your job, not mine, to decide the facts of this case.

The case will be submitted to you in the form of a special verdict consisting of ___ questions. In answering the questions, you should consider only the evidence that has been received at this trial.

Do not concern yourselves with whether your answers will be favorable to one side or another, or with what the final result of this lawsuit may be.

Note that certain questions in the verdict are to be answered only if you answer a preceding question in a certain manner. Read the introductory portion of each question very carefully before you undertake to answer it. Do not answer questions needlessly.

Burden of Proof

When a party has the burden to prove any matter by a preponderance of the evidence, it means that you must be persuaded by the testimony and exhibits that the matter sought to be proved is more probably true than not true. You should base your decision on all of the evidence, regardless of which party presented it.

Middle Burden of Proof

In answering question ___, you are instructed that the burden is on the plaintiff to convince you to a reasonable certainty by evidence that is clear, satisfactory, and convincing that the answer should be "yes."

Answers Not Based on Guesswork

If, after you have discussed the testimony and all other evidence that bears upon a particular question, you find that the evidence is so uncertain or inadequate that you have to guess what the answer should be, then the party having the burden of proof as to that question has not met the required burden of proof. Your answers are not to be based on guesswork or speculation. They are to be based upon credible evidence from which you can find the existence of the facts that the party must prove in order to satisfy the burden of proof on the question under consideration.

Selection of Presiding Juror; Communication with the Judge; Verdict

When you go to the jury room to begin considering the evidence in this case you should first select one of the members of the jury to act as your presiding juror. This person will help to guide your discussions in the jury room.

You are free to deliberate in any way you decide or select whomever you like as a presiding juror. However, I am going to provide some general suggestions on the process to help you get started. When thinking about who should be presiding juror, you may want to consider the role that the presiding juror usually plays. He or she serves as the chairperson during the deliberations and has the responsibility of insuring that all jurors who desire to speak have a chance to do so before any vote. The presiding juror should guide the discussion and encourage all jurors to participate.

Once you are in the jury room, if you need to communicate with me, the presiding juror will send a written message to me. However, don't tell me how you stand as to your verdict.

As I have mentioned before, the decision you reach must be unanimous; you must all agree.

When you have reached a decision, the presiding juror will sign the verdict form, put a date on it, and all of you will return with the verdict into the court.

Suggestions for Conducting Deliberations:

In order to help you determine the facts, you may want to consider discussing one claim at a time, and use my instructions to the jury as a guide to determine whether there is sufficient evidence to prove all the necessary legal elements for each claim or defense. I also suggest that any public votes on a verdict be delayed until everyone can have a chance to say what they think without worrying what others on the panel might think of their opinion. I also suggest that you assign separate tasks, such as note taking, time keeping and recording votes to more than one person to help break up the workload during your deliberations. I encourage you at all times to keep an open mind if you ever disagree or come to conclusions that are different from those of your fellow jurors. Listening carefully and thinking about the other juror's point of view may help you understand that juror's position better or give you a better way to explain why you think your position is correct.

III. DAMAGES**General**

On the damages question, the party asking for damages has the burden of convincing you, by the preponderance of the evidence, both that he or she has been injured or damaged and the amount of the damages.

The party seeking damages need not produce evidence that is as exact as the evidence needed to support findings on other questions in the verdict. Determining damages involves the consideration of many different factors that cannot be measured precisely. In determining the damages you must base your answer on evidence that reasonably supports your determination of damages under all of the circumstances of the case. You should award as damages the amount of money that you find fairly and reasonably compensates the named party for his or her injuries.

Do not measure damages by what the lawyers ask for in their arguments. Their opinions as to what damages should be awarded should not influence you unless their opinions are supported by the evidence. It is your job to determine the amount of the damages sustained from the evidence you have seen and heard. Examine that evidence carefully and impartially. Do not add to the damage award or subtract anything from it because of sympathy to one side or because of hostility to one side. Do not make any deductions because of a doubt in your minds about the liability of any of the parties.

Income Taxes

You must not add to any award of damages any money to compensate the plaintiff for state or federal income taxes. Damages received as an award for personal injuries are exempt from income taxes. On the other hand, you must not subtract any money from your award of damages just because the plaintiff is not required to pay income taxes.

Pain and Suffering

In determining how much money will fairly and reasonably compensate plaintiff for past pain and suffering [disability] [disfigurement] [mental anguish] [loss of capacity for enjoyment of life],

you should consider any pain and suffering, mental anguish and apprehension, sorrow and anxiety plaintiff has endured from the time of the incident up to the present time. There is no exact standard for deciding how much to award plaintiff for these damages. Your award should be fair and just in the light of the evidence.

Aggravation of Pre-existing Injury or Condition

The evidence shows that the plaintiff was previously injured when _____. If the injuries plaintiff received at _____ aggravated any physical, mental or emotional condition resulting from the earlier injury or injuries, you should award fair and reasonable compensation for such aggravation. However, you should award compensation only if you find the aggravation of the existing condition was a natural result of the injuries received at _____.

Duty to Mitigate Damages

A person who has been damaged may not recover for losses that he or she could have reduced by reasonable efforts. "Reasonable efforts" do not include efforts that might cause serious harm or subject the person making the effort to an unreasonable risk, unreasonable inconvenience, unreasonable expense, disorganization of his or her business or loss of honor and respect.

If you find that a reasonable person would have taken steps to reduce the loss, and if you find that the plaintiff did not take such steps, then you should not include as damages any amount the plaintiff could have avoided. If you find that a reasonable person would not have taken steps to reduce the loss under all of the circumstances existing in the case, then you should not consider the plaintiff's failure to act when you determine damages.

It is defendants' burden to satisfy you by the greater weight of the credible evidence that plaintiff should have taken steps to reduce the loss and failed to do so.

Mortality Tables

In answering the question of future damages as a result of plaintiff's injuries, you may take into consideration the fact that at this time _____ is _____ years of age. According to the mortality tables, plaintiff has a life expectancy of ____ years.

Although a mortality table giving the expectancy of life of a person of _____'s age, was received in evidence as an aid in determining such expectancy, it is not conclusive or binding upon you. Such tables are based upon averages, and there is no certainty that any person will live the average duration of life rather than a longer or shorter period. In order to determine the probable length of life of _____, you should take into consideration all of the facts and circumstances established by the credible evidence bearing upon that subject.

Future Earnings

In determining the amount of damages for any loss of _____ that will be incurred in the future, it is your duty to determine the present worth of such future damages.

By present worth, I am referring to the fact that a lump sum of money received today is worth more than the same sum paid in installments over a period of months or years. A sum received today can be invested and earn money at current interest rates. Your answer will reflect the present value in dollars of an award of future damages if you make a reduction for the earning power of money.

Keep in mind that this instruction does not apply to the portion of future damages that represents future pain and suffering. In computing the amount of future damages, you may take into account economic conditions, present and future, and the effects of inflation.

The fact that I have instructed you on the proper measure of damages does not mean I have any view about the verdict in this case. These instructions on damages are only for your guidance in the event that you should find in favor of plaintiff on the question of liability.

Punitive Damages

If you answered "yes" to Question No. ____, you may award punitive damages in addition to compensatory damages. You are not required to make any award of punitive damages, but you may do so if you think it is proper under the circumstances to make such an award as an example or punishment to deter the defendant and others from offending in a similar manner in the future. In deciding whether to make an award of punitive damages you may also consider the seriousness of the offense committed.

Punitive damages may be awarded even if the violation of plaintiff's rights resulted in only nominal compensatory damages. That is, even if the plaintiff can show no damages or other injury as a result of a defendant's actions, if the defendant acted with deliberate indifference to plaintiff's rights, punitive damages may be awarded.

Punitive damages are never a matter of right. It is in the jury's discretion to award or withhold them. Punitive damages may not be awarded unless the defendant acted with deliberate indifference to the plaintiff's rights. Even if you find that the violations were reckless or deliberate, you may withhold or allow punitive damages as you see fit.

If you find that a defendant's conduct was motivated by evil motive or intent, such as ill will or spite or grudge either toward the injured person individually or toward all persons such as plaintiff, then you may find that the defendant deliberately violated the plaintiff's rights.

Acts are reckless when they represent a gross departure from ordinary care in a situation where a high degree of danger is apparent. If the defendant was in a position in which he certainly should have known that his conduct would violate the plaintiff's rights, and proceeded to act in disregard of that knowledge and of the harm or the risk of harm that would result to the plaintiff, then he acted with reckless disregard for the plaintiff's rights.

In answering this question, you are instructed that the burden is on the plaintiff to convince you to a reasonable certainty by evidence that is clear, satisfactory, and convincing that the answer should be "yes."

**PROCEDURES FOR CALLING WITNESSES TO TRIAL
IN CASES ASSIGNED TO JUDGE CRABB**

At trial, plaintiff will have to be ready to prove facts supporting his claims against the defendants. One way to offer proof is through the testimony of witnesses who have personal knowledge about the matter being tried. If a party wants witnesses to be present and available to testify on the day of trial, the party must follow the procedures explained below. (“Party” means either a plaintiff or a defendant.) These procedures must be followed whether the witness is:

- 1) A defendant to be called to testify by a plaintiff; or
- 2) A plaintiff to be called to testify by a defendant; or
- 3) A person not a party to the lawsuit to be called to testify by either a plaintiff or a defendant.

**I. PROCEDURES FOR OBTAINING ATTENDANCE OF INCARCERATED
WITNESSES WHO AGREE TO TESTIFY VOLUNTARILY**

An incarcerated witness who tells a party that he is willing to attend trial to give testimony cannot come to court unless the court orders his custodian to let him come. The Court must issue an order known as a writ of habeas corpus ad testificandum. This court will not issue such a writ unless the party can establish to the court’s satisfaction that

- 1) The witness has agreed to attend voluntarily; and
- 2) The witness has actual knowledge of facts directly related to the issue to be tried.

A witness’s willingness to come to court as a witness can be shown in one of two ways.

- a. The party can serve and file an affidavit declaring under penalty of perjury that the witness told the party that he or she is willing to testify voluntarily, that is, without being subpoenaed. The party must say in the affidavit when and where the witness informed the party of this willingness;

OR

b. The party can serve and file an affidavit in which *the witness* declares under penalty of perjury that he or she is willing to testify without being subpoenaed.

The witness's actual knowledge of relevant facts may be shown in one of two ways.

a. The party can declare under penalty of perjury that the witness has relevant information about the party's claim. However, this can be done only if the *party* knows first-hand that the witness saw or heard something that will help him prove his case. For example, if the trial is about an incident that happened in or around a plaintiff's cell and, at the time, the plaintiff saw that a cellmate was present and witnessed the incident, the plaintiff may tell the court in an affidavit what happened, when and where the incident occurred, who was present, and how the witness was in a position to see or hear what occurred;

OR

b. The party can serve and file an affidavit in which *the witness* tells the court what happened, when and where the incident occurred, who was present, and how the witness was in a position to see or hear what occurred.

Not later than four weeks before trial, a party planning to use the testimony of an incarcerated witness who has agreed to come to trial must serve and file a written motion for a court order requiring the witness to be brought to court at the time of trial. The motion must

- 1) State the name and address of the witness; and
- 2) Come with an affidavit described above to show that the witness is willing to testify and that the witness has first-hand knowledge of facts directly related to the issue to be tried.

When the court rules on the motion, it will say who must be brought to court and will direct the clerk of court to prepare the necessary writ of habeas corpus ad testificandum.

II. PROCEDURE FOR OBTAINING THE ATTENDANCE OF INCARCERATED WITNESSES WHO REFUSE TO TESTIFY VOLUNTARILY

If an incarcerated witness refuses to attend trial, TWO separate procedures are required. The court will have to issue a writ of habeas corpus ad testificandum telling the warden to bring the witness to trial and the party must serve the witness with a subpoena.

Not later than four weeks before trial, the party seeking the testimony of an incarcerated witness who refuses to testify voluntarily must file a motion asking the court to issue a writ of habeas corpus ad testificandum and asking the court to provide the party with a subpoena form. (All requests from subpoenas from pro se litigants will be sent to the judge for review before the clerk will issue them.)

The motion for a writ of habeas corpus ad testificandum will not be granted unless the party submits an affidavit

- 1) Giving the name and address of the witness; and
- 2) Declaring under penalty of perjury that the witness has relevant information about the party's claim. As noted above, this can be done only if the *party* knows first-hand that the witness saw or heard something that will help him prove his case. In the affidavit, the party must tell the court what happened, when and where the incident occurred, who was present, and how the witness was in a position to see or to hear what occurred.

The request for a subpoena form will not be granted unless the party satisfies the court in his affidavit that

- 1) The witness refuses to testify voluntarily;
- 2) The party has made arrangements for a person at least 18 years of age who is not a party to the action to serve the subpoena on the witness; or
- 3) The party is proceeding in forma pauperis, has been unable to arrange for service of the subpoena by a person at least 18 years of age who is not a party to the action and needs assistance from the United States Marshal or a person appointed by the court.

