United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Robert W. Gettleman	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	12 C 277	DATE	1/18/2012
CASE TITLE	U S A vs City of Chicago		

DOCKET ENTRY TEXT:

Ex parte petition [1] for leave to serve "John Doe" summons is granted.

[Docketing to mail notice]

00:00

Courtroom Deputy	GDS

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF ARKANSAS
(LITTLE ROCK)

In re:	)	
MICHAEL and SANDY CHITMON	)	
	)	
Debtors.	)	Bk. No. 4:11-bk-15584
	)	
	)	Chapter 13

ORDER

Upon the United States' request, the United States' Motion to Dismiss Objection to Claim of the Internal Revenue Service (Dkt. No. 26) is hereby withdrawn.

IT IS SO ORDERED.

Dated: 01/17/2012

JAMES G. MIXON
United States Bankruptcy Judge

Date: _____

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF ARKANSAS
(LITTLE ROCK)

In re:	)	
MICHAEL and SANDY CHITMON	)	
	)	
Debtors.	)	Bk. No. 4:11-bk-15584
	)	
	)	Chapter 13

ORDER

Upon consideration of the United States' Motion to Dismiss Objection to Claim of the Internal Revenue Service, the Court finds that the Debtors failed to properly serve the objection on the United States. The Court therefore GRANTS the United States until February 10, 2012 to respond to the objection and continues the hearing on the objection to February 17, 2012 at 9:00 a.m.

IT IS SO ORDERED.

James G. Mixon

Dated: 01/18/2012

JAMES G. MIXON
United States Bankruptcy Judge

Date: _____

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
FORT PIERCE DIVISION
Case No. 10-cv-14279-Graham/Lynch

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALVA DAVID RUSSELL,
SHARON RUSSELL, and
JPMORGAN CHASE BANK, NA,

ORDER GRANTING DISTRIBUTION OF PROCEEDS
FROM THE JUDICIAL SALE OF THE SUBJECT PROPERTY

Upon consideration of the Unopposed Motion of United States for Order To Distribute Proceeds from the Judicial Sale of the Subject Property (D.E. 41), filed January 12, 2012, and for good cause shown, the Court grants the plaintiff's request for an order distributing the proceeds of the judicial sale of the real property located at 12 Crown Court, Fort Pierce, Florida, 34949 (the "Subject Property"), and any forfeited earnest money deposits (collectively, referred to herein as the "cash sales proceeds").[1]

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[1] The Subject Property is more particularly described as follows:

> Lot K, Block 18, QUEENS COVE UNIT ONE, according to the Plat thereof, as recorded in Plat Book 11, page 12, of the Public Records of St. Lucie County, Florida.
>
> TOGETHER WITH a permanent easement for beach access to the Atlantic Ocean along the following described property:
> The North five (5) feet of the North 300 feet of the South 900 feet of that part of Government Lot 1, Section 23, Township 34 South, Range 40 East, lying East of State Road A-1-A, for ingress and egress to the Atlantic Ocean.
>
> SUBJECT TO Restrictions, reservations, limitations and easements of record, if any; this reference to said restrictions shall not

IT IS THEREFORE ORDERED THAT the cash sales proceeds from the judicial sale of the real property commonly known as the Joachim property shall be distributed, as follows:

(1) The sum of **$16,460.54** shall be distributed to ***Lowes International Realty Plus.***, as Receiver, in full payment of the amounts to which it is entitled as a commission and expenditures necessary for the sale.

(2) The sum of **$54,030.96, plus interest from December 15, 2011 until paid (computed at the per diem rate of $3.81)**, shall be paid to ***JPMorgan Chase Bank, NA***, as the mortgage lien holder of the property, in full satisfaction of its mortgage lien on the property.

(3) The sum of **$30,000** shall be distributed to **Sharon Russell** (in her attorney's trust account) in full satisfaction of her mortgage lien on the property.

(4) The **remaining cash sales proceeds** shall be distributed to the ***United States of America***, and upon receipt of such distribution, the ***United States*** shall apply it in payment of the unpaid federal income tax assessments of Alva David Russell for the tax years 1998 and 2000.

(5) The distribution to the United States referred to in paragraph (4), above, is not sufficient to pay in full the unpaid tax assessments owed by Alva David Rusell. Accordingly, no portion of the sales proceeds shall be distributed to Alva David Russell.

DONE and **ORDERED** in Chambers at Miami, Florida, this 17th day of January, 2012.

DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

operate to reimpose the same.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF ARKANSAS
(LITTLE ROCK)

In re:	)	
CARLTON and FREDA KNIGHT	)	
	)	
Debtors.	)	Bk. No. 4:11-bk-13723
	)	
	)	Chapter 13

ORDER

Upon the United States' request, the United States' Motion to Dismiss Objection to Claim of the Internal Revenue Service (Dkt. No. 71) is hereby withdrawn.

IT IS SO ORDERED.

Dated: 01/17/2012

JAMES G. MIXON
United States Bankruptcy Judge

Date: _____

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

United States of America

Plaintiff,

v.

Case No.: 1:11−cv−07922
Honorable Virginia M. Kendall

Douglas Drenk

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Wednesday, January 18, 2012:

MINUTE entry before Honorable Virginia M. Kendall: MOTION by Plaintiff United States of America for leave to appear Telephonically[9] is granted. Motion hearing set for 1/19/2012 on this motion is hereby stricken. Counsel to contact the courtroom deputy the day before at (312) 408−5153 to give the contact information.Mailed notice(tsa,)

IT IS ORDERED as set forth below:

Date: January 18, 2012

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 09-82915
Hindu Temple and Community Center of Georgia, Inc.,	CHAPTER 11
Debtor.	JUDGE MASSEY
Indian Handicrafts Development Corporation, Movant, v.	CONTESTED MATTER
Lloyd Whitaker, Trustee., Respondent.	

ORDER DENYING MOTION TO REMOVE THE TRUSTEE

The Court held an evidentiary hearing on January 18, 2012 on Indian Handicrafts Development Corporation's motion to remove the Trustee in this Chapter 11 case, Lloyd Whitaker. Movant was represented by counsel, as was Respondent.

Based on the findings of fact and conclusions of law stated orally on the record and for the reasons stated on the record, the motion to remove the Trustee is DENIED. The Clerk is directed to serve a copy of this Order on counsel for Movant, counsel for Respondent and the Trustee.

END OF ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA : RESTITUTION ORDER

-v.- : 11 Cr. 495 (LBS)

AKMELL EDWARDS, :

Defendant. :

- x

WHEREAS, Defendant Akmell Edwards was sentenced on January 18, 2012;

WHEREAS, at sentencing, the Court ruled that Defendant Akmell Edwards should be ordered to pay restitution;

IT IS ORDERED that Defendant Akmell Edwards pay $37,120 to the following: the "Internal Revenue Service, IRS-RACS, Attn: Mail Stop 6261, Restitution, 333 W. Pershing Ave., Kansas City, MO 64108"; and

IT IS FURTHER ORDERED that this restitution be, and hereby is, joint and several with any order of restitution that may be imposed on Defendant Akmell Edwards's co-defendants in connection with this case.

Dated: New York, New York
January 18, 2012

SO ORDERED:

THE HONORABLE LEONARD B. SAND
UNITED STATES DISTRICT JUDGE

In the United States Court of Federal Claims

No. 10-192T

(Filed: January 18, 2012)

SALEM FINANCIAL, INC., Plaintiff, v. UNITED STATES, Defendant.	Defendant's Motion to Compel Discovery; Tax Reserve Information; Work Product Doctrine; Waiver; Tax Practitioner Privilege; Attorney-Client Privilege; Non-Legal Advice; Purely Legal Advice; Advice Given in a Non-Legal Capacity; Quick Peek Procedure.

Rajiv Madan, with whom were *Christopher Bowers*, *John Magee*, *Deana El-Mallawany*, *James C. McGrath*, *Christopher Murphy*, and *Nathan Wacker*, Bingham McCutchen LLP, Washington, DC, for Plaintiff.

Dennis M. Donohue, with whom were *John A. DiCicco*, Principal Deputy Assistant Attorney General, *Raagnee Beri*, *William E. Farrior*, *Gregory L. Jones*, *Alan S. Kline*, *Kari M. Larson*, and *John L. Schoenecker*, Tax Division, United States Department of Justice, Washington, DC, for Defendant.

OPINION AND ORDER ON
DEFENDANT'S MOTION TO COMPEL DISCOVERY

WHEELER, Judge.

