In the United States Court of Federal Claims

No. 11-808T
(Filed: January 24, 2012)

WELLS FARGO & COMPANY,	)
Plaintiff,	)
v.	)
THE UNITED STATES,	)
Defendant.	)

O R D E R

Defendant's unopposed motion, filed January 23, 2012, for a 60-day enlargement of time within which to respond to plaintiff's complaint is **GRANTED**. Accordingly, defendant shall file its answer or otherwise respond to plaintiff's complaint by **March 30, 2012**.

IT IS SO ORDERED.

s/Nancy B. Firestone
NANCY B. FIRESTONE
Judge

In the United States Court of Federal Claims

No. 07-147T
(Filed: January 24, 2012)

GLEN W. CORKILL,	)
Plaintiff,	)
v.	)
THE UNITED STATES,	)
Defendant.	)

O R D E R

Based on the representations in the parties' joint status report, filed January 23, 2012, the parties shall file a joint status report by **February 22, 2012**, indicating the progress made towards a final settlement or a proposed schedule for litigating the remaining income averaging claims.

IT IS SO ORDERED.

s/Nancy B. Firestone
NANCY B. FIRESTONE
Judge

In the United States Court of Federal Claims

No. 03-2875T
(Filed: January 24, 2012)

ROBERT H. DONALDSON and JOAN C. DONALDSON,	)
Plaintiffs,	)
v.	)
THE UNITED STATES,	)
Defendant.	)

O R D E R

Based on the representations in the parties' joint status report, filed January 23, 2012, that there are no unresolved claims in the above-captioned case, the Clerk of the Court is directed to enter final judgment in favor of the defendant.

IT IS SO ORDERED.

s/Nancy B. Firestone
NANCY B. FIRESTONE
Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 11-1175 PA (SSx)	Date	January 24, 2012
Title	United States v. David Champion		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Paul Songco	Not Reported	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: IN CHAMBERS - COURT ORDER

Before the Court is plaintiff United States' (the "Government") Motion for Summary Judgment (Docket No. 50). Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for January 23, 2012, is vacated, and the matter taken off calendar.

The Government commenced this action against defendant David Champion ("Champion") to enjoin him from, among other things, continuing to provide advice to others concerning what the Government alleges to be fraudulent and false methods for evading federal tax liabilities. Defendant did not file an opposition to the Government's Motion. See Local Rule 7-12 ("The Court may decline to consider any memorandum or other paper not filed within the deadline set by order or local rule. The failure to file any required paper, or the failure to file it within the deadline, may be deemed consent to the granting or denial of the motion."). However, consistent with Marshall v. Gates, 44 F.3d 722 (9th Cir. 1995), the Court will not grant a motion for summary judgment due to the non-moving party's failure to file an opposition. Id. at 725 ("[W]e have held that a motion for summary judgment cannot be granted simply because the opposing party violated a local rule.") (citing Henry v. Gill Industries, Inc., 983 F.2d 943, 950 (9th Cir.1993)). Instead, the Court must still analyze the record to determine if any material disputed facts exist. Id.

The Government's Complaint for Permanent Injunctive Relief asserts two claims. In its first claim for relief, the Government seeks an injunction pursuant to 26 U.S.C. § 7408. Section 7408 of the Internal Revenue Code ("IRC") authorizes a district court to enjoin any person from further engaging in conduct subject to penalty under either IRC § 6700 or § 6701, if injunctive relief is appropriate to prevent recurrence of that conduct. Section 6700 provides that a penalty will be imposed against any person who organizes or assists in the organization of a partnership or other investment plan or arrangement, or participates in the sale of an interest in an entity or plan, and (a) knowingly makes, or causes to be made, a false or fraudulent statement as to the allowability of a deduction or credit, the excludability of any income, the securing of another tax benefit, because of an interest held in the entity or because of his participation in the plan, or (b) makes a gross valuation overstatement as to any material matter. Section 6701 imposes a penalty on any person who aids or assists in, procures, or advises with respect to the preparation or presentation of a federal tax return, refund claim, or other

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 11-1175 PA (SSx)	Date	January 24, 2012
Title	United States v. David Champion		

document, knowing or having a reason to believe that it will be used in connection with any material matter arising under the internal revenue laws, and knowing that if so used it would result in an understatement of another person's tax liability. The Government's second claim seeks an injunction pursuant to 26 U.S.C. § 7402, which authorizes a district court to issue injunctions as may be necessary or appropriate for the enforcement of the internal revenue laws, even if the United States has other remedies available for enforcing those laws.

For the past ten years if not longer, Champion has assisted people who have taxable income and are required to file income and employment tax returns avoid meeting their tax obligations by "dropping out of the system." For a fee, Champion consults with his customers, helping them negotiate their financial affairs in a number of ways. Champion's advice is based on his belief that most American citizens do not fit within the definition of "taxpayer" and thus are not subject to the internal revenue laws. In particular, Champion adopts the position that federal income tax is limited by the Constitution (i.e., the 16th Amendment) to include only income in the form of dividends, patronage dividends, and interest from corporate investment, and therefore most Americans do not owe income taxes. According to Champion, as long as an American citizen keeps his affairs private, and does not allow himself or his activities to become subject to government regulation, that individual can maintain his "nontaxpayer" status.

To make his services known, Champion owns and maintains two websites: www.orignalintent.org, which he started in approximately 2001 or 2002, and www.nontaxpayers.org, which he started about 2002 or 2003. Champion's customers can contact him through his website (www.nontaxpayer.org). Champion also has in the past broadcast his views through his own independent radio program (http://www.americanradioshow.us/) that has been aired through webcast and satellite. In early 2011 Champion self-published a 400-page work entitled Income Tax: Shattering the Myths that is for sale on another of his websites (http://www.taxrevolt.us/). The IRS secured a copy of the publication from one of Champion's customers (Joseph Petreshek), who voluntarily provided it to "explain" and defend his conduct. In the publication, Champion identifies himself as "the most knowledgeable person in the nation" with respect to its content on federal tax matters. The book includes an advertisement for Champion's services.

Via his "nontaxpayer.org" website, Champion invites potential customers (many of whom he requires to formally certify their "nontaxpayer" status in advance) to consult with him. Champion benefits economically from the services he provides his customers by charging them for his advice. Champion sent invoices to his customers and requires that "all invoices must be paid in cash," in keeping with his overall "nontaxpayer" philosophy. Once a customer agrees to work with him, Champion makes himself available (for a fee) to assist that customer with structuring their financial affairs in order to avoid payment of income and payroll taxes. To this end, he provides customers advice, helps them prepare necessary paperwork (e.g., correspondence on their behalf or contractual documents when the customer desires to establish a trust), or assists them, as an advocate, in explaining

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 11-1175 PA (SSx)	Date	January 24, 2012
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their new-found "nontaxpayer" status to their employers or business associates. He also informs them that, like him, their nontaxpayer status means they need not file federal tax returns.[1/]

Champion's theories concerning the Government's taxing authority are wrong. Views such as those advanced by Champion have been rejected as frivolous by all courts that have analyzed similar arguments. See generally United States v. Gerads, 999 F.2d 1255 (8th Cir. 1993) (rejecting concept that filing of income tax return is purely voluntary); United States v. Karlin, 785 F.2d 90, 91 (3d Cir. 1986) (rejecting concept that individuals are not "persons" as defined in the Internal Revenue Code); United States v. Studley, 783 F.2d 934, 937 (9th Cir. 1986) (rejecting concepts that wages do not constitute "income" subject to federal income taxation, and noting in dicta that "this argument has been consistently and thoroughly rejected by every branch of the government for decades"). For these reasons, as well as the additional arguments contained in the Government's moving papers, the Court concludes that the Government is entitled to summary judgment against Champion.

The Court has reviewed the proposed Permanent Injunction sought by the Government. In determining the Government's entitlement to injunctive relief, the Court has applied the standard adopted by the Supreme Court for assessing the appropriateness of issuing a permanent injunction:

> According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S. Ct. 1837, 1839, 164 L. Ed. 2d 641 (2006). In confirming the standard to apply when issuing injunctive relief, the Supreme Court noted that it has "consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a [liability] determination . . . ." Id. at 392-93, 126 S. Ct. 1840.

In weighing the four factors, the Court concludes that the Government is entitled to most of the injunctive relief it requests. Champion has substantially interfered with the enforcement of the internal revenue laws by his broad propagation of completely false information about the federal tax laws, combined with promoting his false expertise in assisting customers in fully realizing the benefits of their

---

[1/] According to the Government, Champion has not filed a federal income tax return since the mid-1990s. He was audited by the IRS in 1993 for the 1985 to 1990 tax years. For those years, as well as 1996 and 1997, he has an unpaid tax liability exceeding $800,000, exclusive of penalties and interest.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 11-1175 PA (SSx)	Date	January 24, 2012
Title	United States v. David Champion		

"nontaxed" status. Champion's conduct interferes with the proper administration of the Internal Revenue Code because it results in either frivolous tax filings with the IRS that hinder the IRS's ability to determine the correct tax liabilities of his customers, or causes his customers to attempt to evade the payment of taxes entirely. The IRS is accordingly forced to expend valuable resources trying to determine the correct tax liabilities of Champion's customers and then collect such amounts. As a result of Champion's misconduct, his customers have failed to file proper tax returns, failed to make proper payroll tax payments, and consistently understated their actual tax liability. Champion has also personally resisted legitimate efforts by the IRS to investigate his conduct by employing frivolous legal tactics and advising his customers to act in a similar fashion when they have been the subject of IRS investigation. The Court therefore finds that Champion's conduct results in irreparable harm to the United States and to the public. There is no adequate remedy at law for his misconduct.

The Court therefore grants the Government's Motion for Summary Judgment and will sign and enter a Permanent Injunction. The Court will modify the Government's proposed Judgment and Permanent Injunction slightly for the sake of clarity and to facilitate possible enforcement.

IT IS SO ORDERED.

_____ : _____

Initials of Preparer _____

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. DAVID CHAMPION, Defendant.	No. CV 11-1175 PA (SSx) JUDGMENT AND PERMANENT INJUNCTION

In accordance with this Court's January 24, 2012 Order granting the Motion for Summary Judgment filed by plaintiff United States of America (the "United States") against defendant David Champion ("Champion"), the Court has concluded that Champion's theories concerning the Government's taxing authority are wrong. Views such as those advanced by Champion have been rejected as frivolous by all courts that have analyzed similar arguments. See generally United States v. Gerads, 999 F.2d 1255 (8th Cir. 1993) (rejecting concept that filing of income tax return is purely voluntary); United States v. Karlin, 785 F.2d 90, 91 (3d Cir. 1986) (rejecting concept that individuals are not "persons" as defined in the Internal Revenue Code); United States v. Studley, 783 F.2d 934, 937 (9th Cir. 1986) (rejecting concepts that wages do not constitute "income" subject to federal income taxation, and noting in dicta that "this argument has been consistently and thoroughly rejected by every branch of the government for decades"). It is therefore hereby

ORDERED, ADJUDGED, AND DECREED that upon receiving actual notice of this Judgment and Permanent Injunction:

1. Pursuant to 26 U.S.C. §§ 7402 and 7408, Champion is permanently enjoined from acting in any advisory, consulting, or participatory capacity in any way for any individuals or entities, whether for pay or not, with respect to the individual or entity's federal tax obligations, including but not limited to (a) assisting individuals in becoming "nontaxpayers," (b) assisting individuals in evading their income tax obligations through their "nontaxpayer" status, (c) instructing individuals that they can become, or are, "nontaxpayers," (d) assisting individuals in avoiding reporting their Social Security Numbers, Taxpayer Identification Numbers, or any other identification information that might be disclosed to the IRS by a third party, (e) creating or forming trusts of any kind for individuals, and/or (f) assisting individuals in creating or forming trusts of any kind.

2. Pursuant to 26 U.S.C. §§ 7402 and 7408, and except as otherwise set forth below, Champion is enjoined from acting in any advisory or participatory capacity in any way for any trusts created by or for any of his customers, himself, or any other parties in the past ten years and in which he has assisted in the creation or management in any way during that time, including acting as trustee;

3. Pursuant to 26 U.S.C. §§ 7402 and 7408, Champion and his representatives, agents, servants, employees, and anyone in active concert or participation with him who received actual notice of this Judgment and Permanent Injunction, is enjoined from directly or indirectly:

(A) Organizing or selling tax shelters, plans, or any other arrangements that advise or assist taxpayers to attempt to evade the assessment or collection of such taxpayers' correct federal tax, including but not limited to selling or providing for free to customers any services or assistance whatsoever involving (a) informing taxpayers that they are "nontaxpayers" not subject to federal income taxation, (b) assisting customers in any way in

evading their tax obligations by maximizing their purported "nontaxpayer" status, or (c) the creation, establishment, or maintenance of trusts of any kind;

(B) Engaging in any other activity subject to penalty under 26 U.S.C. § 6700, i.e. organizing or selling a plan or arrangement and making a statement regarding the excludability of income or securing of any other tax benefit, by participating in the plan that they know or have reason to know is false or fraudulent as to any material matter, including but not limited to the following false statements: (a) that there are individuals properly referred to as "nontaxpayers" who are outside the scope of federal income taxation, (b) that individuals should maximize their "nontaxpayer" status by refusing to provide (or refusing to allow others to provide) taxpayer identification information (including Social Security Numbers or Taxpayer Identification Numbers) to the IRS, (c) that the creator of a common law or "pure" trust can transfer his personal or business assets or proceeds into the trust and continue to exercise day-to-day control over the asset or proceeds in question without incurring any federal income tax liability from that activity, (d) that a pure trust need not file a Form 1041 income tax return and therefore is not subject to federal income taxation, and/or (e) that individuals need not comply with IRS summonses;

(C) Engaging in any activity subject to penalty under 26 U.S.C. § 6701, i.e. aiding or assisting in, procuring, or advising with respect to the preparation or presentation of a federal tax return, refund claim, or other document, knowing or having a reason to believe that it will be used in connection with any material

matter arising under the internal revenue laws, and knowing that if so used it would result in an understatement of another person's tax liability; and

