

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA

Plaintiff(s),

ORDER

-against

CV 12-00110 (JFB)(ETB)

ALBERT C. LINDAHL

Defendant(s),

-----X

The above-captioned case has been referred to E. Thomas Boyle, Magistrate Judge, for purposes of scheduling discovery, resolution of discovery disputes, settlement conferences and any other purposes set forth at 28 U.S.C. § 636(b)(1)(A).

An initial scheduling conference will be held in this case at 11:00 a.m. on May 4, 2012 before Judge Boyle, in Courtroom 830, Alfonse M. D’Amato U.S. Courthouse, Central Islip, New York. All counsel must be present unless excused by the court. Counsel for plaintiff(s) is obligated to serve a copy of this order on each defendant.

COUNSEL FOR PLAINTIFF(S) OR PLAINTIFF PRO SE IS OBLIGATED TO SERVE A COPY OF THIS ORDER ON EACH DEFENDANT.

1. Planning Meeting and Automatic Disclosure - Rule 26(f) and (a)(1), Fed. R. Civ. P.

The parties are required to comply with the automatic disclosure rules contained at Rule 26(a)(1) of the Federal Rules of Civil Procedure. The parties are directed to provide the required information within fourteen (14) days after the planning meeting of the parties, as required by Rule 26(f) of the Federal Rules of Civil Procedure. This planning meeting should occur as soon as practicable, but no later than twenty-one (21) days before the initial scheduling conference.

2. File a Proposed Discovery Plan - Rule 26(f), Fed. R. Civ. P.

A proposed discovery plan should be filed with the Court within fourteen (14) days after the planning meeting.

The proposed discovery order should include the following:

1. Deadline for motions to amend pleadings including joinder of additional parties.
2. Date for service of initial document production demands and interrogatory requests with responses served within thirty (30) days.
3. Deadline for seeking approval to file any motion for summary judgment.
4. Date for the submission of the pre-trial order.
5. The discovery completion date.
6. Any agreement between the parties relating to the disclosure and discovery of electronically stored information (“ESI”), including the form(s) in which it is to be produced.
7. Any agreement between the parties relating to claims of privilege, including the

procedure to follow for returning inadvertently produced materials.

3. Court Intervention

The parties are advised that discovery demands must be served at least forty-five (45) days in advance of the discovery completion date to support a request for court intervention. Any motion for court intervention relating to discovery must be filed at least thirty (30) days prior to discovery completion.

4. Modification of a Scheduling Order

Any request for modification of a scheduling order must be filed and served prior to the discovery completion date. A scheduling order will be modified by the Court only upon a showing of good cause. Fed. R. Civ. P. 16(b). Extensions -- not exceeding a total of 120 days-- shall be granted based upon good cause. Any further modification shall only be granted upon a showing of manifest injustice. Fed. R. Civ. P. 16(e).

5. Request for a Conference

Any request for a conference with the Court shall be in writing and shall set forth the reason for the request and at least two (2) dates on which all parties are available.

Individual Practices

The individual rules of the Court can be found in the New York Law Journal (www.nylj.com), at the Eastern District of New York web site at "www.nyed.uscourts.gov" or copies may be obtained from the Clerk's Office of the Eastern District of New York.

ELECTRONIC CASE FILING (ECF) - All documents filed with the court shall be filed electronically, in compliance with Administrative Order 2004-08, dated June 22, 2004.

SO ORDERED:

Dated: Central Islip, New York
January 23, 2012

/s/ E. Thomas Boyle
E. THOMAS BOYLE
United States Magistrate Judge

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE WESTERN DISTRICT OF MISSOURI

IN RE: ARTHUR E. THOMPSON)	
MARY E. THOMPSON,)	Case No. 11-21569-DRD
)	
Debtors.)	Chapter 7
_____)	
ARTHUR EUGENE THOMPSON and)	
MARY ELIZABETH THOMPSON,)	
)	
Plaintiffs,)	
)	
v.)	Adv. No. 11-02054
)	
UNITED STATES OF AMERICA, ex rel.)	
INTERNAL REVENUE SERVICE,)	
)	
Defendant.)	
_____)	

JUDGMENT

THIS MATTER comes before the Court upon Plaintiffs' Complaint to Determine Dischargeability of their federal income tax debts.

WHEREFORE it appears to the Court that the Plaintiffs and the United States are in agreement as to the disposition of this adversary proceeding pursuant to the stipulation filed herein, it is

ORDERED AND ADJUDGED that the stipulation between Plaintiffs and the United States is APPROVED and ADOPTED by the Court, and it is

FURTHER ORDERED as follows:

1. The Plaintiffs' 2004, 2005, and 2006 federal income tax liabilities are dischargeable pursuant to 11 U.S.C. §§ 507(a)(8) and 523(a)(1).
2. The Plaintiffs' federal income tax liability for tax year 2007 is not subject to

discharge pursuant to 11 U.S.C. §§ 523(a)(1)(A) and 507(a)(8)(A)(I).

3. The IRS filed a Notice of Federal Tax Lien in Cooper County, Missouri, with regard to Plaintiffs' unpaid federal income tax liabilities for the 2004, 2005, and 2006 tax years. This Notice of Federal Tax Lien continues in effect and attaches to all existing property and rights to property, including exempt property, belonging to the Plaintiffs both on and prior to the filing of their Chapter 7 petition. *See* 11 U.S.C. § 522(c)(2)(B); 26 U.S.C. § 6322

4. Each party shall bear its own costs and attorney's fees.

Dated: January 23, 2012

/s/Dennis R. Dow
HONORABLE DENNIS R. DOW
CHIEF UNITED STATES BANKRUPTCY JUDGE

Approved by:

MARY ELIZABETH PHILLIPS
United States Attorney

/s/ Erin Lindgren
ERIN E. LINDGREN
Trial Attorney
U.S. Department of Justice, Tax Division
P.O. Box 7238, Ben Franklin Station
Washington, DC 20044
Telephone: (202) 353-0013
E-mail: Erin.Lindgren@usdoj.gov
Attorney for the United States

Dated: January 17, 2012

/s/ Alan Meyer
ALAN MEYER
400 S. Ohio Street
Sedalia, MO 65301
Telephone: (660)827-1005
Facsimile: (660) 851-0810
Email: alanmeyerlaw@gmail.com
Attorney for Debtors/Plaintiffs

Dated: January 17, 2012

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JAMES ALLEN MACHEN

Plaintiff,

v.

SCOTT IVERSON, et. al.

Defendants.

Civ. No. 11-1557 (DWF/JSM)

REPORT AND RECOMMENDATION

The above matter came before the undersigned on Defendants Clifford Lozinski and Johnson, West & Co., PLLC's Motion to Dismiss [Docket No. 10]; Defendants Thomas Flynn, Thomas Alexander, and Larkin, Hoffman Daly & Lindgren LTD's Motion to Dismiss [Docket No. 16]; Defendant Central Mortgage's Motion to Dismiss [Docket No. 18]; Defendant Minnesota Department of Revenue's Motion to Dismiss [Docket No. 20]; Defendant City of Chaska's Motion to Dismiss [Docket No. 28]; Defendants Anne Barry Moh and the Hon. Bruce Peterson's Motion to Dismiss [Docket No. 31]; Defendants Patricia Bodin and ProTitle, Co.'s, Motion to Dismiss [Docket No. 32]; Defendants Richard Stanek, Hennepin County Support and Collections, Bev Lowe, Ken Collias and Karen Extel's Motion to Dismiss [Docket No. 37]; Defendants Saxon Mortgage and Deutsche Bank's Motion to Dismiss or in the Alternative for a More Definite Statement [Docket No. 42]; Defendants KleinBank, Daniel Klein and Matthew Klein's Motion to Dismiss [Docket No. 56]; Defendants Associated Bank, National Association and Gerald Anderson's Motion to Dismiss [Docket No. 63]; Defendant Joseph Dicker's Motion to Dismiss [Docket No. 67]; Defendant John Hedback's Motion

to Dismiss [Docket No. 69]; the United States' Motion to Substitute as Proper Defendant for Scott Iverson and Patricia Patton and Motion to Dismiss [Docket No. 84]; Defendant American Family Insurance's Motion to Dismiss [Docket No. 91]; Defendant Michael L. Perlman's Motion to Dismiss [Docket No. 98]; and Plaintiff James Allen Machen's Notice of Voluntary Dismissal [Docket No. 102].

This matter was referred to the undersigned Magistrate Judge for a Report and Recommendation by the District Court pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.1.

I. BACKGROUND

A. The Complaint

On June 13, 2011, plaintiff James A. Machen, who is pro se, filed a Complaint naming the above-listed defendants (collectively, the "moving defendants"), as well as his former wives Mahlega Abdesharafat Athanta Crosswell and Robin Campbell (f/k/a Robin Machen), Andrew Moran, SMG, Inc., Michael Morton, Mark Saliterman, Morton Equity, LLC, "KL Title/Brend[a] [C]olston [#L 20355319]," Zurich Assurance of America, Bank of America Mortgage, Aislee Smith, Commercial Properties, Commercial Partners and Mallie Sharafat. Complaint [Docket No. 1].

It is difficult to either characterize or summarize Machen's Complaint. The caption indicates that the Complaint is for "RICO and Discrimination and Fraud." Complaint, p. 2. Generally, Machen has alleged that the defendants engaged in a RICO-style conspiracy to defraud him of his "rightful earned accumulations of equity, redistributing unjust enrichment to all involved, allegedly breaking the laws to achieve its end." Id., p. 1. Similarly, Machen asked that the Complaint be considered a "RICO

filing based on the treble damages contained in the RICO Act of 1970.” Id. Machen also invoked the “Civil Rights Act.” He did not elaborate on this cause of action except to say that “the 1964 & 1967 Civil Rights Acts have not eradicated the undercurrent bias, having been preceded by Plessy V. Ferguson [sic] 1898 and then 1954 Brown v. Bd. of Education for school integration.” Id. In an affidavit that accompanied the Complaint, Machen bemoaned his poor relationship with his adult children, which he blamed on his former wife, Robin Campbell. Affidavit of James Allen Machen (“Machen Aff.”), pp. 1-2. [Docket No. 2]. According to Machen, “[t]ime now for all to get their due for the wrong doings and alleged crimes committed in this long excruciating suffering caused by racism, jealousy and unconstitutional treatment while covering for each other, while breaking w. ethics and the laws of governance to project each citizen.” Id. The Complaint does not distinguish between any of the defendants regarding these alleged causes of action.

As best as this Court can discern, the events at issue occurred between 1998, when the IRS began an audit of Machen’s business taxes, and March, 2009, when Machen was forced from his home. Id., ¶¶1, 20. The Complaint references numerous wrongs that apparently Machen has suffered over eleven years including the IRS audit, divorce and child support enforcement proceedings, a bankruptcy, a mortgage foreclosure, the sheriff’s sale of his residential property, and water damage to his commercial property. See generally Complaint. The Complaint is organized into three sections entitled “Averments and Background,” “Annihilation of finality of equity, career and lifestyle,” and “Final Blow.” Complaint, pp. 1, 3, 5.

Machen alleged that defendant Scott Iverson of the IRS conducted a tax audit of Machen's business, Jamco International, Inc., in 1998. Complaint, ¶1. Defendant Clifford Lozinski of the Johnson, West & Co. firm, performed tax work for Jamco and approved amounts assessed by the IRS and did not allow the "deductive cash payment" that Machen made to his former wife. Id., ¶¶2, 3.¹ Machen alleged that defendant City of Chaska somehow cheated him out of an overpayment he made to the City in connection with a property that then went into foreclosure. Id. ¶3. As against defendant Associated Bank, Machen alleged that he took a loan out in 2000 and the Bank charged him 10% interest, but "Gerard [sic] Anderson kept the funds to be paid over two years but charged me interest of 10% while I had only partial use of the funds." Id., ¶4. The Complaint alleged that "Bank of America has an accounting history document reflecting that they were paid in full, \$398,000 in late July, 2004 and that it remains unknown what Associated Bank the 2nd mortgage holder was paid!" Complaint, ¶14. Paragraph 18 alleged that "[t]hen SMG INC a non existing (exhibit) entity was paid \$536,000 via Associated Bank would implicate Associated Bank to be involved in the fraud." ²

Paragraphs 6 and 10 of the Complaint refer to dissolution proceedings of Machen's marriage to defendant Robin Campbell, over which defendant Hennepin County District Court Judge Bruce Peterson presided in 2002 and 2003. Machen

¹ The Court interpreted this to mean that Machen believed that he was entitled to a tax deduction for payments made to his former wife and that Lozinski did not account for the deduction.

² Machen's reference to an "exhibit" apparently relates to a "Certificate of No Record" issued by the Minnesota Secretary of State's Office on December 12, 2010, indicating that the Secretary of State could not locate records for "SMG Inc." The Certificate is attached to Machen's affidavit [Docket No. 2-1].

alleged that in the time period of 2003-2004, his former bankruptcy lawyer, defendant Joseph Dicker, “bamboozled” him in connection with the dissolution proceedings by having him deposit funds that Machen owed his former wife for child support with the Clerk of Court and by telling Machen that if he did not provide the security for his child support payments as required by Judge Peterson, that Judge Peterson would take away Machen’s residence. Complaint, ¶10.

As against defendants Daniel Klein, Matthew Klein, and KleinBank (formerly First National Bank of Chaska), Machen alleged wrongdoings in connection with a bankruptcy filing involving Machen’s company, Jamco. Id., ¶11. Machen claimed that these defendants “posted, thru their employees erratic accounting payments which when started with the incorrect balance would end up with a much larger balance due than borrowed. They did submitted [sic] a wrong doing or fraud claim in BKY 02.90781 account in order to be unjustly enriched by more than \$750,000 owed and paid by a U.S. trustee without question.” Id. Machen asserted that attorneys Thomas Flynn, Thomas Alexander and the law firm of Larkin, Hoffman, Daly, Lindgren “bamboozled” the bankruptcy trustee by forming a collusive relationship with defendant Mahlega Abdsharafat Athana Crosswell (one of Machen’s former wives) that somehow transferred \$1,000,000 to Abdsharafat. Id., ¶12-13. Machen also complained of Flynn’s failure to object when the bankruptcy court converted Jamco’s bankruptcy to a Chapter 7 liquidation. Id., ¶9.