Background

This case involves the determination of the appropriate tax treatment of a complex transaction known as STARS ("Structured Trust Advantaged Repackaged Securities"). By means of the STARS transaction, Plaintiff's predecessor-in-interest, Branch Investments LLC ("Branch") was able to claim foreign income tax credits on its 2002-2007 U.S. tax returns totaling $498,161,951; business expense deductions on its 2002-2007 tax returns; and interest expense deductions on its 2006-2007 U.S. tax returns. See Compl. ¶¶ 31, 34-35, March 30, 2010. During the 2002-2007 taxable years, Branch was a partially-owned subsidiary of Branch Banking and Trust Company, which was a

wholly-owned subsidiary of BB&T Corporation ("BB&T"). Id. ¶¶ 7, 11. Branch ceased utilizing STARS in April 2007. See id. ¶ 27.

On February 12, 2010, the Internal Revenue Service ("IRS") issued a Notice of Deficiency regarding Branch's tax reporting on its 2002-2007 U.S. tax returns and asserted penalties for the alleged underpayment of taxes during that time period. Id. ¶¶ 41-42. Plaintiff subsequently executed a Notice of Deficiency Waiver consenting to the immediate assessment and collection of taxes while reserving its right to seek a refund. Id. ¶¶ 43-44. On March 1, 2010, the IRS assessed taxes, penalties, and deficiency interest resulting from adjustments for the 2002-2007 tax years, totaling $884,735,418.49, which amount Plaintiff paid in full that same day. Id. ¶ 47. After the IRS denied Plaintiff's claim for a tax refund, see id. ¶¶ 48-49, Plaintiff filed its complaint in this Court on March 30, 2010, seeking recovery of $688,110,924.80 in federal income taxes and penalties for the taxable years 2002-2007, as well as deficiency interest collected from Plaintiff and overpayment interest on the refund requested. Id. ¶ 1.

The parties initiated discovery in the fall of 2010 and are scheduled to complete fact discovery by April 2, 2012. See Scheduling Order, Sept. 15, 2011, Dkt. No. 44. On November 29, 2011, the Government filed a motion asserting that certain of Plaintiff's privilege claims are improper and seeking to compel Plaintiff to produce documents in the following categories: (A) those containing tax reserve information; (B) those withheld under the tax practitioner privilege; and (C) those withheld under the attorney-client privilege. See (Def.'s Mot. 5, 15, 22). The Government alleges that the attorney-client privilege does not protect the documents within the third category because the documents contain: (1) non-legal advice; (2) purely legal advice; or (3) advice from a person acting in a non-legal capacity. See Transcript of Oral Argument ("Tr.") 30, 37 (Donohue), Jan. 4, 2012; (Def.'s Mot. Ex. 15). Plaintiff filed its response to the Government's motion on December 19, 2011 ("Pl.'s Resp."), and the Government filed its reply on December 29, 2011 ("Def.'s Repl."). The Court heard oral argument on these discovery issues on January 4, 2012 at the National Courts Building in Washington, DC.

Discussion

A. Documents Containing Tax Reserve Information

The first category of documents that the Government seeks to compel are Plaintiff's tax reserve documents. Plaintiff has redacted and withheld documents containing STARS-specific tax reserve information,[1] including its tax reserve estimates

[1] When preparing financial statements, public companies must calculate "tax reserves," reflecting the estimated value of contingent tax liabilities, such as losses resulting from the IRS disallowing certain tax reporting positions. See United States v. Textron Inc., 577 F.3d 21, 37 (1st Cir. 2009) (Torruella, J., dissenting); Michael M. Lloyd, Mark T. Gossart, and Garrett A.

and other "[t]ax reserve information reflecting BB&T's analysis of the potential outcomes of litigation." (Pl.'s Resp. 8); (Def.'s Mot. Exs. 5-6.) Plaintiff claims that it is entitled to withhold these documents because they were prepared "in anticipation of litigation" and are thereby protected by the work product doctrine. (Pl.'s Resp. 8, 23.) By contrast, the Government maintains that tax reserves are prepared for financial reporting purposes—not in anticipation of litigation—and therefore, the tax reserves and associated workpapers are not protected by the work product doctrine. (Def.'s Mot. 5-6.)

In the alternative, the Government contends that Plaintiff waived any work product protection that may have applied to the tax reserve documents by relying on advice from its outside financial auditor, PricewaterhouseCoopers ("PwC"), concerning the reserves as a defense to IRS penalties, and by allowing PwC employees to testify as to the reasonableness of BB&T's tax reserves. Id. at 13-14. Plaintiff admits that it has put PwC's advice "at issue" in this case but contends that its tax reserves are "based on information and analysis independent of PwC's advice" and do "not relate to the same subject matter as PwC's technical analysis of STARS." (Pl.'s Resp. 6, 36.) As such, Plaintiff maintains that it did not waive work product protection over its tax reserve documents by relying on PwC's advice as part of its penalty defense. Id.

It is an unsettled question whether tax reserves and associated workpapers are prepared in anticipation of litigation, such that they constitute protected work product. See, e.g., United States v. Textron Inc., 577 F.3d 21, 31-32 (1st Cir. 2009) (holding that Textron's tax work papers were not protected by the work product doctrine); but see, e.g., Regions Fin. Corp. & Subsidiaries v. United States, 2008 U.S. Dist. LEXIS 41940, at *23-25 (N.D. Ala. 2008) (holding that Regions' tax accrual work papers were protected by the work product doctrine). The Federal Circuit has not ruled directly on the issue, and there is no controlling Supreme Court precedent.[2] The Court is sympathetic to the public policy considerations counseling toward application of the work product doctrine to tax reserve documents. See Textron, 577 F.3d at 34-39 (Torruella, J., dissenting). Nevertheless, the Court need not decide whether tax reserve documents are protected work product because the Court finds that Plaintiff has waived any such protection by relying on PwC's advice as a defense to IRS penalties.

Fenton, Understanding Tax Reserves and the Situations in Which They Arise, Tax Notes, July 6, 2009; (Pl.'s Resp. 23); (Def.'s Mot. 5).

[2] In United States v. Arthur Young & Co., 465 U.S. 805 (1984), the Supreme Court declined to create an accountant-client privilege protecting tax accrual workpapers "'absent unambiguous directions from Congress.'" Id. at 816 (quoting United States v. Bisceglia, 420 U.S. 141, 150 (1975)). In so doing, the Court emphasized that the relevant statutory provisions at the time reflected a "congressional policy choice *in favor of disclosure*." Id. at 816. As discussed more fully below, congressional policy changed in 1998 when Congress enacted legislation creating a tax practitioner privilege. See 26 U.S.C. § 7525 (2006). In light of this change, the Court concludes that the Supreme Court's rationale in Arthur Young is not controlling.

Work product protection may be waived, and the party invoking the privilege must prove that it has not waived the protection. Eden Isle Marina, Inc. v. United States, 89 Fed. Cl. 480, 503 (2009) (citing Evergreen Trading, LLC v. United States, 80 Fed. Cl. 122, 127 (2007)). Waiver occurs when a party discloses material "'in a way inconsistent with keeping it from the adversary,'" Evergreen, 80 Fed. Cl. at 133 (quoting United States v. Mass. Inst. of Tech., 129 F.3d 681, 687 (1st Cir. 1997)), such as using material as a basis for an affirmative defense, id. at 130.

When a party waives work product protection, the waiver extends to all non-opinion work product concerning the same subject matter. In re EchoStar Comms. Corp., 448 F.3d 1294, 1302 (Fed. Cir. 2006). In this way, "a party is prevented from disclosing communications that support its position while simultaneously concealing communications that do not." Fort James Corp. v. Solo Cup Co., 412 F.3d 1340, 1349 (Fed. Cir. 2005) (internal citation omitted). While "[t]here is no bright line test" to determine what falls within the subject matter of a waiver, id. at 1349, the "overarching goal" of subject matter waiver is "to prevent a party from using the advice he received as both a sword, by waiving privilege to favorable advice, and a shield, by asserting privilege to unfavorable advice," In re EchoStar, 448 F.3d at 1303 (internal citations omitted). Balancing the competing interests, subject matter waiver seeks to ensure fundamental fairness. See Eden Isle Marina, 89 Fed. Cl. at 503-05.

As part of its defense to IRS penalties, Plaintiff contends it had reasonable cause for its tax reporting of the STARS transaction based upon "the extensive KPMG and Sidley tax opinions, PwC's conclusion that reliance on these opinions was reasonable, and [BB&T's] own internal review and approval of the proposed transaction." (Pl.'s Resp. 6); see also (Def.'s Mot. Ex. 11 at 8). By relying on PwC's advice as part of its defense to IRS penalties, Plaintiff concedes that it has put "the advisor's advice 'at issue' in this case." (Pl.'s Resp. 6.) Plaintiff attempts to distinguish, however, between PwC's "technical analysis of STARS" and the information and analysis that resulted in BB&T's tax reserve position, conceding waiver as to the former but not as to the latter. Id. at 36. Specifically, Plaintiff states: "Because Plaintiff's tax reserve information is based on information and analysis independent of PwC's advice and therefore does not relate to the same subject matter as PwC's technical analysis of STARS, no such waiver has occurred." Id.

