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OPINION OF THE EIGHTH CIRCUIT (DECEMBER 13, 2018)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOSEPH ALLEN MAY,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; INTERNAL REVENUE SERVICE; JOEL WILSON, Special Agent; MELANIE G. MOFFAT,

Defendants-Appellees.

No. 18-1411

Appeal from United States District Court for the Western District of Missouri-Jefferson City

Before: BENTON, SHEPHERD, and STRAS, Circuit Judges.

PER CURIAM

Joseph Allen May appeals the district court's[1] dismissal of his pro se action under 26 U.S.C. § 7431 (providing for civil damages for unauthorized inspection or disclosure of tax returns and tax return information).

[1] The Honorable Nanette K. Laughrey, United States District Judge for the Western District of Missouri.

We find no basis, and May offers none, for reversing the dismissal. *See Topchian v. JPMorgan Chase Bank, N.A.*, 760 F.3d 843, 848-49 (8th Cir. 2014) (de novo review; explaining liberal construction of pro se complaint). We also find no abuse of discretion in the denial of May's post-judgment motion. *See Ryan v. Ryan*, 889 F.3d 499, 507-08 (8th Cir. 2018) (Fed. R. Civ. P. 59(e) motion); *Horras v. Am. Capital Strategies, Ltd.*, 729 F.3d 798, 804 (8th Cir. 2013) (post-judgment motion for leave to amend complaint). The judgment is affirmed. *See* 8th Cir. R. 47B.

JUDGMENT OF THE EIGHTH CIRCUIT
(DECEMBER 13, 2018)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOSEPH ALLEN MAY,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA;
INTERNAL REVENUE SERVICE; JOEL WILSON,
Special Agent; MELANIE G. MOFFAT,

Defendants-Appellees.

No. 18-1411

Appeal from U.S. District Court for the
Western District of Missouri-Jefferson City
(2:17-cv-04157-NKL)

Before: BENTON, SHEPHERD, and
STRAS, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

Order Entered in Accordance with Opinion:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals,
Eighth Circuit

December 13, 2018

ORDER OF THE DISTRICT COURT OF MISSOURI (FEBRUARY 12, 2018)

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

JOSEPH ALLEN MAY,

Plaintiff,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants.

Case No. 2:17-cv-04157-NKL

Before: Nanette K. LAUGHREY,
United States District Judge.

On December 15, 2017, the Court dismissed the complaint by *pro se* plaintiff Joseph Allen May, DDS, on the grounds that his claims against the United States of America were time-barred, and his claims against the other defendants were barred under 26 U.S.C. § 7431(a)(1). May now moves for leave to file an amended complaint against the United States alone on the basis of alleged facts he claims to have recently discovered. The amended complaint includes a new claim under the Federal Tort Claims Act ("FTCA"). For the reasons set forth below, May's motion is denied.

I. Allegations in Proposed Amended Complaint

May alleges that, on April 7, 2014, Special Agent Wilson and another IRS employee came to his office "demanding that [he] stop his dental practice of treating patients for an unscheduled visit," read him a *Miranda* warning in front of his patients and secretary, told him that he was under criminal investigation for tax crimes, and issued IRS administrative subpoenas to his corporation. Doc. 37-1 (amended complaint), ¶ 7(a)-(d).

He further alleges that, on December 15, 2017, he learned through the USA's initial disclosures in this litigation that IRS employees had "contacted Plaintiff's patients, assistants and ex-wife, Maryna May." *Id.*, ¶ 8. By interviewing them, the IRS allegedly "caused it to be made known" to these individuals "that Plaintiff was under IRS CID investigation. . . ." *Id.*, ¶ 12.

On November 15, 2016, an unidentified IRS Special Agent returned Plaintiff's records, which had been subpoenaed by the federal Grand Jury, announcing in front of Plaintiff's secretary, Glenda Scoville, that "the criminal investigation was over . . . as no crime could be found to support an indictment." *Id.*, ¶ 9.

May alleges that he sustained "financial damages" because of the "unauthorized disclosures by United States employees (IRS) discovered by Plaintiff in January-February 2016." *Id.*, ¶ 10. Plaintiff claims that his corporation's "gross production lost $100,000 in 2015, $225,000 in 2016, and $400,000 in 2017" and he discovered these losses within the two-year statute of limitations. *Id.*, ¶ 11.

May seeks damages pursuant to 26 U.S.C. § 7431 and the Federal Tort Claim Act ("FTCA") in the amount

of $1,000 per unauthorized disclosure, actual damages for lost business income equal to the amount of his corporation's losses in 2015, 2016, and 2017, attorneys' fees of $37,500 for his defense in the criminal investigation, and punitive damages of $500,000. *Id.*, ¶¶ 17, 20, 23-26, 27, 32, 35, 36-39.

II. Standard

Federal Rule of Civil Procedure 15(a) permits a party to seek leave of court to amend a pleading. "[W]hile amendments to a party's complaint should be liberally granted, different considerations apply to motions filed after dismissal." *Geier v. Missouri Ethics Comm'n*, 715 F.3d 674, 677 (8th Cir. 2013) (quotation marks and citation omitted). Because May's original complaint was dismissed, he no longer has the right to amend, and must seek leave of court to file an amended complaint. *Id.*

Although leave to amend should be granted freely when justice so requires, denial of leave to amend is appropriate if amendment would be futile. *See, e.g., U.S. ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 557-58 (8th Cir. 2006). A *pro se* complaint should be construed liberally, but nonetheless, it must contain sufficient facts to support the claims advanced. *Stone v. Harry*, 364 F.3d 912, 914 (8th Cir. 2004).