Defendant John Hedback is named in the caption of the Complaint, but there is no reference to him in the body of the Complaint. According to Hedback, he was the Chapter 7 bankruptcy trustee for Jamco who Flynn allegedly “bamboozled.” Answer of

Defendant John A. Hedback, ¶7 [Docket No. 22]. Hedback's Answer indicated that Jamco filed a Chapter 11 bankruptcy in the District of Minnesota on April 5, 2002 and that the bankruptcy was converted to a Chapter 7 on May 27, 2001 (sic).³ Id., ¶¶3, 5. In his role as bankruptcy trustee, Hedback paid claims submitted by defendant Mallie Sharafat pursuant to a Trustee's Final Report and Proposed Distribution. Id., ¶7.

Machen accused defendant Mark Saliterman of manufacturing a fraudulent loan in connection with Machen's residence and that defendants K.L. Title, Brenda Colston, Pro-Title, Patricia Bodin, Central Mortgage, Saxon Mortgage and Deutsche Bank participated in the fraud. Id., ¶14-17. Bev Lowe, Hennepin County Sheriff Richard Stanek and attorney Michael Perlman were named as defendants as a result of their apparent involvement in a sheriff's sale of Machen's residence following a mortgage foreclosure. Complaint, ¶¶18, 20.

Machen named American Family Insurance as a defendant because "American Family Ins. Piggy-backed on the public knowledge of the plaintiff information and voided out payment for hail storm damage to personal residence." Id., ¶21. He named the Minnesota Department of Revenue ("MDOR") as a defendant because it "manufactured documents to assess insane taxes not owed without the plaintiff[s] actual signature to further halt the career of the plaintiff and lockout of the American Dream!" Id., ¶22.

Machen alleged that the banks and mortgage lenders named as defendants "racketeered" to confiscate \$3,000,000 in property from him. Id., ¶19. As damages, Machen sought \$129,289,500. Id., p. 7.

³ This appears to be a typographical error. The Bankruptcy Court converted Jamco's bankruptcy from a Chapter 11 to a Chapter 7 on May 27, 2003. Jamco International, Inc., Bankruptcy Case No. 02-90781(D. Minn.) [Docket No. 76].

B. Defendants' Responses to the Complaint and Motions to Dismiss

The MDOR, Joseph Dicker, John Hedback, and Michael Perlman answered Machen's Complaint [Docket Nos. 8, 15, 22, 78] and also moved for dismissal [Docket Nos. 20, 67, 69, 98]. The other moving defendants filed motions to dismiss in lieu of answering. There is a common theme among the moving defendants' arguments for dismissal—Machen's Complaint is a nearly incoherent collection of rambling statements that does not meet the pleading standards of Rule 8 of the Federal Rules of Civil Procedure and must be dismissed pursuant to Rule 12(b)(6). Nonetheless, because each of the moving defendants addressed different allegations lodged against them, the Court will briefly describe their motions.

Lozinski Defendants. Defendants Lozinski and Johnson, West & Co. (the "Lozinski Defendants") moved for judgment on the pleadings on the basis of Rule 12(b), Machen's failure to comply with Rule 8(a), and lack of federal subject matter jurisdiction or diversity jurisdiction. Memorandum of Law of Defendants Clifford Lozinski and Johnson, West & Co., PLLC in Support of their Motion for Judgment on the Pleadings ("Lozinski Defs.' Mem."), pp. 3-7 [Docket No. 12]. These defendants also claimed that the Complaint failed to adequately plead a RICO claim and that to the extent that Machen's allegations against them could be construed to be an accounting malpractice claim, such claims are subject to a six-year statute of limitations pursuant to Minn. Stat. §541.05. Because Machen's allegations concerned actions that the Lozinski Defendants took in 1998, his claims based on accounting malpractice are time-barred. Id., pp. 8-9.

Larkin, Hoffman Defendants. Defendants Thomas Flynn, Thomas Alexander, Larkin, Hoffman Daly & Lindgren, Ltd., Patricia Bodin and Pro Title Co. (the “Larkin, Hoffman Defendants”) moved for dismissal pursuant to Rule 12(b)(6). Defendants Thomas Flynn, Thomas Alexander, Larkin Hoffman Daly & Lindgren, Ltd., Patricia Bodin, and Pro Title, Co.’s Memorandum of Law in Support of Motion to Dismiss (“Larkin, Hoffman Mem.”), pp. 3-5 [Docket No. 90]. The Larkin Hoffman Defendants argued that Machen lacked standing to bring a RICO claim because nowhere in the Complaint did he allege conduct by the Larkin, Hoffman Defendants that could be construed to constitute racketeering, and even if Machen could establish standing, he has failed to allege facts to make out a RICO claim. Id., pp. 7-11. As to Machen’s claim of discrimination, the Larkin Hoffman Defendants contended it fails to state a claim because Machen was never employed by them, nor did he exhaust his administrative remedies by filing a charge of discrimination. Id., p. 11. The Larkin Hoffman Defendants further submitted that any claim of fraud against them failed because Machen has not met the heightened pleading requirements of Rule 9(b). Id., pp. 11-13.

The Larkin, Hoffman Defendants also maintained that Machen did not plead legal malpractice against the Larkin, Hoffman attorneys, although, “legal malpractice is the only claim that [the Larkin, Hoffman] defendants can imply from [Machen’s] vague factual assertions.” Id., p. 13. The Larkin, Hoffman Defendants asserted that to the extent that the Complaint can be construed to allege legal malpractice, it must be dismissed because Machen failed to allege any of the elements of legal malpractice, as defined by Minnesota law. Id., p. 13-14 (citing Blue Water Corp. v. O’Toole, 336 N.W.2d 279, 281 (Minn. 1983) (defining the elements of legal malpractice)).

Finally, the Larkin, Hoffman Defendants alleged that all of Machen's claims are time-barred because the statute of limitations for RICO claims is four years, the statute of limitation for fraud and legal malpractice is six years, and the statute of limitations for filing a discrimination charge under Title VII of the Civil Rights Act is 300 days. Id., pp. 14-15. Although the limitations periods for fraud, RICO and legal malpractice claims may be tolled by fraudulent concealment, these defendants contended that Machen hadnot alleged tolling based on fraudulent concealment. Id., p. 16.

Central Mortgage. Defendant Central Mortgage moved for dismissal pursuant to Rule 12(b)(6) because "[i]t is clear, based on the rambling allegations contained in the Complaint, that Plaintiff has failed to state a claim against Central upon which relief can be granted." Central Mortgage Company, Inc.'s Memorandum of Law in Support of its Motion to Dismiss ("Central Mortgage Mem."), p. 1 [Docket No. 51]. Machen alleged that an unidentified mortgage was moved to and from various entities. Complaint, ¶17. However, Central Mortgage never held an interest in any of Machen's mortgages. Affidavit of Lou Ann Howard⁴ ("Howard Aff."), ¶5 [Docket No. 52]. Rather, Central Mortgage serviced a loan executed by Machen in favor of Maribella Mortgage from July 2, 2006 to August 8, 2008. Id., ¶4. Because Machen has not alleged any claims against Central in connection with its servicing of the mortgage, his Complaint against Central Mortgage must be dismissed. Central Mortgage Mem., p. 5. Central Mortgage also asserted that based on the standard for summary judgment, there were no genuine

⁴ Lou Ann Howard is a Senior Vice President for Central Mortgage. Howard Aff., ¶1.

issues of material fact that would preclude summary judgment in its favor. Id., pp. 3-4.⁵ In the alternative, Central sought an order requiring Machen to amend his Complaint pursuant to Rule 12(e) to provide a more definite statement of his claims against Central. Id. Finally, Central Mortgage moved for dismissal because Machen never properly served it. Id., p. 6; Howard Aff., ¶6.

MDOR. The MDOR moved to dismiss the Complaint pursuant to Rule 12(b)(6) and on the ground that Machen's claims against it are barred by the Eleventh Amendment, which has not been abrogated by the RICO statute. Memorandum in Support of Minnesota Department of Revenue's Motion to Dismiss ("MDOR Mem."), pp. 2-3. [Docket No. 71]. Additionally, to the extent that Machen's Complaint could be construed to be an appeal of a tax assessment by the MDOR, those matters are within the exclusive jurisdiction of the Minnesota Tax Court. Id., p. 4.

City of Chaska. The City of Chaska Economic Development Authority ("Chaska EDA") moved to dismiss Machen's Complaint pursuant to Rule 12(b)(6) and because any RICO claims against the Chaska EDA are time-barred. City of Chaska Economic Development Authority's Memorandum of Law in Support of Its Motion to Dismiss ("Chaska EDA Mem."), pp. 2-4 [Docket No. 87].

⁵ Central Mortgage's invocation of Rule 56 was based on its argument that the Court could convert a motion to dismiss to a motion for summary judgment if it considered matters outside the pleadings. Central Mortgage Mem., p. 3. Although not explicit, Central Mortgage appeared to be referring to the Howard affidavit submitted for the Court's consideration.

Barry and Peterson. Defendants Anne Barry⁶ and Judge Bruce Peterson moved to dismiss Machen's Complaint on Eleventh Amendment immunity grounds. Judge Peterson is a judge of the Minnesota State District Court, and Anne Barry is the Deputy Commissioner of the Minnesota Department of Human Resources. Memorandum of Law in Support of Motion to Dismiss of Defendants Anne Barry and Judge Bruce Peterson ("Barry/Peterson Mem."), pp. 1-3 [Docket No. 66]. These defendants asserted that the State has not waived its immunity in connection with Machen's claims. Id., p. 3. Additionally, to the extent that Machen was suing Judge Peterson in his individual capacity, those claims are barred by judicial immunity. Id., p. 4. Finally, although Barry is listed as a defendant in the case caption, she is not referenced at all in the body of the Complaint. Therefore, these defendants argued that the Complaint as to Barry violates Rule 8(a) and should be dismissed. Id., p. 6.⁷

Hennepin County Defendants. Defendants Hennepin County Sheriff Richard Stanek, Hennepin County Support and Collections, Bev Lowe, Ken Collias and Karen Extel (Axtel) (the "Hennepin County Defendants") moved for dismissal pursuant to Rule 12(b)(6), noting that Stanek, Collias and Extel (Axtel) are not mentioned anywhere in the Complaint except the caption. Memorandum in Support of Motion to Dismiss by Defendants Richard Stanek (Sheriff), Hennepin County Support and Collections, Bev Lowe, Ken Collias and Karen Extel ("Hennepin County Defs.' Mem."), p. 1 [Docket No.

⁶ The Complaint incorrectly identified Anne Barry as Ann Barry Moh. Memorandum of Law in Support of Motion to Dismiss of Defendants Anne Barry and Judge Bruce Peterson, p. 1 [Docket No. 66].

⁷ These defendants objected that the Complaint was not signed and therefore violated Rule 11. Barry and Judge Peterson Mem., p. 6. The Court notes that Machen's notarized signature appears on page 7 of the Complaint.

75].⁸ According to the Hennepin County Defendants, “there is absolutely no explanation as to how Richard Stanek, Bev Lowe, Ken Collias, Karen Extel (Axtel) or Hennepin County Support and Collections committed any of Plaintiff’s accusations and allegations.” Id., pp. 2-3.

Saxon/Deutsche Bank Defendants. Defendants Saxon Mortgage Services, Inc. and Deutsche Bank National Trust Company (incorrectly called “Deuche Bank” in the Complaint) (the “Saxon/Deutsche Bank defendants”) moved for dismissal pursuant to Rule 12(b)(6) or, alternatively for a more definite statement pursuant to Rule 12(e). Defendants Saxon Mortgage and Deutsche Bank’s Memorandum of Law in Support of Motion to Dismiss or, Alternatively, for a More Definite Statement (“Saxon/Deutsche Bank Mem.”), pp. 2-7 [Docket No. 44]. These defendants asserted, as have others, that Machen made no effort to describe the facts, or the “who what, when, where, how” that would support either a fraud or RICO claim against them. Id., p. 5. The Saxon/Deutsche Bank Defendants also maintained that Machen did not properly serve Deutsche Bank, and has improperly identified Deutsche Bank as “Deuche Bank” in the Complaint. Id., p. 6. As a result, these defendants argued that the Court lacked jurisdiction over Deutsche Bank and the Complaint against it must be dismissed. Id., pp. 6-7.

KleinBank Defendants. Defendants KleinBank, Daniel Klein, and Matthew Klein (the “KleinBank Defendants”) moved for dismissal on the grounds that Machen’s Complaint failed to establish a basis for jurisdiction in the Federal District Court.

⁸ Machen implied that Hennepin County Child Support and Collections committed “grand larceny” by overbilling Machen for child support payments due to his former wife, but there are no facts to support this statement. Complaint, ¶10.

Memorandum of Law of Defendants KleinBank, Daniel Klein and Matthew Klein in Support of Their Motion to Dismiss (“KleinBank Mem.”), pp. 2-3 [Docket No. 58]. The KleinBank Defendants noted that Machen did not serve Matthew Klein with the Summons and Complaint, and that Daniel Klein, who was personally served, is not authorized to accept service on behalf of KleinBank, as he is not an officer. Affidavit of Charles Arndt (“Arndt Aff.”), ¶¶ 4-6 [Docket No. 60]. As a result, KleinBank was never properly served pursuant to Fed. R. Civ. P. 4(h)(1)(B). KleinBank Mem., p. 4. The KleinBank Defendants also moved for judgment on the pleadings, arguing that Machen failed to plead fraud with the requisite specificity and failed to satisfy RICO pleading requirements. Id., pp. 4-6.

Associated Bank Defendants. Associated Bank, National Association and Gerald Anderson (“Associated Bank Defendants”) moved for dismissal pursuant to Rule 12(b)(6), arguing that Machen’s Complaint did not describe any cognizable claims against them, and if Machen was alleging fraud, he failed to do so with the requisite particularity. Associated Bank, National Association’s and Gerald Anderson’s Memorandum in Support of Motion to Dismiss Plaintiff’s Complaint (“Associated Bank’s Mem”), p. 2 [Docket No. 64]. In addition, Machen alleged that his last contact with Associated Bank or Anderson was in 2004, which the Associated Bank Defendants contended barred any claims based on fraud or breach of contract based on the six-year statute of limitations. Id., p. 3. Finally, these defendants noted that there is no evidence that Associated Bank or Anderson were ever properly served with the Summons and Complaint. Therefore, the Complaint should be dismissed with prejudice. Id.

