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

IN RE:

AEM, INC., and MIRABILIS VENTURES, INC.,

Debtors.

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AEM, INC., and MIRABILIS VENTURES, INC.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Case No. 6:12-cv-636-Orl-37
Consolidated with
Case No. 6:12-cv-638-Orl-37
Case No. 6:12-cv-639-Orl-37

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**ORDER**

This cause is before the Court on Appellants' Unopposed Motion Requesting Enlargement of Time to File Initial Brief (Doc. No. 12), filed May 17, 2012. The Court makes the following observations.

First, the Motion does not comply with the May 8, 2012 Order of the Court directing the parties to use a consolidated caption, and setting a briefing schedule. (Doc. No. 9, p. 2.) In the future, the Court may summarily deny or strike filings that do not comply with the requirements set forth in Court Orders.

Second, under Federal Rule of Civil Procedure 16, scheduling orders may be modified only for good cause, and only when the schedule "cannot 'be met despite the diligence of the party seeking the extension.' " *Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1418 (11th Cir. 1998). Appellants' Motion does not set forth the correct standard for an extension of time. It does not set forth any basis for this Court to find good cause, and no

basis on which this Court may find diligence. The only basis it sets forth is that mediation began on May 8, 2012 and that the parties would like to "complete mediation" in some unspecified time frame. Without any other information, this is an insufficient basis for an extension of time.

Third, counsel for both parties should be aware that the granting of an extension may not be used as a basis for additional extensions in the future. Despite the shortcomings of the application the Court will grant the requested extension to avoid the need to review a subsequent filing seeking the same relief.

Therefore, it is hereby **ORDERED** that Appellants' Unopposed Motion to Extend Time (Doc. No. 12) is **GRANTED.** The Court's May 8, 2012 scheduling Order (Doc. No. 9) is amended as follows:

1. Appellants shall file a single, consolidated opening brief consisting of no more than 30 pages but otherwise consistent with the Federal Rules of Bankruptcy Procedure on or before June 29, 2012.
2. Appellee shall file a single, consolidated response brief consisting of no more than 30 pages but otherwise consistent with the Federal Rules of Bankruptcy Procedure on or before July 13, 2012.
3. Appellants shall file a single, consolidated reply brief consisting of no more than 15 pages but otherwise consistent with the Federal Rules of Bankruptcy Procedure on or before July 27, 2012.

**DONE AND ORDERED** in Chambers in Orlando, Florida, on May 18, 2012.

ROY B. DALTON, JR.
United States District Judge

Copies:
Counsel of Record

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

**AIKON INDUSTRIAL COMMERCIAL CORPORATION,**

Plaintiff,

v.

Case No. 2:11-cv-10079-BAF-MAR
Hon. Bernard A. Friedman

**BETTYE JOHNSON KILPATRICK, et al.,**

Defendants.
_____/

**ORDER DISMISSING WITH PREJUDICE AND WITHOUT COSTS**

This Court has been informed by counsel for the parties that all of the issues involved were resolved and that the motion to withdraw as counsel is withdrawn.

ACCORDINGLY:

IT IS HEREBY ORDERED that this matter is dismissed without costs or attorney fees.

May 22, 2012

S/Bernard A. Friedman
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

**The following constitutes the ruling of the court and has the force and effect therein described.**

Harlin DeWayne Hale

**United States Bankruptcy Judge**

**Signed May 21, 2012**

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

| | | |
|---|---|---|
| IN RE: | § | |
| | § | |
| ARCHER HEALTHCARE PROVIDERS, LLC | § | CASE NO. 10-70454-11 |
| d/b/a ARCHER CITY NURSING CENTER | § | |
| | § | |
| PADUCAH HEALTHCARE PROVIDERS, LLC | § | JOINTLY ADMINISTERED |
| d/b/a PADUCAH NURSING CENTER | § | |
| | § | |
| VERNON HEALTHCARE PROVIDERS, LLC | § | |
| d/b/a VERNON NURSING & | § | |
| REHABILITATION CENTER | § | |
| | § | |
| DEBTORS. | § | |

**ORDER GRANTING DEBTORS' MOTION TO DISMISS BANKRUPTCY CASE**

CAME ON FOR HEARING the Motion of Archer Healthcare Providers, LLC d/b/a Archer City Nursing Center ("Archer Healthcare"); Paducah Healthcare Providers, LLC d/b/a Paducah Nursing Center ("Paducah Healthcare"); Vernon Healthcare Providers, LLC d/b/a Vernon Nursing & Rehabilitation Center ("Vernon Healthcare") (collectively "Debtors") to

Dismiss Bankruptcy Case (the "Motion") and the court after review of the Motion, consideration of the arguments of counsel and noting no opposition to the Motion, is of the opinion that the Motion should be granted, it is therefore

ORDERED that the Chapter 11 Case filed by Debtors is hereby dismissed without prejudice to re-filing. Debtors shall pay all outstanding US Trustee's fees within 14 days.

### End of Order ###

**ORDER PREPARED BY:**

Weldon L. Moore, III
Sussman & Moore, L.L.P.
8333 Douglas Avenue, Suite 1525
Dallas, Texas 75225
Phone: 214-378-8270
Fax: 214-378-8290

***ATTORNEYS FOR DEBTORS***

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 11-80360--CIV-HURLEY**

**JEFFREY A. AZIS, and**
**JEFFREY A. AZIS, CPA, PA,**
**petitioners,**

**v.**

**UNITED STATES INTERNAL**
**REVENUE SERVICE,**
**respondent.**
_____/

**ORDER ADOPTING MAGISTRATE JUDGE'S**
**REPORT AND RECOMMENDATION**

**THIS CAUSE** is before the court upon the petitioners' motion to quash IRS subpoena, which matter was previously referred to United States Magistrate Judge James Hopkins pursuant to 28 U.S.C. §§ 636-39 and Rule 72 of the Federal Rules of Civil Procedure, for a recommended disposition.

On May 3, 2012, Magistrate Judge Hopkins filed a report and recommendation upon the motion [DE# 47]. On May 21, 2012, petitioners filed their objections to the report and recommendation [DE# 50]. Having carefully reviewed the petitioners' objections to the Report, and pursuant to 28 U.S.C. § 636(b)(1)(C), having made a *de novo* determination with respect to those portions of the report to which a written formal objection has been lodged, the court finds the resolution of the issues as recommended by Magistrate Judge Hopkins to be sound and well-reasoned and accordingly adopts it here.

It is therefore **ORDERED** and **ADJUDGED**:

1. Magistrate Judge Hopkins May 3, 2012 report and recommendation

[DE# 47] is **ADOPTED** and **INCORPORATED** in full.

2. The petitioners' motion to quash IRS subpoena [DE # 1] is **DENIED**, the government's motion to deny the petition [DE# 17] is **GRANTED**, and the IRS shall be allowed to continue its investigation without delay.

3. The petitioners' motion for declaratory judgment [DE# 37, 38], motion to initiate bad faith discovery [DE# 39, 40] and motion to allow Jeffrey A. Azis to intervene on behalf of Jeffrey A. Azis, CPA, PA [DE# 42] are **DENIED**.

4. This case is CLOSED.

**DONE** and **SIGNED** in Chambers at West Palm Beach, Florida this 22nd day of May, 2012.

Daniel T. K. Hurley
United States District Judge

Copies furnished to:

United States Magistrate Judge Hopkins

Jeffrey A. Azis, *pro se*

Jeffrey A. Azis, CPA, PA,
c/o Jeffrey A. Azis

all counsel

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

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United States of America,

Plaintiff,

Civ. No. 11-62 (RHK/JJK)
**ORDER**

v.

Joanna Bame, *et al*,

Defendants.

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This matter is before the Court *sua sponte*.

The United States filed suit against Joanna Bame and the several other Defendants on January 10, 2011, alleging fraudulent conveyance, money had and received, and unjust enrichment. On May 9, 2012, Defendants filed a Motion for Summary Judgment (Doc. No. 60), noticing its Motion for a hearing on June 20, 2012. On May 18, 2012, the United States filed its own Motion for Summary Judgment (Doc. No. 66), noticing its Motion for a hearing on June 29, 2012. The Court believes these dispositive Motions should not be separately briefed and should be treated as cross-motions and heard together.

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS ORDERED**:

1. The hearing on Defendant's Motion for Summary Judgment, currently scheduled for June 20, 2012, is **CONTINUED** to June 29, 2012, at 8:00 a.m. in

Courtroom 7A, Warren E. Burger Federal Building and United States Courthouse, 316 N. Robert Street, St. Paul, Minnesota;

2. The following briefing schedule shall apply to the parties' Motions: responsive briefs shall be served and filed no later than June 8, 2012. No replies—whether by memorandum, affidavit, letter, or otherwise—will be permitted absent further Order of the Court; and

3. The Parties' briefs shall conform to the word limitations provided in Local Rule 7.1(d)—that is, the total number of words in each party's briefs (combined) shall not exceed 12,000.

Date: May 22, 2012

s/Richard H. Kyle
RICHARD H. KYLE
United States District Judge

**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEVADA**

LEE BELCHER, et al.,

Plaintiff(s),

vs.

DENNIS CROWTHER, et al.,

Defendant(s).

2:03−cv−01358−DAE −RJJ

MINUTES OF THE COURT

May 22, 2012

PRESENT:
The Honorable David A. Ezra, U.S. District Judge

Deputy Clerk: Molly Morrison Recorder/Reporter: None Appearing

Counsel for Plaintiff(s): None Appearing Counsel for Defendant(s): None Appearing

**MINUTE ORDER IN CHAMBERS**
**REGARDING THE REQUIREMENTS OF**
***Klingele v. Eikenberry* and *Rand v. Rowland*: XXX**

A party or parties have filed a motion to dismiss, motion for judgment on the pleadings, or a motion for summary judgment. These are known as "dispositive motions," for they may terminate either some portion or all of this lawsuit, if granted. This notice is given to all parties to this litigation, and particularly to the party against whom the above referenced motion has been filed, pursuant to the requirements of *Klingele v. Eikenberry*, 849 F.2d 409 (9th Cir. 1988), and *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998).

Pursuant to the last sentence in Fed. R. Civ. P. 12(b), if evidence is submitted with a motion to dismiss and considered by the court, then the motion will be treated as a motion for summary judgment. The same is true regarding a motion for judgment on the pleadings. *See* Fed. R. Civ. P. 12(c). **This notice is issued, in part, to alert the plaintiff that if defendants have submitted evidence in support of a motion to dismiss or a motion for judgment on the pleadings, then the court may treat the pending motion as a motion for summary judgment. If the court grants summary judgment, then judgment may be entered against plaintiff and this lawsuit will end without trial.** This notice contains important information about what you need to do to oppose the motion. Please read it carefully.

**Motion to Dismiss-Fed. R. Civ. P. 12(b)(6)**

If the party or parties which filed the motion (hereinafter the "moving party") have filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the party or parties against whom that motion is filed (hereinafter, the "non-moving party") must file points and authorities in opposition to that motion within fourteen (14) days after service of the motion. Local Rule 7-2(b). The failure to file points and authorities in response to any motion shall constitute a consent to the granting of the motion. Local Rule 7-2(d). The court may then grant the motion and dismiss the non-moving party's claims. If the non-moving party does not agree that its claims should be dismissed, it must file and serve points and authorities in opposition within fourteen (14) days from the date the moving party served the non-moving party with the motion.

**Motion for Judgment on the Pleadings-Fed. R. Civ. P. 12(c)**

If the moving party has filed a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), the non-moving party must file points and authorities in opposition to that motion for judgment within fourteen (14) days after service of the motion. Local Rule 7-2(b). The failure to file points and authorities in response to any motion shall constitute a consent to the granting of the motion. Local Rule 7-2(d). The court may then grant the motion and dismiss the non-moving party's claims. If the non-moving party does not agree that its claims should be dismissed, the non-moving party must file and serve points and authorities in opposition within fourteen (14) days from the date the moving party served the non-moving party with the motion.

**Motion for Summary Judgment-Fed. R. Civ. P. 56**

If the moving party has filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) or a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) and attached admissible evidence to the motion, or if it has filed a motion for summary judgment under Fed. R. Civ. P. 56, then the non-moving party must properly oppose the motion, by filing opposing points and authorities, admissible evidence, and a statement of facts under Local Rule 56-1, within twenty−one (21) days after service of the motion. *See* Fed. R. Civ. P. 56, Local Rules 7-2(e) and 56-1. The standards governing motions for summary judgment are stated in Rule 56 of the Federal Rules of Civil Procedure. All parties should read that rule and be familiar with it.

The Ninth Circuit Court of Appeals has directed that the following notice be given to you:

> A motion for summary judgment is a means through which the defendants seek to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.
>
> Federal Rule of Civil Procedure 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact--that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in the form of admissible evidence (such as affidavits, declarations, depositions, answers to interrogatories, or properly authenticated documents as provided in Rule 56(e)), that contradict the facts shown in the defendant's declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted, your case will be dismissed and there will be no trial.
>
> Rule 56-1 of the Local Rules for the United States District Court for the District of Nevada also requires, in addition, that you file with your opposition to a motion for summary judgment a statement of facts which you contend are or are not genuinely in issue in this summary judgment procedure. If you are opposing a summary judgment motion, you should review the opposing party's Local Rule 56-1 statement of facts not genuinely in issue, and you should set forth in writing those facts (supported by specific citation to evidence in the record which you have attached to your motion or statement) which contradict the claims of the opposing party. In other words, you must provide the court a statement of facts supported by attached admissible evidence that demonstrates that the opposing party is not entitled to judgment against you.

If you are the party moving for summary judgment, you should set forth, in writing, a statement of material facts, not genuinely in issue (supported by specific citation to evidence in the record which you have attached to your motion or statement) which supports your claim for summary judgment. In so doing, you must show the court those material facts which can be proven with admissible evidence that demonstrate that you are entitled to have judgment entered in your favor at this time.

If the non-moving party fails to oppose the motion within twenty−one (21) days, or if the non-moving party fails to submit evidence supporting its opposition, and if the motion for summary judgment has merit, that failure to file points and authorities in response to any motion shall constitute a consent to the granting of the motion. Local Rule 7-2(d). The court may then grant the motion and enter judgment. Local Rule 7-2(d).