Yet, Plaintiff's own statements belie its position that the tax reserve analysis was "independent of" PwC's advice and technical analysis of STARS. Plaintiff admits that its reserve position was "informed by *advice of counsel* and Plaintiff's own analysis relating to the strengths and weaknesses of the *technical legal merits of the transaction*." Id. at 23 (emphasis added). Elsewhere, Plaintiff concedes that "part of this reserve setting process was based on the review of *the technical merits of the transaction by PwC's technical tax experts*." Id. (emphasis added). Plaintiff emphasizes that BB&T's reserve amount was based on "more than just the technical analysis," such as "the amount BB&T . . . would

be willing to give up in a settlement and how strenuously the company would defend the transaction if challenged." Id. at 24. However, the fact that BB&T considered other factors in determining its tax reserve position does not negate the fact that BB&T also considered PwC's technical analysis as part of that process. Subject matter waiver precludes Plaintiff from using PwC's favorable advice as a defense to penalties while simultaneously shielding potentially unfavorable advice that appears to have influenced BB&T's tax reserve position.

Furthermore, in the Court's view, the subject matters Plaintiff attempts to parse out are inextricably intertwined: in all likelihood, PwC's technical evaluation of the strengths and weaknesses of the STARS transaction influenced BB&T's analysis of its litigation and settlement positions. In this way, PwC's technical evaluation of STARS cannot be isolated as a separate subject matter but instead, is likely to infuse the entirety of BB&T's tax reserve analysis and position. In light of the above, the Court finds that Plaintiff waived any work product protection that may have applied to its tax reserve documents by relying on PwC's advice as a defense to IRS penalties.

B. Documents Withheld Under the Tax Practitioner Privilege

The Government next seeks to compel six documents[3] that Plaintiff claims are protected by the statutory privilege afforded to federal tax practitioners under 26 U.S.C. § 7525. See (Def.'s Repl. 16); (Def.'s Mot. Ex. 15). According to Plaintiff, the challenged documents contain legal advice from KPMG after the close of the STARS transaction regarding proposed changes in law and the unwinding of STARS. (Pl.'s Resp. 15.) The Government contends that the documents fall within the exception to the privilege, which excludes from protection communications in connection with the "promotion" of a "tax shelter." (Def.'s Repl. 16-19); 26 U.S.C. § 7525(b)(2). In the alternative, the Government maintains that Plaintiff waived the privilege as to the documents at issue by relying on KPMG's advice as a defense to IRS penalties. (Def.'s Mot. 21.)

For its part, Plaintiff denies that STARS is a "tax shelter," as defined by 26 U.S.C. 6662(d)(2)(C)(ii), or that any of the communications withheld under the tax practitioner privilege were made in connection with the "promotion" of a tax shelter. (Pl.'s Resp. 16, 19.) Accordingly, Plaintiff contends that the communications at issue do not fall within the exception to the tax practitioner privilege. Id. at 16. In addition, Plaintiff

[3] Defendant represented in its reply, see (Def.'s Repl. 16), and counsel for Plaintiff confirmed at oral argument, Tr. 56 (McGrath), that of the ten documents Plaintiff initially withheld under the tax practitioner privilege, only five remain in dispute. Based upon the parties' filings, however, the Court has identified six documents that remain at issue: BBTW0002, BBTW0234, BBTW0237, BBTW0238, BBTW0627, and BBTW0629. See (Def.'s Repl. 16); (Pl.'s Resp. 15); (Def.'s Mot. Ex. 6). The Court's analysis concerning the applicability of the tax practitioner privilege pertains to these six documents only insofar as they continue to be in dispute between the parties.

distinguishes between KPMG's advice rendered at the outset of the STARS transaction, on which it is relying as a defense to IRS penalties, and KPMG's advice rendered years later concerning proposed changes in law and the unwinding of STARS. Id. at 20-21. Plaintiff maintains that any waiver as to the former advice does not extend to the latter, which constitutes a separate subject matter. Id.

Through the enactment of the "Internal Revenue Service Restructuring and Reform Act of 1998," Congress created the following tax practitioner privilege:

> With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.

26 U.S.C. § 7525. The tax practitioner privilege may be asserted in "any noncriminal tax proceeding in Federal court brought by or against the United States." § 7525(a)(2). A federally authorized tax practitioner includes "accountants and enrolled agents authorized to practice before the IRS." Evergreen, 80 Fed. Cl. at 134. When Congress created the tax practitioner privilege, it also created an exception to that privilege, exempting from protection written communications "in connection with the promotion of the direct or indirect participation of the person in any tax shelter." § 7525(b)(2).

As noted above, the parties disagree on whether the communications at issue—all of which were made after the STARS transaction was executed, see (Pl.'s Resp. 16)—are in connection with the "promotion" of a tax shelter. Plaintiff takes the view that promotion should be read to encompass only marketing or soliciting activities, so that any promotion of STARS by KPMG ceased once BB&T entered into the transaction in 2002. Id. at 17. By contrast, the Government defines promotion as "furtherance" or "encouragement" of participation in a tax shelter, (Def.'s Mot. 18), and contends that "[t]he only question is whether the communication was 'in connection with the promotion,' not when it occurred," (Def.'s Repl. 18). Accordingly, Defendant maintains that KPMG's post-implementation assistance throughout the duration of STARS constitutes "promotion" of a tax shelter and thereby falls within the exception to the tax practitioner privilege. (Def.'s Repl. 19.)

In the Court's view, the Government seeks to broaden the scope of the exception to the tax practitioner privilege beyond its plain meaning. Congress chose to exempt from protection communications in connection with the "promotion" of participation in a tax shelter; it did not choose to exempt communications in connection with the promotion *and implementation* of a tax shelter, as the Government seeks to do. Once BB&T entered

into the STARS transaction, KPMG no longer needed to promote BB&T's participation: BB&T was already participating. Accordingly, the Court finds that KPMG communications following the closing of the STARS transaction in 2002 do not constitute "promotion" and consequently, do not fall within the exception to the tax practitioner privilege.

Nevertheless, insofar as the documents at issue contain KPMG's advice concerning proposed changes in law and the unwinding of STARS, the Court finds that Plaintiff waived the privilege by relying on KPMG's advice as a defense to IRS penalties. This Court has observed that because the tax practitioner privilege is "largely coterminous with the attorney-client privilege," waiver of the tax practitioner privilege occurs on the same terms as waiver of the attorney-client privilege. Evergreen, 80 Fed. Cl. at 135. Thus, like attorney-client privilege, where a party waives the tax practitioner privilege as to a particular communication, it also waives the privilege as to all communications involving the same subject matter. See id. at 129.

In responding to interrogatories, Plaintiff indicated that it intends to support its defense to tax penalties, in part, by relying on advice it received from KPMG. See (Def.'s Mot. Ex. 11 at 4). Specifically, Plaintiff notes that as part of its efforts to determine the proper tax treatment of STARS, it obtained advice from KPMG, including a formal tax opinion providing a "should" level of comfort regarding Plaintiff's tax treatment of STARS. Id. at 4-5. Plaintiff maintains, however, that this pre-closing advice relates to a subject matter distinct from KPMG's post-closing advice regarding proposed changes in law and the unwinding of STARS. (Pl.'s Resp. 15.) As such, Plaintiff maintains that it has not waived the tax practitioner privilege as to documents containing KPMG's post-closing advice. Id. at 21-22.

The Court is not persuaded. As with its tax reserve documents, the Court finds that Plaintiff is attempting to disclose only advice favorable to its position while concurrently shielding advice concerning the same subject matter that may be unfavorable to its position. In the Court's view, KPMG's pre- and post-closing advice appears to relate to the same subject matter: the proper tax treatment of STARS. It seems Plaintiff intends to use as a defense documents containing KPMG's pre-closing assessment of BB&T's tax treatment of STARS. If so, Plaintiff should not be able to withhold documents from KPMG potentially questioning that earlier assessment. In other words, Plaintiff cannot selectively disclose KPMG advice encouraging BB&T to utilize the STARS transaction while withholding advice counseling BB&T to cease utilizing it.