Joseph Dicker. Joseph Dicker's memorandum of law in support of his motion to dismiss provided some context for the allegations against him in Machen's Complaint. Memorandum of Law in Support of Motion to Dismiss of Joseph W. Dicker ("Dicker Mem.") [Docket No. 101]. Dicker is an attorney who represented Machen in connection with Machen's Chapter 13 bankruptcy. Id., p. 2. Dicker advised Machen that he was at risk of losing his homestead as a result of a property sequestration order issued by the family court as financial security for Machen's support obligations to his former wife. Id. Machen asked Dicker to represent him in the family court proceedings, which Dicker did. Id. Although Machen alleged that Dicker "bamboozled" him in connection with the dissolution proceedings, Dicker stated that all of his actions were undertaken in good faith and with the "express consent and authority and at the direction of the Plaintiff." Id., p. 3.

Dicker moved to dismiss the Complaint on the basis of lack of subject matter jurisdiction, failure to state a claim, failure to plead fraud with specificity, and failure to properly plead a RICO claim. Id., pp. 3-7. Additionally, to the extent that Machen's Complaint could be construed to allege breach of contract or fraud against Dicker, those claims are barred by the six-year statute of limitations. Id., p. 8.

John Hedback. John Hedback, the former Chapter 7 bankruptcy trustee, moved for dismissal on the grounds that the Complaint failed to meet the pleading standard of Rule 8(a), Machen failed to plead fraud with particularity pursuant to Rule 9(b), the Complaint violated Rule 11 standards, and the Complaint failed to state a claim on which relief could be granted pursuant to Rule 12(b)(6). Defendant John A. Hedback's

Motion to Dismiss (“Hedback Motion”), p. 1 [Docket No. 69].⁹ Hedback also moved for judgment on the pleadings. Id.

United States. The United States moved to dismiss IRS employees Scott Iverson and Patricia Patton from the lawsuit and to substitute the United States as the proper defendant. Memorandum in Support of the United States’ Motion to Substitute Itself as the Proper Defendant and to Dismiss (“Gov’t Mem.”), p. 1 [Docket No. 85]. The Government then moved for dismissal pursuant to Rules 12(b)(1) and 12(b)(5) for lack of subject matter jurisdiction and insufficient service of process. Id.

Patton is not referenced in the body of the Complaint, although the Government has identified her as an IRS employee. Id., p. 2. The Government argued that any possible relief in this matter could only come from the United States, not from Iverson and Patton. Id. Therefore, the United States should be substituted as the proper defendant. Gov’t Mem., p. 2. However, even if the United States were substituted as the defendant, the claims against it must be dismissed on the following grounds: (1) the United States has not waived its sovereign immunity and consented to be sued and, accordingly, the Court does not have subject matter jurisdiction over the matter; (2) Machen failed to allege that he exhausted his administrative remedies before bringing suit in federal district court for damages as a result of unauthorized collection of taxes pursuant to 26 U.S.C. §7433(a); (3) to the extent that Machen’s allegations could be construed as a refund suit, he failed to exhaust his administrative remedies as required

⁹ Hedback stated in his motion he would file a memorandum of law and affidavit, once a date had been set for the hearing. Hedback Motion, p. 1. No date for a hearing was set as the Court determined it would decide all motions on the papers. See Order, Amended Order, and Second Amended Order [Docket Nos. 79, 88, 97]. Thus, Hedback filed no memorandum or affidavit.

by 26 U.S.C. §7433; and (4) Machen failed to properly serve his summons and complaint on the United States, Patton, or Iverson. Id., pp. 4-6.

American Family. American Family Insurance insured Machen's residence. Affidavit of Troy Bachmann ("Bachmann Aff."), ¶3; Ex. 1, (insurance policy issued to Machen). [Docket No. 94]. On August 11, 2007 Machen submitted a claim for storm damage to his roof and American Family paid \$1,966.35 on the claim. Bachmann Aff., Ex. 2 (claim record of payment). Machen alleged additional storm damage beyond the payment American Family made and the matter was submitted to two appraisers and an umpire, as provided for in the policy. Bachmann Aff., Ex. 1, p. 5. An appraisal award was made on November 26, 2008, denying Machen any further payments for the storm damage. Id., Ex. 3. American Family forwarded the award to Machen on December 4, 2008 and then wrote to him again on December 18, 2008, indicating that American Family "will be unable to consider payment for replacement of your roof." Id.; Exs. 4, 5.

American Family moved for dismissal pursuant to Rule 12(b)(6). Memorandum in Support of American Family Insurance's Motion to Dismiss ("American Family Mem."), pp. 3-4. Additionally, as the insurance policy contained a two-year statute of limitations on suits brought against it, with the limitations period running from the date of loss, and the hail damage referenced in the Complaint occurred on August 11, 2007, American Family contended Machen's claim against it is now time-barred. Affidavit of Troy Bachmann, Ex. 1, p. 9 (¶19) (insurance policy issued to Machen); American Fam. Mem., p. 5; Complaint, ¶21.

Michael Perlman. Attorney Michael Perlman moved for dismissal pursuant to Rule 12(b)(6), characterizing Machen's Complaint as a "mostly disorganized,

incomprehensible [collection of] statements, if not ramblings or jargon. ” Memorandum in Support of Michael Perlman’s Motion to Dismiss (“Perlman Mem.”), p. 3 [Docket No. 99] (quoting Allen v. Minnesota, Civ. No. 08-4757 (DWF/RLE), 2008 WL 4279506 at *1 (D. Minn., Sept. 10, 2008). In the alternative, Perlman moved to require Machen to provide a more definite statement of the claims against him. Perlman Mem. in Support, p. 3.

The remaining named defendants – Mahlega Abdsharafat Athanta Crowell, Robin C. Campbell (f/k/a Robin Machen), Andrew Moran, SMG, Inc., Michael Morton, Mark Saliterman, Morton Equity LLC, Bank of America Mortgage, KL Title/Brend[a] Colston, Zurich Assurance, Bank of America Mortgage, Aislee Smith, Commercial Properties, Commercial Partners and Mallie Sharafat (collectively, the “non-moving defendants”) — were never served with the Summons and Complaint. See Docket.

C. Machen’s Failure to Respond to the Moving Defendants’ Dispositive Motions and Machen’s “Notice of Cancellation”

On August 16, 2011 this Court ordered Machen to file and serve on or before October 14, 2011, a separate response to each of the thirteen dispositive motions that had been filed at that point. Order, p. 2 [Docket No. 79]. The Order stated that “if plaintiff fails to adhere to the deadlines set forth in this Order, the Court will consider granting defendants’ motions.” Id. The Court noted that Machen was pro se and directed him to the District of Minnesota’s webpage: Representing Yourself (Pro Se) on its website. Id.

The Court issued similar Orders on August 30, 2011, and September 16, 2011, after the Government and American Family had filed their respective dispositive motions. [Docket Nos. 88, 97]. These Orders again required Machen to serve and file

a separate response to each dispositive motion on or before October 14, 2011. Amended Order, p. 3; Second Amended Order, p. 3. The Court again cautioned Machen that the Court would consider granting the pending dispositive motions if he failed to comply with the deadlines described in the Order. Id. Perlman filed his motion shortly after the Second Amended Order was issued. See Docket No. 98 (M. Perlman's Motion to Dismiss, October 6, 2011).

On October 13, 2011, the day before Machen's responses were due, Machen filed a one line statement that stated: "To: All Involved I, James Allen Machen, as Plaintiff, hereby cancels the lawsuit/action, without prejudice." Notice of Voluntary Dismissal [Docket No. 102]. Many of the moving defendants responded to this "cancellation" notice, asking the Court to disregard Machen's attempt to "cancel" his lawsuit without prejudice, and to decide their dispositive motions on their merits. See e.g. Letter to the Court dated October 19, 2011 from counsel for Central Mortgage [Docket No. 103]; Letter to the Court dated October 20, 2011 from the United States [Docket No. 104]; Letter to the Court dated October 21, 2011 from counsel for the Larkin Hoffman Defendants [Docket No. 105]; Letter to the Court dated October 21, 2011 from counsel for the Lozinski Defendants [Docket No. 106]; Reply Memorandum of the KleinBank Defendants [Docket No. 108]; Letter to the Court dated October 21, 2011, from counsel for the Associated Bank Defendants [Docket No. 107]; Letter to the Court dated October 27, 2011 from counsel for the City of Chaska [Docket No. 109]; Letter to the Court from counsel for Saxon/Deutsche Defendants [Docket No. 110]; Letter to the Court dated November 1, 2011 from defendant Hedback [Docket No. 111].

II. ANALYSIS

On October 13, 2011, Machen filed a pleading “cancel[ing] the lawsuit without prejudice.” [Docket No. 102]. At the point he filed this pleading, defendants MDOR, Joseph Dicker, John Hedback, and Michael Perlman had answered Machen’s Complaint and filed motions to dismiss. [Docket Nos. 8, 15, 20, 22, 67, 69, 78, 98]. Other defendants who had been served the Complaint filed motions to dismiss in lieu of answering. Three of those defendants, Central Mortgage, the KleinBank Defendants and American Family, relied on facts outside the Complaint in support of their motions, although none of them moved for summary judgment in the alternative to their motions to dismiss. Central Mortgage did reference Rule 56 and submitted that there were no genuine issues of material fact that would preclude summary judgment in its favor. Central Mortgage Mem., pp. 3-4.

Machen’s attempt to voluntarily dismiss his suit against all defendants without prejudice raises several issues. The initial question this Court must answer is whether Machen’s voluntary dismissal of his suit against all defendants without prejudice (including those who have never been served) “trumps” the motions to dismiss filed by any defendant who had not filed an answer? As set forth below, the Court finds that Machen is entitled to voluntarily dismiss his case without prejudice against any defendant who has yet to be served, and against any defendant who did not file an answer to the Complaint. As to those defendants that answered and filed a motion to dismiss, (MDOR, Dicker, Hedback and Perlman), the Court must next determine whether Machen may unilaterally dismiss his case against them without prejudice, and if he cannot, whether they are entitled to dismissal of his claims against them with or

without prejudice. The Court concludes that Machen may not voluntarily dismiss his claims against MDOR, Dicker, Hedback and Perlman and they are entitled to a dismissal of his case against them with prejudice. Finally, as to those defendants who relied on facts outside the Complaint (Central Mortgage, the KleinBank Defendants and American Family) to support their motions to dismiss, the Court must resolve their motions can be treated as motions for summary judgment, and if yes, whether they are entitled to dismissal of Machen's claims against them with prejudice. Based on the analysis below, the Court finds that it is appropriate to convert Central Mortgage's motion to dismiss to a motion for summary judgment and that it is entitled to dismissal of the claims against it with prejudice. However, as to the KleinBank Defendants and American Family, the Court concludes that their motions cannot be treated as motions for summary judgment, and therefore, the case against them should be dismissed without prejudice.

A. Effect of Machen's Voluntary Dismissal

Machen did not specify the vehicle under which he was "cancelling" his suit without prejudice. However, the Court has treated his pleading as a voluntary dismissal of his suit under Fed. R. Civ. P. 41. This Rule provides in relevant part:

(a) Voluntary Dismissal.

(1) By the Plaintiff.

(A) Without a Court Order. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(B) Effect. Unless the notice ... states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal-or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) By Court Order; Effect. Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper.

Fed. R. Civ. P. 41(a).

Rule 41(a)(1)(A)(i) permits a plaintiff to voluntarily dismiss his suit without prejudice and without any action by the Court when no answer or a motion for summary judgment has been filed. "These two instances have been construed strictly and exclusively." Safeguard Business Systems, Inc. v. Hoeffel, 907 F.2d 861, 863 (8th Cir. 1990). "Because the rule permits dismissal as of right, it requires only notice to the court, not a motion, and permission or order of court is not required." Id. (citing 5 J. Moore, Moore's Federal Practice ¶ 41.02, at 41-14 (1988); 9 C. Wright & A. Miller, Federal Practice & Procedure § 2363, at 159 (1971)). As the Eighth Circuit explained:

In Foss v. Federal Intermediate Credit Bank, 808 F.2d 657, 660 (8th Cir.1986), we recognized that the rule "must not be stretched beyond its literal terms." Similarly, other courts have held that Rule 41(a)(1) creates a bright line that leaves no discretion to the courts. See, e.g., Santiago v. Victim Serv. Agency, 753 F.2d 219, 222 (2d Cir.1985)¹⁰; Thorp v. Scarne, 599 F.2d 1169, 1175 (2d Cir.1979). Thus, we consider only whether an answer or a motion for summary judgment was filed before the notice of voluntary dismissal.

¹⁰ Overruled on other grounds by Gell v. Hartmarx Corp., 496 U.S. 384 (1990), overruling recognized by Valley Disposal, Inc. v. Central Vermont Solid Waste Mgmt. Dist., 71 F.3d 1053, 1054 (2d Cir. 1995).

Id. “Rule 41 is designed to ‘fix the point at which the resources of the court and the defendant are so committed that dismissal without preclusive consequences can no longer be had as of right.” Id. (quoting In re Piper Aircraft Distrib. Sys. Antitrust Litig., 551 F.2d 213, 220 (8th Cir.1977)). “The effect of a voluntary dismissal without prejudice is to render the proceedings a nullity and leave the parties as if the action had never been brought.” In re Piper Aircraft Distrib. Sys. Antitrust Litig., 551 F.2d 213, 219 (8th Cir. 1977) (citations omitted). In such circumstances, “the district court [is] therefore, without jurisdiction to pass upon the merits of the case.” Foss, 808 F.2d at 660.

Based on the explicit language of Rule 41(a) and the unambiguous holdings of the Eighth Circuit, this Court finds that Machen’s voluntary dismissal of the case as to all moving defendants who were not served or if served, did not answer the Complaint or file a motion for summary judgment, must be given effect. While the Court is highly sympathetic to the time and effort expended by those defendants who pursued motions to dismiss in lieu of an answer,¹¹ “Rule 41 * * * sanctions no * * * case by case analysis of the amount of effort expended by defendants. * * * We have consistently held that Rule 41(a)(1) means what it says.” Foss, 808 F.2d at 660 (quoting Carter v. United States, 547 F.2d 258, 259 (5th Cir.1977)). In short, Machen’s voluntary dismissal before certain defendants were served or before certain moving defendants answered

¹¹ These defendants’ efforts may not be completely wasted. “Rule 41(a)(1) gives a plaintiff a maximum of two bites at the apple.” In re Piper, 551 F.2d at 220. Should Machen bring another suit making the same claims and again file a voluntary dismissal before an answer or motion for summary judgment, the dismissal will operate “as an adjudication upon the merits.” Id. (quoting Rule 41(a)(1)(B)) (“But if the plaintiff previously dismissed any federal-or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.”).

or brought a motion for summary judgment, divested the Court of jurisdiction to render a decision on their motions.