**IT IS THEREFORE ORDERED** that non-moving party or parties shall have fourteen (14) days, or twenty−one (21) days for a motion for summary judgment, from the date of this Minute Order within which to file and serve points and authorities (and any other required documents) in opposition to the pending dispositive motion pursuant to the instructions herein, and the moving party shall thereafter have seven (7) days, or fourteen (14) days for a motion for summary judgment, after filing of the opposing points and authorities within which to file and serve reply points and authorities (and any other required documents). The pending motion(s) shall then be submitted to the court for decision.

LANCE S. WILSON, CLERK

By: /s/ Molly Morrison

Deputy Clerk

E-FILED
Tuesday, 22 May, 2012 03:01:55 PM
Clerk, U.S. District Court, ILCD

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF ILLINOIS**

| | | |
|---|---|---|
| GARY D. BOWERS,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES OF AMERICA and COMMISSIONER OF INTERNAL REVENUE,<br><br>Defendants. | ) | Case No. 11-1224 |

# O R D E R

This matter is now before the Court on Defendant's Motion to Dismiss or Alternatively for Summary Judgment. For the reasons set forth below, the Motion to Dismiss [14] is GRANTED.

## BACKGROUND

Plaintiff, Gary Bowers, is a resident of Pekin, Illinois. He has received monthly social security benefits for a number of years and continues to receive these benefits. In June 2010, the Internal Revenue Service placed a levy against Bowers' social security benefits to collect overdue tax debt, requiring the Social Security Administration to remit $1,107.80 of each of the checks since June 2010 to the IRS and leaving a $779.17 monthly benefit for Bowers. He contends that this levy exceeds the 15% maximum allowed under IRS regulations and that all efforts to remedy the situation through the administrative process have failed.

Defendants have now moved to dismiss the Complaint. The matter is fully briefed, and this Order follows.

## DEFENDANTS MOTION TO DISMISS

### I. Legal Standard

Courts have traditionally held that a complaint should not be dismissed unless it appears from the pleadings that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief. *See* Conley v. Gibson, 355 U.S. 41 (1957); Gould v. Artisoft, Inc., 1 F.3d 544, 548 (7th Cir. 1993). Rather, a complaint should be construed broadly and liberally in conformity with the mandate in Federal Rule of Civil Procedure 8(f). More recently, the Supreme Court has phrased this standard as requiring a showing sufficient "to raise a right to relief beyond a speculative level." Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1965 (2007). Furthermore, the claim for relief must be "plausible on its face." Id.; Ashcroft v. Iqbal, 129 S.Ct. 1937, 1953 (2009).

For purposes of a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff; its well-pleaded factual allegations are taken as true, and all reasonably-drawn inferences are drawn in favor of the plaintiff. *See* Albright v. Oliver, 510 U.S. 266, 268 (1994); Hishon v. King & Spalding, 467 U.S. 69 (1984); Lanigan v. Village of East Hazel Crest, 110 F.3d 467 (7th Cir. 1997); M.C.M. Partners, Inc. V. Andrews-Bartlett & Assoc., Inc., 62 F.3d 967, 969 (7th Cir. 1995); Early v. Bankers Life & Cas. Co., 959 F.2d 75 (7th Cir. 1992).

### II. Analysis

The Complaint cites 26 U.S.C. § 7442 as the basis for jurisdiction. Section 7442 provides in its entirety:

> The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat 10-87), or by laws enacted subsequent to February 26, 1926.

This section plainly does not vest Plaintiff with jurisdiction to sue the IRS in federal district court. However, the Court notes that 26 U.S.C. § 7433 does authorize a private right of action to collect civil damages in federal district court and also contains a waiver of sovereign immunity for such a suit.

A levy is an administrative order from the IRS seizing property belonging to a taxpayer in payment of an outstanding tax liability. I.R.C. § 6331(a). Individual income, including social security benefits, is partially exempt from levy under I.R.C. § 6334 in an amount equal to the sum of the taxpayer's standard deduction and personal exemptions. 42 U.S.C. § 407; I.R.C. §§ 6334(a)(9), (c), and (d). For 2009 and 2010, this exempt amount was $779.17 per month.

An IRS levy is generally a one-time occurrence rather than a continuing event, seizing property in existence at the time the levy is served. I.R.C. §§ 6331 (a) and (b). However, a one-time levy may seize a future stream of payments if the taxpayer's right to the payments is fixed and determinable without any requirement for the provision of future services. Treas. Reg. § 301.633-1; Rev. Rul. 55-210. Alternatively, where these requirements may not be satisfied, a levy on salary or wages payable to or received by a taxpayer can also be continuous from the date the levy is first made until the levy is released pursuant to I.R.C. § 6331(e). Further provisions establish that this type of continuing levy on specified payments (which can also include the social security payments at issue here) is subject to a 15% cap. I.R.C. §§ 6331(h)(1) and (2). It is this 15% cap that Plaintiff claims has been violated in this case.

Plaintiff does not challenge the procedures used to institute the levy, but only the amount levied from his social security benefits. Essentially, his position boils down to the argument that any levy against income, such as social security payments, must be made pursuant to I.R.C. § 6331(h)

and is therefore subject to the 15% cap. This argument lacks any basis in fact or law, as "the permissive language of the statute gives the Secretary discretion to approve [continuous] levies under Section 6331(h) rather than under Section 6331(a), but Section 6331(h) does not *require* the Secretary to attach a continuous levy [under Section 6331(h)] even where the type of property might be eligible for one." *Hines v. United States*, 658 F.Supp.2d 139, 146-47 (D.D.C. 2009). In other words, where a levy could be issued under both sections, the statute does not compel that the levy be issued under one section or the other.

Here, Plaintiff's social security payments represent a present, vested right to receive such benefits in fixed monthly payments for the rest of his life. "The amount of benefits are calculable – they are based on earnings averaged over plaintiff's lifetime and determinable based upon a complex formula." *Id.*, c*iting* 42 U.S.C. §§ 402 *et seq.* Receipt of benefits is not contingent on the performance of any additional services, and the tax lien and levy could therefore attach to the entire stream of payments as a one-time levy pursuant to §§ 6331(a)-(b). The assertion that this was a one-time levy is further supported by the fact that the levy was initiated by a paper Form 668-W rather than the electronic processes under the Federal Payment Levy Program, as would be the proper mechanism for a continuous levy. As a one-time levy, the 15% cap on continuing levies under § 6331(h) is simply inapplicable. *See United States v. Marsh,* 89 F.Supp.2d 1171, 1178-79 (D.Hawaii 2000). Plaintiff has therefore failed to establish a claim for relief that is plausible on its face, and the Complaint must be dismissed.

## CONCLUSION

For the reasons set forth above, the Motion to Dismiss [14] is GRANTED and the alternative request for summary judgment is MOOT. This matter is DISMISSED for failure to state a claim

upon which relief could be granted. All deadlines or hearings are VACATED and any other pending motions are now MOOT. This matter is now TERMINATED.

ENTERED this 22nd day of May, 2012.

s/ James E. Shadid
James E. Shadid
Chief United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FRANCES CARLSON,

Plaintiff,

v. Case No. 8:10-cv-900-T-24-MAP

UNITED STATES OF AMERICA,

Defendant.
_____/

**ORDER**

This cause comes before the Court on Plaintiff Frances Carlson's Motion for Judgment as a Matter of Law, to Alter or Amend Judgment, or for a New Trial. (Doc. No. 125). The United States opposes the motion. (Doc. No. 153). For the reasons that follow, Carlson's motion is denied.

## I. Background

On February 2, 2012, the jury returned a verdict in favor of the United States on Carlson's claim under 26 U.S.C. § 6701 for refund of the return preparer penalties the government assessed and collected from her for the years 2002 through 2006. Thereafter, Carlson filed the instant motion pursuant to Federal Rules of Civil Procedure 50(b), 59(e), and 59(a).

## II. Standards of Review

### A. Motion for Judgment as a Matter of Law

Federal Rule of Civil Procedure 50(a) permits the court to grant judgment as a matter of law against a party "[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue . . . ." Fed. R. Civ. P. 50(a). Rule 50(b) allows a party to renew a motion for

judgment as a matter of law after trial, if filed no later than 28 days after entry of judgment. Fed. R. Civ. P. 50(b). A court may grant a motion for judgment as a matter of law only if, after examining "all evidence in a light most favorable to the non-moving party," it determines "there is no legally sufficient evidentiary basis for a reasonable jury to find" for that party. *Aronowitz v. Health–Chem Corp.*, 513 F.3d 1229, 1236–37 (11th Cir. 2008) (per curiam) (internal quotation marks omitted).

Further, in conducting a Rule 50 analysis, the court must refrain from invading the province of the jury: "'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.'" *Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1193 (11th Cir. 2004) (quoting *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000)). A court may "not second-guess the jury or substitute" its judgment for that of the jury if the jury's verdict is supported by sufficient evidence. *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th Cir. 2001). "If substantial evidence exists in opposition to a motion for judgment as a matter of law, such that reasonable people, exercising impartial judgment, could reach different conclusions, then the motion must be denied." *Viart v. Bull Motors, Inc.*, 149 F. Supp. 2d 1346, 1347 (S.D. Fla. 2001).

**B. Motion to Alter or Amend Judgment**

A party may file a Rule 59(e) motion to alter or amend a judgment no later than 28 days after entry of judgment. Fed. R. Civ. P. 59(e). The only grounds for granting a Rule 59(e) motion are the submission of newly discovered evidence or the demonstration of manifest errors of law or fact. *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007). A motion for reconsideration cannot be used "to relitigate old matters, raise argument or present evidence that

could have been raised prior to the entry of judgment." *Id.* (internal quotation marks omitted). "Reconsidering the merits of a judgment, absent a manifest error of law or fact, is not the purpose of Rule 59." *Jacobs v. Tempur–Pedic Intern., Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010).

**C. Motion for a New Trial**

Federal Rule of Civil Procedure 59 governs motions for a new trial, and the Supreme Court has noted that a party may seek a new trial on grounds that "the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury." *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940).

"[N]ew trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great—not merely the greater—weight of the evidence." *Lipphardt*, 267 F.3d at 1186 (citation and internal quotation marks omitted); *see also Redd v. City of Phenix City, Ala.*, 934 F.2d 1211, 1215 (11th Cir. 1991) ("When there is some support for a jury's verdict, it is irrelevant what we or the district judge would have concluded."). To make this determination, the trial judge must independently weigh the evidence favoring the jury verdict against the evidence in favor of the moving party. *Williams v. City of Valdosta*, 689 F.2d 964, 973 (11th Cir. 1982) (citing *Rabun v. Kimberly–Clark Corp.*, 678 F.2d 1053, 1060 (11th Cir.1982)). A trial judge should not substitute her own credibility choices and inferences for the reasonable credibility choices and inferences made by the jury. *Id.* at 973 n.7.

**III. Discussion**

Carlson moves for judgment as a matter of law, for alteration or amendment of judgment, or for a new trial, arguing that the jury's verdict contradicts the evidence of record and that the Court incorrectly instructed the jury regarding burden of proof. The Court will address these arguments in turn.

**A. Evidentiary Challenge**

Carlson argues that the evidence presented at trial does not support the jury's verdict, particularly with respect to a number of the specific returns at issue. Specifically, Carlson contends that, with respect to one group of returns, the evidence is overwhelming that the positions taken on the returns were "absolutely supportable under the law" and "in no way fraudulent." (Doc. No. 125 at 10). With respect to another group of returns, Carlson contends that the evidence does not support a finding that Carlson knew the returns "were wrong in any way, much less fraudulent." (Doc. No. 125 at 11).

The United States responds, generally, that "the jury had an ample evidentiary basis for concluding that Carlson knew that the returns she prepared understated tax liabilities," that "[a]t best, [Carlson's] argument merely establishes that the evidence of Carlson's knowledge with respect to certain penalties was amenable to competing inferences," and that the Court may not reject the verdict simply because the jury rejected Carlson's version of the facts. (Doc. No. 153 at 1). Then, the government responds to Carlson's argument concerning the specific returns with which she takes issue. For each return, the United States outlines evidence the jury could have accepted in determining that Carlson knew the returns she prepared understated another person's tax liability.

In this case, the jury was presented with evidence of dishonest and corrupt business practices at JH Accounting, of Carlson's shuffling of real property ownership and

mischaracterization of assets during a time of personal financial difficulty, of the nature of deductions claimed on the returns at issue, and of the investigation and reasoning of revenue agents that led to those deductions being disallowed. Based on this evidence, the jury concluded that Carlson prepared tax-related documents, knew, or had reason to believe, those documents would be used in connection with a material matter relevant to the internal revenue laws, and knew those documents would understate the tax liability of other persons or entities.

First, as to Carlson's motion for judgment as a matter of law, after examining all evidence in a light most favorable to the government, the Court rejects the argument that there is no legally sufficient evidentiary basis for a reasonable jury to find for the United States. Second, the Court concludes that Carlson has neither submitted newly discovered evidence nor demonstrated manifest errors of law or fact that would support her motion for alteration or amendment of judgment. Finally, having independently weighed the evidence favoring the jury verdict against the evidence in favor of Carlson, and refraining from substituting its own credibility choices and inferences for the reasonable credibility choices and inferences made by the jury, the Court concludes that the jury's verdict was not against the great weight of the evidence presented at trial, and therefore, a new trial is not warranted. Accordingly, the Court rejects Carlson's arguments and denies the motion on this issue.

**B. Challenge to the Burden of Proof Instruction**

Carlson argues that the Court incorrectly instructed the jury as to burden of proof. Carlson raises three assertions in support of her argument: (1) because Congress intended § 6701 to combat fraud, the clear-and-convincing-evidence standard is appropriate; (2) because § 6701 requires actual knowledge, the clear-and-convincing-evidence standard is appropriate; and (3)

because courts have concluded that § 6701 is a fraud statute in the statute-of-limitations context, the clear-and-convincing-evidence standard is appropriate.

The United States responds that the Court's burden-of-proof instruction was correct and that Carlson's motion should be denied. The government notes that the vast majority of courts (in fact, all but one district court) has held that the appropriate standard of proof under § 6701 is the preponderance-of-the-evidence standard, and it argues that, for a number of reasons, the integrated enactment of §§ 6700–6702 supports the application of a uniform standard of proof for penalties assessed under those provisions.