In addition, the parties disagree on BB&T's motivation for entering into the STARS transaction. Plaintiff contends that BB&T entered into the STARS transaction to obtain low-cost financing, see (Pl.'s Resp. 3), while the Government claims that BB&T did so to generate foreign income tax credits, see (Def.'s Mot. 2). The Government

alleges that Plaintiff terminated the STARS transaction in response to the IRS's issuance of regulations disallowing foreign income tax credits from transactions such as STARS. Tr. 31 (Donohue). Insofar as Plaintiff intends to use as a defense KPMG documents showing that it entered into the STARS transaction to obtain low-cost financing, Plaintiff has waived privilege over later KPMG documents regarding proposed changes in law or the unwinding of STARS that may confirm or contradict its position.

C. Documents Withheld Under the Attorney-Client Privilege

The final category of documents that the Government seeks to compel are those that Plaintiff claims are protected by the attorney-client privilege. The Government divides this category into three sub-categories, claiming that the documents are not privileged because they contain: (1) non-legal advice; (2) purely legal advice; or (3) advice from a person acting in a non-legal capacity. See Tr. 30, 37 (Donohue). The Court will address each sub-category in turn.

1. Documents allegedly containing non-legal advice

The Government seeks to compel a total of 410 documents that Plaintiff has withheld under the attorney-client privilege. See Tr. 30 (Donohue). Of the 410 documents, the Government seeks to compel 380 to 390 on the grounds that they are not privileged because they contain non-legal advice related to a tax transaction BB&T entered into in 2007 called the KNIGHT transaction. See id.; (Def.'s Mot. 27-28). For its part, Plaintiff maintains that these documents, provided by outside counsel regarding the KNIGHT transaction, "reflect legal advice." Tr. 64-65 (McGrath); see also (Pl.'s Resp. 10) (asserting that "the documents with respect to which Plaintiff claims attorney-client privilege relate to the provision of legal advice in all instances").

The Court is satisfied that communications related to the KNIGHT transaction may be relevant to the parties' claims and defenses to the extent they deal with the unwinding of STARS and the disposal of STARS assets. See Tr. 32-35 (Donohue) (representing that Plaintiff used the STARS assets as part of the KNIGHT transaction). Nevertheless, insofar as the communications regarding the KNIGHT transaction do not fall within the subject matters described in Parts A and B above, Plaintiff has not waived attorney-client privilege as to those communications. See (Pl.'s Resp. 5). For the attorney-client privilege to attach to the communications, however, they must be made for the purpose of obtaining *legal* advice. Am. Standard, Inc. v. Pfizer, Inc., 828 F.2d 734, 745 (Fed. Cir. 1987) (emphasis added) (citing Upjohn Co. v. United States, 449 U.S. 383, 395 (1981)). Where that is not the case, the communications are not protected.

As noted, the parties maintain diametrically opposite views as to whether the documents at issue contain legal advice. During oral argument on January 4, 2012, counsel for Defendant suggested that the parties' dispute over the documents withheld

under the attorney-client privilege could be resolved by using a "quick peek" procedure. Tr. 29 (Donohue). The Advisory Committee Notes accompanying Federal Rule of Civil Procedure 26 note that parties to a dispute may utilize a quick peek procedure to minimize the costs and delays associated with reviewing large amounts of documents to ensure that privileged communications are not disclosed inadvertently. Fed. R. Civ. Proc. 26(b)(2), advisory committee's note, 2006 amendments. Although the context here is different, the Court finds that something akin to a quick peek procedure would be useful to resolve the parties' dispute, especially given the large number of challenged documents. During oral argument, counsel for Plaintiff stated that he would be amenable to using a quick peek procedure. See Tr. 66-67 (Madan).

Accordingly, the Court directs counsel for the parties to meet in person at a mutually convenient time and place so that the Government may review the approximately 390 documents at issue. The Court anticipates that counsel for the Government will have an opportunity to review each document and designate those that it wishes Plaintiff to produce and those that it no longer seeks to compel. In providing the documents for the Government's review, Plaintiff does not waive any privilege or protection it has asserted previously in this case. Counsel for the parties may engage in discussions to attempt to reach agreement on disclosure or non-disclosure of the documents. If counsel desire to modify the above procedure in any respect, the Court is willing to consider reasonable alternative suggestions from the parties.

2. Documents allegedly containing purely legal advice

The Government seeks to compel an additional sub-category of documents on the basis that they are not privileged because they contain purely legal advice and do not reveal confidential client communications. See (Def.'s Mot. 25-27); Tr. 27-30 (Donohue). By contrast, Plaintiff maintains that the documents are "not something that you would put in the category of pure legal advice." Tr. 64 (McGrath).

The Federal Circuit has explained that the attorney-client privilege does not protect all communications from an attorney to a client, although it protects some. See Stovall v. United States, 85 Fed. Cl. 810, 814-15 (2009) (citing Am. Standard, Inc. v. Pfizer, Inc., 828 F.2d 734, 745 (Fed. Cir. 1987)) (contrasting the Federal Circuit with the Fourth, Ninth, and Tenth Circuits, which have held that *all* advice provided by counsel to a client is privileged). The privilege applies only to communications from an attorney to a client that "reveal, directly or indirectly, the substance of a confidential communication by the client." Am. Standard, 828 F.2d at 745 (internal citation omitted). To illustrate, while an unsolicited legal memorandum from an attorney to members of a trade association may be an example of purely legal advice not protected by the privilege, legal advice in response to a client's request would be privileged.

Given the parties' divergent views on whether these communications contain purely legal advice or protected client communications, the Court finds that a quick peek procedure would be useful for these documents as well. Counsel for both parties indicated at oral argument that they would be amenable to using a quick peek procedure to resolve their dispute as to these documents. See Tr. 28-30 (Donohue); 66-67 (Madan). Accordingly, the parties shall use the same procedure outlined above in Part C(1) of this order to resolve their dispute over the documents that allegedly contain purely legal advice.

3. Documents allegedly containing advice from an individual acting in a non-legal capacity

Finally, the Government seeks to compel six documents that it alleges were prepared by an individual acting in a non-legal capacity. See Tr. 37-39 (Donohue). Specifically, the Government maintains that David Brockway was involved in developing and marketing the STARS transaction when he worked at KPMG. Id. at 38-39. According to the Government, Mr. Brockway then moved to the law firm of McKee Nelson, where he made the challenged communications regarding the STARS transaction. Id. In the Government's view, while at McKee Nelson, Mr. Brockway was still providing advice as a promoter of the STARS transaction rather than as a legal adviser. Id. at 39. Plaintiff, on the other hand, maintains that when Mr. Brockway made the challenged communications, he was serving as legal counsel to BB&T. See Tr. 61 (McGrath).

For the attorney-client privilege to attach to a communication, Plaintiff must show that the communication at issue was made by someone in his or her professional legal capacity. In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984). The Court is satisfied by Plaintiff's representations that Mr. Brockway was serving as a legal adviser to BB&T and was providing legal advice to BB&T regarding the unwinding of STARS. See Tr. 61 (McGrath). Moreover, Plaintiff does not appear to rely on advice from McKee Nelson as a defense in this case. Accordingly, the Court finds that the privilege attaches to the communications from Mr. Brockway and that Plaintiff has not waived the privilege with respect to those communications.

Conclusion

For the reasons set forth above, Defendant's motion to compel is GRANTED IN PART and DENIED IN PART. Counsel for Plaintiff shall promptly produce to Defendant all documents described in Parts A and B of this order. In addition, within 30 days of the date of this order, counsel for the parties shall convene to carry out the quick peek procedure discussed above in Parts C(1) and C(2) of this order. The Court will hold a telephonic status conference with the parties on February 22, 2012 at 10:00 AM (EST) to discuss any outstanding discovery issues related to this opinion and order.

IT IS SO ORDERED.

s/Thomas C. Wheeler
THOMAS C. WHEELER
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, Plaintiff, v. ARVIND AHUJA, Defendant.	Case No. 11-CR-135

SCHEDULING ORDER

PLEASE TAKE NOTICE that the following proceedings have been scheduled before the Honorable C. N. Clevert, Jr., in the United States District Court for the Eastern District of Wisconsin, Room 222 United States Courthouse, 517 East Wisconsin Avenue, Milwaukee, Wisconsin 53202:

FINAL PRETRIAL CONFERENCE: **July 13, 2012 at 9:30 a.m.**

JURY TRIAL: **August 13, 2012 at 8:30 a.m.**

In the event that the defendant wishes to resolve his case short of trial and avoid preparation of a final pretrial report and jury instructions, the court must receive written notification of such intent or a signed copy of the filed plea agreement no later than the close of business on **July 1, 2012.** Otherwise, to insure the orderly preparation of this case for trial,

IT IS ORDERED that all pretrial motions, including motions in limine, must be filed on or before **June 13, 2012**. Each motion in limine should be accompanied by a brief in support with responses due seven (7) days thereafter. Counsel must discuss the anticipated filing of such motions directly with opposing counsel, as often such matters may be resolved

informally without the necessity of a court order. Therefore, when filed, all pretrial motions must include a certification prepared by movant's counsel stating that the parties have been unable to reach an accord after personally consulting with opposing counsel to make sincere effort to resolve their differences.