If the court grants the party's request for a subpoena for an incarcerated witness, it will be the party's responsibility to complete the subpoena form and send it to the person at least 18 years of age who will be serving the subpoena or to the United States Marshal, if the court has ordered that the subpoena be served by the Marshal. The address of the United States Marshal is 120 N. Henry St., Suite 440, Madison, Wisconsin, 53703. If the subpoena is not received by the marshal at least two weeks in advance of trial, the marshal may not have enough time to serve the subpoena on the party's witness.

III. UNINCARCERATED WITNESSES WHO AGREE TO TESTIFY VOLUNTARILY

It is the responsibility of the party who has asked an unincarcerated witness to come to court to tell the witness of the time and date of trial. No action need be sought or obtained from the court.

IV. UNINCARCERATED WITNESSES WHO REFUSE TO TESTIFY VOLUNTARILY

If a prospective witness is not incarcerated, and he or she refuses to testify voluntarily, no later than four weeks before trial, the party must serve and file a request for a subpoena form. All parties who want to subpoena an unincarcerated witness, even parties proceeding in forma pauperis, must be prepared to tender an appropriate sum of money to the witness at the time the subpoena is served. The appropriate sum of money is a daily witness fee and the witness's mileage costs. In addition, if the witness's attendance is required for more than one trial day, an allowance for a room and meals must be paid. The current rates for daily witness fees, mileage costs and room and meals may be obtained either by writing the clerk of court at P.O. Box 432, Madison, Wisconsin, 53703, or calling the office of the clerk at (608) 264-5156.

Before the court will grant a request for a subpoena form for an unincarcerated witness, the party must satisfy the court by affidavit declared to be true under penalty of perjury that

- 1) The witness refuses to testify voluntarily;
- 2) The party has made arrangements for a person at least 18 years of age who is not a party to the action to serve the subpoena on the witness; or
- 3) The party is proceeding in forma pauperis, has been unable to arrange for service of the subpoena by a person at least 18 years of age who is not a party to the action and needs assistance from the United States Marshal or a person appointed by the court; and
- 4) The party is prepared to tender to the marshal or other individual serving the subpoena a check or money order made payable to the witness in an amount necessary to cover the daily witness fee and the witness's mileage, as well as costs for room and meals if the witness's appearance at trial will require an overnight stay.

If the court grants the party's request for a subpoena for an unincarcerated witness, it will be the party's responsibility to complete the subpoena form and send it to the person at least 18 years of age who will be serving the subpoena or to the United States Marshal, if the court has ordered that the subpoena be served by the marshal, together with the necessary check or money order. The address of the United States Marshal is 120 N. Henry St., Suite 440, Madison, Wisconsin, 53703. If the subpoena is not received by the marshal at least two weeks in advance of trial, the marshal may not have enough time to serve the subpoena on the party's witness.

V. SUMMARY

The chart below may assist in referring you to the section of this paper which sets forth the appropriate procedure for securing the testimony of witnesses in your case.

WITNESSES			
INCARCERATED		UNINCARCERATED	
VOLUNTARY A court order that the witness be brought to court is required. Papers are due 4 weeks before trial.	INVOLUNTARY A court order that the witness be brought to court and a subpoena are required. A motion must be served & filed 4 weeks before trial. Subpoena forms must be completed 2 weeks before trial.	VOLUNTARY Nothing need be sought or obtained from the court.	INVOLUNTARY Pro se parties must obtain an order granting issuance of a subpoena. Papers are due 4 weeks before trial. Completed forms <u>and fees</u> are due 2 weeks before trial.

Office of the Clerk
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

120 North Henry Street, Room 320 • P.O. Box 432 • Madison, WI 53701-0432 • 608-264-5156

October 27, 2006

MEMO TO COUNSEL

If a case is **settled on the weekend before trial**, the court should be notified immediately by calling Clerk of Court Peter Oppeneer at (608) 287-4875. This notification will enable the Clerk to call off unneeded jurors and to advise the trial judge to discontinue working on the case. The same procedure should be followed to report last-minute emergencies which might affect the start of the trial.

**ORDER IN NON-JURY CASES
ASSIGNED TO JUDGE CRABB**

Counsel are hereby directed to observe the following requirements in preparing for the trial to the court in this case:

I. No later than TWO WEEKS IN ADVANCE OF THE TRIAL counsel are to confer for the following purposes:

A. To enter into comprehensive written stipulations of all uncontested facts in such form that they can be offered at trial as the first evidence presented by the party desiring to offer them. If there is a challenge to the admissibility of some uncontested facts that one party wishes included, the party objecting and the grounds for objection must be stated.

B. To make any deletions from their previously-exchanged lists of potential trial witnesses.

C. To enter into written stipulations setting forth the qualifications of expert witnesses.

D. To examine, mark, and list all exhibits that any party intends to offer at trial. (A copy of this court's procedures for marking exhibits is contained in this packet.)

E. To agree as to the authenticity and admissibility of such exhibits so far as possible and note the grounds for objection to any not agreed upon.

F. To agree so far as possible on the contested issues of law.

G. To examine and prepare a list of all depositions and portions of depositions to be read

into evidence and agree as to those portions to be read. If any party objects to the admissibility of any portion, the name of the party objecting and the grounds shall be set forth.

H. To explore the prospects of settlement.

It shall be the responsibility of plaintiff's counsel to convene the conference between counsel and, following that conference, to prepare the Pretrial Statement described in the next paragraph.

2. No later than ONE WEEK PRIOR TO THE TRIAL, plaintiff's counsel shall submit a Pretrial Statement containing the following:

A. The parties' comprehensive written stipulations of all uncontested facts.

B. The probable length of trial.

C. The names of all prospective witnesses. Only witnesses so listed will be permitted to testify at the trial except for good cause shown.

D. The parties' written stipulation setting forth the qualifications of all expert witnesses.

E. Schedules of all exhibits that will be offered in evidence at the trial, together with an indication of those agreed to be admissible and a summary statement of the grounds for objection to any not agreed upon. Only exhibits so listed shall be offered in evidence at the trial except for good cause shown.

F. An agreed statement of the contested issues of law supplemented by a separate statement by each counsel of those issues of law not agreed to by all parties.

G. A list of all depositions and portions of depositions to be offered in evidence, together with an indication of those agreed to be admissible and summary statements of the grounds for objections to any not so agreed upon. If only portions of a deposition are to be offered, counsel should mark the deposition itself with colored markers identifying the portions each party will rely upon.

3. No later than ONE WEEK PRIOR TO TRIAL, each counsel shall file with the court and serve upon opposing counsel a statement of all the facts that counsel will request the court to find at the conclusion of the trial. In preparing these statements, counsel should have in mind those findings that will support a judgment in their client's favor. The proposed findings should be complete. They should be organized in the manner in which counsel desire them to be entered. They should include stipulated facts, as well as facts not stipulated to but which counsel expect to be supported by the record at the conclusion of the trial. Those facts that are stipulated to shall be so marked.

4. Along with the proposed findings of fact required by paragraph 3 of this order, each counsel shall also file and serve a proposed form of special verdict, as if the case were to be tried to a jury.

5. Before the start of trial, each counsel shall submit to the court a complete set of counsel's pre-marked trial exhibits to be used by the judge as working copies at trial.

6. If counsel wish to submit trial briefs, they are to do so no later than THREE WORKING DAYS PRIOR TO TRIAL. Copies of briefs must be provided to opposing counsel.

Final pretrial submissions are to be filed as stated above with no exceptions. Failure to file or repeated and flagrant violations may result in the loss of membership in the bar of this court.

Entered this 27th day of October, 2006.

BY THE COURT:

BARBARA B. CRABB
District Judge

ORDER REGARDING TIMELY PRESENTATION
OF TRIAL WITNESSES AND TRIAL EVIDENCE

The parties must have all witnesses and other evidence ready and available for timely presentation at trial in order to prevent delay. Failure to comply with this order will be grounds for an order precluding the presentation of any additional evidence by the non-complying party.

Entered this 27th day of October, 2006.

BY THE COURT:

BARBARA B. CRABB
District Judge

POLICY REGARDING COUNSEL ROOMS DURING TRIAL

We will do our best to provide a room for counsel to use during trial. However, because the courthouse has a limited number of rooms, we cannot guarantee that an attorney room will be available. We do not have enough rooms to provide a separate space for counsel to eat lunch.

To assure fairness, counsel rooms will be randomly assigned the Wednesday before the week a trial is scheduled to start. Counsel may request a room by calling 608-261-5731. If one party requests a room, we will assign a counsel room to each party in the case. If there are not enough rooms available for all parties in a case, no party will be assigned a room.

Cleaning staff will perform routine cleaning tasks in rooms assigned to counsel during trial. On the day trial is completed, counsel are expected to remove their materials and leave the room neat and orderly. If the trial ends late in the day and another trial is not scheduled to begin the next day, counsel may make arrangements to remove their materials the next morning.

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

STANLEY G. JONES, II and
BETTE J. JONES,

Plaintiffs,

NO. 11-2300 SHM C

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER DISMISSING CASE WITHOUT PREJUDICE

Plaintiffs having filed a Notice of Voluntary Dismissal, it is hereby ORDERED, pursuant to Rule 41(a)(1)(A)(I) of the Federal Rules of Civil Procedure, that this case is DISMISSED, without prejudice.

It is so ORDERED this 17th day of February, 2012.

s/Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MINNESOTA

IN RE:)	
)	
GERALD O. CHRISTENSON and)	
ANITA R. CHRISTENTON,)	
)	
Debtors.)	Bankr. No.: 08-60485
)	Chapter 7
_____)	

**ORDER FOR TRANSPORT TO ST. PAUL, MINNESOTA
FOR RESUMPTION OF RULE 2004 EXAMINATION**

The United States, Bankruptcy Trustee David Velde, the Minnesota Department of Revenue, and Anita and Gerald Christenson jointly moved for an order permitting the United States Marshal to transport Mr. Christenson from the Sherburne County jail in Elk River to the federal courthouse in St. Paul, MN, on March 1, 2012 and, if necessary, on March 2, 2012, for the resumption of his Rule 2004 examination. Additionally, the moving parties requested an order directing the United States Marshal to bring to the Rule 2004 examination the briefcase that Mr. Christenson had with him when he was incarcerated. IT IS HEREBY ORDERED THAT:

1. Gerald Christenson may be released from Sherburne County jail to the custody of the United States Marshal or any authorized United States Officer for transport to St. Paul, MN on March 1, 2012 and, if necessary, March 2, 2012, for the resumption of his Rule 2004 examination to be taken in the Edward J. Devitt Courtroom, First Floor, at the United States Courthouse, 316 North Robert Street, St. Paul, MN 55101, during the hours of 10:00 a.m. to 4:00 p.m.
2. Gerald Christenson shall remain in the continuous custody of the United States Marshal during the examination and shall be returned each day to Sherburne County jail.
3. The United States Marshal should bring the briefcase to the Rule 2004 examination that Mr. Christenson had with him when he was arrested.
4. The United States Marshal should not allow Mr. Christenson access to the briefcase or its contents, but should instead provide the briefcase to Mr. Christenson's attorney, Joseph Dicker, just prior to the start of the Rule 2004 examination. Mr. Dicker should thereafter maintain custody of the briefcase and its contents subject to paragraph 5 of this Order.
5. Mr. Dicker must review the contents of the briefcase with Mr. Christenson just prior to the Rule 2004 examination, and then allow

counsel for the United States, the Bankruptcy Trustee, and the Minnesota Department of Revenue to inspect and copy all non-privileged documents. Mr. Dicker shall remove only those documents he believes to be privileged and, by March 9, 2012, distribute a privilege log describing the removed documents and the basis for the privilege to counsel for the Trustee, the United States and the State of Minnesota. Any documents subject to a claim of privilege shall be retained by counsel for Mr. Christenson until 14 business days after providing the aforementioned privilege log to the other counsel above identified and for such longer period as may be necessary for the Court to rule on the validity of the claimed privilege if during said 14-day period any counsel requests the Court to do so.

6. Except as herein modified, the provisions of this Court's Orders dated January 26, 2010 (Docket No. 156), February 18, 2010 (Docket No. 158), March 10, 2010 (Docket No. 160), March 16, 2010 (Docket No. 162), and August 15, 2011 (Docket No. 256) shall remain in full force and effect with respect to Gerald Christenson.

DATED: February 17, 2012 /e/ Dennis D. O'Brien

DENNIS D. O'BRIEN
UNITED STATES BANKRUPTCY JUDGE

NOTICE OF ELECTRONIC ENTRY AND FILING ORDER OR JUDGMENT Filed and Docket Entry made on 02/17/2012 Lori Vosejka, Clerk, By DLR, Deputy Clerk

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MINNESOTA

IN RE:)	
)	
GERALD O. CHRISTENSON and)	
ANITA R. CHRISTENTON,)	
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DATED: February 17, 2012 /e/ Dennis D. O'Brien

DENNIS D. O'BRIEN
UNITED STATES BANKRUPTCY JUDGE

NOTICE OF ELECTRONIC ENTRY AND FILING ORDER OR JUDGMENT Filed and Docket Entry made on 02/17/2012 Lori Vosejka, Clerk, By DLR, Deputy Clerk

Civil No. 11-2015 (JAG)

1 plaintiff(s), even if involving different parties. This shall include the caption and
2 number of case(s). This requirement must be complied with even if counsel in the
3 related cases is different.

