Appendix A

Table of Contents

Appendix A

Rule 14.1(i)(i)—Appellate Opinion

USCA11 (Apr. 28, 2020) – Aff'd. with sanctions.

Case: 19-12003 Date Filed: 04/28/2020 Page: 1 of 17

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-12003
Non-Argument Calendar

D.C. Docket No. 2:17-cv-00281-JES-UAM

MICHAEL EDWARD BUFKIN,

Plaintiff – Appellant,

versus

SCOTTRADE, INCORPORATED,
apparently an Arizona corporation,
officially and individually,
JACOB J. LEW
Secretary, the Department of the Treasury,
officially and individually,
d.b.a. U.S. Department of Treasury,
TIMOTHY F. GEITHNER,
Secretary, the Department of the Treasury,
officially and individually
d.b.a. U.S. Department of Treasury,
JOHN KOSKINEN,
Commissioner, Internal Revenue Service,
officially and individually,
DOUGLAS SHULMAN,
Commissioner, Internal Revenue Service,
officially and individually, et al.,

Defendants – Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(April 28, 2020)

Before JORDAN, NEWSOM, and TJOFLAT, Circuit Judges.

PER CURIAM:

Michael Edward Bufkin, appearing *pro se,* appeals the District Court's orders dismissing his "tax" claims against Scottrade, Inc. and officials and staff of the Internal Revenue Service ("IRS") and the U.S. Department of Treasury (collectively, the "government parties") for selling the stocks in his Scottrade account and conspiring to have Scottrade give the funds to the IRS to satisfy a tax liability. He claims that he never "volunteered" to be a taxpayer, and thus that it was improper to take the funds from his trading account to satisfy his alleged tax liability. As best as we can tell from his complaint, he asserts a breach of contract claim against Scottrade for selling his shares at the request of the IRS and various claims against the government parties in both their official and individual capacities, including *Bivens*[1] and intentional tort claims for violating his "right not [⊥ 3] to contract" with the IRS to pay taxes, conspiracy to obtain the funds in his Scottrade account and to violate his right not to contract with the IRS, failure to prevent the

[1] *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999 (1971).

conspiracies under 42 U.S.C. § 1983, failure to train, and a request for administrative sanctions. Alternatively, he seeks a declaration that he is not a "taxpayer," guidance on how to terminate his obligations as a taxpayer, or "injunctive/mandamus relief' requiring the production of documents showing that Bufkin is indeed a taxpayer.

On appeal, Bufkin argues that the District Court erred by (1) denying his motion to strike the magistrate judge's order staying discovery; (2) granting the government parties' motion to dismiss his complaint against them; (3) granting Scottrade' s motion to compel arbitration of the claims against it; and (4) permitting the clerk to sign and enter the judgments against him. The government parties have also moved for sanctions against Bufkin under Federal Rule of Appellate Procedure 38, on the ground that this appeal is frivolous. After careful review, we affirm the District Court's orders in all respects and grant the government parties' motion for sanctions.

I.

Bufkin first appeals the District Court's denial of his motion to strike the magistrate judge's order staying discovery. He claims that the magistrate judge lacked the authority to make any decisions in his case because he did not consent [⊥ 4] to resolution by a magistrate judge, and so the District Court erred in denying his motion to strike the magistrate judge's order and the magistrate judge abused her discretion in staying discovery.

We review a district court's discovery orders for abuse of discretion. *See Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1366 (11th Cir. 1997). The district court "may designate a magistrate judge to

hear and determine any pretrial matter pending before the court," with certain listed exceptions for dispositive matters that do not apply here. 28 U.S.C. § 636(b)(1)(A). The district court reviews a magistrate judge's determinations on non-dispositive pretrial matters under the clearly-erroneous or contrary-to-law standard. *Jordan v. Comm'r, Miss. Dep't of Corr.*, 947 F.3d 1322, 1327 (11th Cir. 2020) (citing 28 U.S.C. § 636(b)(1)(A)).

Here, the District Court was well within its discretion to refer this non-dispositive, pretrial discovery matter to the magistrate judge in accordance with § 636(b)(1)(A). Contrary to Bufkin's contention, the parties' consent is not required for a magistrate judge to resolve such discovery disputes.

