UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re	)	
	)	
AEM, INC.,	)	Case No. 6:08-bk-04681-KSJ
	)	Chapter 11
Debtor.	)	
	)	

ORDER GRANTING MOTION BY IRS FOR PARTIAL SUMMARY JUDGMENT AND DENYING MOTION BY DEBTOR FOR SANCTIONS, MOTIONS IN LIMINE BY IRS, AND MOTION BY DEBTOR TO BIFURCATE

This case came on for consideration on the Motion by IRS for Partial Summary Judgment (Doc. No. 251), the Motion by AEM for Sanctions against the IRS (Doc. No. 260), the Motion in Limine by IRS to exclude evidence in support of AEM's refund claim (Doc. No. 261), the Motion in Limine by IRS to exclude testimony by R.W. Cuthill and specific documentary exhibits (Doc. No. 262), and the Emergency Motion by AEM to Bifurcate Hearing on Objection to Claim No. 4 and Amend Claim Objection and File Adversary Proceeding Relating Back to Objection to Claim (Doc. No. 269). Consistent with the Memorandum Opinion, entered simultaneously, it is

ORDERED:

1. The Motion by IRS for Partial Summary Judgment (Doc. No. 251) is granted. AEM is not entitled to a refund of the taxes it claims to have improperly paid on behalf of the Non-Debtor Companies.
2. The Motion by AEM for Sanctions against the IRS (Doc. No. 260) is denied.
3. The Motion in Limine by IRS to exclude evidence in support of AEM's refund claim (Doc. No. 261) is denied.
4. The Motion in Limine by IRS to exclude testimony by R.W. Cuthill and specific documentary exhibits (Doc. No. 262) is denied.

5. The Emergency Motion by AEM to Bifurcate Hearing on Objection to Claim No. 4 and Amend Claim Objection and File Adversary Proceeding Relating Back to Objection to Claim (Doc. No. 269) is denied.

6. The parties are directed to return to mediation to discuss settlement, in light of these rulings. Mediation shall be concluded by **May 31, 2012**.

7. A pretrial conference on the remaining issues—the amount of Mirabilis' tax overpayments and the existence and amount of AEM's tax liability (IRS' Claim No. 4)—is set for **2:00 p.m. on June 13, 2012**.

DONE AND ORDERED in Orlando, Florida, on March 21, 2012.

Karen S. Jennemann cxc

KAREN S. JENNEMANN
Chief United States Bankruptcy Judge

Copies furnished to:

Debtor: Mirabilis Ventures, Inc., c/o R.W. Cuthill, Jr., 341 N. Maitland Ave. #210, Maitland, FL 32751

Debtors' Attorney: Latham Shuker Eden & Beaudine LLP, Attn. Justin Luna, 390 N. Orange Ave. Suite 600, Orlando FL 32801

Special Counsel for Debtor: Broad and Cassel, Attn. Roy Kobert, 390 N. Orange Ave., Suite 1400, Orlando, FL 32801

Attorney for USA: Scott H. Park, Assistant U.S. Attorney, ID No. USA084, 501 W. Church St., Suite 300, Orlando, FL 32805

Attorney for USA: I. Randall Gold, Assistant U.S. Attorney, 501 W. Church Street, Suite 300, Orlando, FL 32805

Attorney for USA: Valerie G. Preiss, Tax Division, U.S. Department of Justice, P.O. Box 14198, Washington, DC 20044

United States Trustee's Office: Attn: Elena Escamilla, 135 W. Central Blvd., Suite 620, Orlando, FL 32801

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AIU INSURANCE COMPANY, Plaintiff,	:	No. 3:11 CV 1873 (MRK)
v.	:	
MARIA MATTHEWS, ET AL., Defendants.	:	

CASE MANAGEMENT ORDER

The Court having received the parties' Local Rule 26(f) Report and having conferred telephonically with the parties on March 21, 2012, the following case management schedule shall apply:

1. **Joinder of parties and amendment of pleadings.** The parties will join any additional parties and file any and all amendments of pleadings no later than **May 15, 2012**.

2. **Discovery:** All discovery, including all discovery relating to expert witnesses, will be completed (not just propounded) by **September 4, 2012.**

   NOTE: All discovery issues should be resolved in good faith by counsel in accordance with their obligations to the Court under the Federal Rules of Civil Procedure and the District's Local Rules. Before filing any motion relating to discovery, the parties are required to jointly confer with the Court by telephone, 203-773-2022.

3. **Expert Discovery**: Defendant's expert reports will be served by **May 30, 2012**, and all depositions of defendant's experts will be completed by **June 29, 2012**.

4. **Damages Analysis:** A damages analysis will be provided by any party who has a claim or counterclaim for damages no later than **May 30, 2012**.

5. **Dispositive Motions:** Dispositive motions, if any, including all motions to exclude testimony of experts pursuant to Fed. R. Evid. 702-05 and the *Daubert v. Merrill Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) line of cases shall be filed by **November 30, 2012**.

6. **Trial Memorandum:** If no dispositive motions are filed, the Parties' Joint Trial Memorandum (instructions are attached) is due **December 31, 2012**. If dispositive motions are filed, the Joint Trial Memorandum is due 30 days after the Court's decision on the dispositive motion.

7. **Trial Ready Date:** If no dispositive motions are filed, the case will be considered trial ready on **January 30, 2013**. If dispositive motions are filed, the case will be considered trial ready immediately after the filing of the parties' Joint Trial Memorandum.

8. **Status Conference:** A TELEPHONIC STATUS CONFERENCE WILL BE HELD ON **AUGUST 1, 2012, at 8:30 A.M.** Plaintiff's counsel will initiate the conference call. The parties will file a joint status report (instructions attached) with the Court no later than **July 25, 2012**.

Counsel should note that it takes approximately three and a half months from the time the Court receives a joint request for referral to a magistrate judge for purposes of a settlement conference until the parties can actually meet with the magistrate judge for such settlement conference. It is the responsibility of counsel to take this into account when requesting a referral for settlement.

THE PARTIES ARE CAUTIONED THAT THE ABOVE DEADLINES ARE ORDERS OF THE COURT; THEY CAN BE MODIFIED ONLY BY THE COURT ITSELF AND NOT BY THE INFORMAL CONSENT OF THE PARTIES. WHILE THE COURT ENCOURAGES PARTIES TO ENGAGE IN SETTLEMENT NEGOTIATIONS, THE PURSUIT OF SETTLEMENT NEGOTIATIONS, AND EVEN A REFERRAL TO A MAGISTRATE JUDGE FOR PURPOSES OF A SETTLEMENT CONFERENCE, DOES NOT RELIEVE THE PARTIES OF THEIR OBLIGATION TO ADHERE TO THESE DEADLINES ABSENT A COURT ORDER TO THAT EFFECT.

NO MODIFICATIONS OF THESE DEADLINES WILL BE GRANTED ABSENT A SHOWING OF GOOD CAUSE WHICH REQUIRES A PARTICULARIZED SHOWING THAT THE PARTY SEEKING THE EXTENSION HAS ACTED WITH DUE DILIGENCE

AND THAT THE REASONS FOR THE MODIFICATION COULD NOT REASONABLY HAVE BEEN ANTICIPATED BY THE PARTIES WHEN THEY FILED THEIR PROPOSED CASE MANAGEMENT PLAN.

IT IS SO ORDERED.

/s/ Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut: March 21, 2012.

RE: **CASE NO. 3:11 CV 1873 (MRK)**

TO: **COUNSEL OF RECORD:**

On or before **July 25, 2012,**

THE PARTIES SHALL FILE WITH THE COURT [with certification copies sent to all counsel of record] A JOINT STATUS REPORT, STATING THE FOLLOWING:

(a) THE STATUS OF THE CASE, IDENTIFYING ANY PENDING OR ANTICIPATED MOTIONS, OR ANY CIRCUMSTANCES POTENTIALLY INTERFERING WITH THE PARTIES' COMPLIANCE WITH THE SCHEDULING ORDER, AS WELL AS A DETAILED STATEMENT OF ALL DISCOVERY UNDERTAKEN TO DATE, INCLUDING HOW MANY DEPOSITIONS EACH PARTY HAS TAKEN AND THE SPECIFIC DISCOVERY THAT REMAINS TO BE COMPLETED;

(b) INTEREST IN REFERRAL FOR SETTLEMENT PURPOSES TO A UNITED STATES MAGISTRATE JUDGE OR TO THE DISTRICT`S SPECIAL MASTERS PROGRAM;

(c) WHETHER THE PARTIES WILL CONSENT TO A TRIAL BEFORE A MAGISTRATE JUDGE; AND

(d) THE ESTIMATED LENGTH OF TRIAL.

NO STATUS REPORTS WILL BE ACCEPTED VIA FACSIMILE.

BY ORDER OF THE COURT
ROBERTA D. TABORA, CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOINT TRIAL MEMORANDUM INSTRUCTIONS
FOR THE HONORABLE MARK R. KRAVITZ (rev. 5/10)

The parties shall confer and shall jointly prepare and submit for the Court's approval a Joint Trial Memorandum in compliance with the District's Standing Order Regarding Trial Memoranda in Civil Cases as modified in these instructions. **Counsel shall electronically file the Joint Trial Memorandum and all attachments via CM/ECF. If exempted from electronic filing, counsel shall instead file an original of the Joint Trial Memorandum and all attachments with the Clerk of the Court. In either event, counsel shall also provide Chambers with a courtesy copy of the Joint Trial Memorandum and all attachments in hard copy.** The Joint Trial Memorandum is intended to be a jointly prepared document. Therefore, these Instructions are not satisfied by simply stapling together trial memoranda prepared separately by counsel for each party.
The Joint Trial Memorandum shall contain the following information:

(1) *TRIAL COUNSEL*: Counsel shall list the names, addresses, telephone numbers, fax numbers and e-mail addresses of the attorney(s) who will try the case. **Trial counsel must attend the Final Pretrial Conference(s) unless excused in advance by the Court.**

(2) *JURISDICTION*: Counsel shall set forth the basis for federal jurisdiction.

(3) *JURY/NON-JURY*: Counsel shall state whether the case is to be tried to a jury or to the court.

(4) *LENGTH OF TRIAL*: Counsel shall set forth a realistic estimate of trial days required based on the expected length of testimony for each witness on both direct and cross-examination.

(5) *FURTHER PROCEEDINGS*: Specify, with reasons, the necessity of any further proceedings prior to trial.

(6) *NATURE OF CASE*: Counsel for both parties shall separately state the nature of each cause of action and the relief sought. If appropriate, state the nature of any cross-claims, counterclaims and/or affirmative defenses.

(7) *TRIAL BY MAGISTRATE JUDGE*: Counsel shall indicate whether they have agreed to a trial by a Magistrate Judge and if so, file signed consent forms providing for any appeal to be heard directly by the Court of Appeals.

(8) *EVIDENCE*: **Prior to preparing and submitting the Joint Trial Memorandum, counsel are required to exchange lists of proposed witnesses, exhibits and deposition transcripts to enable counsel for each party to state in the Joint Trial Memorandum whether they object to any proposed witness, exhibit or transcript.**

(a) Witnesses: Counsel shall set forth the names and addresses of each witness to be called at trial, including a brief summary of the anticipated testimony and the expected duration of the witness's testimony. Counsel shall indicate which witnesses are likely to testify and which witnesses will be called only if the need arises. For each expert witness, set forth the opinion to be expressed, a brief summary of the basis of the opinion and a list of the materials on which the witness intends to rely. Also state the area of the witness's expertise and attach a copy of the expert's report and a curriculum vitae, if available.

Any objection to the admissibility of the testimony of any witness must be stated in this section of the Joint Trial Memorandum, along with a brief statement of the grounds and authority supporting the objection as well as a brief statement from the proponent of the witness regarding admissibility.

NOTE: Witnesses not included in this list shall not be permitted to testify at trial except with the permission of the Court and for good cause shown. Additionally, witnesses shall not be permitted to testify to matters not reasonably encompassed by the summary of their anticipated testimony contained in the Joint Trial Memorandum except with the permission of the Court and for good cause shown. All listed witnesses will be permitted to testify on the matters identified in the Joint Trial Memorandum unless there is an explicit objection stated to the witness's anticipated testimony.

(b) Exhibits: Counsel shall attach a list of all exhibits – including a brief description of their contents – to be offered at trial. The parties shall mark all exhibits numerically with exhibit tags (which will be provided by the Clerk's Office upon request) starting with Plaintiff's Exhibit "1" and Defendant's Exhibit "501." Where there are multiple plaintiffs or defendants, counsel shall coordinate exhibit identification to ensure that exhibit numbers are not duplicated. Copies of the actual exhibits shall be exchanged no later than seven (7) days prior to submission of the Joint Trial Memorandum. **Copies of all exhibits to which there may be objections must be brought to the Final Pretrial Conference.** Three (3) days before trial, counsel shall deliver to Judge Kravitz copies of all exhibits placed in two separate, different colored three-ring binders (i.e., a blue binder for the plaintiff's exhibits and a red binder for the defendant's exhibits) with a copy of the exhibit list at the front of the binders and with each exhibit separately tabbed; and shall deliver to the Courtroom Deputy the original set of exhibits, also in separate, different colored binders for each side, along with an exhibit list pursuant to Local District Civil Rule 14(b).

Any objection to the admissibility of any exhibit must be stated in this section of the Joint Trial Memorandum, along with a brief statement of the grounds and authority supporting the objection as well as a brief statement from the proponent of the exhibit regarding admissibility.

NOTE: Exhibits not listed will not be admitted at trial, except for good cause shown. All listed exhibits shall be deemed admissible unless there is an explicit objection stated to the exhibit.

(c) Deposition Testimony: Counsel shall list each witness who is expected to testify by deposition at trial due to his or her unavailability, as defined by Fed. R. Civ. P. 32(a)(4). Such list will include a designation by page references of the deposition transcript which each party proposes to read into evidence. The opposing party shall also list cross-designations. The list shall include all objections to deposition designations. A marked-up version of the deposition transcript must be submitted along with the Joint Trial Memorandum, with the designations and cross-designations clearly indicated in such a way that they can be readily distinguished (for example, the plaintiff's designations may be indicated with blue highlighting or underlining, while the defendant's cross-designations may be indicated with red highlighting or underlining). **Do not submit deposition transcripts that will only be used for another purpose, such as impeachment.**

NOTE: Objections not stated in the Joint Trial Memorandum will be deemed waived, except for good cause shown.

(9) *STIPULATIONS AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW*: Counsel for both parties shall confer in an effort to enter into a written stipulation of uncontroverted facts and into an agreed statement of the contested issues of fact and law.

(a) *Bench Trial*: Each party shall submit specific proposed findings of fact necessary to support a judgment in that party's favor, identifying each witness and/or exhibit as to each factual conclusion. Each party shall also submit proposed conclusions of law, citing the legal authority that supports each claim or defense.

Except under unusual circumstances, post-trial briefing will not be permitted. Any pre-trial memoranda which any party(ies) wish the Court to consider must be filed no later than seven (7) days prior to the date trial commences.

(b) *Jury Trial*: The stipulation of uncontroverted facts shall will be read to the jury, and no evidence shall be presented on the uncontested facts. Counsel shall prepare the stipulation as Joint Exhibit 1.

(1) *Proposed Voir Dire Questions*: Counsel shall attach a list of questions to be submitted to the jury panel as part of the Joint Trial Memoranda, with any supplements no later than 24 hours before jury selection.

(2) *Proposed Jury Instructions*: The parties shall meet and confer for the purposes of preparing and filing jury instructions. Counsel shall attach requests for jury instructions, citing relevant legal authority for each proposed instruction. Counsel are not required to submit general jury instructions which, for example, instruct the jury on its role, evidence in general, witness credibility, etc. If any party objects to another party's proposed instruction, counsel must briefly state the nature of the objection and the legal authority supporting the objection.

(3) *Proposed Verdict Form*: Counsel shall meet and confer for the purposes of preparing and filing a proposed verdict form and/or special interrogatories. Counsel shall attach proposed verdict forms and any proposed special interrogatories. If the parties are unable to agree as to the appropriateness of a proposed form, counsel for the objecting party must state the basis for the objection and provide an alternative proposal.

(4) *Brief Description of Case and Parties*: Counsel shall meet and confer and agree upon a brief description of the case, the issues and the parties that the Court can read to proposed jurors at the outset of jury selection.

(10) ANTICIPATED EVIDENTIARY PROBLEMS: Counsel shall list any evidentiary problems anticipated by any party and shall attach to the Joint Trial Memorandum motions *in limine* along with memoranda of law concerning any anticipated evidentiary problems. All memoranda in opposition to any motion *in limine* must be filed within seven (7) days of the date on which the Joint Trial Memorandum is filed and in any event no later than 3 days before the Final Pretrial Conference.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

INSTRUCTIONS REGARDING TELEPHONIC DISCOVERY CONFERENCES BEFORE HONORABLE MARK R. KRAVITZ (rev. 1/04)

The standard scheduling order that Judge Kravitz enters in cases before him provides as follows: "All discovery issues should be resolved in good faith by counsel in accordance with their obligations to the Court under the Federal Rules of Civil Procedure and the District's Local Rules. Before filing any motion relating to discovery, the parties are required to jointly confer with the Court by telephone, 203-773-2022."

Parties seeking to confer with Judge Kravitz telephonically regarding discovery disputes must comply with the following requirements:

1. Counsel for parties to discovery disputes must jointly contact Judge Kravitz's Chambers to set up a date and time for the telephonic conference. Except in extraordinary circumstances, Chambers staff will not entertain a request to schedule a telephonic conference unless counsel for all parties to the discovery dispute are on the telephone when the request is made to Chambers so that a date and time for the conference can be selected at that time.

2. Before contacting Chambers to schedule a telephonic discovery conference, counsel for parties to any discovery dispute are required by Rule 37(a)(2) of the Federal Rules of Civil Procedure and Local Rule 37(a)(2) to have conferred with one another and to have made a good faith effort to eliminate or reduce the area of controversy. All discovery issues should be resolved in good faith by counsel in accordance with their obligations to the Court under the Federal Rules of Civil Procedure and the District's Local Rules. Judge Kravitz interprets the good faith conference obligation of the Federal Rules and Local Rules to require counsel to confer either face-to-face or by telephone; exchanges of correspondence are not sufficient in and of themselves to satisfy counsel's good faith conference obligations. At the outset of the telephonic discovery conference, Judge Kravitz will require counsel for each party to the discovery dispute to certify orally that they have complied with their good faith conference obligations under the Federal Rules and Local Rules.

3. Before seeking a telephonic discovery conference, counsel for all parties to a discovery dispute must also agree upon the issues that they intend to raise with Judge Kravitz and inform Chambers of those issues at the time the telephonic conference is scheduled. If the

parties cannot in good faith agree upon the issues to be raised with Judge Kravitz, they shall so notify Chambers when they request a telephonic discovery conference.

4. If the dispute involves a written interrogatory, request for production, request for admission, deposition notice and/or subpoena (the " discovery request"), counsel for the party who served the discovery request at issue will, immediately following the telephone call requesting the conference, provide Chambers via facsimile with a copy of the particular discovery request at issue and the opposing party's written response to that particular request. Judge Kravitz does not need the entire discovery request and response but requires only the particular portions of the discovery request and response at issue. Before faxing a copy of the disputed request(s) and response(s) to Judge Kravitz, counsel for the party seeking to fax the disputed request must inform Chambers of counsel's intent to fax Judge Kravitz a copy of the disputed request.

5. Other than the request at issue, Judge Kravitz does not require, and does not want, counsel for the parties to provide him with any briefs, documents, deposition transcripts, correspondence or written argument regarding the discovery issue in dispute. If Judge Kravitz requires briefs or other papers, he will establish a briefing schedule during the telephonic discovery conference.

6. Counsel should agree in advance on which party will be responsible for instituting the telephonic discovery conference. Counsel should not contact Judge Kravitz's Chambers until counsel for all parties to the discovery dispute are on the telephone. Failure to participate in a scheduled telephonic discovery conference may result in the imposition of sanctions.

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Principal Deputy Assistant Attorney General

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UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF HAWAII

In re EVANGELINE APACIBLE-RIVERA, Debtor.	Case No. 11-01438 (Chapter 13)
	Adv. Pro. No. 11-90052
EVANGELINE APACIBLE-RIVERA, Plaintiff,	Hearing Date: March 16, 2012
	Judge: Honorable Robert J. Faris
V.	Related Docket No. 31
DEPARTMENT OF TREASURY, INTERNAL REVENUE SERVICE, Defendant.	

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The hearing on Defendant United States' Motion for Summary Judgment, filed on February 15, 2012, was held on March 16, 2012.

On March 15, 2012, Debtor filed an untimely opposition to the United States’ motion.

At the hearing on the United States’ motion, Debtor appeared pro se, and Jeremy N. Hendon, Trial Attorney, United States Department of Justice, Tax Division, appeared by telephone on behalf of the United States.

For the reasons stated in open court pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure,

IT IS HEREBY ORDERED that the United States’ Motion for Summary Judgment is GRANTED, JUDGMENT be entered in favor of the Defendant in this Adversary Proceeding, and the amended claim of the Internal Revenue Service is allowed as filed.

UNITED STATES BANKRUPTCY COURT DISTRICT OF HAWAII

/s/ Robert J. Faris
United States Bankruptcy Judge
Dated: March 21, 2012

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

UNITED STATES OF AMERICA, Plaintiff, v. RONALD R. BRICE, et al., Defendants.	)))))))))	No. 10-05062-CV-SW-DGK

ORDER

Having considered Plaintiff's Motion to Substitute Counsel (Doc. 37), it is hereby

ORDERED that Natalie Sexsmith is substituted as counsel for Plaintiff, in place of Mary Bielefeld, Martin Shoemaker and Lisa Bellamy.

/s/ Greg Kays
GREG KAYS, JUDGE
UNITED STATES DISTRICT COURT

Dated: March 21, 2012

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA, :
v. : Case No. 8:09-CV-384-T-23TGW
:
WILLIAM O'CALLAGHAN, et al., :

ORDER

THIS CAUSE came on for consideration upon the United States' Motion for Confirmation of Sale and for Order of Distribution of Sale Proceeds (Doc. 135), the defendants' opposition thereto (Doc. 137), the United States' reply to the defendants' opposition memorandum (Doc. 139), and the defendants' unauthorized "supplemental response" (Doc. 140).

The defendants oppose the United States' motion on the ground that the Eleventh Circuit Court of Appeals has reinstated their appeal, so the disposition of this case is not final (Doc. 137, ¶9, 10; Doc. 140). However, as the United States has pointed out (Doc. 139), this circumstance is not cause to deny the motion, as the district court and the Eleventh Circuit Court of Appeals have already considered, and rejected, the defendants' motions to stay this matter pending resolution of an appeal (see Docs. 129, 131). In particular, the Eleventh Circuit denied the defendants' motion for stay pending appeal because the defendants "failed to demonstrate a substantial case on the merits" (Doc. 131, p.1).