Jury instructions must "accurately reflect the law," and within those parameters, district courts are afforded "wide discretion as to the style and wording employed in the instructions." *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1283 (11th Cir.2008) (internal quotation marks omitted). Appellate courts must ensure "that the instructions show no tendency to confuse or to mislead the jury with respect to the applicable principles of law," and they "will not disturb a jury's verdict unless the charge, taken as a whole, is erroneous and prejudicial." *S.E.C. v. Yun*, 327 F.3d 1263, 1281 (11th Cir. 2003) (internal quotation marks omitted).

Carlson has raised her burden-of-proof argument before this Court numerous times, and each time, the Court has rejected it. The Court has found, and continues to find, persuasive the conclusions and reasoning employed by the courts that have adopted the preponderance-of-the-evidence standard — and rejected the clear-and-convincing-evidence standard — for § 6701 claims. *E.g.*, *Mattingly v. United States*, 924 F.2d 785 (8th Cir. 1991). Accordingly, the Court concludes that it correctly instructed the jury to apply the preponderance-of-the-evidence standard in this case, and as such, the Court denies Carlson's motion on this issue.

**IV. Conclusion**

Accordingly, it is ORDERED AND ADJUDGED that Plaintiff Frances Carlson's Motion for Judgment as a Matter of Law, to Alter or Amend Judgment, or for a New Trial (Doc. No. 125) is **DENIED**.

**DONE AND ORDERED** at Tampa, Florida, this 22nd day of May, 2012.

Susan C. Bucklew

SUSAN C. BUCKLEW
United States District Judge

Copies to:
Counsel of Record

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

**CITIGROUP, INC.,**

**Plaintiff,**

**vs.**

**Civil Action 2:12-cv-0300**
**Judge Marbley**
**Magistrate Judge King**

**UNITED STATES OF AMERICA,**

**Defendant.**

**ORDER**

Upon joint motion, Doc. No. 10, this action is hereby **STAYED** pending resolution of *United States v. Quality Stores, Inc.*, Case No. 10-1563, currently pending in the United States Court of Appeals for the Sixth Circuit.

The parties are **DIRECTED** to report on the status of this case within thirty (30) days of the issuance of a decision in *Quality Stores*.

Defendant may have until thirty (30) days after the stay is lifted to respond to the *Complaint*.

*s/Norah McCann King*
Norah McCann King
United States Magistrate Judge

Date: May 22, 2012

**SO ORDERED.**

**SIGNED this 22nd day of May, 2012.**

**LEIF M. CLARK**
**UNITED STATES BANKRUPTCY JUDGE**

---

**IN THE UNITED STATES BANKRUPTCY COURT**
**WESTERN DISTRICT OF TEXAS**
**SAN ANTONIO DIVISION**

| | | |
|---|---|---|
| **IN RE:** | ) | |
| | ) | |
| **CONNIE THERESA CRUZ,** | ) | **CASE NO. 10-50422-LMC** |
| | ) | **CHAPTER 13** |
| **DEBTOR.** | ) | |

**ORDER GRANTING UNITED STATES' MOTION FOR LEAVE**
**FOR THE INTERNAL REVENUE SERVICE TO FILE LATE CLAIM**

The United States' Motion for Leave to File a Late Claim is **Granted.**

It is therefore **ORDERED** that the United States, Internal Revenue Service, may file an amended, late claim within ten (10) days of date of this order.

# # #

Honorable Linda B. Riegle
United States Bankruptcy Judge

**Entered on Docket**
**May 22, 2012**

**UNITED STATES BANKRUPTCY COURT**
**DISTRICT OF NEVADA**

| | |
|---|---|
| In re:<br>DESERT CAPITAL REIT, INC.,<br>Debtor. | Case No.: 11-16624 (LBR)<br>Chapter 11<br>**Order Granting in Part Motion for Allowance of Administrative Fees and Expenses**<br>Hearing Date: May 9, 2012<br>Hearing Time: 2:00pm |

**ORDER GRANTING IN PART MOTION FOR ALLOWANCE OF ADMINISTRATIVE FEES AND EXPENSES**

Upon consideration of the motion (the "Motion") filed by Taberna Preferred Funding VI, Ltd. ("Taberna VI"), by and through its collateral manager, TP Management LLC, pursuant to sections 503(b)(3) and 503(b)(4) of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the "Bankruptcy Code"), requesting that the Court allow as an administrative expense claim against the above-captioned debtor's (the "Debtor") estate (i) the fees associated with prosecuting the involuntary petition in the amount of $45,833.00 (the "Involuntary Petition Fees"), (ii) the fees associated with its efforts to replace the Debtor's management with an independent fiduciary in the amount of $61,080.50 (the "Substantial Contribution Fees"), and (iii) the costs associated with such efforts in the amount of $9,235.91 (the "Costs"); the Court hereby finds that (a) the Court has jurisdiction over this matter pursuant

to 28 U.S.C. §§ 157 and 1334, (b) proper and adequate notice has been given and that no other or further notice is necessary, (c) Taberna VI's efforts to replace the Debtor's management with an independent fiduciary have resulted in a direct benefit to the Debtor's estate and creditors, (d) the Substantial Contribution Fees and Costs sought by Taberna VI in the Motion were incurred, pursuant to section 503(b)(3) of the Bankruptcy Code, in connection with Taberna VI making a substantial contribution to this bankruptcy case; and (e) the Substantial Contribution Fees and Costs are reasonable and allowable under section 503(b)(4) of the Bankruptcy Code; the Court requested additional briefing regarding whether Taberna VI's request for the allowance of the Involuntary Petition Fees pursuant to sections 503(b)(3) and 503(b)(4) of the Bankruptcy Code should be allowed; and after due deliberation thereon, and good and sufficient cause appearing therefore,

IT IS HEREBY ORDERED that:

1. The Motion is GRANTED in part.

2. Taberna VI is allowed an administrative expense claim, pursuant to sections 503(b)(3) and 503(b)(4) of the Bankruptcy Code, for (i) the Substantial Contribution Fees in the amount of $61,080.50 and (ii) the Costs in the amount of $9,235.91 (the "Allowed Claim").

3. The Debtor shall pay the Allowed Claim at the direction of Taberna VI no later than five (5) business days following entry of this Order. The Debtor is further authorized and empowered to take such actions as may be necessary and appropriate to implement the terms of this Order.

4. The Court shall conduct a hearing on June 27, 2012 to determine whether Taberna VI will be allowed an administrative claim, pursuant to sections 503(b)(3) and 503(b)(4) of the Bankruptcy Code, for the Involuntary Petition Fees. Taberna VI shall submit any brief in supports of its request for an administrative claim for the Involuntary Petition Fees on or before June 8, 2012.

5. This Court shall retain jurisdiction with respect to all matters relating to the interpretation or implementation of this Order.

6. This Order shall be effective immediately upon entry.

* * * * *

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**UNITED STATES BANKRUPTCY COURT**

**DISTRICT OF NEVADA**

| | |
|---|---|
| In re:<br><br>DESERT CAPITAL REIT, INC.,<br><br>Debtor. | CASE NO.: 11-16624 (LBR)<br><br>Chapter 11<br><br>**LOCAL RULE 9021 CERTIFICATION**<br><br>Hearing Date: May 9, 2012<br>Hearing Time: 2:00 PM |

## LOCAL RULE 9021 CERTIFICATION

In accordance with LR 9021, counsel submitting this document certifies that the order accurately reflects the court's ruling and that (check one):

___ The court has waived the requirement set forth in LR 9021(b)(1).

____No party appeared at the hearing or filed an objection to the motion.

__X__ I have delivered a copy of this proposed order to all counsel who appeared

at the hearing, and each has approved or disapproved the order, or failed to respond, as indicated below [list each party and whether the party has approved, disapproved, or failed to respond to the document]:

The only other party to appear at the hearing, Desert Capital REIT, Inc., approved the form of this order.

Counsel appearing: Counsel for Desert Capital REIT, Inc.: CANDACE C. CLARK, DOUGLAS S. DRAPER, and Counsel for Taberna Preferred Funding VI, LTD.: JEFFREY S. RUGG, MICHAEL G. WILSON.

Unrepresented parties appearing: None

Trustee: No Appearance at Hearing; No additional Service required.

____ I certify that this is a case under Chapter 7 or 13, that I have served a copy of this order with the motion pursuant to LR 9014(g), and that no party has objected to the form or content of the order.

Dated: May 21, 2012

Respectfully submitted,

*/s/ Jeffrey S. Rugg*
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FILED
MAY 22 2012
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ANA NILA GARCIA DE BECK, ET AL,
PLAINTIFFS,

VS.

UNITED STATES OF AMERICA,
DEFENDANT, COUNTER-PLAINTIFF,
and THIRD PARTY PLAINTIFF,

CIVIL NO. 5:11-CV-00045-FB

VS.

DR. ROBERT LEE BECK, D.M.D., M.D.,
ET AL, DEFENDANTS.

**ORDER GRANTING UNITED STATES' MOTION TO EXTEND PAGE LIMIT IN MOVING FOR PARTIAL SUMMARY JUDGMENT ON REMAINING ISSUES**

There is now before the Court the motion of the Defendant, United States, for leave to file a combined motion for partial summary judgment against Dr. Robert Beck, AGB Enterprises, and JB Vega Corporation on the remaining issues in this case. Good cause having been shown, it is hereby

ORDERED that the United States' Motion is granted, and the United States shall be allowed up to 45 pages within which to present its combined motion for partial summary jdgment against Dr. Robert Beck, AGB Enterprises, and JB Vega Corporation on the remaining issues in this case.

SIGNED this 22 day of May, 2012.

UNITED STATES MAGISTRATE JUDGE

**UNITED STATES BANKRUPTCY COURT**
**EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| **IN RE:** | : | **Chapter 13** |
| **ROBERT V GERENSER** | : | |
| | : | |
| **Debtor(s)** | : | **Bky. No. 11-19376 ELF** |
| | : | |
| **ROBERT GERENSER** | : | |
| | : | |
| **Plaintiff(s)** | : | |
| | : | |
| **v.** | : | **Adv. No. 12-0250** |
| | : | |
| **INTERNAL REVENUE SERVICE** | : | |
| **Defendant(s)** | : | |

# PRETRIAL ORDER #2

**AND NOW**, at the request of the parties, it is hereby **ORDERED** that:

1. The Pretrial Order previously entered in this adversary proceeding is **AMENDED** and the deadlines set forth in the Proposed Pretrial Schedule filed by the parties (Doc #6) are **ADOPTED** and made an Order of this court.

2. A mandatory final pretrial/settlement conference shall be held on **November 8, 2012 at 1:00 p.m. in Bankruptcy Courtroom No. 1, Robert N.C. Nix Federal Building & Courthouse, 900 Market Street, Second Floor, Philadelphia, Pennsylvania.**

3. Absent cause shown, no further extensions of the deadline for filing the joint pretrial statement or continuance of the final pretrial/settlement conference will be granted.

**Date:** May 21, 2012

**ERIC L. FRANK**
**U.S. BANKRUPTCY JUDGE**

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI SOUTHERN DIVISION**

| | | |
|---|---|---|
| **UNITED STATES OF AMERICA,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **Civil No. 1:11-cv-62-HSO-JMR** |
| | ) | |
| **DAVID E. GRIFFIN,** | ) | |
| **JULIE B. GRIFFIN,** | ) | |
| **CITIMORTGAGE, INC.,** | ) | |
| | ) | |
| | ) | |
| **Defendants.** | ) | |

**CONSENT JUDGMENT**

BEFORE THE COURT is a Joint Motion for Judgment [73] filed May 21, 2012, by the United States of America and agreed to by Defendants David Griffin and Julie Griffin. The parties move to dismiss the claims between them at issue in this matter. The Court, having considered said Motion, is of the opinion that the Motion is well taken and should be granted.

**IT IS, THEREFORE, ORDERED AND ADJUDGED** that, the Joint Motion for Judgment [73] is **GRANTED**, and this case is **DISMISSED**.

**IT IS, FURTHER, ORDERED AND ADJUDGED** that, Judgment is entered in favor of the United States and against David E. Griffin for federal trust fund recovery penalty liabilities in the amount of $200,252.02, as of January 23, 2012, plus interest pursuant to 26 U.S.C. §§ 6621 and 6622, representing the unpaid employment and income taxes withheld from employees to Diversified Power Group, Inc. for the tax periods ending June 30, 1998, through June 30, 1999.

**IT IS, FURTHER, ORDERED AND ADJUDGED** that, the United States' tax liens attach to the real property owned by the Griffins located at 16732 Spring Lake Drive West, Vancleave, Mississippi ("the Subject Property").

**IT IS, FURTHER, ORDERED AND ADJUDGED** that, the United States' tax liens are foreclosed on the Subject Property, and in the event the Subject Property is sold, the proceeds of the sale payable to David Griffin, after satisfaction of Citimortgage, Inc.'s interest, will be paid to the United States.

**IT IS, FURTHER, ORDERED AND ADJUDGED** that, upon request and agreement by the parties, the Court retains jurisdiction to enforce the terms of the parties' settlement agreement.

**SO ORDERED AND ADJUDGED**, this the 22nd day of May, 2012.

*s/ Halil Suleyman Ozerden*
HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

**UNTIED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

TOM HODGES,

Plaintiff, CASE NO. 11-13981

v. HON. MARIANNE O. BATTANI

UNITED STATES OF AMERICA,

Defendant.
_____/

**OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS**

This matter is before the Court on Defendant United States' Motion to Dismiss. (Doc. 12). The Court heard oral argument on April 5, 2012, and at the conclusion of the hearing took the motion under advisement. For the reasons that follow, the Court **GRANTS** the motion.

## I. BACKGROUND

As of March 1, 2010, Plaintiff Tom Hodges owed Defendant United States of America, acting through the Internal Revenue Service, Department of Treasury, $69,414.10 in unpaid income taxes for 2006, 2007, and 2008. (Doc. 1 Ex. A; Ex. D). On that date, Defendant issued Plaintiff a "Final Notice" thereby affording him certain statutory avenues of appeal (i.e., "Collection Due Process" ["CDP"] rights) prior to any form of enforced collection activity. (Doc. 1 Ex. A). On March 25, 2010, Plaintiff exercised his CDP rights, desiring either an installment payment agreement or Offer-in-Compromise. (Doc. 1 Ex. B; Ex. C).

On May 7, 2010, prior to the beginning of any CDP process, Defendant issued a wage levy to Home Care of Michigan, Plaintiff's employer. (Doc. 1 Ex. D). After Plaintiff notified Defendant of the procedural irregularity, it released the levy.