On these grounds, the Court has no choice but to recommend that Machen's suit against the following defendants be dismissed without prejudice: Scott Iverson, Patricia Patton, Daniel Klein, Matthew Klein, KleinBank, Mahlega Abdsharafat Athanta Crowell, Thomas Flynn, Thomas Alexander, Larkin, Hoffman, Daly Lindgren, Robin C. Campbell, Ken Collas, Karen Extel (Axtel), Ann Barry Moh (Ann Barry), Hennepin County Support and Collections, Andrew V. Moran, Bruce Peterson, Bev Lowe, Deutsche Bank, Saxon Mortgage, Pro-Title Co., Patricia Bodine, Clifford Lozinski; Johnson, West & Co.; Richard Stanek, SMG, Inc., Associated Bank, Gerald Anderson, Michael Morton, Mark Saliterman, Morton Equity, LLC, KL Title/Brend colson #L. 20355319; Zurich Assurance of America; City of Chaska Economic Development Authority, Bank of America Mortgage, Aislee Smith, American Family Insurance, Commercial Properties, Commercial Partners, Mallie Sharafat.¹²

Defendants MDOR, Dicker, Hedback and Perlman answered Machen's Complaint. Therefore, pursuant to Rule 41(a)(2), this Court must determine the terms on which the Complaint should be dismissed as to them, i.e. whether it should be dismissed with or without prejudice.

As for defendants Central Mortgage, American Family Insurance and the KleinBank Defendants, each of these parties submitted affidavits in connection with their motions to dismiss. Consequently, the Court must examine whether it is appropriate to convert their motions to dismiss to motions for summary judgment. If

¹² The Court's decision to recommend dismissal without prejudice against the KleinBank Defendants and American Family is discussed in more detail below.

these motions to dismiss are converted to motions for summary judgment, then the Court may also rely on Rule 41(a)(2) to determine the terms on which the Complaint should be dismissed against these defendants. Hamm v. Rhone-Poulenc Rorer Pharms., Inc., 187 F.3d 941, 950 (8th Cir. 1999) (“A Rule 12(b)(6) motion to dismiss, which has been converted by the district court into a motion for summary judgment, is considered for purposes of Rule 41(a)(1)(i) as a motion for summary judgment.”) (citing Kurkowski v. Volcker, 819 F.2d 201, 203 (8th Cir. 1987); Chambers v. Gesell, 120 F.R.D. 1, 2 (D. D.C. 1988)).

B. Should Central Mortgage, American Family Insurance and KleinBank Defendants’ motions to Dismiss be Converted to Motions for Summary Judgment?

A motion to dismiss pursuant to Rule 12(b)(6) “must be treated as a motion for summary judgment when matters outside the pleadings are presented to and not excluded by the trial Court.” Gibb v. Scott, 958 f.2d 814, 816 (8th Cir. 1992) (quoting Woods v. Dugan, 660 F.2d 379, 380 (8th Cir. 1981)). “Most courts ... view ‘matters outside the pleading’ as including any written or oral evidence in support of or in opposition to the pleading that provides some substantiation for and does not merely recite what is said in the pleadings.” Id. (internal citation and quotation omitted). “The Court has complete discretion to determine whether or not to accept material beyond the pleadings that is offered in conjunction with a Rule 12(b)(6) motion.” Stahl v. United States Dept. of Agric., 327 F.3d 697, 701 (8th Cir. 2003) (internal quotation and citation omitted).

Federal Rule of Civil Procedure 12(d) requires that when the court treats a motion to dismiss as a motion for summary judgment, the parties “must be given a

reasonable opportunity to present all the material that is pertinent to the motion.” The Eighth Circuit has held that “parties have constructive notice that the court will treat the motion as one for summary judgment when the moving party states that it is moving for summary judgment and the parties submit and refer to materials outside the complaint.” Riehm v. Engelking, 538 F.3d 952, 962, n. 5 (8th Cir. 2008); see also Blair v. Willis, 420 F.3d 823, 827 (8th Cir. 2005) (stating that notice to the nonmoving party that the court intends to convert a Rule 12 motion to a Rule 56 motion – “whether actual or constructive – is typically required.”); Angel v. Williams, 12 F.3d 786, 788 (8th Cir. 1993) (Rule 12(b) “does not require the court to give affirmative notice to the parties of its intent to consider matters outside of the complaint” and constructive notice is sufficient when plaintiff has adequate time to respond.). Examples where a party has been deemed to have received constructive notice that a motion to dismiss may be converted to a Rule 56 motion include when opposing party had the opportunity file an amended complaint before a court ruled on the motion and had substantial time to respond to the motion, (see Blair, 420 F.3d at 827), or when the opposing party acknowledged the outside materials in its responsive papers, or has submitted papers outside the complaint for consideration. See Riehm, 538 F.3d at 962, n. 5; Angel, 12 F.3d at 788.

At the same time, in the case involving a pro se party, the Court must proceed with caution in converting a motion to dismiss to a motion for summary judgment. Malaney v. Elal Israel Airlines, 331 Fed. Appx. 772, 774 (2d Cir. 2009) (“A district court may convert a motion to dismiss into a summary judgment motion if the court gives sufficient notice to an opposing party and an opportunity for that party to

respond...notice is particularly important when a party is proceeding pro se.”) (internal citations and quotations omitted); Beacon Enter., Inc. v. Menzies, 715 F.2d 757, 767 (2nd Cir. 1983) (reversing as error the district court’s conversion of a motion to dismiss to a motion for summary judgment without “unequivocal notice” to pro se litigant and noting that “notice is particularly important when a party is proceeding pro se and may be unaware of the consequences of his failure to offer evidence bearing on triable issues.”) (internal citations omitted).

Applying these precepts to the motions filed by Central Mortgage, American Family and the KleinBank Defendants, which relied on materials outside the Complaint, only Central Mortgage discussed summary judgment as an alternative to its motion to dismiss, and even then was not abundantly clear that it was moving for summary judgment in the alternative. Central Mortgage Mem., pp. 2-3. Nonetheless, the Court finds that Central Mortgage’s submission of the Howard affidavit, its explicit references to summary judgment in its memorandum, and its recitation of the summary judgment standard requiring the opposing party to set forth specific facts showing that there is a genuine issue for trial, put Machen on constructive notice that Central Mortgage was asking the Court to convert its motion to dismiss to a motion for summary judgment. Machen did not respond in any way, except to file his notice of dismissal.

On the other hand, the KleinBank Defendants and American Family Insurance did not move for summary judgment in the alternative, and there is no reference in their motions or memoranda to summary judgment, despite the fact that both parties submitted affidavits in support of their motions. Under these circumstances, these defendants did not provide adequate notice to Machen that summary judgment was a

possibility and, therefore, the Court cannot find that he had constructive notice that the Court would treat their motions under Rule 56. Finding that their motions did not constitute a motion for summary judgment, the Court must find that Machen's voluntary dismissal is governed by Rule 41(a)(1)(A)(i) and the Court is divested of jurisdiction to render a decision on their motions.

Based on this analysis, the Court concludes that only Central Mortgage's motion to dismiss can be converted to a motion for summary judgment, and the motions to dismiss American Family and the KleinBank Defendants cannot. Therefore, as earlier indicated, the Court finds that Machen's suit against American Family and the KleinBank Defendants must be dismissed without prejudice.

C. Motions to Dismiss by MDOR, Dicker, Hedback, Perlman and Central Mortgage

1. Standard of Review

In considering a motion to dismiss under Rule 12(b)(6), there are several principles at play which bear on this Court's decision whether to dismiss Machen's suit against the MDOR, Dicker, Hedback, Perlman and Central Mortgage with or without prejudice. For starters, when a party brings a motion to dismiss, the pleadings are construed in the light most favorable to the non-moving party, and the facts alleged in the complaint must be taken as true. Ashley County, Ark. v. Pfizer, Inc., 552 F.3d 659, 665 (8th Cir. 2009). In addition, "the court must resolve any ambiguities concerning the sufficiency of the plaintiffs' claims in favor of the plaintiffs, and give the plaintiffs the benefit of every reasonable inference drawn from the well-pleaded facts and allegations in their complaint." Ossman v. Diana Corp., 825 F. Supp. 870, 880 (D. Minn. 1993) (internal quotation marks and citations omitted). At the same time, to withstand a

motion to dismiss under Rule 12(b)(6), litigants must properly plead their claims under Rule 8 of the Federal Rules of Civil Procedure and meet the principles articulated by the United States Supreme Court in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) and Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009).

Under Rule 8(a)(2), a pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” This pleading requirement does not require detailed factual allegations. Martin v. ReliaStar Life Ins. Co., Civil No. 09-01578 (MJD/AJB), 2010 WL 1840877 at *8 (D. Minn. 2010) (citing Twombly, 550 U.S. at 555). On the other hand, a “pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 555). Thus, to “survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S., at 570). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 556). “[T]he plausibility standard, which requires a federal court complaint to ‘state a claim for relief that is plausible on its face, . . . asks for more than a sheer possibility that a defendant has acted unlawfully.’” Ritchie v. St. Louis Jewish Light, 630 F.3d 713, 717 (8th Cir. 2011) (internal quotation and citation omitted). “Determining whether a complaint states a plausible claim for relief will, . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” Iqbal, 129 S. Ct. at 1950.

A complaint fails to state a claim for relief when it fails to provide fair notice of the grounds for the claims made against a particular defendant by lumping all defendants together and not sufficiently alleging who did what to whom. Tully v. Bank of America, N.A., CIV. NO. 10–4734 (DWF/JSM), 2011 WL 1882665 at *6 (D. Minn. May 17, 2011) (citing Liggins v. Morris, 749 F. Supp. 967, 971 (D. Minn. 1990) (“Plaintiffs assert each of the causes of action against the Defendants generally, but do not otherwise specify which claims are asserted against any particular defendant, or which specific claims each Plaintiff is asserting. Thus, the Bank Defendants, and the Court, are left to guess which Plaintiffs are asserting which claims against which Defendants. The Court concludes that such pleading is inadequate and that Rule 8 requires greater specificity than that found in Plaintiffs’ Amended Complaint.”). See also Gurman v. Metro Hous. & Redevelopment Auth., 2011 U.S. Dist. LEXIS 69977 at *3 (June 29, 2011) (dismissing amended complaint without prejudice¹³ for failing to meet Rule 8 pleading standard and noting that “the Court has repeatedly criticized the filing of ‘kitchen-sink’ or ‘shotgun’ complaints—complaints in which a plaintiff brings every conceivable claim against every conceivable defendant.) (citations omitted); Moua v. Jani-King of Minn., 613 F. Supp. 2d 1103, 1111 (D. Minn. 2009) (“Plaintiffs’ fraud claims fail to satisfy Rule 9(b) because the allegations cluster all the Defendants together without the required specificity to discern the respective roles of the individual defendants in the alleged fraud scheme.”).

In summary, the pleading standard articulated by Rule 8 “does not require detailed factual allegations, but it [does demand] more than an unadorned, the-

¹³ Judge Schiltz stayed his order of dismissal for thirty days to allow plaintiffs to file a second amended complaint that complied with the directives set forth in his order. Gurman, 2011 LEXIS 69977 at *15.

defendant-unlawfully-harmed-me accusation.” Iqbal, 129 S. Ct. at 1949 (internal quotation marks and citations omitted). In making this determination, “the complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible.” Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009) (citations omitted).

Pro se complaints, “however inartfully pleaded” are held to “less stringent standards than formal pleadings drafted by lawyers.” Haines v. Kerner, 404 U.S. 519, 520 (1972). “[I]f the court can reasonably read the pleadings to state a valid claim on which the [plaintiff] could prevail, it should do so despite the [plaintiff’s] failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements.” Barnett v. Hargett, 174 F.3d 1128, 1133 (10th Cir.1999) (quoting Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir.1991)). But the court’s liberal construction does not extend to allowing defective and insufficiently pled claims to proceed. Stone v. Harry, 364 F.3d 912, 914 (8th Cir. 2004) (pro se complaint must allege facts sufficient to support the claims advanced); Martin v. Sargent, 780 F.2d 1334, 1337 (8th Cir.1985). (“[A]lthough it is to be liberally construed, a pro se complaint must contain specific facts supporting its conclusions.”); Kaylor v. Fields, 661 F.2d 1177, 1183 (8th Cir.1981) (“[P]leadings * * *brought pro se [] are to be liberally construed. * * * But a well-pleaded complaint must contain something more than mere conclusory statements that are unsupported by specific facts.”) (citations omitted). Neither may the courts, in granting the deference owed to pro se parties, “assume the role of advocate for the pro se litigant.” Barnett, 174 F.3d 1133.

“Ordinarily dismissal of a [pleading] for failure to comply with Rule 8 should be with leave to amend.” Michaelis v. Nebraska State Bar Ass’n., 717 F.2d 437, 438-39 (8th Cir. 1983). Nonetheless, when a complaint is so deficient or defective that the court is convinced that its defects cannot be cured through re-pleading, dismissal with prejudice is appropriate. Ikechi v. Verizon Wireless, Civ. No. 10-4554 (JNE/SER), 2011 WL 2118797 at *5, n. 6 (D. Minn. April 7, 2011) (recommending dismissal with prejudice of plaintiff’s fraud claims because it was unlikely that plaintiff could cure the defective pleading on re-pleading), 2011 WL 2118791 at *3 (D. Minn. May 25, 2011) (adopting the Report and Recommendation of Magistrate Judge Rau regarding dismissal of plaintiff’s fraud claims for failure to satisfy the particularity requirement of Rule 9(b)); McLean v. United States, 566 F.3d 391, 400-401 (4th Cir. 2009) (“to the extent...that a district court is truly unable to conceive of any set of facts under which a plaintiff would be entitled to relief, the district court would err in designating [a] dismissal to be without prejudice. Courts, including this one, have held that when a complaint is incurable through amendment, dismissal is properly rendered with prejudice and without leave to amend.”); McKesson HBOC, Inc. v. New York State Common Ret. Fund, Inc., 339 F.3d 1087, 1096 (9th Cir. 2003) (dismissal with prejudice is appropriate where “deficiencies in [plaintiff’s] claims cannot be cured by amendment”); Cato v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995) (a pro se litigant should be given chance to amend complaint unless it is “absolutely clear that the deficiencies of the complaint could not be cured by amendment.”).