III. Discussion

The sole factual allegation that May now raises that was not addressed in the Court's ruling dismissing the original complaint[1] is that May learned on Decem-

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[1] The Court has already held that the allegations May now makes in ¶ 9 of the amended complaint would not state a claim under

ber 15, 2017 that the IRS let it be known to his patients, assistants, associates, and ex-wife that he was "under IRS CID investigation for a tax crime." Doc. 37-1, ¶¶ 12, 19, 22. May learned of this purported disclosure upon receipt of Defendant's initial disclosures pursuant to Rule 26. *Id.*, ¶¶ 8, 12.

In relevant part, the disclosures listed the following as "[w]itnesses with likely discoverable information that the United States may use to support its claims or defenses":

Witness	Subjects of Discoverable Information
Maryna May	All matters at issue in the case.
Glenda Scoville	All matters at issue in the case.
Jack May . . .	All matters at issue in the case.
Plaintiffs/Customers of Plaintiff's dental practice (to be designated)	All matters at issue in the case.
Employees of Plaintiff's dental practice (to be designated)	All matters at issue in the case.

Doc. 38-2, at 1. From this disclosure, May infers that "United States Employees (IRS) contacted Plaintiff's patients, assistants and ex-wife, Maryna May" and

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Section 7431. *See* Doc. 34, at 7 (holding that the November 14, 2016 incident could not support a claim of unauthorized disclosure because the IRS agent's alleged statements did not indicate that Plaintiff was the subject of a criminal investigation). May does not argue that the Court's prior decision on that point should be reconsidered.

"caused it to be made known that Plaintiff was under IRS CID investigation. . . ." Doc. 37-1, ¶¶ 8, 1; *see also id.*, ¶ 22 ("By interviewing such individuals, prior patients, assistants, associates and ex-wife of Petitioner, every person interviewed by United States employees (IRS) were informed that Plaintiff was under IRS CID investigation for a tax crime.").

The Court explained in its prior order that to avoid dismissal of a § 7431 claim, "a plaintiff must specify who made the disclosures, to whom the disclosures were made, what information was disclosed, the circumstances surrounding the disclosures, and the dates that the disclosures were made. . . ." Doc. 34, at 3-4 (citing, *inter alia*, *Joseph A. May v. United States*, No. 91-0650, 1992 U.S. Dist. LEXIS 16055, at **9-10 (W.D. Mo. 1992) (Bartlett, J.)). Here, May does not allege "what information was disclosed, the circumstances surrounding the disclosures, [or] the dates that the disclosures were made. . . ." May's allegation that the IRS interviewed his prior patients, assistants, and his ex-wife and thereby informed them that he "was under IRS CID investigation for a tax crime" is merely conclusory. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). The fact that Defendant listed these individuals as potential witnesses in the case that May brought does not indicate that the IRS previously contacted them, let alone that the IRS informed them that May was under criminal investigation. Thus, May's allegations "are merely consistent with [the] defendant's liability," and "stop[ ] short of the line between possibility and plausibility of entitlement to relief." *Id.* (quotation

marks and citation omitted). Without any specific allegations concerning the supposedly unauthorized disclosures he recently discovered, May's amendment of his complaint would be futile.

May also attempts to bring a new claim under the Federal Tort Claims Act ("FTCA"). Doc. 37-1, ¶¶ 27-39. However, Congress has not waived sovereign immunity for tort claims "arising in respect of the assessment or collection of any tax." 28 U.S.C. § 2680 (c); *see also Jones v. United States*, 16 F.3d 979, 980-81 (8th Cir. 1994) ("The United States retains its sovereign immunity under section 2680(c) from claims arising in respect to tax assessment or collection even when, as here, the claims encompass torts and constitutional violations."). Thus, this claim is barred.

IV. Conclusion

For the reasons discussed above, May's proposed amendment of his complaint would be futile. Accordingly, his motion for leave to amend the complaint is denied.

/s/ Nanette K. Laughrey
United States District Judge

Dated: February ___, 2018
Jefferson City, Missouri

ORDER OF THE DISTRICT COURT DENYING MOTION TO RECONSIDER (DECEMBER 15, 2017)

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

JOSEPH ALLEN MAY D.D.S.,

Plaintiff,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants.

Case No. 2:17-cv-04157-NKL

Before: Nanette K. LAUGHREY,
United States District Judge.

Plaintiff Joseph Allen May, D.D.S., *pro se*, asks the Court to reconsider its dismissal of his claims against Defendant Melanie Moffat. Doc. 21. The motion is denied.

May sued Moffat, a private attorney, under 26 U.S.C. § 7431 for making allegedly unauthorized disclosures of his tax information as defined in 26 U.S.C. § 6103, when Moffat had represented May's former wife in a dissolution proceeding. May alleged that in the course of that proceeding, Moffat publicly filed a document containing part of his 2014 federal

income tax return, without his authorization. Moffat moved to dismiss May's claim under § 7431 on two, independent grounds: that she did not disclose a "return" as the term is defined under § 6103, and she is not a "person" as defined under § 6103.

The Court granted Moffat's motion to dismiss on the first ground and did not reach the second one. Doc. 18 (Order dated 10/16/2017). The Court held that § 6103 applied to the disclosure of tax returns or return information that was filed with the Internal Revenue Service and then disseminated from the IRS to certain persons identified in § 6103(a)(1)-(3) and disclosed by them. The Court held, "That is as far as the statute goes. [T]here is no indication . . . that Congress intended to enact a general prohibition against public disclosure of tax information." *Stokwitz v. United States*, 831 F.2d 893, 896 (9th Cir. 1987). The statute is simply "designed to protect the information flow between taxpayers and the IRS by controlling the disclosure by the IRS of information received from taxpayers." 831 F.2d at 894. Here, May's Complaint did not allege that Moffat had obtained his return from the IRS and then disclosed it. To the contrary, May admitted in his suggestions in opposition to Moffat's motion to dismiss that Moffat had obtained the tax return from May in the course of the dissolution proceeding, pursuant to a state court order to produce all of his tax returns for purposes of calculating child support obligations. Doc. 13, p. 9. Therefore, the Court granted Moffat's motion to dismiss for failure to state a claim.