IT IS FURTHER ORDERED that all counsel who will actually try this case must meet and confer in person with the goal of jointly preparing a single final pretrial report. The final pretrial report must be electronically filed no later than the close of business on **July 6, 2012,** the principal burden of which rests with counsel for the government. The joint pretrial report must address each of the following:

1. A brief summary of the charge(s) against the defendant for purposes of informing potential jurors of the nature of the case and the parties involved.

2. The anticipated length of the trial.

3. Any stipulations of fact reached by the parties.

4. The name, occupation, and city of residence of all potential witnesses.

5. In the event an expert witness is expected to be called to testify, a narrative statement detailing the witness's background and qualifications.

6. A complete list of all exhibits the parties expect will be offered or otherwise referenced during the trial. All exhibits must be marked and numbered in accordance with L.R. 26. Copies of the exhibits must be disclosed and provided to opposing counsel. If an identical exhibit is to be used by both parties during the course of trial, the exhibit should be marked only once.

IT IS ALSO ORDERED that the parties shall confer and file jointly, to the extent possible, the following documents by **July 6, 2012**.

1. Proposed non-standard voir dire.

2. Proposed jury instructions and verdict form. These submissions must be appropriately tailored to the facts and law applicable to the case. If, after a good faith effort is made, the parties are unable to agree on a particular instruction or question in the verdict form, counsel should file a separate proposed instruction and or verdict question, along with a short memorandum of law, including an offer of proof, if required.

Dated at Milwaukee, Wisconsin, this 18th day of January, 2012.

BY THE COURT:

/s/ C. N. Clevert, Jr.
C. N. Clevert, Jr.
Chief U.S. District Judge

FILED
United States Court of Appeals
Tenth Circuit

January 18, 2012

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JEFFREY THOMAS MAEHR,

Petitioner - Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent - Appellee.

No. 11-9019

ORDER

Before KELLY and GORSUCH, Circuit Judges.

This matter is before the court on petitioner Jeffrey T. Maehr's Motion To Reconsider Motion to Wave [sic] Docket Fee On Constitutional Grounds Not Addressed By The Court. Upon consideration of the motion and the docket as a whole, the request is denied. Within 14 days of the date of this order, Mr. Maehr must either pay the filing fee in full to the clerk of the Tax Court, or he must complete and file in this court a proper motion to proceed in forma pauperis. That motion must include all of the financial information required, and will not be processed unless it is completed in full. Mr. Maehr may use the form forwarded by the court previously. In this regard we note completed ifp applications are sealed on the court's docket and not available to the public. We remind

Mr. Maehr this matter will be dismissed for failure to prosecute if the fee is not paid or the form not completed fully and returned within 14 days.

Entered for the Court,

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER
Clerk of Court

FILED
United States Court of Appeals
Tenth Circuit

January 18, 2012

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JEFFREY THOMAS MAEHR,

Petitioner - Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent - Appellee.

No. 11-9019

ORDER

This matter is before the court on petitioner's Motion To Resubmit Previously Pleaded New Evidence Improperly Rejected By U.S. Tax Court, Due To Improper Service of Process By The U.S. Tax Court. That motion will be referred to the panel of judges who will hear this case on the merits. The opening brief remains due February 15, 2012. Mr. Maehr may argue issues related to claimed error in that brief.

Entered for the Court,

ELISABETH A. SHUMAKER
Clerk of Court

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

B.H. MILLER, JR.	*	CIVIL NO. 2:11-cv-2507
v.	*	SECTION "A" (2)
UNITED STATES OF AMERICA	*	JUDGE ZAINEY
* * * * * * * * *		MAGISTRATE WILKINSON

ORDER

CONSIDERING THE FOREGOING;

IT IS HEREBY ORDERED that the United States *Ex Parte* Motion for Extension of Time is hereby GRANTED. The United States is hereby granted an additional twenty-one (21) days from the present due date within which to file responsive pleadings in the captioned matter.

Thus done and signed this 17th day of January, 2012 in New Orleans, Louisiana.

JAY C. ZAINEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-80732-CIV-HURLEY

MARYANN LARKIN AND
THOMAS LARKIN,
plaintiffs,

vs.

UNITED STATES OF AMERICA,
defendant.
_____/

ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT

THIS CAUSE is before the Court upon defendant's motion to dismiss the plaintiffs' amended complaint [DE# 13], plaintiffs' response in opposition [DE#14] and the defendant's reply [DE# 15]. Upon consideration, it is **ORDERED AND ADJUDGED**:

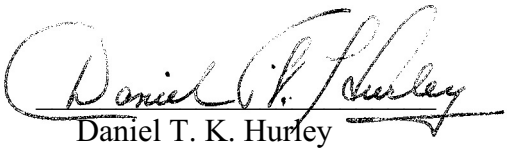
1. The defendant's motion to dismiss the plaintiffs' claim for compensatory damages by way of refund of interest (Count 2) under 28 U.S.C. §1346(a)(1) is **DENIED** for reasons outlined in the court's November 3, 2011 order dismissing plaintiffs' original complaint without prejudice [DE# 10].

2. The defendant's motion to dismiss the plaintiffs' claim for abatement of interest (Count 2) under 26 U.S.C. § 6402(a) is **GRANTED** for reasons stated in the November 3, 2011 order and the claim for abatement of interest (Count 2) is accordingly **DISMISSED WITH PREJUDICE**.

3. The defendant's motion to dismiss all claims for injunctive and declaratory relief (Count 1) is **GRANTED** for reasons stated in the court's November 3, 2011 order, and Count 1 of the plaintiffs' amended complaint is accordingly **DISMISSED WITH PREJUDICE**.

4. The defendant's motion to dismiss the class action allegations based on sovereign immunity is **GRANTED** as plaintiffs do not allege that the the proposed class members have met the statutory prerequisites for bringing a refund suit, such as paying the taxes due or filing an administrative claim for a refund. Accordingly, plaintiff's class action claim for refund of interest set forth in Count 2 of the amended complaint is **DISMISSED WITH PREJUDICE.** *Saunooke v United States,* 8 Cl. Ct. 327 (1985)(court cannot gain subject matter jurisdiction over tax refund action until each member of proposed class has paid entire assessed deficiency and filed a timely claim for refund); *Heisler v United States*, 463 F.2d 375 (9th Cir. 1972)(per curiam).

DONE AND ORDERED in Chambers at West Palm Beach, Florida this 18th day of January, 2012.



Daniel T. K. Hurley
United States District Judge

Copies furnished:
all counsel

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JOHN L. HILL,

Petitioner,

-vs- **Case No. 6:11-cv-2047-Orl-28KRS**

INTERNAL REVENUE SERVICE,

Respondent.

ORDER

This case is before the Court on the United States' Motion to Dismiss Petition to Quash (Doc. No. 7) filed October 21, 2011. The United States Magistrate Judge has submitted a report recommending that the motion be granted.

After an independent *de novo* review of the record in this matter, and consideration of Petitioner's Objection to the Report and Recommendation (Doc. 12) and the Government's Response thereto (Doc. 13), the Objection is **overruled**. The Court agrees entirely with the findings of fact and conclusions of law in the Report and Recommendation. Therefore, it is **ORDERED** as follows:

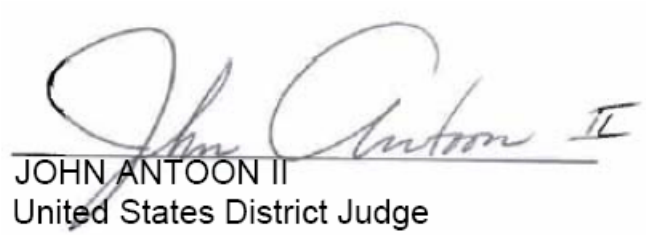
1. That the Report and Recommendation filed December 16, 2011 (Doc. No. 11) is **ADOPTED** and **CONFIRMED** and made a part of this Order.

2. The United States' Motion to Dismiss Petition to Quash Summons (Doc. No. 7), is **GRANTED**.

3. The Petition to Quash (Doc. No. 1) is **DISMISSED**.

4. The Clerk of the Court is directed to close this case.

DONE and **ORDERED** in Chambers, Orlando, Florida this __18th___ day of January, 2012.