With these principles in mind, the Court considers whether Machen's RICO, fraud and discrimination claims against the MDOR, Dicker, Hedback, Perlman and Central Mortgage should be dismissed with or without prejudice.

2. RICO Claim

Machen's sole reference to a RICO violation is reflected in the following passages of his Complaint:

The plaintiff herein request that the court permit this lawsuit as a joint claim against all the defendants and allow for any separate agreeably accepted stipulated settlement(s) and that it be considered a RICO filing based on the treble damages contained in the RICO Act 1970. The alleged joint acts of the defendants was well Orchestrated racketeering influenced Corruption Organization aimed at complete destruction [sic] and defraud of the plaintiffs. The group functionality was likened to an interwoven weave of boxholder [sic] bugs so as not to have anyone penetrate the alleged crimes committed by all.

The group started with a few and then attracted many with the conspiracy to, totally defraud the complaintant [sic] of his rightful earned accumulations of equity, redistributing unjust enrichment to all involved, allegedly breaking the laws to achieve its end.

Claimant alleges that these banks and or mortgage companies along with Mahlega Abdsharafat are racketeering to confiscate a \$3,000,000 property and \$1,600,000 value of contents for self-unjust enrichment.

Complaint, p. 1; ¶19 (emphasis added).

The RICO Act, under 18 U.S.C. § 1962(b), provides:

It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or

control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

To state a claim for damages under RICO, a complaint must “show ‘(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.’” Crest Const. II, Inc. v. Doe, 660 F.3d 346, 353 (8th Cir. 2011) (quoting Nitro Distrib., Inc. v. Alticor, Inc., 565 F.3d 417, 428 (8th Cir. 2009), quoting Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985) (footnote omitted)).

A RICO enterprise consists of “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact, although not a legal entity.” 18 U.S.C. § 1961(4). “The enterprise does not have to have a hierarchy, chain of command, fixed roles, or even a method of making decisions. An association-in-fact enterprise need only have ‘three structural features: (1) a purpose, (2) relationships among those associated with the enterprise, and (3) longevity sufficient to permit these associates to pursue the enterprise's purpose.’” Crest Constr. II, NO. 07-0728-CV-W-DGK, 2010 WL 3456690 at *3 (W.D. Mo. Aug. 27, 2010) (quoting Boyle v. United States, 129 S.Ct. 2237, 2243-2244 (2009)); see also Murrin v. Fischer, 07-CV-1295 (PJS/RLE), 2008 WL 540857 at *12 (D. Minn. Feb. 25, 2008) (“As defined by RICO, an enterprise has three (3) components: (1) a common or shared purpose; (2) some continuity of structure and personnel; and (3) an ascertainable structure different from that inherent in a pattern of racketeering.”) (citing United States v. Lee, 374 F.3d 637, 647 (8th Cir. 2004), cert. denied, 545 U.S. 1141 (2005); United States v. Kehoe, 310 F.3d 579, 586 (8th Cir. 2002), cert. denied, 538 U.S. 1048 (2003); McDonough v. National Home Insur. Co., 108 F.3d 174, 177 (8th Cir. 1997); United States v. Lemm, 680 F.2d 1193, 1198 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983)).

To make out a “pattern of racketeering activity,” 18 U.S.C. § 1961(5), requires a plaintiff to plead the existence of at least two predicate acts of racketeering activity, as defined in 18 U.S.C. § 1961(1), and to further establish that those predicate acts manifest the elements of “continuity plus relationship.” Murrin, 2008 WL 540857 at *12 (citing H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 238-39 (1989)).

“Racketeering activity” refers to criminal activity and includes bribery and extortion, “which is chargeable under State law and punishable by imprisonment for more than one year”; and certain acts “indictable” under federal law. See 18 U.S.C. § 1961(1)(A), (B). “[T]o prove a pattern of racketeering activity a plaintiff . . . must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity.” Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc., 528 F.3d 1001 1028 (8th Cir. 2008) (citations omitted). To do this “a plaintiff must provide evidence of multiple predicate acts occurring over a substantial period of time (closed-end continuity) or evidence that the alleged predicate acts threaten to extend into the future (open-ended continuity).” Id.; see also Murrin, 2008 WL 540857 at *12 (“Continuity can be either closed- or open-ended”) (citing H.J. Inc., v. Northwestern Bell Tele. Co. 492 U.S. 229, 241-42 (1989)). “A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time,” although “[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement.” Murrin, 2008 WL 540857 at *12 (citing H.J. Inc., 492 U.S. at 238-39; United States v. Hively, 437 F.3d 752, 761 (8th Cir. 2006) (noting that Courts have found that closed-ended continuity requires a scheme that lasts at least one year)). “In

contrast, open-ended continuity can be established by showing the existence of a specific threat that extends indefinitely into the future.” Id. (citing Lange v. Hocker, 940 F.2d 359, 361 (8th Cir. 1991); Hively, 437 F.3d at 761). Thus, to establish open-ended continuity, the plaintiff must show “that the predicate acts themselves involve a distinct threat of long-term racketeering activity or that the predicate acts constitute a regular way of conducting an on-going legitimate business or a RICO enterprise.” Crest Constr. II, 2010 WL 3456690 at *3.

A RICO claim based on fraud must be pled with particularity under Rule 9(b). “Under Rule 9(b)'s heightened pleading standard, allegations of fraud ... [must] be pleaded with particularity. In other words, Rule 9(b) requires plaintiffs to plead the who, what, when, where, and how: the first paragraph of any newspaper story.” Summerhill v. Terminix, Inc., 637 F.3d 877, 880 (8th Cir. 2011) 637 F.3d at 880 (alteration in original) (citation and internal quotation marks omitted).

Affording Machen the benefit of a liberal construction of his pleadings, this Court cannot read into his Complaint a properly pled RICO claim against the MDOR, Dicker, Hedback, Perlman and Central Mortgage. First, Machen’s statements regarding RICO are exactly the sort of conclusory statements soundly rejected under Iqbal and Twombly. Second, Machen pled no facts to support a claim of racketeering activity by any of these defendants (i.e. criminal acts) or a pattern of racketeering activity – to the contrary, what facts are alleged against these defendants stem from individual dealings each of the defendants had with Machen. See Handeen v. Lemaire, 112 F.3d 1339, 1353 n. 19 (8th Cir. 1997) (quoting Terry A. Lambert Plumbing, Inc. v. Western Sec. Bank, 934 F.2d 976, 981 (8th Cir.1991) (“a single transaction which involves only one

victim and takes place over a short period of time does not constitute the pattern of racketeering required for long-term criminal activity under a RICO claim.”). Third, Machen failed to allege an enterprise, much less one engaged in interstate or foreign commerce, as required by the statute. Indeed, the Complaint is silent as to any relationship these defendants may have had with each other, and Hedback is not even mentioned in the Complaint apart from the caption.

It is not the Court’s role to attempt to resuscitate Machen’s defective pleading. See GJR Invs., Inc. v. County of Escambia, 132 F.3d 1359, 1369 (11th Cir. 1998) (“Yet even in the case of pro se litigants this leniency does not give a court license to serve as de facto counsel for a party or to rewrite an otherwise deficient pleading to sustain an action.”) (internal citations omitted), overruled on other grounds, Randall v. Scott, 610 F.3d 701, 709 (11th Cir. 2010). Machen’s Complaint failed in every way to properly plead a cause of action under RICO and this Court has no reason to believe that it can ever be cured. Where as here, the Complaint is “based entirely on delusional perceptions of persecution, unreasonable inferences drawn from those delusions, incoherent explanations of fact, or conclusory legal claims cast in the form of factual allegations,” it may be dismissed with prejudice “for the sake of judicial economy.” Adams v. F.B.I., CIV. NO. 06-07321, 2007 WL 627912 at *2 (N.D. Cal. Feb. 26, 2007). Therefore, this Court recommends dismissal of this claim with prejudice as to the MDOR, Dicker, Hedback, Perlman, and Central Mortgage.

3. Fraud

To state a claim for common law fraud under Minnesota law, a plaintiff must prove: (1) there was a false representation by a party of a past or existing material fact;

(2) that was made with knowledge of the falsity of the representation or made as of the party's own knowledge without knowing whether it was true or false; (3) with the intention to induce another to act in reliance thereon; (4) that the representation caused the other party to act in reliance thereon; and (5) that the party suffered pecuniary damage as a result of his or her reliance. Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520, 532 (Minn.1986). Federal Rule of Civil Procedure 9(b) requires fraud claims to be plead with "particularity." "In other words, the complaint must plead the who, what, where, when, and how" of the alleged fraud. Drobnak v. Andersen Corp., 561 F.3d 778, 783 (8th Cir. 2009). "This requirement is designed to enable defendants to respond specifically, at an early stage of the case, to potentially damaging allegations of immoral and criminal conduct. The level of particularity required depends on, inter alia, the nature of the case and the relationship between the parties. Conclusory allegations that a defendant's conduct was fraudulent and deceptive are not sufficient to satisfy the rule." BJC Health Sys. v. Columbia Cas. Co., 478 F.3d 908, 917 (8th Cir.2007) (citations and internal quotation marks omitted).

None of the allegations in the Complaint allege any misrepresentations by MDOR, Dicker, Hedback, Perlman, and Central Mortgage, or for that matter, come remotely close to meeting the Rule 9(b) standard of particularity. For example: The only reference to the MDOR is in paragraph 22 of the Complaint, in which Machen asserted that the IRS and MDOR "piggy-backed each other to accept fraud reporting and/or manufactured documents to assess insane taxes." This is not a cognizable cause of action, much less a claim for fraud.

To the extent that Machen's complaint that Dicker "bamboozled" him in connection with his bankruptcy and child support proceedings could be construed to be a claim for fraud, that claim fails because Machen failed to plead any of the requisite elements of fraud. Paragraph 10 of the Complaint, which contains the allegations against Dicker, alleges that Dicker advised Machen in connection with Judge Peterson's property sequestration order, Machen deposited \$154,000 with the court, and the funds were disbursed as support payments until 2007. Fraud on Dicker's part cannot be gleaned from the allegations in this paragraph. However, even if Machen could cure all of the pleading deficiencies of his fraud claim against Dicker, the claim is futile as it is time-barred. Dicker's last interactions with Machen were in 2003 or 2004. Complaint, ¶10; Dicker Mem., pp. 7-8; Machen Aff., p. 2. Pursuant to Minn. Stat. §541.05, fraud claims are subject to a six-year statute of limitations. Any theoretical cause of action against Dicker for fraud expired in 2009.

Hedback is not mentioned apart from the caption. The only mention of Central Mortgage is found in paragraph 17 of the Complaint, which alleged that a mortgage "was moved about from Maribella Mortgage to GMAC, Central Mortgage, Saxon Mortgage and Deuche [sic] Bank without my notarized or actual signature." Central Mortgage serviced a mortgage executed by Machen, but never held any interest in the mortgage and knows nothing about the origination of the mortgage or what happened to the mortgage after it ceased being the servicer. Howard Aff., ¶¶3-5. The Complaint is devoid of facts or allegations of fraud regarding Hedback or Central Mortgage.

Similarly, there are no allegations of fraud against Perlman. The sole reference to Perlman is that he was present on the day that Machen was removed from his home

pursuant to the execution of a writ for unlawful detainer issued by the Hennepin County district court. Complaint, ¶20; see Answer of Michael Perlman, ¶3. The Complaint does not allege any of the elements of fraud against Perlman and there is no indication in any of the pleadings that Machen and Perlman had any interaction with each other apart from Perlman's presence on the day Machen was removed from his residence.

Except to invoke the word fraud here and there in his Complaint, Machen has set forth no facts that remotely resemble a claim of fraud. Like the RICO claim, this Court has no reason to believe that Machen's claim of fraud can ever be cured. For all of these reasons, this Court recommends that Machen's claim of fraud against the MDOR, Dicker, Hedback, Perlman, and Central Mortgage be dismissed with prejudice.

4. Discrimination

Machen's complaint for "discrimination" is completely incoherent. The Complaint alleged that:

As exhibits have allowed evidentiary document proof there exists scams, bogus, larceny agreement, collusion, forgery of signatures, fraud and discrimination fueled by an American history of slavery with its emancipation proclamation of 1863 via president A. Lincoln, Tenant farming, Jim Crow laws, the 1964 & 1967 Civil Rights Acts have not eradicated the undercurrent of bias, having been preceded by Plessy v. Ferguson [sic] 1898 and then 1954 Brown Vs. Bd Education for school integration.

Complaint, p. 1. Machen's accompanying affidavit stated that "[t]ime now for all to get their due for the wrong doings and alleged crimes committed in this long excruciating suffering caused by racism, jealousy, and unconstitutional treatment Machen Aff., p. 2. These are the only two references in the Complaint to "discrimination" and they make no reference to the MDOR, Dicker, Hedback, Perlman, or Central Mortgage. The

Court declines to attempt to analyze these statements within the context of the Civil Rights Act of 1964, as amended, when Machen has not indicated which portion of the Act he is proceeding under, whether he is a member of a protected class, or how any of the defendants “discriminated” against him. Machen’s use of the words “discrimination” and “racism” cannot be construed to state a cause of action. Machen’s discrimination claim is the quintessence of a “pleading that offers ‘labels and conclusions’” ... described by Iqbal. 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 555).

In any event, even if Machen were permitted to amend his Complaint to allege facts to support a claim of discrimination, such a claim is futile, as it too is time-barred. In order to commence a legal action asserting a claim of race discrimination, a discrimination charge under Title VII must first be filed with the Equal Employment Opportunity Commission within 300 days of the alleged discrimination, 42 U.S.C. §2000e-5(e)(1).¹⁴ Whatever acts Machen is complaining against any defendant, they ended in 2009, (see Complaint, ¶20), and cannot now be pursued.¹⁵

For all of these reasons, Machen’s claim of discrimination against MDOR, Dicker, Hedback, Perlman, and Central Mortgage should be dismissed with prejudice.

¹⁴ If Machen were making a claim of race discrimination under the Minnesota Human Rights Act, the suit must be commenced in court or the charge of discrimination filed with the Minnesota Department of Human Rights within one year of the act of discrimination. Minn. Stat. §362A.28, subd. 3.