It is therefore, upon consideration

ORDERED:

1. That the United States' Motion for Confirmation of Sale and for Order of Distribution of Sale Proceeds (Doc. 135) be, and the same is hereby, **GRANTED**. Accordingly, the sale of the Subject Property, more fully described as:

> Lot 13, Block 12, Mandalay Subdivision, according to plat thereof recorded in Plat Book 14, Page 32-35 of the Public Records of Pinellas County, Florida

to Bradley Paddock for $341,000.00 is **CONFIRMED**. The IRS shall issue a deed for the Subject Property to Paddock.

2. That the Clerk of the Court shall distribute the funds held in the Court's registry related to this matter as follows:

a. To PALS (payable to the "United States Treasury") for the cost of the judicial sale to be delivered to:

Sharon Sullivan — $2,498.11
Internal Revenue Property Appraisal
and Liquidation Specialist
Internal Revenue Service
7850 SW 6th Court MS 5780
Plantation, Florida 33324

b. Pinellas County Tax Collector (payable to "Pinellas County") along with a copy of the 2001 Real Estate Tax (attached to the Declaration of Sharon Sullivan as Exhibit 3) to be delivered to:

Diane Nelson $6,762.94
Pinellas County Tax Collector
Post Office Box 4005
Seminole, Florida 33775-4005

c. To the United States (payable to "United States Treasury") to be applied to the income tax liabilities of William O'Callaghan for 1981, 1982, and 1983 to be delivered to:

William E. Thompson $331,738.95
Department of Justice, Tax Division
Office of Review
Post Office Box 310
Ben Franklin Station
Washington, D.C. 20044

d. The Clerk of the Court shall distribute any interest that has accrued on such funds to the United States Treasury as set forth in paragraph "c" above.

DONE AND ORDERED at Tampa, Florida, this 21st day of March, 2012.

Thomas G. Wilson

THOMAS G. WILSON
UNITED STATES MAGISTRATE JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - DETROIT

In Re:	)	
	)	Case no. 10-69798
JACQUELINE ANN CORAZZA,	)	Chapter 7
	)	Hon. Walter Shapero
Debtor.	)	

THIRD ORDER CONTINUING SHOW CAUSE HEARING REGARDING ATTEMPTED COLLECTION OF 2004 INCOME TAX ASSESSMENT

This matter is before the Court on the stipulation filed on March 21, 2012, between the creditor United States of America (IRS) and the debtor Jacqueline A. Corazza, to continue the show cause hearing regarding the IRS's attempted collection of an assessment of 2004 income tax, previously scheduled for March 22, 2012, at 9:30 a.m. That stipulation is GRANTED, and the show cause hearing is hereby continued to **Thursday, May 24, 2012, at 9:30 a.m.**, at the Theodore Levin Courthouse, Courtroom 1042, 231 W. Lafayette Street, Detroit, Michigan 48226.

SO ORDERED.

Signed on March 21, 2012

/s/ Walter Shapero
Walter Shapero
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re: Case No. 8-11-bk-23529-CPM

Gregory Albert Darst Chapter 13

Debtor.
____________________/

ORDER ON TRUSTEE'S MOTION TO DISMISS CASE
FOR FAILURE TO COMPLY WITH FIRST DAY ORDER OF ONE OR
MORE DEFICIENCIES AND RESCHEDULING §341 MEETING OF CREDITORS
(EFFECTIVE DATE OF THIS ORDER IS 14 DAYS FROM DATE OF ENTRY)

THIS CASE came on for a hearing on March 7, 2012 upon the Trustee's Motion to Dismiss Case for Failure to Comply with First Day Order of One or More Deficiencies and rescheduling §341 Meeting of Creditors (Docket No. 28). The Court having reviewed the Motion and based upon the facts set forth above, it is

ORDERED AND ADJUDGED as follows:

1. The Trustee's Motion to Dismiss Case for Failure to Comply with First Day Order of One or More Deficiencies and rescheduling §341 Meeting of Creditors (Docket No. 28) is hereby **GRANTED**.

2. The Trustee shall deduct from all monies disbursed and to be returned to the Debtor his normal percentage thereof as necessary costs and expenses from sums collected pursuant to 11 U.S.C. 1326(a)(2)[2], together with any fee, charge or amount required under 28 U.S.C. Chapter 123.

3. The Trustee shall deduct from all monies disbursed and to be returned to the Debtor his normal percentage thereof as necessary costs and expenses from sums

collected pursuant to 11 U.S.C. 1326(a)(2)[2], together with any fee, charge or amount required under 28 U.S.C. section 123.

4. The Trustee shall disburse all Trust Fund monies held as adequate protection and for Administrative expenses, as provided for in this Court's Order Establishing Duties of Trustee and Debtor etc., to those secured creditors provided for in the Debtor's proposed Chapter 13 Plan ("Plan") and to administrative expense holders.

a. The Trustee shall disburse the Trust Fund monies to the secured creditors, either in the total amount due or, if Trust Fund monies prove insufficient, pro rata. These monies shall be paid pursuant to the creditor's proof of claim or, if a claim was not previously filed, pursuant to the terms of the Plan.

b. Pursuant to the Order Establishing Duties of the Debtor, if the Debtor's attorney seeks no more in compensation than the Courts Presumptively Reasonableness Fee and additional fees as approved in the Court's Order Establishing Presumptively Reasonable Debtor's Attorney Fee in Chapter 13 Cases, Misc. Pr. 07-02, August 31, 2007, then such fee is hereby deemed to be an allowed administrative expense for purposes of entitlement to Trust Funds. The compensation to Debtor's counsel shall be paid in accordance with the Trust Funds portion of the chapter 13 plan. If a plan payment is insufficient to pay 100 percent of the plan's monthly allocation to the secured creditors and administrative expense creditors, the payment shall be prorated among all creditors having an entitlement to Trust Funds. The Debtor is hereby granted leave to file an objection to the allowance of these attorney fees within fourteen (14) days from the date of this order, if deemed advisable.

5. The Trustee shall return to the Debtor any monies not previously disbursed and file his final report, upon which filing he will be discharged of his duties as Trustee.

6. The effective date of this Order is delayed fourteen (14) days to permit the Debtor to convert this case to another Chapter under the Bankruptcy Code if the Debtor wishes to do so.

7. If the Debtor chooses to file a Motion for Reconsideration of this Order Dismissing case and/or if this case is re-converted back to a Chapter 13, the Debtor shall file an Amended Plan within fourteen (14) days after any Order Reinstating this case or fourteen (14) days after re-converting this case back to a Chapter 13, serving a copy upon all creditors and the Trustee.

8. All pending hearings are canceled, except for any Order to Show Cause hearings the Court has set.

DONE and ORDERED in Chambers at Tampa, Florida on March 21, 2012.

Catherine McEwen

Catherine Peek McEwen
United States Bankruptcy Judge

Copies to be provided by CM/ECF service

JMW/KMB/sn C13T 03/12/12

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. MARK SIMONS; JOYCE W. SIMONS SIMONS FAMILY TRUST, JOYCE W. SIMONS Trustee; SIMONS ENTERPRISES TRUST, JOYCE W. SIMONS and MARK SIMONS Trustees; GREENPOINT MORTGAGE COMPANY; J.P. MORGAN CHASE & CO., as Successor in Interest to BANK ONE, UTAH, N.A.; J. BARRES JENKINS; and NORMA C. JENKINS, Defendants.	Case No. 2:06-CV-00750-CW-SA ORDER OF CONFIRMATION OF SALE AND DISTRIBUTION OF PROCEEDS

On August 30, 2011, the Court entered an Order of Judicial Sale (Docket No. 209) in this case. The Order directed the Internal Revenue Service to sell property of the Judgment debtors Mark and Joyce Simons and report the sale to the Court. The Order permitted the sale of the property commonly known as 185 West Center Street ("Parcel 1") and 105 West Center Street ("Parcel 2"), Nephi, Utah, and is more particularly described as follows:

> Parcel 1:
> The North 122 feet of the West 172 feet of Lot 3, Block 27, Plat "A" of the Nephi Townsite Survey. Juab County, Utah.
>
> Parcel 2:
> Beginning at the Northeast corner of lot 4, Block 27, Plat "A" of the Nephi Townsite Survey, thence South 70 feet along the East line of said Block, thence West 152 feet, thence South 144.5 feet to the South line of Lot 4, thence West 62.5 feet to the Southwest corner of Lot 4, thence South 135.96 feet to the North bank of Salt Creek, thence Northwesterly down the North bank of Salt Creek 238.66 feet to the West line of Lot 2 of said Block 27, thence North 231 feet to Northwest corner of Lot 3 of said Block 27, thence East 429 feet to the place of beginning. Juab County, Utah.

The United States has reported, and the Court so finds, that the sale was publicized in accordance with 28 U.S.C. § 2001 and properly conducted. For four weeks prior to January 19, 2012, a newspaper of general circulation in Juab County published notice of the sale. (Shadday Decl., Exs. A-D).

On January 19, 2012, at 185 and 105 West Center Street, Nephi, Utah, the United States offered for sale at public auction to the highest bidder the property described in the Notice of Sale. Eleven bidders registered for the sale of Parcel 1 and twelve bidders registered for the sale of Parcel 2. The successful bidders made payment to the IRS, which deposited in the registry of the Court a total of $146,000.00 with respect to Parcel 1 and $84,000.00 with respect to Parcel 2. The United States seeks an Order confirming the sale and directing the Clerk to distribute the sale proceeds.

In accordance with the foregoing, and for good cause shown, it is

ORDERED that the sale on January 19, 2012, of the real property commonly known as 185 and 105 West Center Street, Nephi, Utah was properly conducted. The sale is hereby confirmed. It is further

ORDERED that the Internal Revenue Service is authorized to execute and deliver to the purchaser a Certificate of Sale and Deed conveying the real property commonly known as 185 and 105 West Center Street, Nephi, Utah to the purchaser or to their assignee(s). It is further

ORDERED that, on delivery of the Certificate of Sale and Deed, all interests in, liens against, or claims to the subject property that are held or asserted in this action by the plaintiff or any of the defendants are discharged. On delivery of the Certificate of Sale and Deed, the real property commonly known as 185 West Center Street, Nephi, Utah and 105 West Center Street, Nephi, Utah shall be free and clear of the interests of defendants Mark Simons, Joyce Simons, J. Barres Jenkins, Norma Jenkins, Simons Family Trust, Simons Enterprises Trust, Bank One, Utah and Greenpoint Mortgage Company. It is further

ORDERED that possession of the property sold shall be yielded to the purchasers upon the production of a copy of the Certificate of Sale and Deed; and if there is a refusal to so yield, a Writ of Assistance may, without further notice, be issued by the Clerk of this Court to compel delivery of the property to the purchaser. It is further

ORDERED that the Clerk shall distribute the funds on deposit in this case as follows:

a. First, by check made payable to the "Internal Revenue Service" in the amount of $2,900.24 for costs of sale, including a memo line denoting "Simons - cost of sale," mailed to:

Darlene Shadday
Internal Revenue Service
4041 N Central Ave M/S 4210
Phoenix, AZ 85012-3330

b. Second, by check made payable to the "Juab County, Utah" in the amount of $4,977.22 for the unpaid property taxes associated with the property located at 105 West Center Street, Nephi Utah, including a memo line denoting "105 West Center Street, Nephi - property tax," mailed to:

Juab County Treasurer
DeEtte Worthington
160 North Main
Nephi, Utah 84648

c. Third, by check made payable to the "Juab County, Utah" in the amount of $1,318.45 for the unpaid property taxes associated with the property located at 185 West Center Street, Nephi Utah, including a memo line denoting "185 West Center Street, Nephi - property tax," mailed to:

Juab County Treasurer
DeEtte Worthington
160 North Main
Nephi, Utah 84648

d. Fourth, the entire remaining balance, without reduction for registry fees, for application to the judgment debt in this case, by check made payable to the "United States Treasury," including a memo line denoting "Mark Simons - judgment" mailed to:

Richard R. Ward
Department of Justice, Tax Division
P.O. Box 683
Ben Franklin Station
Washington, D.C. 20044

IT IS SO ORDERED.

Dated: March 20, 2012.

BY THE COURT:

TED STEWART
United States District Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re MIRABILIS VENTURES, INC., Debtor.	Case No. 6:08-bk-04327-KSJ Chapter 11
In re AEM, INC., Debtor.	Case No. 6:08-bk-04681-KSJ Chapter 11
AEM, INC., and MIRABILIS VENTURES, INC. Plaintiffs, vs. UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, Defendant.	Adv. Proc. 6:11-ap-00087-KSJ

MEMORANDUM OPINION

These cases have long and tortured histories of disagreement between the United States of America, Internal Revenue Service (IRS) and related debtors Mirabilis Ventures, Inc. ("Mirabilis") and AEM, Inc. (AEM).[1] In resolving the IRS' claim in the Mirabilis bankruptcy case, this Court determined Mirabilis overpaid taxes to the IRS. Though the amount of Mirabilis' overpayment has not been determined by the Court, the IRS concedes it is in excess of $1.1 million.[2]

[1] The Court detailed much of this history in its Initial Findings of Fact and Conclusions of Law. Case No. 8-bk-4327, Doc. No. 658.
[2] Case No. 8-bk-4327, Doc. No. 658, at 26; Doc. No. 660. Amended Claim No. 4, filed by the IRS in the AEM case, sets the amount of overpayments at $1,122,848.29. The IRS maintains it is entitled to offset this amount against AEM's tax liabilities.

Mirabilis is not yet entitled to a refund of its tax overpayment, however, because whether related debtor AEM owes the IRS employment taxes is still in dispute.[3] The IRS contends AEM owes $3,195,661.83.[4] AEM contends it not only does not owe any employment taxes but is entitled to a refund of approximately $24 million, the amount AEM "improperly" paid on behalf of three other companies: Presidion Solutions VI, Inc., Presidion Solutions VII, Inc., and National MedStaff, Inc. ("Non-Debtor Companies").[5] If it is determined AEM owes taxes, the Court then will consider whether the IRS may apply Mirabilis' overpayments to AEM's outstanding tax liability.[6] The Court now must address several preliminary motions before holding a needed evidentiary hearing to resolve the remaining factual questions regarding AEM's tax liability (IRS' Claim No. 4) and Mirabilis' tax overpayments.

In the AEM case, the IRS moved for summary judgment on AEM's $24 million refund request.[7] AEM moved for sanctions against the IRS.[8] The IRS made two motions in limine regarding evidence at trial.[9] AEM lastly made an emergency motion for bifurcation of the trial on its objection to Claim No. 4 and refund request and for leave to file an adversary proceeding relating back to the date it filed its objection to claim.[10]

Debtors then filed the contemplated adversary proceeding against the IRS on May 20, 2011. The complaint restates AEM's objection to claim and refund request and asserts fraudulent transfer causes of action pursuant to both federal and state law on behalf of both AEM

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[3] This issue is presented by the IRS' Claim No. 4 and AEM's Objection to Claim No. 4. Case No. 8-bk-4681, Doc. No. 162.
[4] Case No. 08-bk-04681, IRS Claim No. 4.
[5] Case No. 08-bk-04681, Doc. No. 162. AEM originally sought more than $25 million from the IRS, but it has revised its request to slightly less than $24 million. Adversary Proceeding No. 11-ap-87, Doc. No. 1, ¶ 54 (stating amount of refund due as $23,981,442.14).
[6] Case No. 8-bk-4327, Doc. No. 658 at 26-27. In an effort to obtain Court approval for a setoff, the IRS filed a Motion for Relief from Stay. Case No. 8-bk-4327, Doc. No. 660. That motion cannot be resolved until the question of AEM's tax liability is determined. The Court holds the motion for relief in abeyance until a party asks for a further hearing on the motion.
[7] Case No. 8-bk-4681, Doc. No. 251. AEM's contention that it overpaid taxes was presented for the first time in AEM's Objection to Claim No. 4 of the IRS. Doc. No. 162. AEM's official refund request was made via filing of amended Form 941s for first and second quarters 2007, in December 2009.
[8] Case No. 8-bk-4681, Doc. No. 260.
[9] Case No. 8-bk-4681, Doc. Nos. 261, 262.
[10] Case No. 8-bk-4681, Doc. No. 269.

and Mirabilis.[11] The IRS moved to dismiss the complaint with prejudice, on the grounds the fraudulent transfer causes of action are barred by the statute of limitations and the remaining counts are duplicative of the issues already being litigated in the contested matter arising from IRS' Claim No. 4 in the AEM bankruptcy case, which was originally set for trial on April 22, 2011.[12]

Background

AEM is a wholly-owned subsidiary of Mirabilis. Mirabilis and its numerous subsidiaries, including AEM, were controlled by Frank L. Amodeo who used the companies to perpetrate one of the largest payroll-processing frauds in U.S. history. Amodeo personally stole millions of dollars in federal income and Social Security withholding taxes from the companies and their clients rather than paying those monies to the IRS. Amodeo exercised control over AEM's bank accounts and, as a part of his fraud scheme, directed transfers of funds through those accounts.

Amodeo became aware he and his companies were under investigation for tax crimes in late 2006. Subsequently, the drama of debtors' disputes with the IRS unfolded in two venues: a criminal prosecution in United States District Court and bankruptcy cases in this Court. On April 25, 2008, the U.S. Attorney instituted *in rem* civil forfeiture proceedings in the United States District Court for the Middle District of Florida against certain properties owned by Amodeo and Mirabilis.[13] In late May and early June 2008, Mirabilis and AEM filed for relief under Chapter 11 of the Bankruptcy Code.[14] At that time, R. W. Cuthill, an experienced receiver and liquidation trustee, was installed as President of Mirabilis to oversee debtors' liquidation.

On June 13, 2008, the IRS filed Claim No. 2 in the Mirabilis case, asserting Mirabilis had outstanding corporate tax liability of $438,173.48.

[11] AP No. 11-ap-87, Doc. No. 1.
[12] AP No. 11-ap-87, Doc. No. 14.
[13] Case No. 6:08-cv-00670-ACC-KRS, Doc. No. 1.
[14] Mirabilis filed bankruptcy on May 27, 2008; AEM filed on June 5, 2008. All references to the Bankruptcy Code are to Title 11 of the United States Code.

On July 10, 2008, the IRS filed Claim No. 4 in the AEM bankruptcy case, asserting AEM had Form 941 payroll tax liability for the second quarter of 2007 in the amount of $3,195,661.83 (composed of a priority unsecured claim for $2,492,059.53 and a general unsecured claim of $703,602.30, including interest). The IRS later amended this claim after the claims bar date. Amended Claim No. 4 is also for $3,195,661.83 but recharacterizes the debt: claiming $1,122,848.29 as debt secured by monies the IRS is holding (as a result of Mirabilis tax overpayments) and $2,072,813.54 as priority unsecured debt.

On August 6, 2008, Amodeo was indicted for conspiracy, failure to remit payroll taxes, wire fraud and obstruction of an agency investigation. That same month, the U.S. Attorney moved to stay the debtors' bankruptcy cases, pending resolution of the ongoing criminal proceedings against Amodeo.

On September 23, 2008, Amodeo pleaded guilty to his crimes.[15] As a part of his plea agreement, Amodeo admitted the assets of Mirabilis and AEM were proceeds of his fraud, and he forfeited them.

On October 30, 2008, AEM and Mirabilis were indicted for various tax crimes, including conspiracy and wire fraud. Although the debtors initially pleaded not guilty in the criminal proceedings, Cuthill began negotiations with the U.S. Attorney's office to change their pleas to nolo contendere.[16] The Office of the U.S. Attorney would not consent to nolo contendere pleas and pushed for trial.

In November 2008, the debtors and the U.S. Attorney reached a settlement in the bankruptcy case. Pursuant to the terms of the settlement, debtors' bankruptcies would move

[15] Amodeo currently is serving a twenty-two-year sentence in federal prison.

[16] "Nolo contendere" means "I do not contest it." "Throughout its history, . . . the plea of nolo contendere has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency." *North Carolina v. Alford*, 400 U.S. 25, 36 n.8, 91 S. Ct. 160, 167 n.8 (1970).

forward, and the IRS would receive an allowed general unsecured claim of $200 million for the government's civil forfeiture claims.[17] The criminal cases against AEM and Mirabilis continued.

On October 9, 2009, AEM objected to IRS' Claim No. 4 and stated it had overpaid taxes by "improperly" paying withholding taxes for not only itself but also for the three Non-Debtor Companies.[18] In December 2009, AEM filed amended tax returns for first and second quarters 2007, asserting overpayment of taxes and entitlement to a refund of approximately $25 million.

On May 19, 2010, AEM and the IRS agreed to try AEM's objection to the IRS' $3 million claim and AEM's request for a $25 million refund in the same proceeding.[19]

Two days later, on May 21, 2010, Mirabilis and AEM filed a motion with the U.S. District Court, Judge John Antoon II, seeking the court's approval of their nolo contendere pleas. The companies' motion was based on their assertions that Cuthill lacked the personal knowledge of criminal acts that would be necessary for him to enter guilty pleas for the corporations and that guilty pleas would undercut the debtors' recovery on professional liability claims they were pursuing against those who helped devise and orchestrate the criminal scheme. The debtors' motion stated the pursuit of these claims was in the public interest because "[t]he majority of the remaining assets in the Defendant-Debtors bankruptcy estates are in the form of professional malpractice claims" and "the taxpayers are the real majority creditors" in the bankruptcy cases.[20] The motion made no mention of AEM's claim for a tax refund.

In June 2010, after considering the parties' briefs and hearing oral argument, Judge Antoon granted AEM and Mirabilis' motion to enter nolo contendere pleas.[21] Cuthill entered the

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[17] Case No. 8-bk-4327, Doc. No. 101 at 8.
[18] Case No. 8-bk-4681, Doc. No. 162.
[19] Case No. 8-bk-4327, Doc. No. 594 at 8-10. At a status conference on February 25, 2011, counsel for AEM acknowledged: (1) the agreement to try both disputes in one proceeding, and (2) the fact that, although AEM could have filed a fraudulent transfer action, it had elected not to do so because it felt all the disputed issues could be resolved in the context of its claim objection. Case No. 8-bk-4681, Doc. No. 247.
[20] *U.S. v. AEM, Inc., et al.*, Case No. 6:08-cr-231-JA-KRS, Doc. No. 139, at 9-10.
[21] *Id.*, Doc. No. 149.

pleas on behalf of the corporations. As punishment for their crimes, the corporations received a $200 million forfeiture judgment.[22]

Also in June 2010, the IRS amended Claim No. 2 in the Mirabilis case to claim $0.00. The IRS conceded Mirabilis owed no taxes and, in fact, had overpaid the IRS. After the criminal case was resolved, this Court issued Initial Findings of Fact and Conclusions of Law resolving certain questions of Mirabilis' tax liability.[23] The Court concluded Mirabilis had overpaid the IRS; but the specific amount of the overpayment was not determined. Also, the question of whether Mirabilis was due a refund could not be decided until the existence and amount of AEM's tax liability was determined.