On October 11, 2010, after the CDP process began, but before it was complete, Defendant issued a levy to TCF Bank, Plaintiff's bank. (Doc. 1 Ex. E). Plaintiff notified Defendant of this second untimely levy and Defendant could not explain why the levy was issued while the CDP process was on-going.

When Defendant issued the above levies, it disclosed Plaintiff's tax returns and other confidential information to Plaintiff's employer and bank. Plaintiff maintains that I.R.C. § 6330 prohibits Defendant from pursuing any form of levy activity while the CDP process remains pending. (Doc. 1 at ¶ 7). Plaintiff also claims the release of the information contained on each of the two levy documents constituted improper disclosure under I.R.C. § 7431(c)(1)(A). (Doc. 1 at ¶ 13).

In accordance with the administrative requirements of I.R.C. § 7433, on November 4, 2010, Plaintiff filed a "Claim for Damages" with Defendant. (Doc. 1 Ex. G). Having not received a response from Defendant regarding this administrative claim, on September 13, 2011, Plaintiff filed a single-count Complaint against Defendant for "Unauthorized Collections Actions." (Doc. 1).

Defendant filed a motion to dismiss under Rules 12(b)(1) and (b)(6) in response. (Doc. 12). Defendant's Rule 12(b)(1) argument is premised solely on the assumption that Plaintiff brought his claim pursuant to I.R.C. § 7431. Through the response and reply briefs, the parties have resolved a patent ambiguity in Complaint and agreed that

Plaintiff's claim arises under I.R.C. § 7433 and not § 7431. (Doc. 14 at p. 3; Doc. 15 at p. 1). As a result, Defendant has abandoned its Rule 12(b)(1) argument.

The Court also notes Defendant does not seek dismissal of Plaintiff's claim to the extent it is based upon an alleged violation of I.R.C. § 6330:

> [Plaintiff] claims that [Defendant's] actions give rise to a claim for damages under 26 U.S.C. §7433 because they were in direct violation of 26 U.S.C. §6330, which prohibits such collection activity while Hodges was pursuing his collection due process rights. The United States is not moving to dismiss that claim at this time.

(Doc. 12 at 3). Defendant's motion is now before the Court.

## II. STANDARD OF REVIEW

### A. Rule 12(b)(6)

A complaint may be dismissed for failure to state a claim if "'it fails to give the defendant fair notice of what the . . . claim is and the ground upon which it rests.'" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). A complaint need not contain detailed factual allegations, but it must include more than labels and conclusions. Twombly, 550 U.S. at 555; Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). A court must determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. "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." Iqbal, 129 S.Ct. at 1949. The Court must accept the well-pleaded factual allegations as true. Hensley Mfg. v. ProPride, Inc., 579 F.3d 603 (6th Cir. 2009) (citing Twombly, 550 U.S. at 555).

Although the plausibility standard is not equivalent to a "'probability requirement,' . . . it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. (quoting Twombly, 550 U.S. at 556). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-that the pleader is entitled to relief." Iqbal, 129 S.Ct. at 1950 (quoting F.R. Civ. P. 8(a)(2)).

**III. ANALYSIS**

Since there is no longer a dispute over subject matter jurisdiction, and Defendant is not moving to dismiss Plaintiff's claim based on an alleged violation of I.R.C. § 6330, the parties explained at the hearing that the remaining issue presented is whether Plaintiff has stated a viable wrongful disclosure claim based on an alleged violation of I.R.C. § 6103.

A plaintiff can bring an action for damages under I.R.C. § 7433 if the Internal Revenue Service discloses certain information without authorization. A disclosure is unauthorized if it violates the directives set forth in I.R.C. § 6103. That section provides a general rule that a tax payer's returns are confidential and should not be disclosed. This general rule is subject to a series of exceptions. See 26 U.S.C. §6103(c)-(q). One of these exceptions allows disclosures of information relating to enforcement of tax laws. 26 U.S.C. §6103(k)(6). The Secretary of the Treasury has promulgated regulations prescribing the circumstances in which disclosure may be made under I.R.C. § 6103(k)(6). See 26 C.F.R. §301.6103(k)(6)–1. Under these regulations, the Service is authorized to disclose return information of a taxpayer against whom a collection activity is directed in order "to locate assets in which the taxpayer has an

interest . . . or otherwise to apply the provisions of the Code relating to establishment of liens against such assets, or levy on, or seizure, or sale of, the assets, to satisfy any such liability." 26 C.F.R. § 301.6103(k)(6)–1(a)(1)(vi). Courts interpreting these regulations have explained that information disclosed in notices of levy are necessary to collection activity and fall squarely within the exemption under I.R.C. § 6103(k)(6). Farr v. United States, 990 F.2d 451, 455 (9th Cir. 1993); Mann v. United States, 204 F.3d 1012, 1018 (10th Cir. 2000) (stating "the general rule is that liens and levies do not constitute unauthorized disclosures under §6103.").

In this case, Plaintiff claims that since the levies directed towards his employer and bank were prematurely issued, the disclosures made in connection with those levies were unauthorized under I.R.C. § 6103. An overwhelming majority of federal courts have squarely rejected Plaintiff's position by holding that "the authority to disclose return information during the collection process is not premised on the procedural propriety of the underlying collection action." McIntosh v. United States, 1998 WL 762344, No. C-1-95-1109, (September 17, 1998 S.D. Ohio) (collecting nine cases); see also Mann, 204 F.3d at 1020-21 ("[T]he validity of the lien and levies is immaterial to the issue of whether the disclosure contained in those notices is authorized under § 6103 . . . ."). On the other hand, an isolated minority of cases holds that a disclosure made in connection with an unlawful levy violates I.R.C. § 6103. Id. (citing two cases).

After reviewing each side of the issue, the Court adopts the majority rule and dismisses Plaintiff's claim to the extent it is based upon an alleged violation of I.R.C. § 6103. The reasoning behind the majority position is persuasive:

> [T]he validity of the underlying lien and levy is wholly irrelevant to the disclosure issue. [A]llowing tax preparers to file a wrongful disclosure

> action whenever a defective lien is issued would allow tax preparers to circumvent the procedures for determining whether a valid lien had been issued and require the court to rule on the merits of the underlying assessment. In Cuda v. United States, No. 90-17, 1991 WL 80842 (W.D. Mich. April 2, 1991), this Court held that disclosure is authorized so long as a lien has been issued, regardless of whether the lien itself was erroneous. Otherwise, a tax preparer could sue the United States for damages every time a lien was determined to be invalid.

Coplin & Assocs. v. United States, 814 F. Supp. 643, 646 (W.D. Mich. 1992) (internal quotation marks and citations omitted), aff'd, 27 F.3d 566 (6th Cir. 1994). Moreover, the "plain language of section 6103 . . . mandates the conclusion that the lawfulness of the levy is irrelevant to whether disclosure is authorized. . . . Neither the statute nor the regulations on their face authorize the court to consider whether the collection activity itself is proper." Mann, 204 F.3d at 1020 (quoting Venen v. United States, 38 F.3d 100, 106 (3rd Cir. 1994). Under the majority rule, even if the Court assumes the levies at issue were procedurally defective, any disclosures made in connection with those levies do not violate I.R.C. § 6103. Accordingly, Plaintiff has failed to state a viable wrongful disclosure claim.

## IV. CONCLUSION

For the reasons stated above, the Court **GRANTS** Defendant's motion to dismiss.

**IT IS SO ORDERED.**

s/Marianne O. Battani
MARIANNE O. BATTANI
UNITED STATES DISTRICT JUDGE

DATED: May 22, 2012

CERTIFICATE OF SERVICE

I hereby certify that on the above date a copy of this Order was served upon all counsel of record via the Court's ECF Filing System.

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 1:12-cv-0629

CALDWELL JONES, JR., and
VANESSA D. JONES,

Defendants.
_____/

**SCHEDULING ORDER**

This matter is before the Court upon the parties' Joint Preliminary Report and Discovery Plan. Having considered the matter and for good cause shown, it is hereby ORDERED as follows:

- The deadline for the parties to amend their pleadings and add parties to this action shall be June 1, 2012.
- The parties shall complete discovery by September 17, 2012.
- The deadline for filing motions for summary judgment shall be October 17, 2012.
- The parties shall file a proposed consolidated pretrial order no later than 30 days after the close of discovery, or entry of the Court's ruling

on any pending motions for summary judgment, whichever is later. Daubert motions with regard to expert testimony shall be filed no later than 30 days after close of discovery.

DONE AND ORDERED this 22 day of May, 2012.

/s/Charles A. Pannell, Jr.
CHARLES A. PANNELL, JR.
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**Case No. 09-23696-Civ-COOKE/BANDSTRA**

UNITED STATES OF AMERICA,

Plaintiff

vs.

LA FARGA INTERIORS, INC., *et al*.,

Defendants.
_____/

**SECOND AMENDED ORDER CONFIRMING SALE AND DIRECTING DISTRIBUTION OF PROCEEDS OF SALE**

THIS CASE is before me on Plaintiff United States of America's Motion for Confirmation of Sale and Order of Distribution. (ECF No. 44). Defendants did not file an opposition to the Motion, and the time to do so has passed.

On December 10, 2010, I entered a Consent Judgment in this action. (ECF No. 41). On January 13, 2011, I entered an Order of Sale authorizing the IRS's Property Appraisal and Liquidation Specialists ("PALS") to offer for public sale and to sell the real property located at 12201 SW 131st Avenue, Unit A-1, Miami, Florida 33186-6401 legally described as:

> Condominium Unit A-1 in KENDALL CROSSINGS WAREHOUSE CENTER, A CONDOMINIUM, according to the Declaration of Condominium thereof, recorded on December 7, 1981, in Official Records Book 11287, Page 817, of the Public Records of Dade County, Florida, together with an undivided interest in the common elements appurtenant thereto, as set forth in said Declaration.

Folio No. 30-5914-002-0010.

The United States now informs this Court that the IRS's PALS sold the above-referenced property on February 17, 2012. (Sullivan Aff. at 1, ECF No. 44-1). Having reviewed the Motion, the exhibits thereto, and the record in this case, I find that the sale was legally and

properly conducted.

Accordingly, it is **ORDERED, ADJUDGED, and DECREED** that the sale of the above-referenced property is **CONFIRMED**. The IRS shall convey the deed of the property to the purchasers, Particia D. Viani and Jeffrey N. Nottebaum.

The Clerk is directed to distribute the funds deposited into its registry as follows:

a. To the United States, in care of its counsel, as reimbursement for expenses incurred in selling the Property: **$1,172.13**.

b. To Fernando Casamayor, Miami-Dade County Tax Collector, 140 West Flagler Street #1403, ATTN: Luis R. Mendoza, Folio Number 30 5914 002 0010, for unpaid real property taxes: **$11,552.36**.

c. To the United States, in care of its counsel, the remaining net sales proceeds, for application against the outstanding federal income tax liabilities of La Farga Interiors, Inc.: **$102,275.51,** plus any interest that has accrued on the sales proceeds deposited with the Court.

**DONE and ORDERED** in chambers, at Miami, Florida this 22nd day of May 2012.

Marcia G. Cooke

MARCIA G. COOKE
United States District Judge

Copies to:

Ted E. Bandstra, U.S. Magistrate Judge
Counsel of record

# United States District Court, Northern District of Illinois

| Name of Assigned Judge or Magistrate Judge | Blanche M. Manning | Sitting Judge if Other than Assigned Judge | Sidney I. Schenkier |
|---|---|---|---|
| **CASE NUMBER** | 11 C 5666 | **DATE** | 5/22/2012 |
| **CASE TITLE** | United States of America vs. Ali, et al. | | |

**DOCKET ENTRY TEXT**

Telephone status conference held. Settlement conference is set for **07/02/12** at **9:00 a.m. The settlement conference will be held in chambers, Rm. 1756.** The settlement conference will be conducted in accordance with the Court's Standing Order on Instructions for Settlement Conference, which is enclosed and which can also be accessed from the Court's webpage at http://www.ilnd.uscourts.gov/JUDGE/ SCHENKIER/sispage.htm. The schedule for exchange of settlement letters required by the Standing Order is as follows: plaintiff's counsel shall serve a settlement letter on defense counsel by **06/11/12**, and defendant's counsel shall serve a settlement letter on plaintiff's counsel by **06/25/12**. The parties may not change these dates for exchange without either written agreement of the parties or court order. The defendant's counsel shall deliver copies of the settlement letters to chambers by **noon on 06/26/12**. The parties may not change this date absent court order. Defendant's decision maker to be available by phone. All other parties with "full and complete settlement authority," as defined in the Standing Order, must personally attend the conference. The parties who attend the conference shall read all settlement letters prior to the commencement of the conference. Failure to comply with the Standing Order or with the schedule set in this order may result in sanctions.

Docketing to mail notices.
*Copy to judge/magistrate judge.

| | | |
|---|---|---|
| | Courtroom Deputy Initials: | smk |

**MAGISTRATE JUDGE SIDNEY I. SCHENKIER**
**219 South Dearborn Street**
**Chicago, IL 60604**

**Courtroom 1700** **Telephone: (312) 435-5609**
**Chambers 1756** **Fax Number: (312) 554-8677**

# INSTRUCTION FOR SETTLEMENT CONFERENCE

The Court believes that the parties should fully explore and consider settlement, and should do so at the earliest reasonable opportunity in the case. For those cases that can be resolved through settlement, early consideration of settlement can allow the parties to avoid unnecessary litigation. This will allow the parties to also avoid the substantial cost, expenditure of time, and distractions that are typically a part of the litigation process. Even for those cases that cannot be resolved through settlement, early consideration of settlement can allow the parties to better understand the factual and legal nature of their dispute. This often can result in focusing and streamlining the issues to be litigated – which again, can save the parties considerable time and money.

Consideration of settlement is a serious matter; it therefore deserves and requires serious and thorough preparation prior to the settlement conference. Set forth below are the procedures that the Court will require the parties to follow in preparing for the settlement conference, and the procedures that the Court typically will employ in conducting the conference. Counsel are directed to provide a copy of this Standing Order to their clients, and to discuss these procedures with them.