(D) Directly or indirectly organizing, promoting, marketing, or selling any plan or arrangement that advises or encourages taxpayers to attempt to violate internal revenue laws or unlawfully evade the assessment or collection of their federal tax liabilities, including promoting, selling, or advocating (a) the existence of a class of "nontaxpayers, and/or (b) the use and/or creation of common law or "pure" trusts as a means of eliminating if not greatly reducing their income tax liabilities;

4. Within thirty (30) days of receiving actual notice of this Judgment and Permanent Injunction, Champion shall, in a conspicuous location, post on all of his websites (including but not limited to "www.nontaxpayer.org," "www.davechampionshow.com", and "www.originalintent.org") a copy of this Judgment and Permanent Injunction. Champion shall certify to this Court in writing by filing a declaration under penalty of perjury that he has done so within thirty (30) days of receiving actual notice of this Judgment and Permanent Injunction. This requirement shall also apply to any future website that contains, links to, or advertises information concerning Champion's views and services related to taxation that Champion may obtain, initiate, or begin the operation of while this Judgment and Permanent Injunction remains in effect. Champion shall not knowingly make any statements, written or verbal, or cause or encourage others to make any statements, written or verbal, that misrepresent any of the terms of this Judgment and Permanent Injunction, whether such statements are made on the aforementioned websites or otherwise;

5. Pursuant to 26 U.S.C. § 7402, Champion is hereby required, within thirty (30) days of receiving actual notice of this Judgment and Permanent Injunction, to provide the United States with a list of the names and addresses (to the extent Champion can reasonably ascertain such information) of all: (a) purchasers of Income Tax: Shattering the Myths since

its publication, and (b) customers who paid Champion to provide them any tax-related services in the past five years;

6. Pursuant to 26 U.S.C. § 7402, Champion is hereby required, within thirty (30) days of receiving actual notice of this Judgment and Permanent Injunction, to provide a copy of this Judgment and Permanent Injunction by mail or e-mail to all employees, affiliates, associates representatives, agents, and servants, and all persons who have purchased from him any products, services, advice, or publications associated with the tax scheme described in the underlying complaint (where Champion can reasonably ascertain the mailing or e-mail addresses of such individuals). Champion shall certify to this Court in writing by filing a declaration under penalty of perjury that he has done so within thirty (30) days of receiving actual notice of this Judgment and Permanent Injunction;

7. Pursuant to 26 U.S.C. § 7402, Champion shall, within thirty (30) days of receiving actual notice of this Judgment and Permanent Injunction: (a) remove from all existing unsold copies of Income Tax: Shattering the Myths, and any copies of it to be published in the future, the pages advertising his services (as reflected in Schedule A appended to this Permanent Injunction), (b) mail or e-mail to all purchasers of Income Tax: Shattering the Myths since its publication (where Champion can reasonably ascertain the mailing or e-mail addresses of such purchasers) a copy of this Judgment and Permanent Injunction and a separate notification that states:

> TO ALL PURCHASERS OF INCOME TAX: SHATTERING THE MYTHS:
>
> **Under no circumstances** should you rely on the content of Income Tax: Shattering the Myths in determining your federal income tax liability. You should instead seek appropriate professional assistance (*e.g.* from an attorney, certified public accountant, or otherwise properly licensed and reputable tax return preparer).

and (c) include a copy of the above notification and a copy of the Judgment and Permanent Injunction with all copies of Income Tax: Shattering the Myths sold after the date of this Judgment and Permanent Injunction; Champion shall certify to this Court in writing by filing a declaration under penalty of perjury that he has done so within thirty (30) days of receiving actual notice of this Judgment and Permanent Injunction;

8. This Court retains jurisdiction to enforce this Judgment and Permanent Injunction, and that for the purposes of monitoring compliance with its terms, the United States may conduct discovery using the formal procedures described in Fed. R. Civ. P. 30, 31, 33, 34, 36, and 45, or as otherwise provided in the Federal Rules of Civil Procedure, or permitted by this Court;

9. The Court warns the parties, and all of those covered by the terms of the Judgment and Permanent Injunction who receive actual notice of it, that any violation of the terms of this Judgment and Permanent Injunction may result in the imposition of sanctions against the violator, up to and including the initiation of contempt proceedings.

IT IS SO ORDERED.

DATED: January 24, 2012

Percy Anderson
UNITED STATES DISTRICT JUDGE

SCHEDULE A

This book is about the legal and moral issues involved in the income tax.

It is **not** a "how to" manual on leaving the income tax system behind. Many people would do well to seek experienced guidance, especially companies that intend to stop withholding from their workers.

Should you decide that experienced guidance is the wise course for you, please feel free to contact my office at (775) 751-0811.

PLEASE TURN TO THE NEXT PAGE

The Dave Champion Show and Other Resources

For information about the
Dave Champion Show -
such as how to listen - go to
www.davechampionshow.com.

Facebook.com/DaveChampionFanPage

Twitter.com/Dave_Champion

Youtube.com/TheDaveChampionShow

PLEASE TURN TO THE NEXT PAGE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Honorable Eugene R. Wedoff

Hearing Date Jan. 24, 2012

Bankruptcy Case No. 11-37690

Adversary No.

Title of Case Tracy A. Sunderlage

Brief Statement of Motion Motion of Trustee to convert case to Chapter 7 From Chapter 11 Bankruptcy

Names and Addresses of moving counsel Ehlong Crane
135 S. LaSalle
Chicago, Illinois

Representing Truste

ORDER

This matter coming on for hearing on the motion of Ehlong Crane Chapter 11 Trustee to convert to Chapter 7, Motion is Granted This case is converted from Chapter 11 to Chapter 7 of the Bankruptcy Code

Eugene R. Wedoff

24 JAN 2012

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

R&J ELECTRICAL SERVICES, INC., A Michigan Corporation,	)	
Plaintiff,	)	
v.	)	Civil No. 12-cv-10146-PJD
UNITED STATES OF AMERICA.	)	
Defendant.	)	

STIPULATION AND AGREED ORDER AND JUDGMENT

The plaintiff R&J Electrical Services, Inc., a Michigan corporation, and the defendant United States of America, hereby stipulate as follows:

WHEREAS, the plaintiff R&J Electrical Services, Inc., owes unpaid federal employment and unemployment taxes for the periods ending June 30, 2010, September 30, 2010, and December 31, 2010, totaling $143,781.80 as of January 18, 2012;

WHEREAS, the United States served a Notice of Levy with respect to the plaintiff's accounts at TCF National Bank on December 19, 2011;

WHEREAS, the plaintiff R&J Electrical Services, Inc., desires in good faith to enter into an agreement with the United States to pay those liabilities in full through a series of installment payments;

WHEREAS, at a hearing before the United States District Court for the Eastern District of Michigan on January 19, 2012, the court stayed enforcement of the levy while the parties discussed the feasibility of an installment agreement;

WHEREAS, the parties have determined that the operation of the plaintiff's business and the assets currently available to the plaintiff support an agreement on the following terms, and ask the Court to enter judgment obligating the parties as follows.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. The United States shall release its levy of December 19, 2011 on all accounts held by the plaintiff at TCF National Bank.

2. The plaintiff shall remit to the United States Treasury the sum of $25,000, by electronic funds transfer or certified check dated January 26, 2012.

3. The plaintiff shall remit the sum of $3,211.45 to the United States Treasury on the 28th of each month, beginning in February 2012 and continuing until the United States has received payment in full of the plaintiff's outstanding 2010 tax liabilities.

4. The United States agrees to abstain from further levy action on the assets of the plaintiff with respect to the above-identified tax liabilities for as long as the plaintiff is current with its installment payments.

5. The plaintiff shall remain current on its semiweekly federal tax deposits for the tax periods that accrue during the pendency of this agreement.

6. Any failure by the plaintiff to remit payment under this agreement shall constitute a default. In the event of a default, the Internal Revenue Service may levy on the plaintiff's assets or take any other appropriate collection action.

7. The parties shall bear their own costs in the instant action.

IT IS SO ORDERED, ADJUDGED AND DECREED.

S/Patrick J. Duggan
Patrick J. Duggan
United States District Judge

Dated: January 24, 2012

I hereby certify that a copy of the foregoing document was served upon counsel of record on January 24, 2012, by electronic and/or ordinary mail.

S/Marilyn Orem
Case Manager

Agreed:

For the Plaintiff:

/s/ with consent of Joseph Falcone
JOSEPH FALCONE
Joseph Falcone, P.C.
3000 Town Center, Suite 2370
Southfield, MI 48075
Telephone: 248 357 6610
jf@lawyer.com

For the United States:

JOHN A. DiCICCO
Principal Deputy Assistant Attorney General
Tax Division

/s/ Julie C. Avetta
JULIE C. AVETTA
Trial Attorney, Tax Division
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Facsimile: (202) 514-5238
Email: Julie.C.Avetta@usdoj.gov

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 Tuesday, January 24, 2012:

MINUTE entry before Honorable Virginia M. Kendall:Plaintiff's motion for default judgment [7] is denied. Defendant's oral motion for leave to file his appearance is granted to close of business today. Defendant must appear himself or his counsel at the next status hearing. Initial Status hearing set for 2/7/2012 at 09:00 AM. Joint status report is due by 2/1/2012. Advised in open court notice(tsa,)

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 Tuesday, January 24, 2012:

MINUTE entry before Honorable Virginia M. Kendall:Defendant to answer or otherwise plead by 2/14/2012. Advised in open court notice(tsa,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

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

IN RE:	
	CASE NO. 08-08769 BKT
LUIS ORTEGA FIGUEROA	**Chapter 13**
DIGNA RIZO ROCHA	
XXX-XX-	
XXX-XX-	
	FILED & ENTERED ON 01/24/2012
Debtor(s)	

ORDER DENYING RECONSIDERATION

Upon debtors' failure to comply with the order of 1/03/2012 (docket #153), based on the order of 10/27/2011 (docket #146) and the IRS' opposition to debtor's motion to set aside dismissal (docket #152); the Debtors' request for reconsideration of the order dismissing the instant case (docket entry #151) is hereby denied.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 24 day of January, 2012.

Brian K. Tester
U. S. Bankruptcy Judge

United States District Court
District of Massachusetts

JOSEPH IANTOSCA, Individually and as Trustee of the Faxon Heights Apartments Realty Trust and Fern Realty Trust, BELRIDGE CORPORATION, GAIL A. CAHALY, JEFFREY M. JOHNSTON, BELLEMORE ASSOCIATES, LLC, and MASSACHUSETTS LUMBER COMPANY, INC., Plaintiffs, v. BENISTAR ADMIN SERVICES, INC., DANIEL CARPENTER, MOLLY CARPENTER, BENISTAR PROPERTY EXCHANGE TRUST COMPANY, INC., BENISTAR LTD., BENISTAR EMPLOYER SERVICES TRUST CORPORATION, CARPENTER FINANCIAL GROUP, LLC, STEP PLAN SERVICE INC., BENISTAR INSURANCE GROUP, INC., and BENISTAR 419 PLAN SERVICES INC., Defendants, TRAVELERS INSURANCE COMPANY and CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, Reach and Apply Defendants.	Civil Action No. 08-11785-NMG
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON and All Participating Insurers and Syndicates, Third-Party Plaintiff, v. WAYNE H. BURSEY, Third-Party Defendant.	

MEMORANDUM & ORDER

GORTON, J.

This action arises from the plaintiffs' effort to recover against some of the defendants a multimillion dollar Massachusetts state court judgment in what has previously been described as "the Cahaly Litigation." The Court has already been called upon to resolve several discovery disputes between the parties in this matter. It is now being asked to resolve a dispute between the United States ("the government"), a plaintiff by intervention, and defendants Benistar Admin Services, Inc. ("BASI") and Benistar 419 Plan Services, Inc. ("Benistar 419"). Before the Court are motions of those defendants to compel disclosures from the government. The government opposes both motions.

I. Background

On January 10, 2011, the government moved to intervene in this case, alleging that federal tax liens against BASI and Benistar 419 had attached to any proceeds to which those parties may become entitled as a result of a Pennsylvania lawsuit they brought ("the Pennsylvania Settlement"). Those tax liens arose when, on July 8, 2009, the Secretary of the Treasury made identical assessments for tax penalties, pursuant to 26 U.S.C. § 6708, against both BASI and Benistar 419 for $1,120,000, neither of which has been paid. It sought to enforce those liens by

attaching to any interest those entities or their alter egos have in the Pennsylvania Settlement.

The Court allowed the government's motion to intervene on February 11, 2011. In March, 2011, the Court granted the government's motion to conduct its own limited discovery and ordered that such discovery be completed by August 15, 2011. On August 12, 2011, the government moved to extend discovery by four months, stating that, despite its diligent discovery efforts, it had received from defendants no initial disclosures, no documents in response to production requests and few answers to its interrogatories. In late September, 2011, the government filed three separate motions to compel discovery from defendants BASI, Benistar 419 and Step Services.

In October, 2011, the Court granted the government's motion to extend the discovery deadline to December 31, 2011 because of the defendants' refusal to cooperate with its various requests. It further admonished the parties to resolve the underlying discovery disputes on their own, which, alas, they were unable to do. In November, 2011, the Court allowed the government's motions to compel disclosures with respect to the unresolved issues.

On December 16, 2011, defendants BASI and Benistar 419 moved to compel the government to answer particular requests for admission, requests for production and interrogatories. The

government has opposed both motions.

Discovery in this case closed on December 31, 2011. Trial is currently scheduled for March 26, 2011.

II. Analysis

A. Failure to Confer

As an initial matter, the government contends that defendants' motions to compel should be denied because Benistar and BASI failed to confer or attempt to confer with the government prior to filing them, as required by Fed. R. Civ. P. 37 and Local Rule 37.1. Correspondence was exchanged between counsel, however, in which the matters in dispute were discussed. Given the several prior discovery disputes in this case, it appears unlikely that the issues would have been resolved through additional efforts to confer between counsel. The Court will not, therefore, deny the motions on this ground and will proceed to consider the merits (or demerits) of the motions.