The Court set the final evidentiary hearing on AEM's Objection to Claim No. 4, including AEM's refund request, for April 22, 2011. The IRS advised the Court it did not believe it would call any witnesses as the AEM matter could be resolved as a matter of law; AEM advised the Court it intended to call only two, possibly three, witnesses: Cuthill, Kirtus Bocox (the accountant who prepared AEM's amended tax returns in 2009), and possibly a representative of the IRS.[24]

At the end of March 2011, the IRS filed a motion for partial summary judgment pertaining only to AEM's refund request.[25]

The next month brought a flood of filings. AEM filed a motion for sanctions against the IRS.[26] The IRS filed two evidentiary motions in limine[27] and a motion for relief from stay.[28] And, four days before the final evidentiary hearing, on April 18, 2011, AEM filed an emergency

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[22] This is the same $200 million that the debtors and United States had agreed would exist as an allowed general unsecured claim in the debtors' bankruptcies. *See supra* at 5-6.
[23] Case No. 8-bk-4327, Doc. No. 658.
[24] Case No. 8-bk-4681, Doc. No. 247. AEM's responses to interrogatories also identified Cuthill and Bocox as the only people it believed to have knowledge of the facts relevant to the issues presented by the IRS' Claim No. 4 and AEM's refund request. Case No. 8-bk-4681, Doc. No. 251, Ex. F.
[25] Case No. 8-bk-4681, Doc. No. 251.
[26] Case No. 8-bk-4681, Doc. No. 260.
[27] Case No. 8-bk-4681, Doc. Nos. 261, 262.
[28] Case No. 8-bk-4327, Doc. No. 660.

motion to bifurcate the hearing on the claim objection, amend its claim objection, and file an adversary proceeding relating back to October 9, 2009 (the date AEM filed its Objection to Claim).[29]

On April 22, 2011, the Court continued the final evidentiary hearing originally set for the same day, reopened discovery, and ordered the parties to file all pleadings related in any way to the issues raised in Claim No. 4 and the Objection to Claim by May 20, 2011. The Court also ordered the parties to mediate their disputes.[30]

On May 20, 2011, debtors filed an adversary proceeding against the IRS. The complaint objects to Claim No. 4 in the AEM bankruptcy; seeks a determination of AEM's tax liability for 2007; and asserts payments AEM and Mirabilis made to the IRS were fraudulent transfers.[31] The IRS moved to dismiss the complaint.[32]

Court-ordered mediation did not resolve the parties' disputes. This memorandum opinion addresses the pending motions.

<u>The IRS' Motion for Partial Summary Judgment on the Claim Objection is Granted</u>

Claim No. 4 filed by the IRS and debtor AEM's Objection to Claim present two issues: (1) does AEM owe the IRS Form 941 taxes for second quarter 2007? and (2) is AEM owed a refund of approximately $24 million by the IRS for overpayment of Form 941 taxes in 2007? The IRS has moved for summary judgment on the second issue only — whether AEM is owed a refund.

AEM's reason for requesting the refund is that, in 2007, it paid first and second quarter 2007 Form 941 taxes for the Non-Debtor Companies. AEM did not own these entities, contends it was not obligated to pay taxes on their behalf, and wants the money paid on their behalf returned.

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[29] Case No. 8-bk-4681, Doc. No. 269.
[30] Case No. 8-bk-4681, Doc. No. 286.
[31] AP No. 11-ap-87, Doc. No. 1.
[32] AP No. 11-ap-87, Doc. No. 14.

Under Federal Rule of Civil Procedure 56, made applicable by Federal Rule of Bankruptcy Procedure 7056, a court may grant summary judgment where "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."[33] The moving party has the burden of establishing the right to summary judgment.[34] "When a motion for summary judgment has been made properly, the nonmoving party may not rely solely on the pleadings, but . . . must show that there are specific facts demonstrating that there is a genuine issue for trial."[35] Conclusory allegations by either party, without specific supporting facts, have no probative value.[36]

In determining entitlement to summary judgment, "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts."[37] "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial."[38] A material factual dispute precludes summary judgment.[39]

The facts material to this Court's decision regarding AEM's entitlement to a refund are not in dispute:

- In 2007, AEM filed Form 941 tax returns for first and second quarter 2007 that included the combined employment tax liabilities of AEM and the three Non-Debtor Companies—Presidion Solutions VI, Inc., Presidion Solutions, VII, Inc., and National MedStaff.[40]

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[33] Fed. R. Civ. P. 56.
[34] *Fitzpatrick v. Schlitz (In re Schlitz)*, 97 B.R. 671, 672 (Bankr. N.D. Ga. 1986).
[35] *Brown v. Crawford*, 906 F.2d 667, 670 (11th Cir. 1990).
[36] *Evers v. General Motors Corp.* 770 F.2d 984, 986 (11th Cir. 1985).
[37] *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 1776 (2007).
[38] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986).
[39] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986).
[40] The IRS refers to these returns as "consolidated" returns. AEM argues that the filing of a "consolidated" Form 941 return is improper, and the IRS concedes there is no statutory authority for a "consolidated" Form 941 tax return. Whether such a filing is proper, however, does not change the undisputed historical fact: AEM filed one return for each of the first and second quarters of 2007 and included on each of those returns the employment taxes owed by AEM and the Non-Debtor Companies.

- "In 2006 and 2007, all four companies deposited their total payrolls into a bank account, maintained at Bank of America, in the name of AEM d/b/a Mirabilis HR."[41]
- These deposits included funds for payroll taxes for all four companies.[42]
- The IRS was paid Form 941 taxes for the first two quarters of 2007 from the same Bank of America account in AEM's name, on behalf of: (1) AEM, (2) Presidion Solutions VI, Inc., (3) Presidion Solutions VII, Inc., and (4) National MedStaff, Inc.
- The IRS filed Claim No. 4 in AEM's bankruptcy case, asserting AEM has Form 941 tax liability for second quarter 2007 of over $3 million.
- On October 9, 2009, AEM objected to Claim No. 4 and stated it had overpaid taxes because it had improperly paid 941 tax liability of the Non-Debtor Companies.
- In December 2009, AEM filed amended Forms 941 for the first and second quarter of 2007, on its own behalf only, seeking a refund of more than $25 million, on the basis it had inadvertently included income and payroll tax liabilities of the Non-Debtor Companies on its original Form 941s and paid tax deposits for those other entities out of AEM's bank account.

These undisputed facts support summary judgment for the IRS. AEM is not entitled to a refund because the monies that were paid to the IRS on behalf of the Non-Debtor Companies are not AEM's property to recover.[43]

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[41] AEM Response to Interrogatory No. 1, United States' First Set of Interrogatories. Case No. 8-bk-4681, Doc. No. 251, Ex. F.

[42] Case No. 8-bk-4681, Doc. No. 275 at 18.

[43] The IRS makes several other arguments in support of its motion. The IRS' arguments that application of the doctrines of judicial estoppel, voluntary payment, and variance require summary judgment in its favor are preserved. However, because the discussion below disposes of AEM's refund claim in its entirety, the Court does not address those other arguments in this opinion.

AEM contends the tax payments made to the IRS in 2007 on behalf of the Non-Debtor Companies are AEM's property for the sole reason the payments were made from a bank account in AEM's name. AEM provides no other basis for its contention that it owned those monies. But, it is undisputed that the customers of AEM **and the Non-Debtor Companies** directly deposited funds into the same account. It is also undisputed that **the deposited funds were the four companies' total payrolls and included funds for payroll taxes due from each of the four companies**.[44] The funds were used to pay all four entities' payroll taxes for first and second quarter 2007.

AEM and the IRS dispute whether the funds in the AEM account were segregated by company. AEM contends they were rendered untraceable to any particular client or any of the four companies by virtue of their commingling and dissipation. The IRS contends AEM maintained detailed records segregating the finances of the four companies who deposited funds into the AEM account. This factual dispute is irrelevant, however, as commingling of funds would not transform the Non-Debtor Companies' money, later paid to the IRS as payroll taxes due from those companies, into AEM's property. AEM's repeated assertion that the transformation occurred does not make it so.[45]

Florida law applies to determine AEM's property right in the monies; Florida law is clear that depositing money in the account of another does not necessarily transfer ownership of that money to the account owner.[46] The identity of the real owner of the money is a factual determination.[47] Here, the undisputed facts—in 2006 and 2007, customers of AEM and the Non-Debtor Companies directly deposited funds into the AEM account at Bank of America; the deposited funds were the companies' total payrolls and included funds for payroll taxes due from

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[44] Case No. 8-bk-04681, Doc. No. 275 at 18.

[45] AEM provides no legal authority for this assertion. Its brief cites only the deposition testimony of Mr. Cuthill in support of the proposition. *See* Case No. 8-bk-4681, Doc. No. 275 at 18.

[46] *See Ginsberg v. Goldstein*, 404 So.2d 1098 (Fla. 3d DCA 1981); *James v. Commercial Bank at Apopka*, 310 So. 2d 399 (Fla. 4th DCA 1975).

[47] *See James*, 310 So.2d at 399.

each of the four companies; and the funds were used to pay the four entities' payroll taxes for first and second quarter 2007—demonstrate the monies that were eventually paid to the IRS continued to belong to each of the Non-Debtor Companies after they were deposited in the AEM account. The undisputed facts also demonstrate the Non-Debtor Companies intended that taxes would be paid from those monies. Most importantly, the undisputed facts do not support the conclusion that the Non-Debtor Companies intended to transfer ownership of the monies they owed in payroll taxes to AEM. Absolutely nothing in the record supports this untenable conclusion.

Allowing AEM a refund of the payroll tax payments made to the IRS on behalf of the Non-Debtor Companies would be inequitable. The deposits were the Non-Debtor Companies' entire payrolls, **including monies owed for payroll taxes**. The Non-Debtor Companies' first and second quarter 2007 payroll taxes were paid with those monies, and the IRS credited each company for the payments. If AEM were to receive a refund of those monies, it would be receiving an unjustified windfall of $24 million. The Non-Debtor Companies then would owe the IRS for first and second quarter 2007 payroll taxes, even though the money to pay those taxes was collected and paid by AEM in 2007.

What AEM is asking this Court to do is to give it $24 million at the expense of the Non-Debtor Companies and their innocent customers, on whose behalf and with whose money it paid payroll tax liabilities to the IRS. AEM is not entitled to a refund of the almost $24 million in taxes it claims to have improperly paid on behalf of the Non-Debtor Companies. AEM had no right to the monies in 2007, and AEM has no right to the monies today. The IRS' motion for partial summary judgment on AEM's Objection to Claim No. 4 is GRANTED.

AEM's Motion for Sanctions is Denied

AEM moves this Court for sanctions against the IRS for filing and continuing to prosecute its Amended Claim No. 4.[48] The motion, filed in April 2011, argues the IRS has no evidence to substantiate a claim against AEM for 2007 payroll taxes and that the IRS "intentionally dragged out the litigation of the AEM IRS Claim Objection."[49] The motion argues the IRS' claim was made in bad faith because it: (1) was based solely upon an invalid, unsigned tax return, and (2) the IRS knew the payments AEM made to the IRS in 2007 were more than sufficient to offset AEM's tax liability. AEM appeals to the Court to act, pursuant to its inherent authority and § 105 of the Bankruptcy Code, to award sanctions against the IRS in the amount of AEM's attorneys' fees in responding to Claim No. 4.

AEM's motion cites no evidence to support its contentions. Neither does AEM provide any legal authority for its arguments that the IRS' claim is facially invalid because it relies on unsigned returns and that AEM is due a refund because it used its own monies to pay taxes on behalf of the Non-Debtor Companies.

Most importantly, the IRS' claim for tax liability is a colorable one. The IRS based its claim on tax assessments created from filed returns, as evidenced by the Certificates of Assessments and Payments attached to the IRS' motion for partial summary judgment (notably, filed prior to AEM's motion seeking sanctions).[50] And, the IRS' position—that AEM has tax liability because it underpaid in 2007 and is not entitled to credit for the payments made on behalf of the Non-Debtor Companies—is far from frivolous. Indeed, the IRS' arguments have resulted in partial summary judgment against AEM on its refund claim, and the Court soon will

[48] Case No. 8-bk-4681, Doc. No. 260 at 4.
[49] *Id.*
[50] Case No. 8-bk-4681, Doc. No. 251, Ex. D. Mooting the legal question of whether signed tax returns are required to be presented to demonstrate taxpayer liability, the IRS located and produced AEM's second quarter 2007 tax return, signed by Frank Amodeo, shortly after the motion for sanctions was filed. The IRS does not seek payment for first quarter 2007 payroll taxes from AEM.

resolve the question of AEM's remaining tax liability, if any. AEM's Motion for Sanctions is DENIED.

The IRS' Motions in Limine are Denied

The IRS filed two motions in limine in anticipation of trial. Both motions seek rulings excluding evidence.

The first motion[51] seeks to exclude all evidence supporting any ground for AEM's refund request other than that set forth in AEM's amended tax returns (filed in December 2009). Because summary judgment has been granted for the IRS on AEM's refund claim, there will be no trial of the refund request. This motion is denied as moot.

The IRS' second motion in limine[52] seeks to exclude the testimony of R. W. Cuthill, the current president and sole employee of AEM. It also seeks to exclude AEM's exhibits 30-32, 36-62, 67, 72, and 73. The motion is made pursuant to Fed. R. Evid. 602, which requires a percipient witness to have personal knowledge of the matters to which he testifies, and Fed. R. Evid. 803(6), which requires authentication by a qualified witness for a business record to be excepted from the rule against hearsay.

The record is insufficient for the Court to make evidentiary rulings at this time; the scope of Cuthill's testimony is undetermined, and the evidentiary purpose of the exhibits identified in the motion is not yet clear. If and when Cuthill's testimony is offered, the Court will rule on all contemporaneous objections to his testimony. The Court will rule on objections to documentary exhibits at the time they are moved into evidence. The Court also denies this motion in limine.

[51] Case No. 8-bk-4681, Doc. No. 261.
[52] Case No. 8-bk-4681, Doc. No. 262.

AEM's Emergency Motion to Bifurcate the Hearing and for
Leave to File an Adversary Proceeding Relating Back to the Claim Objection is Denied

On April 18, 2011, four days before the scheduled trial on the IRS' Claim No. 4 and AEM's Objection to Claim, AEM made an emergency motion. AEM sought bifurcation of the single evidentiary hearing into two: one to try AEM's liability for the tax debt (IRS' Claim No. 4) and another to try AEM's $24 million refund claim. AEM also sought permission to file a fraudulent transfer adversary proceeding against the IRS as an additional means of recovering the $24 million it contends it is owed by the IRS. AEM implicitly acknowledged a fraudulent transfer action was untimely but argued it would relate back to the filing of the Objection to Claim on October 9, 2009.

The IRS' Claim No. 4 was filed over two years before this emergency motion; AEM's Objection to Claim, which included its contention that AEM had overpaid taxes, was filed eighteen months before the emergency motion. Almost a year before seeking bifurcation, on May 19, 2010, AEM and the IRS agreed to try AEM's objection to the IRS' $3 million claim and AEM's request for a refund in the same proceeding.[53] And, at a status conference on February 25, 2011, two months before the trial date, counsel for AEM again acknowledged the parties' agreement to try both disputes in one proceeding and stated that, although AEM could have filed a fraudulent transfer action, it had elected not to do so because it felt all the disputed issues could be resolved in the context of its claim objection.[54]

AEM's belatedly filed emergency motion appears to be a reaction to the legal positions taken by the IRS in its motion for summary judgment and motions in limine; yet, AEM provides no explanation why the IRS' motions create the necessity for bifurcation of the hearing or filing of a fraudulent transfer adversary proceeding. AEM pursued its refund claim based **solely** on an overpayment theory from the time it filed its claim objection in October 2009. In open court,

[53] Case No. 8-bk-4327, Doc. No. 594 at 8-10.
[54] Case No. 8-bk-4681, Doc. No. 247.

AEM explicitly agreed to try the refund claim in the same proceeding as its objection to the IRS' Claim No. 4. Until February 2011, AEM did not use the phrase "fraudulent transfer" in reference to its claim objection or refund request, in writing or at a hearing; and, even on February 25, 2011, when the subject was discussed for the first time, AEM's counsel acknowledged AEM had chosen **not** to pursue a fraudulent transfer action.

AEM's motion is denied. First, there is nothing left to bifurcate. In granting the IRS' motion for partial summary judgment, the Court has determined AEM is not entitled to a refund because AEM had no right to the monies paid to the IRS on behalf of the Non-Debtor Companies. Second, AEM cannot wait until the eve of trial to rescind its agreement to proceed only on its overpayment theory. Both the IRS and the Court relied on AEM's statement that all disputes could be resolved with the claim objection. Until four days before the trial, AEM never expressed a desire to pursue a fraudulent transfer theory of recovery; indeed, it affirmatively disavowed such a desire. As a result, discovery was concluded; a trial date was set. It is simply too late for AEM to change its legal theory. AEM's emergency motion to bifurcate the hearing and for leave to file an adversary proceeding relating back to the date it filed its objection to claim is DENIED.

The IRS' Motion to Dismiss the Adversary Complaint is Granted

On May 20, 2011, AEM filed its ten-count adversary proceeding complaint against the IRS.[55] Mirabilis is also a plaintiff. Count I of the complaint restates AEM's objection to the IRS' Claim No. 4. Count II seeks a determination of AEM's tax liability as $0.00 and seeks refund of $23.9 million in overpayments by AEM. The remaining eight counts are actual and constructive fraudulent transfer claims alleged pursuant to §§ 544, 548 and 550 and the Florida Uniform Fraudulent Transfer Act (FUFTA). Counts III and IV seek return of $23.9 million in alleged actually fraudulent transfers of AEM money to IRS; Counts VII and VIII seek to avoid

[55] AP No. 11-ap-87, Doc. No. 1.

the transfer of the same $23.9 million and additional monies AEM contends were constructively fraudulent transfers by AEM to the IRS. Counts V, VI, IX, and X seek to avoid transfers of Mirabilis funds as actually and constructively fraudulent transfers.

The IRS moves to dismiss the entire complaint on two grounds. First, the IRS argues each of the fraudulent transfer actions (Counts III through X, inclusive) is barred by the statute of limitations in § 546(a).[56] AEM filed its petition on June 5, 2008, and the statute of limitations ran as to its fraudulent transfer claims on June 5, 2010. Second, the IRS argues Counts I and II are duplicative of the litigation regarding Claim No. 4 in AEM's bankruptcy case and are not proper stand-alone causes of action.

AEM and Mirabilis do not dispute that § 546(a) is the governing statute of limitations or that the limitations period provided by the statute elapsed almost a year before they filed the fraudulent transfer adversary proceeding. Instead, plaintiffs make three arguments why the statute of limitations should not bar their fraudulent transfer claims: (1) the complaint relates back to the objection to the IRS' Claim No. 4 that AEM filed in October 2009; (2) equitable tolling bars the application of the statute of limitations; and (3) the IRS waived the statute of limitations. The Court finds no merit in plaintiffs' arguments.

First, AEM's untimely complaint cannot relate back to AEM's Objection to Claim filed in October 2009 for two reasons: (1) the claim objection did not put the IRS or the Court on notice that either Mirabilis or AEM intended to bring any action alleging either entity

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[56] Section 546(a) states:

> An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of--
> (1) the later of--
> (A) 2 years after the entry of the order for relief; or
> (B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
> (2) the time the case is closed or dismissed.

fraudulently transferred monies to the IRS; [57] and (2) the complaint alleges facts that are new and distinct from those in the claim objection.

"The critical issue in Rule 15[(b)] determinations is whether the original [pleading] gave notice to the defendant of the claim now being asserted."[58] AEM's Objection to Claim No. 4 did not put the IRS or the Court on notice that it or Mirabilis intended to pursue a fraudulent transfer action. The claim objection states, in pertinent part:

> 8. First, the IRS has miscalculated, and AEM has overpaid, its withholding taxes. The IRS improperly submitted its proof of claim based on, and AEM improperly paid withholding taxes on, the estimated taxes for four distinct and separate companies: (1) AEM, Inc.; (2) Presidion Solutions VI, Inc.; (3) Presidion Solutions VII, Inc.; and (4) National MedStaff, Inc. However, the IRS and AEM should only have included AEM, Inc. when calculating the amount of withholding taxes AEM was required to pay to IRS.
>
> 9. Using the correct calculations, as reflected by the attached copy of consolidating spreadsheets, AEM has already paid its due withholding taxes and thus does not owe any withholding taxes to IRS. In fact, based on AEM's overpayment of the taxes, AEM still retains a credit balance. As such, the IRS' claim must be disallowed in its entirety. True and correct copies of the spreadsheets evidencing payments made and the proper calculations of AEM's withholdings are attached hereto as composite Exhibit "A."[59]

The claim objection states only that AEM objects to the IRS' claim on the basis AEM improperly paid taxes for companies other than itself and, therefore, overpaid the IRS. It says nothing at all about: (1) Mirabilis (including any monies paid by Mirabilis or out of Mirabilis bank accounts); or (2) any fraud, actual or constructive. The claim objection does not even

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[57] AEM's counsel stated as much when he said, in May 2010, "I think [counsel for the IRS] is combining the request for refund with the claim objection. . . . this is just an objection to their 3 million dollar claim. If she wants to combine that with the trial to give us 26 million if we win, I'm happy to do that, but I don't think that's what's teed up . . . ." Case No. 8-bk-4327, Doc. No 594 at 8-9. Notably, the discussion ended with the parties and the Court agreeing to try "the whole thing in one swoop." *Id.* at 10. No statement was made about any fraudulent transfer causes of action by AEM. Neither was there any discussion of any action to recover any monies on behalf of Mirabilis.

[58] *Moore v. Baker*, 989 F.2d 1129, 1131 (11th Cir. 1993) (citing *Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America*, 438 F.2d 1286, 1299-1300 (5th Cir. 1971), cert. denied, 404 U.S. 1047, 92 S. Ct. 701 (1972)). Rule 15 is made applicable to adversary proceedings by Fed. R. Bankr. P. 7015.