JOHN ANTOON II
United States District Judge

Copies furnished to:

United States Magistrate Judge
Counsel of Record
Unrepresented Party

FILED
2012 Jan-18 PM 03:46
U.S. DISTRICT COURT
N.D. OF ALABAMA

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

SMOKY MOUNTAIN BAKERY PRODUCTS & BAKE CRAFTERS FOOD COMPANY,	]	
Plaintiffs,	]	CV-12-BE-0098-S
v.	]	
REGIONS FINANCIAL CORP., et. al.,	]	
Defendants.	]	

ORDER

This matter is before the court on "United States' Unopposed Motion to Extend Time to Respond to Plaintiff's Complaint and Continuance of Preliminary Injunction Hearing Set for January 25, 2012" (doc. 3). The court GRANTS the motion in part and DEFERS ruling on it in part.

The court GRANTS the motion to the extent that it requests a continuance of the preliminary injunction hearing; the court CONTINUES the hearing on January 25, 2012 at 10:00 a.m., CONVERTING it to a status conference to be held in fifth floor chambers. Further, the court DEFERS ruling on the other requests in the United States' motion and will discuss them at the status conference. In light of these rulings, the court SUSPENDS the submission deadlines regarding the preliminary injunction hearing.

DONE and ORDERED this 18th day of January, 2012.

Karon O. Bowdre

KARON OWEN BOWDRE
UNITED STATES DISTRICT JUDGE

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Attorneys for the United States of America

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN MARIANA ISLANDS

AI, FANG LIN, et al., CONCORDE GARMENT MANUFACTURING CORPORATION and DOES 1-1000, Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant.	CIVIL CASE NO. 11-00014 **STIPULATED CASE MANAGEMENT PLAN**

Pursuant to Rules 16 and 26(f) of the Federal Rules of Civil Procedure, the parties hereby submit the following Scheduling Order and Discovery Plan**:**

1. **Nature of the Case.** Plaintiffs are suing the United States for a refund of FICA taxes

assessed during the tax years of 2004-2007.

2. **Posture of the Case**.

    1. No pending motions are on file.

    2. The following motions have been resolved: **None to date.**

    3. The following discovery has been initiated: **None to date.**

3. **Motions to Amend**. All motions to amend the pleadings shall be filed on or before **Wednesday, May 9, 2012.**

4. **Motions to Add Parties**: All motions to add parties shall be filed on or before **Wednesday, April 25, 2012.**

5. **Discovery Plan**. The following is the description and schedule of all pretrial discovery each party intends to initiate prior to the close of discovery:

    1. **Initial Disclosures**: The times for disclosures under Rules 26(a) and 26(e) of the Federal Rules of Civil Procedure are modified as follows: Rule 26(a)(1)(C) - *within 14 days from the date of this order*.

    2. **Depositions**: Depositions are still to be scheduled.

    3. **Written Discovery**: Each party may propound interrogatories and requests to produce and requests for admissions within the limits set by the Local Rules. If either party determines that it needs to propound more discovery than permitted by the Rules, the parties will confer in good faith to accommodate reasonable discovery requests prior to the filing of any motion relating to a discovery dispute.

    4. **Discovery Cutoff**. The discovery cutoff date (defined as the last date that all responses to written discovery shall be due and by which all depositions shall be concluded) shall be **Wednesday, January 23, 2013**.

    5. **Expert Discovery**:

i. The disclosures of expert testimony required under Federal Rule of Civil Procedure 26(a)(2) shall be made by Plaintiff not later than **Wednesday, October 24, 2012.**

ii. The disclosures of expert testimony required under Federal Rule of Civil Procedure 26(a)(2) shall be made by Defendant not later than **Wednesday, November 21, 2012.**

iii. Any disclosure of rebuttal expert testimony under Rule 26(a)(2) shall be made no later than **Wednesday, December 19, 2012.**

iv. The depositions of experts may be scheduled at any time at least 20 days subsequent to the submission of rebuttal reports and the depositions of said experts shall be completed no later than **Wednesday, January 23, 2013.**

6. **Motions**.

1. The anticipated discovery motions are: **None are anticipated at this time.**

All discovery motions shall be filed on or before **Wednesday, January 16, 2013**.

2. The anticipated dispositive motions are: **The United States anticipates filing a motion to dismiss**.

All dispositive motions shall be filed on or before **Wednesday, March 27, 2013**.

7. **Settlement**. The prospects for settlement are unknown.

8. **Preliminary Pretrial Conference**. There shall be a preliminary pretrial conference on **Thursday, May 2, 2013.**

9. **Pretrial Filings**. The parties' pretrial materials, discovery materials, witness lists, exhibit lists, and designation of discovery responses shall be filed on or before **Thursday, May 9, 2013.**

10. **Pretrial Order**. The proposed pretrial order shall be filed on or before **Thursday, May 9, 2013**.

11. **Final Pretrial Conference**. The final pretrial conference shall be held on **Thursday, May 16, 2013.**

12. **Trial**. Trial shall commence on **Tuesday, May 28, 2013.**

13. **Jury.** Plaintiffs have demanded trial by jury.

14. **Anticipated Trial Time**. It is anticipated that it will take approximately 7 to 10 days to try this case.

15. **Identity of Counsel**. The counsels involved in this case are:

Steven P. Pixley, Esq.
Attorney at Law
Third Floor, TSL Plaza
Beach Road,Garapan
P.O. Box 7757 SVRB
Saipan, MP 96950
Attorney for Concorde Garment Manufacturing Corp.

Colin M. Thompson, Esq.
Thompson Law Office, LLC
J.E. Tenorio Building
PMB 917 P.O. Box 1001
Saipan, MP 96950
Attorney for Employee Plaintiffs

Andy R. Camacho
Trial Attorney, Tax Division
U.S. Department of Justice
555 4th Street, N.W.
Washington, D.C. 20044
Attorney for Defendant

Mikel W. Schwab
Assistant U.S. Attorney
U.S. Attorney's Office
Sirena Plaza, Suite 500
108 Hernan Cortez Ave.
Hagatna, GU 96910
Attorney for Defendant

Jessica F. Cruz
Assistant U.S. Attorney
U.S. Attorney's Office
Sirena Plaza, Suite 500
108 Hernan Cortez Ave.
Hagatna, GU 96910
Attorney for Defendant

16. **Settlement Conference**: The parties wish to submit this case to a settlement conference. A settlement conference shall be held on **Wednesday, February 27, 2013.**

17. **Suggestions for Shortening Trial**. The parties will explore stipulations as to undisputed facts.

18. **Case Management Issues**: The scheduling order has been calculated based on a "Complex Track."

RESPECTFULLY SUBMITTED:

ALCIA A.G. LIMTIACO
United States Attorney
Districts of Guam and the NMI

DATED: 1/18/12 By: /s/ Jessica F. Cruz
MIKEL W. SCHWAB
JESSICA F. CRUZ
Assistant U.S. Attorneys

DATED: 1/18/12 /s/ Steven P. Pixley
STEVEN P. PIXLEY
Attorney at Law

DATED: 1/18/12 /s/ Colin M. Thompson
COLIN M. THOMPSON
Attorney at Law

MINUTES OF THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

77 EAST MISSOURI TOWNHOUSES ASS'N v. MARY ANN MATZ

THE HONORABLE H. RUSSEL HOLLAND CASE NO. 2:11-cv-2541-HRH

PROCEEDINGS: **ORDER FROM CHAMBERS**

Upon review of the pleadings, and for good cause shown, it is hereby ordered that the United States of America, for the Department of Treasury - Internal Revenue Service, has 60 days from the date of service upon the U.S. Attorney, or until January 30, 2012, to respond to plaintiff's complaint.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Merrill Cantatierra Homeowners Association, Plaintiff, vs. Terry Mayo, et al., Defendants.	No. CV 11-2199-PHX-DKD **ORDER**

On November 9, 2011 a Notice of Removal by United States of America was filed (Doc. 1). Upon Stipulation of the parties the United States was dismissed from this action (Doc. 9). Pending before the Court is Plaintiff's Motion to Remand to State Court (Doc. 10). The removing party having been dismissed from this matter and no other party appearing or objecting to said motion,

IT IS HEREBY ORDERED granting Plaintiff's Motion to Remand to State Court (Doc. 10).

DATED this 17th day of January, 2012.

Stephen M. McNamee
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

STEPHEN NORET, et al.,

Plaintiff,

vs.

DEPARTMENT OF THE TREASURY, et al.,

Defendants.

_____/

CASE NO. CV F 11-1690 LJO MJS

ORDER TO TAKE MOTION UNDER SUBMISSION
(Docs. 9, 11.)

Pursuant to its practice and Local Rule 230(g), this Court will consider defendant United States of America's motion to dismiss on the record without a hearing and VACATES the January 30, 2012 hearing. No party is to appear before this Court on January 30, 2012. Moreover, plaintiffs failed to file timely opposition papers to further warrant vacating the hearing. See Local Rule 230(c).