B. Requests for Admissions

1. Legal Standard

Pursuant to Fed. R. Civ. P. 36(a),

> A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to: (A) facts, the application of law to fact, or opinions about either....

Fed. R. Civ. P. 26(B)(1) provides that a party "may obtain discovery regarding any nonprivileged matter that is relevant to

any party's claim or defense." Information is relevant where it "appears reasonably calculated to lead to the discovery of admissible evidence." Id.

2. Application

With respect to requests for admission numbers 6, 7 and 9, defendants' motions are DENIED because they seek admission of pure conclusions of law outside the scope contemplated by Fed. R. Civ. P. 36(a). Defendants' arguments to the contrary are frivolous.

With respect to request for admission number 15, defendants' motions are DENIED because that request is argumentative and calls for admissions of facts not established on the record. Kasar v. Miller Printing Machinery Co., 36 F.R.D. 200, 203 (W.D. Pa. 1964) ("Where a request for admission is argumentative and only possibly could be proper if certain facts are established, but such facts are not definitely on the record, objections to such request should be sustained.").

Regarding request for admission number 2, defendants' motions are ALLOWED. The government shall provide the defendants with a summary of its inquiry in order to determine its reasonableness. Under Fed. R. Civ. P. 36(a)(4), a party may assert lack of knowledge or information as a reason for failing to admit or deny only if he states that he has made reasonable inquiry and that the information known or readily obtainable is

insufficient to enable him to admit or deny. What constitutes "reasonable inquiry" and is "readily obtainable" is a "relative matter that depends upon the facts of each case." T. Rowe Price Small-Cap Fund, Inc. v. Oppenheimer & Co., Inc., 174 F.R.D. 38, 43 (S.D.N.Y. 1997). Reasonableness cannot simply be ascertained absent a brief description of the inquiry made.

No other requests for admission are in dispute.

C. Requests for Production

1. Legal Standard

Pursuant to Fed. R. Civ. P. 34, a party may serve on another party a request for production of documents within the scope of Rule 26(b), and a responding party must

> produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request.

2. Application

With respect to (1) both defendants' requests for production numbers 3, 4, 6, 7, (2) BASI's request for production numbers 16 and 19 and (3) Benistar 419's request for production number 18, defendants' motions are DENIED. For each request, the government identified a range of labeled documents. Defendants contend that those ranges were not sufficiently responsive insofar as they provided "identical or nearly identical" ranges for "substantively different" requests and that the government should therefore be compelled to amend its responses to include "more

meaningful identification of the documents." Beyond mere conjecture, however, BASI and Benistar 419 have failed to show this Court how or why the government's responses are insufficient.

With respect to both defendants' request for production number 10, defendants' motions are ALLOWED, in part, and DENIED, in part. The government has not waived its privilege by producing a privilege log one week after its response but it shall produce any nonprivileged, responsive documents which are potentially relevant to defendants' defense with respect to the delayed due process hearing. Although the government contends (and is likely correct) that that defense is not legally sustainable, the Court has not yet so ruled.

Benistar 419's request for production number 19 is DENIED. Correspondence from Koresko to the Internal Revenue Service or Department of Justice has no bearing on the validity of the tax assessment made against Benistar 419.

Regarding Benistar 419's request for production number 20 and BASI's request for production number 21, defendants' motions are DENIED because those requests are overly broad and unduly burdensome. The Court cautions the government, however, that, to the extent it has not already done so, it shall produce all documents relevant to its tax assessment. If any responsive documents are withheld, they will not be admitted at trial.

No other requests for production are in dispute.

D. Interrogatories

1. Legal Standard

Pursuant to Fed. R. Civ. P. 33, a party may serve on another party an interrogatory that relates to any matter that may be inquired into under Rule 26(b). Furthermore, an interrogatory may ask for an opinion or contention that relates to fact or the application of law to fact. A party objecting to an interrogatory must state with specificity its grounds for objection.

2. Application

With respect to BASI interrogatory number 2 and Benistar 419 interrogatory number 12, BASI's motion is DENIED because the interrogatories call for pure conclusions of law outside the scope contemplated by Rule 33(a)(2).

Regarding BASI interrogatory number 4 and Benistar 419 interrogatory number 15, BASI's motion is DENIED because, as the government contends, the question is ambiguous and argumentative.

As to BASI interrogatory numbers 5 and 6, BASI's motion is ALLOWED because the government did not respond to that portion of BASI's motion to compel in its opposition.

With respect to BASI's interrogatory number 7 and Benistar 419's interrogatory number 17, defendants' motions are DENIED as unnecessary and unduly burdensome because the government's

reasons for objecting to the various requests for admission are stated in its responses to those requests.

As to Benistar 419 interrogatory numbers 1, 2, 4 and 13, Benistar 419's motion is DENIED because the government's response is sufficient.

Benistar 419's motion to compel a further answer to interrogatory number 6 is DENIED. The government has already summarized instances in which it engaged in telephone and in-person conversations with plaintiffs' counsel and produced non-privileged written correspondence between the government and plaintiff. If and to the extent Benistar 419 contends the government must summarize each and every in-person and telephone conversation between the government and plaintiffs' counsel, its request is overly broad and unduly burdensome and seeks privileged and irrelevant information.

Regarding Benistar 419 interrogatory number 8, Benistar 419's motion is DENIED. Any settlement arrangement between the government and the plaintiffs is irrelevant to the legitimacy of the tax assessment made against the defendants. Benistar 419's conclusory assertion that the information is relevant to "bias or unclean hands" is without merit.

As to Benistar 419 interrogatories 9 and 16, Benistar 419's motion to compel is DENIED because the information sought is not relevant to the validity of the government's assessment against

Benistar 419.

No other interrogatories are in dispute.

ORDER

In accordance with the foregoing, the Motions to Compel of Benistar Admin Services, Inc. (Docket No. 323) and Benistar 419 Plan Services, Inc. (Docket No. 326) are **ALLOWED**, in part, and **DENIED**, in part, as set forth above. To the extent that defendants' motions are allowed, in part, the government will supplement its responses on or before February 10, 2012. Sanctions will not be imposed on either party at this time, but if the Court is called upon to resolve any further discovery disputes, sanctions will be assessed against the losing party.

So ordered.

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

Dated January 24, 2012

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

IN RE:	
	CASE NO. 10-07248 ESL
WILFREDO CORDERO RODRIGUEZ	**Chapter 13**
AIDA E CORDERO AVILES	
XXX-XX-	
XXX-XX-	
Debtor(s)	**FILED & ENTERED ON 01/24/2012**

ORDER GRANTING UNOPPOSED MOTION

This case is before the Court on the following: Motion for leave to file late proof of claim, filed by Internal Revenue Service, docket #43.

Due notice having been given, there being no opposition, and good cause appearing thereof, the motion is hereby granted.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 24 day of January, 2012.

Enrique S. Lamoutte Inclan
U. S. Bankruptcy Judge

CC: DEBTOR(S)
JOSE J MEDINA MENDEZ
JOSE RAMON CARRION MORALES
Internal Revenue Service-CLAIRE H TAYLOR
U.S. DEPT. OF JUSTICE

In the United States Court of Federal Claims

No. 11-498T
(Filed January 24, 2011)

* *

STEVEN R. GIESE,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

* *

ORDER

The Court has reviewed the defendant's unopposed motion to stay proceedings (Docket No. 15) until the United States Court of Appeals for the Federal Circuit ("Federal Circuit") issues its opinion on the interlocutory appeal currently before it in *Beard v. United States*, Fed. Cir. No. 2011-5107. The Court **GRANTS** defendant's motion. The case is hereby **STAYED** until the Federal Circuit issues its opinion in the above described matter. As requested by defendant and agreed to by plaintiff, defendant shall have ten days from the date of the Federal Circuit's opinion within which to file its response to the complaint.

IT IS SO ORDERED.

s/ Victor J. Wolski

VICTOR J. WOLSKI
Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

GARY WESTERMAN PLAINTIFF

v. CASE NO. 10-6055

UNITED STATES OF AMERICA DEFENDANT

ORDER

Currently before the Court is the Plaintiff's unopposed Motion to Waive Jury Trial (Doc. 28). The Court being well and sufficiently advised in the premises finds the motion should be and is hereby **GRANTED**. Accordingly, this matter is re-scheduled for a bench trial beginning Monday, February 27, 2012, at 9:00 a.m. in Hot Springs.

IT IS SO ORDERED this 23rd day of January, 2012.

/S/ Robert T. Dawson
Honorable Robert T. Dawson
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. 3:08-cv-966-J-34MCR

JUDITH BARNES and NATHAN GENRICH,

Defendants.
_____/

REPORT AND RECOMMENDATION[1]

THIS CAUSE is before the Court on Plaintiff's Motion for Default Judgment (Doc. 50) filed January 4, 2012. The Court, having considered the Motion, the exhibits attached thereto, as well as the Complaint (Doc. 1), and being otherwise advised, recommends Plaintiff's Motion be granted.

I. BACKGROUND

Defendant Genrich filed a joint federal income tax return (Form 1040) for the 1997 tax year with Defendant Judith Barnes reporting an income tax due of $927,359; however, he failed to fully pay the income tax liability reported on that return. (Doc. 1, ¶¶ 10-11; Doc. 50-1, ¶ 4; Doc. 50-2, ¶ 2). On November 30, 1998, the Secretary of the

[1]Any party may file and serve specific, written objections hereto within FOURTEEN (14) DAYS after service of this Report and Recommendation. Failure to do so shall bar the party from a de novo determination by a district judge of an issue covered herein and from attacking factual findings on appeal. See 28 U.S.C. §636(b)(1); Rule 72(b), Fed.R.Civ.P.; and Local Rule 6.02(a), United States District Court for the Middle District of Florida.

Treasury assessed income tax of $659,019 for the year 1997 against Defendant, plus penalties and interest.[2] (Doc, 1, ¶ 10; Doc. 50-1, ¶ 5, Doc. 50-2, ¶ 3).

Subsequently, the Secretary of the Treasury notified Defendant Genrich of the assessments and made demand for payment. Defendant refused to pay the full amount of the assessments. (Doc. 1, ¶ 11; Doc. 50-1, ¶ 7). According to Plaintiff, as of December 31, 2011, an amount of $1,671,212.76 remains due and owing on the assessments, plus interest. (Doc. 50, p. 3).

On October 8, 2008, Plaintiff filed a Complaint against Defendants Barnes and Genrich seeking a judgment on the unpaid federal income tax liabilities for tax year 1997 and to foreclose federal tax liens on and sell real property with the proceeds to be applied toward the tax liabilities. (Doc. 1). On October 28, 2008, a copy of the summons and complaint were served on Defendant Genrich, who failed to answer. (Doc. 4). Thus, Plaintiff filed a Motion for Entry of Clerk's Default, which was entered on December 17, 2008. (Docs. 6, 7).[3] Since that time, Defendant Genrich has failed to appear, plead, or otherwise defend in this action. Consequently, Plaintiff requests the Court enter default judgment against him on his outstanding federal income tax liabilities. (Doc. 50). Defendant failed to file a response, and the time for doing so has passed. Accordingly, this matter is now ripe for judicial review.

---

[2]The difference between the income tax reported on the return and the lesser amount assessed against him was due to a change in the capital gains tax rate that occurred in the middle of 1997. (Doc. 50-2, ¶¶ 4-5.)

[3]Because Defendant Barnes answered the Complaint contesting the amount of her and Defendant Genrich's joint income tax liabilities for 1997, the Court found it appropriate for the United States to delay seeking default judgment against Defendant Genrich until now. (Docs. 10, 11, 49).

II. ANALYSIS

A. Default Judgment

Rule 55(b) of the Federal Rule of Civil Procedure provides that a Court may enter judgment by default if the party against whom judgment is sought has failed to plead or otherwise defend in the action and is not an infant or incompetent person. Defendant Genrich has failed to plead or defend this action, and his default has been entered. (Doc. 7). He is not exempt from default judgment. [4] Thus, a default is appropriate.

A party's default is deemed an admission of the plaintiffs well-pleaded allegations of fact. Buchanan v. Bowman, 820 F.2d 359, 361 (11th Cir. 1987); see also Nishimatsu Constr. Co. v. Houston Nat'l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975) ("The defendant, by his default, admits the plaintiffs well-pleaded allegations of fact, is concluded on those facts by the judgment, and is barred from contesting on appeal the facts thus established."). Here, the Court finds Plaintiff's allegations, which are deemed true as a matter of law, are sufficient to justify Plaintiff's claims against Defendant Genrich.

B. Unpaid Federal Tax

An assessment of federal tax by the Internal Revenue Service is presumed valid. See, e.g., Welch v. Helvering, 290 U.S. 111,115 (1933); United States v. Chila, 871 F. 2d 1015, 1018 (11th Cir. 1989); United States v. Dixon, 672 F. Supp. 503, 506-07 (M.D. Ala. 1987), aff'd 849 F. 2d 1478 (11th Cir. 1988). Additionally, a Form 4340 "Certificate

[4]Defendant Genrich is not an infant, incompetent person, or a person in the military service or otherwise exempted from default judgment under the Service Members Civil Relief Act, 50 App. U.S.C. § 501, *et seq*. (Doc. 50-3).

of Assessments, Payments and Other Specified Matters," is presumptive proof of a valid assessment. Chila, 871 F.2d at 1018. A taxpayer has the burden of overcoming the presumption of correctness by proving that the method of computing the tax, and therefore the assessment, is arbitrary and without foundation. Olster v. Commissioner, 751 F.2d 1168, 1174 (11th Cir. 1985) (citations omitted); Dixon, 672 F. Supp. at 506.