In his motion to reconsider, May argues that *Stokwitz*, a case involving the forced search of a Naval attorney's briefcase and seizure of tax returns, and the Navy's disclosure of the returns to various

personal, was inapplicable. In *Stokwitz*, the Ninth Circuit held that the attorney had no remedy under § 6103, because his returns were not obtained directly or indirectly from the IRS 831 F.2d at 897. Regardless of the underlying facts of *Stokwitz*, the case's holding demonstrates how the prohibition on disclosure under the statute works. Other courts have similarly held that § 6103 does not apply to disclosure of returns obtained from persons or entities other than the IRS *See Commodity Futures Trading Comm'n v. Collins*, 997 F.2d 1230, 1233 (7th Cir. 1993) ("[T]he statute does not block access, through pretrial discovery or otherwise, to copies of tax returns in the possession of litigants."); *Clode-Baker v. Cocke*, 2012 WL 1357023, at *2 (W.D. Tex. Apr. 16, 2012) (same, citing *Stokwitz,) report and recommendation approved*, 2012 WL 357-0713 (W.D. Tex. July 2, 2012). *See also St. Regis Paper Co. v. United States*, 368 U.S. 208, 218-19 (1961) (holding that tax returns in the hands of the government are confidential but "copies in the hands of the taxpayer are held subject to discovery"); and *United States v. Reynolds*, 2017 WL 680328, at *2 (N.D. Ill. Feb. 21, 2017) (same) (citing *St. Regis*, 368 U.S. at 218-19). Because Moffat obtained the tax return not from the IRS but from May, § 6103 does not apply to Moffat's alleged disclosure of the return and May fails to state a claim against her under § 7431. May cites no authority to the contrary in his motion to reconsider.

May further argues that he states a claim against Moffat because she is a "person" listed under § 6103(a), specifically, § 6103(l)(6), which authorizes disclosure of return information by the IRS to child support enforcement agencies, but only for the purpose of and

to the extent necessary to establish and collect child support obligations. The Court did not decide in the dismissal order, and does not decide here, whether Moffat is a child support enforcement agency for purposes of § 6103(l)(6) because, as discussed above, May does not claim that Moffat obtained the tax return from the IRS. May's inability to establish that Moffat obtained the return from the IRS makes analysis of his "person" argument unnecessary, and the cases that he cites do not change the Court's conclusion. *See* Doc. 21 (citing *Clode-Baker v. Cocke*, 2012 WL 1357023, at *2 (W.D. Tex. Apr. 16, 2012), *report and recommendation* adopted, 2012 WL 3570713 (W.D. Tex. July 2, 2012), and *Manning v. Haggerty*, 2011 WL 4527818 (M.D. Pa. Sept. 28, 2011)).

In *Clode-Baker* 2012 WL 1357023, at *2, the plaintiff claimed that the defendant, her daughter in law, obtained the plaintiff's tax return information from the IRS and then disclosed it. The defendant moved to dismiss on the basis that she was a private individual who did not fall under any of the categories of persons listed under § 6103(a) who could be sued for an unauthorized disclosure. The district court pointed to *Stokwitz's* holding that § 6103 was "designed to curtail loose disclosure practices by the IRS." and that "there is no indication . . . that Congress intended to enact a general prohibition against public disclosure of tax information." 2012 WL 1357023, at *2 (citing *Stokwitz*, 831 F.2d at 894 and 896)). The district court further explained that in § 6103, "'Congress set out to limit disclosure by persons who get tax returns in the course of public business—employees of the IRS, state employees to whom the IRS makes authorized disclosures, and private persons who obtain return

information from the IRS with strings attached.'" *Id.* (quoting *Hrubec v. Nat'l R.R. Passenger Corp.*, 49 F.3d 1269, 1270 (7th Cir. 1995)). In turn, to state a claim against a private person, a plaintiff must demonstrate that the person falls into one of the specific categories listed under § 6103(a). *Id.* The court held that because the plaintiff had failed to identify any category applicable to the defendant, the claim for unauthorized disclosure must be dismissed. *Id.* at *3.

In other words, the court in *Clode-Baker* did not hold that a private person may be sued under § 7431 regardless of whether she obtained the tax return information from the IRS, so long as she falls under one of the categories listed under § 6103(a). *Clode-Baker* simply involved a private person who had obtained the tax information from the IRS prior to disclosing it, and the court proceeded to discuss how a claim may be stated against such a person. The court nevertheless acknowledged the threshold requirement to bring suit under § 7431—disclosure of a return or return information obtained from the IRS. 2012 WL 1357023, at *2-3 (citing *Stokwitz*, 831 F.2d at 894 and 896, and *Hrubec*, 49 F.3d at 1270). As discussed above, May cannot establish this requirement.

Similar to *Clode-Baker*, the other case that May cites, *Manning v. Haggerty*, 2011 WL 4527818 (M.D. Pa. Sept. 28, 2011), involved an allegation that the defendants obtained the plaintiff's information from the IRS. Specifically, the plaintiff claimed that the defendants opened her letters from the IRS about potential liens and tax liability, and then disclosed the information without her permission. *Id.* at *1. The district court denied as futile the plaintiff's motion for leave to amend to add a count for unauthorized

disclosure, because the defendants did not fall within any category of persons listed in § 6103. *Id.* at *5. The court did not hold that a private person may be sued under § 7431 regardless of whether she obtained the tax return information from the IRS.