Moreover, the magistrate judge did not clearly err in staying discovery pending the government parties' motion to dismiss and Scottrade's motion to compel arbitration. Under the Federal Arbitration Act ("FAA"), a court "shall on application of one of the parties stay" the proceedings if it finds that the issue [⊥ 5] presented is "referable to arbitration under an agreement in writing for such arbitration," so that the parties may arbitrate the claims in accordance with the terms of the agreement. 9 U.S.C. § 3. Additionally, "[f]acial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should... be resolved before discovery begins." *Chudasama,* 123 F.3d at 1367. "Because a facial challenge to the legal sufficiency of a claim raises only questions of law, 'neither the parties nor the court have any need for discovery before the court rules on the motion.'" *World Holdings, LLC v. Fed. Republic of Germany, 701* F.3d 641, 655 (11th Cir.

2012) (quoting *Chudasama,* 123 F.3d at 1367).

Scottrade filed a motion to compel arbitration in accordance with its written arbitration agreement with Bufkin, and the government parties filed a motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1) and failure to state a claim under Rule 12(b)(6), challenging the legal sufficiency of Bufkin's complaint. The magistrate judge took a "preliminary peek" at the motions and determined that they were likely meritorious and dispositive of the case. Given the potential for Bufkin's claims against Scottrade to be resolved in arbitration, and the likelihood that Bufkin's claims against the government parties could be fully resolved on the government parties' motion to dismiss, the magistrate judge [⊥ 6] appropriately stayed discovery until these motions could be decided. As such, the District Court did not abuse its discretion in denying Bufkin's motion to strike.

II.

Next, Bufkin appeals the District Court's order granting the government parties' motion to dismiss. The District Court found, as a preliminary matter, that Bufkin's argument that he is not a taxpayer because he did not volunteer to pay taxes is "patently frivolous," and so it dismissed his requests for injunctive and declaratory relief regarding his status as a taxpayer without further discussion. It then considered the various bases upon which the Court might exercise subject matter jurisdiction over Bufkin's claims against the government parties in their official capacities. After determining that no such basis for jurisdiction existed, it dismissed those claims for lack of subject-matter jurisdiction. Moreover, with respect to Bufkin's claims against the

government parties in their individual capacities, the Court found that none of the individuals were properly served, and so the Court lacked personal jurisdiction over the government parties with respect to those claims. In any event, the Court found that Bufkin had not alleged any well-plead constitutional violations under *Bivens*. We first address the District Court's rulings that it lacked subject-matter jurisdiction and personal jurisdiction over the government parties, and then consider the District Court's alternative dismissal under Rule 12(b)(6). [⊥ 7]

A.

We review dismissal for lack of subject matter jurisdiction *de novo*. *Christian Coal. of Fla., Inc. v. United States*, 662 F.3d 1182, 1188 (11th Cir. 2011). Sovereign immunity limits the court's jurisdiction to hear claims against the United States to only those areas where Congress has expressly waived the immunity—i.e., where the federal government has consented to be sued. *Id.*; *see also United States v. Mitchell*, 463 U.S. 206, 212, 103 S. Ct. 2961, 2965 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."). The immunity covers federal officials sued in their official capacities. *See Davila v. Gladden*, 777 F.3d 1198, 1209 (11th Cir. 2015). "In order to authorize official-capacity suits, Congress must clearly waive the federal government's sovereign immunity." *Id.* Statutes waiving immunity are thus strictly construed. *Id.*; *Christian Coal. of Fla.*, 662 F.3d at 1188.

None of the statutes that Bufkin cites in his complaint support exercising subject-matter

jurisdiction over his claims against the government parties in their official capacities. Bufkin cites 28 U.S.C. § 1330, which provides for district courts' original jurisdiction over actions against foreign states; § 1333, which provides for admiralty and maritime jurisdiction; and § 1339, which provides for "original jurisdiction of any civil action arising under any Act of Congress relating [⊥ 8] to the postal service." Those statutes are plainly inapplicable here. He also cites § 1331, which provides for jurisdiction over civil claims arising under the constitution and laws of the United States (i.e., federal questions), and § 1343, which applies to federal civil, rights violations by state officials, but neither of those statutes provide a waiver of sovereign immunity. *See Beale v. Blount*, 461 F.2d 1133, 1138 (5th Cir. 1972).[2]

The District Court considered several other potential grounds for exercising jurisdiction, including under the Federal Tort Claims Act ("FTCA") or as a claim for the recovery of taxes under 28 U.S.C. § 1346(a)(1), and correctly concluded that neither of those statutes authorized Bufkin's suit against the government parties in their official capacities, primarily because Bufkin had not taken steps to exhaust his administrative remedies.[3] *See Motta ex rel. A.M. v. United States*, 717 F.3d 840, 843 (11th Cir. 2013) (explaining that while the FTCA provides a limited waiver of the United States'

---

[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as precedent all decisions of the former Fifth Circuit Court of Appeals decided prior to October 1, 1981.