Here, a delegate of the Secretary of the Treasury assessed Defendant Genrich's federal income tax liability, including penalties and interest, for the amount of $1,671,212.76. Plaintiff has submitted a declaration with a Form 4340 establishing the amount and existence of the assessments. (Doc. 50-1). Defendant has failed to appear and respond, or to produce any evidence to rebut the presumptive validity of those assessments. (Docs. 6, 7). Additionally, the assessments at issue are based on the tax return filed by Defendant. (Doc. 50-2, ¶¶ 4, 5). Therefore, Plaintiff is entitled to a judgment against Defendant Genrich in the amount of $1,671,212.76.

C. Hearing

"As a general rule, the court may enter a default judgment awarding damages without a hearing only if the amount of damages is a liquidated sum, an amount capable of mathematical calculation, or an amount demonstrated by detailed affidavits." Directv, Inc. v. Huynh, 318 F.Supp.2d 1122, 1129 (M.D. Ala. 2004) (citing Adolph Coors Co. v. Movement Against Racism and the Klan, 777 F.2d 1538, 1543-44 (11th Cir. 1985) and Directv, Inc. v. Griffin, 290 F.Supp.2d 1340, 1343 (M.D. Fla. 2003)). Here, in support of his claim for damages, Plaintiff has provided detailed affidavits. As the essential

evidence regarding damages is before the Court, the undersigned concludes that the record in this case is sufficient to calculate damages without an evidentiary hearing.

III. CONCLUSION

Accordingly, after due consideration, it is respectfully

RECOMMENDED:

Plaintiff's Motion for Entry of Default Final Judgment (Doc. 24) be **GRANTED** and the Clerk be directed to enter final judgment in Plaintiff's favor and against Defendant Nathan Genrich in the total amount of $1,671,212.76 as of December 31, 2011, with interest accruing at the usual and lawful rate for federal court judgments thereafter.

DONE AND ENTERED in Chambers in Jacksonville, Florida this 24th day of January, 2012.

Monte C. Richardson

MONTE C. RICHARDSON
UNITED STATES MAGISTRATE JUDGE

Copies to:

Hon. Marcia Morales Howard
United States District Judge

Counsel of Record

Nathan Genrich
1102 West Wedgewood Drive
Waukesha, WI 53186

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff(s), v. JOHN BIANCO, Defendant(s).	CASE NO. 2:12−cv−00011−RAJ MINUTE ORDER REGARDING INITIAL DISCLOSURE, JOINT STATUS REPORT, and EARLY SETTLEMENT

I. Initial Scheduling Dates

Pursuant to the December 1, 2000 revisions to the Federal Rules of Civil Procedure, the Court sets the following dates for initial disclosure and submission of the Joint Status Report and Discovery Plan:

Deadline for FRCP 26(f) conference..... 02/23/2012
Initial Disclosure Pursuant to FRCP 26(a)(1)..... 03/01/2012
Combined Joint Status Report and Discovery Plan as Required by FRCP 26(f), and Local Rule CR 16..... 03/08/2012

If this case involves claims that are exempt from the requirements of FRCP 26(a) and (f), please notify Victoria Ericksen by telephone at (206) 370−8517.

II. Joint Status Report and Discovery Plan

All counsel and any pro se parties are directed to confer and provide the Court with a combined Joint Status Report and Discovery Plan (the "Report") by **03/08/2012**. This conference shall be done by direct and personal communication, whether that be a face−to−face meeting or a telephonic conference. The Report will be used in setting a schedule for the prompt completion of the case. It must contain the following information by corresponding paragraph numbers:

1. A statement of the nature and complexity of the case.

2. A statement of which ADR method (mediation, arbitration, or other) should be used. The alternatives are described in Local Rule CR 39.1. If the parties believe there should be no ADR, the reasons for that belief should be stated.

3. Unless all parties agree that there should be no ADR, a statement of when mediation or another ADR proceeding under Local Rule CR 39.1 should take place. In most cases, the ADR proceeding should be held within four months after the Report is filed. It may be resumed, if necessary, after the first session.

4. A proposed deadline for joining additional parties.

5. A proposed discovery plan that indicates:

   A. The date on which the FRCP 26(f) conference and FRCP 26(a) initial disclosures took place;

   B. The subjects on which discovery may be needed and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

   C. What changes should be made in the limitations on discovery imposed under the Federal and Local Civil Rules, and what other limitations should be imposed;

   D. A statement of how discovery will be managed so as to minimize expense (e.g., by foregoing or limiting depositions, exchanging documents informally, etc.); and

   E. Any other orders that should be entered by the Court under FRCP 26(c) or under Local Rule CR 16(b) and (c).

6. The date by which the remainder of discovery can be completed.

7. Whether the parties agree that a full−time Magistrate Judge may conduct all proceedings, including trial and the entry of judgment, under 28 U.S.C. § 636(c) and Local Rule MJR 13. The Magistrate Judge who would be assigned to this case is Judge James P. Donohue. Agreement in the Report will constitute the parties' consent to referral of the case to the assigned Magistrate Judge.

8. Whether the case should be bifurcated by trying the liability issues before the damages issues, or bifurcated in any other way.

9. Whether the pretrial statements and pretrial order called for by Local Rules CR 16 (e), (h), (i), and (1), and 16.1 should be dispensed of in whole or in part for the sake of economy.

10. Any other suggestions for shortening or simplifying the case.

11. The date the case will be ready for trial.

12. Whether the trial will be jury or non−jury.

13. The total number of trial days required.

14. The names, addresses, telephone numbers, and email addresses of all trial counsel.

15. If, on the due date of the Report, all defendant(s) or respondent(s) have not been served, counsel for plaintiff shall advise the Court when service will be effectuated, the reason why it was not made earlier, and shall provide a proposed schedule for the required FRCP 26(f) conference and FRCP 26(a) initial disclosures.

16. Whether any party wishes a scheduling conference prior to a scheduling order being entered in the case.

If the parties are unable to agree on any part of the Report, they may answer in separate paragraphs. No separate reports are to be filed.

The time for filing the Report may be extended only by court order. Any request for an extension should be made by telephone to Victoria Ericksen at (206) 370−8517.

If the parties wish to have a status conference with the Court at any time during the pendency of this action, such request should be directed to Victoria Ericksen at (206) 370−8517.

III. PLAINTIFF'S RESPONSIBILITY

This Order is issued at the outset of the case, and a copy delivered by the clerk to counsel for plaintiff (or plaintiff, if pro se) and any defendants who have appeared. Plaintiff's counsel (or the plaintiff, if pro se) is directed to serve copies of this Order on all parties who appear after this Order is filed within ten (10) days of receipt of service of each appearance. Plaintiff's counsel (or plaintiff, if pro se) will be responsible for starting the communications needed to comply with this Order

IV. ALTERATIONS TO ELECTRONIC FILING PROCEDURES

As of June 1, 2004, counsel shall be required to electronically file all documents with the Court. Pro se litigants may file either electronically or in paper form. Information and procedures for electronic filing can be found on the Western District of Washington's website at www.wawd.uscourts.gov.

The following alterations to the Electronic Filing Procedures apply in all cases pending before Judge Jones:

- Section III, Paragraph F: When the aggregate submittal to the Court (i.e., the motion, any declarations and exhibits, the proposed order, and the certificate of service) exceeds **50 pages** in length, a paper copy of the document (with tabs or other organizing aids as necessary) shall be delivered to the Clerk's Office by 10:30 a.m. the morning after filing. The chambers copy must be clearly marked with the words "Courtesy Copy of Electronic Filing for Chambers."
- Section III, Paragraph L: Unless the proposed order is stipulated, agreed, or otherwise uncontested, the parties need not email a copy of the order to the judge's email address.

V. Early Settlement Consideration

When civil cases are settled early − before becoming costly and time consuming − all parties and the Court benefit. The Federal Bar Association Alternative Dispute Resolution Task Force Report for this district stated:

> [T]he major ADR−related problem is not the percentage of civil cases that ultimately settle, since statistics demonstrate that approximately 95% of all cases are resolved without trial. However, the timing of settlement is a major concern. Frequently, under our existing ADR system, case resolution occurs far too late, after the parties have completed discovery and incurred substantial expenditure of fees and costs.

The judges of this district have adopted a resolution "approving the Task Force's recommendation that court−connected ADR services be provided as early, effectively, and economically as possibile in every suitable case." The steps required by this Order are meant to help achieve that goal while preserving the rights of all parties.

If settlement is achieved, counsel shall notify Victoria Ericksen at (206) 370−8517.

VI. Sanctions

A failure by any party to comply fully with this Order may result in the imposition of sanctions.

DATED January 24, 2012

s/ Richard A. Jones
United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. JAMES E. FRANK, TRUSTEE OF THE JAMES E. FRANK AND CATHRINE FRANK TRUST dated 10-23-1969 together with supplements and amendments thereto aka THE FRANK FAMILY TRUST, by its unidentified trustee, CATHRINE ANN SHIRLEY, and DAN McALLISTER, San Diego County Treasurer/Tax Collector, Defendants.	CASE NO. 11-CV-2010 JLS (JMA) **ORDER: GRANTING PLAINTIFF'S MOTION FOR LEAVE TO SERVE BY PUBLICATION AND FOR EXTENSION OF TIME FOR SERVICE** (ECF No. 7)

Presently before the Court is Plaintiff United States of America's motion to serve process on Defendant by publication and for extension of time to complete service on Defendant The Frank Family Trust ("the Trust"). (Motion, ECF No. 7.) Defendants have not opposed. The motion hearing set for January 26, 2012, is **HEREBY VACATED**, and the matter is taken under submission without oral argument pursuant to Civil Local Rule 7.1(d)(1). Having considered the parties' arguments and the law, the Court **GRANTS** Plaintiff's motion.

//

SERVICE BY PUBLICATION

Plaintiff filed this action to foreclose the United States' federal tax liens and/or judgment lien against certain real property in El Cajon, California pursuant to 26 U.S.C. §§ 7401, 7402. As the record title holder of the subject property, the Trust was named as a defendant in this case. (Mem. ISO Motion 2.) Plaintiff served Cathrine Ann Shirley, primary beneficiary of the Trust along with her children, believing her to be the successor trustee to her mother, Cathrine Frank. (*Id.*) Plaintiff then learned, through diligent effort, that the successor trustee was La Jolla Bank and Trust Company. (*Id.*) However, the bank, ultimately acquired by Bank of America, did not consent to serve as trustee, leaving the successor trustee of the Trust undetermined. (*Id.* at 3.) For these reasons, Plaintiff seeks leave to serve process by publication on the successor trustee of the Trust. (*Id.* at 5.)

Service of process may be accomplished by "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made." Fed. R. Civ. P. 4(e)(1). California law provides for service by publication when "upon affidavit it appears to the satisfaction of the court in which the action is pending that the party to be served cannot with reasonable diligence be served in another manner specified in this article," and that the party to be served has or claims an interest in real property subject to the action. Cal. Civ. Proc. Code § 415.50. Service of process must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Further, the "means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 315.

Here, Plaintiff has made several unsuccessful attempts to serve the successor trustee. (Mem. ISO Motion 2-3.) In fact, Plaintiff believes there is no successor trustee. (*Id.* at 3.) Plaintiff notes that Cathrine Ann Shirley, the sole beneficiary of the Trust under California law as well as the primary named beneficiary of the Trust, has already been served in her individual capacity and has actual notice of this lawsuit. This ameliorates the concern that individuals with the underlying interest held by the Trust are unaware an action has been filed that may affect their

interest held by the Trust.[1] Without the appointment of a successor trustee, Plaintiff's declaration satisfies the Court that the successor trustee cannot "with reasonable diligence be served in another manner" as specified in California Code of Civil Procedure section 415.50.[2]

EXTENSION OF TIME TO COMPLETE SERVICE OF PROCESS

A federal court "must extend the time for service" if the plaintiff shows good cause. Fed. R. Civ. P. 4(m). Here, Plaintiff has served process on all known parties and has pursued identification of the unknown Defendant successor trustee for service. (Mem. ISO Motion 2–3.) Good cause appearing, Plaintiff's request for an extension of time to complete service of process is **GRANTED**.

CONCLUSION

For the reasons stated above, the Court **GRANTS** Plaintiff's motion. Plaintiff shall publish the summons in a newspaper of general circulation in San Diego, California and El Cajon, California pursuant to California Code of Civil Procedure section 415.50. Publication of notice shall be once a week for four consecutive weeks. Cal. Gov. Code § 6064. If the trustee's identity and address are ascertained before expiration of this twenty-eight day period of notice, Plaintiff shall mail a copy of the summons, the complaint, and this Order forthwith to that party. *See* Cal. Civ. Proc. Code. § 415.50(b). Plaintiff **SHALL FILE** proof of service of such process not later than April 27, 2012.

IT IS SO ORDERED.

DATED: January 24, 2012

Janis L. Sammartino
Honorable Janis L. Sammartino
United States District Judge

[1] Plaintiff states that Cathrine Ann Shirley has indicated she would have no objection to being appointed as the successor trustee. (Mem. ISO Motion 2 n.1.) The Court notes that, under California law, courts have discretion to take any action necessary to dispose of judicial proceedings concerning trusts, including the appointment of a temporary trustee to administer the trust in whole or in part. *See, e.g.*, Cal. Prob. Code § 17206. However, the Court currently does not have enough information about the Trust to consider appointment of a temporary trustee, nor has any party requested such action be taken. If such a motion is made, it should be properly supported and include the Deed of Trust and the asserted basis of the Court's authority to appoint a trustee in the requested capacity.

[2] Under California law, Plaintiff's declaration has the same legal force as an affidavit. Cal. Civ. Proc. Code § 2015.5.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STANLEY R. KRUTE, et al.,

Defendants.

_____/

No. CIV S-10-3241-KJM-CMK

FINDINGS AND RECOMMENDATIONS

Plaintiff brings this civil action to reduce outstanding federal tax liens to a judgment and for foreclosure of federal tax liens. Pending before the court is plaintiff's unopposed motion for summary judgment (Doc. 29).