4 9. Any other matters deemed important to the case.

5 At the scheduling conference, counsel shall attend fully prepared to discuss all other matters
6 outlined in Local Rule 16(a). Upon meeting with counsel, the Magistrate Judge shall approve and/or
7 modify the proposed discovery timetable, which shall become final and binding upon all parties.
8 Modifications thereto may not be unilaterally made by counsel, but rather must be approved by the
9 court, upon a finding of good cause, and preferably as the result of a joint request.

10 The Magistrate Judge shall further set a dispositive motions deadline. Parties are forewarned
11 that in the absence of a Court order, the filing of dispositive motions will not automatically suspend
12 the deadlines set pursuant to this Order.

13 The directives and deadlines set forth in this Order are intended to assist the parties, counsel
14 and Court in the most effective litigation of this case. These are of strict compliance; extensions
15 and/or continuances shall only be granted for good cause. Additionally, discovery impasses may
16 only be brought to the Court's attention upon compliance with Local Rule 26(b).

17 The Court hereby sets the following deadlines: Joint Pretrial Memorandum due by
18 1/14/2013; Pretrial/Settlement Conference set for 1/21/2013; Jury trial is scheduled for 1/28/2013.
19 The Magistrate Judge shall set all deadlines pertaining to discovery and any dispositive motions
20 within the 12 month framework established by the Court.

21 **Failure to fully comply with the directives and deadlines set forth in this Order shall**
22 **result in sanctions, which may be imposed by the Magistrate Judge.** This order is issued
23 pursuant to Fed. R. Civil P. 16 and Local Rule 16.

24 **SO ORDERED.**

25 In San Juan, Puerto Rico this 17th day of February, 2012.

26
27 s/ Jay A. Garcia-Gregory
JAY A. GARCIA-GREGORY
28 United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

FIRST BANK & TRUST, SB,
Plaintiff

vs.

CASE NO. 2:11-cv-00300-JMS-WGH

ROBERT D. NICOL; SUSAN M. NICOL;
ROBERT D. NICOL d/b/a R & R LOGGING;
SUSAN M. NICOL d/b/a THE SEWING CORNER;
GIBSON COUNTY COAL, LLC; STATE OF INDIANA,
AND UNITED STATES ATTORNEY GENERAL,
INTERNAL REVENUE SERVICE
Defendants.

ORDER

COMES NOW the Plaintiff, First Bank & Trust, SB, by counsel, and files its Motion for Leave to File Amended Complaint and Motion to Substitute Defendant. The Court, being duly advised in the premises, now FINDS that said motion should be GRANTED.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff shall be allowed to file its Amended Complaint herein and shall be allowed to substitute the United States of America in place of the United States Attorney General, Internal Revenue Service.

SO ORDERED this 17th day of January, 2012.



WILLIAM G. HUSSMANN, JR.
Magistrate Judge

Copies to:

Tracy M. Weber

Nick J. Cirignano

Elizabeth Noel Hahn

David R. Krebs

Clay W. Havill

Gabrielle Golda Hirz

Jeffrey L. Hunter

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION**

**GENESIS AIR, LLC, and
WILBUR O. COLOM**

PLAINTIFFS

V.

CAUSE NO. 1:09-CV-308-SA-DAS

**UNITED STATES OF AMERICA,
NELSON SMITH, and HICKS & SMITH, PLLC**

DEFENDANTS

MEMORANDUM OPINION

The factual and procedural background of this complicated litigation can be found in the Court's prior Memorandum Opinions [108, 110] addressing the parties' Motions for Summary Judgment. A jury trial on Plaintiff Colom's negligent misrepresentation claim against the Smith Defendants was set to begin on January 9, 2011. On that day, it was determined that the action could not proceed without a final determination of the amounts and relative priority of the competing liens held by Colom and the United States. The trial was canceled and additional briefing was had on this issue.

This Court set a hearing on February 6, 2012 to hear arguments "regarding any outstanding issues between Plaintiffs and the United States of America in this action which have not been resolved by this Court's summary judgment rulings." As argued in their briefs and at the hearing, Plaintiffs and the Smith Defendants contend that: (1) Pursuant to 28 U.S.C. § 2410, the Court should extinguish the United States' tax liens because they are valueless, or (2) regardless of whether the Court releases the tax liens, the Court should enter a final judgment pursuant to Rule 54(b) regarding the status of the liens. For the following reasons, the Court declines to release the tax liens at issue but does find entry of judgment pursuant to Rule 54(b) to be appropriate.

I. Releasing the tax liens via 28 U.S.C. § 2410 because they are “valueless.”

Plaintiffs first argue that because Colom’s security interest exceeds the value of the subject property, the United States’ tax liens are “valueless” and this Court is empowered by 28 U.S.C. § 2410 to remove the liens.

The Court does not find this argument to be well taken for the following reasons. First, this argument is untimely. This issue was not raised on summary judgment or listed in the Pre-trial Order [123] (PTO) completed by the parties on August 5, 2011. The PTO, which was signed by all parties, states without objection that “No factual issues remain in this litigation regarding the claims asserted against the United States. As a result, there is no need for the United States to participate in the trial of this matter.”

Second, the Court does not find this argument well taken on the merits. Colom argues that “Congress enacted 28 U.S.C. § 2410 to give Courts the ability to release valueless federal tax liens from property.” Section 2410 waives the United States’ sovereign immunity in both quiet title and foreclosure actions. 28 U.S.C. §§ 2410(a)(1),(2); Estate of Johnson, 836 F.2d 940, 943 (5th Cir. 1988).¹

¹The Fifth Circuit described the history of section 2410 as follows:

Under section 2410 as originally enacted in 1931, the government consented to be made a defendant in suits “for the foreclosure of a mortgage or other lien upon real estate, for the purpose of securing an adjudication touching any mortgage or other lien the United States may have or claim on the premises involved.” The words “to quiet title to” were added in 1942 as part of an amendment primarily intended to broaden the statute to include personal property. See Falik v. United States, 343 F.2d 38, 41 (2nd Cir. 1965). The addition of suits to quiet title resulted from a request of Attorney General, later Justice, Jackson in a 1941 letter to the Chairman of the Senate Judiciary Committee. In that letter,

Here, Colom is bringing suit under section 2410(a)(1) to “quiet title,”² not to foreclose his interest under section 2410(a)(2). It is undisputed that section 2410(a)(2) provides a vehicle to extinguish the federal liens through a judicial foreclosure. The United States argues that a quiet title action is not the appropriate vehicle to obtain the relief sought by Colom, and he should instead initiate a foreclosure in order to extinguish the tax liens. The Court agrees. As the Fifth Circuit has stated, it is an “unsound premise” that an action to quiet title “is one to extinguish the lien of the United States, rather than what it really is—a determination that a tax lien does not exist, has been extinguished, or is inferior in rank.” United States v. Morrison, 247 F.2d 285, 291 (5th Cir. 1957); see also Progressive Consumers Fed. Credit Union v. United States, 79 F.3d 1228, 1232 (1st. Cir. 1996) (“we have held and reaffirm today that section 2410(a)(1) controversies encompass disputes concerning both the ‘validity and priority of liens,’ as distinguished from actions seeking ‘their extinguishment in a manner not permitted by the statutes’”) (quoting Remis v. United States, 273

Jackson wrote that “justice and fair dealing would require that a method be provided to clear real-estate titles of questionable or valueless government liens.” H.R.Rep. No. 1191, 77th Cong., 1st Sess. 2 (1941); S.Rep. No. 1646, 77th Cong., 2d Sess. 2 (1942); see also United States v. Perry, 473 F.2d 643, 645 (5th Cir.1973). The amendment “was in response to the recognized need for a way to force disputes over government tax liens to resolution, rather than leaving the United States in complete control of the timing.” Id.; see also United States v. Brosnan, 363 U.S. 237, 246, 80 S. Ct. 1108, 1114, 4 L. Ed. 2d 1192 (1960) (“[The statute’s] only apparent purpose is to lift the bar of sovereign immunity which had theretofore been considered to work a particular injustice on private lienors.”).

Id.

²Part of the relief Colom seeks in his Amended Complaint is to “Remove the cloud from the title to Plaintiff’s property” which has been held to fall within the “to quiet title” language of § 2410(a)(1). Norman v. United States, 962 F. Supp. 936 (S.D. Miss. 1996).

F.2d 293, 294 (1st Cir. 1960)); United States v. Brosnan, 363 U.S. 237, 246-47, 80 S Ct. 1108, 4 L. Ed. 2d 1192 (1960) (“The specific permission of [2410(a)] to institute a quiet-title suit against the United States obviously contemplates a declaration by the federal courts of previously created legal consequences. If a [section 7424 or section 2410] were invoked to extinguish a federal lien, a subsequent suit to quiet title obviously would not be necessary.”).

Additionally, Congress has specifically provided a procedure for discharging a lien when the interest of the United States is valueless. See 26 U.S.C. § 6325(b)(2)(B); E.J. Friedman Co., Inc. v. United States, 6 F.3d 1355, 1358 (9th Cir. 1993). In the only opinion the Court could locate addressing this issue, the Ninth Circuit Court of Appeals held that “[t]o permit a party to discharge a ‘valueless’ lien in a quiet title action under § 2410 would be contrary to the provisions of § 6325(b)(2)(B) and would rob the Secretary of the discretion granted him by Congress.” E.J. Friedman, 6 F.3d at 1358. The Court finds this to be an additional basis to deny Plaintiffs’ request to extinguish or release the tax liens.

Finally, even if section 2410(a)(1) authorized the Court to grant Colom the relief sought, the Court finds that Colom has failed to offer any competent evidence that the United States’ liens lack monetary value. The only evidence offered by Plaintiffs on this point is an appraisal prepared in December 2008, valuing the property at \$325,000, and a Lowndes County tax assessment, printed on January 23, 2012 but containing no indication of when it was prepared, valuing the property at \$272,000. By way of background, as stipulated in the PTO, prior to the foreclosure sale, Golden Triangle Planning & Development District (GTPPD) possessed a first lien on the property in the amount of approximately \$83,000. Colom possessed a second lien on the property in the amount

of approximately \$296,750.³ The United States possessed a third lien in the amount of approximately \$212,302.

For the first time in this litigation, Colom now claims that when he purchased the property at the foreclosure sale, he acquired not only title to the property but also GTPDD's first lien on the property. As the United States points out, "Plaintiffs have provided no evidence that either one of them at any time acquired the Golden Triangle interest or how they might have acquired it." Colom simply asserts that, "Once Mr. Colom purchased the property, he possessed both senior liens to it. . . ." and cites to Mountaineer Investments, LLC v. United States, 2009 WL 3747205 (S.D. Miss. Nov. 4, 2009). Mountaineer held that, under Mississippi law, when a lien holder acquires fee title to real property, there is no merger of the purchaser's lien into his title absent an expression of intent to do so. Mountaineer does not stand for the proposition that a purchaser at a foreclosure acquires both title to the property and the underlying deed of trust being foreclosed upon.

Colom next argues that the property has significantly decreased in value since the December 2008 appraisal, relying on the Lowndes County Tax Assessor valuation of \$272,040. However, as the United States points out, while the assessment shows that it was printed out on January 23, 2012, it gives no indication of when the valuation was made or how it was prepared. At the hearing, no witnesses were called to lay a foundation for the introduction of these documents nor was any other evidence presented as to the value of the property. The Court finds, on the record before it, that Colom has failed to prove that the United States' liens lack monetary value. For this and all the foregoing reasons, the Court finds that the tax liens continue to encumber the property.

³The IRS stipulated in the PTO that, based on this Court's summary judgment rulings, this is the amount Colom may assert in priority to the United States' lien, but reserves the right to appeal at the appropriate time.

II. Final Judgment as to the United States pursuant to Fed. R. Civ. P. 54(b).

Colom alternatively seeks, regardless of whether the tax liens are released, that the Court enter final judgment against the United States. Rule 54(b) provides:

Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

The Court finds there is no just reason for delay for entry of a final judgment under Rule 54(b) as to all claims regarding the existence, amount, and priority of the competing liens at issue in this case as determined by this opinion, the Court's prior rulings, and the parties' stipulations in the PTO. A separate judgment shall issue in accordance with this opinion.

SO ORDERED on this, the 17th day of February, 2012.

/s/ Sharion Aycock
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

GENESIS AIR and)	
WILBUR O. COLOM,)	
)	
Plaintiffs,)	CIVIL ACTION NO. 1:09-cv-308-SA
)	
v.)	
)	
UNITED STATES OF AMERICA;)	
NELSON SMITH; and)	
HICKS & SMITH, PLLC,)	
)	
Defendants.)	