[3] Bufkin also explicitly disclaimed reliance on § 1346 for establishing subject-matter jurisdiction.

sovereign immunity for tort claims, a federal court may not exercise jurisdiction over a suit unless the claimant first files an administrative claim with the appropriate agency); 26 U.S.C. § 7422(a) ("No suit or proceeding shall be maintained in any court for the recovery of any internal [⊥ 9] revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary.").[4] Furthermore, as we stated in Bufkin' s previous appeal to this Court, the Anti-Injunction Act and Declaratory Judgment Act do not authorize his requests for injunctive or declaratory relief. *See Bufkin v. United States*, 522 F. App'x 530, 533 (11th Cir. 2013).

Rather than present any non-frivolous arguments

---

[4] The Court also considered whether it could exercise jurisdiction over Bufkin's suit by construing it as a claim regarding the collection of taxes under 26 U.S.C. § 7433(a). But even if that might have provided a basis for the Court's subject-matter jurisdiction, *see Galvez v. I.R.S.*, 448 F. App'x 880, 887 (11th Cir. 2011) (declining to construe § 7433(d)(1)'s requirement that a plaintiff exhaust administrative remedies as a jurisdictional bar to suit), Bufkin's suit should still have been dismissed for failure to state a claim due to his failure to exhaust his administrative remedies, *see* 26 U.S.C. § 7433(d)(1) ("A judgment for damages shall not be awarded... unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service.").

supporting jurisdiction or a waiver of sovereign immunity, Bufkin has simply dismissed the government parties' claim of sovereign immunity as "insanity run amuck" and a "cover story defense." The District Court properly dismissed Bufkin's claims against the government parties in their official capacities for lack of subject-matter jurisdiction. [⊥ 10]

B.

We review dismissal for lack of personal jurisdiction *de novo*. *Fraser v. Smith*, 594 F.3d 842, 846 (11th Cir. 2010). The district court lacks personal jurisdiction when service of process is not in "substantial compliance" with the requirements of the Federal Rules of Civil Procedure, even if a defendant has actual notice of the filing of the suit. *See Prewitt Enters., Inc. v. OPEC*, 353 F.3d 916, 925 (11th Cir. 2003). To serve a government official in his individual capacity, a party must both serve the United States and serve the official personally under Rule 4(e). Fed. R. Civ. P. 4(i)(3). Here, Bufkin attempted to serve the government parties in their individual capacities by delivering the summons via certified mail to the Department of Treasury and IRS government offices in Washington, D.C. and Florida.

Rule 4 generally permits service of process by certified mail only if the defendant agrees to waive personal service. Fed. R. Civ. P. 4(d). Otherwise, Rule 4 does not authorize service through certified mail unless such service is permitted under the laws of the state where the district court is located–here, Florida–or the state where service is made–here, either Florida or the District of Columbia. *See* Fed. R. Civ. P. 4(e)(1). Florida law permits service by certified mail, but only if the defendant agrees to

waive personal service. Fla. R. Civ. P. 1.070(i); *Transp. & Gen. Ins. Co. v. Receiverships of Ins. Exch.*, 576 So. 2d 1351, 1352 (Fla. Dist. [⊥ 11] Ct. App. 1991) ("There is no statutory authority, or authority under Rule 1.070, Florida Rules of Civil Procedure, for serving appellant only by certified mail, as was done here."). The District of Columbia also permits the use of certified mail, provided that the return receipt is signed by either the party to be served or someone who is authorized to accept service on the party's behalf. D.C. Super. Ct. R. Civ. P. 4(c)(4), (e), (i)(3); *Cruz-Packer v. District of Columbia,* 539 F. Supp. 2d 181, 187 (D.D.C. 2008) (finding service ineffective where the plaintiff mailed the required papers to each individual defendant's business address, but failed to present evidence either that they were delivered to any of the individual defendants or that the people who signed for the mailings were authorized to receive service of process, as opposed to being authorized simply to receive mail); *Byrd v. District of Columbia*, 230 F.R.D. 56, 59 (D.D.C. 2005) ("[It is] established District of Columbia precedent that service of process is invalid when the plaintiff sends a summons and complaint by certified mail to a defendant's offices but the mail is signed for by a secretary, receptionist, or other individual not specifically authorized to accept service of process. This holds true even if the receptionist or secretary generally opens and signs for the mail delivered to that address.").