May's "person" argument and the authority that he cites do not change the Court's conclusion that May's claim against Moffat must be dismissed because Moffat did not obtain the tax return from the IRS, and that § 7431 therefore does not apply to Moffat's alleged disclosure of the return.

In view of the foregoing, Plaintiff May's motion to reconsider, Doc. 21, is denied.

/s/ Nanette K. Laughrey
United States District Judge

Dated: December 15, 2017
Jefferson City, Missouri

ORDER OF THE DISTRICT COURT (DECEMBER 15, 2017)

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

JOSEPH ALLEN MAY D.D.S.,

Plaintiff,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants.

No. 2:17-cv-04157-NKL

Before: Nanette K. LAUGHREY,
United States District Judge.

This is a case brought under 26 U.S.C. § 7431 by Plaintiff Joseph Allen May, D.D.S., *pro se*, who seeks damages from the Defendants for making allegedly unauthorized disclosures of his tax return information. Defendant United States of America has moved under Fed. R. Civ. P. 12(b)(6) to dismiss the claims against it, on the basis that the claims are untimely and that May has otherwise failed to state a claim that falls under the United States' waiver of sovereign immunity. Doc. 19. The United States further argues that the claims against the remaining Defendants, the Internal Revenue Service, IRS Special Agent Joel Wilson, and

Unknown IRS Agents, should be dismissed because the United States is the only entity that may be sued under § 7431[1], and that May's request for non-monetary relief is not permitted under § 7431.

May moves for leave to file amended suggestions in opposition to the United States' motion to dismiss, and submitted his proposed amended suggestions with his motion for leave. Docs. 29 and 29-1.

May's motion for leave is granted. The United States' motion to dismiss is granted.

I. Background[2]

May states that he "had a history of problems with the IRS for failure to file in 1992." Doc. 1 (Complaint) p. 3, ¶ 10.

He alleges that on April 7, 2014, Special Agent Wilson and another IRS agent came to his office "demanding that [he] stop his dental practice of treating patients for an unscheduled visit," read him a *Miranda* warning in front of his patients, told him that he was under criminal investigation, and issued IRS administrative subpoenas to his corporation. Doc. 1 (Com-

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[1] The Court previously dismissed an unauthorized disclosure claim against another Defendant, Melanie Moffat, a private attorney. Doc. 18 (Order dated 10/16/2017). Moffat's alleged disclosure was separate from those which the governmental defendants allegedly made.

[2] For purposes of deciding a Rule 12(b)(6) motion to dismiss, a court accepts the factual allegations contained in the complaint as true and construes them in the light most favorable to the plaintiff. *See Eckert v. Titan Tire Corp.*, 514 F.3d 801, 806 (8th Cir. 2008), and *Phipps v. F.D.I.C.*, 417 F.3d 1006, 1010 (8th Cir. 2005).

plaint) p. 3, ¶ 13(a)-(d). May complied with the administrative subpoenas later in 2014. *Id.*, p. 4, ¶ 15.

May next alleges that "SA Wilson and other agents made unauthorized disclosures to individuals and persons in other United States agencies in violation of 26 U.S.C. § 7431." *Id.*, p. 3, ¶ 14.

Then, "[i]n 2015, SA Wilson issued Federal Grand Jury subpoenas to discover possible tax crimes by the Plaintiff." *Id.*, p. 3, ¶ 15. May states that he complied with the Grand Jury subpoenas in May of 2015. *Id.*

Finally, May alleges that "[a]round sometime in October 2016, an un-identified IRS Special Agent returned all of the Plaintiff's records which had been subpoenaed by the Federal Grand Jury as no crime could be found to support a federal indictment." *Id.*, p. 5, ¶ 21.

May filed his Complaint in this case on August 22, 2017. He seeks $1,000 per unauthorized disclosure, actual damages for lost business income, attorney fees, and punitive damages, as well as an order requiring the IRS to issue him a letter stating that he is no longer under criminal investigation for the tax years 2005 through 2016. *Id.*, p. 12.

II. Discussion

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (citations omitted). A waiver of sovereign immunity is strictly construed in favor of the United States, and the party bringing suit bears the burden of demonstrating waiver. *Snider v. United States*, 468 F.3d 500, 509 (8th Cir. 2006); *VS Ltd. P'ship v. HUD*, 235 F.3d 1109, 1112 (8th Cir.

2000); and *Murray v. Murray*, 558 F.2d 1340, 1341 (8th Cir. 1977). If the party bringing suit fails to do so, then the claim must be dismissed. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). *See also United States v. Sherwood*, 312 U.S. 584, 586 (1941) (The terms of the United States' consent to suit "define [a] court's jurisdiction to entertain the suit.").

As discussed below, May has failed to demonstrate waiver, and his claims must be dismissed.

A. The Claims Against the United States Are Untimely, or Otherwise Fail to State a Claim Falling Under § 7431's Waiver of Sovereign Immunity

Section 7431(d) provides that suit for unauthorized disclosure of tax return information may be brought "at any time within 2 years after the date of discovery by the plaintiff of the unauthorized . . . disclosure." The "date of discovery" is the date when the plaintiff knows or reasonably should have known of the disclosure. *Aloe Vera of America, Inc. v. United States*, 699 F.3d 1153, 1159 (9th Cir. 2012). "Discovery" means not only the facts that a plaintiff actually knew, but the facts that a reasonably diligent plaintiff would have known. *Id.* at 1159-60 (citing *Merck & Co. v. Reynolds*, 559 U.S. 633, 635 (2010)).