FINAL JUDGMENT PURSUANT TO RULE 54(b)

IN CONSIDERATION of the Order [Doc. No. 107] dated August 1, 2011, the related Memorandum Opinion [Doc. No. 108], the parties’ stipulations in the Pretrial Order [Doc. No. 123], the Plaintiffs’ Motion to Set Show Cause Hearing [Doc. No. 125], the briefs filed by the parties regarding that Motion [Doc. Nos. 131, 133 and 134] and the presentations made by the parties at the hearing held on February 6, 2012, and the Court finding that there is no just reason for delay, as the remainder of this action cannot proceed without a final determination of the extent of plaintiff Wilbur Colom’s security interest entitled to priority relative to the federal tax liens, final judgment now is entered pursuant to Federal Rule of Civil Procedure 54(b) as to the claims regarding the United States and the various interests asserted against the property that is the subject of this action (the “subject property”). As a result, it is **ORDERED, ADJUDGED AND DECREED** as follows:

That the United States’ tax liens regarding Maurice Webber’s (a) outstanding federal unemployment tax liability (Form 940) for 2000 and (b) outstanding federal employment tax liabilities (Form 941) for the third and fourth quarters of 1997; all four calendar quarters of 1998,

1999 and 2000; the third quarter of 2001; and the second quarter of 2002 continue to encumber the subject property;

That the plaintiff Wilbur O. Colom holds a security interest, which he acquired from Union Planters Bank, against the subject property in priority to the above-described federal tax liens; and

That the amount of plaintiff Wilbur O. Colom's security interest in the subject property that he may assert in priority to the federal tax liens is \$296,750.00.

SO ORDERED, ADJUDGED AND DECREED on this, the 17th day of February, 2012.

/s/ Sharion Aycock
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JAMES GRAY JR. and FAYE E. GRAY,

Plaintiffs,

v.

CASE NO: 8:11-cv-1786-T-27TGW

THE INTERNAL REVENUE SERVICE, *et al.*,

Defendants.

ORDER

BEFORE THE COURT is the United States of America's Motion to Dismiss or in the Alternative for Summary Judgment (Dkt. 14). Upon consideration of the Complaint (Dkt. 1), the United States of America's Motion to Dismiss or in the Alternative for Summary Judgment (Dkt. 14), the Declaration of John Shatraw (Dkt. 15-1), and the Plaintiffs' Response and Objection to Respondent's Motion to Dismiss or in the Alternative for Summary Judgment (Dkt. 23), the Court finds that the Plaintiffs' claims are frivolous (*i.e.*, Plaintiffs' factual and legal contentions are clearly baseless) and that dismissal is warranted under 28 U.S.C. § 1915(e)(2)(B).

Procedural Background¹

On December 20, 2011, this Court entered an order directing Plaintiffs to show cause, in writing why this action should not be dismissed under 28 U.S.C. § 1915(e)(2)(B). *See* Dkt. 16, ¶ 2. In a January 6, 2012 Order, the Court reiterated its prior directive that Plaintiffs show cause why this action should not be dismissed. *See* Dkt. 20, ¶ 1. The Court also notified Plaintiffs that if the Court

¹ The procedural history of this action is more fully summarized in a January 26, 2012 Order, granting the Plaintiffs an extension through February 8, 2012, to respond to the Order to Show Cause and Motion to Dismiss or in the Alternative for Summary Judgment. *See* Dkt. 22.

deemed dismissal unwarranted under 28 U.S.C. § 1915(e)(2)(B), the Motion to Dismiss or in the Alternative for Summary Judgment would be disposed of under Rule 56, Federal Rules of Civil Procedure, and further advised Plaintiffs of the procedures governing the resolution of a motion for summary judgment in accordance with *Johnson v. Pullman, Inc.*, 845 F.2d 911 (11th Cir. 1988). See Dkt. 20, ¶¶ 2-3.

Plaintiffs have filed a Response and Objection to Respondent's Motion to Dismiss or in the Alternative for Summary Judgment (Dkt. 23), but have not submitted sworn affidavits, declarations, or other evidence as required to preclude summary judgment under Rule 56. Moreover, Plaintiffs have not filed a separate response specifically addressing the issue raised by the Court in the Order to Show Cause.

Discussion

As Plaintiffs are proceeding *in forma pauperis*, this action is governed by 28 U.S.C. § 1915 which provides in pertinent part:

Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that –

- (B) the action or appeal –
 - (i) is frivolous or malicious;
 - (ii) fails to state a claim upon which relief may be granted; or
 - (iii) seeks monetary relief against a defendant who is immune from such relief.

28 U.S.C. § 1915(e)(2). “[A] complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact. As the Courts of

Appeals have recognized, § 1915[(e)(2)(B)]’s term ‘frivolous,’ when applied to a complaint, embraces not only the inarguable legal conclusion, but also the fanciful factual allegation.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

A review of the record reveals that the levies challenged by Plaintiffs are those relating to taxes arising from the 1997-2001 tax years (the “**early tax years**”).² The undisputed facts demonstrate that Plaintiffs had an opportunity to readily challenge these tax levies and that the IRS complied with the statutory notice requirements. *See* Shatraw Dec., ¶¶ 6-7, 10, 12-13. In any event, James Gray’s attempt to challenge the levy at issue is barred by the applicable statute of limitations. *See* 28 U.S.C. § 7433(a). Similarly, Plaintiffs’ contention that the amount of the levy issued on Faye Gray’s paycheck exceeded that permitted under applicable law is misplaced. *See* Shatraw Dec., ¶ 9; 26 U.S.C. § 6334(d); 26 C.F.R. 301.6334-2.³

Conclusion

While *pro se* pleadings are to be construed liberally, *Haines v. Kerner*, 404 U.S. 519 (1972), the Complaint fails to assert any discernible basis for the relief sought against any named defendant.⁴

² At best, Plaintiffs appear to be mistaken as to the tax years that form the bases for the levies referenced in the Complaint. In this regard, while Plaintiffs assert in their response to the Motion to Dismiss or in the Alternative for Summary Judgment that their claims arise from tax years 2002-2006 (the “**later tax years**”) rather than the early tax years, the documents attached to the Complaint as well as the Declaration of John Shatraw readily demonstrate that the levies at issue relate to the early tax years. *See, e.g.*, Shatraw Dec., ¶¶ 10, 13; Complaint, Ex. C. To the extent Plaintiffs purport to assert claims relating to levies for the later tax years, such claims must fail because the undisputed evidence demonstrates that as of the filing of the Complaint no levies had been issued as to the 2002-2006 tax years. Shatraw Dec., ¶¶ 11, 16.

³ Plaintiffs cite to 26 U.S.C. § 6331(h) for the proposition that a continuing levy on wages cannot exceed 15 percent of such wages. Plaintiffs misinterpret the effect of the statutory provision. Rather than establish a cap on a continuing levy on wages, section 6331(h) actually allows a levy, once approved, to continue to attach to up to 15 percent of the *minimum* exemption for wages, salary, and other income. In this case, the levy was only imposed on Faye Gray’s wages that exceeded exempt wages. *See* Shatraw Dec., ¶ 9.

⁴ As the United States notes, it (and not the named defendants) is the proper defendant with respect to the Plaintiffs’ claims for monetary relief. *See* 26 U.S.C. § 7433; *see also Dugan v. Rank*, 372 U.S. 609, 620 (1963).

The Court, therefore, finds that the action in its present form is frivolous under 28 U.S.C. § 1915(e)(2)(B). The petition lacks an arguable basis either in law or in fact and even liberally construed, is based on indisputably meritless legal and factual theories. *See Neitzke*, 490 U.S. at 327 (noting that statute governing proceedings *in forma pauperis* grants courts the power to pierce veil of complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless).⁵

Accordingly, it is **ORDERED AND ADJUDGED** that:

- (1) This cause is **DISMISSED** pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).
- (3) The Motion to Dismiss or in the Alternative for Summary Judgment (Dkt. 14) is

DENIED as moot.

- (3) The Clerk is directed to **CLOSE** this case.

DONE AND ORDERED in chambers this 17th day of February, 2012.


JAMES D. WHITTEMORE
United States District Judge

Copies to:
Pro Se Plaintiffs
Counsel of Record

⁵ Despite electing not to file tax returns since 1988, Plaintiffs bring this action to recover damages for what they view as “excessive,” unconstitutional,” and/or untimely tax levies. A review of the allegations in the Complaint, together with the exhibits attached thereto, demonstrate that the Plaintiffs’ claims stem from, at best, their misunderstanding of the events giving rise to the levies at issue, or, at worst, an intentional attempt to deceive the Court by manufacturing false and misleading exhibits. *See, e.g.*, Complaint, Ex. A & Q. In any event, the careful consideration the Court has given this matter goes well beyond that necessary to justify dismissal of the Plaintiffs’ frivolous claims. *Cf. Crain v. Commissioner of Internal Revenue*, 737 F.2d 1417 (5th Cir. 1984); *Wnuck v. Commissioner of Internal Revenue*, 136 T.C. 498 (U.S. Tax Ct. 2011).

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11 **UNITED STATES BANKRUPTCY COURT**
12 **DISTRICT OF ARIZONA**

13 In re:

14 DANIEL LEWIS HENDON,
15 Defendant.

16 HENRY H. LEE,
17 Plaintiff,
18 v.

19 DANIEL LEWIS HENDON,
20 Defendant.

In Proceedings Under Chapter 11
Case No: 2:11-bk-21164-EWH
Adv. No: 2:11-ap-01991-EWH

**ORDER GRANTING STIPULATED
ORDER FOR RELIEF FROM THE
AUTOMATIC STAY**

21 This matter having come before the Court on the Parties' Stipulation for Relief from the
22 Automatic Stay (the "Stipulation"); and for good cause appearing;

23 IT IS HEREBY ORDERED that the Stipulation is approved and the Parties will take
24 action pursuant to the terms of the Stipulation as follows:

- 25 i. Henry Lee is granted relief from the automatic stay to proceed against
26 Debtor Daniel Hendon on only Count Two (2) (violation of Cal. Corp.
27 Code 17254, *et. seq.*) of Case No. 30-2010 00355077, California Superior
28 Court, Orange County (the "State Court Case");
- ii. Lee will dismiss, with prejudice, Counts One (1) (fraudulent conveyance)
and Three (3) (alter ego) of the State Court Case as to Hendon alone with
the Parties to bear their own fees and costs as to the dismissed counts;

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- iii. In the event Lee successfully obtains a judgment against Hendon on Count Two of the First Amended Complaint in the State Court Case, Lee agrees to only seek to collect against that judgment from the resources available under Hendon’s Directors’ and Officers’ Policy (Greenwich Insurance Company Policy No. ELU103964-08), or any other Policy that provides coverage for the claims of Lee in the event he prevails on Count Two of the First Amended Complaint in the State Court Case;
- iv. Lee is permitted to continue prosecuting the non-debtor defendants in the State Court Case and may proceed to collect against those entities in the event Lee obtains judgments against each;
- v. Lee will hold a general unsecured claim under Hendon’s confirmed Plan of Reorganization for the remaining portion of any judgment obtained by Lee against Hendon for which he cannot collect against the non-debtor entities or collect against the remaining proceeds available under Hendon’s D&O Policy;
- vi. Upon approval by the Court of this Stipulation, Lee will dismiss Adversary Proceeding, No. 2:11-ap-01991-EWH, with prejudice, with each party bearing their own attorneys’ fees and costs incurred to date.

DATED AND SIGNED ABOVE

Phillips, Harris J. (TAX)

From: neb_bkecf@neb.uscourts.gov
Sent: Friday, February 17, 2012 3:08 PM
To: Courtmail@neb.uscourts.gov
Subject: Ch-13 11-41255-TLS Mark Hysell Order on Motion to Compel

*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30-page limit do not apply.**

U.S. Bankruptcy Court

District of Nebraska

Notice of Electronic Filing

The following transaction was received from law entered on 2/17/2012 at 2:07 PM CST and filed on 2/17/2012

Case Name: Mark Hysell
Case Number: [11-41255-TLS](#)
Document Number: 74

Docket Text:

Order Granting Trustee's Motion To Compel Filed by Trustee Kathleen Laughlin (Related Doc # [73]). The Trustees Motion to Compel is granted. Debtor(s) shall comply with trustee's motion by March 2, 2012, or this case will be dismissed upon declaration of trustee. Movant is responsible for giving notice to parties in interest as required by rule or statute. HEREBY ORDERED by Judge Thomas L. Saladino (Text Only Order) (law)

The following document(s) are associated with this transaction:

11-41255-TLS Notice will be electronically mailed to:

Steven M. Curry on behalf of Debtor Mark Hysell
smcurry@cconline.net, currylaw@yahoo.com

Patricia Fahey
ustpreion13.om.ecf@usdoj.gov

Jeffrey L. Hrouda on behalf of Creditor Pinnacle Bank of Madison, Nebraska
jhrouda@telebeep.com

Kathleen Laughlin
ecfclerk@ne13trustee.com, klaughlin13@ecf.epiqsystems.com

Harris J. Phillips on behalf of Creditor United States of America
harris.j.phillips@usdoj.gov, central.taxcivil@usdoj.gov; seth.g.heald@usdoj.gov

Sheldon R. Singer on behalf of Creditor JPMorgan Chase Bank, N.A.
ssinger@stlaw.net, awitt@stlaw.net; eyarbrough@stlaw.net

11-41255-TLS Notice will not be electronically mailed to:

United States District Court
District of Massachusetts

JOSEPH J. IANTOSCA and DAVID A.)
IANTOSCA, as guardians of Joseph)
Iantosca Sr. and as Trustees of)
the Faxon Heights Apartments)
Realty Trust and Fern Realty)
Trust, BELRIDGE CORPORATION,)
GAIL A. CAHALY, JEFFREY M.)
JOHNSTON, BELLEMORE ASSOCIATES,)
LLC, and MASSACHUSETTS LUMBER)
COMPANY, INC.,)
Plaintiffs,)

Civil Action No.
08-11785-NMG

v.)