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I. BACKGROUND[1]

The Internal Revenue Service ("IRS") made federal income tax assessments against Krute for the tax years 1998 and 1999. Despite notice and a demand for payment, Krute failed to pay the taxes due. As of November 1, 2011, Krute owed a total of $166,080.71 in unpaid federal income taxes, interest, and penalties.[2] On April 21, 2010, a delegate of the Secretary of the Treasury recorded notices of federal tax liens against three parcels of real property owned by Krute located within Siskiyou County.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when it is demonstrated that there exists "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Under summary judgment practice, the moving party

> . . . always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.
>
> Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

"[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Id. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. at 322. "[A] complete failure of

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[1] The facts related here are derived from plaintiff's statement of undisputed facts, which plaintiff does not challenge.

[2] Interest continues to accrue under 26 U.S.C. § 6622 until the tax debt is paid.

proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." Id. at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. See Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." T.W. Elec. Serv., 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments).

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In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. See Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson, 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (citation omitted).

III. DISCUSSION

In its unopposed motion for summary judgment, plaintiff argues: (1) it is entitled to reduce to judgment the tax assessments made for 1998 and 1999; and (2) it is entitled to foreclose its liens against the three parcels of real property owned by Krute located in Siskiyou County. The court agrees. The tax assessments at issue here were properly made via certified Certificates of Assessments and Payments and Other Specified Matters (Form 4340), which are sufficient evidence of the assessments for purposes of summary judgment. See Hughes v. United States, 953 F.2d 531 (9th Cir. 1992); Koff v. United States, 3 F.3d 1297 (9th Cir. 1993).[3] Therefore, plaintiff is entitled to a judgment against Krute for the 1998 and 1999 tax years in the amount of $166,080.71, plus accrued but unassessed statutory penalties, interest, and other

[3] In addition, Krute failed to respond to requests for admissions served by plaintiff. As such, the admissions are deemed admitted and this alone provides sufficient evidence of the tax indebtedness at issue, as well as the propriety of service by plaintiff of various assessments.

additions as provided by law from November 1, 2011.

Plaintiff also argues that it is entitled to foreclose its liens against Krute's interests in the three parcels of real property located in Siskiyou County. Because it is undisputed that plaintiff has meritorious tax liens, and because it is also undisputed that Krute has property interests in the subject parcels of real property, plaintiff is entitled to the relief it requests. See United States v. Rodgers, 461 U.S. 677 (1983).

IV. CONCLUSION

Based on the foregoing, the undersigned recommends that plaintiff's unopposed motion for summary judgment (Doc. 29) be granted.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within 14 days after being served with these findings and recommendations, any party may file written objections with the court. Responses to objections shall be filed within 14 days after service of objections. Failure to file objections within the specified time may waive the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: January 23, 2012

CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ISIDORO RODRIGUEZ,

Plaintiff,

v.

JACK HARBESTON, SEA SEARCH-ARMADA LP, ARMADA COMPANY, IOTA PARTNERS, HFP, INC., GENERAL PARTNER OF IOTA PARTNERS; SEA SEARCH ARMADA, SEA SEARCH ARMADA LLC, MURDOCK CO., DANILO DEVIS P.; DOUGLAS SHULMAN, in his individual capacity; JOHN G. ROBERTS, in his individual capacity; ERIC HOLDER in his individual capacity; and Jane/John Does

Defendant.

CASE NO. 11-CV-1601(JCC)

ORDER

This matter comes before the Court on Plaintiff Isidoro Rodriguez's motion for letter rogatory. (Dkt. No. 23). The Inter-American Convention Additional Protocol Article III requires the following for letters rogatory:

> Letters rogatory shall be prepared on forms that are printed in the four official languages of the Organization of American States or in the languages of the State of origin and of the State of destination and conform to Form A contained in the Annex to this Protocol. Letters rogatory shall be accompanied by the following: a. Copy of the complaint or pleading that initiated the action in which the letter rogatory was issued, as well as a translation thereof into the language of the State of destination; b. Un-translated copy of the documents attached to the complaint or pleading; c. Un-translated copy of any

rulings ordering issuance of the letter rogatory; d. Form conforming to Form B annexed to this Protocol and containing essential information for the person to be served or the authority to receive the documents; and e. Certificate conforming to Form C annexed to this Protocol on which the Central Authority of the State of destination shall attest to execution or non-execution of the letter rogatory.

The specified Forms A, B, and C, are provided in US Marshal Form 272 (USM-272) and US Marshal Form 272A (USM 272A).

Plaintiff's motion is accompanied by a properly completed Form USM-272 and Form USM 272A, translated and un-translated copies of the complaint, and all attachments. Accordingly, Plaintiff's motion is GRANTED. (Dkt. No. 23). The Clerk is directed to sign and seal Plaintiff's submitted Form USM-272 (Dkt. No. 23-1) at pages 2 and 5, Form USM-272A (Dkt. No. 23-3) at pages 2 and 5, and return it to Plaintiff.

Dated this 24th day of January 2012.

John C. Coughenour
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
The Honorable Michael E. Romero

In re:	)	
	)	Case No. 06-18082 MER
JAMES CHARLES VAUGHN	)	
	)	Chapter 11
Debtor.	)	
	)	
JAMES CHARLES VAUGHN	)	Adversary No. 08-1095 MER
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE,	)	
	)	
Defendant.	)	

Signed/Docketed
December 28, 2011

ORDER

This matter involves the rise and fall of James Vaughn, an obviously intelligent man who made an extremely unintelligent decision. Through hard work and entrepreneurial talent, he gained experience in the options trading, venture capital, and cable television industries, rising to executive positions in several companies. In 1995, he started a successful cable company and began acquiring small cable companies with an eye to selling to a larger entity. The venture was sold in 1999 for a gross sales price of $2.1 billion, of which Mr. Vaughn received approximately $34 million in cash and stock. Sadly, this inspiring business success story then took a very negative turn when Mr. Vaughn made the investment which forms the subject of this action.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(a) and (b) and 157(a) and (b). This is a core proceeding under 28 U.S.C. § 157(b)(2)(I) as it concerns the dischargeability of a particular debt.

BACKGROUND FACTS[1]

The Plaintiff in this action, James Charles Vaughn ("Vaughn"), graduated from high school in 1962. He completed some college courses, but did not earn a degree. Vaughn gained significant experience in business by working with several companies, primarily in the cable television industry. During the 1980s and 1990s, he served as the senior vice president of Triax Communications, a cable company, and was involved in budgeting, financial review, capital raising, acquisitions, and complex negotiations. During the time Vaughn was with Triax, it grew from 30,000 subscribers to approximately 400,000 subscribers. In addition, early in his career, Vaughn began trading options and options futures. As he gained experience, he developed an understanding of the mechanics of investments.

In 1995, Vaughn started Frontier Vision Partners ("Frontier Vision"). He borrowed $500,000 from JP Morgan to start up the company. JP Morgan later invested an additional $25 million in the venture. Frontier Vision raised additional capital through Vaughn, JP Morgan agents, and from presentations to investors. Vaughn explained Frontier Vision's business model was to become a world cable television acquirer, with the intent to buy smaller companies and eventually sell them to a larger entity. To that end, Frontier Vision purchased rural cable television providers and consolidated them into a single provider.

When Frontier Vision began in 1995, it hired the international accounting firm KPMG, LLP ("KPMG") to review acquisition agreements, handle tax preparation and audit activities, document public bond offerings, and perform related services. Vaughn hired Mr. Jack Koo ("Koo"), an experienced commercial banker, as Frontier Vision's chief financial officer. Mr. James McHose ("McHose"), a certified public accountant previously employed by KPMG as a senior tax manager, was also hired by Frontier Vision as vice president and treasurer.

In early 1999, Frontier Vision was sold to Adelphia Communications Corporation ("Adelphia"). From the sale, Vaughn received approximately $20 million in cash and $11 million in Adelphia stock. Koo also received significant cash and Adelphia stock from the sale.

Vaughn knew he would realize capital gains from the sale of Frontier Vision in excess of $30 million. Thus, after the sale was announced, McHose arranged meetings with financial advisors for Vaughn and Koo to suggest investment and tax strategies addressing their profits from the sale. In two meetings with KPMG partner Gary Powell ("Powell"), a product called Bond Linked Issue Premium Structure ("BLIPS") was presented as an investment possibility. The BLIPS product was offered by a company known as Presidio Advisory Services, LLC ("Presidio"). In August 1999, Vaughn, as a potential investor, was issued a "Confidential Memorandum" which described the BLIPS program in detail.

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[1] The background facts in this Order are taken from the testimony at trial, as well as exhibits and designated portions of depositions presented by the parties. In order to avoid a distracting number of footnotes, the Court will only insert a citation in reference to a specific document or where clarification is needed.

A. The BLIPS Program

In the Confidential Memorandum, Presidio described BLIPS as a three-stage, seven-year program comprised of investment funds, or investment pools. The first stage, to last 60 days, involved relatively low risk strategies, while the second stage, lasting 120 days, and the third stage, lasting six and one-half years, increased the risk on the investment with the potential for higher returns. Investors, known as Class A members, could withdraw from the program after the first 60 days.[2] In general, this strategy focused on investing in foreign currencies, including currencies "pegged" to the United States dollar.[3] Specifically, these funds, in which a Class A member could invest through creation of a separate investment entity, would "invest in U.S. dollar and foreign currency denominated debt securities of corporate and governmental issuers and enter into forward foreign currency contracts, options on currencies and securities and other investments. . . ."[4] Stated simply, this was an investment which could make money based on the volatility of foreign currencies.

What made BLIPS a "tax strategy" was how the investment was to be funded. Generally, an investor would contribute a relatively modest amount compared to the amount ultimately invested. The balance of the investment would be funded through a loan. The loan would be somewhat unconventional because it would charge a high rate of interest and also carry what was referred to as an "initial unamortized premium amount," or loan premium. The loan premium created a lower, "market rate" of interest, by doing the following three things: 1) amortizing the loan premium; 2) paying interest on the loan amount; and 3) paying interest on the premium itself. Stated differently, while the aggregate of the loan and the loan premium was owed, the premium was being amortized as the loan went forward.[5]

The more important aspect of the investment would be the basis claimed by the taxpayer for such an arrangement. Under the BLIPS program, the taxpayer would claim a basis of the total amount contributed to the investment less the stated principal amount of the loan. As a result, the loan premium is added to the initial investor contribution. Thus, gains are protected by the high basis or, alternatively, in a case where a tax loss may be attractive, for a relatively

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[2] Joint Exhibit 3, Confidential Memorandum, pp. 7-8 and p. 15.

[3] Joint Exhibit 3, Confidential Memorandum, pp. 8-9.

[4] Joint Exhibit 3, Confidential Memorandum, p. 4 "Executive Summary."

[5] Testimony of Dr. David DeRosa ("DeRosa"). To show how this would work, DeRosa posited an investor who borrows $100 for a year at 6% simple interest, where the interest at the end of the loan term is thus $6, and the investor would owe $106 at the end of the year. If, on the other hand, the investor borrowed $60 for one year at 76.67% interest, and received a $40 premium, the interest at the end of the loan term would be $46, and the investor would owe $106. In each case, the investor receives $100 and owes $106 at the end of the year. According to DeRosa, the loan Vaughn received follows the same model as the second example, but over seven years rather than one year. See Internal Revenue Service ("IRS") Exhibit NNNNN.

little actual cash outlay, a claimed basis could result in a high tax loss "even though the taxpayer has incurred no corresponding economic loss."[6]

B. The Investment

In July 1999, following their receipt of the Confidential Memorandum, Vaughn and Koo met with David Makov and Robert Pfaff of Presidio to discuss investments involving the Argentine Peso and the Hong Kong Dollar. The investments were to be accomplished through the creation of a fund called Sill Strategic Investment Fund ("Sill"), to which entities created by the individual investors would contribute funds through an account at Deutsche Bank AG ("Deutsch Bank"). Deutsche Bank would then provide loans for investments in the foreign currency markets through the BLIPS program.

Vaughn chose to invest in the BLIPS program, and in furtherance of this decision created an entity known as Pilchuck Ventures, LLC ("Pilchuck"). On October 7, 1999, pursuant to Presidio's instructions, Vaughn wired $2.8 million to the Pilchuck account at Deutsche Bank to commence the BLIPS transaction.[7] In Vaughn's case, the corresponding loan from Deutsche Bank would be $66 million, plus a $40 million "premium."[8]

Vaughn received closing documents to be reviewed, signed, and returned.[9] The credit documents with Deutsche Bank were dated October 13, 1999. Sill was set up on October 22, 1999.[10] Presidio's letter to Vaughn of October 26, 1999 indicated Sill received contributions from Pilchuck on October 22, 1999 in a total amount of $109.5 million, which included the $2.8 million supplied by Vaughn and the amount loaned by Deutsche Bank.[11] On October 22, 1999, Deutsche Bank sent confirmation notices showing transactions involving approximately $107 million, primarily purchases of Argentine Pesos and Hong Kong Dollars.[12] [13]

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[6] IRS Exhibit UUU, Internal Revenue Bulletin Notice 2000-44 , p. 255.

[7] Joint Exhibit 5.

[8] See Joint Exhibit 7H, formation documents for Pilchuck, p. 9, approving credit agreement with Deutsche Bank; Joint Exhibit 7B, Credit Agreement between Pilchuck and Deutsche Bank; and IRS Exhibit C, noting a $1 million loan premium assigned for each $700,000 contributed by an investor.

[9] See Joint Exhibits 7A-7L.

[10] Joint Exhibit 8.

[11] Joint Exhibit 12.

[12] Joint Exhibits 9, 10, and 11.