- **Pre-settlement Conference Exchange of Proposals.** The Court has found that settlement conferences are more likely to be productive if, before the conference, the parties have had a written exchange of their settlement positions. Accordingly, at least fourteen (14) calendar days prior to the date of the settlement conference, plaintiff's counsel shall serve on defense counsel a letter that sets forth at least the following information: (a) a brief summary of the evidence and legal principles that plaintiff asserts will allow it to establish liability, (b) a brief explanation of why damages or other relief would appropriately be granted at trial, (c) an itemization of the damages plaintiff believes can be proven at trial, and a brief summary of the evidence and legal principles supporting those damage, and (d) a settlement proposal. Defendant's counsel shall serve on plaintiff's counsel a responding letter that sets forth at least the following information: (a) any points in plaintiff's letter with which the defendant ***agrees***, (b) any points in plaintiff's letter with which defendant ***disagrees***, with references to supporting evidence and legal principles, and (c) a settlement offer. The Court expects that each of these letters typically should be five pages or fewer.

- Plaintiff's counsel shall deliver copies of these letters to chambers. **DO NOT FILE COPIES OF THESE LETTERS IN THE CLERK'S OFFICE.**

  The Order scheduling the settlement conference will set forth the dates for the exchange of letters and their delivery to chambers. The schedule is designed to ensure that the Court and the parties have enough time to prepare for the conference. Failure to comply with the schedule set by the Court may result in sanctions.

- **ATTENDANCE OF PARTIES REQUIRED.** Unless the Court allows otherwise by separate order, ***parties with full and complete settlement authority are required to personally attend the conference.*** This means that if a party is an individual, that individual must personally attend; if a party is a corporation or governmental entity, a representative of that corporation or governmental entity (other than counsel of record) with full and complete settlement authority must personally attend. "Full and complete settlement authority" means the authority to negotiate and agree to a binding settlement agreement at any level up to the settlement proposal of the plaintiff. If a party requires approval by an insurer to settle, then a representative of the insurer with full and complete settlement authority must attend.

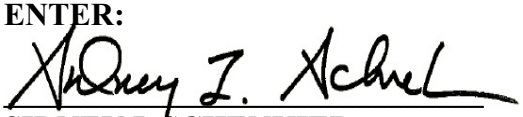
  The Court sets aside a significant block of time for each settlement conference. The Court strongly believes that the personal presence of the parties, and their direct participation in the discussions and "give and take" that occur, will materially increase the chances of settlement. Thus, absent a showing of unusual and extenuating circumstances, the Court will not permit a client to merely be available by telephone as an alternative to personal presence at the conference. The Court requires that parties attending the conference read the settlement letters exchanged between the parties before coming to the conference.

- **CONFERENCE FORMAT.** The Court generally will follow a mediation format: that is, each side will have an opportunity to make a presentation to the other side, which will be followed by joint discussion with the Court and private meetings by the Court with each side. The Court expects both the lawyers and the party representatives to be fully prepared to participate in the discussions and meetings. In these discussions, the Court expects all parties to be willing to reassess their previous positions, and to be willing to explore creative means for resolving the dispute.

- **STATEMENTS INADMISSIBLE.** Any statements made by any party during the settlement conference will not be admissible at trial. The Court expects the parties to address each other with courtesy and respect, but at the same time strongly encourages the parties to speak frankly and openly about their views of the case.

**ANY PARTY WHO WISHES TO VARY ANY OF THE PROCEDURES SET FORTH IN THIS STANDING ORDER MUST MAKE AN APPROPRIATE REQUEST TO THE COURT PRIOR TO THE EXCHANGE OF SETTLEMENT LETTERS DESCRIBED ABOVE.**

**ENTER:**



**SIDNEY I. SCHENKIER**
**United States Magistrate Judge**

**Dated: February 25, 2010**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff, | §<br>§<br>§ | |
| v. | § | CIVIL ACTION NO. H-12-0723 |
| STEPHEN V. MOSS, *et al.*,<br>Defendants. | §<br>§<br>§ | |

**ORDER**

It is hereby **ORDERED** that the deadline for the parties' Joint Discovery/Case Management Plan is extended to **July 23, 2012,** and the initial pretrial conference is rescheduled to **July 30, 2012, at 2:00 p.m.** It is further

**ORDERED** that by **July 9, 2012**, Plaintiff shall either present evidence of service on Defendants or show cause why this case should not be dismissed for lack of service. Plaintiff is advised that failure to comply will result in dismissal of this case pursuant to Rule 4(m) of the Federal Rules of Civil Procedure as to any unserved Defendant.

SIGNED at Houston, Texas, this **22nd** day of **May, 2012**.

Nancy F. Atlas
United States District Judge

P:\ORDERS\11-2012\0723ResetIPTC.Rule4m.wpd 120522.0906

DISTRICT OF OREGON
FILED
May 22, 2012
Clerk, U.S. Bankruptcy Court

Below is an Order of the Court.

TRISH M. BROWN
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

| | |
|---|---|
| In re<br><br>Stephen Miles Munson,<br><br>Debtor. | Case No. 10-39795-tmb11<br><br>ORDER EXTENDING TIME TO FILE APRIL 2015 REPORT |

This matter came before the Court on Stephen Miles Munson's ("Debtor") motion for an extension of time within which to file the Rule 2015 Report for April 2012. After reviewing the Motion, and the Court being fully advised in the premises, it is hereby

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*FARLEIGH WADA WITT*
Attorneys at Law
121 SW Morrison Street, Suite 600
Portland, Oregon 97204-3136
Telephone: (503) 228-6044
Facsimile: (503) 228-1741

ORDERED that the deadline for the Debtor to file the Rule 2015 Report for April 2012 is extended to and including May 25, 2012.

# # #

**PRESENTED BY:**

FARLEIGH WADA WITT

By: /s/ Jason M. Ayres
Jason M. Ayres, OSB #001966
jayres@fwwlaw.com
(503) 228-6044
Of Attorneys for Debtor

cc: Interested Parties



***FARLEIGH WADA WITT***
Attorneys at Law
121 SW Morrison Street, Suite 600
Portland, Oregon 97204-3136
Telephone: (503) 228-6044
Facsimile: (503) 228-1741

DISTRICT OF OREGON
FILED
May 22, 2012
Clerk, U.S. Bankruptcy Court

Below is an Order of the Court.

TRISH M. BROWN
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

| | |
|---|---|
| In re<br><br>Stephen Miles Munson,<br><br>Debtor. | Case No. 10-39795-tmb11<br><br>ORDER EXTENDING TIME TO FILE APRIL 2015 REPORT |

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Attorneys at Law
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Portland, Oregon 97204-3136
Telephone: (503) 228-6044
Facsimile: (503) 228-1741

ORDERED that the deadline for the Debtor to file the Rule 2015 Report for April 2012 is extended to and including May 25, 2012.

# # #

**PRESENTED BY:**

FARLEIGH WADA WITT

By: /s/ Jason M. Ayres
Jason M. Ayres, OSB #001966
jayres@fwwlaw.com
(503) 228-6044
Of Attorneys for Debtor

cc: Interested Parties



***FARLEIGH WADA WITT***
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Portland, Oregon 97204-3136
Telephone: (503) 228-6044
Facsimile: (503) 228-1741

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | § | |
| | § | |
| *Plaintiff,* | § | |
| | § | |
| v. | § | CIVIL ACTION H-11-110 |
| | § | |
| DAVID C. NANCE, *et al.,* | § | |
| | § | |
| *Defendants.* | § | |

**ORDER**

Pending before this court is defendant Patricia Nance's motion to vacate default judgment. *See* Dkt. 29. An oral hearing will be held on defendant's motion on June 6, 2012 at 10:00 a.m. in Courtroom 9-D, 515 Rusk, Houston, Texas.

Signed at Houston, Texas on May 22, 2012.

Gray H. Miller
United States District Judge

ORIGINAL

# In the United States Court of Federal Claims

FILED

MAY 22 2012

U.S. COURT OF
FEDERAL CLAIMS

**No. 11-885 T**

**ANTHONY J. and MARIA T. NASHARR**

**JUDGMENT**

**v.**

**THE UNITED STATES**

Pursuant to the court's Memorandum Opinion and Order, filed May 22, 2012, granting defendant's motion to dismiss for lack of subject matter jurisdiction,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed, without prejudice. No costs.

Hazel C. Keahey
Clerk of Court

**May 22, 2012**

By: Deborah L. Scanlon

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $455.00.

ORIGINAL

FILED

MAY 22 2012

U.S. COURT OF FEDERAL CLAIMS

# In the United States Court of Federal Claims

No. 11-885T
(Filed May 22, 2012)

| | |
|---|---|
| **ANTHONY J. and MARIA T. NASHARR, *pro se*,** | Tax; RCFC 12(b)(1) motion to dismiss for lack of jurisdiction; claim for rebate of penalty; whether full payment rule applicable to claim challenging only penalty; jurisdictional requirement to file claim for refund prior to suit, 26 U.S.C. § 7422(a) (2006). |
| Plaintiffs, | |
| v. | |
| **THE UNITED STATES,** | |
| Defendant. | |

Anthony J. Nasharr and Maria T. Nasharr, Hinsdale, IL, plaintiffs, *pro se*.

Shelley D. Leonard, Washington, DC, with whom was Assistant Attorney General Kathryn Keneally, for defendant. David I. Pincus, Chief, and Mary M. Abate, Assistant Chief, Tax Division, Court of Federal Claims Section, of counsel.

## MEMORANDUM OPINION AND ORDER

**MILLER**, Judge.

This case is before the court on defendant's motion to dismiss pursuant to RCFC 12(b)(1) for lack of subject matter jurisdiction. The issue for decision is whether plaintiffs Anthony J. and Maria T. Nasharr 1/ have met the required jurisdictional elements to proceed before the Court of Federal Claims on their request for an abatement of the penalty assessed for their failure to pay income taxes for the 2003 tax year. Argument is deemed unnecessary.

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1/ The allegations of the complaint primarily concern Mr. Nasharr.

## FACTS

Although this case specifically concerns the circumstances surrounding the 2003 tax year, the developed factual record indicates that the plaintiffs' 2/ tardiness problems with the Internal Revenue Service ("IRS") actually began during the 1996 tax year and continued through the 1999 tax year. For the years 1996 through 1999, plaintiffs failed to timely file or pay their income taxes and were subsequently assessed penalties for late filing and late payment and the interest that accrued on those deficits. See Def.'s Br. filed Apr. 2, 2012, Ex. 11, at 61-68. Beginning in February 2003, Mr. Nasharr began sending payments to the IRS. 3/ See id. Ex. 10, at 60. On February 20, 2003, Mr. Nasharr sent the IRS a check for $30,000.00. Id. On March 24, 2003, Mr. Nasharr sent a check for $20,000.00 to the IRS "to apply to my debt." Id. Ex. 10, at 57. Again on April 24, 2003, Mr. Nasharr sent the IRS a check for $105,000.00 "for application to my debt." Id. Ex. 10, at 58. Mr. Nasharr sent a final check in the amount of $72,000.00 on September 2, 2003. 4/ Because plaintiffs failed to designate how these funds should be applied to their outstanding balance, the IRS credited their tax account in chronological order, beginning with the 1996 tax year balance. See id. Ex. 11, at 61-68. It appears from the Account Transcripts that with the final payment in September, plaintiffs had resolved their outstanding balance for the 1996 through 1999 tax years. Id. Ex. 11, at 68.

At the same time in 2003 when Mr. Nasharr was making these voluntary payments on his outstanding balance, he was experiencing professional difficulties. In 2003 Mr. Nasharr, an attorney, was a name-partner in the law firm Forran Nasharr & O'Toole, LLC, of Chicago, Illinois. See id. at 2; id. Ex. 1, at 13. However, in 2004 Mr. Nasharr was "ousted from the partnership he helped create by his two former partners." Compl. filed Dec. 19, 2011, ¶ 5.

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2/ Defendant notes that for the 1996 through 1999 tax years, plaintiffs filed either as "Single" or "Married Filing Separate," but for the 2003 tax year filed "Married Filing Jointly." Def.'s Br. filed Apr. 2, 2012, at 4 n.4. For simplicity's sake, the court will continue to refer jointly to plaintiffs, but notes that the Nasharrs' problems with the Internal Revenue Service ("IRS") prior to 2003 seem to be the result of Mr. Nasharr's actions alone.

3/ The complaint also alleges that Mr. Nasharr designated $19,634.00 in withholding in 2003 to be applied to his outstanding tax balance, but the court has seen no evidence of this in the documentation submitted. See Compl. filed Dec. 19, 2011, ¶ 3.

4/ The record clearly reflects that Mr. Nasharr submitted four payments to the IRS in 2003. It is not at all clear why plaintiffs aver that Mr. Nasharr "sent voluntary payments of $197,000.00" when it appears as though he actually submitted $227,000.00 in payments. See Compl. ¶ 3.

Due to the contentious nature of the firm's dissolution, Compl. ¶¶ 5-6, Mr. Nasharr did not receive his Schedule K-1, Partner's Share of Income, Credits, Deductions, etc., for the 2003 tax year until October 5, 2004—well past the deadline to timely file a return. See Def.'s Br. filed Apr. 2, 2012, Ex. 3, at 19, 22. The Schedule K-1 reflects that Mr. Nasharr earned $171,832.00 in income in 2003. Despite receiving the Schedule K-1 in October 2004, plaintiffs took no immediate action to file a return for the 2003 tax year. Instead, on July 17, 2007, the IRS prepared a Substitute for Return, and on March 31, 2008, assessed the amount plaintiffs owed in taxes as $258,252.00. See id. Ex. 4, at 24; id. Ex. 5, at 33. To this amount, the IRS assessed late filing and failure to pay penalties and calculated the accrued interest on the outstanding balance. See id.

Plaintiffs filed their 2003 tax return on May 10, 2009, and reported owing $197,643.00 in taxes to be offset by $19,634.00 in previous withholdings, resulting in a total tax balance of $178,009.00. See id. Ex 6, at 42. In response, the IRS adjusted the penalties assessed and abated some of the original penalty amounts. See id. Ex. 4, at 25; id. Ex. 5, at 34. Dissatisfied with only this partial reduction, on May 27, 2009, plaintiffs submitted Forms 843, Claim for Refund and Request for Abatement, and requested that the IRS abate both the failure to file and failure to pay penalties for reasonable cause. See id. Ex 1. The IRS denied relief on December 18, 2009. Id. Ex. 7. In the letter sent to plaintiffs, the IRS provided information on the appellate options available to taxpayers in plaintiffs' situation. Id. They may either appeal the decision directly to the Office of Appeals or,

> [i]f you don't appeal, you may file a claim for refund after you pay the penalty. If you want to take your case to court immediately, you should request in writing that your claim for refund be immediately rejected. Then you will be issued a notice of disallowance. You have two years from the date of the notice of disallowance to bring suit . . . .