BENISTAR ADMIN SERVICES, INC.,)
DANIEL CARPENTER, MOLLY)
CARPENTER, BENISTAR PROPERTY)
EXCHANGE TRUST COMPANY, INC.,)
BENISTAR LTD., BENISTAR EMPLOYER)
SERVICES TRUST CORPORATION,)
CARPENTER FINANCIAL GROUP, LLC,)
STEP PLAN SERVICE INC., BENISTAR)
INSURANCE GROUP, INC., and)
BENISTAR 419 PLAN SERVICES INC.,)
Defendants,)

TRAVELERS INSURANCE COMPANY and)
CERTAIN UNDERWRITERS AT LLOYD'S,)
LONDON,)
Reach and Apply)
Defendants.)

CERTAIN UNDERWRITERS AT LLOYD'S,)
LONDON and All Participating)
Insurers and Syndicates,)
Third-Party Plaintiff,)

v.)

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

MEMORANDUM & ORDER

GORTON, J.

In an effort to recover on a multimillion dollar judgment obtained in Massachusetts state court, plaintiffs have sued to reach and apply the defendants interest in a settlement arising from litigation in Pennsylvania. The United States has intervened to enforce federal tax liens assessed against two of the defendants.

I. Background

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

Defendants Benistar Property Exchange Trust Company, Daniel Carpenter, Molly Carpenter, Benistar Admin Services, Inc. ("BASI"), Benistar Ltd., Benistar Employer Services Trust Corporation and Carpenter Financial Group, LLC (together "the Cahaly Defendants") were parties to the Cahaly Litigation and are liable under the resulting judgment. Not all of those parties were originally named in the Cahaly Litigation but, in September, 2003, the state court "pierced the corporate veil" and extended

liability to additional entities owned by Daniel and Molly Carpenter. The remaining defendants in this case, Benistar Insurance Group, Benistar 419 Plan Services, Inc. ("Benistar 419") and Step Plan Services Inc. ("Step Plan") (together "the New Defendants"), were not parties to the Cahaly Litigation.

Plaintiffs allege that 1) certain of the defendants are entitled to \$4.5 million in settlement proceeds from litigation they initiated in Pennsylvania ("the Pennsylvania Settlement") and 2) Travelers Insurance Company ("Travelers") and Certain Underwriters of Lloyd's, London ("Certain Underwriters") (together "the Reach and Apply Defendants") are poised to deliver those proceeds to the defendants. Pursuant to M.G.L. c. 214, § 3(6), plaintiffs seek to reach and apply all defendants' interests in those proceeds to satisfy the Cahaly Judgment.

The Pennsylvania Settlement arises out of an action brought by the New Defendants, Wayne Bursey ("Bursey") and BASI against John Koresko ("Koresko") and several entities he owned. Only one defendant, BASI, is nominally both a judgment debtor in the Cahaly Litigation and a plaintiff in the Pennsylvania litigation, and defendants assert that the Pennsylvania Settlement will be paid only to Step Plan.¹

¹ Defendants initially asserted that Step Plan was the sole payee of the Pennsylvania Settlement proceeds but then, without explanation, contended that the sole payee was Benistar 419. They now have reverted back to their original claim that Step Plan is the sole payee.

Defendants contend that, because Step Plan was not a party to the Cahaly Litigation, the plaintiffs cannot reach and apply its right to the Pennsylvania Settlement in order to enforce the Cahaly Judgment. Plaintiffs respond that the Pennsylvania Settlement may, however, be reached and applied because defendants have abused and are abusing the corporate form and/or have fraudulently conveyed their interests in the Pennsylvania Settlement in order to avoid having to satisfy the Cahaly Judgment.

This Court, after determining that the plaintiffs would likely succeed on the merits of their reach and apply claim, entered a preliminary injunction barring the Reach and Apply Defendants from distributing any of the settlement proceeds to the defendants. The injunction was imposed in November, 2008 for a six-month period subject to extension for good cause shown, and, upon motion from the plaintiffs, was subsequently extended "until further order of this Court". Step Plan and Benistar 419 appealed the preliminary injunction to the First Circuit Court of Appeals and were denied relief. See Iantosca v. Step Plan Services, Inc., 604 F.3d 24, 34 (1st Cir. 2010) (affirming allowance of preliminary injunction).

In a further twist and turn, the Court allowed the government's motion to intervene in the case in February, 2011. The government seeks to enforce two federal tax liens, for \$1.12

million dollars each, that it has filed against BASI and Benistar 419 with the Town of Simsbury, Connecticut. The government alleges that the liens attach to any proceeds to which those entities are entitled as a result of the Pennsylvania Settlement and have priority over plaintiffs' claims.

This action is scheduled to proceed to a jury trial in this Session on Monday, March 26, 2012. Currently before the Court are 1) defendants' motions for summary judgment with respect to both the plaintiffs' and the government's claims, 2) the government's motion for partial summary judgment on the issue of tax liability, 3) two motions to strike filed by the defendants and 4) a motion to strike and for sanctions filed by the plaintiffs.

II. Analysis

A. Legal Standard

The role of summary judgment is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Mesnick v. Gen. Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991). The burden is on the moving party to show, through the pleadings, discovery and affidavits, "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

A fact is material if it "might affect the outcome of the

suit under the governing law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). “Factual disputes that are irrelevant or unnecessary will not be counted.” Id. A genuine issue of material fact exists where the evidence with respect to the material fact in dispute “is such that a reasonable jury could return a verdict for the nonmoving party.” Id.

Once the moving party has satisfied its burden, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine, triable issue. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The Court must view the entire record in the light most favorable to the non-moving party and indulge all reasonable inferences in that party’s favor. O’Connor v. Steeves, 994 F.2d 905, 907 (1st Cir. 1993). Summary judgment is appropriate if, after viewing the record in the non-moving party’s favor, the Court determines that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.

B. Motions to Strike and for Sanctions

There are currently three motions to strike pending: one motion to strike and for sanctions filed by the plaintiffs with respect to portions of the motions for summary judgment filed on behalf of Daniel and Molly Carpenter and two motions to strike filed by the defendants with respect to portions of the government’s motion for summary judgment. The Court will deny

the motions to strike but will consider the facts alleged in each motion for summary judgment only to the extent that they are undisputed and based upon personal knowledge. The Court concludes that government's motion for summary judgment is supported by properly submitted evidence.

C. Defendants' Motions for Summary Judgment with respect to Plaintiffs' Claims

1. BASI, Benistar 419, Daniel Carpenter and Step Plan

The motions for summary judgment filed by BASI, Benistar 419 and Daniel Carpenter simply re-assert several arguments already raised and rejected by this Court and do not offer any additional undisputed evidence in support thereof. Those motions will therefore be denied.

First, this Court has already rejected defendants' arguments that proceeds of the Pennsylvania Settlement cannot be reached and applied because they are payable solely to entities not nominally subject to the Cahaly Judgment. There is sufficient evidence in the record from which a reasonable jury could determine that the defendants are abusing the corporate form and/or have engaged in fraudulent transfers in order to avoid the Cahaly Judgment. If plaintiffs prove such abuse or fraud, the proceeds from the Pennsylvania Settlement may be reached and applied in satisfaction of their judgment. Thus, to the extent that defendants' motions for summary judgment are based on such arguments, they are without merit.

Second, this Court has already rejected defendants' res judicata and collateral estoppel arguments based on the state court's dismissal of plaintiffs' claims against certain "Jane Doe Affiliates and Subsidiaries of Benistar Defendants and Jane Doe Entities controlled by Daniel Carpenter." In their opposition to the preliminary injunction, defendants asserted (as they do now) that the Cahaly Judgment precluded any recovery from the New Defendants because the New Defendants qualify as "Jane Does".

The Court disagreed and entered the preliminary injunction. It concluded that the Cahaly Judgment was not intended to foreclose prospectively plaintiffs' ability to enforce that judgment against an entity later determined to be an alter ego of the Cahaly Defendants. Nonetheless, the Court conceded that it was "reluctant to over-interpret state court judgments" and thus, as a condition of the continued validity of the preliminary injunction, required plaintiffs to seek clarification of the Cahaly Judgment from the Massachusetts Superior Court for Suffolk County. Plaintiffs did so and their motion for clarification was decided in May, 2010. Massachusetts Superior Court Judge Stephen E. Neel held that the interpretations and analyses of this Court (and of the First Circuit on appeal) were consistent with his understanding of the Cahaly Judgment and that there was no persuasive reason to conclude otherwise. Thus, to the extent that defendants' motions for summary judgment are based on such

arguments previously raised and rejected, they are without merit.

Third, Step Plan's contends, without legal or factual support, that the Pennsylvania Settlement is property which may not be reached and applied because 1) the Cahaly Judgment is not final and 2) the settlement is "simply a payment to be made in the future" to Step Plan under an "executory contract" among the defendants. First, the Cahaly Judgment, which was affirmed by the Massachusetts Supreme Judicial Court in 2008, is final. Second, an executory contract is one in which the contracting parties owe one another ongoing duties of performance. Where all elements of performance have been accomplished leaving only an obligation to pay money, there is no executory contract. Matter of Dunes Casino Hotel, 63 B.R. 939, 948 (D.N.J. 1986). Step Plan's arguments with respect to executory contracts are thus singularly unavailing and do not support its motion for summary judgment.

2. Molly Carpenter

The undisputed facts demonstrate that the Massachusetts Superior Court has deemed Molly Carpenter's liability for \$3.87 million under the Cahaly Judgment to be fully satisfied. Because she is no longer indebted to the plaintiffs, her motion for summary judgment will be allowed. Plaintiffs' concerns that defendants will re-assign the proceeds from the Pennsylvania Settlement to her are ill-founded because those proceeds are

subject, until further order of the Court, to the preliminary injunction entered on November 21, 2008.

D. Cross-Motions for Summary Judgment with respect to the Government's Complaint in Intervention

The government has moved to intervene in this case to enforce identical \$1.12 million federal tax liens assessed against BASI and Benistar 419. The government alleges that the liens may be enforced against the interests of those entities in the Pennsylvania Settlement.

The tax penalties which underlie the liens were assessed for the respective failures of BASI and Benistar 419 to provide the IRS with investor lists which the government contends each entity was required to maintain from February 28, 2000 to at least January 20, 2006. It is undisputed that, in January, 2006, the IRS requested BASI and Benistar 419 to produce investor lists and that, to date, each entity has failed to do so. The primary disagreement between the parties is whether BASI and Benistar 419 were, in fact, statutorily required to maintain such lists.

The government contends that they were so required and accordingly moves for partial summary judgment that the tax liens are valid.² BASI and Benistar 419, however, assert that they

² Genuine issues of fact that would remain to be proved at trial, so the government contends, are that 1) the tax liens attach to the defendants' right to proceeds from the Pennsylvania Settlement and 2) the liens have priority over plaintiffs' claims.

were never so required and move for summary judgment that the tax liens are invalid. Furthermore, they argue, they are entitled to summary judgment because 1) they had reasonable cause to believe they were not subject to the list requirement and associated penalties and 2) even if the tax liens are valid, the penalty assessed against them is excessive and the government's action violates their right to due process.

1. Origin of the Government's Liens

On January 20, 2006, the IRS sent BASI and Benistar 419 written requests to produce each list they were obligated to maintain pursuant to 26 U.S.C. § 6112 ("the 2006 list requests"). In response, BASI and Benistar 419 sent to the IRS typed, and unsigned, sheets of paper containing the statements "Not Liable, Not a Material Advisor," and "N/A".

In August, 2009, the IRS notified BASI and Benistar 419 that it had assessed a \$1.12 million tax penalty against each of them for failing to provide the requested lists ("the 2009 lien notices"). The notice explained that the penalty was calculated based on \$10,000 per day for 112 days (from February 18, 2006 to June 9, 2006) and referred to a "year/period end" of December 31, 2002.

In August, 2010, the IRS sent BASI and Benistar 419 notice of 1) its intent to levy on the tax penalties and 2) its filing of federal tax liens against each entity for \$ 1.12 million with

the Town of Simsbury, Connecticut. Shortly thereafter, BASI and Benistar 419 timely requested Collection Due Process ("CDP") hearings with respect to the government's lien and intent to levy. To date, a CDP hearing has not been scheduled and both penalties remain unpaid.

2. Overview of the Relevant Statutory and Regulatory Provisions

During all times relevant to this action, the Tax Code has required certain taxpayers to maintain investor lists with respect to "reportable" or "listed" transactions and penalized those who fail to make such lists available to the IRS upon written request. Because the statute and regulations thereunder have evolved over time, however, an overview of the applicable provisions is in order.