[59] Case No. 8-bk-4681, Doc. No. 162.

indicate AEM seeks a refund from the IRS.[60] For this reason alone, the fraudulent transfer counts of the complaint cannot relate back to the filing of the claim objection in October 2009.[61]

The complaint's fraudulent transfer counts cannot relate back to the claim objection for a second reason: the complaint alleges facts that are new and distinct from those in the claim objection. "When new or distinct conduct, transactions, or occurrences are alleged as grounds for recovery, there is no relation back, and recovery under the [new] complaint is barred by limitations if it was untimely filed."[62] The complaint alleges fraudulent transfers of Mirabilis' money; these are entirely different monies and transactions than the overpayments referenced in the claim objection (all AEM funds). This is also true with regard to the complaint's allegations that AEM fraudulently transferred funds in addition to the $24 million in overpayments AEM pursued through its claim objection and subsequent refund request. And, with respect to all the transfers alleged in the complaint (including those that are referred to as overpayments in the claim objection), the complaint relies on new allegations of conduct and circumstances that were not even hinted at in the claim objection. These new allegations include: that Amodeo made the transfers to the IRS; that Amodeo lacked authority to transfer the funds to the IRS; that the monies were transferred for the benefit of the IRS; that the monies were transferred with actual intent to hinder, delay or defraud plaintiffs' creditors; and that plaintiffs were insolvent at the time of the transfers to the IRS.

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[60] Indeed, at the confirmation hearing, a week after the objection to claim was filed, Mr. Cuthill stated that a decision had not been made yet as to whether AEM would, in fact, be seeking a refund from the IRS. Case No. 8-bk-4327, Doc. No. 596 at 45.

[61] Plaintiffs' argument that the IRS should have known plaintiffs intended to assert fraudulent transfer causes of action based on subsequent events in the case is irrelevant. The legally significant question is whether **the pleading to which plaintiffs seek relation back** (here, the objection to claim) provides notice to the IRS of plaintiffs' fraudulent transfer claims. *See* Fed. R. Civ. P. 15(c)(1). Even if relevant to the relation back analysis, the Court finds the events identified by plaintiffs did not put the IRS (or this Court) on notice plaintiffs intended to pursue fraudulent transfer causes of action. Indeed, as stated previously, in February 2011, less than two months before trial was scheduled on all matters related to Claim No. 4 and AEM's objection thereto, AEM acknowledged that it had affirmatively decided **not** to pursue a fraudulent transfer case.

At the same status conference, AEM identified Cuthill, the accountant who prepared AEM's amended tax returns, and an IRS representative as its only witnesses. The fact that this witness list is inadequate to present evidence on each element of a fraudulent transfer cause of action is further indication that AEM did not provide notice of any intent to present a fraudulent transfer case.

[62] *Moore*, 989 F. 2d at 1131 (citing *Holmes v. Greyhound Lines, Inc.*, 757 F.2d 1563, 1566 (5th Cir. 1985)).

Second, no basis for equitable tolling of the statute of limitations exists. This is not the typical equitable tolling case where plaintiffs were ignorant of their fraud causes of action until after the statute ran; indeed, they do not argue that they were.[63] Instead, plaintiffs argue "extraordinary circumstances beyond [their] control made it impossible to file the claims on time."[64] There is no factual basis for the Court to reach that conclusion. Plaintiffs have been managed by an experienced receiver and represented by skilled and experienced bankruptcy counsel throughout their bankruptcies. The ongoing litigation over the IRS' Claim No. 4 and AEM's objection thereto did not, in any way "prevent[] enforcement of the [fraudulent transfer] remedy by action."[65] Mr. Cuthill was not limited by any stay, injunction, or other legal impediment to the filing of a fraudulent transfer action. Moreover, nothing the IRS did prevented plaintiffs from asserting their fraudulent transfer claims before the statute of limitations ran. AEM simply changed its mind to file a fraudulent transfer adversary proceeding after the applicable statute of limitations expired.

Third, the IRS never waived the statute of limitations defense. The statements plaintiffs cite in their response to the motion to dismiss do not evidence the "intentional relinquishment of a known right" necessary to effect a waiver.[66] The IRS never expressed any waiver of any defense to plaintiffs' claims. Indeed, the IRS never knew the claims existed; as late as February 2011, AEM itself stated it was not pursuing fraudulent transfer claims.

The two-year statute of limitations in § 546(a)(1)(A) applies to plaintiffs' fraudulent transfer causes of action. The newly raised fraudulent transfer counts, Counts III-IX, are time barred and are dismissed with prejudice.

Counts I and II of the complaint also are dismissed for a different reason. Count I is an amended objection by AEM to Claim No. 4; it reasserts the original overpayment grounds stated

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[63] AP No. 11-ap-87, Doc. No. 19 at 11.
[64] *Id.* (citing *In re M & L Business Machines, Inc.*, 153 B.R. 308, 311 (D. Co. 1993)).
[65] *In re M & L Business Machines, Inc.*, 153 B.R. at 311 (citations omitted).
[66] *Dade County v. Rohr Indus., Inc.*, 826 F.2d 983, 990 (11th Cir. 1987).

in the Objection to Claim and adds a new objection that the IRS' claim must be disallowed pursuant to § 502(d) unless and until the IRS refunds the fraudulent transfers alleged in the now dismissed Counts III-IX of the complaint. Count II seeks determination of AEM's tax liability on the overpayment, based entirely on grounds previously stated in AEM's objection to claim. To the extent Counts I and II rely on the same theory as the objection to claim pending in AEM's main case, they are duplicative and unnecessary. The objection properly initiated a contested matter within the AEM bankruptcy case, and litigation of that contested matter will resolve those issues fully. To the extent Count I asserts an amended claim objection based on the new theory that transfers of AEM and Mirabilis funds were fraudulent, the untimely pleading is disallowed for the reasons discussed above.

In conclusion, the court simultaneously will issue separate orders consistent with this Memorandum Opinion as follows:

1. The IRS' motion for partial summary judgment on AEM's Objection to Claim No. 4[67] is GRANTED. AEM is not entitled to a refund of the taxes it claims to have improperly paid on behalf of the Non-Debtor Companies.
2. AEM's motion for sanctions against the IRS[68] is DENIED.
3. The IRS' motion in limine to exclude evidence in support of AEM's refund claim[69] is DENIED as moot.
4. The IRS' motion in limine to exclude testimony by R.W. Cuthill and specific documentary exhibits[70] is DENIED without prejudice to the IRS' ability to make objections at trial, on a contemporaneous basis with the evidentiary offerings.

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[67] Case No. 8-bk-4681, Doc. No. 251.
[68] Case No. 8-bk-4681, Doc. No. 260.
[69] Case No. 8-bk-4681, Doc. No. 261.
[70] Case No. 8-bk-4681, Doc. No. 262.

5. AEM's emergency motion to bifurcate the trial on its objection to Claim No. 4 and refund request and for leave to file an adversary proceeding relating back to the date it filed its Objection to Claim [71] is DENIED.

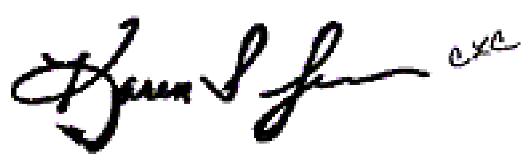
6. The IRS' motion to dismiss the adversary complaint in 11-ap-87[72] is GRANTED. The complaint is DISMISSED WITH PREJUDICE.

7. The IRS' Motion for Relief from Stay[73] is ABATED pending the request of any party to set a hearing on the motion.

The parties are directed to return to mediation to further discuss settlement, in light of these rulings. Mediation shall be concluded by **May 31, 2012**.

A non-evidentiary pretrial conference on the two remaining issues—the amount of Mirabilis' tax overpayments and the existence and amount of AEM's tax liability (IRS' Claim No. 4)—is set for **2:00 p.m. on June 13, 2012**.

DONE AND ORDERED in Orlando, Florida, on March 21, 2012.



KAREN S. JENNEMANN
Chief United States Bankruptcy Judge

[71] Case No. 8-bk-4681, Doc. No. 269.
[72] AP No. 11-ap-87, Doc. No. 14.
[73] Case No. 8-bk-4327, Doc. No. 660.

Copies furnished to:

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United States Trustee's Office: Attn: Elena Escamilla, 135 W. Central Blvd., Suite 620, Orlando, FL 32801

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ELKHORN VALLEY BANK & TRUST, Plaintiff,	)	4:11CV3201
v.	)	
UNITED STATES OF AMERICA, Defendant.	)	ORDER OF DISMISSAL

A Stipulation for Dismissal, ECF No. 17, has been filed by counsel of record and states that "[t]he parties stipulate that this case be dismissed with prejudice, the parties to bear their respective costs, including any possible attorney fees or other expenses of litigation."

IT IS ORDERED that this case is dismissed with prejudice, each party to bear its respective costs, including any possible attorney fees or other expenses of litigation.

Dated March 21, 2012.

BY THE COURT

s/ Warren K. Urbom
United States Senior District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Sharona A. Grunspan,	**)**	**CASE NO. 10 CV 2581**
	)	
Plaintiff,	**)**	**JUDGE PATRICIA A. GAUGHAN**
	)	
Vs.	**)**	
	)	
United States of America,	**)**	**Memorandum of Opinion and Order**
	)	
Defendant.	**)**	

Introduction

This matter is before the Court upon plaintiff's Motion for Summary Judgment (Doc. 19) and United States of America's Motion for Summary Judgment (Doc. 33). For the following reasons, plaintiff's motion is DENIED and defendant's motion is GRANTED.

Facts

Plaintiff Sharona A. Grunspan filed this Complaint for Refund of Taxes against the United States of America and the Commissioner of Internal Revenue[1]. An Amended Complaint

[1] Defendant states in its Answer that the Commissioner of Internal Revenue is not a proper party herein. The Court hereby dismisses this party as improperly named.

was filed which alleges that on September 15, 2003, the Internal Revenue Service (IRS) assessed the 26 U.S.C. § 6672 Responsible Party 100% penalty against plaintiff for the second quarter of 2002 in the amount of $128,995.83. On four dates in 2009, plaintiff paid refundable amounts toward the penalties in the total amount of $1,126.65. A refund claim for the latter amount was disallowed by the IRS. Plaintiff alleges that she is not a responsible party, and seeks judgment providing her a refund in the amount of $1,126.65 and for the abatement of any penalty.[2]

The following facts are taken from the evidence submitted by the parties. Plaintiff has a Bachelor of Science degree in accounting. She became a certified public accountant in 1978, but has been on inactive status since around 1992. During the time in question, plaintiff understood that a corporation withholds a certain amount of income and Social Security taxes from the wages of its employees with each payroll and holds those moneys in trust until due to be deposited with the IRS. (pltf. depo.)[3]

In 1983, plaintiff, who had been married previously, married Willie Grunspan who is now deceased. At the time, plaintiff was a single mother who was "very thankful" to find a man who would marry her with a child. (*Id.*)

See Blachy v. Butcher, 221 F.3d 896 (6^{th} Cir. 2000)(recognizing that the IRS is not a proper party), *Render v. IRS*, 389 F.Supp.2d 808 (E.D.Mich. 2005) (The United States is the proper party, not the IRS.)

2 Defendant states in a footnote in its reply brief, "There is more at stake in this case than the $1,126.65 of payments against the $128,995.83 assessment relating to Victory Park for the second quarter of 2002. ... Plaintiff filed administrative refund claims for the balance she paid for that assessment, and for two other quarterly assessments relating to Victory Park, totaling over $125,000. (Doc. 35 at fn 12) The Court is only concerned with the Complaint filed herein.

3 Plaintiff's deposition was taken on two dates and, consequently, consists of two volumes.

Plaintiff worked in the accounting field through 1991. Before plaintiff met him, Mr. Grunspan "was running nursing homes for many years." Plaintiff "was just an accountant ... [and] knew nothing from running nursing homes." She worked for accounting firms and "did bookkeeping and accounting." In 1993, plaintiff and her husband purchased a nursing home, and renamed it Beachwood Nursing Home. Plaintiff "guesses" she was the controller, finance director. (*Id.*)

Beginning in 1995, Mr. Grunspan acquired land and started planning a new nursing home facility which opened in 1998 as Emerald Ridge. Mr. Grunspan "was the wheeler and dealer, and [plaintiff] was the pencil pusher," doing whatever her husband required of her. In 2000, Mr. Grunspan invested with others in nursing homes, but plaintiff had no involvement in these businesses. (*Id.*)

In 2000, plaintiff's husband approached her with a "done deal" to invest in a nursing home, Victory Park[4], with Hugh Clark and Brian Marrie. Plaintiff was "very much against it,"but gave in as "I would just give in to things. He wanted to do it. I let him do it. I was single for 11 years... and didn't want to be left on the street." While Mr. Grunspan was never physically abusive towards plaintiff, he "had a very bad temper" which showed when he "threw plates around" and was disrespectful of plaintiff in front of others. When plaintiff told Mr. Grunspan that she would not sign the Victory Park papers, he threw plaintiff's clothes in their backyard and put his clothes in the car and drove to a hotel. Plaintiff drove to the hotel, returned

4 In addition to the nursing home, the Grunspans also acquired the assisted living care business referred to as Victoria Retirement Community, Inc. As the issue herein involves only plaintiff's liability concerning Victory Park, the discussion herein addresses only Victory Park.

Mr. Grunspan's clothes to the house, and called her attorney asking him to "get us back together because I don't want to be alone again." After that, plaintiff signed the papers to acquire Victory Park. The Grunspans each owned 26% of the business, and Clark and Marrie each owned 24%. Plaintiff was named treasurer of Victory Park. Plaintiff testified that she was an officer "by name only." She does not know whether she was a director. (*Id.*)

Plaintiff points to the testimony of Lynda Fanara, whom she characterizes as the Grunspans's housekeeper. Defendant shows, however, that Fanara's testimony is that she was a receptionist at the Beachwood Nursing Home and an assistant to plaintiff. She would visit the Grunspans's house to accomplish personal errands and tasks for plaintiff. According to Fanara, plaintiff was "always in tears" because Mr. Grunspan "stressed her out" about the businesses, and he "was always, always, always yelling and screaming at her. It would totally embarrass her." Mr. Grunspan "would never listen" to plaintiff. (Fanara depo.)

During 2000 through January 2002, Clark and Marrie handled the day-to-day operations of the nursing home. In late 2001, Mr. Grunspan received Victory Park's 2000 income tax return which showed a "phenomenal loss." This prompted him to request financial records from Clark and Marrie and to direct plaintiff to write letters to them which he dictated. Plaintiff and her husband visited Victory Park "to see what was going on," and plaintiff examined the books and records in November and December 2001. It was learned that Clark and Marrie were only using the company funds to pay management fees and to pay personal expenses of family members. In November or December 2001, plaintiff and her husband learned that Victory Park had not paid its withholding taxes. Through her review of the records, plaintiff learned in November 2001 that Victory Park had unpaid withholding taxes in the amount of $165,000 for the first three quarters of 2001. She presented this to her husband, but there was "nothing she could do" because she "just did the paperwork." "They were running the show. I did nothing." (pltf. depo.)

Beginning in the early part of 2002, plaintiff and her husband attempted to "wrangle control" from Clark and Marrie. In January 2002, Clark and Marrie were removed as authorized signators on the checking account, and only plaintiff and her husband could sign checks for Victory Park during the second and third quarters of 2002. According to plaintiff, however, Mr. Grunspan retained control of all the funds and she wrote checks at his direction. Ultimately, the Victory Park lease was terminated and Clark and Marrie were forced out. Plaintiff told her husband that "you can't play with the IRS." But when plaintiff suggested paying the outstanding withholding taxes from another fund, Mr. Grunspan "basically said I'm going to kill you if you pay those taxes from anywhere else. He says, don't you dare fund anything that those guys took away from us." According to plaintiff, her husband threatened her but she "didn't believe him." (*Id.*)

Fanara testified that her "observation" was that Mr. Grunspan "made the final decision," "he was the boss,"he made all the determinations about which bills to pay for all the nursing homes, and plaintiff would never make a decision without going through him. But, Fanara acknowledged that "I know nothing about Victory Park." She first learned of Victory Park's withholding tax problem when plaintiff asked her in 2011 to be a witness in the case. (Fanara depo.)

In December 2001 or January 2002, Greg Taylor, who administered Victory Park's payroll system, was informed by his supervisor that he would thereafter report to plaintiff and her husband rather than Marrie and Clark. According to Taylor, Clark and Marrie were no longer working at Victory Park by February 2002 and plaintiff had informed him that their access to funds had been terminated. Around the end of 2001 or early 2002, Taylor met with plaintiff at which time they discussed unpaid employment taxes and notices sent by the IRS. Plaintiff instructed Taylor to make deposits of Victory Park's receipts into the bank account and to send the deposit slips to plaintiff by Airborne Express to her home. Taylor sent tax information to plaintiff in this manner as well. Plaintiff instructed Taylor to take on some increased responsibilities that had previously been done by Marrie. He was in frequent contact with plaintiff. During the second quarter of 2002, Taylor and plaintiff discussed payments of particular bills. Taylor received IRS notices showing overdue withholding taxes during the second quarter of 2002 and he forwarded them to plaintiff. Taylor had some conversations with plaintiff regarding these notices. She indicated that the withholding taxes "would be taken care of." Taylor considered plaintiff to be his "overall supervisor." (Taylor depo.)

Victory Park maintained computerized bookkeeping records with QuickBooks. According to Taylor, plaintiff made changes on the QuickBooks system during 2002. (*Id.*) Plaintiff acknowledged that she worked with Taylor to "close the books and bring things up-to-date." Work on payroll tax reports reinforced that payroll taxes had not been paid. (pltf. depo.)

Victory Park was required to make withholding tax deposits with the IRS within a few days of issuing payroll checks. Taylor testified that during 2001 he provided plaintiff with the accounting and bookkeeping records so she could review them. He transmitted payroll records to her every two weeks. (Taylor depo.) Plaintiff testified that she did not know whether there were payroll tax reports in the packages Taylor was sending her. (pltf. depo.)

Taylor also sent Victory Park's bank statements to plaintiff during the first half of 2002 so that she could review and reconcile them which would show the lack of withholding tax deposits.[5] (Taylor depo.) Plaintiff had the ability, but did not do the bank reconciliations until July or August 2002. (pltf. depo.)

Elder Life Services, which was owned and operated by the Grunspans, performed some bookkeeping and accounting services for Victory Park. It prepared checks that Mr. Grunspan would sign or, occasionally, plaintiff would sign if Mr. Grunspan was unavailable or told her to sign them. (*Id.*)

Plaintiff signed 38 checks for Victory Park during the period from March 29, 2002 and July 12, 2002. (pltf. depo.; Alan Shapiro decl.) While plaintiff was in Florida from March through May 2002, she had blank checks that she used to pay bills for Victory Park. (pltf. depo.)

Victory Park was closed and stopped operating on June 30, 2002. (*Id.*) On September 15, 2003, the IRS made an assessment against plaintiff for unpaid withholding taxes of Victory Park for the second quarter of 2002.

This matter is before the Court upon the parties' cross-motions for summary judgment. [6]

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5 Taylor was terminated in late 2003 as an employee of entities that were successors to Victory Park in a telephone conference call participated in by plaintiff.

6 Defendant filed a combined brief in opposition to plaintiff's motion and in support of its own motion. The Court previously ordered that the brief be no more than 20 pages in length. As filed, the brief consisted of 18 pages of "undisputed" and "disputed" facts, and two pages of argument. Defendant's separately filed Motion for Summary Judgment contains no further argument. The Court notes that this combined brief is a "refiling" of defendant's previous combined brief in opposition to plaintiff's motion and in support of its own motion. In the earlier filing, defendant presented a 20 page discussion and argument, and attempted to submit a separate 33 page appendix which included the statement of facts. The Court did not permit the filing of the appendix. Because the second combined brief is a refiling of the first, the Court cannot

Standard of Review

Summary Judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (citing Fed. R. Civ. P. 56(c)); *see also LaPointe v. UAW, Local 600*, 8 F.3d 376, 378 (6th Cir. 1993). The burden of showing the absence of any such genuine issues of material facts rests with the moving party:

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits," if any, which it believes demonstrates the absence of a genuine issue of material fact.

Celotex, 477 U.S. at 323 (citing Fed. R. Civ. P. 56(c)). A fact is "material only if its resolution will affect the outcome of the lawsuit." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

Once the moving party has satisfied its burden of proof, the burden then shifts to the nonmoving party. Federal Rule of Civil Procedure 56(e) provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of [his] pleadings, but [his response], by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is genuine issue for trial. If he does not respond, summary judgment, if appropriate, shall be entered against him.

The court must afford all reasonable inferences and construe the evidence in the light most favorable to the nonmoving party. *Cox v. Kentucky Dep't. of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995) (citation omitted); *see also United States v. Hodges X-Ray, Inc.*, 759 F.2d 557, 562 (6th

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consider the arguments set forth in the first. Defendant subsequently filed a reply brief which contains a full discussion of the law.

Cir. 1985). However, the nonmoving party may not simply rely on its pleading, but must "produce evidence that results in a conflict of material fact to be solved by a jury." *Cox*, 53 F.3d at 150.

Summary judgment should be granted if a party who bears the burden of proof at trial does not establish an essential element of his case. *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 941 (6th Cir. 1995) (citing *Celotex*, 477 U.S. at 322). Accordingly, "the mere existence of a scintilla of evidence in support of plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995) (quoting *Anderson*, 477 U.S. at 52 (1986)). Moreover, if the evidence is "merely colorable" and not "significantly probative," the court may decide the legal issue and grant summary judgment. *Anderson*, 477 U.S. at 249-50 (citation omitted).

<u>Discussion</u>

(1) Plaintiff's Motion for Summary Judgment

Plaintiff argues that she is neither a responsible party nor willfully failed to pay the trust fund taxes. For the following reasons, the Court disagrees that plaintiff has demonstrated such.

The Sixth Circuit has explained:

> Section 3102 of the Internal Revenue Code of 1954 requires an employer to withhold social security taxes imposed on its employees and section 3402(a) of the Code requires the withholding of income taxes from wages of employees. Withholding taxes are not simply a debt; they are part of the wages of the employee, held by the employer in trust for the government. 26 U.S.C. § 7501. The 'trust fund taxes' are for the exclusive use of the Government and are not to be used to pay the employer's business expenses, including salaries, or for any other purpose.

Gephart v. United States, 818 F.2d 469 (6th Cir. 1987) (citations omitted).

A trust fund recovery penalty law has been enacted which gives the government a source of recovery when losses occur. 26 U.S.C. § 6672(a) states:

> (a) General rule.--Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

Liability under this section attaches if the individual "1) is responsible for paying the taxes and 2) willfully fails to turn over the tax money to the government." *Bell v. United States*, 355 F.3d 387 (6th Cir. 2004) (citations omitted); *Gephart*, 818 F.2d at 473.

"The determination of responsibility focuses on the 'degree of influence and control which the person exercised over the financial affairs of the corporation and, specifically, disbursements of funds and the priority of payments to creditors.' " *Bell*, 355 F.3d at 393 (quoting *Gephart*, 818 F.2d at 473.) Factors have been identified to be considered by a court: the duties of the officer as described by the corporate by-laws; the ability of the individual to sign checks for the corporation; the identity of the officers, directors, and shareholders of the corporation; the identity of the individuals who hired and fired employees; and the identity of the individuals who were in control of the financial affairs of the corporation. *Gephart*, 818 F.2d at 473 (citations omitted). No one factor is determinative and the Court looks to the totality of the circumstances.