¹⁵ While neither MDOR, Dicker, Hedback, Perlman, nor Central Mortgage raised this issue in their briefs, the Court “has the power to sua sponte dismiss a complaint for failure to state a claim.” Smith v. Boyd, 945 F.2d 1041, 1043 (8th Cir. 1991) (quoting Mildfelt v. Circuit Court, 827 F.2d 343, 345 (8th Cir. 1987) (per curiam)); Hanson v. Sullivan, (NO. 3:91-706), 1992 WL 227610 at *3 (D. Minn. June 02, 1992) (dismissing suit sua sponte for failure to state a claim where it was obvious that the plaintiff could not prevail on the facts alleged.)

5. Other Grounds for Dismissal

This Court has concluded that Machen's Complaint failed to state a claim for which relief could be granted and should be dismissed with prejudice as to the MDOR, Dicker, Hedback, Perlman and Central Mortgage. As to the MDOR, there are additional grounds upon which dismissal with prejudice should be granted.

Under the Eleventh Amendment, federal courts do not have subject matter jurisdiction over a claim against a state for damages when the state has not consented to the suit. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 64-65 (1996); Roberts v. Dillon, 15 F.3d 113, 115 (8th Cir. 1994). This immunity extends to state officials as well since "a suit against a state official in his or her official capacity is a suit against the official but rather is a suit against the official's office [and] is no different from a suit against the State itself." Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989). When a lawsuit is barred by the Eleventh Amendment, the case must be dismissed for lack of subject matter jurisdiction. Seminole Tribe, 517 U.S. at 64-65. Absent a clear statement that officials are being sued in their individual capacities, a complaint is construed to be against individual in their official capacity. Murphy v. Arkansas, 127 F.3d 750, 754 (8th Cir. 1997). The State of Minnesota has not waived its immunity from suit in federal court for Machen's claims. See DeGidio v. Perpich, 612 F. Supp. 1383, 1388-89 (D. Minn. 1985) (Minnesota's limited waiver of sovereign immunity in state court pursuant to the State's Tort Claims Act is not a waiver of Eleventh Amendment immunity from suit in federal court for federal claims). Thus, the MDOR is immune from suit in federal court.

Furthermore, to the extent that the Complaint can be construed to be an appeal of a state tax assessment, this Court lacks jurisdiction to consider such an appeal, which is the exclusive purview of the Minnesota Tax Court. Minnesota Statute §271.01, subd. 5 provides that “[e]xcept for an appeal to the supreme court or any other appeal allowed under this subdivision, the Tax Court shall be the sole, exclusive, and final authority for the hearing and determination of all questions of law and fact arising under the tax laws of the state... .” As argued by the MDOR, any complaints Machen had regarding tax assessments (and the Complaint is completely vague as to what assessment he might be protesting) must be raised to the Tax Court, and not this Court. See M.A. Mortenson v. Minnesota Comm’r of Revenue, 470 N.W.2d 126, 128-130 (Minn. Ct. App. 1991) (reversing district court order denying motion to dismiss tax assessment claim for lack of subject matter jurisdiction, and stating “the tax court has jurisdiction to decide this tax assessment matter completely.”). Where re-pleading will not cure the jurisdictional hurdle raised by Minn. Stat. §271.01, subd. 5, dismissal with prejudice as to all claims involving the MDOR’s role in tax assessments of Machen’s property is appropriate.

III. CONCLUSION

In conclusion, this Court finds that Machen’s voluntary dismissal divested this Court of jurisdiction over claims against any defendant who was not served with the Complaint, and against any defendant who did not answer or file a motion for summary judgment. As to those defendants who did file an answer and move to dismiss (the MDOR, Dicker, Hedback, Perlman) or gave constructive notice that they were seeking summary judgment (Central Mortgage), this Court determined that their motions should

be granted and the claims against them be dismissed with prejudice because they cannot be cured.

IV. RECOMMENDATION

For the reasons set forth above, it is recommended that:

1. Defendants Clifford Lozinski and Johnson, West & Co., PLLC's Motion to Dismiss [Docket No. 10]; Defendants Thomas Flynn, Thomas Alexander, and Larkin, Hoffman Daly & Lindgren LTD's Motion to Dismiss [Docket No. 16]; Defendant City of Chaska's Motion to Dismiss [Docket No. 28]; Defendants Ann Barry Moh (Anne Barry) and the Hon. Bruce Peterson's Motion to Dismiss [Docket No. 31]; Defendants Patricia Bodin and ProTitle, Co.'s, Motion to Dismiss [Docket No. 32]; Defendants Richard Stanek, Hennepin County Support and Collections, Bev Lowe, Ken Collias and Karen Extel's Motion to Dismiss [Docket No. 37]; Defendants Saxon Mortgage and Deutsche Bank's Motion to Dismiss or in the Alternative for a More Definite Statement [Docket No. 42]; Defendants KleinBank, Daniel Klein and Matthew Klein's Motion to Dismiss [Docket No. 56]; Defendants Associated Bank, National Association and Gerald Anderson's Motion to Dismiss [Docket No. 63]; the United States' Motion to Substitute as Proper Defendant for Scott Iverson and Patricia Patton and Motion to Dismiss [Docket No. 84]; Defendant American Family Insurance's Motion to Dismiss [Docket No. 91]; be DENIED as moot in light of Machen's Notice of Voluntary Dismissal and Plaintiff's Complaint be dismissed without prejudice as to these defendants;

2. Defendant Central Mortgage's Motion to Dismiss [Docket No. 18]; Defendant Minnesota Department of Revenue's Motion to Dismiss [Docket No. 20]; Defendant Joseph Dicker's Motion to Dismiss [Docket No. 67]; Defendant John

Hedback's Motion to Dismiss [Docket No. 69]; and Defendant Michael L. Perlman's Motion to Dismiss [Docket No. 98] be GRANTED and Plaintiff's Complaint against these defendants be dismissed with prejudice.

3. Plaintiff's Complaint against the remaining defendants, Mahlega Abdsharafat Athanta Croswell, Robin C. Campbell (f/k/a Robin Machen), Andrew Moran, SMG, Inc., Michael Morton, Mark Saliterman, Morton Equity LLC, Bank of America Mortgage, KL Title/Brend[a] Colston, Zurich Assurance, Bank of America Mortgage, Aislee Smith, Commercial Properties, Commercial Partners and Mallie Sharafat be dismissed without prejudice.

Dated: January 23, 2012

Janie S. Mayeron
JANIE S. MAYERON
United States Magistrate Judge

NOTICE

Under D. Minn. LR 72.2(b), any party may object to this Report and Recommendation by filing with the Clerk of Court, and serving all parties by **February 6, 2012**, a writing which specifically identifies those portions of this Report to which objections are made and the basis of those objections. Failure to comply with this procedure may operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals. A party may respond to the objecting party's brief within fourteen days after service thereof. A judge shall make a de novo determination of those portions to which objection is made. This Report and Recommendation does not constitute an order or judgment of the District Court, and it is therefore not appealable to the Court of Appeals.

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

ALVIN D. CRAIGHEAD,)	
)	
Plaintiff,)	
)	
v.)	Case No. CIV-11-621-D
)	
COMMISSIONER OF INTERNAL)	
REVENUE,)	
)	
Defendant.)	

ORDER

Before the Court is Defendant’s Motion to Dismiss for Lack of Subject-Matter Jurisdiction [Doc. No. 19], filed pursuant to Fed. R. Civ. P. 12(b)(1).¹ In the alternative, if the Court determines the issue presented is not jurisdictional, Defendant seeks dismissal for failure to state a claim under Rule 12(b)(6). The time for filing a response has expired.² Thus, the Motion is at issue.

Plaintiff, who appears *pro se*, has filed suit against the United States of America *ex rel.* the Commissioner of Internal Revenue, seeking relief under 26 U.S.C. § 7433 for alleged violations of Internal Revenue Service (“IRS”) collection procedures. Specifically, Plaintiff alleges he has been a target of IRS collection activities since 2004 or 2005 that have been mistakenly directed at him but concern inheritance taxes for “a decedent coincidentally named Alvin D. Craighead.” *See* Compl. [Doc. No. 1], ¶ 5. Plaintiff alleges that “the IRS levies and ongoing demands for this Alvin D. Craighead to file tax returns” are fraudulent and that the repeated collection attempts “were and

¹ Defendant incorrectly cites Rule 12(b)(5), but plainly seeks a dismissal governed by Rule 12(b)(1).

² On November 7, 2011, Plaintiff filed a timely response that improperly included a motion or cross-motion within the same document and, thus, was stricken for noncompliance with LCvR7.1(c). Plaintiff has not sought to correct his filing error.

are outrageous due to the fact that Alvin D. Craighead is not deceased and therefore it is impossible for Alvin D. Craighead to owe a tax on the transfer of property from his estate to his heirs requiring both a tax return and the payment of inheritance taxes.” *Id.* ¶¶ 6-7. Plaintiff expressly states that his Complaint does not challenge the validity of a federal tax or a tax assessment, but “is solely directed at the violations of IRS collections practices guidelines related to harassment and fraud.” *Id.* ¶ 4 (emphasis in original). Plaintiff seeks “maximum damages against the United States of one million dollars or another sum found reasonable and just by the jury.” *Id.* ¶ 7.

Defendant’s Motion

Defendant seeks dismissal on the ground that Plaintiff “has not exhausted his administrative remedies, which is a jurisdictional requirement.” *See* Def.’s Mot. Dism. [Doc. No. 19]. Invoking its sovereign immunity from suit, Defendant argues that Plaintiff is seeking damages under a statute that authorizes a civil action against the United States only under narrow circumstances. Specifically, liability may arise if an IRS agent violates a federal statute or regulation in the collection of taxes, but a claimant must exhaust administrative remedies before asserting a claim for damages. *See* 26 U.S.C. § 7433(d)(1). Defendant contends the administrative process is governed by federal regulations that require a claimant to submit a written claim containing certain information “to the Area Director, Attn: Compliance Technical Support Manager of the area in which the taxpayer resides.” *See* 26 C.F.R. § 301.7433-1(e). Defendant notes that Plaintiff alleges in his pleading the filing of an administrative complaint “with the then acting Commissioner of Internal Revenue,” rather than the proper recipient. *See* Compl. [Doc. No. 1], ¶ 2. Also, based on counsel’s affidavit and a copy of a document received by the IRS, Defendant argues that Plaintiff’s administrative complaint was insufficient to satisfy the regulations or to provide notice of the claim

now asserted. As stated above, Defendant takes the position that the statutory requirements are jurisdictional. *See, e.g., Gass v. United States Dep't of Treasury*, No. 99-1179, 2000 WL 743671 (10th Cir. June 9, 2000). Defendant acknowledges, however, that some courts treat exhaustion as a mandatory, but not jurisdictional, prerequisite that may be considered under Rule 12(b)(6). *See, e.g., Rae v. United States*, 530 F. Supp. 2d 127, 131 (D.D.C. 2008) (citing cases).

Standard of Decision

“Motions to dismiss for lack of subject matter jurisdiction ‘generally take one of two forms: (1) a facial attack on the sufficiency of the complaint’s allegations as to subject matter jurisdiction; or (2) a challenge to the actual facts upon which subject matter jurisdiction is based.’” *City Of Albuquerque v. United States Dep’t of Interior*, 379 F. 3d 901, 906 (10th Cir. 2004) (quoting *Ruiz v. McDonnell*, 299 F. 3d 1173, 1180 (10th Cir.2002)). If the motion challenges only the sufficiency of the plaintiff’s jurisdictional allegations, a district court must confine itself to the pleadings and accept the allegations as true; additional evidentiary materials may not be considered. *See Holt v. United States*, 46 F. 3d 1000, 1002 (10th Cir. 1995). Where, however, the motion challenges the underlying factual basis for subject matter jurisdiction, the court’s decision is not constrained by the pleadings; instead, “the court must look beyond the complaint and has wide discretion to allow documentary and even testimonial evidence.” *Paper, Allied-Industrial, Chemical & Energy Workers Int’l Union v. Continental Carbon Co.*, 428 F. 3d 1285, 1292-93 (10th Cir. 2005). In the event of a factual challenge, “‘a district court may not presume the truthfulness of the complaint’s factual allegations. A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1).’” *Sizova v. National Inst. of Standards & Tech.*, 282 F.3d 1320, (10th Cir. 2002) (quoting *Holt v. United States*, 46 F.3d

1000, 1003 (10th Cir.1995)).³ Upon consideration, the Court finds that Defendant's Motion presents a factual challenge to Plaintiff's allegation that he exhausted administrative remedies before filing suit and, if this challenge presents a jurisdictional issue, that matters outside the pleadings may be considered without treating the motion as one for summary judgment under Rule 56.

On the other hand, if a Rule 12(b)(6) motion presents matters outside the pleadings, the Court must treat the motion "as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." *See* Fed. R. Civ. P. 12(d). In this situation, the Court must provide notice that the motion is being converted to a summary judgment motion and must give the opposing party an opportunity to respond in the manner required by Rule 56. *See Whitesel v. Sengenberger*, 222 F.3d 861, 866 (10th Cir. 2000); *Brown v. Zavaras*, 63 F.3d 967, 969 (10th Cir.1995). Thus, in this case, the nature of the issue presented will determine the procedures to be followed in ruling on Defendant's Motion.

Discussion

Defendant concedes that administrative exhaustion is viewed as jurisdictional in some contexts and non-jurisdictional in others, and there is no binding Tenth Circuit authority on the issue with regard to 26 U.S.C. § 7433. However, the court of appeals recently observed in a § 7433 case:

³ Generally, "a court's reference to evidence outside the pleadings does not convert the motion to a Rule 56 motion [for summary judgment]." *Holt*, 46 F.3d at 1003. There is an exception to this rule, however, "when resolution of the jurisdictional question is intertwined with the merits of the case." *Id.* (citations omitted); *see Continental Carbon*, 428 F.3d at 1292; *Sizova*, 282 F.3d at 1324; *see also Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1296 (10th Cir. 2003). The focus of the inquiry in determining whether the issues are intertwined "is whether resolution of the jurisdictional question requires resolution of an aspect of the substantive claim." *Continental Carbon*, 428 F.3d at 1292 (quoting *Pringle v. United States*, 208 F.3d 1220, 1223 (10th Cir. 2000)); *see Davis*, 343 F.3d at 1296; *Sizova*, 282 F.3d at 1324. The court of appeals has determined in the context of other statutes that the issue of administrative exhaustion is not intertwined with the substantive merits of a claim and, therefore, may be decided under Rule 12(b)(1). *See Davis*, 343 F.3d at 1296; *Sizova*, 282 F.3d at 1324-25.