Id. Ex. 7, at 45.

Plaintiffs elected to appeal the decision, but their appeal similarly was denied on November 3, 2010. Id. Ex. 8. In the letter sent to plaintiffs explaining the Appeals Tax Specialist's decision, plaintiffs were again advised, as follows:

> Since your representative has stated that he does not agree with my determination, your next level of appeal would be to file a formal refund suit with either the United States District Court or the United States Claims Court. After the penalty charges have been paid, you may file a claim for refund on Form 843 . . . . Include a written statement that your claim for refund be

> immediately disallowed. You will then be issued a notice of claim disallowance.
>
> You will have two years from the date of the notice of disallowance to bring suit in the appropriate [court].

Id. Ex. 8, at 49. In December 2010, plaintiffs next chose to file suit in the United States Tax Court again seeking an abatement of the penalties that had been levied for their delinquent filing and failure to pay income taxes in 2003. Id. Ex. 9. On April 22, 2011, the Tax Court dismissed plaintiffs' petition for lack of jurisdiction to review determinations with respect to the abatement of penalties. Id. Ex. 9, at 55-56.

The record indicates that plaintiffs have not made any subsequent payments to the IRS pertaining to their 2003 outstanding balance. Nonetheless, on December 19, 2011, plaintiffs filed the present action for "abatement of duplicate penalties for failure to pay of $53,689.00 plus associated interest accumulated." 5/ Compl. at 1. Plaintiffs allege entitlement to abatement relief because the following grounds constitute reasonable cause for their delay in filing and paying their income taxes: (1) plaintiffs erred in failing to specify that the payments submitted in 2003 were to be applied to their 2003 income tax liability, an amount sufficient to cover the tax assessed, Compl. ¶ 3; (2) plaintiffs reasonably believed all tax liabilities were fully paid because of the payments submitted in 2003, id. ¶ 5; (3) Mr. Nasharr was unable to obtain the necessary records in time to timely file his 2003 return, id.; and (4) the "stress of [Mr. Nasharr's] law firm breakup" was a causal factor, id. ¶ 7.

## DISCUSSION

I. Standards

1. Subject matter jurisdiction pursuant to RCFC 12(b)(1)

Documents filed *pro se* are "to be liberally construed . . . and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam) (citation

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5/ As identified by defendant, although plaintiffs specifically request only an abatement of the failure to pay penalty, plaintiffs make references throughout the complaint to both the failure to file and failure to pay penalties. Plaintiffs stated in their response brief that they are, in fact, "seeking only relief from failure to pay to avoid double penalties." Pls.' Br. filed Apr. 23, 2012, ¶ 4.

omitted) (internal quotation marks omitted); see also Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam); Ruderer v. United States, 412 F.2d 1285, 1292 (Ct. Cl. 1969) ("[W]e have strained our proper role in adversary proceedings to the limit, searching this lengthy record to see if plaintiff has a cause of action somewhere displayed."). Nevertheless, while "[t]he fact that [a plaintiff] acted *pro se* in the drafting of his complaint may explain its ambiguities, . . . it does not excuse its failures, if such there be." Henke v. United States, 60 F.3d 795, 799 (Fed. Cir. 1995). Although *pro se* plaintiffs are given some leniency in presenting their case, their *pro se* status does not immunize them from pleading facts upon which a valid claim can rest. See, e.g., Ledford v. United States, 297 F.3d 1378, 1382 (Fed. Cir. 2002) (affirming dismissal of *pro se* plaintiff's complaint which sought, *inter alia*, a tax refund). Additionally, the filings of *pro se* plaintiffs receive less leniency vis-à-vis jurisdictional requirements. See Kelley v. Sec'y, U.S. Dep't of Labor, 812 F.2d 1378, 1380 (Fed. Cir. 1987) ("We agree that leniency with respect to mere formalities should be extended to a *pro se* party, . . . . [but] a court may not similarly take a liberal view of [a] jurisdictional requirement and set a different rule for *pro se* litigants only."); see also Ledford, 297 F.3d at 1382 (affirming dismissal of *pro se* plaintiff's complaint seeking unpaid tax refund).

Defendant levies the objection that plaintiffs' asserted claims are outside the court's jurisdiction. Jurisdiction must be established before the court may proceed to the merits of a case. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 88-89 (1998). Courts are presumed to lack subject matter jurisdiction unless it is affirmatively indicated by the record; therefore, it is a plaintiff's responsibility to allege facts sufficient to establish the court's subject matter jurisdiction. Renne v. Geary, 501 U.S. 312, 316 (1991); DaimlerChrysler Corp. v. United States, 442 F.3d 1313, 1318 (Fed. Cir. 2006) ("[I]t is settled that a party invoking federal court jurisdiction must, in the initial pleading, allege sufficient facts to establish the court's jurisdiction."). Once the court's subject matter jurisdiction is put into question, it is "incumbent upon [the plaintiff] to come forward with evidence establishing the court's jurisdiction. . . . [The plaintiff] bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence." Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 748 (Fed. Cir. 1988) (citation omitted); accord M. Maropakis Carpentry, Inc. v. United States, 609 F.3d 1323, 1327 (Fed. Cir. 2010).

If the facts purporting to establish jurisdiction are disputed, the court may consider evidence outside of the pleadings to resolve the dispute. See Rocovich v. United States, 933 F.2d 991, 994 (Fed. Cir. 1991) (applying rule in tax refund case). "[I]f a motion to dismiss for lack of subject matter jurisdiction . . . challenges the truth of the jurisdictional facts alleged in the complaint, the . . . court may consider relevant evidence in order to resolve the factual dispute." Reynolds, 846 F.2d at 747 (citation omitted); accord Moyer v. United States, 190 F.3d 1314, 1318 (Fed. Cir. 1999). However, when a federal court hears a

jurisdictional challenge, "its task is necessarily a limited one." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), abrogated on other grounds by Harlow v. Fitzgerald, 457 U.S. 800 (1982). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Id.

II. The full payment rule

This court's jurisdiction is established by 28 U.S.C. § 1491 (2006), which provides that "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department . . . ." 28 U.S.C. § 1491(a)(1). In tax cases, this court often looks to 28 U.S.C. § 1346(a)(1) (2006), for more specific guidance on the scope of that jurisdiction. Section 1346(a)(1) provides, as follows:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> > (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws . . . .

28 U.S.C. § 1346(a)(1); see Shore v. United States, 9 F.3d 1524, 1525 (Fed. Cir. 1993). From this statutory direction, defendant argues that this court lacks jurisdiction to adjudicate plaintiffs' claim because this court's jurisdiction is limited to those suits in which the taxpayer has paid fully both the tax liability at issue and the penalty prior to filing suit. Def.'s Br. filed Apr. 2, 2012, at 7; Def.'s Br. filed May 4, 2012, at 3.

Known as the "full payment rule," in Flora v. United States, 357 U.S. 63 (1958), aff'd on reh'g, 362 U.S. 145 (1960), the United States Supreme Court stated that "§ 1346(a)(1), correctly construed, requires full payment of the assessment before an income tax refund suit can be maintained." 362 U.S. at 177. The United States Court of Appeals for the Federal Circuit interpreted Flora in Shore to determine whether penalties also must be paid in full prior to filing in court. The Federal Circuit concluded that "if the taxpayers assert a claim over assessed interest or penalties on grounds not fully determined by the claim for recovery of principal [they must] prepay such interest and penalties as well as the assessed tax principal." Shore, 9 F.3d at 1527-28.

This case is unusual in that plaintiffs are not making any refund claim on the underlying tax; plaintiffs are challenging only the penalty levied for their failure to pay. See Pls.' Br. filed Apr. 23, 2012, ¶ 4. Defendant points out that, in fact, plaintiffs' penalty claim would not be fully determined by their tax refund claim if plaintiffs had made a tax refund claim. Def.'s Br. filed Apr. 2, 2012, at 7-8. However, because plaintiffs still have an outstanding balance of $270,494.20, of which $168,730.22 is owed for penalties and interest, plaintiffs have not satisfied the full payment rule. See Def.'s Br. filed Apr. 2, 2012, at 9. Plaintiffs appear to counter this position by arguing that they have made sufficient payments towards their 2003 tax liability to cover the amount of accumulated penalty that they are challenging. See Pls.' Br. filed Apr. 23, 2012, ¶ 2 ("We assert that an amount exceeding the requested penalty has indeed been voluntarily paid."). This appears to be an extrapolation of the basic principle embraced in Flora that a taxpayer must have first paid the amount that he subsequently challenges in court. The upshot of plaintiffs' contentions seems to be that, because they are only challenging the failure to file penalty, that is the only amount that must have been paid prior to filing suit.

Despite the unique posture of the case, plaintiffs have failed to satisfy the jurisdictional requirement of prepayment prior to filing suit. First, although plaintiffs argue to the contrary, it does not even appear that they have paid the full amount of the failure to pay penalty that they are challenging. As noted by defendant, plaintiffs have submitted payments totaling $95,879.02 toward their 2003 tax liability. See Def.'s Br. filed May 4, 2012, at 2; Def.'s Br. filed Apr. 2, 2012, Ex. 4; id. Ex. 5. While this amount may have been sufficient to cover the failure to pay penalty, assessed at $42,737.50, it does not appear that plaintiffs designated that any of their subsequent payments be allocated to paying the failure to pay penalty. As such, defendant correctly notes that it was within the discretion of the IRS to distribute the payments "in order of priority that the Service determines will serve its best interest" and the IRS accordingly applied those payments to the underlying tax balance rather than the penalty. See Rev. Proc. 2002-26 § 3.02, 2002-15 I.R.B. 746 (stating that if "the taxpayer does not provide specific written directions as to the application of payment, the Service will apply the payment to periods in the order of priority that the Service determines will serve its best interest" which, it then explains, will be in the order of tax then penalty then interest). Therefore, plaintiffs have not established that they have fully paid the failure to pay penalty.

Second, although plaintiffs advocate a conceptually plausible interpretation of Flora, the practical effect of their position would run counter to the full payment rule. Assuming that plaintiffs were correct that a taxpayer could pay only the amount of a penalty and then subsequently challenge only the penalty in court, then, were the taxpayer to succeed, the fact that an unpaid tax balance still existed would mean that the penalty would be refunded only up until the time of the judgment. Provided that the plaintiff did not pay off the entire

balance of the outstanding tax liability, penalties would again begin accruing the day after judgment entered. The effect of such litigation gymnastics would be only to delay and obstruct the application of penalties to a delinquent taxpayer—a tactical maneuver not contemplated by applicable law. In order to gain access to the courts, a taxpayer first must pay the amount assessed by the IRS before he is allowed to challenge the validity of the amount. This procedure has been implemented because it is the one most likely to ensure that the IRS collects the revenue that it is owed. Similarly, those taxpayers who are delinquent in filing and paying their taxes should be penalized. Were this court to adopt plaintiffs' proposed scheme, however, it would be possible for litigation as to the validity of the underlying tax to then be brought in two steps. First, a plaintiff would pay and challenge the penalty while "conceding" the validity of the underlying tax. If successful, the hurdle for plaintiff under the full payment rule would be lowered, and the same money that was paid to challenge the penalty could then be substituted to pay for the tax. This would result in obstructionist litigation that would deprive the public fisc of the entire sum initially assessed and potentially ease the burden assumed by those taxpayers who chose not to file and pay their taxes on time. Neither of these results is desirable. Flora and Shore command that plaintiffs must pay both the full amount of the tax owed, as well as the amount of the penalty that they separately challenge, in order to establish jurisdiction. Because plaintiffs still have an outstanding tax liability of $270,494.20—inclusive of a failure to file penalty, a failure to pay penalty, and the resulting interest—plaintiffs have not fulfilled the mandate of the full payment rule.

III. The requirement that plaintiffs must first file a claim for refund with the IRS

Defendant also states that plaintiffs have not filed a claim for refund with the IRS prior to filing suit in this court. See Def.'s Br. filed Apr. 2, 2012, at 9-10; Def.'s Br. filed May 4, 2012, at 4. This court's jurisdiction in tax refund cases is limited by 26 U.S.C. § 7422(a) (2006), which provides, as follows:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

26 U.S.C. § 7422(a). It is incumbent upon a taxpayer to demonstrate that this claim for refund has been filed because, as the Federal Circuit has noted, "[W]hether sovereign immunity has been waived and the Court of Federal Claims has jurisdiction over . . . refund

claims depends on whether the taxpayers' submissions to the IRS constitute a claim for refund." Waltner v. United States, No. 2011-5105, 2012 WL 1352941, at *3 (Fed. Cir. Apr. 19, 2012).

Plaintiffs have not demonstrated that they filed a claim for a refund of the failure to pay penalty that they now challenge. The record indicates that in May 2009, plaintiffs filed a Form 843 seeking an abatement of the penalties. See Def.'s Br. filed Apr. 2, 2012, Ex. 1. A fundamental difference exists between an abatement and a refund, and it has been established that a Form 843 submitted in pursuit of an abatement does not constitute a claim for refund. See Ertle v. United States, 93 F. Supp. 619, 620 (Ct. Cl. 1950). Therefore, the Court of Federal Claims also lacks jurisdiction on this ground.

## CONCLUSION

Accordingly, based on the foregoing, defendant's motion to dismiss for lack of subject matter jurisdiction is granted, and the Clerk of the Court shall enter judgment dismissing the complaint without prejudice.

**IT IS SO ORDERED**.

No costs.

**Christine Odell Cook Miller**
Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MARCO T. ORDONEZ,

Plaintiff,

v.

U.S. DEPARTMENT OF THE TREASURY; and INTERNAL REVENUE SERVICE,

Defendants.