In establishing responsibility, "it is sufficient that the person have significant control over the disbursement of funds." *Id.* (citations omitted) The person need not have "the final word as to which creditors should be paid." *Id.* Absolute control over the corporation's finances is not required to impose liability. *Kinnie v. U.S.*, 994 F.2d 279 (6th Cir. 1993) A responsible person is one "with ultimate authority over expenditure of funds since such a person can fairly be said to be responsible for the corporation's failure to pay over its taxes, or more explicitly, one who has authority to direct payment of creditors." *Gephart*, 818 F.2d at 473 (quoting *Barrett v. United States*, 580 F.2d 449 (1978) (internal quotations omitted). *See also Cline v. United States,* 1993 WL 272516 (6th Cir. July 21, 1993) ("The test for determining who is a responsible person under Section 6672 is a functional test which focuses on the degree of influence and control which the person exercises over the financial affairs of the corporation, particularly with respect to disbursements of funds and determining the priority of payments to creditors. A person's duty to remit withholding payments to the government must be viewed in light of his power to compel or prohibit the allocation of corporate funds. It is a test of substance, not form.") Additionally, "Although check signing authority is one factor to be considered in determining liability under Section 6672, the relevant inquiry is not simply whether the individual performed the ministerial function of signing a check but, rather, the individual's control over the decision-making process through which allocations to creditors are made." *Id.* There may be more than one person deemed a "responsible person" within a corporation. *Gephart*, 818 F.2d at 473.

"Courts have generally given broad interpretation to the term 'responsible person' under section 6672." *Smith v. U.S.*, 555 F.3d 1158 (10th Cir. 2009).

In determining willfulness, the Court looks to that word's "basic definition:" a "responsible person who makes a deliberate choice to voluntarily, consciously, and intentionally pay other creditors rather than make tax payments is liable for willful failure." *Bell*, 355 F.3d at 393 (citations omitted). "The responsible party need not exhibit an intent to defraud the IRS or some other evil motive; all that is necessary to demonstrate willfulness is the existence of an intentional act to pay other creditors before the federal government." *Id.* The Sixth Circuit holds that "proof of a responsible person's knowledge of payments to other creditors and awareness of the failure to pay the trust fund taxes is enough to trigger liability." *Id., Gephart* ("Willfulness is present if the responsible person had knowledge of the tax delinquency and knowingly failed to rectify it when there were available funds to pay the government.")

The taxpayer has the burden of proving by a preponderance of the evidence that she either was not a responsible person or that her failure to remit withheld taxes to the government was not willful. *Collins v. United States,* 848 F.2d 740 (6th Cir. 1988); *Kinnie v. U.S.,* 994 F.2d 279 (6th Cir. 1993) (A taxpayer claiming that he was not a responsible person liable for withholding taxes bears the burden of proving that he is not a responsible person and that he did not act willfully in failing to pay over the taxes.)

(a) responsible party

Plaintiff argues that she is not a responsible party as she lacked the authority to control the process over which Victory Park selected creditors for payment given that she had no control over the disbursement of funds and she was abused and dominated by her husband who controlled Victory Park. On this basis, plaintiff contends, she cannot be held personally liable for taxes she had neither the ability nor the authority to pay.

Relying on the following testimony she gave at deposition, plaintiff asserts that individuals other than she controlled Victory Park's finances, she did not determine which bills would be paid, and she did not exercise control over the payroll. When asked why Medicare or Medicaid payments which came in after January 2002 were not applied toward overdue federal withholding taxes, plaintiff testified, "I don't know who controlled the cash. I don't know anything...." (pltf. depo. Vol. I 111) Plaintiff also testified, "I did not make the decision as to which checks were released for payment. Will did.... Will, with his executive director, Michael Campbell, knew what money was in the bank. And they decided who to pay based on who screamed the loudest and who they needed to pay off. I was not involved in operating the company." (*Id.* 115) Plaintiff testified that she "had nothing to do with payroll."(*Id.* 118) Plaintiff testified that during the second and third quarters of 2002, she and Will Grunspan were the only authorized signators for Victory Park but "that's all I was... It gave me the authority, but it didn't give me the right to do what I wanted. Mr. Grunspan had control of all the funds." (*Id.* 127) "I had no control of what was happening at Victory Park and the moneys or anything. I had no control." (*Id.* 174) When asked whether during the relevant period she understood that the withholding taxes were not being paid over to the IRS, she testified, "I was not involved in cash management. I do not know what was done or what was not done. I was not involved in day-to-day operations." (*Id.* 197) "Mr.Grunspan told me what to pay at all times." "He was in charge." (*Id.* 243) When asked about checks she signed while in Florida, plaintiff testified, "Well, if I wasn't directed or approved by my husband, then it was requested by the executive director because I had nothing to do with the operations of the facility. So I would know nothing of what needed to be paid. So it wasn't a decision I made on my own. It was somebody said, this needs to be paid, and since you're the signer and you're the only one that can do it, then you better pay it because we needed it paid."(*Id.* 142) Marrie and Clark did all the paying of bills until early February 2002. (*Id.* 84) Plaintiff never directed anyone to cause a payment to be made for a Victory Park expense without her husband's direction, instruction, or approval. (*Id.* 131) Plaintiff "had no idea who was and who was not paid. That was Will's domain." And, while she knew the payroll taxes had not been paid, her husband said that he would "handle it." (*Id.* 198-199)

While she and her husband had disagreements over the withholding taxes, her husband "decided not to pay them." (*Id.* 244)

For the following reasons, the Court finds that plaintiff has not demonstrated as a matter of law that she is not a responsible person.

While plaintiff testified that Clark and Marrie decided what bills to pay until early February 2002, the two were forced out of Victory Park prior to the period at issue (the second quarter of 2002). Plaintiff testified that "in the early part of 2002 we attempted to wrangle control" from Clark and Marrie after it had been discovered in late 2001 that Victory Park had suffered huge losses for 2001 and plaintiff and her husband discovered their abuses. (*Id.* 66-67) Nor was Mike Campbell an authorized signator as plaintiff testified that only she and her husband were authorized to sign checks. Furthermore, as discussed above, in-house bookkeeper Greg Taylor testified regarding his practice of sending financial items and tax information to plaintiff at her house, and discussions he had regarding these matters and bill payments with plaintiff. Thus, plaintiff played a role in the system that was used to pay bills for Victory Park during the relevant period.

Plaintiff contends that she only signed checks when instructed to do so by her husband. But, as defendant points out, plaintiff had the power to refuse to sign the checks and prevent a default on the payment of taxes. In *Thomas v. U.S.,* 41 F.3d 1109 (7th Cir.1994), the Seventh Circuit recognized that possessing check writing authority encompasses the "converse authority to refuse to write checks." Plaintiff admits she could have refused to sign the checks unless her husband agreed that the taxes could be paid. (pltf. depo. 308)

Plaintiff claims that she lacked control and was not involved in Victory Park's operations. Yet, plaintiff testified that she knew the withholding taxes of Victory Park for periods in 2001 were unpaid. She knew this by going through the books and records. When she signed checks during the first three quarters of 2002, she knew the 2001 withholding taxes were unpaid. (*Id.* 107) She further testified that she signed two checks for $80,000 each to transfer funds to a payroll account to cover Victory Park payroll while “maybe” knowing that there were unpaid and overdue withholding taxes for the first and second quarters of 2002. In fact, plaintiff testified as to all the checks she signed during the first three quarters of 2002 that “maybe” she knew the withholding taxes had not been fully paid at the time. Additionally, plaintiff testified that she argued with her husband during the second quarter of 2002 about the unpaid taxes. (*Id.* 224-225, 244-245, 207-276)

Plaintiff does not specifically dispute Greg Taylor’s testimony that he and plaintiff discussed Victory Park tax matters in the first half of 2002, he forwarded copies of IRS notices regarding Victory Park unpaid withholding taxes to plaintiff during the second and third quarters of 2002, and he discussed the matter of unpaid withholding taxes with plaintiff during the second quarter of 2002.[7] (Taylor depo. 44-45, 63-66) Defendant concedes that there is no evidence that plaintiff prepared or signed payroll checks, but points out that plaintiff testified that she worked with Greg Taylor on payroll tax records and reports. (pltf. depo. Vol I. 104-107)

Plaintiff relies on interviews of Marrie and Clark conducted by the IRS wherein they did not identify plaintiff as a person responsible for directing or authorizing which bills were paid

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[7] When asked at deposition, “Did Mr. Taylor provide you with any notices from the IRS regarding withholding taxes?” Plaintiff responded, “I don’t recall. He either provided me or Mr. Grunspan.” And, “Did Mr. Taylor discuss with you perhaps by telephone any notices from the IRS regarding unpaid withholding taxes?” Plaintiff responded, “I don’t recall.” (pltf. depo. Vol. I 328)

for Victory Park. (Doc. 34 Exs. 1 and 2, Form 4180) These interviews, however, do not show whether or not plaintiff was responsible for paying bills in the second quarter of 2002. (*Id.*) Further, as discussed above, Clark and Marrie were no longer working at Victory Park during the second quarter of 2002. Finally, if anything, the interviews support the defendant's position herein. Clark stated in his interview that Will and Sharona Grunspan maintained or had access to the books and records of Victory Park. (Ex. 2 at 5) Marrie stated in his interview that "Will and Sharona got involved and cut management fees and wanted to take over everything in order to pay the payroll taxes." And, Marrie stated that plaintiff was given copies of the the QuickBooks software in November/December 2001. (Ex. 1 at 5)

Plaintiff does not dispute defendant's evidence showing that she signed 38 checks for Victory Park during the first three quarters of 2002 totaling over $370,000, and as to each check she "maybe" knew the withholding taxes of Victory Park had not been fully paid for the second quarter of 2002. During the second quarter of 2002, plaintiff signed 30 checks totaling over $240,000, including more than $160,000 from Victory Park's general account to its payroll account to be used to pay net payrolls knowing that the related withholding taxes were not being paid. It is undisputed that when plaintiff signed checks for Victory Park during the first three quarters of 2002, she knew that withholding taxes for 2001 were unpaid. (*Id.* 207-276; Shapiro decl.)

Further, during March 12, 2002 through May 18, 2002, plaintiff stayed in Sunny Isles, Florida. She testified that she took 10-20 blank Victory Park checks with her. Defendant demonstrates that she actually signed about 20 checks. Plaintiff testified that she signed some checks and made some payments for bills of Victory Park. Plaintiff testified that the checks were directed or approved by her husband, or the executive director Mike Campbell who indicated that a bill needed to be paid and she was an authorized signer. (*Id*. 136-137,141-143.) But, plaintiff testified that while she was in Florida, her husband was skiing elsewhere, and that she may have signed checks not directed by her husband if they were "very, very small" or "something that really needed paid that was very, very important or was already on the accounts payable that needed to be paid." (*Id.* 142-143) Therefore, not all the payments were directed or approved by her husband. Additionally, defendant points out that Mike Campbell was not authorized to sign checks for Victory Park and could not order or direct plaintiff to pay a bill, especially given that plaintiff was an owner of Victory Park and Campbell was not. Plaintiff and her husband were the only authorized signators and sole shareholders after ousting Marrie and Clark.

Plaintiff testified that in early July 2002, she signed a check in the amount of $75,000 to Beachwood Nursing Home, an entity owned by the Grunspans, to repay a loan that Beachwood made to Victory Park to pay its payroll checks for the last pay period in the second quarter of 2002, when it lacked funds. The loan only covered the net payroll to the employees, not the withholding taxes associated with it and plaintiff "maybe" knew that there were unpaid withholding taxes for the second quarter of 2002. (*Id.* 255-258)

Plaintiff asserts that of the 2151 checks signed during the second quarter of 2002, she signed only approximately 1%[8] while her husband signed the other 99%. (Tania Welch decl. ¶ 3, 5) Plaintiff testified, "Mr. Grunspan instructed me to sign checks received and prepared by

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[8] It would have been slightly more than 1% as plaintiff signed 30 checks out of 2151.

Victory Park when he could not sign them. I signed all checks based on his instructions." And, "I'm going to tell you this again. I did not want to be involved in Victory Park. I was against it. Every check that I signed I was instructed by Mr. Grunspan to sign it." (pltf. depo. Vol I. 233-234)

As discussed above, however, plaintiff need not have had absolute control over Victory Park's finances in order to be held responsible, nor need she have had the final word over which creditors should be paid. Defendant has pointed to sufficient evidence showing that plaintiff, an accountant, exercised significant control over Victory Park's finances given that she audited its books and records, participated in ousting Clark and Marrie, oversaw the in-house bookkeeper, engaged in bookkeeping and accounting work, signed checks, and participated in terminating Greg Taylor.

Plaintiff asserts that "the vast majority of checks [she] signed were merely to transfer money among inter-company accounts... she did not prefer creditors over the United States by signing these checks." (Doc. 19 at 6) (See also plaintiff's reply brief wherein she states that a "significant portion of these checks involve intra-company transfers- not payments to third party creditors.") But, several of the checks, totaling about $160,000, serve to transfer funds from Victory Park's general account to its payroll account in order to issue paychecks to employees. Plaintiff testified that she knew when she signed these checks that the funds would not cover the associated withholding taxes and that past employment taxes remained unpaid. (pltf. depo. Vol. I 224-225) Thus, employees were preferred over past-due taxes. Additionally, a check in the amount of $50,000 transferring funds from Victory Park to Victoria Retirement Community, which could have been a loan to Victoria, was money which could have been used to pay the overdue taxes. Another check plaintiff refers to as an intra-company transfer is a check used to make a payment of $35,000 for overdue rent. (pltf. depo. 253-254) Again, plaintiff acknowledges that at the time she signed that check she “maybe” understood there were unpaid withholding taxes for the second quarter of 2002. (*Id.*) This too would be a payment to a creditor in preference to the taxes owed to defendant, even if the creditor is another company owned by plaintiff and her husband.

Plaintiff maintains that defendant provides no evidence that she was a director of Victory Park and she testified that she was unsure of who served as Victory Park’s directors. Defendant, however, submits a letter that plaintiff admits she and her husband sent to Clark and Marrie in December 2001 regarding the latter’s failure to make the withholding tax payments. The letter states that plaintiff and her husband had previously requested Clark’s and Marrie’s presence at a Board of Directors meeting, which was scheduled at plaintiff’s and her husband’s “earliest availability,” but Clark and Marrie did not comply. This seems to indicate that the four were members of the Board of Directors. (Doc. 35 Ex. 46) Plaintiff also asserts that Mr. Grunspan, Clark, and Marrie were Victory Park’s operating shareholders, while she was merely a minority shareholder. But, Clark and Marrie were forced out in early 2002, prior to the period at issue here.

Plaintiff also asserts that she did not hire or fire employees. But, the evidence shows that she participated in firing Greg Taylor and in forcing out Clark and Marrie.

Plaintiff posits that her involvement with Victory Park extended only to the performance of a few simple accounting and clerical functions, but her deposition testimony shows otherwise. As discussed above, in November and December 2001, she examined the books and records of

Victory Park and identified unpaid withholding taxes. This resulted in the ousting of Clark and Marrie by plaintiff and her husband. Plaintiff worked with Greg Taylor, Victory Park's in-house bookkeeper, on financial and tax matters. Taylor forwarded IRS notices concerning overdue withholding taxes to plaintiff. The two discussed the tax matters. After January 2002, plaintiff worked with Taylor to update Victory Park's books and records, including the payroll tax records. Plaintiff had access to the QuickBooks- the online books and records. After Clark's and Marrie's departure, plaintiff's husband asked her to handle the accounting and bookkeeping while he handled the other departments. (pltf. depo. Vol II 74)

Plaintiff argues that she was abused and dominated by her husband and, as a result, had no control over Victory Park's funds. Plaintiff points to her deposition testimony that her husband threatened her more than once with divorce and that she feared being left alone to raise her children. She complied with his demands as a result of these fears. His temper manifested in "feigned"physical violence and throwing dishes. He verbally berated plaintiff in front of others, and plaintiff's personal assistant testified that he constantly screamed at plaintiff. When plaintiff attempted to disagree with her husband over the initial acquisition of Victory Park, he threw her clothes in the backyard and moved to a motel which demonstrated that he was manipulative and domineering. Her husband threatened to kill plaintiff if she disobeyed his directives regarding the outstanding taxes. Plaintiff argues that she took this threat seriously as evidenced by her deposition testimony:

> It was an off the cuff remark that said, don't you dare take any money from the other facilities to pay the taxes that those idiots didn't pay. I'll kill you if you do. Now, I didn't take- - I know that you considered that a threat. I considered it a threat as well. I wasn't going to take the money and pay it, okay. I had no control of Victory and Victoria whatever I tried to do. It was his baby.

(pltf. depo. Vol. I 307)

Plaintiff relies on *Barrett v. United States*, 580 F.2d 449 (Ct.Cl. 1978), wherein a wife was found to not be a responsible person for purposes of § 6672. But that case is distinguishable. The court found the following facts to support its finding: the husband ran the business with an "iron hand"; he turned the check-signing over to his wife only after creditors and employees refused to accept the company's checks and demanded cash payments due to the husband's mismanagement; the husband compelled his wife to sign checks over her objection by berating her publicly, threatening her, and at times beating her; the wife was afraid of her husband and as a result was submissive and subservient to him in all matters; the husband forced his wife on multiple occasions to loan or otherwise provide her private wealth to the business, some of which was never repaid; the wife's "basic function" for the company was to sign checks at the direction of her husband, although she also picked up mail at the post office and deposited receipts at the bank because these "chores" gave her "something to do"; the wife discussed with her husband the need to pay withholding taxes as she was aware of the company's past experiences with the IRS, but the husband told her "he would take care of the matter"; and the wife was not an officer, director, or shareholder of the corporation.

While the wife in *Barrett* was "beaten" by her husband who had a "short and violent temper," plaintiff testified that her husband was never physically abusive toward her. (pltf. depo. Vol. I 52, 55) While plaintiff asserts, as discussed immediately above, that she took his death threat seriously, plaintiff also testified:

> Well, he threatened me, but I didn't believe him. I think he just said it in the heat of the moment because he had a very bad temper, okay? That's all I would say.

(*Id.* 303) Plaintiff additionally testified that she and her husband "always argued about Norwood and Victory or Victoria until the day he died," "we always argued about Victory Park" even after the threat, and she also yelled at her husband. (*Id.* 193, 306, Vol. II 67-68) Unlike the wife in *Barrett,* there is no evidence that plaintiff's husband herein coerced her into signing checks. Nor does the evidence show that plaintiff was afraid or subservient to her husband, only that she feared he would divorce her.[9]

The Court agrees with defendant that to accept plaintiff's argument would create a new defense to responsibility based on one spouse's fear that the other would quit the marriage if he or she would not join the other in violating withholding tax laws. Plaintiff knew that in signing checks to pay creditors other than the IRS when withholding taxes were overdue, she was failing to fulfill the tax obligations. Unlike the wife in *Barrett,* plaintiff appears to have been a director and was a shareholder, and participated in the financial matters concerning Victory Park.

Finally, other district courts have rejected attempts by wives who claim they are not responsible parties due to their domineering or verbally abusive husbands. *See Holzman v. U.S.,* 1993 WL 556456 (D.Col. 1993) (The court found the wife to be a responsible person despite the husband's affidavit testimony that his wife had "total, unquestioning obedience" "My wife knew that disobedience would threaten her marriage. It would have ultimately caused her physical harm as well...") and *Luce v. Luce,* 119 F.Supp.2d 779 (S.D.Ohio 2000) (The wife argued that she was merely carrying out the business decisions of her husband who decided who did and did not get paid, and those decisions were not to be questioned. The court recognized that in businesses operated by family members, particularly spouses, one may be slow to overrule the

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[9] While plaintiff asserts that her fear of raising her children on her own perpetuated her acquiescence to her husband, in 2002 her children were ages 30, 19, and 16.

other “in order to preserve family harmony.” But the court concluded that “this sort of reasoning would subvert the liberal purpose of the statute by allowing responsible parties to escape liability under § 6672 in family business situations.”)

For the foregoing reasons, the Court finds that plaintiff fails to establish as a matter of law that she is not a responsible person.

(b) Willfulness

Plaintiff argues that she did not willfully fail to remit the trust fund taxes because she did not voluntarily write checks preferring other creditors over the United States given that she only wrote checks on Mr. Grunspan’s direct orders. Additionally, plaintiff asserts that she was completely dominated, controlled, and abused by her husband. She feared for her life and was coerced by threats of losing her husband.

As discussed above, plaintiff has not demonstrated that she only wrote checks on Mr. Grunspan’s direct orders. Nor has plaintiff established that her husband completely dominated and abused her, or that she feared for her life. Threats of losing her husband are insufficient to absolve plaintiff of responsibility. Rather, the evidence shows that plaintiff did sign checks during the first three quarters of 2002 knowing the 2001 withholding taxes were unpaid and “maybe” the taxes for those periods were overdue. She testified that she argued with her husband during the second quarter of 2002 about her view that the overdue withholding taxes of Victory Park should be paid. During the second quarter of 2002, plaintiff signed two $80,000 checks on the Victory Park general account transferring funds to its payroll account that were used to pay net payrolls. She knew that the withholding taxes relating to those payrolls were not paid to the IRS from the funds transferred. (pltf. depo. Vol. I 224-227) When plaintiff signed those checks, she knew the funds would not be used to pay the related withholding taxes.

For the foregoing reasons, the Court finds that plaintiff fails to establish as a matter of law that her failure was not willful.

For these reasons, plaintiff's Motion for Summary Judgment is denied.

(2) Defendant's Motion for Summary Judgment

Defendant argues that it is entitled to summary judgment because the facts demonstrate that plaintiff is a responsible person who willfully failed to collect, account for, or pay the withholding taxes for Victory Park for the second quarter of 2002. Defendant argues that plaintiff had the power to refuse to sign the thirty checks she signed during the period in issue, totaling over $240,000, which is in excess of the amount of unpaid withholding taxes at issue. Plaintiff paid funds to other creditors at a time when she knew or should have known that the withholding taxes were not paid and transferred funds to be used for net payroll, knowing that no provisions were being made to pay the related withholding taxes.

(a) Responsible Person

Based on the foregoing discussion, the Court finds that defendant has established, as a matter of law, that plaintiff is a responsible person.