Furthermore, to sufficiently allege a claim under § 7431, a plaintiff must specify who made the disclosures, to whom the disclosures were made, what information was disclosed, the circumstances surrounding the disclosures, and the dates that the disclosures were made, or else the allegations must be dismissed. *See Singh v. New York State Dep't of Taxation & Fin.*, 2011 WL 3273465, at *27 (W.D.N.Y. July 28, 2011),

report and recommendation adopted, 865 F.Supp.2d 344 (W.D.N.Y. 2011) (holding that the plaintiff failed to state a claim under § 7431, where the plaintiff failed to specify what documents and information were disclosed, when the alleged disclosures occurred, or to whom the disclosures were made); and *Joseph A. May v. United States*, 1992 U.S. Dist. LEXIS 16055, *5-6 (W.D. Mo. 1992) (Bartlett, J.) (holding that the plaintiff must "specifically allege who made the alleged disclosures, to whom they were made, the nature of the disclosures, the circumstances surrounding them, and the dates on which they were made", or suffer dismissal).

Conclusory allegations do not suffice to establish § 7431's waiver of sovereign immunity. *See Cryer v. United States*, 554 F.Supp.2d 642, 644-45 (W.D. La. 2008) (granting motion to dismiss § 7431 claim for failure to state a claim because conclusory allegations that special agents of the IRS criminal division made oral disclosures, to certain identified individuals and businesses, that the plaintiff was the subject of a criminal investigation were devoid of any detail or supporting factual basis); and *Chapin v. Hutton*, 1999 WL 550237, at * 8 (D. Id. June 22, 1999) (recommending § 7431 claims be dismissed for failure to state a claim where the plaintiff only alleged that the defendants had discussed the plaintiff's tax liabilities and other confidential matters with unauthorized persons and that such disclosures were not within a statutory exception, because such vague and conclusory statements were insufficient to permit the court to determine whether a violation actionable under § 7431 had occurred), *adopted in relevant part by* 1999 WL 1315-643, at *4 (D. Id. Nov. 24, 1999). *See also Ashcroft v.*

Iqbal, 556 U.S. 662, 678 (2009) ("[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are insufficient to avoid dismissal).

May first alleges that IRS agents came to his office on April 7, 2014 and, in front of his patients, read him *Miranda* warnings, told him that he was under criminal investigation, and issued administrative subpoenas to his corporation. Any unauthorized disclosure that occurred on April 7, 2014 was discovered by May at that time because he was present. May did not file his Complaint until August 2017. Therefore, any claim under § 7431 is untimely because suit was filed more than two years after the incident.

To avoid the two-year deadline, May argues that he only realized financial damages when he filed his 2015 and 2016 tax returns which showed business losses and that he required discovery to discover the unauthorized disclosures. He also suggests that he could not have brought suit sooner because the government would have claimed that there was a pending criminal investigation. Doc. 25, p. 4, and Doc. 29-1, pp. 5-6 of 7. The date when May allegedly realized the extent of his financial damages, or when the government was no longer pursuing a criminal investigation, is not the date that triggers the two-year deadline under § 7431(d). Rather, § 7431(d) expressly provides that the two-year period begins to run "after the date of discovery by the plaintiff of the unauthorized inspection or disclosure." Section 7431(d) provides for no other determination of the filing deadline and the statute must be strictly construed in favor of the United States. *Snider*, 468 F.3d at 509. May knew of any allegedly unauthorized disclosures in connection

with the April 7, 2014 incident because he was present at the time. The claim is therefore untimely.

May also alleges that Special Agent Wilson and other agents made unauthorized disclosures to "individuals and other persons in other United States agencies." Doc. 1, ¶ 14. This allegation is entirely conclusory. May has therefore failed to show that he meets § 7431's waiver. *See Iqbal*, 556 U.S. at 678; and *Cryer*, 554 F.Supp.2d at 644-45.

May also alleges that an agent issued Federal grand jury subpoenas in 2015, with which he had complied by May of 2015. May does not specify what the allegation was, to whom it was made, or when it was made. He therefore failed to carry his burden of establishing that he met § 7431's waiver. *See Singh*, 2011 WL 3273465, at *27; *May*, 1992 U.S. Dist. LEXIS 16055, *5-6; *Cryer*, 554 F.Supp.2d at 644-45; and *Chapin*, 1999 WL 550237, at * 8. In any event, May knew of the subpoenas no later than May of 2015 because he had responded to them by that time, which was more than two years before he filed his Complaint. Therefore, the claim concerning the grand jury subpoena fails to state a claim and is untimely.

May also alleges that "sometime in October 2016, an un-identified IRS Special Agent returned all of the Plaintiff's records which had been subpoenaed by the Federal Grand Jury as no crime could be found to support a federal indictment." Doc. 1, p. 5, ¶ 21. May fails to specify what information was disclosed to the agent or to whom the disclosure was made. He therefore fails to state a claim under § 7431. *See Singh*, 2011 WL 3273465, at *27; *May*, 1992 U.S. Dist. LEXIS 16055, *5-6; *Cryer*, 554 F.Supp.2d at 644-45; and *Chapin*, 1999 WL 550237, at * 8.

In his Suggestions in Opposition, May attempts to add a new fact:

> A Special Agent of the United States returned all of Plaintiff's corporate records on November 14, 2016 (Monday) at or about 3:15 PM stating the Criminal investigation was over to the Plaintiff and his secretary. This was the last known disclosure. If the Plaintiff's secretary had been confused over the criminal investigation, it was clear that the Plaintiff had been under criminal investigation which devastated the Plaintiff's dental practice. . . .