Civil No. 11cv2340-CAB (NLS)

**ORDER GRANTING PLAINTIFF'S REQUEST FOR EXTENSION OF TIME TO RESPOND TO MOTION TO DISMISS**

**[Doc. No. 14]**

Plaintiff is a state prisoner proceeding *pro se* and *in forma pauperis* with an action against the Internal Revenue Service for "erroneously denied tax refund". On April 18, 2012, Defendants file a motion to dismiss the case. [Doc. No. 13.] On May 14, 2012, Plaintiff filed a request for an extension to time to respond to the motion to dismiss. [Doc. No. 14.] Plaintiff requests that the Court give him until June 17, 2012 to file his opposition to the motion to dismiss, because he is incarcerated and has limited time to do legal research in the prison law library. Accordingly, the Court finds good cause to **GRANT** the request. Plaintiff shall file his opposition to the motion to dismiss on or before **June 18, 2012**. Defendant shall file its reply on or before **June 25, 2012**.

**IT IS SO ORDERED.**

DATED: May 22, 2012

**CATHY ANN BENCIVENGO**
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | No. 09-539 |
| | ) | |
| WILLIAM RABEH; VICTORIA RABEH; VICTORIA RABEH d/b/a DIANA'S SPORSTWEAR a/k/a CHRISTINA'S SPORTSWEAR, INC.; DIANA RABEH; and SOVEREIGN BANK, | ) | |
| | ) | |
| Defendants. | ) | |

**STIPULATION AND AGREED ORDER**

Based on the stipulation of the parties, as indicated by the signatures affixed hereto, the Court hereby

ORDERS that Count V (set aside fraudulent conveyance) of the United States' complaint is dismissed with prejudice, parties to bear their own fees and costs;

ORDERS that Count VI (foreclose Federal tax liens) of the United States' complaint is dismissed with prejudice, parties to bear their own fees and costs; and further

ORDERS that Diana Rabeh is dismissed as a party to this litigation.

**IT IS SO ORDERED.**

DATE: 5/22/12

LAWRENCE F. STENGEL
United States District Judge

Agreed to by:

Geoffrey J. Klimas
U.S. Department of Justice, Tax Division
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William Rabeh
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*Defendant*

Victoria Rabeh
888 Pennsylvania Street
Whitehall, PA 18052
*Defendant*

END OF ORDER

**UNITED STATES BANKRUPTCY COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION – DETROIT**

**IN RE**:

Leigh Jeff Rose

Debtor.
_____/

Case No. 11-71412-SWR
Hon. Steven W. Rhodes
Chapter 7

**ORDER EXTENDING THE DEADLINE TO FILE A COMPLAINT TO OBJECT TO THE DISCHARGE OF THE DEBTOR AS TO THE TRUSTEE ONLY**

The Trustee, Fred Dery, by and through his counsel, Lieberman, Gies & Cohen PLLC and the Debtor, Leigh Jeff Rose, by and through his counsel, Robert N. Bassel, having stipulated and agreed to extend the deadline to file a complaint to object to the discharge of the debtor under 11 U.S.C. §727; and the Court otherwise being fully advised in the premises;

**NOW THEREFORE,**

**IT IS HEREBY ORDERED** that the deadline to file a complaint to object to the discharge of the debtor pursuant to 11 U.S.C. §727 is extended to July 27, 2012 as to the Trustee only.

.

**Signed on May 22, 2012**

**/s/ Steven Rhodes**
**Steven Rhodes**
**United States Bankruptcy Judge**

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

| | | |
|---|---|---|
| E. J. SAAD, P.C., | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | CIVIL ACTION NO. 12-00018-KD-N |
| | ) | |
| HINKLE METALS & SUPPLY CO. INC., et al., | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | |

REPORT AND RECOMMENDATION

This interpleader action is before the Court on a motion (docs. 24-25) filed by the United States on behalf of the Department of Treasury and Internal Revenue Service, one of the named defendants herein, to dismiss this action for lack of both personal and subject matter jurisdiction. The United States also seeks to have all funds deposited by the plaintiff in this case, namely $94,478.02 (doc. 30), paid to the United States. This matter has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636 (b)(1)(B) for entry of a Report and Recommendation. An Order was entered on March 19, 2012 (doc. 27) setting a deadline within which the parties could respond to this motion to dismiss. No party has responded or sought an extension of time within which to respond.[1] For the reasons stated below, however, it is recommended that the motion be **DENIED.**

[1] This failure to respond is of no consequence inasmuch as the present motion to dismiss present's a facial attack on the complaint which requires this Court to "consider the allegations (Continued)

I. Background and Procedural History.

The Internal Revenue Service ("IRS") issued a Notice of Levy to Plaintiff E.J. Saad, P.C. ("Saad") on December 12, 2011, seeking a certain fund in Saad's possession to collect the tax debts of Air Comfort Company, Inc. ("ACC").[2] (Doc. 25 at 1). The IRS sought to collect ACC's federal employment tax liabilities for the last three quarters of 2010 and the first quarter of 2011, which amounted to $629,184.70. (*Id*. at 2; Doc. 1-2 at 2). Saad's account held settlement proceeds of two claims Saad brought on ACC's behalf. (*Id*; Doc. 1 at ¶ 11.). On January 6, 2012, subsequent to the IRS levy, Hinkle Metals & Supply Co., Inc. ("Hinkle") and BancorpSouth Bank, Inc. ("BancorpSouth") served garnishments upon Saad for the same fund. (*Id*. at 2-3; Docs 1-1 and 1-4). BancorpSouth had previously advised Saad by letter dated November 29, 2011, that, pursuant to an alleged "prior perfected lien," it claimed the settlement funds held by Saad. (Doc. 1-3 at 2).

On January 12, 2012, Saad filed this interpleader action asserting jurisdiction pursuant to "28 U.S.C. § 1335 [statutory interpleader] and Fed.R.Civ.P. 22 [Rule

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of the complaint as true." Schmidt v. U.S. Army Corps of Engineers, 2008 WL 2783292, *3 (W.D. Mich. July 15, 2008). "However, the Court is not required to 'accept as true legal conclusions or unwarranted factual inferences' [asserted in an unopposed motion to dismiss]." Shipp v. United States, 2005 WL 2464669, *4 (W.D. Tenn. 2005), *quoting* Grindstaff v. Green, 133 F.3d 416, 421 (6th Cir. 1998). Consequently, the nonmoving parties are not prejudiced by their failure to respond.

[2] On March 19, 2012, Saad filed a Suggestion of Bankruptcy on behalf of ACC. (Doc. 26).

interpleader]." (Doc. 1 at ¶ 6). Saad disclaims any ownership interest in the amount remaining in ACC's settlement proceeds after Saad's deduction of litigation fees and costs incurred in its representation of ACC connection with the aforementioned two claims. (Doc. 1 at ¶ 11). Saad asserts that "[t]he garnishment, levy and claim of Hinkle, the IRS and BancorpSouth each and all seek the same funds and expose Saad to double or multiple liability [and] Saad is in doubt as to which of the claimants is or are entitled to the funds, if any." (Doc. 1 at ¶ 12).

On January 16, 2012, Saad sought permission (doc. 7) to deposit the funds at issue in the Registry of the Court. Saad subsequently deposited $94,478.02 into the Registry of the Court. *See* Docs. 10 and 30. BancorpSouth and Hinkle have appeared and filed their Answers (doc. 14 and 17, respectively) to the Complaint. On March 16, 2012, the United States filed the present motion to dismiss (doc. 24), on the grounds, in sum, that this action must be dismissed for lack of both personal jurisdiction and subject matter jurisdiction. (Doc. 25 at 2). The United States argues that the Court lacks personal jurisdiction over the named defendant, addressed by the United States as "the 'Department of Treasury' and 'Internal Revenue Service'," because neither is a suable entity. (Doc. 25 at 4). The Court is said to lack of subject matter jurisdiction over the United States, "the real party in interest," because it has not waived its sovereign immunity in this particular case. The United States specifically contends that, because Saad is granted immunity in connection with its payment of the IRS levy, it is not subject to any threat of multiple liability and, without such threat, there is no need for

interpleader relief. Further, absent the need for such relief, the Government states that it does not waive its sovereign immunity under 28 U.S.C. § 2410(a), which authorizes suits against the United States "in any district court, or in any State court having jurisdiction of the subject matter . . . of interpleader or in the nature of interpleader with respect to real or personal property on which the United States has or claims a mortgage or other lien."[3] As stated previously, none of the parties have opposed the arguments advanced by the United States.

II. Standard of Review.

The Eleventh Circuit has held that a Rule 12(b)(1) motion to dismiss may assert either a factual or facial attack on subject matter jurisdiction. McElmurray v. Consol. Gov't of Augusta-Richmond County, 501 F.3d 1244, 1251 (11th Cir. 2007). This Court recently addressed the Standard of Review for a 12(b)(1) motion in Cincinnati Ins. Co. v. Emmons, 2011 WL 1380023, * 1 (S.D. Ala. Mar. 24, 2011), as follows:

> "[W]hen a defendant properly challenges subject matter jurisdiction under Rule 12( b)( 1) the district court is free to independently weigh facts, and 'may proceed as it never could under Rule 12(b)(6) or Fed.R.Civ.P. 56'." Turcios v. Delicias Hispanas Corp., 275 Fed. Appx. 879, 880 (11th Cir. 2008), *quoting* Morrison v. Amway Corp., 323 F.3d 920, 925 (11th Cir. 2003)(*quoting* Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990)). "Motions to dismiss for lack of subject matter jurisdiction pursuant to

[3] The term "action in the nature of interpleader," found in both Rule 22 and in 28 U.S.C. § 1335, "refers to those actions in which an interpleading plaintiff asserts an interest in the subject matter of the dispute." Hussain v. Boston Old Colony Ins. Co., 311 F.3d 623, 631 (5th Cir. 2002). In the case at bar, there is no dispute that Saad seeks a discharge from liability and therefore impliedly disavows any ownership interest in the funds at issue. (Doc. 1, Prayer for Relief.)

> Fed.R.Civ.P. 12(b)(1) may attack jurisdiction facially or factually." Spring Air International, LLC v. R.T.G.Furniture Corp., 2010 WL 4117627, *1 (M.D. Fla. Oct. 19, 2010), *quoting* Morrison, 323 F.3d at 925 n. 5. With respect to a facial challenge, the allegations in the complaint are assumed to be true by the Court, which then must determine whether the complaint sufficiently alleges a basis for subject matter jurisdiction. *Id., citing* Lawrence, 919 F.2d at 1529. In contrast to a facial challenge, a factual attack challenges the "existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Id*. at *2, *quoting* Lawrence, 919 F.2d at 1529. (additional citations and footnotes omitted.)
>
> In other words, "when a Rule 12(b)(1) motion constitutes a factual attack on subject matter jurisdiction, 'no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of the jurisdictional issue'." Turcios, 275 Fed. Appx. at 880, (*quoting* Lawrence, 919 F.2d at 1529).

2011 WL 1380023 at *1.

In this case, the United States asserts that it is the real party in interest but maintains that it is immune from suit. "Federal sovereign immunity deprives a court of subject matter jurisdiction." Stackhouse v. United States, 2011 WL 820885, * 6 (D. Minn. Feb. 11, 2011), *quoting* Cooke v. Stanton, 2009 WL 424537 at * 4 (D. Minn. Feb. 18, 2009)(*citing* Riley v. United States, 486 F.3d 1030, 1031-32 (8th Cir. 2007)). When a challenge to subject matter jurisdiction is advanced, the plaintiff bears the burden to establish that jurisdiction exists. U.S. ex rel. Sanders v. East Alabama Healthcare Authority, 953 F.Supp. 1404, 1408-09 (M.D. Ala., 1996), *citing* Thomson v. Gaskill, 315 U.S. 442, 62 S.Ct. 673, 86 L.Ed. 951 (1942); Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511 (5th Cir.), *cert denied,* 449 U.S. 953 (1980). Osborn v. United States, 918 F.2d 724, 730 (8th Cir. 1990).

If the motion to dismiss under Rule 12(b)(1) is based on a deficiency in the pleadings, the "standard of review is the same standard we apply in Rule 12(b)(6) cases." Stalley v. Catholic Health Initiatives, 509 F.3d 517, 521 (8th Cir. 2007)(*citing* Mattes v. ABC Plastics, Inc., 323 F.3d 695, 697-98 (8th Cir. 2003). Under this standard, the plaintiff must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims, namely the right to jurisdiction in this Court, rather than facts that are "merely consistent with such a right." *Id., citing* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

With respect to interpleader actions, the plaintiff bears the burden of proving that interpleader is proper. Fresh America Corp. v. Wal-Mart Stores, Inc., 393 F.Supp.2d 411, 414 (N.D. Tex. 2005). Statutory interpleader is proper when a (1) stakeholder has a single fund worth at least $500; (2) where two or more adverse claimants with diverse citizenship[4] are competing for that fund; and (3) the stakeholder has deposited the fund in the Court's registry. 28 U.S.C. § 1335(a). "There are two varieties of interpleader: 'true interpleader,' in which the stakeholder disclaims all interest in the disposition of the fund; and 'actions in the nature of interpleader,' in which the stakeholder is one of a group of claimants asserting a right to the fund." *Id.*, 393 F.Supp.2d at 414, *quoting*, Airborne Freight Corp. v. United States, 195 F.3d 238, 240 (5th Cir. 1999). "In a true interpleader action, the stakeholder is dismissed from the suit after the Court determines that

[4] According to the Complaint, the claimants to the fund at issue are diverse in citizenship. (Doc. 1 at ¶¶ 2-5). The United States does not challenge this diversity.

interpleader is appropriate, and only the parties asserting an interest in the fund remain." *Id*. The United States acknowledges that SAAD disclaims all interest in the disposition of the funds at issue in this case. (Doc. 25 at 3).