Case law establishes that the term "responsible person" is interpreted broadly. Despite plaintiff's deposition testimony that she lacked control, the evidence shows that plaintiff had, and exercised, sufficient authority at Victory Park to render her a responsible person. She and her husband were the only signators, and had taken complete control over Victory Park just prior to the second quarter of 2002. Even accepting plaintiff's testimony that she only signed checks at her husband's direction, she had the power to refuse to sign checks to prevent a default on the payment of taxes. At a minimum, plaintiff admitted to signing some checks while she was in Florida without her husband's direction or approval. She admittedly knew the withholding taxes for periods in 2001 were unpaid and had no reason to believe that they had been paid for the quarter at issue. In fact, she signed checks during this period while "maybe" knowing the taxes were unpaid. She discussed the issue of unpaid taxes with her husband. Plaintiff signed checks transferring funds to cover net payroll, but not the associated withholding taxes. Plaintiff, an accountant, performed bookkeeping and accounting work for Victory Park. She has not demonstrated that her husband's verbal abuse and domination absolved her of liability. Plaintiff signed checks during the second quarter of 2002 in an amount which exceeded the amount of unpaid withholding taxes for the period.

For these reasons, and those discussed above regarding plaintiff's motion, no genuine issue of material fact exists as to whether plaintiff was a responsible person.

(b) Willfulness

Nor does an issue of fact remain as to plaintiff's willful failure to pay the trust fund taxes. Plaintiff testified that she knew the requirements for withholding taxes and the consequences for not paying them. She had personal knowledge that the 2001 taxes were unpaid. When she signed checks during the first three quarters of 2002, she also knew or should have known that the taxes for the period at issue were likewise unpaid. Plaintiff signed checks transferring funds for Victory Park's payroll account while knowing that the related withholding taxes were not being paid. Plaintiff testified that when she signed the 30 checks during the second quarter of 2002, she could not have simply paid the payroll taxes instead because "there was no money." (pltf. depo. 308-309) As discussed above, plaintiff has not demonstrated that her husband's abuse excuses her willfulness. In fact, plaintiff testified that if she had written a check for the unpaid taxes instead of signing the other checks during the period at issue, her husband would have left her. (*Id.*) Threats of losing her husband are insufficient to absolve plaintiff of willfulness.

For these reasons, and those discussed above regarding plaintiff's motion, no genuine issue of material fact exists as to whether plaintiff willfully failed to remit the taxes.

For the foregoing reasons, defendant's Motion for Summary Judgment is granted.

Conclusion

For the foregoing reasons, plaintiff's Motion for Summary Judgment is denied and United States of America's Motion for Summary Judgment is granted.

IT IS SO ORDERED.

/s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
United States District Judge

Dated: 3/21/12

DISTRICT OF OREGON
F I L E D
March 21, 2012
Clerk, U.S. Bankruptcy Court

Below is an Order of the Court.

FRANK R. ALLEY
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re: LOREN LEE HOLM and DENNA HOLM, Debtors.	Case No. 11-61975-fra13 Adversary No. 11-06186-fra
LOREN LEE HOLM and DENNA HOLM, Plaintiffs, v. COMMISSIONER OF THE INTERNAL REVENUE SERVICE, Defendant.	ORDER DISMISSING ADVERSARY PROCEEDING

THIS MATTER came before the Court for a confirmation hearing scheduled March 13, 2012, in the underlying Chapter 13 bankruptcy case. Kent Anderson appeared with the Debtors,

KENT ANDERSON LAW OFFICE
888 West Park Street
Eugene, Oregon 97401
(541) 683-5100

Loren and Denna Holm. The Debtors, through counsel, announced their desire to dismiss this Adversary Proceeding. Now, therefore,

IT IS HEREBY ORDERED that the adversary proceeding is dismissed, without prejudice, no fees or costs are awarded to either party.

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Submitted by:

/s/ Kent Anderson
Kent Anderson, OSB #78125
Attorney for Debtors/Plaintiffs

cc:

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Below is the Order of the Court.

Karen A. Overstreet
U.S. Bankruptcy Judge
(Dated as of Entered on Docket date above)

The Court's oral ruling on the record at the hearing is incorporated herein by this reference.

UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

In re: KRISTINE L. HOVDE Debtors.	)	Bankr. No. 10-23427-KAO Adv. No. 11-01295-KAO
KRISTINE L. HOVDE, Plaintiff, v. UNITED STATES INTERNAL REVENUE SERVICE, Defendant	)	**ORDER GRANTING THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT**

Before the Court is the United States' Motion for Summary Judgment. For the reasons stated on the record:

IT IS HEREBY ORDERED THAT the United States' Motion to for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED THAT

(1) Ms. Hovde's federal income tax liability for the 1999, 2000, 2001, 2002, 2003, 2004, and 2005 tax years, with the exception of nonpecuniary penalties as defined

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by § 523(a)(7), is not dischargeable under 11 U.S.C. § 523(a); and

(2) Ms. Hovde's federal income tax liability for the 2006 tax year is dischargeable.

IT IS SO ORDERED

///End of Order///

Presented by:

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Principal Deputy Assistant Attorney General

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UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re MIRABILIS VENTURES, INC., Debtor.	)	Case No. 6:08-bk-04327-KSJ Chapter 11
In re AEM, INC., Debtor.	)	Case No. 6:08-bk-04681-KSJ Chapter 11
AEM, INC., and MIRABILIS VENTURES, INC. Plaintiffs, vs. UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, Defendant.	)	Adv. Proc. 6:11-ap-00087-KSJ

MEMORANDUM OPINION

These cases have long and tortured histories of disagreement between the United States of America, Internal Revenue Service (IRS) and related debtors Mirabilis Ventures, Inc. ("Mirabilis") and AEM, Inc. (AEM).[1] In resolving the IRS' claim in the Mirabilis bankruptcy case, this Court determined Mirabilis overpaid taxes to the IRS. Though the amount of Mirabilis' overpayment has not been determined by the Court, the IRS concedes it is in excess of $1.1 million.[2]

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[1] The Court detailed much of this history in its Initial Findings of Fact and Conclusions of Law. Case No. 8-bk-4327, Doc. No. 658.

[2] Case No. 8-bk-4327, Doc. No. 658, at 26; Doc. No. 660. Amended Claim No. 4, filed by the IRS in the AEM case, sets the amount of overpayments at $1,122,848.29. The IRS maintains it is entitled to offset this amount against AEM's tax liabilities.

Mirabilis is not yet entitled to a refund of its tax overpayment, however, because whether related debtor AEM owes the IRS employment taxes is still in dispute.[3] The IRS contends AEM owes $3,195,661.83.[4] AEM contends it not only does not owe any employment taxes but is entitled to a refund of approximately $24 million, the amount AEM "improperly" paid on behalf of three other companies: Presidion Solutions VI, Inc., Presidion Solutions VII, Inc., and National MedStaff, Inc. ("Non-Debtor Companies").[5] If it is determined AEM owes taxes, the Court then will consider whether the IRS may apply Mirabilis' overpayments to AEM's outstanding tax liability.[6] The Court now must address several preliminary motions before holding a needed evidentiary hearing to resolve the remaining factual questions regarding AEM's tax liability (IRS' Claim No. 4) and Mirabilis' tax overpayments.

In the AEM case, the IRS moved for summary judgment on AEM's $24 million refund request.[7] AEM moved for sanctions against the IRS.[8] The IRS made two motions in limine regarding evidence at trial.[9] AEM lastly made an emergency motion for bifurcation of the trial on its objection to Claim No. 4 and refund request and for leave to file an adversary proceeding relating back to the date it filed its objection to claim.[10]

Debtors then filed the contemplated adversary proceeding against the IRS on May 20, 2011. The complaint restates AEM's objection to claim and refund request and asserts fraudulent transfer causes of action pursuant to both federal and state law on behalf of both AEM

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[3] This issue is presented by the IRS' Claim No. 4 and AEM's Objection to Claim No. 4. Case No. 8-bk-4681, Doc. No. 162.
[4] Case No. 08-bk-04681, IRS Claim No. 4.
[5] Case No. 08-bk-04681, Doc. No. 162. AEM originally sought more than $25 million from the IRS, but it has revised its request to slightly less than $24 million. Adversary Proceeding No. 11-ap-87, Doc. No. 1, ¶ 54 (stating amount of refund due as $23,981,442.14).
[6] Case No. 8-bk-4327, Doc. No. 658 at 26-27. In an effort to obtain Court approval for a setoff, the IRS filed a Motion for Relief from Stay. Case No. 8-bk-4327, Doc. No. 660. That motion cannot be resolved until the question of AEM's tax liability is determined. The Court holds the motion for relief in abeyance until a party asks for a further hearing on the motion.
[7] Case No. 8-bk-4681, Doc. No. 251. AEM's contention that it overpaid taxes was presented for the first time in AEM's Objection to Claim No. 4 of the IRS. Doc. No. 162. AEM's official refund request was made via filing of amended Form 941s for first and second quarters 2007, in December 2009.
[8] Case No. 8-bk-4681, Doc. No. 260.
[9] Case No. 8-bk-4681, Doc. Nos. 261, 262.
[10] Case No. 8-bk-4681, Doc. No. 269.

and Mirabilis.[11] The IRS moved to dismiss the complaint with prejudice, on the grounds the fraudulent transfer causes of action are barred by the statute of limitations and the remaining counts are duplicative of the issues already being litigated in the contested matter arising from IRS' Claim No. 4 in the AEM bankruptcy case, which was originally set for trial on April 22, 2011.[12]

Background

AEM is a wholly-owned subsidiary of Mirabilis. Mirabilis and its numerous subsidiaries, including AEM, were controlled by Frank L. Amodeo who used the companies to perpetrate one of the largest payroll-processing frauds in U.S. history. Amodeo personally stole millions of dollars in federal income and Social Security withholding taxes from the companies and their clients rather than paying those monies to the IRS. Amodeo exercised control over AEM's bank accounts and, as a part of his fraud scheme, directed transfers of funds through those accounts.

Amodeo became aware he and his companies were under investigation for tax crimes in late 2006. Subsequently, the drama of debtors' disputes with the IRS unfolded in two venues: a criminal prosecution in United States District Court and bankruptcy cases in this Court. On April 25, 2008, the U.S. Attorney instituted *in rem* civil forfeiture proceedings in the United States District Court for the Middle District of Florida against certain properties owned by Amodeo and Mirabilis.[13] In late May and early June 2008, Mirabilis and AEM filed for relief under Chapter 11 of the Bankruptcy Code.[14] At that time, R. W. Cuthill, an experienced receiver and liquidation trustee, was installed as President of Mirabilis to oversee debtors' liquidation.

On June 13, 2008, the IRS filed Claim No. 2 in the Mirabilis case, asserting Mirabilis had outstanding corporate tax liability of $438,173.48.

[11] AP No. 11-ap-87, Doc. No. 1.
[12] AP No. 11-ap-87, Doc. No. 14.
[13] Case No. 6:08-cv-00670-ACC-KRS, Doc. No. 1.
[14] Mirabilis filed bankruptcy on May 27, 2008; AEM filed on June 5, 2008. All references to the Bankruptcy Code are to Title 11 of the United States Code.

On July 10, 2008, the IRS filed Claim No. 4 in the AEM bankruptcy case, asserting AEM had Form 941 payroll tax liability for the second quarter of 2007 in the amount of $3,195,661.83 (composed of a priority unsecured claim for $2,492,059.53 and a general unsecured claim of $703,602.30, including interest). The IRS later amended this claim after the claims bar date. Amended Claim No. 4 is also for $3,195,661.83 but recharacterizes the debt: claiming $1,122,848.29 as debt secured by monies the IRS is holding (as a result of Mirabilis tax overpayments) and $2,072,813.54 as priority unsecured debt.

On August 6, 2008, Amodeo was indicted for conspiracy, failure to remit payroll taxes, wire fraud and obstruction of an agency investigation. That same month, the U.S. Attorney moved to stay the debtors' bankruptcy cases, pending resolution of the ongoing criminal proceedings against Amodeo.

On September 23, 2008, Amodeo pleaded guilty to his crimes.[15] As a part of his plea agreement, Amodeo admitted the assets of Mirabilis and AEM were proceeds of his fraud, and he forfeited them.

On October 30, 2008, AEM and Mirabilis were indicted for various tax crimes, including conspiracy and wire fraud. Although the debtors initially pleaded not guilty in the criminal proceedings, Cuthill began negotiations with the U.S. Attorney's office to change their pleas to nolo contendere.[16] The Office of the U.S. Attorney would not consent to nolo contendere pleas and pushed for trial.

In November 2008, the debtors and the U.S. Attorney reached a settlement in the bankruptcy case. Pursuant to the terms of the settlement, debtors' bankruptcies would move

[15] Amodeo currently is serving a twenty-two-year sentence in federal prison.

[16] "Nolo contendere" means "I do not contest it." "Throughout its history, . . . the plea of nolo contendere has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency." *North Carolina v. Alford*, 400 U.S. 25, 36 n.8, 91 S. Ct. 160, 167 n.8 (1970).

forward, and the IRS would receive an allowed general unsecured claim of $200 million for the government's civil forfeiture claims.[17] The criminal cases against AEM and Mirabilis continued.

On October 9, 2009, AEM objected to IRS' Claim No. 4 and stated it had overpaid taxes by "improperly" paying withholding taxes for not only itself but also for the three Non-Debtor Companies.[18] In December 2009, AEM filed amended tax returns for first and second quarters 2007, asserting overpayment of taxes and entitlement to a refund of approximately $25 million.

On May 19, 2010, AEM and the IRS agreed to try AEM's objection to the IRS' $3 million claim and AEM's request for a $25 million refund in the same proceeding.[19]

Two days later, on May 21, 2010, Mirabilis and AEM filed a motion with the U.S. District Court, Judge John Antoon II, seeking the court's approval of their nolo contendere pleas. The companies' motion was based on their assertions that Cuthill lacked the personal knowledge of criminal acts that would be necessary for him to enter guilty pleas for the corporations and that guilty pleas would undercut the debtors' recovery on professional liability claims they were pursuing against those who helped devise and orchestrate the criminal scheme. The debtors' motion stated the pursuit of these claims was in the public interest because "[t]he majority of the remaining assets in the Defendant-Debtors bankruptcy estates are in the form of professional malpractice claims" and "the taxpayers are the real majority creditors" in the bankruptcy cases.[20] The motion made no mention of AEM's claim for a tax refund.

In June 2010, after considering the parties' briefs and hearing oral argument, Judge Antoon granted AEM and Mirabilis' motion to enter nolo contendere pleas.[21] Cuthill entered the

[17] Case No. 8-bk-4327, Doc. No. 101 at 8.
[18] Case No. 8-bk-4681, Doc. No. 162.
[19] Case No. 8-bk-4327, Doc. No. 594 at 8-10. At a status conference on February 25, 2011, counsel for AEM acknowledged: (1) the agreement to try both disputes in one proceeding, and (2) the fact that, although AEM could have filed a fraudulent transfer action, it had elected not to do so because it felt all the disputed issues could be resolved in the context of its claim objection. Case No. 8-bk-4681, Doc. No. 247.
[20] *U.S. v. AEM, Inc.*, *et al.*, Case No. 6:08-cr-231-JA-KRS, Doc. No. 139, at 9-10.
[21] *Id.*, Doc. No. 149.

pleas on behalf of the corporations. As punishment for their crimes, the corporations received a $200 million forfeiture judgment.[22]

Also in June 2010, the IRS amended Claim No. 2 in the Mirabilis case to claim $0.00. The IRS conceded Mirabilis owed no taxes and, in fact, had overpaid the IRS. After the criminal case was resolved, this Court issued Initial Findings of Fact and Conclusions of Law resolving certain questions of Mirabilis' tax liability.[23] The Court concluded Mirabilis had overpaid the IRS; but the specific amount of the overpayment was not determined. Also, the question of whether Mirabilis was due a refund could not be decided until the existence and amount of AEM's tax liability was determined.

The Court set the final evidentiary hearing on AEM's Objection to Claim No. 4, including AEM's refund request, for April 22, 2011. The IRS advised the Court it did not believe it would call any witnesses as the AEM matter could be resolved as a matter of law; AEM advised the Court it intended to call only two, possibly three, witnesses: Cuthill, Kirtus Bocox (the accountant who prepared AEM's amended tax returns in 2009), and possibly a representative of the IRS.[24]

At the end of March 2011, the IRS filed a motion for partial summary judgment pertaining only to AEM's refund request.[25]

The next month brought a flood of filings. AEM filed a motion for sanctions against the IRS.[26] The IRS filed two evidentiary motions in limine[27] and a motion for relief from stay.[28] And, four days before the final evidentiary hearing, on April 18, 2011, AEM filed an emergency

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[22] This is the same $200 million that the debtors and United States had agreed would exist as an allowed general unsecured claim in the debtors' bankruptcies. *See supra* at 5-6.
[23] Case No. 8-bk-4327, Doc. No. 658.
[24] Case No. 8-bk-4681, Doc. No. 247. AEM's responses to interrogatories also identified Cuthill and Bocox as the only people it believed to have knowledge of the facts relevant to the issues presented by the IRS' Claim No. 4 and AEM's refund request. Case No. 8-bk-4681, Doc. No. 251, Ex. F.
[25] Case No. 8-bk-4681, Doc. No. 251.
[26] Case No. 8-bk-4681, Doc. No. 260.
[27] Case No. 8-bk-4681, Doc. Nos. 261, 262.
[28] Case No. 8-bk-4327, Doc. No. 660.

motion to bifurcate the hearing on the claim objection, amend its claim objection, and file an adversary proceeding relating back to October 9, 2009 (the date AEM filed its Objection to Claim).[29]

On April 22, 2011, the Court continued the final evidentiary hearing originally set for the same day, reopened discovery, and ordered the parties to file all pleadings related in any way to the issues raised in Claim No. 4 and the Objection to Claim by May 20, 2011. The Court also ordered the parties to mediate their disputes.[30]

On May 20, 2011, debtors filed an adversary proceeding against the IRS. The complaint objects to Claim No. 4 in the AEM bankruptcy; seeks a determination of AEM's tax liability for 2007; and asserts payments AEM and Mirabilis made to the IRS were fraudulent transfers.[31] The IRS moved to dismiss the complaint.[32]

Court-ordered mediation did not resolve the parties' disputes. This memorandum opinion addresses the pending motions.

<u>The IRS' Motion for Partial Summary Judgment on the Claim Objection is Granted</u>

Claim No. 4 filed by the IRS and debtor AEM's Objection to Claim present two issues: (1) does AEM owe the IRS Form 941 taxes for second quarter 2007? and (2) is AEM owed a refund of approximately $24 million by the IRS for overpayment of Form 941 taxes in 2007? The IRS has moved for summary judgment on the second issue only — whether AEM is owed a refund.

AEM's reason for requesting the refund is that, in 2007, it paid first and second quarter 2007 Form 941 taxes for the Non-Debtor Companies. AEM did not own these entities, contends it was not obligated to pay taxes on their behalf, and wants the money paid on their behalf returned.

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[29] Case No. 8-bk-4681, Doc. No. 269.
[30] Case No. 8-bk-4681, Doc. No. 286.
[31] AP No. 11-ap-87, Doc. No. 1.
[32] AP No. 11-ap-87, Doc. No. 14.

Under Federal Rule of Civil Procedure 56, made applicable by Federal Rule of Bankruptcy Procedure 7056, a court may grant summary judgment where "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."[33] The moving party has the burden of establishing the right to summary judgment.[34] "When a motion for summary judgment has been made properly, the nonmoving party may not rely solely on the pleadings, but . . . must show that there are specific facts demonstrating that there is a genuine issue for trial."[35] Conclusory allegations by either party, without specific supporting facts, have no probative value.[36]

In determining entitlement to summary judgment, "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts."[37] "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial."[38] A material factual dispute precludes summary judgment.[39]

The facts material to this Court's decision regarding AEM's entitlement to a refund are not in dispute:

- In 2007, AEM filed Form 941 tax returns for first and second quarter 2007 that included the combined employment tax liabilities of AEM and the three Non-Debtor Companies—Presidion Solutions VI, Inc., Presidion Solutions, VII, Inc., and National MedStaff.[40]

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[33] Fed. R. Civ. P. 56.
[34] *Fitzpatrick v. Schlitz (In re Schlitz)*, 97 B.R. 671, 672 (Bankr. N.D. Ga. 1986).
[35] *Brown v. Crawford*, 906 F.2d 667, 670 (11th Cir. 1990).
[36] *Evers v. General Motors Corp.* 770 F.2d 984, 986 (11th Cir. 1985).
[37] *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 1776 (2007).
[38] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986).
[39] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986).
[40] The IRS refers to these returns as "consolidated" returns. AEM argues that the filing of a "consolidated" Form 941 return is improper, and the IRS concedes there is no statutory authority for a "consolidated" Form 941 tax return. Whether such a filing is proper, however, does not change the undisputed historical fact: AEM filed one return for each of the first and second quarters of 2007 and included on each of those returns the employment taxes owed by AEM and the Non-Debtor Companies.

- "In 2006 and 2007, all four companies deposited their total payrolls into a bank account, maintained at Bank of America, in the name of AEM d/b/a Mirabilis HR."[41]
- These deposits included funds for payroll taxes for all four companies.[42]
- The IRS was paid Form 941 taxes for the first two quarters of 2007 from the same Bank of America account in AEM's name, on behalf of: (1) AEM, (2) Presidion Solutions VI, Inc., (3) Presidion Solutions VII, Inc., and (4) National MedStaff, Inc.
- The IRS filed Claim No. 4 in AEM's bankruptcy case, asserting AEM has Form 941 tax liability for second quarter 2007 of over $3 million.
- On October 9, 2009, AEM objected to Claim No. 4 and stated it had overpaid taxes because it had improperly paid 941 tax liability of the Non-Debtor Companies.
- In December 2009, AEM filed amended Forms 941 for the first and second quarter of 2007, on its own behalf only, seeking a refund of more than $25 million, on the basis it had inadvertently included income and payroll tax liabilities of the Non-Debtor Companies on its original Form 941s and paid tax deposits for those other entities out of AEM's bank account.

These undisputed facts support summary judgment for the IRS. AEM is not entitled to a refund because the monies that were paid to the IRS on behalf of the Non-Debtor Companies are not AEM's property to recover. [43]

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[41] AEM Response to Interrogatory No. 1, United States' First Set of Interrogatories. Case No. 8-bk-4681, Doc. No. 251, Ex. F.

[42] Case No. 8-bk-4681, Doc. No. 275 at 18.

[43] The IRS makes several other arguments in support of its motion. The IRS' arguments that application of the doctrines of judicial estoppel, voluntary payment, and variance require summary judgment in its favor are preserved. However, because the discussion below disposes of AEM's refund claim in its entirety, the Court does not address those other arguments in this opinion.

AEM contends the tax payments made to the IRS in 2007 on behalf of the Non-Debtor Companies are AEM's property for the sole reason the payments were made from a bank account in AEM's name. AEM provides no other basis for its contention that it owned those monies. But, it is undisputed that the customers of AEM **and the Non-Debtor Companies** directly deposited funds into the same account. It is also undisputed that **the deposited funds were the four companies' total payrolls and included funds for payroll taxes due from each of the four companies**.[44] The funds were used to pay all four entities' payroll taxes for first and second quarter 2007.