Doc. 25, p. 3. This fact does not appear in the Complaint and May has not requested leave to amend it. The United States acknowledges that leave to amend a complaint should be freely given when justice so requires, but also points out that a court need not entertain futile amendments to the pleadings. Doc. 28, p. 2 (citing, *inter alia*, Fed. R. Civ. P. 15(a) and *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 225 (8th Cir 1994)). The November 14, 2016 incident would be insufficient to state a claim of unauthorized disclosure under § 7431, because the agent's alleged statement did not identify any return information and did not identify the subject of the investigation. The agent's statement revealed only that May's corporate records were part of a criminal investigation that had concluded. A witness' documents may lawfully be subpoenaed in the course of a criminal investigation, *see* Fed. R. Crim. P. 17(c), and logically, they may lawfully be returned. Furthermore, § 7431 does not prohibit an agent from stating that an investigation has concluded where the subject of the

investigation is not identified. *See* § 6103(b)(2)(A) (defining return information as including information about "whether the taxpayer's return was, is being, or will be examined or subject to other investigation . . . or determination of the existence of liability . . . of any person under this title for . . . any fine, forfeiture, or offense") (emphasis added), and *Snider v. United States*, 468 F.3d 500, 507 (8th Cir. 2006) (holding that § 7431's prohibition on unauthorized disclosures is not violated where agents show their badges and identify themselves as criminal investigators as a necessary part of their investigation, but is violated where agents disclose the subject of their investigation).

May argues that "if his secretary had been confused over the criminal investigation, it was clear that the Plaintiff had been under criminal investigation." Doc. 25, p. 3. As discussed above, the agent did not identify the subject of the investigation, nor any return information. Moreover, if May's secretary had not been confused, *i.e.*, she already knew, then the agent did not "make known" to her that May was under criminal investigation. *See* § 6103(b)(8) (a disclosure is "the making known to any person in any manner whatever a return or return information"). May's argument concerning the unpled November 14, 2016 incident does not demonstrate that he has a legally sufficient claim against the United States under § 7431.

In his proposed Amended Suggestions in Opposition, May attempts to add other new facts:

- Special Agent Joel Wilson went to various unknown individuals, businesses, and companies saying, Joseph May, D.D.S., the Plaintiff was under Criminal Investigation.

- Also, SA Joel Wilson sent off an unknown number of envelopes with his identifier as "Criminal Investigation" as the return address and the same on numerous subpoenas.

Doc. 29-1, p. 4. These facts do not appear in the Complaint and May has not moved for leave to amend it. Nonetheless, these additional facts do not state a legally sufficient, timely claim against the United States under § 7431 because May does not specify when the disclosures were made, the nature of and the circumstances surrounding the disclosures, nor to whom the disclosures were made. *See Singh*, 2011 WL 3273465, at *27; *May*, 1992 U.S. Dist. LEXIS 16055, *5-6; *Cryer*, 554 F.Supp.2d at 644-45; and *Chapin*, 1999 WL 550237, at * 8.

In view of the foregoing, all claims against the United States are dismissed.

B. Only the United States May Be Sued Under § 7431(a)(1) for the Government's Allegedly Unlawful Disclosure of Tax Return Information

In addition to the United States, May names as Defendants the IRS, Special Agent Wilson, and Unknown Government Agents. But by its plain language, § 7431(a)(1) provides for suit against only the United States for a governmental officer or employee's allegedly unlawful disclosure:

> If any officer or employee of the United States knowingly, or by reason of negligence, inspects or discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages

> against the United States in a district court of the United States.

(Emphasis added.) Individual agents may not be sued under the statute. *See Diamond v. United States*, 944 F.2d 431, 435 (8th Cir. 1991) (actions under § 7431 must be brought against the United States rather than against the individual IRS agent); and *Mid-South Music Corp. v. Kolak*, 756 F.2d 23, 25 (6th Cir. 1984) (the only proper defendant under § 7431(a)(1) is the United States; an individual employee is not a proper defendant). Therefore, Special Agent Wilson and the Unknown IRS Agents may not be sued under § 7431 for the alleged unlawful disclosures.

Furthermore, not only the United States but its agencies are entitled to sovereign immunity from suit absent a waiver. *Meyer*, 510 U.S. at 475. And as discussed above, the scope of a waiver must be strictly construed in favor of the sovereign. *Snider*, 468 F.3d at 509. Section 7431 does not, by its plain language, authorize suit against an agency of the United States, only against the United States. Therefore, the IRS may not be sued under § 7431.

May does not respond to the United States' argument concerning the limitation of the reach of § 7431 to the United States. In view of the foregoing, the United States is the only proper defendant under § 7431, and the claims against the IRS, IRS Special Agent Joel Wilson, and the Unknown IRS agents are dismissed.

C. May's Request for an Order Requiring the IRS to Issue Him a Letter is Precluded by Sovereign Immunity

In addition to payment of monetary relief, May asks the Court to order the IRS to issue him a letter stating that he is no longer under criminal investigation for the tax years 2005 through 2016. Nothing in § 7431 permits the Court to order the IRS to issue a letter, and § 7431's waiver must be strictly construed in favor of the sovereign. *See Snider*, 468 F.3d at 509. The request is therefore precluded by sovereign immunity.

III. Conclusion

Plaintiff May's motion for leave to file amended suggestions in opposition to the United States' motion to dismiss, Doc. 29, is granted, and the Clerk shall file May's proposed amended suggestions, Doc. 29-1. Defendant United States of America's motion to dismiss, Doc. 19, is granted and all claims against the United States, the Internal Revenue Service, IRS Special Agent Joel Wilson, and Unknown IRS agents are dismissed.