Prior to the enactment of the American Jobs Creation Act of 2004 ("2004 Jobs Act"), Pub. L. No. 108-357, 118 Stat. 1418 (codified at 26 U.S.C. § 1 et seq.), the list maintenance rules required "sellers" and "organizers" of a "potentially abusive tax shelter" to maintain a list identifying each person who purchased an interest in the tax shelter. 26 U.S.C. § 6112(a) (2002) (amended 2004). A "potentially abusive tax shelter" was defined to include 1) any tax shelter for which registration is required under § 6111 and 2) any other entity, investment plan or arrangement which is specified in the regulations as having a potential for tax avoidance or evasion. Id. § 6112(b). The

organizer or seller was required to make the list available for inspection upon written request from the IRS. Id. § 6112(c). Failure to comply with the list maintenance requirement subjected a taxpayer to a penalty of \$50 per name omitted from the list with a maximum penalty of \$100,000 per year. Id. § 6708.

Congress, citing the refusal of some tax shelter promoters to provide the IRS with investor lists when requested, decided that the penalty was not meaningful and more effective tools for curbing the use of abusive tax avoidance transactions were needed. H.R. REP. NO. 108-548(I), at 271-72 (2004). Thus, since the enactment of the 2004 Jobs Act, heftier and more time-sensitive penalties attach to a taxpayer's failure to maintain and provide the IRS with requested investor lists. Any person required to maintain investor lists with respect to reportable transactions, and who receives a written request from the IRS but fails to make the lists available in 20 business days, may be assessed a \$10,000 penalty for each day of failure after the 20th business day. 26 U.S.C. § 6708(a)(1) (2010). No penalty is to be imposed, however, if the failure to produce the lists is due to "reasonable cause".³ Id. § 6708(a)(2).

Other provisions of the 2004 Jobs Act alter the definition of which taxpayers are subject to the list maintenance

³ In no event is a failure to maintain a required list to be considered reasonable cause for failing to make the list available to the IRS. H.R. REP. NO. 108-548, at 272 n.273.

requirement and reportable transactions. The person required to maintain lists is referred to as a "material advisor". 26 U.S.C. § 6112(a). A material advisor is defined as any person who 1) provides any material aid, assistance or advice with respect to organizing, managing, promoting, selling, implementing, insuring or carrying out any reportable transaction and 2) directly or indirectly derives gross income for the advice or assistance in excess of an established threshold amount or such other amount as may be prescribed by the Secretary. Id. § 6111(b)(1). The established threshold amount is \$50,000 in the case of a "reportable transaction" where substantially all of the tax benefits are provided to natural persons and \$250,000 in any other case. Id. For "listed transactions", however, the regulations provide that the threshold amounts are reduced from \$50,000 to \$10,000 and from \$250,000 to \$25,000. 26 C.F.R. § 301.6111-3.

A "reportable transaction" is any transaction with respect to which information must be included with the taxpayer's return because the IRS has determined, under the regulations prescribed under § 6111, that the transaction is of the kind that has the potential for tax avoidance or evasion. Id. § 6707A(c)(1). A "listed" transaction is a kind of reportable transaction that is the same as or is substantially similar to a transaction that has been specifically identified by the IRS as a tax avoidance

transaction. Id. § 6707A(c)(2).

The requirement that a material advisor maintain an investor list applies to transactions with respect to which material aid, assistance or advice is provided after the date of enactment of the 2004 Jobs Act, and the enhanced penalty for failing to maintain investor lists applies to requests made after the date of enactment. H.R. REP. NO. 108-548, at 272.

3. Defendants' Liability under the List Maintenance Requirement

Daniel Carpenter designed and implemented the Benistar 419 Plan ("the Plan"), which was crafted to be a multiple employer welfare benefit trust providing pre-retirement life insurance to covered employees. Benistar 419 is the sponsor of the Plan and BASI is its administrator.

BASI and Benistar 419 were subject to the list maintenance requirement, and thus liable for failing to provide the lists upon request from the IRS, if, at the relevant times between 2000 and 2006, 1) the Plan qualified as a "potentially abusive tax shelter" or a "reportable" or "listed" transaction, 2) BASI and Benistar 419 qualified as "organizers" and/or "sellers" or "material advisors" and 3) their failure to provide the lists requested was not excusable for "reasonable cause".

a. Potentially Abusive Tax Shelter and Reportable/Listed Transactions

Under the Tax Code during all times relevant to the instant

proceeding, whether under the rubric of a "potentially abusive tax shelter" or a "reportable" or "listed" transaction, any transaction that was specified in the regulations as having a potential for tax avoidance triggered the list maintenance requirement. One such tax avoidance transaction identified by the regulations since the year 2000 is a transaction "substantially similar" to that described in Notice 95-34. See IRS, Notice 2000-15, "Listed Transactions", 2000-12 I.R.B. 826 (Mar. 20, 2000); IRS, Notice 95-34, "Tax Problems Raised by Certain Trust Arrangement Seeking to Qualify for Exemption from Section 419", 1995-23 I.R.B. 10 (June 5, 1995). Notice 95-34 describes the characteristics of certain trust arrangements that falsely purport to qualify as multiple employer welfare benefit funds exempt from Sections 419 and 419A. Those sections impose strict limits on the amount of tax-deductible prefunding permitted for contributions to a welfare benefit fund.

The government contends that the Plan administered by Benistar 419 and BASI is substantially similar to the transaction described in Notice 95-34 and thus triggers the list maintenance requirement. Its position derives substantial support from a decision of the U.S. Tax Court in which that Court deemed the Plan to be a listed transaction after determining it obtained similar kinds of tax benefits and was factually similar to the transaction described in Notice 95-34. See McGehee Family

Clinic, P.A. v. Comm'r of Internal Revenue, Nos. 15646-08, 15647-08, 2010 WL 3583386, at *4 (U.S. Tax Court Sept. 15, 2010).

Benistar 419 does not set forth specific facts to dispute that contention but instead argues that 1) the government cannot prove the Plan meets various requirements of a "tax shelter" listed in former § 6111 and 2) prior to November, 2009, disclosure of a transaction "substantially similar" to a "listed transaction" was not required.

Neither contention is tenable. First, the government need not prove the Plan meets the definition in superceded § 6111 if it is able to demonstrate that the alternative definition of a "potentially abusive tax shelter" under superceded § 6112 is met. The latter specifically includes plans of the kind the Secretary determines by regulations as having a potential for tax avoidance. Second, transactions that were substantially similar to listed transactions have required disclosure since 2000. The relevant regulations effective in 2000 provided that, for purposes of the list requirement, a tax shelter includes

any transaction a significant purpose of the structure of which is the avoidance or evasion of Federal income taxes within the meaning of ... § 301.6111-2T(b).

26 C.F.R. § 301.6112-1T, A-4 (2000). Under § 301.6111-2T(b), the avoidance or evasion of taxes was considered a significant purpose of the structure of the transaction if the transaction was

the same as or substantially similar to one of the types of transactions that the [IRS] has determined to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction for purposes of section 6111.

Thereafter, beginning in 2003, a potentially abusive tax shelter for purposes of the list maintenance requirement was explicitly defined as a transaction that has a potential for tax avoidance or evasion, including any listed transaction. 26 C.F.R. § 301.6112-1 (2003). A listed transaction was then defined, as it is now, as a transaction which is the same as or substantially similar to a transaction that has been specifically identified by the IRS as a tax avoidance transaction.

Because defendants' contentions regarding the government's burden and the history of the disclosure requirement are without merit, and because they have offered no specific facts rebutting the government's evidence that the Plan is "substantially similar" to the tax avoidance transaction described in Notice 95-34, the Court concludes that, as a matter of law, the Plan prompted the list maintenance requirement during the relevant period.

b. Organizers/Sellers and Material Advisors

Even though the Plan was a listed transaction, BASI and Benistar 419 also must be shown to have qualified as 1) "organizers" and/or "sellers" or 2) "material advisors" at the relevant times between 2000 and 2006 in order to be liable under

the list maintenance requirement.

The government contends that BASI and Benistar 419 were "organizers" and/or "sellers" within the meaning of the Tax Code prior to the enactment of the 2004 Jobs Act, and thereafter were "material advisors" within the meaning of the current law.

BASI and Benistar 419 do not address whether they ever qualified as organizers and/or sellers under the prior law because they contend the government only seeks to hold them liable as "material advisors". Seizing upon this mistaken interpretation of the government's claim, defendants argue that the liens fail because the government cannot prove that 1) BASI ever made a "tax statement" or 2) Benistar 419 directly or indirectly derived gross income for its advice or assistance in excess of the established threshold amount. Such proof is required to prove that either entity was a "material advisor".

The government clearly seeks to hold the defendants liable as organizers and/or sellers of a potentially abusive tax shelter, and the current list disclosure requirement applies to 1) any person required to maintain a list under current § 6112(a), i.e., "material advisors" with respect to a "reportable" or "listed" transaction, and 2) any person who was required to maintain a list under superceded § 6112(a), i.e., "organizers" and "sellers" of a "potentially abusive tax shelter". 26 U.S.C. § 6112(b). Because neither defendant has

offered any rebuttal to the government's evidence that they qualified as organizers and/or sellers under superceded § 6112, there is no material dispute that they did so qualify.

The Court also rejects BASI's contention that it cannot be held liable as a material advisor based upon the doctrines of claim and/or issue preclusion due to a previous ruling in a related case by United States District Judge Janet C. Hall in the District of Connecticut. See Benistar Admin Services, Inc. v. United States of America, No. 10-1320 (Telephonic Ruling, Mar. 31, 2011). In that case, BASI contested the legality of the government's tax lien and moved to enjoin its enforcement. Judge Hall denied the motion for injunctive relief and, in so doing, rejected several of the legal arguments BASI and Benistar 419 raise again here in their motions for summary judgment.

Judge Hall also noted, however, that the government had orally conceded that BASI had never made a tax statement. Based upon that concession and the record then before her, Judge Hall held that the government could not establish that BASI was subject to the list maintenance requirement between 2003 and 2006, the period during which the regulations required an entity to make a tax statement in order to be required to maintain investor lists. Nonetheless, she denied BASI's motion after concluding that BASI could be shown to qualify as an "organizer" of a "potentially abusive tax shelter" at some point between 2000

and 2003 and thus be found liable for failure to provide requested lists during that period. Ultimately, the Connecticut action was decided in the government's favor.

The holding in the Connecticut case does not somehow foreclose the government from proving, in the instant action, that BASI was subject to the list maintenance requirement between 2003 and 2006. First, the doctrine of claim and issue preclusion apply only where there has been a final judgment on the merits. *Grella v. Salem Five Cent Savings Bank*, 42 F.3d 26, 30 (1st Cir. 1994). Dicta in a ruling on a motion for a preliminary injunction hardly qualifies. Second, the government's concession was for purposes of that hearing and does not bind it in this proceeding. It will be treated as an ordinary (rather than a judicial) admission which can be contradicted by other evidence. See *Gonzalez v. Walgreens Co.*, 918 F.2d 303, 305 (1st Cir. 1990); *Fidelity & Deposit Co. of Md. v. Hudson United Bank*, 653 F.2d 766, 777 (3d Cir. 1981).

Finally, the government has offered substantial evidence to support its contention that BASI and Benistar 419 qualify as "material advisors" within the meaning of the current law. As discussed above, a taxpayer is a material advisor if he

- 1) provides any material aid, assistance or advice with respect to organizing, managing, promoting, selling, implementing, insuring or carrying out any reportable transaction and

2) directly or indirectly derives gross income for the advice or assistance in excess of an established threshold amount. The first prong requires proof that the subject taxpayer made a "tax statement", defined as:

any statement ... oral or written, that relates to a tax aspect of a transaction that causes the transaction to be a reportable transaction.

26 C.F.R. § 301.6111-3. Under the second prong,

all fees for a tax strategy or for services for advice (whether or not tax advice) or for the implementation of a reportable transaction are taken into account.

Id. All of the surrounding facts and circumstances must be scrutinized when determining whether "consideration received in connection with a reportable transaction constitutes gross income derived directly or indirectly for aid, assistance, or advice."

Id.

Here, the government has proffered deposition testimony, company agreements, and financial and promotional documents from which a jury could infer that both prongs of the definition have been satisfied, including that BASI made a tax statement and that Benistar 419 received income in excess of the threshold amount. In light of the Court's conclusion that the Plan qualified as a "listed transaction", the government here need only establish that BASI and Benistar 419 derived income in excess of the lower threshold amounts.

Nevertheless, the government's evidence and supporting

arguments are ambiguous with respect to which agreements were in fact operative at any given time, which statements were made when and what compensation was in fact rendered for material aid, assistance or advice. The government will therefore be compelled to resolve such ambiguities and prove that the respective applicable standards were met to the satisfaction of the jury.

c. Reasonable Cause

Section 6708 of Title 26 of the United States Code provides that no penalty for failure to disclose a required client list shall be imposed on a day that the taxpayer can prove reasonable cause for failure to disclose. Thus, if the failure of BASI and Benistar 419 to provide the requested lists was due to reasonable cause, the penalty assessed against them is invalid.