[13] Sill then proceeded to change the interest rate structure by engaging in a "swap" derivative transaction with Deutsche Bank, which lowered the rate to the more conventional London Interbank Offer Rate ("LIBOR") common in financial markets. Thus, Sill received, at least on paper, the 17.694 % times $66.7 million, that is, the $66.7 million plus the $40 million. Since, following the swap, Sill had to pay LIBOR on the whole indebtedness, it

On December 9, 1999, Vaughn received a report from Presidio showing a Pilchuck loss, as of December 8, 1999, of approximately $280,000.[14] Thereafter, as planned, Vaughn "pulled out" of the investment after approximately 60 days.[15] After deduction of fees and interest, Vaughn received approximately $900,000 back from his initial $2.8 million investment, comprised of U. S. dollars, Euros, and Adelphia stock.[16]

The large losses in the BLIPS transactions were generated because Pilchuck (and its sole owner, Vaughn) received only approximately $900,000 in returns on its investment, on a cost basis equal to the amount originally contributed by Vaughn, $2.8 million, plus the loan premium of $40 million, for a basis of approximately $43 million. Thus, a tax loss of approximately $42 million could potentially have been generated by this "investment."

C. The Tax Problem

Thereafter, Lees prepared Vaughn's 1999 tax return.[17] This return reflected certain of the losses generated by the BLIPS investment. According to Lees, he relied on the opinions of KPMG and the law firm of Brown & Wood in taking a loss on that return.[18] While Vaughn acknowledged the purpose of BLIPS was to generate losses to him of approximately $40 million, he noted the loss taken on his 1999 tax return did not reflect any real hard dollar loss to anybody at the time the return was filed. In fact, he had no actual losses in the amount claimed when the deduction was taken. He admitted he did not take the full amount of the BLIPS losses on his 1999 tax return. He did take sufficient tax losses to result in his reporting only a $2.4 million

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becomes apparent the transaction is really a simple loan at LIBOR interest on $106.7 million. Because Sill was able to swap the 17.694 % interest rate for interest at LIBOR, DeRosa stated the only purpose for the initial 17.694 % interest rate was to amortize the $40 million and pay interest at market levels. Thus, after the contribution by Pilchuck, Sill now had a bargain rate, LIBOR, plus the $2.8 million put in by Vaughn, but the actual funds were still, and always were, physically held by Deutsche Bank.

[14] Joint Exhibit 13.

[15] See IRS Exhibit HH, consisting of a letter from KPMG employee Robert Lees ("Lees") to Vaughn, dated December 16, 1999, confirming their discussion in which Vaughn directed KPMG to take steps to withdraw Pilchuck from Sill, and a withdrawal request signed by Vaughn and dated December 10, 1999.

[16] Vaughn initially stated he did not authorize the purchase of Adelphia stock as part of the ending of the BLIPS transaction, but, upon review of his earlier deposition testimony, concluded he misspoke.

[17] IRS Exhibit V.

[18] As part of the promotion of BLIPS, KPMG provided a "more likely than not" opinion letter to investors, in which KPMG stated its belief it was more likely than not the IRS would accept the validity of the investment program. On March 23, 2000, Powell sent Vaughn ten pages of KPMG's opinion letter; after Vaughn had signed off on those pages, Powell provided the full opinion letter, dated December 31, 1999. Further, for an additional fee of approximately $50,000, Vaughn also received a similar opinion letter from the law firm of Brown & Wood, a firm engaged by KPMG, dated December 31, 1999. Joint Exhibit 19. However, Powell did not send Vaughn the Brown & Wood letter until May 24, 2000.

capital gain from the sale of Frontier Vision. However, he denied Powell instructed him to take less than the full loss to avoid arousing any IRS suspicions.

On September 5, 2000, the IRS issued Internal Revenue Bulletin Notice 2000-44 addressing tax avoidance using artificially high basis.[19] That Notice stated in part:

> Under the position advanced by the promoters of this arrangement, the taxpayer claims that only the stated principal amount of the indebtedness, $2,000X in this example, is considered liability assumed by the partnership that is treated as a distribution of money to the taxpayer that reduces the basis of the taxpayer's interest under § 752 of the Internal Revenue Code. Therefore, disregarding any additional amounts the taxpayer may contribute to the partnership, transaction costs, and any income realized or expenses incurred at the partnership level, the taxpayer purports to have a basis in the partnership interest equal to the excess of cash contributed over the stated principal amount of the indebtedness, even though the taxpayer's net economic outlay to acquire the partnership interest and the value of the partnership interest are nominal or zero. In this example, the taxpayer purports to have a basis of $1,000X (the excess of cash contributed ($3,000X) over the stated principal amount of the indebtedness ($2,000X)). On disposition of the partnership interest, the taxpayer claims a tax loss with respect to that basis amount, even though the taxpayer has incurred no corresponding economic loss.[20]

KPMG determined BLIPS investors should be contacted regarding the Notice. Specifically, Mr. Jeffrey Eischeid, a KPMG employee, through an email to Powell dated October 3, 2000, provided a script to be used in conversations with such clients and specifically identified Vaughn and Koo as investors who should be contacted.[21] Vaughn did not recall attending a meeting with representatives of KPMG regarding Notice 2000-44, but Lees thought there may have been such a meeting on January 21, 2001, and remembered KPMG representatives continued to insist the transaction was legitimate and would back the transaction and fight the IRS on its interpretation.[22] It is not clear whether, in any such meeting, Vaughn was informed of the increased likelihood of audit or the increased possibility KPMG would be required to provide to the IRS the names of clients engaged in transactions similar to those described in the Notice.[23]

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[19] IRS Exhibit UUU.

[20] *Id.*, p. 255.

[21] Vaughn Exhibit 24.

[22] Joint Exhibit 20.

[23] See also Vaughn Exhibit 27, Memorandum of Oral Advice, dated March 25, 2002, signed by Tracy Henderson, another KMPG employee, commemorating the January 2001 meeting with Powell, Koo and Vaughn. Vaughn could not remember this meeting; however, he points out the Memorandum does not contain the paragraph in the script provided to Powell on October 3, 2000, indicating such probabilities had been discussed.

On February 6, 2001, Lees sent a letter to Vaughn containing a copy of Notice 2000-44. Vaughn could not remember receiving this document.

On February 6, 2002, Victoria Sherlock ("Sherlock"), a KPMG in-house attorney, met with Koo and Vaughn to discuss an IRS settlement initiative, Notice 2002-2. Sherlock represented Koo, who had received an audit letter from the IRS in 2001 regarding his BLIPS investment. Koo stated he had not had much contact with Vaughn during 2001, and first informed him of his audit letter at the February 6, 2002 meeting. At this meeting, Sherlock, without making a representation about whether she believed BLIPS would ultimately result in additional taxes, informed Vaughn he should disclose his participation in BLIPS to the IRS.[24] Vaughn's disclosure was provided to the IRS on or about March 28, 2002.[25] Vaughn also provided other information requested by the IRS, and agreed to extensions of the statute of limitations to allow the IRS to continue its investigation concerning the losses on his 1999 tax return.

In May 2002, Vaughn and his then-wife Cindy Vaughn received letters from the IRS scheduling an appointment to examine their 1999 tax returns.[26] On March 18, 2004, Lees filed amended tax returns for the Vaughns for 1997, 1998 and 1999, adding a net operating loss carry-back incurred by Vaughn in 2003.[27]

On May 24, 2004, the IRS issued Announcement 2004-46, the so-called "Son of Boss Settlement Initiative."[28] Vaughn asserts he was aware by this time of misrepresentations and omissions made by KPMG and Presidio, through conversations with his attorney, with Koo and through review of a widely-known Senate Subcommittee Report critical of investment vehicles such as BLIPS.[29] Specifically, Vaughn claims KPMG and Presidio hid information from their clients, made misrepresentations about the economic substance and leverage in investments, and misrepresentations about the validity of opinion letters. Vaughn mailed a Notice of Election to Participate in the Announcement 2004-46 Settlement Initiative on June 21, 2004. On June 24,

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[24] Sherlock Deposition, pp. 54 and 67.

[25] Joint Exhibit 25.

[26] Joint Exhibit 26.

[27] IRS Exhibit XX.

[28] Vaughn Exhibit 47, IRS Announcement 2004-46, "Son of Boss Settlement Initiative." The essence of this proposal by the IRS was to resolve the transactions described in IRS Notice 2000-44, like BLIPS, by allowing taxpayers to concede tax benefits from the transactions, including basis adjustments, and to treat their net out of pocket costs as either long term capital losses or ordinary losses. Taxpayers who participated in the initiative were required to make full payment of the liabilities under the initiative by the date the agreement with the IRS was executed.

[29] Vaughn Exhibit 38, United States Senate Report entitled "U.S. Tax Shelter Industry: The Role of Accountants, Lawyers, and Financial Professionals–Four KPMG Case Studies: FLIP, OPIS, BLIPS, and SC2".

2004, Vaughn received a notice of deficiency showing taxes for the tax year ended December 31, 1999, in the sum of $8,617,902 ("the 2004 Assessment").[30] He could not pay these taxes within thirty days, and so could not meet the eligibility requirements of the Settlement Initiative.[31]

On November 3, 2006, Vaughn filed his Chapter 11 petition (the "Petition Date"). The IRS filed a proof of claim for $14,359,592 as a general unsecured claim, stating at that time the taxes were not entitled to priority under 11 U.S.C § 507(a)(8)(A)[32] because they were assessed more than 240 days before the Petition Date. Almost a year after the Petition Date, and three years after the 2004 Assessment, the IRS realized its error. On October 29, 2007, the IRS abated the 2004 Assessment as unlawful, and on April 10, 2008, the IRS filed its amended proof of claim, asserting the taxes were entitled to priority.

ISSUES AT TRIAL AND THE PARTIES' POSITIONS

Before the Court is the determination of the dischargeability of the 2005 assessments for the 1999 and 2000 taxes.[33] Critical to this determination is whether Vaughn 1) made a fraudulent return; or 2) willfully attempted in any manner to evade or defeat tax for years 1999 and 2000, pursuant to § 523(a)(1)(C).

Vaughn seeks a finding the taxes assessed against him prepetition, which were abated postpetition and which will be reassessed postpetition, are dischargeable under §§105, 523(a), and 507(a)(8). Specifically, Vaughn alleges KPMG and its agents abused their fiduciary relationship with Vaughn by approaching and pressuring him to invest in BLIPS. Vaughn further asserts because of Koo's financial expertise, he reasonably relied on Koo's advice and representations by KPMG, Koo, and attorneys engaged by KPMG. Vaughn thus did not perform

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[30] Joint Exhibit 29. The liability was the result of conclusion of the IRS that the claimed basis for Vaughn's BLIP investment was too high–the $40 million loan premium should not have been included because that obligation was taken over by Sill and never represented funds paid by Pilchuck or Vaughn. See IRS Exhibit UUU, p. 3, IRS Notice 2000-44, "Tax Avoidance Using Artificially High Basis." As noted above, this Notice describes an example similar to the BLIPS transaction described here, and notes the taxpayer would claim a basis of the total amount contributed to the investment (in this case, $106.7 million) less the stated principal amount of the loan (in this case $66.7 million) for a basis (in this case $44 million) "even though the taxpayer has incurred no corresponding economic loss." The Notice goes on to state the purported losses from such a transaction "do not represent bona fide losses reflecting actual economic consequences as required for purposes of [26 U.S.C.] § 165."

[31] Vaughn Exhibit 45, IRS Announcement 2004-46 p.2.

[32] Unless otherwise noted, all future statutory references in the text are to Title 11 of the United States Code.

[33] The Court's record reflects the IRS's tax claim arises from unpaid taxes for 1999 in the amount of $8,617,902, and for 2000 in the amount of $119,928.

much, if any, personal due diligence of the BLIPS program.[34] When Koo determined there was economic substance to the BLIPS investment, and based on KPMG's promises, Vaughn invested. Finally, he notes he was also distracted by his wife's serious medical problems at the time.

Vaughn contends KPMG committed fraud because it misrepresented the nature of the BLIPS transaction and did not timely provide promised opinion letters–not until after the investment was made.[35] In addition, Vaughn asserts KPMG knew the investments and that it was being investigated by the Senate for its involvement in the BLIPS program, but did not timely disclose this information to him. Vaughn therefore states he did not willfully evade taxes either through the filing of his tax return or his actions following the filing of the tax return because he was counseled by KPMG that the transaction was legitimate and would ultimately be approved by the IRS.

The IRS asserts the tax assessments are nondischargeable under § 523(a)(1)(C). According to the IRS, Vaughn willfully attempted to evade his tax obligations for 1999 and 2000, and filed fraudulent returns for those years. The IRS states Vaughn knew or should have known, and in reckless disregard of the information that would have informed him, that BLIPS provided him with no reasonable opportunity to earn a reasonable pre-tax profit. He also knew or should have known BLIPS would not survive IRS scrutiny. The IRS contends Vaughn and Koo were too sophisticated to believe BLIPS was legitimate.

Moreover, in contrast to Vaughn's arguments, the IRS points out on March 24, 2000, Vaughn signed off on the draft opinion letter to Pilchuck which KPMG planned to issue regarding BLIPS.[36] The cover letter to the draft, signed by Gary Powell, directed Vaughn to sign the last page of the draft indicating Vaughn had read the draft letter and agreed with its contents. The IRS states Vaughn's representations in this letter were false, and Vaughn knew the BLIPS investment had no reasonable prospect for earning a pre-tax profit, and, contrary to the letter, there was no economic reason for borrowing funds from Deutsche Bank at an excessive interest rate.

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[34] Vaughn admitted the following key language in KPMG's engagement letter was incorrect: "Client [Vaughn] has independently determined that there is a reasonable opportunity for Client to earn a reasonable pre-tax profit from the [BLIPS] Investment Program in excess of all associated fees and costs."

[35] Specifically, Vaughn testified representatives from KPMG did not tell him KPMG's opinion letter was predicated on Vaughn's own representations about BLIPs, and that KPMG and Presidio representatives told him there was a reasonable possibility of a pre-tax profit from BLIPS. (However, as noted below, he did "sign off" on representations before receiving the final version of the KPMG opinion letter.) He further stated he did not receive the hundreds of pages of loan documents to be reviewed and signed until a few days before closing. With respect to KPMG's opinion letter, Vaughn stated he did not receive anything until March 23, 2000, when Powell sent him the first ten pages of the opinion letter and requested he "sign off" on them in order to receive the full opinion letter. See Joint Exhibit 17.