/s/ Nanette K. Laughrey
United States District Judge

Dated: December 15, 2017
Jefferson City, Missouri

ORDER OF THE DISTRICT COURT GRANTING DEFENDANT'S MOTION TO DISMISS (OCTOBER 16, 2017)

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

JOSEPH ALLEN MAY D.D.S.,

Plaintiff,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants.

No. 2:17-cv-04157-NKL

Before: Nanette K. LAUGHREY,
United States District Judge.

This is a case brought under 26 U.S.C. § 7431 by Plaintiff Joseph Allen May, D.D.S., *pro se*, who seeks damages and penalties from the Defendants for making allegedly unauthorized disclosures of his tax information as defined in 26 U.S.C. § 6103. The Defendants are the United States of America, the Internal Revenue Service, IRS Special Agent Joel Wilson, and Unknown IRS agents, as well as Melanie Moffat, an attorney. Moffat moves under Fed. R. Civ. P. 12(b)(6) for dismissal of the claims against her. Doc. 8. The motion is granted.

I. Background

Plaintiff was formerly married to Anna Mae Pon May. Plaintiff alleges that in 2012, during the parties' dissolution proceeding, Mrs. May reported to the IRS that Plaintiff had forged her signature on a tax form. The IRS performed a criminal investigation, but nothing ultimately came of it.

Defendant Moffat represented Mrs. May in the dissolution. The substantive allegations against Moffat contained in the Complaint are set out here in their entirety:

> 18. Defendant, Melanie Moffat, published part of the Plaintiff's 2014 tax return on August 27, 2015 where Melanie Moffat identified the document as part of the Plaintiff's tax return. This document contained tax return information as defined in 26 U.S.C. 6103 and appeared to be an unauthorized disclosure by this Defendant.
>
> 19. Cole County Circuit Court records of Jefferson City, Missouri revealed over 10 people requested copies of this document and such document remains unsealed at this date by the Cole county Circuit court.
>
> 20. SA Wilson and other agents refused to prosecute Defendant Melanie Moffat for Making unauthorized disclosures of tax information as defined in 26 U.S.C. 6103.
>
> * * *
>
> 45. [ ](a) There are over ten requests for copies of a pleading filed by Melanie Moffat where part of Plaintiff's 2014 tax return was

> attached to the pleading to degrade or demonize the Plaintiff in violation of Title 26 U.S.C. § 7431 (civil) and 7213. . . .
>
> * * *

Doc. 1, pp. 4 and 11.

II. Discussion

Moffat makes two arguments in support of her motion to dismiss for failure to state a claim. She argues that § 6103's prohibition against disclosure of a "return" does not apply to her because Plaintiff does not and cannot allege that she obtained the tax return from the IRS. She also argues that she is not within the class of persons to whom § 6103's prohibitions on disclosure apply. As discussed below, Moffat is entitled to dismissal based on the first argument, and the Court therefore need not address the second one.

For purposes of deciding a motion to dismiss for failure to state a claim, a court accepts the factual allegations contained in the complaint as true. *Eckert v. Titan Tire Corp.*, 514 F.3d 801, 806 (8th Cir. 2008). To survive a motion to dismiss, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint is plausible if its "factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Braden v. Wal–Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678). A complaint that offers labels, bare assertions, and "[t]hreadbare recitals of the elements of a cause of

action, supported by mere conclusory statements," is insufficient to avoid dismissal. *Iqbal*, 556 U.S. at 678. *See also Schooley v. Kennedy*, 712 F.2d 372, 373 (8th Cir. 1983) ("Although *pro se* pleadings are to be construed liberally, *pro se* litigants are to not excused from compliance with relevant rules of the procedural and substantive law.").

A. Sections 7431 and 6103

Section 7431 allows individuals to sue for civil damages if their tax return information was disclosed in violation of § 6103. Section 7431 provides in relevant part:

> If any person who is not an officer or employee of the United States knowingly, or by reason of negligence, inspects or discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103 . . . , such taxpayer may bring a civil action for damages against such person in a district court of the United States.

§ 7431(2). In turn, § 6103 provides in relevant part:

> Returns and return information shall be confidential, and except as authorized by this title—
>
> (1) no officer or employee of the United States,
>
> (2) no officer or employee of any State, any local law enforcement agency receiving information under subsection (i)(7)(A), any local child support enforcement agency, or any local agency administering a program listed in subsection (1)(7)(D) who has or had access

to returns or return information under this section or section 6104(c), and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1) (D)(iii), paragraph (6), (10), (12), (16), (19), (20), or (21) of subsection (1), paragraph (2) or (4)(B) of subsection (m), or subsection (n), shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section.

§ 6103(a). A "return" is defined as:

> [A]ny tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

§ 6103(b)(1). "Return information" is similarly defined as:

> [A] taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other

> data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]

§ 6103(b)(2)(A).