Due to bearing the heaviest caseload in the nation with the recent retirement of former U.S. District Judge Oliver Wanger, limited resources, and the need to prioritize criminal and older civil matters over more recently filed actions, this Court ADMONISHES the parties that it is unable to commit to address this action to meet the parties' needs and expectations. As such, this Court urges the parties to consider the conduct of all further proceedings by a U.S. Magistrate Judge, whose caseload and availability is more accommodating to the parties. Forms to consent to a U.S. Magistrate Judge are available on this Court's website.

IT IS SO ORDERED.

Dated: January 18, 2012

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

JOHN A. DiCICCO
Principal Deputy Assistant Attorney General

RICK WATSON
Trial Attorney, Tax Division
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Attorneys for the United States

FLORENCE NAKAKUNI
United States Attorney
District of Hawaii
Of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ASSOCIATION OF APARTMENT OWNERS OF ALI'I LANI, by its Board of Directors,

Plaintiff,

v.

CHARLEY CHALEUNVONG; MANTHA CHALEUNVONG; UNITED STATES OF AMERICA, DEPARTMENT OF TREASURY, IRS; THE BANK OF NEW YORK MELLON, as Trustee for the Certificate holders of CWALT, INC., Alt. Loan Trust 2005-40CB, Mort. Pass-Through Cert., Series 2005-40CB; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as nominee for COUNTRYWIDE HOME LOANS, INC., a New York Corp.; JOHN DOES 1-5; JANE DOES 1-5; DOE PARTNERSHIPS 1-5; DOE CORPORATIONS 1-5; and DOE GOVERNMENTAL UNITS 1-5;

Defendants

Case: 1:11-cv-703-DAE-RLP

Order Re: STIPULATION CONCERNING PRIORITY

Upon stipulation by the Plaintiff and the United States, and good cause having been shown, it is hereby ORDERED that the interests of the United States in this matter, as reflected in the Notices of Federal Tax Lien described in the Complaint and the Stipulation Concerning Priority (Docket #12), are superior to the interests of the Plaintiff to the real property at issue in this case. Therefore, the United States' federal tax liens shall be completely satisfied before the homeowner assessment lien identified in Plaintiff's Complaint if the Court orders the foreclosure of the subject property or otherwise orders the sale of the subject property.

DATED AT HONOLULU, HAWAII, JANUARY 18, 2012

Richard L. Puglisi
United States Magistrate Judge

ASSOCIATION OF APARTMENT OWNERS OF ALI'I LANI V. CHALEUNVONG, ET AL., CIVIL NO. 11-00703 DAE-RLP; ORDER RE: STIPULATION CONCERNING PRIORITY

E-Filed 1/18/2012

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SANTA CLARA VALLEY HOUSING GROUP, INC., et al., Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Case No. 5:08-cv-05097-WHA ORDER[1] GRANTING PLAINTIFFS' MOTION FOR RECONSIDERATION IN PART AND MODIFYING ORDER OF SEPTEMBER 21, 2011 [re: dkt. entry 102]

On September 21, 2011, the Court issued an order addressing the parties' cross-motions for summary judgment. The parties sought adjudication as to whether certain warrants issued by Plaintiff Santa Clara Valley Housing Group, Inc. ("Santa Clara") constituted a second class of stock pursuant to 26 C.F.R. § 1.1361-1(*l*)(4) ("the regulation"). The Court concluded that the warrants did constitute a second class of stock under subsection (*l*)(4)(ii) but not under subsection (*l*)(4)(iii). Santa Clara seeks reconsideration of that ruling, asserting that the Court erred in applying subsection (*l*)(4)(ii) in this case and failed to consider whether the warrants fall within the safe harbor

[1] This disposition is not designated for publication in the official reports.

established in subsection (*l*)(4)(iii)(C). For the reasons discussed below, the motion will be granted in part.[2]

Santa Clara asserted the inapplicability of subsection (*l*)(4)(ii) in its summary judgment briefing and at the hearing. It now makes the same arguments in greater detail. Repetition of arguments previously considered and rejected by the Court is not permitted under the Civil Local Rules. *See* Civ. L.R. 7-9(c). Moreover, Santa Clara's renewed arguments do not alter the Court's conclusion that a warrant may be considered an "instrument, obligation, or arrangement issued by a corporation" for purposes of subsection (*l*)(4)(ii).

A more difficult issue is raised by Santa Clara's assertion that the Court failed to address the safe harbor established by subsection (*l*)(4)(iii)(C). Both subsections (*l*)(4)(ii) and (*l*)(4)(iii) contain safe harbor provisions. At the time it issued its ruling on the parties' cross-motions, the Court read the regulation as providing a distinct safe harbor for each subsection. It treated the safe harbor provision codified at subsection (*l*)(4)(ii)(B) as creating an exception for instruments that otherwise would be considered a second class of stock under subsection (*l*)(4)(ii), and it interpreted the safe harbor provision codified at subsection (*l*)(4)(iii)(C) as setting forth an exception for instruments that otherwise would be considered a second class of stock under subsection (*l*)(4)(iii). For this reason, having concluded that subsection (*l*)(4)(iii) did not apply in this case, the Court did not address the safe harbor provision established by subsection (*l*)(4)(iii)(C). The Court did not understand Santa Clara to be arguing that the safe harbor provision in subsection (*l*)(4)(iii) applies to instruments that constitute a second class of stock under subsection (*l*)(4)(ii).

In its motion for reconsideration, Santa Clara points to the following language in subsection (*l*)(4)(i):

> **(4) Other instruments, obligations, or arrangements treated as a second class of stock --** (i) In general. Instruments, obligations, or arrangements are not treated as a second class of stock for purposes of this paragraph (*l*) unless they are described in paragraph (*l*)([4])(ii) or (iii) of this section. However, **in no event are instruments, obligations, or arrangements described in paragraph (b)(4)** of this section (relating to deferred compensation plans), **paragraphs (*l*)(4)(iii)(B) and (C)** of this section (relating to the exceptions and safe harbor for options), **paragraph (*l*)(4)(ii)(B)** of this section (relating to the safe harbors for certain short-term unwritten advances and proportionally-held debt), or **paragraph (*l*)(5)** of this

[2] The Court concludes that the motion is appropriate for disposition without oral argument pursuant to Civil Local Rule 7-1(b).

> section (relating to the safe harbor for straight debt), **treated as a second class of stock for purposes of this paragraph (*l*)**.

26 C.F.R. § 1.1361-1(*l*)(4)(i) (emphasis added). The government urges the Court to interpret the above language simply as listing the different safe harbor provisions that might apply *in the context* of the subsection to which each safe harbor is appended. The government contends that a statutory construction that would apply every safe harbor to every instrument, regardless of where in the regulatory scheme the safe harbor appears, would not comport with the structure of the regulation. There does not appear to be any case law on point. However, the language is unambiguous; it says that "in no event" shall an instrument be treated as a second class of stock if the requirements for any of the listed safe harbors are satisfied. This directive does not appear to conflict with any other language in the statute or with the statute's overall structure. Accordingly, the Court concludes that the warrants do not constitute a second class of stock if they fall within the safe harbor provision of (*l*)(4)(iii)(C). *See Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) ("The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.) (internal quotation marks and citation omitted).

Subsection (*l*)(4)(iii)(C) provides as follows:

> (C) Safe harbor for certain options. A call option is not treated as a second class of stock if, on the date the call option is issued, transferred by a person who is an eligible shareholder under paragraph (b)(1) of this section to a person who is not an eligible shareholder under paragraph (b)(1) of this section, or materially modified, the strike price of the call option is at least 90 percent of the fair market value of the underlying stock on that date. For purposes of this paragraph (l)(4)(iii)(C), a good faith determination of fair market value by the corporation will be respected unless it can be shown that the value was substantially in error and the determination of the value was not performed with reasonable diligence to obtain a fair value. Failure of an option to meet this safe harbor will not necessarily result in the option being treated as a second class of stock.

26 C.F.R. § 1.1361-1(*l*)(4)(iii)(C). As an initial matter, the government argues that the instruments in question are not truly "warrants," but rather are "synthetic equity instruments" that do not fall within a safe harbor for call options.[3] As discussed in the summary judgment order, the record is clear that the warrants were issued solely to protect the Schott family's equity in the company

[3] Subsection (*l*)(4)(iii) refers to call options, warrants, and similar instruments collectively as "call options." 26 C.F.R. § 1.1361-1(*l*)(4)(iii)(A).

during the period of time that the majority shares were "parked" in the Los Angeles Safety Members Pension Plan ("LAPF"). However, it also is clear that the instruments in fact were warrants that would permit the Schott family to purchase shares of the company sufficient to dilute LAPF's shares in the event that LAPF refused to sell back its shares at the agreed-upon time. Accordingly, the Court cannot conclude as a matter of law that a safe harbor provision applicable to warrants does not apply here.