BASI and Benistar contend that the record demonstrates the requisite reasonable cause and thus the tax penalties are invalid. Their proof consists of 1) a letter, dated December 19, 2003, from Attorney John H. Reid, III, opining that Benistar 419 is not subject to the list maintenance requirement ("the Reid opinion letter") and 2) the inclusion of a reference to a "year/end period" of 2002 in the 2006 list requests and the 2009 lien notices.

That evidence falls woefully short of the requisite reasonable cause. First, Benistar 419 has established only that the Reid opinion letter exists. It has offered no evidence that

it actually relied on that letter, let alone that any actual reliance was reasonable under all the surrounding facts and circumstances. As the government points out, the evidence suggests instead that the defendants made a calculated decision not to provide an investor list to the IRS under any circumstances. For example, Daniel Carpenter testified that

the only thing that we have never turned over to the service and we maintain that we will never turn over to the service are the names of the participants and the names of the participating employers.

Furthermore, Wayne Bursey, an officer of Benistar 419, wrote in a letter to Plan participants in 2005 that Benistar 419 had been able to fend off "improper and illegal inquiry" from the IRS into the names of Plan participants and further vowed that it would "never surrender the names of [its] Participating Employers or Plan Participants."

Second, although BASI and Benistar 419 contend that the year/period reference indicates that the penalties arise entirely from defendants' actions in 2002, the government responds that the date is simply a placeholder for administrative purposes and refers only to the calendar year during which the investigation was opened. BASI and Benistar 419 have not shown that it was reasonable for them to interpret the request as requiring them to produce only those investor lists they were required to maintain in 2002, especially considering the fact that Daniel Carpenter is a lawyer with experience in tax law. In any event, and more

germanely, neither defendant has established that it was not required to maintain investor lists in 2002.

Thus, defendants' motions for summary judgment on the grounds of reasonable cause fail. Nonetheless, construing the record in the light most favorable to the defendants for purposes of the government's motion for partial summary judgment, the Court concludes that there is a genuine issue of material fact with respect to the reasonable reliance and/or interpretation of the government's 2006 requests as applying only to the tax year 2002. Thus, summary judgment will be withheld from either side on the issue of reasonable cause.

In summary, the Court concludes that the Plan was a listed transaction and that the defendants qualified as "organizers" and/or "sellers" within the meaning of the superceded law. There remains a genuine issue of material fact for the jury, however, with respect to whether 1) defendants qualified as "material advisors" and 2) their failure to provide lists was excusable for reasonable cause. Accordingly, the defendants' motions for summary judgment will be denied and the government's motion for partial summary judgment will be allowed, in part, and denied, in part.

4. The Remaining Arguments of BASI and Benistar 419

Finally, for the reasons discussed below, defendants' remaining arguments concerning due process and the amount of the

penalties assessed against them do not entitle them to summary judgment.

a. Penalties Assessed

BASI and Benistar 419 contend that, even if they were liable to maintain investor lists, the penalty assessed against them is excessive because any failure on their part to provide required lists prior to enactment of the 2004 Jobs Act should have been calculated based on the penalty applicable during that period. As discussed above, the current penalty is \$10,000 per day commencing 20 business days after a taxpayer's failure to deliver requested client lists whereas the former penalty was \$50 per day with a maximum penalty of \$100,000 each year.

The Court concludes that this defense fails as a matter of law and thus cannot support either defendant's motion for summary judgment. The current penalty applies where a person required to maintain a list under § 6112(a) fails to make such list available to the IRS in accordance with § 6112(b). A written request for disclosure under § 6112(b) requires any person who is required to maintain a list under § 6112(a), or who was required to maintain a list under that section "as in effect before the enactment of the American Jobs Creation Act of 2004", to make such list available for inspection. The clause "as in effect before the enactment of the American Jobs Creation Act of 2004" was specifically added in 2005, see Golf Opportunity Zone Act of

2005, Pub. L. No. 109-135, § 403(z), and was intended to clarify that

the penalty under section 6708 for failing to comply with the section 6112 list maintenance requirements applies to both (1) material advisors with respect to reportable transactions under present-law section 6112, and (2) organizers and sellers of potentially abusive tax shelters under prior-law section 6112.

JOINT COMM. ON TAXATION, "Technical Explanation of the Revenue Provisions on H.R. 4440", at 87-88 (Dec. 16, 2005). Thus, the current penalty is intended to apply to a taxpayer who fails to comply with a request for disclosure made after the enactment of the 2004 Jobs Act, regardless of whether that taxpayer was required to maintain such a list pursuant to the current or former versions of § 6112(a).

Moreover, such an interpretation does not, as defendants contend, result in an impermissible retroactive application of the penalty. The House Committee Report clearly states that "the provision imposing a penalty for failing to maintain investor lists applies to requests made after the date of enactment." H.R. REP. NO. 108-548(I), at 271-72 (2004) (emphasis added). The tax penalties were thus assessed against BASI and Benistar 419 for their failure to comply with the 2006 list request. Each entity was on notice, at least as of 2005, that the current, heightened penalties would attach to unreasonable refusals to disclose required lists upon request from the IRS and that

in no event is a failure to maintain a required list to

be considered reasonable cause for failing to make the list available to the IRS.

Id. at 272 n.273.

As United States District Judge Hall observed when rejecting the same argument in the Connecticut action,

Even if the company had elected not to create and maintain lists prior to 2004, in light of the lower statutory penalties, ... nothing on the record [suggests] that [BASI] couldn't have created and maintained the required list starting in 2004, even lists going back to 2000, once it was on notice of heightened penalties for failure to produce such a list upon request and thus avoid the penalty for failure to produce the lists in 2006.

Benistar Admin Services, Inc., supra. This Court agrees with that rationale and concludes that it was appropriate for the government to calculate the penalty assessment pursuant to the current statute.

b. Due process

Defendants contend that the government, in initiating this action, has violated its statutory obligation under 26 U.S.C. § 6330(e)(1) to suspend "levy actions" while a Collection Due Process ("CDP") hearing is pending. That statute provides that

if a [CDP] hearing is requested ... the levy actions which are the subject of the requested hearing ... shall be suspended for the period during which such hearing, and appeals therein, are pending.

Defendants fail to appreciate, however, the fact that the Tax Code provides the government with two distinct means by which to collect delinquent taxes: 1) pursuant to § 7403, it may institute

a lien-foreclosure suit in federal court and 2) pursuant to § 6331, it may collect by administrative levy. United States v. Nat'l Bank of Commerce, 472 U.S. 713, 720 (1985). "The levy is a provisional remedy and typically does not require any judicial intervention." Id. (internal quotation omitted). It is defined as including "the power of distraint and seizure by any means." 26 U.S.C. §§ 6331(b), 7701(a)(21).

Clearly, a request for a CDP hearing requires only that the government suspend levy actions, not lien-foreclosure actions in which a defendant has a full opportunity to contest the merits of the underlying assessment. Indeed, the treasury regulations promulgated under 26 U.S.C. § 6330 specifically provide that, when a CDP hearing is pending, the government "may take other non-levy collection actions such as initiating judicial proceedings to collect the tax shown on the CDP Notice" 26 C.F.R. § 301.6330-1(g)(2); see also 26 U.S.C. § 6502(a).

The Court therefore concludes that the government's action fully comports with the requirements of due process and that the defendants' due process argument fails as a matter of law.

ORDER

In accordance with the foregoing Memorandum,

- 1) Plaintiffs' motion to strike and for sanctions (Docket No. 291) is **DENIED**;
- 2) Defendants' motions to strike (Docket Nos. 349 and 356) are **DENIED**;
- 3) the motions for summary judgment with respect to Plaintiffs' First Amended Complaint filed by Benistar Admin Services, Inc. (Docket No. 276), Benistar 419 Plan Services, Inc. (Docket No. 278), Step Plan Services, Inc. (Docket No. 280) and Daniel Carpenter (Docket No. 284) are **DENIED**;
- 4) the motion for summary judgment with respect to Plaintiffs' First Amended Complaint filed by Molly Carpenter (Docket No. 282) is **ALLOWED**;
- 5) the motions for summary judgment with respect to the government's tax lien claim filed by Benistar Admin Services, Inc. (Docket No. 333), Benistar 419 Plan Services, Inc. (Docket No. 334) and the remaining defendants (Docket No. 335) are all **DENIED**; and
- 6) the government's motion for partial summary judgment against Benistar Admin Services, Inc. and Benistar 419 Plan Services, Inc. (Docket No. 332) is, with respect to the Benistar Plan's status as a listed transaction from February 28, 2000 to January 20, 2006 and the defendants' qualification as "organizers" and/or "sellers" within the meaning of the superceded law, **ALLOWED**; but is, with respect to the defendants' qualification as "material advisors" and the issue of reasonable cause, **DENIED**.

So ordered.

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

Dated February 17, 2011

MINUTE ORDER

CASE NUMBER: CV NO. 09-00065SOM-RLP

CASE NAME: United States of America Vs. Quoc Thi Hoang Nguyen, et al.

ATTYS FOR PLA:

ATTYS FOR DEFT:

INTERPRETER:

JUDGE: Susan Oki Mollway

REPORTER:

DATE: 02/17/2012

TIME:

COURT ACTION: EO: Counsel for the United States is directed to submit, no later than February 22, 2012, a letter updating the district judge in this case.

Submitted by Leslie L. Sai, Courtroom Manager

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING

FEB 17 2012

Stephan Harris, Clerk
Cheyenne

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PHOENIX FUEL CORPORATION,
THOMAS PERKINS, ANTHONY
ROMEO, JARED AZCUY, CHARLES
LITTLE, TRADEWIND SERVICES,
INC., and CHARTER AMERICA, INC.,

Defendants.

Case No. 11-CV-132-F

INITIAL PRETRIAL ORDER

On February 17, 2012, an initial pretrial conference was held in the above-entitled matter before the Honorable Nancy D. Freudenthal District Judge for the District of Wyoming. Counsel participating were:

PLAINTIFF: Rickey Watson

DEFENDANTS: John Kuker and Elizabeth Hinze appearing for Phoenix Fuel Corp. and Thomas L. Perkins. Ronald Lopez, Thomas Nicholas III, and Maurice Baumgarten appearing for Anthony Romeo, Jared Azcuy, Charles Little, and Charter America, Inc.

Jurisdiction and Venue —

The Court has jurisdiction over both the parties and the subject matter of this action, and venue is properly in the United States District Court for the District of Wyoming. Proper service of process has been accomplished on all parties, and no parties are erroneously joined in or omitted from the action.

Consent to Trial by Magistrate Judge —

The parties are all aware of the provisions of 28 U.S.C. § 636(c) and U.S.D.C.L.R. 73.1(b), and acknowledge that this case will proceed before the District Judge assigned hereto, and not before the Magistrate Judge located in Cheyenne, Wyoming. However, the parties are not precluded from consenting to trial before a Magistrate Judge anytime sixty (60) days prior to the trial date.

Claims and Defenses —

This is a civil action to reduce to judgment outstanding tax assessments of the federal corporate income tax liabilities of Phoenix Fuel Corporation (Phoenix) and to establish that Thomas Perkins, Anthony Romeo, Jared Azcuy, Charles Little, Tradewind Services, Inc. (Tradewind) and Charter America, Inc. (Charter) are individually responsible for those assessed taxes. This action arises out of the liquidation of Phoenix. Plaintiff claims that in a series of transactions in 2001 and 2002, Tradewind sold 80% of the common stock of Phoenix to Charter, a company wholly owned by Anthony Romeo. During this time period, Romeo served as Chairman of the Board of Phoenix, Jared Azcuy was the Vice-President, and Charles Little was the Chief Financial Officer. In

December 2005, Phoenix, Charter, and the related parties entered into a stock redemption agreement where Charter agreed to sell its 80% stake in the company to Robert Lyle. Defendants also approved an asset purchase agreement, used to fund the stock redemption agreement, which resulted in dissolution of Phoenix. Plaintiff claims the liquidation of Phoenix resulted in unfunded tax liabilities to the federal government.

Plaintiff presents eleven causes of action against the Defendants: (1) to reduce tax assessments against Phoenix Fuel to judgment; (2) Tradewind is liable to the United States for improper distributions received from the liquidation of Phoenix Fuel; (3) Charter is liable to the United States for improper distributions received from the liquidation of Phoenix Fuel; (4) Thomas Perkins is liable to the United States as an officer/director who voted for/assented to improper distributions of Phoenix Fuel's assets; (5) Anthony Romeo is liable to the United States as an officer/director who voted for/assented to improper distributions of Phoenix Fuel's assets; (6) Jared Azcuy is liable to the United States as an officer/director who voted for/assented to improper distributions of Phoenix Fuel's assets; (7) Charles Little is liable to the United States as an officer/director who voted for/assented to improper distributions of Phoenix Fuel's assets; (8) to set aside fraudulent conveyances under Wyo. Stat. § 34-14-105; (9) to set aside fraudulent conveyances under Wyo. Stat. § 34-14-106; (10) to set aside fraudulent conveyances under Wyo. Stat. § 34-14-107; (11) to set aside fraudulent conveyances under Wyo. Stat. § 34-14-108.

Defendants previously filed a Motion to Dismiss for Lack of Personal Jurisdiction over certain Defendants. On November 23, 2011, the Court denied Defendants' motion to dismiss and concluded that the Court had personal jurisdiction over each of the Defendants. Defendants continue to claim the Court does not have personal jurisdiction over certain Defendants.