Most of the courts that have examined the issue in light of the Supreme Court's decision in *Jones v. Bock*, 549 U.S. 199, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007), have concluded that the exhaustion requirement in § 7433 is non-judicial. *See, e.g., Marsoun v. United States*, 591 F. Supp. 2d 41, 44 (D.D.C. 2008). However, we need not decide the issue because “[t]he characterization is important . . . only when the defendant has waived or forfeited the issue[.]” *McQueen ex rel. McQueen v. Colo. Springs Sch. Dist. No. 11*, 488 F.3d 868, 873 (10th Cir. 2007).

Carter v. United States, 389 F. App'x 809, 812 (10th Cir. 2010).⁴ Since that observation was made, other federal appellate courts have held that exhaustion is not a jurisdictional prerequisite to suit under § 7433. *See Hoogerheide v. IRS*, 637 F.3d 634, 636 (6th Cir. 2011); *see also Kim v. United States*, 632 F.3d 713, 720 (D.C. Cir. 2011); *Galvez v. IRS*, No. 11-10659, 2011 WL 4348328 (11th Cir. Sept. 19, 2011) (unpublished). The Court is persuaded by the analysis set forth by the Sixth Circuit in *Hoogerheide* that administrative exhaustion is not a jurisdictional requirement. Accordingly, when this procedural prerequisite to a claim for damages under § 7433 is challenged by a Rule 12(b)(6) motion utilizing materials outside the pleadings, the issue must be decided by summary judgment in the manner required by Rule 56. *See Kim*, 632 F.3d at 719-20.

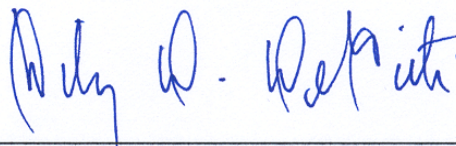
In short, the Court finds that Defendant's Motion to Dismiss raises the non-judicial issue of whether Plaintiff's claim under § 7433 is barred by a lack of administrative exhaustion. Therefore, the Court will treat the Motion as one for dismissal under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, and because it relies on material outside Plaintiff's pleading, the Motion will be considered as one for summary judgment under Rule 56.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss for Lack of Subject-Matter Jurisdiction [Doc. No. 19] is converted to a motion for summary judgment under Fed. R. Civ.

⁴ Unpublished opinion cited pursuant to Fed. R. App. P. 32.1(a) and 10th Cir. R. 32.1.

P. 56. Plaintiff shall respond to Defendant's Motion in the manner required by Rule 56 within 21 days of the date of this Order.

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



TIMOTHY D. DEGIUSTI
UNITED STATES DISTRICT JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re

AURORA OF TAMPA, INC.
d/b/a Remington Steakhouse,
Debtor.

Case No.: 8:11-bk-21104-MGW
Chapter 11

**ORDER DENYING UNITED STATES TRUSTEE'S MOTION TO EXAMINE
TRANSACTIONS WITH ATTORNEY PURSUANT TO 11 U. S. C. §329 AND FED. R.
BANKR. P. 2016(b) AND 2017 AND DISQUALIFY EMPLOYMENT OF ATTORNEY
PURSUANT TO 11 U.S.C. §327 AND FED. R. BANKR. P. 2014 (DOC. NO. 57)**

THIS CAUSE came to be heard before this Court on January 11, 2012, to consider the United States Trustee's Motion to Examine Transactions with Attorney pursuant to 11 U.S.C. §329 and Fed. R. Bankr. P. 2016(b) and 2017 and Disqualify Employment of Attorney pursuant to 11 U.S.C. §327 and Fed. R. Bankr. P. 2014 (Doc. No. 57). There appearing Steve C. Grider, Esquire on behalf of David W. Steen, P. A. for the Debtor, and Nicole Peair, Esquire on behalf of the United States Trustee, the Court having reviewed the Motion, having heard argument of counsel and otherwise being duly advised in the premises, finds accordingly, it is

ORDERED that:

1. The United States Trustee's Motion to Examine Transactions with Attorney pursuant to 11 U.S.C. §329 and Fed. R. Bankr. P. 2016(b) and 2017 and Disqualify Employment of Attorney pursuant to 11 U.S.C. §327 and Fed. R. Bankr. P. 2014 (Doc. No. 57) be and it is hereby **Denied**.
2. The Debtor's counsel is hereby ordered to file the Application to be Employed and a Second Amended Disclosure of Compensation Statement.

DONE AND ORDERED at Tampa, Florida on January 23, 2012.



MICHAEL G. WILLIAMSON
United States Bankruptcy Judge

cc: David W. Steen, Esquire
United States Trustee

UNITED STATES BANKRUPTCY COURT

Northern District of Georgia

In Re: Debtor(s)

Clarence Orville Beery III
937 Pinbrook Drive
Lawrenceville, GA 30043

Case No.: **11-67071-crm**
Chapter: **7**

xxx-xx-3416

ORDER

Because no party in interest has filed a request for an order of dismissal pursuant to 11 U.S.C. § 521(i)(2) and because the parties in interest should not be subjected to any uncertainty as to whether this case is subject to automatic dismissal under §521(i)(1), Debtor is not required to file any further document pursuant to §521(a)(1)(B) to avoid an automatic dismissal and this case is not and was not subject to automatic dismissal under §521(i)(1). This does not prevent any party in interest from requesting by motion that Debtor supply further information described in § 521(a)(1)(B), and this does not prevent the United States Trustee or Chapter 7 Trustee from requesting by any authorized means, including but not limited to motion, that the Debtor supply further information.

C. Ray Mullins

C. Ray Mullins
United States Bankruptcy Judge

**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

**TERRY L. NEAL; BADGER CREEK
NURSERY, LLC; MICHAEL NEAL,
individually, as Personal Representative of
the Estate of Maureen Gail Neal, Deceased,
and as Trustee of Neal Family Trust;
SHANNON NEAL; STEVE MARTIN
CONSTRUCTION, INC; HOEVET &
BOISE, P.C.; NEAL FAMILY TRUST; and
CLACKAMAS COUNTY**

Defendants.

Civil No. 11-353-AC

**ORDER GRANTING UNITED STATES'
MOTION TO CONFIRM SALE**

ORDER TO CONFIRM SALE

Before the Court is Plaintiff United States' Motion to Confirm Sale. No opposition or objection to the Motion was filed. Having considered the United States' Motion and the relevant law, the motion is hereby GRANTED.


///

///

///

Pursuant to this Order, the sale is hereby confirmed. The distribution of sales proceeds shall be dealt with in a separate order.

DATED this 23rd day of January, 2012.


UNITED STATES DISTRICT JUDGE
Magistrate

Respectfully submitted by:

JOHN A. DICICCO
Principal Deputy Assistant Attorney General

/s/ Jeremy N. Hendon
JEREMY N. HENDON, OSB #98249
QUINN P. HARRINGTON, OSB #083544
Trial Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 683
Ben Franklin Station
Washington, D.C. 20044-0683
Telephone: (202) 353-2466
(202) 514-6507
Facsimile: (202) 307-0054
Email: jeremy.hendon@usdoj.gov
quinn.p.harrington@usdoj.gov
western.taxcivil@usdoj.gov
Attorneys for United States of America

AMANDA MARSHALL
United States Attorney
Of Counsel

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

PEOPLE'S UNITED EQUIPMENT
FINANCE CORP.,

Plaintiff,

v.

DESERT ROCK EXCAVATION INC.
AND M.J. HUGHES CONSTRUCTION,
INC.,

Defendants.

No. CV-11-036-LRS

ORDER GRANTING
UNITED STATES' MOTION TO
INTERVENE

Before the Court is the United States' motion to intervene. Having considered the motion, any responses thereto, and the applicable law, it is hereby

ORDERED that the United States' motion, ECF No. 45, is GRANTED. The United States is permitted to intervene as a party in this matter and the United States' intervenor complaint is deemed filed as of this date.

IT IS SO ORDERED.

Dated this 23rd day of January, 2012.

s/Lonny R. Suko

LONNY R. SUKO
United States District Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL N. BENOIT, et al.,

Defendant.

CASE NO. 08cv2140-MMA(JMA)

**ORDER GRANTING DEFENDANT’S
MOTION FOR STAY OF AMENDED
ORDER OF JUDICIAL SALE**

[Doc. No. 96]

Plaintiff United States of America brought this claim to reduce federal income tax assessments to judgment against Defendant Michael N. Benoit and to reduce the federal tax liens against a residence he owns located at 9518 Emerald Grove Avenue, Lakeside, California, 92040 (the “property”). On June 2, 2010, the Court entered judgment in favor of the United States. Defendant, proceeding *pro se*, has appealed the judgment and now seeks a stay of the judicial sale of the property pending the resolution of his appeal. For the following reasons, the Court **GRANTS** Defendant’s motion and **STAYS** the enforcement of the January 20, 2012 Amended Order of Judicial Sale until resolution of Defendant’s pending appeal.

///
///
///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BACKGROUND

On June 2, 2010, the Court entered judgment in favor of the United States, finding Defendant indebted to the United States for unpaid federal income tax liabilities for the tax years 1995 and 1996, plus further interest and statutory additions as allowed by law. *See* Doc. No. 64. On July 29, 2011, the Court entered an order authorizing the sale of Defendant’s property, the proceeds of which would go to covering the costs of the sale; to satisfying all unpaid taxes and other assessments owed to San Diego County; to the United States for application to Defendant’s unpaid federal tax assessments for federal income taxes for the years 1995 and 1996, including all accrued statutory penalties, additions, and interest, until fully paid; and to the State of California Franchise Tax Board to satisfy its liens on the property. *See* Doc. No. 93.

On August 11, 2011, Defendant filed this motion to stay the order of judicial sale. *See* Doc. No. 96. Shortly thereafter, the United States filed a motion to amend the Court’s July 29, 2011 Order to correct an inadvertent omission and provide for payment of the senior mortgage lien against the property held by J.P. Morgan Chase. *See* Doc. No. 98. On August 25, 2011, the Court stayed the enforcement of the July 29, 2011 Order until resolution of the United States’ motion to amend. *See* Doc. No. 102. On January 20, 2012, the Court granted the United States’ motion and entered an amended order of judicial sale. *See* Doc. No. 111.

Defendant argues that a stay of the sale of his property is warranted because he is likely to succeed on appeal. According to Defendant, the Court granted summary judgment in error, as multiple issues of fact require that this case proceed to trial. Defendant also asserts that unless the Court stays the sale of the property, he will be evicted from his home. The United States filed an opposition, to which Defendant replied. *See* Doc. Nos. 100, 108. The United States contends that Defendant is not entitled to a stay of the anticipated sale unless he posts a supersedeas bond as required by Rule 62(d) of the Federal Rules of Civil Procedure.

///
///
///
///

DISCUSSION

Federal Rule of Civil Procedure 62(d) allows a party appealing a money judgment to obtain an automatic stay of execution of judgment pending appeal by posting a satisfactory supersedeas bond:

If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a) (1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.

FED. R. CIV. P. 62(d). The purpose of a supersedeas bond is to protect the appellee from the risk of a later uncollectible judgment and compensate the appellee for any loss resulting from the stay of execution. *N.L.R.B. v. Westphal*, 859 F.2d 818, 819 (9th Cir. 1988).

Defendant urges the Court to stay the sale of his property without requiring a supersedeas bond. A court may exercise its discretion to deviate from the letter of Rule 62, when equity and the interests of justice so require. *See Intern. Telemeter v. Hamlin Intern. Corp.*, 754 F.2d 1492, 1495 (9th Cir.1985). When an appellant requests a Rule 62 stay pending the outcome of his appeal, courts look to the Supreme Court’s decision in *Hilton v. Braunskill*, 481 U.S. 770 (1987), for guidance and consider four primary factors: “(1) whether the stay applicant has a made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Hilton*, 481 U.S. at 776 (citations omitted).

Here, the first factor weighs against Defendant, who has not demonstrated a likelihood of succeeding on appeal. However, the second factor weighs in Defendant’s favor, as the loss of real property is usually considered an irreparable injury. As to the fourth factor, the tax debt has been outstanding for the better part of a decade and a half, and collection of the current judgment has already been delayed for many months. Thus, while there is certainly a public interest in the collection of delinquent taxes, that interest will not be further frustrated in any meaningful way by granting a stay pending resolution of Defendant’s appeal.

With respect to the third factor, although a considerable amount of money is at stake, further delaying the collection of the judgment against Defendant will not “substantially” injure the United

1 States if certain conditions are met. Pursuant to the judgment in this case, the United States is a
2 judgment creditor who also holds a statutory tax lien on the property in question. Thus, a stay
3 pending appeal will not threaten the United States' security interest in the property. However, the
4 United States' concerns regarding devaluation, further encumbrances, and damage to the property if
5 the judicial sale is stayed are legitimate. In response, Defendant argues that a supersedeas bond is
6 not necessary to protect the United States' interests because sufficient equity in the property exists to
7 do so.

8 To secure a judgment, real property must typically retain higher value than the base value of
9 the judgment. *Brooktree Corp. v. Advanced Micro Devices, Inc.*, 757 F.Supp. 1101, 1104 (S.D. Cal.
10 1990). Defendant asserts that the value of the property is currently estimated at approximately
11 \$290,000 according to the website www.zillow.com.¹ The United States relies upon the San Diego
12 County tax assessor's most recent valuation of the property, \$213,831, to dispute this assertion.
13 According to Defendant, he owes \$54,564.43 on his mortgage to JP Morgan Chase. Pursuant to the
14 judgment in this case, Defendant owes federal tax liens in the amount of \$144,847.44 as of
15 December 21, 2009, plus statutory interest accruing after that date to the date of payment, in addition
16 to state tax liens in the amount of \$32,683.69 as of January 29, 2009, plus statutory interest accruing
17 after that date to the date of payment. Using the assessed value of the subject property, the United
18 States calculates that Defendant currently has a negative equity of \$31,295. Using the Zillow
19 estimate, Defendant claims approximately \$50,000 in equity in the subject property.

20 Defendant's estimate of the property's value would render the property sufficient on its own
21 to secure the judgment. The Court finds that as long as protective measures are taken to ensure the
22 maintenance of the property and to preserve its value pending appeal, the United States' interests are
23 protected. Furthermore, Defendant's continuing mortgage payments on the property pending appeal
24 inure to the United States' benefit since each payment presumably increases Defendant's equity in
25 the property. Accordingly, the Court shall exercise its discretion to stay the judicial sale of
26 Defendant's property, subject to the terms and conditions set forth below.