[36] Joint Exhibit 17.

In addition, the IRS states Vaughn sought to conceal the BLIPS losses from the IRS by directing Presidio to cause Sill to purchase Euros and Adelphia stock in order to attach most of his tax losses to shares of Adelphia.[37] According to the IRS, the Euros and Adelphia stock were purchased in such a fashion that the tax basis of approximately $40 million could be allocated, once Pilchuck had withdrawn from Sill, 8% to Euros and 92% to a capital asset–the stock.[38] Moreover, the IRS states Vaughn evaded taxes associated with the sale of his company by transferring assets to family members and spending enough to reduce the value of his estate to far less than his taxes.

DISCUSSION

Section 523(a)(1) provides:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt–
>
> (1) for a tax or a customs duty--
>
> (A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;
>
> (B) with respect to which a return, or equivalent report or notice, if required--
>
> (i) was not filed or given; or
>
> (ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or
>
> (C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax. . .[39]

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[37] See IRS Exhibit HH, Annex A, signed by Vaughn, withdrawing Pilchuck's capital account balance from Sill and directing the purchase of Euros and shares of Adelphia stock.

[38] *Id.*, p.3, Information Sheet containing instructions for allocation of "total notional" of $40,000,000 after withdrawal of Pilchuck from Sill.

[39] 11 U.S.C. § 523(a)(1).

This subsection, to be read in the disjunctive, thus contains two separate exceptions to discharge: 1) for making a fraudulent return; and 2) for willfully attempting to defeat and evade tax.[40] The IRS admits it bears the burden of proving the tax debts should be excepted from discharge by a preponderance of the evidence.[41]

A. Filing a Fraudulent Return

This Court can find no cases from the Tenth Circuit Court of Appeals discussing what constitutes a fraudulent return under § 523(a)(1)(C). The issue has been addressed, however, by other courts in this Circuit. These courts have focused on 1) knowledge of the falsehood of the return; 2) an intent to evade taxes; and 3) an underpayment of the taxes, items which have come to be referred to as the *"Krause"* factors.[42] These courts have also set forth additional "badges of fraud" signaling a fraudulent return, including: 1) consistent understatement of income; 2) failure to maintain adequate records; 3) failure to file tax returns; 4) implausible or inconsistent behavior by a debtor; 5) concealing assets; 6) failure to cooperate with taxing authorities; and 7) unreported income from an illegal activity.[43]

The facts set forth above lead to the conclusion Vaughn knew or should have known the returns he filed in 1999 and 2000 contained false information. Specifically, after receiving approximately $34 million in cash and stock from the sale of his company, he invested, through creation of Pilchuk, in a risky and complex transaction promoted by KPMG. He did not conduct his own investigation regarding the nature of the investment nor its tax consequences. Rather, he asserts he relied on the representations of KPMG, of KPMG's attorneys, and of Koo after Koo had reviewed the information supplied by KPMG. Unfortunately for him, Vaughn signed several documents expressly representing he had made an independent investigation. Moreover, he knew, at least by the time he filed the 1999 and 2000 tax returns, the investment was considered suspect by the IRS, and was being investigated. He further acknowledges he now believes the investment had no economic basis.

The evidence makes clear Vaughn was, and is, a sophisticated businessman. What he may lack in formal education, he made up for with hard work, long experience, and intelligence, enabling him to build organizations and eventually create a business which he sold for $2.1 billion. He is a self-made, successful entrepreneur whose accomplishments merit admiration and

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[40] *See In re Tudisco*, 183 F.3d 133, 137 (2d Cir.1999); *In re Epstein*, 303 B.R. 280 (Bankr. E.D.N.Y. 2004).

[41] *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

[42] *Wilson v. United States*, 394 B.R. 531, 540-541 (Bankr. D. Colo. 2008), *rev'd in part on other grounds*, 407 B.R. 405 (10th Cir. BAP 2009) *(*citing *United States v. Krause (In re Krause)*, 386 B.R. 785, 825 (Bankr. D. Kan. 2008) (collecting cases)). *See also In re Fliss*, 339 B.R. 481, 486 (Bankr. N.D. Iowa 2006); *In re Schlesinger*, 290 B.R. 529, 536 (Bankr. E.D. Pa. 2002).

[43] *Krause*, 386 B.R. at 824 (citations omitted).

respect. It is simply not credible such an individual would enter into a transaction like BLIPS without making an independent investigation. Nor it is credible a savvy businessman like Vaughn would not have identified the numerous red flags associated with the transaction–red flags suggesting the investment strategy was not sound and might be an abusive tax shelter.[44]

As his defense, Vaughn seeks to convince this Court he relied on the misrepresentations of others. The Court recognizes KPMG, KPMG's attorneys, and others who may have made representations to Vaughn about BLIPS can certainly be argued to have committed malfeasance. However, it is simply not believable that a man of Vaughn's experience and business acumen would risk endangering what at that time must have been the financial culmination of his career, the $34 million from the sale of his company, without much more personal involvement and a true independent investigation. It is not credible Vaughn could have failed to recognize a representation by KPMG, the promoter of the BLIPS program, or a representation by the lawyers hired by KPMG, might not constitute a truly unbiased opinion or serve as independent investment advice. As the promoter of BLIPS, KPMG and anyone working for KPMG had an inherent conflict of interest when rendering an opinion on BLIPS. Further, even though it stood to gain fees, the attorneys hired by KPMG to issue "opinion letters" only felt comfortable issuing such a letter with the conclusion that BLIPS stood at least a 50% chance of being disallowed by the IRS. For these reasons, the Court finds Vaughn knew or should have known BLIPS-related losses were improper to claim as an offset against taxes he owed on his income from selling his company, thus meeting the first prong of the *Krause* test.

For these same reasons, the Court questions Vaughn's position he viewed BLIPS primarily as an investment versus a tax savings vehicle. According to DeRosa, the IRS's expert witness, BLIPS could not reasonably have generated any gains for investors. DeRosa analyzed the currency transactions engaged in by Sill, and pointed out they had no economic impact. For example, Sill initially bought Euros on a "spot" transaction with the dollars and simultaneously sold the Euros "forward" one month.[45] Such "short forward" transactions simply "washed out" at the U.S. dollar interest rate, and did not constitute meaningful economic transactions because there was no economic risk and the money never left Deutsche Bank. In DeRosa's opinion,

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[44] Such "warning signals" include the overly complex nature of the Deutsche Bank loan, the reliance on a "loan premium" not contributed by Vaughn to create a tax basis for the investment and KPMG's requirements for Vaughn to state, by signing a draft, that he agreed with KPMG's opinions, before KPMG would issue its actual opinion.

[45] DeRosa explained a spot transaction is one which settles in two bank business days, with the last day, or "settlement day" as the day the currencies are valued. A forward transaction, by contrast, is one where the "settlement day" of the currency to be valued is beyond two days–anywhere from a week to any time in the future. A forward transaction is based on the difference of between one currency and the other, and because of differentials in interest rates, the forward rate cannot equal the spot except if the interest rates in both countries are equal to each other at that moment in time.

there was no prospect of making any money other than interest on such transactions.[46] Sill also obtained "forward" positions with Hong Kong Dollars and Argentine Pesos. DeRosa stated these transactions were really a short-term bet the currencies would collapse and be worth much less in, for example, sixty days, when an investor would be able to buy back U.S. Dollars with significantly less valuable Hong Kong Dollars or Argentine Pesos.

DeRosa opined the problem with this strategy was the Hong Kong Dollar and the Argentine Peso in 1999 were extremely stable, with little to no chance of devaluation or collapse. He noted because the Hong Kong Dollar and the Argentine Peso are "hard pegged" to the U.S. Dollar, they are among the least volatile currencies.[47] They have traditionally been stable even when other currencies fell in value. Therefore, there was virtually no possibility of an economic return on this transaction. To obtain one, according to DeRosa, Vaughn would have had to realize an unrealistic return of 67% on his $2.8 million–in DeRosa's opinion, an impossible hurdle in 60 days.

DeRosa also noted the crippling restrictions placed on Sill by Deutsche Bank in their agreement. The investments Sill could make were extremely limited, and Deutsche Bank, according to DeRosa, could liquidate Sill's positions essentially at will. Deutsche Bank also reduced the possibility of gain by charging fees based on forecasts of Sill's portfolio fluctuation, the so-called "value at risk haircut." Deutsche Bank further retained the right to call the loan if the value of the portfolio dropped below $108,033,750, or 101.25% of the $106.7 million funding amount, which, in DeRosa's opinion, meant Sill could not invest in anything that would make money because it was prevented from taking any risks.[48]

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[46] DeRosa stated eventually, however, even in this "zero sum" game, interest parity will cost money over time, eroding the original investment. Specifically, according to DeRosa, under John Maynard Keynes's theory of interest parity, there are no free transactions. The "forward" is the same as the "spot" adjusted for the interest rate differential during the term of the transaction. In other words, the "forward" amount will differ from the "spot" amount by the gap in the interest rate–otherwise, an investor could make money simply by switching investments to the highest interest currency. DeRosa stated if an investor is "shorting" a currency like the Hong Kong Dollar or the Argentine Peso, the investor will pay, implicit in the price of the "forward," a higher interest rate than the U.S. Dollar rate, creating a "cost of carry" which eats away at the investor's position over time.

[47] A "pegged" currency means the exchange rate with other currencies is fixed by a country's central bank. Some are called "soft pegs" because the government intends to keep the exchange rate fixed but could change the rate at any time. Some are "hard pegged," which means the central bank of a country keeps on hand enough reserves of foreign currency, usually U.S. dollars, to exchange all of its currency in circulation at a fixed price, and promises to make a market continuously. Two hard pegged currencies, for purposes of this case, were the Hong Kong Dollar and the Argentine Peso.

[48] Moreover, DeRosa noted the cost of leaving the investment after 60 days, even though that was what Vaughn anticipated, was high, due to breakage fees and other penalties. Further, he pointed out the other fees associated with the transaction, including $1.1 million to Presidio and $500,000 to KPMG, did not make sense because an investor who could establish an account with approximately $1 million could have made the same trades without the Sill investment scheme.

Vaughn must have been aware of these "limitations" in light of his experience. Thus the Court finds Vaughn cannot have made the BLIPS investment because he thought it would be a way, even a risky way, to make money. He was simply too smart a businessman for that. Therefore, he must have had another motivation for placing approximately $2.8 million into BLIPS. Based upon the returns he filed, which showed significant tax losses, and based upon his testimony the returns were structured to show a small net capital gain rather than showing the entire amount of BLIPS losses, the Court concludes his motivation in making the BLIPS investment and filing tax returns using the losses from the BLIPS investment was designed to evade taxes on the income from the sale of his company. Accordingly, the second *Krause* prong (intent) is met.

As to the third prong, it should be noted Vaughn himself testified he underpaid the taxes, and has repeatedly expressed his intention to pay them. His dispute is with the assertion he knew of the impropriety of the BLIPS investment at the time it was made, or at the time he filed his 2004 amendment to his 1999 return. He contends he did not know of the true nature of the investment until much later. Because the Court finds, as described above, he knew or should have known about the problems with BLIPS at the time of the investment, the Court concludes this argument lacks merit. In addition, when he filed his amended 1999 return in 2004, he was aware KPMG was under investigation, and Mr. Lees told him in early 2001 the BLIPS losses would be disallowed. Therefore, the taxes were clearly underpaid and the third prong of the *Krause* test has been met.

The Court notes the other "badges of fraud" signaling a fraudulent return set forth in *Krause*, such as failure to keep records and failure to file returns, are not present. However, the "badge" of implausible and inconsistent behavior exists. Vaughn's general investment manager, Robert Mueller, with whom he placed other investments, described Vaughn as a conservative investor who had never shown any interest in or knowledge of foreign currency based investments.[49] Thus, Vaughn's actions involving the BLIPS investment were inconsistent both with his other investment behaviors, and were both implausible and inconsistent with his business acumen and purported investment goals.

B. Willful Evasion

The most recent appellate decision addressing § 523(a)(1)(C) identified two components to a showing of willful evasion: 1) a conduct requirement; and 2) a mental state requirement.[50] The Court stated:

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[49] Mueller Deposition, p. 32, lines 19-20, and p. 36, lines 13-25.

[50] *United States v. Storey*, 640 F.3d 739, 744 (6th Cir. 2011). *See also United States v. Jacobs, (In re Jacobs)*, 490 F.3d 913, 921 (11th Cir. 2007); *United States v. Fegeley (In re Fegeley)*, 118 F.3d 979, 983 (3rd Cir. 2000).

> To satisfy the conduct requirement, the government must demonstrate that the debtor avoided or evaded payment or collection of taxes through acts of omission, such as failure to file returns and failure to pay taxes, or through acts of commission, such as affirmative acts of evasion. Non-payment of tax alone is not sufficient to bar discharge of a tax obligation, but it is a relevant consideration in the overall analysis. . . . .
>
> [In addition] non-dischargeability under 523(a)(1)(C) requires a "voluntary, conscious, and intentional evasion." The government must prove that the debtor 1) had a duty to pay taxes, 2) knew she had a duty, and 3) voluntarily and intentionally violated that duty.[51]

1. Conduct

A recent case observed when a debtor affirmatively acted to avoid payment or collection of taxes, whether through commission or omission, these actions satisfy the conduct requirement of willful evasion of tax.[52] The *Hawkins* court noted: "[L]arge discretionary expenditures, combined with nonpayment of a known tax, contribute to the conduct analysis. Moreover, nonpayment of a tax can satisfy the conduct requirement when paired with even a single additional culpable act or omission."[53] The *Hawkins* court went on to affirm the bankruptcy court's finding a debtor met the conduct requirement of § 523(a)(1)(C) where he made "unreasonable and unnecessary discretionary expenditures at a time when he knew he owed taxes and knew he would be unable to pay those taxes."[54]

Here, Vaughn admitted as of June 2001, he knew Koo was subject to an IRS audit regarding the BLIPS transaction. In addition, by January 2001, he was informed of the IRS notice questioning the validity of BLIPS by receiving a copy of the Notice 2000-44. He was also in possession of the opinion letter indicating he could be subject to an audit on the same basis. He therefore knew he had a potential liability on the full amount of his gain from the Frontier Vision sale. Nonetheless, although he had transferred approximately one-half of his post-Frontier Vision sale assets to Cindy Vaughn as part of their divorce settlement, he failed to take any actions to preserve his remaining assets for the payment of additional taxes.