III. Analysis.

As an initial matter, the United States is the real party in interest in this case because neither the Treasury nor the IRS is a suable entity. *See e.g.*, Castelberry v. Alcohol, Tobacco and Firearms Div. of Treasury Dept., 530 F.2d 672, 673 n.3 (5th Cir. 1976)("The Bureau of Alcohol, Tobacco and Firearms of the U.S. Treasury Department . . . is not suable, since the Congress has not constituted the Treasury Department or any of its divisions or bureaus as a body corporate and has not authorized either or any of them to be sued eo nomine."), *citing, inter alia,* Blackmar v. Guerre, 342 U.S. 512 (1952)(dealing similarly with the United States Civil Service Commission). *See also* Reppert v. I.R.S., 418 Fed.Appx. 897, 898 n. 1 (11th Cir. Mar. 24, 2011)("Taxpayer named the IRS as defendant but the IRS is not a suable entity."). Consequently, the United States should be substituted for the Department of Treasury and the IRS , who are presently named as party defendants.[5]

Saad filed this interpleader action pursuant to "28 U.S.C. § 1335 [statutory interpleader] and Fed.R.Civ.P. 22 [Rule interpleader]." (Doc. 1 at ¶ 6). Rule 22

[5] "Rule 17 states that '[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by ... the real party in interest'." Curtis v. United States, 63 Fed. Cl. 172, 180 (Fed. Cl. 2004).Such substitution will resolve the contention that this Court lacks personal jurisdiction over the named defendants.

interpleader provides that "[p]ersons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead." Fed.R.Civ.P. 22(a)(1).[6] In addition, Rule 22 provides that "[t]he remedy this rule provides is in addition to—and does not supersede or limit—the remedy provided by 28 U.S.C. § 1335 . . ." Fed.R.Civ.P. 22(b). As stated above, under 28 U.S.C. § 1335, this Court has jurisdiction over a civil interpleader action involving adverse claims to money or property worth $500 or more provided at least two of the adverse claimants are of diverse citizenship and "are claiming or may claim to be entitled to such money or property."[7] The essence of this interpleader action is Saad's assertion that, while it disclaims any ownership interest in the funds it has now deposited with this Court, "[t]he garnishment, levy and claim of Hinkle, the IRS and BancorpSouth each and all seek the same funds and expose Saad to double or multiple liability [and] Saad is in doubt as to which of the

[6] Although Rule 22 provides a procedural structure for handling interpleader cases, the United States argues that it requires independent jurisdictional grounds. Doc. 25 at n.4, *citing, inter alia,* Bell v. United States, 766 F.2d 910, 917 (6th Cir. 1985)(District Court lacked jurisdiction over interpleader action because "the anticipated action does not arise under federal law within the meaning of [28 U.S.C. § 1331].").

[7] 28 U.S.C. § 1335 states in relevant part:

> (a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation ... having his or its custody or possession money or property of the value of $500.00 or more ... if
>
> (1) Two or more adverse claimants, of diverse citizenship ... are claiming or may claim to be entitled to such money or property ... and if (2) the plaintiff has deposited such money or property ... into the registry of the court....

claimants is or are entitled to the funds, if any." (Doc. 1 at ¶ 12). As it has been pled, therefore, this action is a "true interpleader."

The United States acknowledges that Congress has waived the Government's sovereign immunity "in certain interpleader actions." (Doc. 25 at 7, *citing* 28 U.S.C. § 2410(a), which authorizes suits against the United States "in any district court, or in any State court having jurisdiction of the subject matter . . . of interpleader or in the nature of interpleader with respect to real or personal property on which the United States has or claims a mortgage or other lien."). The United States contends, however, that this waiver of immunity applies only to "a valid interpleader." *Id.* According to the United States, "[t]he central prerequisite for a 'true' interpleader action . . . is that the plaintiff-stakeholder runs the risk–but for determination in interpleader–of multiple liability when several claimants assert rights to a single stake." *Id.* at 8, *quoting* Airborne Freight Corp. v. United States, 195 F.3d 238, 240 (5th Cir. 1999) (prerequisite applies whether plaintiff invokes Rule or statutory interpleader); *see also* Ohio Nat'l Life Assur. Corp. v. Langkau, 353 Fed. Appx. 244, 248 (11th Cir. 2009) ("Interpleader is appropriate where the stakeholder may be subject to adverse claims that could expose it to multiple liability on the same fund."). The United States takes the position that:

> [S]ubject matter jurisdiction is lacking here because this action does not fall within the intended purpose of interpleader actions for which the Government has waived its sovereign immunity, i.e., to avoid "'the burden of unnecessary litigation or the risk of loss by the establishment of multiple liability when only a single obligation is owing.'" Airborne Freight Corp, 195 F.3d at 240 (5th Cir. 1999) (quoting Texas v. Florida, 306 U.S. 398, 412 (1939)). Without the threat of multiple liability, an interpleader plaintiff has

> no need for interpleader relief, and the Government does not waive its sovereign immunity under 28 U.S.C. § 2410(a).

(Doc. 25 at 9-10). This argument of the United States is premised solely on the fact that, under 26 U.S.C. § 6332(e), Saad "will not be liable to the other defendants if it honors the levy and remits the funds in question to the IRS." (*Id*. at 10).

"Under section 6332(e), any person who surrenders property to the government pursuant to a levy "shall be discharged from any obligation or liability to the delinquent taxpayer ***and any other person*** with respect to such property or rights to property arising from such surrender or payment," (*Id*. at 10-11, *citing* 26 U.S.C. § 6332(e) (emphasis in original); Carman v. Parsons, 789 F.2d 1532, 1534 (11th Cir. 1986)(Held that "as a matter of law the trustees are immune from liability under ERISA by virtue of the protection of 26 U.S.C.A. § 6332(d) [for their payment of funds held on plaintiff's behalf in a Vacation Fund to the IRS pursuant to two tax levies].")[8]. There is, however, a distinction between "immunity from liability" and "immunity from suit." It is clear that, in this action, the United States can assert no more than Saad's "immunity from liability" pursuant to 26 U.S.C. § 6332(e). The mere fact that this immunity could be asserted by Saad in defense of any action brought against it by Hinkle or BancorpSouth does not insulate Saad from being hauled into Court by Hinkle or BancorpSouth and thus being "***subject to adverse claims*** that could expose it to multiple liability on the same fund." Ohio Nat'l Life

[8] Carmen v. Parsons is not an interpleader action but is, instead, a suit brought by the plaintiff against the trustees of plaintiff's ERISA fund in which plaintiff alleged that "the trustees were not required to transfer the funds to the IRS." 789 F.2d at 1533. The Court held otherwise.

Assur. Corp., *supra*, 353 Fed. Appx. at 248 (emphasis added). The United States cites no case in which a Court has redefined "true interpleader" to require proof of the stakeholder's liability as a prerequisite to filing an interpleader action. All that is required is that the stakeholder be confronted with " two or more ***adverse claimants*** with diverse citizenship [who] are competing for that fund [deposited by the stakeholder into the Court's Registry]. 28 U.S.C. § 1335(a). As the Supreme Court long ago emphasized, an interpleader should be employed for "the avoidance of the burden of ***unnecessary litigation*** or the risk of loss by the establishment of multiple liability when only a single obligation is owing [and] [t]hese risks are avoided by adjudication in a single litigation binding on the parties." Texas v. Florida, 306 U.S. 398, 412 (1939)(emphasis added).

The Bankruptcy Court for the Northern District of Florida recently addressed this issue as follows:

> The IRS' contention that the interpleader must be dismissed because the Mets do not risk exposure to multiple liability is also unavailing. The IRS asserts that 26 U.S.C. § 6332(e) forecloses the possibility of double or multiple liability for the Mets. Specifically, double or multiple liability is barred, in the IRS' view, because Section 6332(e) shields from liability to the delinquent taxpayer, any person in possession of property subject to a levy if said person surrenders such property. However, courts have repeatedly ruled Section 6332(e) is not relevant to the issue of whether an interpleader action may be brought. Kurland v. United States, 919 F.Supp. 419, 422 (M.D. Fla. 1996) addressed the issue head-on:
>
> > Title 26 U.S.C. § 6332(e) may provide a shield against liability to those honoring federal tax liens; however, that is insufficient to override the purpose behind the interpleader rule and statute. First Interstate Bank of Oregon v. United States, 891 F.Supp. 543 (D. Or. 1995). Interpleader gives the disinterested party the ability to bow out, leaving the actual parties with real interests at stake to litigate their claims. *See id.*; New York Life Ins. Co. v. Connecticut Dev. Auth., 700 F.2d 91, 96 (2nd Cir. 1983).

In re Strawberry, 464 B.R. 443, 447-48 (Bankr. N.D. Fla. 2012). *See also* Pro-Steel Bldgs., Inc. v. United States, 810 F.Supp.2d 1302, 1305 (N.D. Fla. 2011 (Interpleader plaintiff held entitled to attorney's fees and costs despite claims that the interpleader action was unnecessary because the plaintiff filed the action in good faith and the protection afforded by 26 U.S.C. § 6332(e) is not absolute.); First Interstate Bank of Oregon, N.A. v. United States, 891 F.Supp. 543, 546 (D. Or. 1995)("[T]he right to interpleader is not incumbent upon a stakeholder showing that it is in jeopardy of multiple liability, as well as multiple litigation. Instead, '[a] stakeholder, acting in good faith, may maintain a suit in interpleader to avoid the vexation and expense of resisting adverse claims, even though he believes only one of them is meritorious'.").

Consequently, the United States has failed to establish that this action is due to be dismissed for lack of subject matter jurisdiction.[9]

CONCLUSION

For the reasons stated above, it is recommended that the motion to dismiss filed by the United States be **DENIED**. The instructions that follow the undersigned's signature

[9] The United States may well have grounds to support a motion for judgment on the pleadings with respect to its tax levy but such relief is not sought at this juncture. In addition, the United States has failed to demonstrate how this Court could be authorized to order the payment of the deposited funds to the Government if the Court had otherwise concluded that it lacked jurisdiction as asserted by the United States.

contain important information regarding objections to the report and recommendation of the Magistrate Judge.[10]

**DONE** this 22nd day of May, 2012.

/s/ Katherine P. Nelson
KATHERINE P. NELSON
UNITED STATES MAGISTRATE JUDGE

[10] The parties are reminded that, if the District Judge adopts this Report and Recommendation, the parties are required to meet and file a Rule 26(f) Report within fourteen (14) days of that Order. *See* Doc. 29.

MAGISTRATE JUDGE'S EXPLANATION OF PROCEDURAL RIGHTS AND RESPONSIBILITIES FOLLOWING RECOMMENDATION AND FINDINGS CONCERNING NEED FOR TRANSCRIPT

Objection. Any party who objects to this recommendation or anything in it must, within fourteen days of the date of service of this document, file specific written objections with the clerk of court. Failure to do so will bar a de novo determination by the district judge of anything in the recommendation and will bar an attack, on appeal, of the factual findings of the magistrate judge. *See* 28 U.S.C. § 636(b)(1)(c); Lewis v. Smith, 855 F.2d 736, 738 (11th Cir. 1988); Nettles v. Wainwright, 677 F.2d 404 (5th Cir. Unit B, 1982)(en banc). The procedure for challenging the findings and recommendations of the magistrate judge is set out in more detail in SD ALA LR 72.4 (June 1, 1997), which provides that:

> A party may object to a recommendation entered by a magistrate judge in a dispositive matter, that is, a matter excepted by 28 U.S.C. § 636(b)(1)(A), by filing a "Statement of Objection to Magistrate Judge's Recommendation" within [fourteen] days [11] after being served with a copy of the recommendation, unless a different time is established by order." The statement of objection shall specify those portions of the recommendation to which objection is made and the basis for the objection. The objecting party shall submit to the district judge, at the time of filing the objection, a brief setting forth the party=s arguments that the magistrate judge's recommendation should be reviewed de novo and a different disposition made. It is insufficient to submit only a copy of the original brief submitted to the magistrate judge, although a copy of the original brief may be submitted or referred to and incorporated into the brief in support of the objection. Failure to submit a brief in support of the objection may be deemed an abandonment of the objection.

A magistrate judge's recommendation cannot be appealed to a Court of Appeals; only the district judge's order or judgment can be appealed.

Transcript (applicable where proceedings tape recorded). Pursuant to 28 U.S.C. § 1915 and Fed.R.Civ.P. 72(b), the magistrate judge finds that the tapes and original records in this action are adequate for purposes of review. Any party planning to object to this recommendation, but unable to pay the fee for a transcript, is advised that a judicial determination that transcription is necessary is required before the United States will pay the cost of the transcript.

DONE this 22nd day of May, 2012.

/s/ Katherine P. Nelson
UNITED STATES MAGISTRATE JUDGE

[11] Effective December 1, 2009, the time for filing written objections was extended to "14 days after being served with a copy of the recommended disposition[.]" Fed.R.Civ.P. 72(b)(2).

ROBERT A. GORDON
U. S. BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| In re: | ) | |
| | ) | |
| CHARLES SINGLETON, | ) | Chapter 7 |
| | ) | |
| Debtor. | ) | No. 09-34991 |
| | ) | |
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | Adv. No. 11-00538 |
| v. | ) | |
| | ) | |
| CHARLES SINGLETON, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

**ORDER CONCERNING MOTION FOR SUMMARY JUDGMENT**

The Court, having reviewed the Plaintiff United States' motion for summary judgment, and any opposition thereto, it is therefore

ORDERED that the United States' motion for summary judgment is GRANTED, in part, as set forth herein; and further

ORDERED that Charles Singleton is indebted to the United States for $ 3,255.00 in unpaid federal income taxes for the 2006 tax year, as of May 7, 2012; and further

ORDERED that Charles Singleton is indebted to the United States for $ 1,327.00 in unpaid federal income taxes for the 2008 tax year, as of May 7, 2012; and further

ORDERED that Charles Singleton's 2006 and 2008 tax debts described above are excepted from discharge in this Chapter 7 bankruptcy case, under Section 523(a)(1)(A) of the Bankruptcy Code (11 U.S.C.); and further

ORDERED that all other issues raised in the summary judgment motion are deferred until trial.

Copies of this Order Shall Be Mailed To:

Lillie Price Wesley
Counsel for the Debtor
3525 H Ellicott Mills Drive, Ste. 103
Ellicott City, MD 20895

Melissa L. Dickey
Trial Attorney, Tax Division
U.S. Dept. of Justice
Post Office Box 227
Ben Franklin Station
Washington, D.C. 20044

END OF ORDER

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

JOHN STAHL,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

No. CV-08-170-FVS

ORDER APPROVING STIPULATION

**THIS MATTER** having come before the Court based upon the "Stipulation Regarding Entry of Judgment"; Now, therefore

**IT IS HEREBY ORDERED:**

1. The "Stipulation Regarding Entry of Judgment" (ECF No. 76) is approved.

2. The District Court Executive is directed to enter the judgment that is attached to the stipulation.

**IT IS SO ORDERED.** The District Court Executive is hereby directed to file this order, enter the judgment that is attached to ECF No. 76, furnish copies to counsel, and close the case.

**DATED** this 22nd day of May, 2012.

s/ Fred Van Sickle
Fred Van Sickle
Senior United States District Judge