27
28 ¹ The estimate of the property's value upon which Defendant relies is referred to by Zillow as
a Zestimate: "Zillow's estimated market value, computed using a proprietary formula. It is not an
appraisal. It is a starting point in determining a home's value." *What Is A Zestimate?* (2006-2012)
Retrieved from <http://www.zillow.com/wikipages/What-is-a-Zestimate/>.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

Based on the foregoing reasons, the Court **GRANTS** Defendant Michael N. Benoit's motion to stay the judicial sale of the real property located at 9518 Emerald Grove Avenue, Lakeside, California, 92040. The Court shall not require a bond. However, as a condition of the stay, Defendant is required to: (1) continue making monthly mortgage payments to JP Morgan Chase; (2) reasonably maintain the property; (3) obtain, maintain, and provide proof of insurance coverage on the property at a level not less than its appraised value, **verification of which must be submitted to the Court within ten (10) business days from the date this Order is filed**; and (4) refrain from engaging in conduct that will further encumber or possibly decrease the value of the property.

If Defendant fails to comply with any one of the above terms and conditions, the stay will be lifted and the property will be subject to sale in compliance with the Court's January 20, 2012 Amended Order of Judicial Sale.


IT IS SO ORDERED.

DATED: January 20, 2012



Hon. Michael M. Anello
United States District Judge

Below is an Order of the Court.



FRANK R. ALLEY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

In re)	
)	Case No. 08-63662-fra7
GEORGE, ROBERT D.)	
GEORGE, PAULA M.)	ORDER ALLOWING PROFESSIONAL
)	COMPENSATION & EXPENSES; AND
)	DIRECTING DISTRIBUTION OF ASSETS
Debtor(s))	

The trustee's final report having either come on for hearing, or the creditors having waived their opportunity for a hearing after due notice, or the NET proceeds realized were insufficient to require a final notice; now therefore,

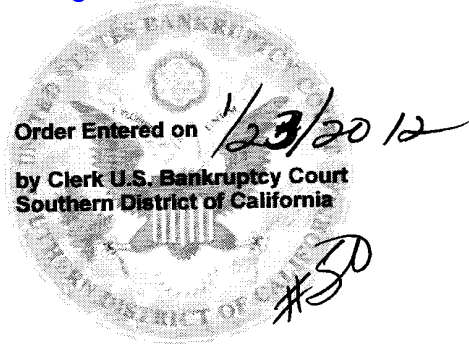
IT IS ORDERED that the following court costs, and professional compensation and expenses, are specifically allowed by the court **[NOTE: INCLUDE OSB# FOR ANY ATTORNEY LISTED BELOW!]**:

COURT COSTS	0.00
DAVID F. WURST, TRUSTEE FEE	**7,021.02
**Compensation may increase due to additional accrued interest	
DAVID F. WURST, TRUSTEE EXPENSE	575.21
PATRICK L. STEVENS, Attorney for Trustee Fees OSB# 980019	32,668.17
PATRICK L. STEVENS, Attorney for Trustee Expenses	1,330.72

IT IS FURTHER ORDERED that the trustee pay the claims allowed against the estate, pursuant to 11 U.S.C. §726, from the balance of estate assets.

###

CSD 1169 [01/39/96]



UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA 325 West "F" Street, San Diego, California 92101-6991	
In Re CARRIE R. STEELE	BANKRUPTCY NO.09-04711-LA11
Debtor	
ADAM D. STRAIT/TRIAL ATTORNEY, TAX DIVISION DEPUTY ATTORNEY GENERAL	
Movant (s)	
CARRIE R. STEELE	Respondent (s)

**ORDER REGULATING DISCOVERY AND PRETRIAL PROCEEDINGS
AND FIXING DATE FOR TRIAL**

The Objection to claims of Franchise Tax Board and the Internal Revenue Service herein having been duly filed and served and the respondent(s) having filed opposition or reply thereto, it is ordered that:

1. 6/14/12, is fixed as the last date for parties to meet and confer, exchange and premark exhibits and place exhibits on exhibit list as required by Local Bankruptcy Rule 7016-7. Extra set of exhibits to be provided court at time of trial. Parties to also prepare stipulation(s) of non-contested facts.
2. 6/21/12, is fixed as the last date by which the proposed final pretrial order required by Local Bankruptcy Rule 7016-9 shall be served and filed with the Court.
3. 7/2/12, is fixed as the last date by which counsel shall take the action required by Local Bankruptcy Rule 7016-12.
4. 6/28/12, at 10:30 a.m., is fixed as the date and time for final pretrial pursuant to Local Bankruptcy Rule 7016-8.
5. 7/9/12, 7/10/12, 7/11/12 at 10:00 a is fixed for the Trial.
6. Failure to comply fully with this order may be deemed an abandonment or failure to prosecute or defend diligently and subject the offending parties to sanctions as provided by Local Bankruptcy Rule 7016-11.

DATED: January 20, 2012


 Judge, United States Bankruptcy Court

CSD 1169

Signed by Judge Louise DeCarl Adler January 20, 2012

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA 325 West "F" Street, San Diego, California 92101-6991	
In Re CARRIE R. STEELE	BANKRUPTCY NO.09-04711-LA11
<small>Debtor</small>	
ADAM D. STRAIT/TRIAL ATTORNEY, TAX DIVISION DEPUTY ATTORNEY GENERAL	
<small>Movant(s)</small>	
CARRIE R. STEELE	<small>Respondent(s)</small>

CERTIFICATE OF MAILING

I certify that on this date a copy of the above order was served by first-class mail on the following parties:

MICHAEL S. KOGAN, KOGAN LAW FIRM, APC, 1901 AVENUE OF THE STARS, SUITE 1050, LOS ANGELES, CA 90067

FAYE C. RASCH, ERVIN COHEN & JESSUP, LLP, 9401 WILSHIRE BLVD, NINTH FLOOR, BEVERLY HILLS, CA 90212

ADAM STRAIT, U.S. DEPT OF JUSTICE, P.O.BOX 683, BEN FRANKLIN STATION, WASHINGTON, D.C. 20044

LESLIE BRANMAN SMITH, 110 WEST A STREET, SUITE 1100/POB 85266, SAN DIEGO, CA 92101

DATED: 1-20-12

Barry K. Lander, Clerk

By: Karen Fearce, Deputy Clerk
Karen Fearce

United States Bankruptcy Court
Southern District of California

In re:
Carrie R. Steele
Debtor

Case No. 09-04711-LA
Chapter 11

CERTIFICATE OF NOTICE

District/off: 0974-3

User: mrodrigue
Form ID: pdf01

Page 1 of 2
Total Noticed: 3

Date Rcvd: Jan 23, 2012

Notice by first class mail was sent to the following persons/entities by the Bankruptcy Noticing Center on Jan 25, 2012.

db
+Carrie R. Steele, 109 Poza Rica Ct., Solana Beach, CA 92075-2521
+FAYE C. RASCH, ERVIN COHEN & JESSUP,LLP, 9401 WILSHIRE BLVD, 9TH FLOOR,
BEVERLY HILLS, CA 90212-2928
+MICHAEL S. KOGAN, KOGAN LAW FIRM APC, 1901 AVENUE OF THE STARS, STE 1050,
LOS ANGELES, CA 90067-6036

Notice by electronic transmission was sent to the following persons/entities by the Bankruptcy Noticing Center.
NONE. TOTAL: 0

***** BYPASSED RECIPIENTS *****

NONE. TOTAL: 0

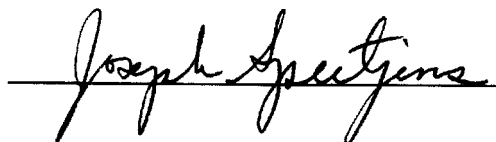
Addresses marked '+' were corrected by inserting the ZIP or replacing an incorrect ZIP.
USPS regulations require that automation-compatible mail display the correct ZIP.

I, Joseph Speetjens, declare under the penalty of perjury that I have sent the attached document to the above listed entities in the manner shown, and prepared the Certificate of Notice and that it is true and correct to the best of my information and belief.

Meeting of Creditor Notices only (Official Form 9): Pursuant to Fed. R. Bank. P. 2002(a)(1), a notice containing the complete Social Security Number (SSN) of the debtor(s) was furnished to all parties listed. This official court copy contains the redacted SSN as required by the bankruptcy rules and the Judiciary's privacy policies.

Date: Jan 25, 2012

Signature:



District/off: 0974-3

User: mrodrigue
Form ID: pdf01

Page 2 of 2
Total Noticed: 3

Date Rcvd: Jan 23, 2012

The following persons/entities were sent notice through the court's CM/ECF electronic mail (Email) system on January 23, 2012 at the address(es) listed below:

Adam Strait on behalf of Creditor United States (Internal Revenue Service)
Adam.D.Strait@usdoj.gov, Western.Taxcivil@usdoj.gov
Diego Santana on behalf of Creditor The Crosby Estate at Rancho Diego@thejudgefirm.com
Haeji Hong on behalf of United States Trustee Tiffany Carroll Haeji.Hong@usdoj.gov,
USTP.Region15@usdoj.gov,shannon.m.vencill@usdoj.gov,tiffany.l.carroll@usdoj.gov
Leslie Branman Smith on behalf of Creditor Franchise Tax Board, State of California
leslie.smith@doj.ca.gov, fatima.terronez@doj.ca.gov;ecfcoordinator@doj.ca.gov
Linh K. Tran on behalf of Transferee Roundup Funding, LLC bline.chapter13@blinellc.com
Michael S. Kogan on behalf of Debtor Carrie Steele mkogan@koganlawfirm.com
Peter Jazayeri on behalf of Debtor Carrie Steele jazayeri@blankrome.com,
smith-ml@blankrome.com
Sylvia L. Shaughnessy on behalf of Creditor United States (Internal Revenue Service)
Sylvia.L.Shaughnessy@irscounsel.treas.gov
Thomas E. McCurnin on behalf of Creditor Leaf Funding Corporation tmccurnin@bkolaw.com
Thomas J Polis on behalf of Creditor Sean Steele tom@polis-law.com
United States Trustee ustp.region15@usdoj.gov

TOTAL: 11

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 09-14224

FRANCIS A. BLAKE and MARY JOAN BLAKE,

Defendants.

JUDGMENT

In accordance with the court's order granting in part summary judgment in favor of the Government [Doc # 31], its "Findings of Fact and Conclusions of Law Pursuant to Rule 52(a)" [Doc # 49], and the parties' stipulated agreement that judgment be entered in favor of the United States on Defendants Francis Blake and Mary Joan Blake's 2002 income tax liability and Francis Blake's 2004 income tax liability, IT IS ORDERED AND ADJUDGED that:

1. Defendants Francis Blake and Mary Joan Blake are indebted to the United States of America for unpaid federal income taxes for the tax year 2000 in the total amount of \$559,168.75, as of January 13, 2012, plus statutory additions, including interest, which will continue to accrue from and after January 13, 2012, pursuant to 28 U.S.C. § 1961(c)(1) and 26 U.S.C. §§ 6601 and 6621;

2. Defendants Francis Blake and Mary Joan Blake are indebted to the United States of America for unpaid federal income taxes for the tax year 2001 in the total

amount of \$223,285.88 as of January 13, 2012, plus statutory additions, including interest, which will continue to accrue from and after January 13, 2012, pursuant to 28 U.S.C. § 1961(c)(1) and 26 U.S.C. §§ 6601 and 6621;

3. Defendants Francis Blake and Mary Joan Blake are indebted to the United States of America for unpaid federal income taxes for the tax year 2002 in the total amount of \$317,380.70, as of January 13, 2012, plus statutory additions, including interest, which will continue to accrue from and after January 13, 2012, pursuant to 28 U.S.C. § 1961(c)(1) and 26 U.S.C. §§ 6601 and 6621;

4. Defendant Francis Blake is indebted to the United States of America for unpaid federal income taxes for the tax year 2004 in the total amount of \$7,852.72, as of January 13, 2012, plus statutory additions, including interest, which will continue to accrue from and after January 13, 2012, pursuant to 28 U.S.C. § 1961(c)(1) and 26 U.S.C. §§ 6601 and 6621;

5. Defendant Francis Blake is indebted to the United States of America for unpaid trust fund penalty assessments pursuant to 26 U.S.C. § 6672 in regard to the wages of the employees of Northern Holdings, Ltd., for the period October 1, 1996, through September 30, 1998, in the total amount of \$434,223.35, as of January 13, 2012, plus statutory additions, including interest, which will continue to accrue from and after January 13, 2012, pursuant to 28 U.S.C. § 1961(c)(1) and 26 U.S.C. §§ 6601 and 6621; and

6. The United States' claims against Mary Joan Blake for unpaid federal income taxes for the tax year 2004 are dismissed without prejudice.

S/Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: January 23, 2012

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, January 23, 2012, by electronic and/or ordinary mail.

S/Lisa Wagner
Case Manager and Deputy Clerk
(313) 234-5522

S:\Cleland\JUDGE'S DESK\C1 ORDERS\09-14224.Blake.Judgment.jrc.wpd



**United States District Court
Northern District of Illinois**

In the Matter of

Katzman

Magistrate Judge Jeffrey Cole

v.

Case No. 11-CV-1441

United States of America

**TRANSFER OF CASE TO THE EXECUTIVE COMMITTEE FOR A
REFERRAL TO MAGISTRATE JUDGE**

The above captioned case is currently pending on my calendar. I recommend to the Executive Committee that this case be referred to a magistrate judge of this Court. The reasons for my recommendation are indicated on the reverse of this form.

A handwritten signature in black ink, reading "Joan N. Lefkow".

Judge Joan Humphrey Lefkow

Date: Monday, January 23, 2012

ORDER OF THE EXECUTIVE COMMITTEE

IT IS HEREBY ORDERED that the above captioned case be referred by lot to a magistrate judge of this Court in accordance with the Rules.

ENTER

FOR THE EXECUTIVE COMMITTEE

A handwritten signature in black ink, reading "James F. Holderman".

Chief Judge James F. Holderman

Dated: Monday, January 23, 2012

CIVIL PROCEDURES

Conduct hearings and enter appropriate orders on the following pretrial motion/matter:

- Perform such additional duties as are not inconsistent with the Constitution and laws of the United States, as specifically set forth below.

EXCEPTIONS OR ADDITIONS:

Plaintiffs motion to deem admitted certain requests for admission [25].