AEM and the IRS dispute whether the funds in the AEM account were segregated by company. AEM contends they were rendered untraceable to any particular client or any of the four companies by virtue of their commingling and dissipation. The IRS contends AEM maintained detailed records segregating the finances of the four companies who deposited funds into the AEM account. This factual dispute is irrelevant, however, as commingling of funds would not transform the Non-Debtor Companies' money, later paid to the IRS as payroll taxes due from those companies, into AEM's property. AEM's repeated assertion that the transformation occurred does not make it so.[45]

Florida law applies to determine AEM's property right in the monies; Florida law is clear that depositing money in the account of another does not necessarily transfer ownership of that money to the account owner.[46] The identity of the real owner of the money is a factual determination.[47] Here, the undisputed facts—in 2006 and 2007, customers of AEM and the Non-Debtor Companies directly deposited funds into the AEM account at Bank of America; the deposited funds were the companies' total payrolls and included funds for payroll taxes due from

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[44] Case No. 8-bk-04681, Doc. No. 275 at 18.

[45] AEM provides no legal authority for this assertion. Its brief cites only the deposition testimony of Mr. Cuthill in support of the proposition. *See* Case No. 8-bk-4681, Doc. No. 275 at 18.

[46] *See Ginsberg v. Goldstein*, 404 So.2d 1098 (Fla. 3d DCA 1981); *James v. Commercial Bank at Apopka*, 310 So. 2d 399 (Fla. 4th DCA 1975).

[47] *See James*, 310 So.2d at 399.

each of the four companies; and the funds were used to pay the four entities' payroll taxes for first and second quarter 2007—demonstrate the monies that were eventually paid to the IRS continued to belong to each of the Non-Debtor Companies after they were deposited in the AEM account. The undisputed facts also demonstrate the Non-Debtor Companies intended that taxes would be paid from those monies. Most importantly, the undisputed facts do not support the conclusion that the Non-Debtor Companies intended to transfer ownership of the monies they owed in payroll taxes to AEM. Absolutely nothing in the record supports this untenable conclusion.

Allowing AEM a refund of the payroll tax payments made to the IRS on behalf of the Non-Debtor Companies would be inequitable. The deposits were the Non-Debtor Companies' entire payrolls, **including monies owed for payroll taxes**. The Non-Debtor Companies' first and second quarter 2007 payroll taxes were paid with those monies, and the IRS credited each company for the payments. If AEM were to receive a refund of those monies, it would be receiving an unjustified windfall of $24 million. The Non-Debtor Companies then would owe the IRS for first and second quarter 2007 payroll taxes, even though the money to pay those taxes was collected and paid by AEM in 2007.

What AEM is asking this Court to do is to give it $24 million at the expense of the Non-Debtor Companies and their innocent customers, on whose behalf and with whose money it paid payroll tax liabilities to the IRS. AEM is not entitled to a refund of the almost $24 million in taxes it claims to have improperly paid on behalf of the Non-Debtor Companies. AEM had no right to the monies in 2007, and AEM has no right to the monies today. The IRS' motion for partial summary judgment on AEM's Objection to Claim No. 4 is GRANTED.

AEM's Motion for Sanctions is Denied

AEM moves this Court for sanctions against the IRS for filing and continuing to prosecute its Amended Claim No. 4.[48] The motion, filed in April 2011, argues the IRS has no evidence to substantiate a claim against AEM for 2007 payroll taxes and that the IRS "intentionally dragged out the litigation of the AEM IRS Claim Objection."[49] The motion argues the IRS' claim was made in bad faith because it: (1) was based solely upon an invalid, unsigned tax return, and (2) the IRS knew the payments AEM made to the IRS in 2007 were more than sufficient to offset AEM's tax liability. AEM appeals to the Court to act, pursuant to its inherent authority and § 105 of the Bankruptcy Code, to award sanctions against the IRS in the amount of AEM's attorneys' fees in responding to Claim No. 4.

AEM's motion cites no evidence to support its contentions. Neither does AEM provide any legal authority for its arguments that the IRS' claim is facially invalid because it relies on unsigned returns and that AEM is due a refund because it used its own monies to pay taxes on behalf of the Non-Debtor Companies.

Most importantly, the IRS' claim for tax liability is a colorable one. The IRS based its claim on tax assessments created from filed returns, as evidenced by the Certificates of Assessments and Payments attached to the IRS' motion for partial summary judgment (notably, filed prior to AEM's motion seeking sanctions).[50] And, the IRS' position—that AEM has tax liability because it underpaid in 2007 and is not entitled to credit for the payments made on behalf of the Non-Debtor Companies—is far from frivolous. Indeed, the IRS' arguments have resulted in partial summary judgment against AEM on its refund claim, and the Court soon will

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[48] Case No. 8-bk-4681, Doc. No. 260 at 4.
[49] *Id.*
[50] Case No. 8-bk-4681, Doc. No. 251, Ex. D. Mooting the legal question of whether signed tax returns are required to be presented to demonstrate taxpayer liability, the IRS located and produced AEM's second quarter 2007 tax return, signed by Frank Amodeo, shortly after the motion for sanctions was filed. The IRS does not seek payment for first quarter 2007 payroll taxes from AEM.

resolve the question of AEM's remaining tax liability, if any. AEM's Motion for Sanctions is DENIED.

The IRS' Motions in Limine are Denied

The IRS filed two motions in limine in anticipation of trial. Both motions seek rulings excluding evidence.

The first motion[51] seeks to exclude all evidence supporting any ground for AEM's refund request other than that set forth in AEM's amended tax returns (filed in December 2009). Because summary judgment has been granted for the IRS on AEM's refund claim, there will be no trial of the refund request. This motion is denied as moot.

The IRS' second motion in limine[52] seeks to exclude the testimony of R. W. Cuthill, the current president and sole employee of AEM. It also seeks to exclude AEM's exhibits 30-32, 36-62, 67, 72, and 73. The motion is made pursuant to Fed. R. Evid. 602, which requires a percipient witness to have personal knowledge of the matters to which he testifies, and Fed. R. Evid. 803(6), which requires authentication by a qualified witness for a business record to be excepted from the rule against hearsay.

The record is insufficient for the Court to make evidentiary rulings at this time; the scope of Cuthill's testimony is undetermined, and the evidentiary purpose of the exhibits identified in the motion is not yet clear. If and when Cuthill's testimony is offered, the Court will rule on all contemporaneous objections to his testimony. The Court will rule on objections to documentary exhibits at the time they are moved into evidence. The Court also denies this motion in limine.

[51] Case No. 8-bk-4681, Doc. No. 261.
[52] Case No. 8-bk-4681, Doc. No. 262.

AEM's Emergency Motion to Bifurcate the Hearing and for
Leave to File an Adversary Proceeding Relating Back to the Claim Objection is Denied

On April 18, 2011, four days before the scheduled trial on the IRS' Claim No. 4 and AEM's Objection to Claim, AEM made an emergency motion. AEM sought bifurcation of the single evidentiary hearing into two: one to try AEM's liability for the tax debt (IRS' Claim No. 4) and another to try AEM's $24 million refund claim. AEM also sought permission to file a fraudulent transfer adversary proceeding against the IRS as an additional means of recovering the $24 million it contends it is owed by the IRS. AEM implicitly acknowledged a fraudulent transfer action was untimely but argued it would relate back to the filing of the Objection to Claim on October 9, 2009.

The IRS' Claim No. 4 was filed over two years before this emergency motion; AEM's Objection to Claim, which included its contention that AEM had overpaid taxes, was filed eighteen months before the emergency motion. Almost a year before seeking bifurcation, on May 19, 2010, AEM and the IRS agreed to try AEM's objection to the IRS' $3 million claim and AEM's request for a refund in the same proceeding.[53] And, at a status conference on February 25, 2011, two months before the trial date, counsel for AEM again acknowledged the parties' agreement to try both disputes in one proceeding and stated that, although AEM could have filed a fraudulent transfer action, it had elected not to do so because it felt all the disputed issues could be resolved in the context of its claim objection.[54]

AEM's belatedly filed emergency motion appears to be a reaction to the legal positions taken by the IRS in its motion for summary judgment and motions in limine; yet, AEM provides no explanation why the IRS' motions create the necessity for bifurcation of the hearing or filing of a fraudulent transfer adversary proceeding. AEM pursued its refund claim based **solely** on an overpayment theory from the time it filed its claim objection in October 2009. In open court,

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[53] Case No. 8-bk-4327, Doc. No. 594 at 8-10.
[54] Case No. 8-bk-4681, Doc. No. 247.

AEM explicitly agreed to try the refund claim in the same proceeding as its objection to the IRS' Claim No. 4. Until February 2011, AEM did not use the phrase "fraudulent transfer" in reference to its claim objection or refund request, in writing or at a hearing; and, even on February 25, 2011, when the subject was discussed for the first time, AEM's counsel acknowledged AEM had chosen **not** to pursue a fraudulent transfer action.

AEM's motion is denied. First, there is nothing left to bifurcate. In granting the IRS' motion for partial summary judgment, the Court has determined AEM is not entitled to a refund because AEM had no right to the monies paid to the IRS on behalf of the Non-Debtor Companies. Second, AEM cannot wait until the eve of trial to rescind its agreement to proceed only on its overpayment theory. Both the IRS and the Court relied on AEM's statement that all disputes could be resolved with the claim objection. Until four days before the trial, AEM never expressed a desire to pursue a fraudulent transfer theory of recovery; indeed, it affirmatively disavowed such a desire. As a result, discovery was concluded; a trial date was set. It is simply too late for AEM to change its legal theory. AEM's emergency motion to bifurcate the hearing and for leave to file an adversary proceeding relating back to the date it filed its objection to claim is DENIED.

<u>The IRS' Motion to Dismiss the Adversary Complaint is Granted</u>

On May 20, 2011, AEM filed its ten-count adversary proceeding complaint against the IRS.[55] Mirabilis is also a plaintiff. Count I of the complaint restates AEM's objection to the IRS' Claim No. 4. Count II seeks a determination of AEM's tax liability as $0.00 and seeks refund of $23.9 million in overpayments by AEM. The remaining eight counts are actual and constructive fraudulent transfer claims alleged pursuant to §§ 544, 548 and 550 and the Florida Uniform Fraudulent Transfer Act (FUFTA). Counts III and IV seek return of $23.9 million in alleged actually fraudulent transfers of AEM money to IRS; Counts VII and VIII seek to avoid

[55] AP No. 11-ap-87, Doc. No. 1.

the transfer of the same $23.9 million and additional monies AEM contends were constructively fraudulent transfers by AEM to the IRS. Counts V, VI, IX, and X seek to avoid transfers of Mirabilis funds as actually and constructively fraudulent transfers.

The IRS moves to dismiss the entire complaint on two grounds. First, the IRS argues each of the fraudulent transfer actions (Counts III through X, inclusive) is barred by the statute of limitations in § 546(a).[56] AEM filed its petition on June 5, 2008, and the statute of limitations ran as to its fraudulent transfer claims on June 5, 2010. Second, the IRS argues Counts I and II are duplicative of the litigation regarding Claim No. 4 in AEM's bankruptcy case and are not proper stand-alone causes of action.

AEM and Mirabilis do not dispute that § 546(a) is the governing statute of limitations or that the limitations period provided by the statute elapsed almost a year before they filed the fraudulent transfer adversary proceeding. Instead, plaintiffs make three arguments why the statute of limitations should not bar their fraudulent transfer claims: (1) the complaint relates back to the objection to the IRS' Claim No. 4 that AEM filed in October 2009; (2) equitable tolling bars the application of the statute of limitations; and (3) the IRS waived the statute of limitations. The Court finds no merit in plaintiffs' arguments.

First, AEM's untimely complaint cannot relate back to AEM's Objection to Claim filed in October 2009 for two reasons: (1) the claim objection did not put the IRS or the Court on notice that either Mirabilis or AEM intended to bring any action alleging either entity

[56] Section 546(a) states:

> An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of--
>
> (1) the later of--
>
> (A) 2 years after the entry of the order for relief; or
>
> (B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
>
> (2) the time the case is closed or dismissed.

fraudulently transferred monies to the IRS; [57] and (2) the complaint alleges facts that are new and distinct from those in the claim objection.

"The critical issue in Rule 15[(b)] determinations is whether the original [pleading] gave notice to the defendant of the claim now being asserted."[58] AEM's Objection to Claim No. 4 did not put the IRS or the Court on notice that it or Mirabilis intended to pursue a fraudulent transfer action. The claim objection states, in pertinent part:

> 8. First, the IRS has miscalculated, and AEM has overpaid, its withholding taxes. The IRS improperly submitted its proof of claim based on, and AEM improperly paid withholding taxes on, the estimated taxes for four distinct and separate companies: (1) AEM, Inc.; (2) Presidion Solutions VI, Inc.; (3) Presidion Solutions VII, Inc.; and (4) National MedStaff, Inc. However, the IRS and AEM should only have included AEM, Inc. when calculating the amount of withholding taxes AEM was required to pay to IRS.
>
> 9. Using the correct calculations, as reflected by the attached copy of consolidating spreadsheets, AEM has already paid its due withholding taxes and thus does not owe any withholding taxes to IRS. In fact, based on AEM's overpayment of the taxes, AEM still retains a credit balance. As such, the IRS' claim must be disallowed in its entirety. True and correct copies of the spreadsheets evidencing payments made and the proper calculations of AEM's withholdings are attached hereto as composite Exhibit "A."[59]

The claim objection states only that AEM objects to the IRS' claim on the basis AEM improperly paid taxes for companies other than itself and, therefore, overpaid the IRS. It says nothing at all about: (1) Mirabilis (including any monies paid by Mirabilis or out of Mirabilis bank accounts); or (2) any fraud, actual or constructive. The claim objection does not even

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[57] AEM's counsel stated as much when he said, in May 2010, "I think [counsel for the IRS] is combining the request for refund with the claim objection. . . . this is just an objection to their 3 million dollar claim. If she wants to combine that with the trial to give us 26 million if we win, I'm happy to do that, but I don't think that's what's teed up . . . ." Case No. 8-bk-4327, Doc. No 594 at 8-9. Notably, the discussion ended with the parties and the Court agreeing to try "the whole thing in one swoop." *Id.* at 10. No statement was made about any fraudulent transfer causes of action by AEM. Neither was there any discussion of any action to recover any monies on behalf of Mirabilis.

[58] *Moore v. Baker*, 989 F.2d 1129, 1131 (11th Cir. 1993) (citing *Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America*, 438 F.2d 1286, 1299-1300 (5th Cir. 1971), cert. denied, 404 U.S. 1047, 92 S. Ct. 701 (1972)). Rule 15 is made applicable to adversary proceedings by Fed. R. Bankr. P. 7015.

[59] Case No. 8-bk-4681, Doc. No. 162.

indicate AEM seeks a refund from the IRS.[60] For this reason alone, the fraudulent transfer counts of the complaint cannot relate back to the filing of the claim objection in October 2009.[61]

The complaint's fraudulent transfer counts cannot relate back to the claim objection for a second reason: the complaint alleges facts that are new and distinct from those in the claim objection. "When new or distinct conduct, transactions, or occurrences are alleged as grounds for recovery, there is no relation back, and recovery under the [new] complaint is barred by limitations if it was untimely filed."[62] The complaint alleges fraudulent transfers of Mirabilis' money; these are entirely different monies and transactions than the overpayments referenced in the claim objection (all AEM funds). This is also true with regard to the complaint's allegations that AEM fraudulently transferred funds in addition to the $24 million in overpayments AEM pursued through its claim objection and subsequent refund request. And, with respect to all the transfers alleged in the complaint (including those that are referred to as overpayments in the claim objection), the complaint relies on new allegations of conduct and circumstances that were not even hinted at in the claim objection. These new allegations include: that Amodeo made the transfers to the IRS; that Amodeo lacked authority to transfer the funds to the IRS; that the monies were transferred for the benefit of the IRS; that the monies were transferred with actual intent to hinder, delay or defraud plaintiffs' creditors; and that plaintiffs were insolvent at the time of the transfers to the IRS.

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[60] Indeed, at the confirmation hearing, a week after the objection to claim was filed, Mr. Cuthill stated that a decision had not been made yet as to whether AEM would, in fact, be seeking a refund from the IRS. Case No. 8-bk-4327, Doc. No. 596 at 45.

[61] Plaintiffs' argument that the IRS should have known plaintiffs intended to assert fraudulent transfer causes of action based on subsequent events in the case is irrelevant. The legally significant question is whether **the pleading to which plaintiffs seek relation back** (here, the objection to claim) provides notice to the IRS of plaintiffs' fraudulent transfer claims. *See* Fed. R. Civ. P. 15(c)(1). Even if relevant to the relation back analysis, the Court finds the events identified by plaintiffs did not put the IRS (or this Court) on notice plaintiffs intended to pursue fraudulent transfer causes of action. Indeed, as stated previously, in February 2011, less than two months before trial was scheduled on all matters related to Claim No. 4 and AEM's objection thereto, AEM acknowledged that it had affirmatively decided **not** to pursue a fraudulent transfer case.

At the same status conference, AEM identified Cuthill, the accountant who prepared AEM's amended tax returns, and an IRS representative as its only witnesses. The fact that this witness list is inadequate to present evidence on each element of a fraudulent transfer cause of action is further indication that AEM did not provide notice of any intent to present a fraudulent transfer case.

[62] *Moore*, 989 F. 2d at 1131 (citing *Holmes v. Greyhound Lines, Inc.*, 757 F.2d 1563, 1566 (5th Cir. 1985)).

Second, no basis for equitable tolling of the statute of limitations exists. This is not the typical equitable tolling case where plaintiffs were ignorant of their fraud causes of action until after the statute ran; indeed, they do not argue that they were.[63] Instead, plaintiffs argue "extraordinary circumstances beyond [their] control made it impossible to file the claims on time."[64] There is no factual basis for the Court to reach that conclusion. Plaintiffs have been managed by an experienced receiver and represented by skilled and experienced bankruptcy counsel throughout their bankruptcies. The ongoing litigation over the IRS' Claim No. 4 and AEM's objection thereto did not, in any way "prevent[] enforcement of the [fraudulent transfer] remedy by action."[65] Mr. Cuthill was not limited by any stay, injunction, or other legal impediment to the filing of a fraudulent transfer action. Moreover, nothing the IRS did prevented plaintiffs from asserting their fraudulent transfer claims before the statute of limitations ran. AEM simply changed its mind to file a fraudulent transfer adversary proceeding after the applicable statute of limitations expired.

Third, the IRS never waived the statute of limitations defense. The statements plaintiffs cite in their response to the motion to dismiss do not evidence the "intentional relinquishment of a known right" necessary to effect a waiver.[66] The IRS never expressed any waiver of any defense to plaintiffs' claims. Indeed, the IRS never knew the claims existed; as late as February 2011, AEM itself stated it was not pursuing fraudulent transfer claims.

The two-year statute of limitations in § 546(a)(1)(A) applies to plaintiffs' fraudulent transfer causes of action. The newly raised fraudulent transfer counts, Counts III-IX, are time barred and are dismissed with prejudice.

Counts I and II of the complaint also are dismissed for a different reason. Count I is an amended objection by AEM to Claim No. 4; it reasserts the original overpayment grounds stated

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[63] AP No. 11-ap-87, Doc. No. 19 at 11.
[64] *Id.* (citing *In re M & L Business Machines, Inc.*, 153 B.R. 308, 311 (D. Co. 1993)).
[65] *In re M & L Business Machines, Inc.*, 153 B.R. at 311 (citations omitted).
[66] *Dade County v. Rohr Indus., Inc.*, 826 F.2d 983, 990 (11th Cir. 1987).

in the Objection to Claim and adds a new objection that the IRS' claim must be disallowed pursuant to § 502(d) unless and until the IRS refunds the fraudulent transfers alleged in the now dismissed Counts III-IX of the complaint. Count II seeks determination of AEM's tax liability on the overpayment, based entirely on grounds previously stated in AEM's objection to claim. To the extent Counts I and II rely on the same theory as the objection to claim pending in AEM's main case, they are duplicative and unnecessary. The objection properly initiated a contested matter within the AEM bankruptcy case, and litigation of that contested matter will resolve those issues fully. To the extent Count I asserts an amended claim objection based on the new theory that transfers of AEM and Mirabilis funds were fraudulent, the untimely pleading is disallowed for the reasons discussed above.

In conclusion, the court simultaneously will issue separate orders consistent with this Memorandum Opinion as follows:

1. The IRS' motion for partial summary judgment on AEM's Objection to Claim No. 4[67] is GRANTED. AEM is not entitled to a refund of the taxes it claims to have improperly paid on behalf of the Non-Debtor Companies.
2. AEM's motion for sanctions against the IRS[68] is DENIED.
3. The IRS' motion in limine to exclude evidence in support of AEM's refund claim[69] is DENIED as moot.
4. The IRS' motion in limine to exclude testimony by R.W. Cuthill and specific documentary exhibits[70] is DENIED without prejudice to the IRS' ability to make objections at trial, on a contemporaneous basis with the evidentiary offerings.

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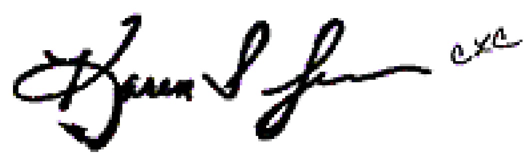
[67] Case No. 8-bk-4681, Doc. No. 251.
[68] Case No. 8-bk-4681, Doc. No. 260.
[69] Case No. 8-bk-4681, Doc. No. 261.
[70] Case No. 8-bk-4681, Doc. No. 262.

5. AEM's emergency motion to bifurcate the trial on its objection to Claim No. 4 and refund request and for leave to file an adversary proceeding relating back to the date it filed its Objection to Claim [71] is DENIED.
6. The IRS' motion to dismiss the adversary complaint in 11-ap-87[72] is GRANTED. The complaint is DISMISSED WITH PREJUDICE.
7. The IRS' Motion for Relief from Stay[73] is ABATED pending the request of any party to set a hearing on the motion.

The parties are directed to return to mediation to further discuss settlement, in light of these rulings. Mediation shall be concluded by **May 31, 2012**.

A non-evidentiary pretrial conference on the two remaining issues—the amount of Mirabilis' tax overpayments and the existence and amount of AEM's tax liability (IRS' Claim No. 4)—is set for **2:00 p.m. on June 13, 2012**.

DONE AND ORDERED in Orlando, Florida, on March 21, 2012.



KAREN S. JENNEMANN
Chief United States Bankruptcy Judge

[71] Case No. 8-bk-4681, Doc. No. 269.
[72] AP No. 11-ap-87, Doc. No. 14.
[73] Case No. 8-bk-4327, Doc. No. 660.