Defendants Phoenix and Thomas Perkins generally deny Plaintiff's allegations and affirmatively allege: (1) that Plaintiff's Complaint fails to state a cause of action upon which relief may be granted; (2) Plaintiff's claims are barred by the doctrines of laches, waiver, and estoppel.

The remaining Defendants also generally deny Plaintiff's allegations and affirmatively allege: (1) the Court lacks personal jurisdiction over each of the Charter Defendants; (2) the action should be transferred to Florida or dismissed based on forum non conveniens; (3) Counts 3 and 5-7 are barred by the four year statute of limitations; (4) Counts 8-11 are barred by the four year statute of limitations; (5) Defendants reasonably relied on qualified legal and accounting experts throughout the agreement and therefore, there is no intent to hinder, delay, and/or defraud Plaintiff; (6) the individual Defendants' decisions were based on sound business judgment and to the extent any of the individuals may be found liable in their capacity as former officers and directors of Phoenix Fuel, they are protected by the Business Judgment Rule; (7) any decision to authorize the distribution of assets to Charter in connection with the Agreement was made in accordance with Wyo. Stat. § 17-16-640; (8) the individual Defendants have complied with all general standards for directors and officers as set forth in Wyo. Stat. § 17-16-830 and all other applicable statutes; (9) Plaintiff lacks

standing to assert specific claims against Charter Defendants; (10) the Complaint fails to state a claim upon which relief may be granted under Wyo. Stat. § 17-16-1407(d) because no assets of Phoenix Fuel were distributed to Charter in the course of any liquidation of Phoenix Fuel; (11) Counts 5-7 fail to state a claim upon which relief may be granted under Wyo. Stat. §§ 17-16-640, 17-16-1409, or 17-16-830 because none of those statutes render officers or directors liable to a creditor for damages that allegedly result from a violation of those statutes; (12) Counts 8-11 fail to state a claim upon which relief may be granted under Wyo. Stat. §§ 34-14-105, 34-14-106, 34-14-107 or 34-14-108 because each of those Counts lack the requisite specificity regarding the factual bases of Plaintiff's claims of fraudulent transfers in violation of Fed. R. Civ. P. 9(b); and (13) Count 9 fails to state a claim upon which relief may be granted under Wyo. Stat. § 34-104-106 because to the extent the United States ever became a creditor of Phoenix Fuel it did not become a creditor until after the alleged conveyances of Phoenix Fuel assets had already take place.

Complexity of the Case —

The Judge is of the opinion that this is non-complex.

Rule 26(f) Scheduling Conference —

The parties have complied with the requirements of Rule 26(f) of the Federal Rules of Civil Procedure.

Self-Executing Routine Discovery —

The parties have complied with self-executing routine discovery exchange as required by U.S.D.C.L.R. 26.1(c).

THE PARTIES HAVE A CONTINUING DUTY TO SUPPLEMENT OR CORRECT ALL DISCOVERY DISCLOSURES OR RESPONSES IN ACCORDANCE WITH FED. R. CIV. P. 26(a) AND U.S.D.C.L.R. 26.1(c).

Proposed Orders —

All proposed orders regarding dispositive civil motions should be submitted to Judge Freudenthal's chambers in a word processing format and emailed to wyojudgndf@wyd.uscourts.gov.

Dispositive Motions — Hearing - September 24, 2012, at 9 a.m.

Deadline July 30, 2012; Responses August 13, 2012

The deadline for the parties to file all dispositive motions and *Daubert* challenges together with briefs and affidavits in support thereof is July 30, 2012.

The parties shall file responsive briefs and affidavits on or before August 13, 2012.

If the dispositive motions are filed earlier than the above scheduled date, the responding party must respond in accordance with U.S.D.C.L.R. 7.1.

Parties submitting deposition testimony in support of their motions shall also provide to the Court via email to wyojudgndf@wyd.uscourts.gov, the e-transcript version of the deposition provided to the parties by the Court Reporter.

The dispositive motions are hereby set for oral hearing before the Honorable Nancy D. Freudenthal on the 24th day of September, 2012, at 9 a.m. in Cheyenne, Wyoming. **The parties shall strictly comply with all provision of U.S.D.C.L.R. 7.1. Counsel for the parties shall submit to the Court, together with their briefs, proposed findings of fact and conclusions of law and orders supported by the record which reflects the position of the parties to be taken at the hearing. [U.S.D.C.L.R. 7.1(b)(2)(d)].** In the event all dispositive motions have been argued and briefed before the Court prior to the above deadlines, counsel shall so advise the Clerk of Court and the hearing date will be stricken.

Expert Witness Designation —

Plaintiff Designation Deadline — June 18, 2012.

Defendant Designation Deadline — July 16, 2012.

In accordance with U.S.D.C.L.R. 26.1(g), Plaintiff shall designate expert witnesses and provide Defendant with a complete summary of the testimony of each expert by June 18, 2012. **In a personal injury lawsuit, Plaintiff's designation SHALL include the designation of all treating medical and mental health providers who may or will be called to testify at trial in part or in full as an expert witness.** In accordance with U.S.D.C.L.R. 26.1(g), Defendant shall designate expert witnesses and provide the Plaintiff with a complete summary of the testimony of each expert by July 16, 2012. These summaries **SHALL** include a comprehensive statement of the expert's

opinions and the basis for the opinions. *See Smith v. Ford Motor Company*, 626 F.2d 784 (10th Cir. 1980). This expert designation does not satisfy the obligation to provide an expert report under Federal Rule of Civil Procedure 26(a)(2)(B). Plaintiff may depose Defendant's experts after the discovery cutoff date, but must complete the depositions fourteen (14) days **PRIOR** to the final pretrial conference.

The party designating the expert witness shall set forth all special conditions or requirements which the designating party or the expert witnesses will insist upon with respect to the taking of their depositions, including the amount of compensation the expert witness will require and the rate per unit of time at which said compensation will be payable. In the event counsel is unable to obtain such information to include in the designation, the efforts to obtain the same and the inability to obtain such information shall be set forth in the designation. U.S.D.C.L.R. 26.1(g).

Discovery Cutoff Date — July 30, 2012

The discovery cutoff date is July 30, 2012. All written discovery requests shall be served upon and received by opposing counsel on or before the discovery cutoff date. All discovery depositions shall be completed by the discovery cutoff date. Trial depositions may be taken up to seven (7) days prior to the trial date.

Stipulations as to Facts — August 6, 2012

The parties shall exchange proposals for stipulations as to facts in accordance with U.S.D.C.L.R. 16.1(b) by August 6, 2012.

Final Pretrial Conference — October 29, 2012 at 9 a.m.

A final pretrial conference in this matter has been scheduled for 9 a.m. on October 29, 2012, in the Chambers of the Honorable Nancy D. Freudenthal, Cheyenne, Wyoming. Parties shall appear in person.

BEFORE THE CONFERENCE, COUNSEL FOR REPRESENTED PARTIES ALL MUST AGREE UPON, PREPARE, AND SIGN A JOINT PROPOSED FINAL ORDER PREPARED FOR JUDGE FREUDENTHAL'S SIGNATURE IN THE FORMAT PROVIDED ON THE DISTRICT COURT WEBSITE UNDER CIVIL FORMS. If you cannot locate the form, please contact Judge Freudenthal's chambers. All represented parties are jointly responsible for the preparation of the proposed Joint Final Pretrial Order, however the Court expects that Plaintiff's counsel will start the draft order and coordinate with other counsel to complete the draft. **A copy of the proposed order must be delivered directly to Judge Freudenthal's chambers (but not filed) via e-mail to wyojudgendf@wyd.uscourts.gov or by U.S. Mail at least five (5) days before the final pretrial conference.**

WITNESS AND EXHIBIT LISTS MUST BE EXCHANGED BY THE PARTIES (BUT NOT FILED) AT LEAST TEN (10) DAYS BEFORE THE FINAL PRETRIAL CONFERENCE. Exhibit lists must be attached to, and witness lists must be included as part of, the proposed Final Pretrial Order in accordance with the instructions in the form order. The parties are not required to list rebuttal witnesses or impeachment exhibits.

COPIES OF ALL EXHIBITS AS TO WHICH THERE MAY BE OBJECTIONS MUST BE BROUGHT TO THE FINAL PRETRIAL CONFERENCE. If an exhibit is not brought to the final pretrial conference and an objection to the exhibit is asserted, the exhibit may be excluded from evidence for noncompliance with this order. Exhibits must be prepared for the final pretrial conference and for trial in accordance with the following instructions:

A. Marking of Exhibits: All exhibits must be marked by the parties before trial. The plaintiff(s) shall list and mark each exhibit with numerals and the number of the case, and counsel for the defendant(s) shall mark each exhibit intended to be offered at the pretrial conference with letters and the number of the case, e.g., Civil No. _____, Plaintiff's Exhibit 1; Civil No. _____, Defendant's Exhibit A. In the event there are multiple parties, plaintiff or defendant, the surname or abbreviated names of the parties shall proceed the word "Exhibit," e.g., Defendant Jones Exhibit A, Defendant Smith Exhibit A, etc.

B. Elimination of Duplicate. The parties should compare the exhibits and eliminate duplicates. If more than one party wants to offer the same exhibit, then it should be marked with a number and listed as a joint exhibit on the exhibit list of the plaintiff(s).

C. Copies for the Court. Before trial, each party must supply four copies of all exhibits to be used at trial. The copies of exhibits should be placed in a ringed binder with a copy of the exhibit list at the front and with each exhibit tabbed. .

EXHIBIT LIST: The parties' exhibit lists are to be prepared in the following format.

Plaintiff(s) Exhibits	Objections (Cite Fed. R. Evid.)	Category A, B, C	Offered	Admit/Not Admitted (A) - (NA)*

* This column is for use by the trial judge at trial. Nothing should be entered in this column by the parties.

The following categories are to be used for objections to exhibits:

- A. **Category A.** These exhibits are admissible upon motion of any party, and will be available for use by any party at any stage of the proceedings without further proof or objection.
- B. **Category B.** These exhibits are objected to on grounds other than foundation, identification, or authenticity. This category should be used for objections such as hearsay or relevance.
- C. **Category C.** These exhibits are objected to on grounds of foundation, identification, or authenticity. This category should not be used for other grounds, such as hearsay or relevance.

ANY COUNSEL REQUIRING AUTHENTICATION OF AN EXHIBIT MUST SO NOTIFY THE OFFERING COUNSEL IN WRITING WITHIN FIVE (5) BUSINESS DAYS

AFTER THE EXHIBIT IS MADE AVAILABLE TO OPPOSING COUNSEL FOR EXAMINATION. Failure to do so is an admission of authenticity.

ANY EXHIBIT NOT LISTED ON EXHIBIT LIST IS SUBJECT TO EXCLUSION AT TRIAL. THE COURT MAY DEEM ANY OBJECTION NOT STATED ON THE EXHIBIT LIST AS WAIVED.

The parties shall identify all witnesses they will call or may call and shall further identify whether each witness will testify in person, by deposition or by video tape.

The parties shall exchange and file witness statements seven (7) days prior to the Final Pretrial Conference. Witness Statements shall be provided for expert witnesses and witnesses whose testimony involves significant technical matters, but no significant issues of credibility. Witness statements shall be prepared and used at trial in accordance with Judge Freudenthal's Procedure for Presentation of Direct Testimony by Witness statement, which is available on the Court's website under forms or by contacting Judge Freudenthal's chambers.

MOTIONS IN LIMINE OR MOTIONS RELATING TO THE EXCLUSION OF EVIDENCE SHALL BE FILED NO LATER THAN SEVEN (7) DAYS PRIOR TO THE **FINAL PRETRIAL CONFERENCE**. Responses shall be filed two (2) court days before the final pretrial conference.

Non-Jury Trial — November 13, 2012

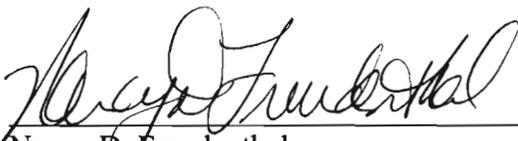
A non-jury trial is set before the Honorable Nancy D. Freudenthal for 8:30 a.m. on November 13, 2012, in Cheyenne, Wyoming, and is expected to last three (3) days. This case is stacked #1 on the civil docket. U.S.D.C.L.R. 40.1(a).

Plaintiff shall submit his Findings of Facts and Conclusions of Law at least ten (10) days prior to the commencement of trial. Defendant shall submit its Findings of Facts and Conclusions of Law five (5) days before trial. ALL FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE TO BE SUBMITTED IN ACCORDANCE WITH JUDGE FREUDENTHAL'S GUIDELINES FOR PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, WHICH ARE AVAILABLE ON THE DISTRICT COURT'S WEBSITE UNDER FORMS OR BY CONTACTING JUDGE FREUDENTHAL'S CHAMBERS.

Settlement Possibilities —

The settlement possibilities of this case are considered by the Judge to be fair.

Dated this 17 day of February, 2012.



Nancy D. Freudenthal
U.S. District Court Judge