Specifically, he purchased a $1.7 million home in Evergreen, Colorado, but put the title in the sole name of his then-fiancee, Kathy St. Onge ("St. Onge"). Moreover, shortly before

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[51] *Storey*, 640 F.3d at 744-745 (citations omitted).

[52] *Hawkins v. Franchise Tax Bd.*, 447 B.R. 291, 301 (N.D. Cal. 2011) (citing *Jacobs*, 490 F.3d at 921).

[53] *Id.*, at 301-302 (citing *Jacobs*, 490 F.3d at 926–27; *Gardner*, 360 F.3d at 560–61; *Fegeley*, 118 F.3d at 984; *United States v. Fretz (In re Fretz)*, 244 F.3d 1323, 1329–30, *Toti v. United States (In re Toti)*, 24 F.3d 806, 809 (6th Cir. 1994)).

[54] *Id.*, at 302.

disclosing his participation in BLIPS to the IRS, Vaughn created and funded a $1.5 million trust for his stepdaughter, Stephanie Frank ("Frank"). In addition, after Vaughn married St. Onge in October, 2001, St. Onge obtained funds of approximately $97,000 from the couple's accounts, spent funds to decorate the Evergreen home, and spent $42,000 on jewelry.[55] Between 2002 and 2003, Vaughn himself spent approximately $20,000 on jewelry.[56] Even if Vaughn himself did not retain access to the funds he spent after knowing of his large potential tax liability, his transfers ensured funds would not be available to satisfy his tax obligations.

2. Mental State

The *Jacobs* and *Hawkins* courts also summarize the case law interpreting the mental state component of willful evasion, noting the requirement is satisfied where the government shows the following three elements: 1) the debtor had a duty under the law; 2) the debtor knew he had the duty; and 3) the debtor voluntarily and intentionally violated the duty.[57] The government does not need to demonstrate fraudulent intent, but only that a debtor acted "knowingly and deliberately."[58]

Similarly, the Tenth Circuit has held a debtor's actions are willful under § 523(a)(1)(C) if they are done voluntarily, consciously, or knowingly and intentionally.[59] It agrees with other courts that more than non-payment of one's taxes is required to establish a willful evasion.[60] However, the Tenth Circuit also noted concealment of assets to avoid payment or collection of taxes may constitute a willful evasion.[61] Indeed, the Tenth Circuit recognized "Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished. . . ."[62] The Court also stated:

> By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling

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[55] IRS Exhibit KKK.

[56] IRS Exhibit NNN.

[57] *Id*., at 300; *Jacobs*, 490 F.3d at 921.

[58] *United States v Mitchell (In re Mitchell*), 633 F.3d 1319, 1328 (6th Cir. 2011).

[59] *Dalton v. Internal Revenue Service*, 77 F.3d 1297, 1302 (10th Cir. 1996) (citing *Toti*, 24 F.3d at 809).

[60] *Id.*, at 1307.

[61] *Id.*

[62] *Id.* at 1301.

> of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal.[63]

In addition, the United States District Court for the District of Massachusetts observed:

> Conduct that constitutes circumstantial evidence of a debtor's willful intent to evade taxes includes: 1) implausible or inconsistent explanations of behavior, 2) inadequate financial records, 3) transfers of assets that greatly reduce assets subject to IRS execution and 4) transfers made in the face of serious financial difficulties.[64]

In this case, as noted above, Vaughn exhibited behavior which was inconsistent with his business acumen and was implausible based on that acumen when he participated in the BLIPS investment. Further, by purchasing expensive homes, automobiles, and jewelry, following a divorce which significantly depleted his assets, he further demonstrated such inconsistent and implausible behavior. That is, knowing, as he must have, the BLIPS investment constituted an improper abusive tax shelter with no economic basis and no reasonable expectation of profit, he nonetheless continued to spend as if there would be no additional tax to pay. This is simply not logical, unless he had another motive for such spending.

The evidence before the Court not only demonstrates he spent the funds and made the transfers in the face of serious financial difficulties, but also indicates his motive in doing so was to reduce assets subject to potential IRS execution. In short, by transferring funds and assets to St. Onge and Frank, he attempted to take those funds and assets out of the reach of the IRS. The Court does not deny Vaughn may have had some altruistic goals in setting up a trust for Frank, and may have had some good intentions for transferring real property to and purchasing real property for St. Onge, but any such motivations are overshadowed and outweighed by the fact Vaughn knew of the impending tax debt, and took no reasonable actions to preserve assets to pay it.

In order to meet the requirements of § 523(a)(1)(C), a debtor need not exhibit fraud or an evil motive. Rather, choosing to satisfy other obligations or pay for non-essentials, while not paying taxes, sufficiently demonstrates intent to evade tax.[65] The United States District Court for the Northern District of California, in affirming the *Hawkins* decision, stated:

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[63] *Id.*, at 1301.

[64] *United States v. Beninati*, 438 B.R. 755, 758 (D. Mass. 2010) (citations omitted). *See also, Geiger v. Internal Revenue Service (In re Geiger)*, 408 B.R. 788, 791 (C.D. Ill. 2009) (citations omitted).

[65] *Hawkins v. Franchise Tax Board (In re Hawkins)*, 430 B.R. 225, 235 (Bankr. N. D. Cal. 2010), *aff'd.*, 447 B.R. 291 (N.D. Cal. 2011) (citing *Lynch v. U.S. (In re Lynch)*, 299 B.R. 62, 64 (Bankr. S.D.N.Y. 2003); *Jacobs*, 490 F.3d at 925–27; *Stamper v. United States, (In re Gardner)*, 360 F.3d 551, 560–61 (6th Cir. 2004); *Wright v. United States (In re Wright)*, 191 B.R. 291, 293 (S.D.N.Y. 1995); *Hamm v. United States (In re Hamm)*, 356 B.R. 263, 285–86 (Bankr. S.D. Fla. 2006)).

> This statement adequately places debtors on notice that their decision to prioritize other obligations or make non-essential purchases, rather than pay a known tax debt, can render their tax debts nondischargeable. Following the reasoning of other courts that have addressed the issue, the Court adopts this standard and affirms the bankruptcy court's conclusion that unnecessary expenditures combined with nonpayment of a known tax constitutes a willful attempt under Section 523(a)(1)(C).[66]

This Court agrees with the reasoning set forth in these cases. Therefore, the Court finds Vaughn's actions meet the state of mind test to show intent to evade tax.

CONCLUSION

Throughout this case, Vaughn has argued he is an innocent victim of the machinations and misrepresentations of KPMG and persons in the employ of or hired by KPMG. This Court does not disagree that such machinations and misrepresentations took place. However, a taxpayer cannot reasonably rely on the advice of a professional who has an inherent conflict of interest, such as the promoter or marketer of a tax investment.[67] KPMG, its employees, and even the law firm employed by KPMG to issue "opinion letters" had such a conflict, because KPMG was the marketer of the BLIPS investment. It is simply not credible that an individual of Vaughn's extensive business background and demonstrated business skill would have reasonably relied on any such representations, and would not have, if he were seriously considering BLIPS as a legitimate investment, obtained a truly independent opinion as to its potential and its tax implications.

For these reasons,

IT IS ORDERED Vaughn's tax debts arising from the sale of Frontier Vision are not dischargeable under 11 U.S.C. § 523(a)(1)(C).

Dated December 28, 2011

BY THE COURT:

Michael E. Romero
U.S. Bankruptcy Judge

[66] *Hawkins, supra*, 447 B.R. at 297.

[67] *See Goldman v. C.I.R.*, 39 F.3d 402, 408 (2nd Cir. 1994) (taxpayers "cannot reasonably rely for professional advice on someone they know to be burdened with an inherent conflict of interest.").

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Honorable Michael E. Romero

In re:	)	
	)	Case No. 06-18082 MER
JAMES CHARLES VAUGHN	)	
Debtor.	)	Chapter 11
	)	
	)	
JAMES CHARLES VAUGHN	)	Adversary No. 08-1095 MER
Plaintiff,	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
INTERNAL REVENUE SERVICE,	)	
Defendant.	)	

JUDGMENT

Pursuant to and in accordance with the Order entered by the Honorable Michael E. Romero, United States Bankruptcy Judge, on December 28, 2011,

IT IS ORDERED AND ADJUDGED as follows:

The Defendant James Charles Vaughn's tax debts arising from the sale of Frontier Vision Partners are not dischargeable under 11 U.S.C. § 523(a)(1)(C).

Dated: December 28, 2011

FOR THE COURT:
BRADFORD L. BOLTON, CLERK

Deputy Clerk

APPROVED AS TO FORM:

Michael E. Romero, Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. CASE NO. 1:11-cv-00060-MP-GRJ

WILLIAM J DICKERT,

Defendant.

_____/

O R D E R

This matter is before the Court on Doc. 42, the Defendant's Motion for Extension of Time to Complete Discovery. Although Mr. Dickert stated in his motion that it was unopposed, the government filed a response at Doc. 43, indicating that it did, in fact, oppose the requested extension of time. Upon consideration, the Court concludes that Mr. Dickert has had ample time to conduct discovery in this case, even though he previously indicated that he would not be taking any discovery, and that such an extension of time is not justified under the circumstances.

Accordingly, it is now **ORDERED** as follows:

The motion for extension of time to complete discovery, Doc. 42, is denied.

DONE AND ORDERED this 24th day of January, 2012.

s/Gary R. Jones
GARY R. JONES
United States Magistrate Judge

Below is an Order of the Court.

ELIZABETH PERRIS
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In re	)	Case No. 11-30383-elp11
	)	
Lori D. Diaz,	)	ORDER GRANTING EXTENSION OF TIME TO
	)	FILE 2015 REPORT THROUGH AND INCLUDING
	)	JANUARY 24, 2012 AS NUNC PRO TUNC FOR
Debtor-in-Possession.	)	JANUARY 23, 2012

Based on Debtor-in-Possession Lori D. Diaz("Debtor") Motion to extend the time to file her 2015 Report (December 2011), it is

ORDERED that Debtor shall file her 2015 Report for the month of December 2011 on January 24, 2012 and 2015 Report shall be entered as nunc pro tunc for January 23, 2012.

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PRESENTED BY:

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Of Attorneys for Debtor-in-Possession

Electronic Mail:

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

First Class Mail:

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

Below is an Order of the Court.

ELIZABETH PERRIS
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In re	)	Case No. 11-30383-elp11
	)	
Lori D. Diaz,	)	ORDER GRANTING EXTENSION OF TIME TO
	)	FILE 2015 REPORT THROUGH AND INCLUDING
	)	JANUARY 24, 2012 AS NUNC PRO TUNC FOR
Debtor-in-Possession.	)	JANUARY 23, 2012

Based on Debtor-in-Possession Lori D. Diaz("Debtor") Motion to extend the time to file her 2015 Report (December 2011), it is

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

First Class Mail:

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

ORDERED in the Southern District of Florida on January 24, 2012.

Erik P. Kimball, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

In re: **Case No. 10-22049-EPK**

WELLINGTON PRESERVE CORPORATION, **Chapter 11**

Debtor.
_____/

ORDER DENYING MOTION TO COMPEL AS MOOT

THIS MATTER came before the Court for hearing on January 19, 2012 upon *United States of America's Motion to Compel* [DE 245] (the "Motion"). For the reasons stated on the record, and being otherwise fully advised in the premises, it is **ORDERED AND ADJUDGED** that the Motion [DE 245] is DENIED as moot.

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Copies to:

Philip Schreiber
P.O. Box 14198
Washington, D.C. 20044

Philip Schreiber is directed to serve a conformed copy of this order to all interested parties and to file a certificate of service with the Court.

In the United States Court of Federal Claims

No. 10-674T
Filed: January 24, 2012

JOHN DACOSTA, ET AL.,	
Plaintiffs,	
v.	
THE UNITED STATES,	
Defendant.	

ORDER

Plaintiffs' unopposed January 19, 2012 Motion For Enlargement Of Time is granted. Plaintiffs will file a response to the Government's June 3, 2011 Motion To Dismiss on or before May 1, 2012.

IT IS SO ORDERED.

SUSAN G. BRADEN
Judge

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UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

In Re William E. Lewinski, Jr. and Cheryl Lewinski **Debtor(s)**	)))))	**HONORABLE RICHARD L. SPEER** **Case No.** 11-33025 - Ch.13

ORDER

This matter comes before the Court upon the Court's own motion.

It is **ORDERED** that a **Further Hearing on Debtors' Objection to Claim of the Internal Revenue Service (Claim #4)** be, and is hereby, scheduled for **Wednesday, February 29, 2012 at 1:30 P.M.,** in Courtroom No. 1, Room 119, United States Courthouse, 1716 Spielbusch Avenue, Toledo, Ohio.

ALL MOTIONS FOR CONTINUANCE OR REQUESTS FOR NON-APPEARANCE IN THE ABOVE CAPTIONED HEARING ARE TO BE MADE DIRECTLY TO THE COURT, AND THOSE MAKING THE MOTIONS OR REQUESTS ARE DIRECTED TO SECURE CONFIRMATION DIRECTLY FROM THE COURT AS TO WHETHER OR NOT THE MOTION OR REQUEST HAS BEEN GRANTED. *ONLY THE COURT* MAY GRANT OR DENY SUCH A MOTION OR REQUEST.

Dated: JAN 24 2012

/S/ RICHARD L. SPEER
RICHARD L. SPEER
United States Bankruptcy Judge