Copies furnished to:

Debtor: Mirabilis Ventures, Inc., c/o R.W. Cuthill, Jr., 341 N. Maitland Ave. #210, Maitland, FL 32751

Debtors' Attorney: Latham Shuker Eden & Beaudine LLP, Attn. Justin Luna, 390 N. Orange Ave. Suite 600, Orlando FL 32801

Special Counsel for Debtor: Broad and Cassel, Attn. Roy Kobert, 390 N. Orange Ave., Suite 1400, Orlando, FL 32801

Attorney for USA: Scott H. Park, Assistant U.S. Attorney, ID No. USA084, 501 W. Church St., Suite 300, Orlando, FL 32805

Attorney for USA: I. Randall Gold, Assistant U.S. Attorney, 501 W. Church Street, Suite 300, Orlando, FL 32805

Attorney for USA: Valerie G. Preiss, Tax Division, U.S. Department of Justice, P.O. Box 14198, Washington, DC 20044

United States Trustee's Office: Attn: Elena Escamilla, 135 W. Central Blvd., Suite 620, Orlando, FL 32801

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re MIRABILIS VENTURES, INC., Debtor.	)	Case No. 6:08-bk-04327-KSJ Chapter 11
In re AEM, INC., Debtor.	)	Case No. 6:08-bk-04681-KSJ Chapter 11
AEM, INC., and MIRABILIS VENTURES, INC. Plaintiffs, vs. UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, Defendant.	)	Adv. Proc. 6:11-ap-00087-KSJ

ORDER GRANTING
MOTION BY IRS TO DISMISS ADVERSARY PROCEEDING

This adversary proceeding came on for consideration on the Motion by IRS to Dismiss Adversary Complaint (Doc. No. 14). Consistent with the Memorandum Opinion, entered simultaneously, it is

ORDERED:

1. The IRS' Motion to Dismiss Adversary Complaint is granted.

2. This adversary proceeding is dismissed.

DONE AND ORDERED in Orlando, Florida, on March 21, 2012.

KAREN S. JENNEMANN
Chief United States Bankruptcy Judge

Copies furnished to:

Debtor: Mirabilis Ventures, Inc., c/o R.W. Cuthill, Jr., 341 N. Maitland Ave. #210, Maitland, FL 32751

Debtors' Attorney: Latham Shuker Eden & Beaudine LLP, Attn. Justin Luna, 390 N. Orange Ave. Suite 600, Orlando FL 32801

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Attorney for USA: Valerie G. Preiss, Tax Division, U.S. Department of Justice, P.O. Box 14198, Washington, DC 20044

United States Trustee's Office: Attn: Elena Escamilla, 135 W. Central Blvd., Suite 620, Orlando, FL 32801

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re	)	
	)	
MIRABILIS VENTURES, INC.,	)	Case No. 6:08-bk-04327-KSJ
	)	Chapter 11
Debtor.	)	
	)	

ORDER ABATING
IRS' MOTION FOR RELIEF FROM STAY

This case came on for consideration on the IRS' Motion for Relief from Stay to Reapply Credit from Employment Tax Period to Income Tax Period and to Set Off Debtor's Tax Overpayments Against AEM, Inc.'s Employment Tax Liabilities (Doc. No. 660). Consistent with the Memorandum Opinion, entered simultaneously, it is

ORDERED:

1. The IRS' Motion for Relief from Stay is ABATED pending the request of any party to set a hearing on the motion.

DONE AND ORDERED in Orlando, Florida, on March 21, 2012.

KAREN S. JENNEMANN
Chief United States Bankruptcy Judge

Copies furnished to:

Debtor: Mirabilis Ventures, Inc., c/o R.W. Cuthill, Jr., 341 N. Maitland Ave. #210, Maitland, FL 32751

Debtors' Attorney: Latham Shuker Eden & Beaudine LLP, Attn. Justin Luna, 390 N. Orange Ave. Suite 600, Orlando FL 32801

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United States Trustee's Office: Attn: Elena Escamilla, 135 W. Central Blvd., Suite 620, Orlando, FL 32801

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

OCHSNER CLINIC FOUNDATION	**CIVIL ACTION**
VERSUS	**NO. 09-6807**
UNITED STATES OF AMERICA	**SECTION: "C"(2)**

ORDER

IT IS ORDERED that the parties' Agreed Order Dismissing This Case Without Prejudice is DENIED WITHOUT PREJUDICE. (Rec. Doc. 31). The Court is unable to dismiss a case pursuant to an order binding the parties to a settlement agreement. The Court will consider a standard motion to dismiss with the right to reopen if good cause is shown that settlement is not consummated within a period of time up to 180 days.

New Orleans, Louisiana, this 21st day of March, 2012.

HELEN G. BERRIGAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

HELEN ROBIN	**CIVIL ACTION**
VERSUS	**NUMBER: 11-3056**
UNITED STATES OF AMERICA	**SECTION: "R"**

ORDER OF DISMISSAL

The Court having been advised by counsel for all parties that they have firmly agreed upon a compromise in this matter;

IT IS ORDERED that this action be and it is hereby dismissed as to all parties, without costs and without prejudice to the right, upon good cause shown, within ninety days, to reopen the action if settlement is not consummated. In addition, the Court specifically retains jurisdiction to enforce the settlement agreement if settlement is not consummated in ninety days. *See* Fed. R. Civ. P. 41(a)(2); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381-82 (1994); *Hospitality House, Inc. v. Gilbert*, 298 F.3d 424, 430 (5th Cir. 2002).

COUNSEL ARE REMINDED THAT, IF WITNESSES HAVE BEEN SUBPOENAED, EVERY WITNESS MUST BE NOTIFIED BY COUNSEL NOT TO APPEAR.

New Orleans, Louisiana, this 21st **day of** March**, 2012.**

Sarah Vance
SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES E. SAVAGE, JR.,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 10-2330 (RWR)**
UNITED STATES OF AMERICA,	)	
Defendant.	)	

ORDER

Counsel for the plaintiff and the defendant in this case notified the court on March 5, 2012 that the parties have reached a settlement. In light of that representation, it is hereby

ORDERED that this case shall be dismissed without prejudice for thirty days. It is further

ORDERED that any party may, within thirty days from entry of this Order, reopen this case upon motion approved by the Court. It is further

ORDERED that if no party moves to reopen this case within thirty days, this case shall, without further order, stand dismissed with prejudice.

SIGNED this 21st day of March, 2012.

__________/s/______________
RICHARD W. ROBERTS
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

George O. Thurman and Elizabeth L. Thurman,	)	
Plaintiffs,	)	No. CV 11-158-TUC-DCB-DTF
v.	)	**REPORT AND RECOMMENDATION**
Internal Revenue Service,	)	
Defendant.	)	

Pending before the Court is Defendant's Motion to Dismiss. (Doc. 10.) Plaintiffs filed three responses. (Docs. 20, 23, 24.) Defendant filed a reply. (Doc. 22.) Pursuant to the Rules of Practice in this Court, the matter was assigned to Magistrate Judge Ferraro for a report and recommendation. The Magistrate recommends the District Court, after its independent review of the record, enter an order granting the motion to dismiss with leave to amend.

BACKGROUND

The Complaint alleges that Plaintiff George Thurman and Defendant signed an agreement in 2005. Plaintiffs allege they have satisfied their side of the bargain and Defendant has failed to do so. Further, Plaintiffs contend the Government admitted that their alleged tax liability was bogus and all Plaintiffs needed to do was to file prior year tax returns. Plaintiffs allege they have done so. Despite that, Plaintiffs allege the Internal Revenue Service (IRS) has garnished George Thurman's wages and claimed Plaintiffs owed on $1.9 million in capital gains from 2000. Plaintiffs ask that the Court order Defendant to honor its agreement and dismiss the debt; stop attacking Elizabeth Thurman as a separate entity; and rescind the liens filed with the Pima County Recorder's Office.[1]

DISCUSSION

Defendant argues that Plaintiffs' Complaint fails to state a claim and is subject to dismissal under Rule 12(b)(6).

Standard for Rule 12(b)(6) Motion to Dismiss

To survive a Rule 12(b)(6) motion to dismiss for failure to state a claim, the complaint must allege facts sufficient "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). The plausibility standard does not amount to a probability requirement, however, it demands "more than a sheer possibility that a defendant has acted unlawfully." *Id.* In evaluating a motion to dismiss, "all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the nonmoving party." *Wyler Summit P'hip v. Turner Broad. Sys. Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). However, "the court [is not] required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Likewise, "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Dismissal under Rule 12(b)(6) can be based on "the lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Analysis

The United States, including its agencies, can only be sued to the extent it has

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[1] As pointed out by Defendant, Plaintiffs appear to be referring to tax liens, not levies as stated in the Complaint. (*See* Doc. 1 at 4 & App. at 3.) Plaintiffs mention tax levies, however, they indicate they are no longer relevant as George Thurman left his employment to avoid the levy of his wages. The Court, therefore, discusses only the tax liens that Plaintiffs allege have been filed with the Pima County Records Office. (*Id.*)

expressly waived its sovereign immunity. *Kaiser v. Blue Cross of Cal.*, 347 F.3d 1107, 1117 (9th Cir. 2003). Plaintiffs do not invoke any statute providing jurisdiction, nor do they cite any authority for the waiver of the government's sovereign immunity with respect to this suit.

The core of the remedy sought by Plaintiffs is a request for the Court to enjoin the IRS from collecting a federal tax that they allege they do not owe. There is a statutory prohibition, with limited exceptions, against a legal suit to restrain the assessment or collection of a federal tax. 26 U.S.C. § 7421(a). If a taxpayer does not establish that he satisfies one of the exceptions, this Court does not have jurisdiction and the case must be dismissed. *Jensen v. I.R.S.*, 835 F.2d 196, 198 (9th Cir. 1987). Plaintiffs do not argue that any of the statutory exceptions are applicable and, upon its own review, the Court finds that they do no meet any of those exceptions. There is one judicial exception, allowing suit when "it is clear that under no circumstances could the Government ultimately prevail," and "equity jurisdiction otherwise exists." *Roat v. Comm., I.R.S.*, 847 F.2d 1379, 1383 (9th Cir. 1988) (quoting *Enochs v. Williams Packing Co.*, 370 U.S. 1, 7 (1962)). Defendant addressed this exception in the motion to dismiss, arguing that Plaintiffs had not met it. In the three responses, Plaintiffs do not argue otherwise. There is no information currently before the Court demonstrating that the Government could not possibly prevail in its tax assessment as to Plaintiffs. Further, Plaintiffs have not alleged facts demonstrating that a remedy in Tax Court or in a refund suit would be inadequate. *See Roat*, 847 F.2d at 1383 (citing *Comm., I.R.S. v. Shapiro*, 424 U.S. 614, 627 (1974)). Plaintiffs have failed to plead an exception to the Anti-Injunction Act and this Court has no jurisdiction over the suit.

Defendant addresses several other possible claims that Plaintiffs might be raising. Defendant discusses the possibility of a refund claim, but Plaintiffs clarified that they are not seeking a refund of taxes collected. (Doc. 20 at 5.) Plaintiffs do not appear to be seeking monetary damages for either the tax liens or for an unauthorized tax collection. However, the Court notes that as to either type of action, there is a two-year statute of limitations and a requirement that administrative remedies be exhausted. 26 U.S.C. §§ 7432(d)(1) & (3), 7433(d)(1) &(3). Based on the current information before the Court, a claim for damages appears to be untimely. Further, Plaintiffs have not alleged that they exhausted administrative remedies available within the IRS.

Plaintiffs request the release of liens and Defendant argues that he fails to allege that the tax lien is unenforceable or that the tax liability has been satisfied, pursuant to 26 U.S.C. § 6325(a). More importantly, this statute provides only for the release of a lien by the Secretary of the Treasury, not for a court action. There is no accompanying waiver of sovereign immunity with respect to a suit over a lien release. To the extent Plaintiffs are seeking either injunctive relief or damages with respect to the liens, the court has no jurisdiction for the reasons discussed above for those types of claim.

Finally, the focus of Plaintiffs' factual allegations is that George Thurman reached an agreement with the IRS in 2005, in which the IRS conceded the tax debt assessed against him was bogus and that to resolve the situation he just needed to file his back tax returns. The signed agreement reflecting this meeting is a list of actions to which Thurman agreed, primarily documents he was to produce. (Doc. 1, App. at 1.) This agreement was entered into on August 22, 2005, when Thurman appeared at a hearing in this Court, set because Thurman had failed to comply with an IRS summons. *United States v. Thurman*, No. 05-MC-004-DCB, Doc. 19 (D. Az. August 22, 2005). Thurman was given until August 30, 2005, to comply with the Court's order enforcing the IRS summons. *Id.* The signed agreement upon which Thurman relies notes the date of August 30. Thus, the agreement is most readily interpreted as Thurman's agreement to provide documents in satisfaction of the summons prior to the Court's enforcement date. The IRS did not agree to take any action in the written document and there is nothing for the Court to enforce against it.

Plaintiffs fail to allege a waiver of sovereign immunity, therefore, this court lacks jurisdiction over the Complaint. Further, they fail to state a claim for relief.

Conclusion

Based on the above assessment, the Court should grant the motion to dismiss. However, when a court dismisses for failure to state a claim, it "should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv.*, 911 F.2d 242, 247 (9th Cir. 1990). Because Plaintiffs are pro se and it is not absolutely clear that they could not state a cause of action, the Court finds that leave to amend should be allowed.

When dismissing with leave to amend, a court is to provide reasons for the dismissal so a plaintiff can make an intelligent decision whether to file an amended complaint. *See Bonanno v. Thomas,* 309 F.2d 320 (9th Cir. 1962); *Eldridge v. Block*, 832 F.2d 1132 (9th Cir. 1987). The Court has advised Plaintiffs of the reasons their Complaint is being dismissed. The Court emphasizes that Plaintiff must plead the basis of the Court's jurisdiction, Fed. R. Civ. P. 8(a)(1), which includes identifying an express waiver of sovereign immunity by the United States with respect to the suit. If Plaintiffs intend to continue their pursuit of injunctive relief, they must allege an applicable exception to the Anti-Injunction Act in order to establish subject matter jurisdiction.

An amended complaint must contain all allegations a plaintiff is asserting against the defendant, as the original complaint will be superseded by an amendment and any arguments not included in the amendment are waived. *See London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981). The Court is aware that the legal issues in this case may be complex, even to a lawyer; nevertheless, Plaintiffs are reminded of their obligation to comply with all rules of procedure and Court orders, regardless of their pro se status. *See King v. Atiyeh,* 814 F.2d 565, 567 (9th Cir. 1987). Failure to do so may result in dismissal of the action. Fed. R. Civ. P. 41(b); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992). If Plaintiffs do not amend their complaint in the time set by the District Court, the Court should dismiss the case and enter judgment.

RECOMMENDATION

Based on the foregoing, the Magistrate Judge recommends that the District Court grant the motion to dismiss the complaint with leave to amend within twenty (20) days.

Pursuant to Federal Rule of Civil Procedure 72(b)(2), any party may serve and file written objections within fourteen days of being served with a copy of the Report and

Recommendation. If objections are not timely filed, they may be deemed waived.

DATED this 21st day of March, 2012.

D. Thomas Ferraro
United States Magistrate Judge

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA Plaintiff, v. JOHN J. URBAN; VIVIAN URBAN; and WHATCOM COUNTY Defendants.	Civil No. 11-00330-RSM ORDER OF FORECLOSURE AND JUDICIAL SALE

Summary Judgment having been entered against John J. Urban and Vivian Urban (the "Urbans") and in favor of the United States, pursuant to 28 U.S.C. §§ 2001 and 2002 and 26 U.S.C. §§ 7402 and 7403, and a stipulation with Whatcom County having been approved and entered by the Court, the Court hereby orders as follows:

1. The parcel of real property upon which foreclosure is sought (the "Subject Property") is real property commonly known as 357 Birch Bay-Lynden Road, Lynden, Washington, and more particularly described as:

> **Parcel A**: Lot B, as delineated on Shuyleman Short Plat, according to the plat thereof, recorded under auditor's file no. 1193836, in volume 1 of short plats, page 79, records of Whatcom County, Washington. Situate in Whatcom County,

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Washington.

Parcel B: An easement for ingress, egress, and utilities as delineated on the face of Shutleman Short Plat, according to the plat thereof, recorded under auditor's file no. 1193836, in volume 1 of short plats, page 79, records of Whatcom County, Washington. Situate in Whatcom County, Washington.

2. The United States has valid tax liens upon the Subject Property based upon the Urbans' unpaid federal income tax liabilities for the 1997 and 1999 tax years with current balances as of January 10, 2012, of $316,680.01 for the 1997 tax year and $93,583.87 for the 1999 tax year, plus additional interest and other accruals thereafter as provided by law. On February 21, 2012, the Court granted the United States' motion for summary judgment against the Urbans which foreclosed the federal tax liens against the Subject Property.

3. Section 7403 of Title 26 (U.S.C.) entitles the Untied States to enforce its liens against the Subject Property in order to enforce the United States' liens upon that property.

4. Summary Judgment has been entered against the Urbans. Dkt. # 17.

5. The United States' federal tax liens against the Subject Property are hereby foreclosed. The United States Marshal for the Western District of Washington, his/her representative, or an Internal Revenue Service Property Appraisal and Liquidation Specialist ("PALS") representative is authorized and directed under 28 U.S.C. §§ 2001 and 2002 to offer for public sale and to sell the Subject Property, free and clear of the right, title and interest of all parties to this action and any successors in interest or transferees of those parties. The United States may choose either the United States Marshal or a PALS representative to carry out the sale under this Order of Foreclosure and Judicial Sale and shall make the arrangements for any sale as set forth in this Order. This Order of Foreclosure and Judicial Sale shall act as a special writ of execution and no further orders or process from the Court shall be required.

6. The United States Marshal for the Western District of Washington, his/her representative, or a PALS representative is authorized to have free access to the Subject Property and to take all actions necessary to preserve it including without limitation retaining a locksmith or other person to change or install locks or other security devices on any part thereof, until a deed thereto is delivered to the ultimate

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purchaser(s).

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

a. Except as otherwise stated herein, the sale of the Subject Property shall be by public auction to the highest bidder, free and clear of all liens and interests.

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

c. The sale shall be held at the courthouse of the county or city in which the Subject Property is located, on the Subject Property's premises, or at any other place in accordance with the provisions of 28 U.S.C. §§ 2001 and 2002, at a date and time announced by the United States Marshal, his/her representative, or a PALS representative.

d. Notice of the sale shall be published once a week for at least four consecutive weeks before the date fixed for the sale in at least one newspaper regularly issued and of general circulation in Whatcom County, and, at the discretion of the Marshal, his/her representative, or a PALS representative, by any other notice that it or its representative may deem appropriate. **State law notice requirements for foreclosures or execution sales do not apply to this sale under federal law.** The notice of sale shall describe the Subject Property and contain the material terms and conditions of sale in this Order of Foreclosure and Judicial Sale.

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

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f. Bidders shall be required to DEPOSIT at the time of sale with the Marshal, his/her representative, or a PALS representative, a minimum of five percent of the bid with the deposit to be made by a certified or cashier's check payable to the United States District Court for the Western District of Washington. Before being permitted to bid at the sale, bidders shall display to the Marshal, his/her representative, or a PALS representative satisfactory proof of compliance with this requirement.

g. The balance of the purchase price of the Subject Property in excess of the deposit tendered shall be paid to the Marshal or a PALS representative (whichever person is conducting the sale) within thirty (30) days after the date the bid is accepted by a certified or cashier's check payable to the United States District Court for the Western District of Washington. If the successful bidder fails to fulfill this requirement, the deposit shall be forfeited and shall be applied to cover the expenses of the sale, including commissions due under 28 U.S.C. § 1921(c), with any amount remaining to be applied to partially satisfy the federal tax liens at issue herein. The Subject Property shall be again offered for sale under the terms and conditions of this Order of Foreclosure and Judicial Sale. The United States may bid as a credit against its judgment without tender of cash.

h. The sale of the Subject Property shall not be final until confirmed by this Court. The Marshal or a PALS representative shall file a report of sale with the Court, together with a proposed order of confirmation of sale, within 35 days from the date of receipt of the balance of the purchase price.

i. Upon confirmation of the sale, the Marshal or PALS representative shall promptly execute and deliver a deed of judicial sale conveying the Subject Property to the purchaser.

j. Upon confirmation of the sale, the interests of, liens against, or claims to the

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Subject Property held or asserted by the United States in the Complaint and any other parties to this action or any successors in interest or transferees of those parties shall be discharged and extinguished. The sale is ordered pursuant to 28 U.S.C. § 2001. **Redemption rights under state law shall not apply to this sale under federal law.**

k. Upon confirmation of the sale, the purchaser shall have the recorder of deeds in Whatcom County, Washington, record the transfer of the Subject Property upon that county's register of title.

8. Until the Subject Property is sold, the Urbans shall take all reasonable steps necessary to preserve the Subject Property (including all buildings, improvements, fixtures and appurtenances thereon). They shall not commit waste against the Subject Property, nor shall they cause or permit anyone else to do so. They shall not do anything that tends to reduce the value or marketability of the Subject Property, nor shall they cause or permit anyone else to do so. They shall not record any instruments, publish any notice, or take any other action that may directly or indirectly tend to adversely affect the value of the Subject Property or that may tend to deter or discourage potential bidders from participating in the public sale, nor shall they cause or permit anyone else to do so. **Violation of this paragraph shall be deemed a contempt of court and punishable as such.**

9. All persons occupying the Subject Property shall leave and vacate permanently within 30 days of the date of this order or by April 30, 2012, whichever is later, each taking with them his or her personal property (but leaving all improvements, buildings, fixtures, and appurtenances) when leaving and vacating. If any person fails or refuses to leave and vacate the property by the time specified in this Order, the United States Marshal's Office or the Sheriff of Whatcom County is authorized to take whatever action they deem appropriate to remove such person or persons from the premises, whether or not the sale of such property is being conducted by a PALS representative. If any person fails or refuses to remove his or her personal property from the Subject Property by the time specified herein, the

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personal property remaining on the Subject Property thereafter is deemed forfeited and abandoned, and the United States Marshal's Office or the PALS representative is authorized and directed to remove and dispose of it in any manner they see fit, including sale, in which case the proceeds of sale are to be applied first to the expenses of sale, and then to the tax lien at issue herein.

10. The Marshal, his or her representative, or a PALS representative, shall deposit the amount paid by the purchaser into the registry of the court. Upon appropriate motion for disbursement or stipulation of the parties, the court will disburse the funds in the following partial order of preference until these expenses and liens are satisfied: first, to the IRS, for allowed costs and expenses of sale, including any commissions due under 28 U.S.C. § 1921(c) and including an amount sufficient to cover the costs of any steps taken to secure or maintain the Subject Property pending sale and confirmation by the Court; second, to Whatcom County, for any and all liens it may have on the Subject Property for unpaid real property taxes or special assessments at the time of the sale; and third, to the United States to partially satisfy the federal tax liens upon the property.

IT IS SO ORDERED this 21st day of March 2012.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

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