Application of the subject safe harbor provision turns upon whether the strike price of the warrants was at least ninety percent of the fair market value of the underlying stock on the date the warrants issued. *See* 26 C.F.R. § 1.1361-1(*l*)(4)(iii)(C). "[A] good faith determination of fair market value by the corporation will be respected unless it can be shown that the value was substantially in error and the determination of the value was not performed with reasonable diligence to obtain a fair value." *Id*. Both sides presented substantial evidence, including expert opinions, as to the fair market value of the shares at the time the warrants issued. This evidence is sufficient to create triable issues of material fact as to the application of the safe harbor provision. Accordingly, the Court will grant reconsideration with respect to this aspect of its ruling, and will modify its ruling accordingly.

ORDER

Good cause therefor appearing,

(1) the motion for reconsideration is GRANTED IN PART as set forth above; and

(2) the Court's ruling that the warrants constituted a second class of stock under subsection 26 C.F.R. § 1.1361-1(*l*)(4)(ii) is modified to reflect a determination that triable issues of material fact exist as to whether the safe harbor provision of 26 C.F.R. § 1.1361-1(*l*)(4)(iii)(C) is satisfied.

DATED: January 18, 2012

JEREMY FOGEL
United States District Judge

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

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO. 2:11cr134-MEF
	)	
MARGARET KIRKSEY	)	

ORDER

Upon consideration of defendant's motion to withdraw document (Doc. # 35) and defendant's motion to continue change of plea hearing (Doc. # 36), and for good cause, it is

ORDERED that the motions are GRANTED. Defendant's change of plea hearing previously scheduled for January 26, 2012 be and hereby is rescheduled for 3:30 p.m. on January 24, 2012 in courtroom 5-B, Frank M. Johnson, Jr. United States Courthouse Complex, One Church Street, Montgomery, Alabama. Accordingly, and for good cause, it is

ORDERED that the government shall provide to the court a copy of any plea agreement no less than two hours prior to the time set for the change of plea proceeding.

The Clerk is directed to provide a court reporter for this proceeding. If the defendant is in custody, the United States Marshal or the person having custody of the defendant shall produce the defendant for this proceeding.

Counsel for the defendant is DIRECTED to confer with the defendant prior to the proceeding set in this order and: (1) advise the defendant about the Sentencing Guidelines, and the fact that while the Sentencing Guidelines are no longer

mandatory the Guidelines remain an important factor which the court will consider in determining a reasonable sentence; (2) advise the defendant that in determining a reasonable and appropriate sentence, the court will consider the sentencing factors set forth in 18 U.S.C. § 3553(a) in addition to the Guidelines; and (3) explain to the defendant each of those factors specifically, including (a) the nature and circumstances of the offense and the history and characteristics of the defendant; (b) the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (c) the need for deterrence; (d) the need to protect the public; (e) the need to provide the defendant with needed educational or vocational training or medical care; (f) the kinds of sentences available; (g) the need to avoid unwanted sentencing disparities; and (h) the need to provide restitution to victims.

Done, this 18th day of January, 2012.

/s/ Susan Russ Walker
SUSAN RUSS WALKER
CHIEF UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

v.

David W. Beissel, Constance W. Beissel Theresa Anderson, Allen Anderson, Catherine Steinhibel, Daniel Beissel, Mary Beissel, Kurt Seleski, Lisa Seleski, Dana Seleski, Wells Fargo Bank, N.A. Minnesota Department of Revenue, Richard Beissel,

Defendants.

Civil No. 11-CV-2579 DSD-TNL

ORDER

It appears that more than one hundred twenty (120) days have elapsed since suit was filed and that no appearance has been entered by defendants Theresa Anderson, Allen Anderson, Daniel Beissel, Mary Beissel, Richard Beissel, Dana Seleski, Kurt Seleski, Lisa Seleski, and Catherine Steinhibel. The Federal Rules of Civil Procedure and the Local Rules of this District require that an answer or other pleading be filed.

Accordingly, counsel for plaintiff is directed to:

1. Notify defendants or their counsel immediately that they are required to answer or otherwise plead to the complaint or submit a stipulation for an extension of time to answer or otherwise plead within ten (10) days of service of the notice; and

2. If no answer or other pleading is filed by the above-named defendants within ten (10) days of service of the notice, plaintiff shall file an application for entry of default or motion for default within thirty (30) days of the date of this order; or

3. Advise the undersigned in writing of any good cause to the contrary.

Failure to comply with this Order may result in dismissal of this action for failure to prosecute.

Dated: January 18, 2012

s/ Tony N. Leung
TONY N. LEUNG
United States Magistrate Judge
USA VS. Beissel et al.
11CV2579

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Robert W. Gettleman	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	**12 C 277**	**DATE**	**1/18/2012**
CASE TITLE	U S A vs JOHN DOE		

DOCKET ENTRY TEXT:

Ex parte petition for leave to serve "John Doe" summons is granted.

[Docketing to mail notice]

00:00

Courtroom Deputy	GDS

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

IN RE:	
	CASE NO. 10-09771 MCF
TF PUERTO RICO CORP	**Chapter 11**
b3= 6103 b3= 6103	
	FILED & ENTERED ON 01/18/2012
Debtor(s)	

ORDER AND NOTICE

The motion to withdraw the motion requesting dismissal or conversion to Chapter 7 filed by United States of America (docket #122) is GRANTED. The hearing scheduled for 02/01/2012 at 09:00 A.M. at the U.S. Bankruptcy Court, José V. Toledo Federal Building and Courthouse, 300 Recinto Sur Street, Courtroom 3, Third Floor, San Juan, Puerto Rico IS VACATED AND SET ASIDE.

The Clerk shall give notice to all parties in interest.

San Juan, Puerto Rico, this 18 day of January, 2012.

Mildred Caban

Mildred Caban Flores
U. S. Bankruptcy Judge

cc: all creditors

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Civil Action 2:10-CV-336
Judge Economus
Magistrate Judge King

TOBIAS H. ELSASS, *et al.*,

Defendants.

ORDER

The Court conferred by telephone with counsel, and with defendant Elsass who is proceeding *pro se*, on January 18, 2012.

On January 13, 2012, Attorney Derek James Walden entered an appearance on behalf of the corporate defendants. Doc. No. 90. Attorney Walden agrees that he can meet the case schedule that is currently in place. *Order*, Doc. No. 88. The parties are **ADVISED** that the Court anticipates no extension of the current case schedule.

Plaintiff has filed a motion for leave to amend the complaint to join an additional party. Doc. No. 89. Pursuant to the current briefing schedule, *see Order*, Doc. No. 88, defendant Elsass has until January 20, 2012 to respond to that motion. The request of the corporate defendants for an extension of time to respond to the motion is **GRANTED**. The corporate defendants may have until January 27, 2012 to respond to the motion for leave to amend. The United States may have until January 30, 2012 to reply in support of the motion.

The parties have encountered difficulty scheduling depositions.

Defendant Elsass contends that plaintiff should not be permitted to conduct its depositions unless he is also able to depose certain specified individuals. For its part, the United States contends that the depositions proposed by defendant Elsass are foreclosed by virtue of the Court's earlier denial of defendants' motion to compel. *See Opinion and Order*, Doc. No. 62.

The Federal Rules of Civil Procedure do not require – or permit – the conditioning of discovery by one party upon discovery by another party. Fed. R. Civ. P. 26(d)(2). Moreover, the local rules of this Court make clear that, unless the denial of defendants' motion to compel is reversed or stayed, the limitations on the scope of discovery established by that order remains the law of the case and controls subsequent proceedings. S.D. Ohio Civ. R. 72.3 ("When an objection is filed to a Magistrate Judge's ruling on a non-case dispositive motion, the ruling remains in full force and effect unless and until it is stayed by the Magistrate Judge or a District Judge.") It follows, then, that plaintiff may proceed with its discovery. If defendant Elsass concludes that there exists a discovery dispute relating to his requested discovery, he shall either file a motion to compel discovery or seek a discovery conference with the Court.

It is therefore **ORDERED** that plaintiff's requested depositions of the four (4) current or former Fraud Recovery Group ("FRG") employees may proceed and must be completed no later than February 10, 2012. Although the Court will expect the parties to attempt to agree to dates that are convenient to all parties and the deponents, if that is not possible, plaintiff may unilaterally establish deposition dates

consistent with this *Order*.

It is further **ORDERED** that plaintiff's deposition of Heidi Williams will proceed on February 2, 2012 at the office of the United States Attorney in Las Vegas, Nevada.

January 19, 2012

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