B. Moffat Did Not Disclose a "Return" for Purposes of § 6103

Section 6103 is "designed to protect the information flow between taxpayers and the IRS by controlling the disclosure by the IRS of information received from taxpayers." *Stokwitz v. United States*, 831 F.2d 893, 894 (9th Cir. 1987). Section 6103 does so by controlling the disclosure of "returns" and "return information," defined under the statute to cover materials filed with or received by the Secretary of the Treasury. *Id.* at 895-96 and n.3; § 6103(b)(1) and (2). "That is as far as the statute goes. [T]here is no indication . . . that Congress intended to enact a general prohibition against public disclosure of tax information." *Id.* at 896. By way of example, *Stokwitz* involved a disclosure claim under § 6103 by a civilian attorney for the U.S. Navy. The attorney was accused of misconduct and escorted off the base. Without a warrant or other authorization, the attorney's supervisees, supervisor, and another employee then searched the attorney's office and briefcase, and seized several items, including the attorney's personal copies of the federal and state tax returns that he had filed for the years 1982 and 1983. A Navy employee audited the

returns, the returns were disclosed to various other Navy employees, and the attorney was then fired. He sued the United States, the Department of the Navy, and the Department of Justice under § 6103 for the disclosure of his tax returns. The Ninth Circuit held that the attorney had no remedy under § 6103, because his returns were not obtained directly or indirectly from the IRS. *Id.* at 897.

Moffat argues, among other things, that Plaintiff fails to allege in the Complaint that she obtained the tax return from the IRS, and she discusses *Stokwitz.* Doc. 9, pp. 3, 4-5. In his suggestions in opposition, Plaintiff does not specifically respond to Moffat's argument concerning the source of his tax return and how that affects his claim under § 6103, focusing instead on Plaintiff's second argument for dismissal, *i.e.*, that she is not within the class of persons to whom § 6103's prohibitions on disclosure apply. *See* Doc. 13, pp. 3-11. Plaintiff does state in his suggestions that Moffat obtained the tax return from him in the dissolution proceeding, pursuant to a state court order to produce all his tax returns for purposes of calculating child support obligations. Doc. 13, p. 9.

Although the allegations in a complaint are to be construed as true at the motion to dismiss stage, and *pro se* pleadings are to be construed liberally, the allegations in a *pro se* complaint must still be supported by some factual content. *See Iqbal*, 556 U.S. at 678, and *Schooley*, 712 F.2d 372, 373 (8th Cir. 1983). Here, Plaintiff simply alleges that the tax return Moffat publicly filed "contained tax return information as defined in 26 U.S.C. 6103." Plaintiff's bare allegation does not satisfy the low bar requiring that some factual content be pled. Therefore, the Complaint does not

state a claim against Moffat under § 6103 and must be dismissed.

The propriety of dismissal of the claim against Moffat at this early stage in the litigation is reinforced by Plaintiff's concession that he provided his tax return to Moffat. Section 6103 does not apply in the case of a return obtained from a source other than the IRS. *See Stokwitz*, 831 F.2d at 897; and *Ryan v. United States*, 74 F.3d 1161, 1163 (11th Cir. 1996) (holding that section 6103's definition of "return information" is confined to information that has passed through the IRS). *See also Commodity Futures Trading Comm'n v. Collins*, 997 F.2d 1230, 1233 (7th Cir. 1993) (Section 6103 "does not block access, through pretrial discovery or otherwise, to copies of tax returns in the possession of litigants; all it prevents is the IRS's sharing tax returns with other government agencies. . . . The subpoena is directed not at the returns, which remain safely locked in IRS's files, but at copies in the possession of the individual.").

In view of the foregoing, Moffat's second argument in support of dismissal need not be addressed.

III. Conclusion

Defendant Melanie Moffat's motion to dismiss the claims against her, Doc. 8, is granted.

/s/ Nanette K. Laughrey
United States District Judge

Dated: October 16, 2017
Jefferson City, Missouri

ORDER OF THE DISTRICT COURT DENYING PETITION FOR REHEARING EN BANC (FEBRUARY 20, 2019)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOSEPH ALLEN MAY,

Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

No: 18-1411

Appeal from U.S. District Court for the
Western District of Missouri-Jefferson City
(2:17-cv-04157-NKL)

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals,
Eighth Circuit.

February 20, 2019

**UNITED STATES' RULE 26(A)(1)
INITIAL DISCLOSURES
(DECEMBER 15, 2017)**

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

JOSEPH ALLEN MAY D.D.S.,

Plaintiff,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants.

Case No. 2:17-cv-04157-NKL

Pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure, the United States of America makes the following initial disclosures.

A. Witnesses:

Witnesses with likely discoverable information that the United States may use to support its claims or defenses are:

Witness	Subjects of Discoverable Information
Joseph Allen May, Plaintiff	All matters at issue in the case.
Maryna May	All matters at issue in the case.
Glenda Scoville	All matters at issue in the case.
Jack May 1601 Jefferson Heights Dr., Jefferson City, Missouri 65109	All matters at issue in the case.
Plaintiffs/Customers of Plaintiff's dental practice (to be designated)	All matters at issue in the case.
Employees of Plaintiff's dental practice (to be designated)	All matters at issue in the case.
Former Special Agent Joel Wilson, Internal Revenue Service	All matters at issue in the case.
Special Agents Jarrett Wade, Julie Tomlinson, Jeff Abbott, and Revenue Agent Michelle Ellis, Internal Revenue Service (IRS personnel should only be contacted through the undersigned counsel for the United States.)	All matters at issue in the case.

Revenue or Technical Employees of the Internal Revenue Service (to be designated) (IRS personnel should only be contacted through the undersigned counsel for the United States.)	IRS employees have knowledge of IRS records, including the Internal Revenue Service's document retention and internal record-keeping procedures.

B. Documents:

The United States has the following categories of documents within its possession, custody, or control that it may use to support its claims or defenses in this case:

- Form 3949 A, Information Referral, received by the IRS on July 24, 2012; and
- IRS Memorandums of Interview related to the above-listed Form 3949, Information Referral.

C. Damages Computation:

The United States is not claiming damages in this case.

D. Insurance Agreement:

Not applicable.

Respectfully submitted,

DAVID A. HUBBERT
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Dated: December 15, 2017

SUPREME COURT
PRESS