Here, the District Court correctly held that Bufkin failed to properly serve the government parties in their individual capacities. First, service by certified mail was not proper under either federal or Florida law because Bufkin presented [⊥ 12] no

evidence that the individual government defendants waived personal service. Second, service by certified mail was not proper under District of Columbia law because Bufkin failed to show that any of the individuals who signed for the mail, none of whom appear to be the named defendants, were authorized to receive service of process on behalf of the individual government defendants.[5] Accordingly, because Bufkin did not properly serve the individual government defendants, the District Court lacked personal jurisdiction over Bufkin's claims against the government parties in their individual capacities. The District Court therefore properly dismissed the claims against the government parties in their individual capacities.

C.

Alternatively, the District Court properly determined that even if it had jurisdiction to consider Bufkin's claims against the government parties, those claims should be dismissed for failure to state a claim under Rule 12(b)(6). We review *de novo* a district court's ruling on a Rule 12(b)(6) motion, viewing the facts in the light most favorable to the plaintiff and accepting all well-pleaded facts as true. *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003). Although we liberally construe a *pro se* litigant's pleadings, *Alba v. Montford,* 517 F.3d 1249, [⊥ 13] 1252 (11th Cir. 2008), we must dismiss a complaint for failure to state a claim "when the allegations in a complaint, however true, could not

---

[5] In fact, some of the return receipts for the documents sent to the IRS office in Washington, D.C. contain nothing more than a stamp from the IRS indicating the date they were received.

raise a claim of entitlement to relief[.]" *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 558, 127 S. Ct. 1955, 1966 (2007).

We have consistently rejected "tax protest" arguments challenging the general applicability of tax liability. *See Biermann v. Comm'r,* 769 F.2d 707, 708 (11th Cir. 1985) ("These arguments are patently frivolous, have been rejected by courts at all levels of the judiciary, and, therefore, warrant no further discussion."). Bufkin's entire lawsuit rests on the frivolous argument that he did not "volunteer" to be a taxpayer and that the government parties violated his fundamental "right not to contract" with the IRS. The District Court thus did not err in dismissing his claims under Rule 12(b)(6).

III.

Third, Bufkin challenges the District Court's order compelling arbitration with Scottrade on the ground that the government parties are essential to the resolution of his case but are not parties to Bufkin's arbitration agreement with Scottrade. He also argues that the key question—whether he volunteered to be a taxpayer—is not subject to arbitration under the Financial Industry Regulatory Authority's regulations. We review a district court's decision regarding a motion to compel arbitration *de novo. Lawson v. Life of the South Ins. Co.,* 648 F.3d 1166, [⊥ 14] 1170 (11th Cir. 2011). To determine whether a dispute between parties to an enforceable arbitration agreement is covered by the arbitration clause, we apply the FAA. *Id.* Under the FAA, an arbitration clause "shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA requires district courts to compel

arbitration of pendent arbitral claims when one of the parties files a motion to compel, even if it results in the inefficient maintenance of separate proceedings in different forums. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217, 105 S. Ct. 1238, 1241 (1985). In other words, "if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation." *KPMG LLP v. Cocchi*, 565 U.S. 18, 19, 132 S. Ct. 23, 24 (2011) (per curiam).

Here, the District Court did not err in granting Scottrade's motion to compel arbitration. Bufkin and Scottrade agreed in writing that any dispute between them would be subject to arbitration, and Bufkin does not contest the validity of that agreement. Moreover, Butkin's claims against Scottrade are clearly arbitrable breach-of-contract claims—not "tax" claims, as Bufkin argues.[6] Because his [⊥ 15] claims against Scottrade are distinct and severable from his claims against the government parties, the District Court did not err in requiring Bufkin to arbitrate those claims separately. *See Cocchi*, 565 U.S. at 19, 132 S. Ct. at 24; *Dean Witter Reynolds Inc.*, 470 U.S. at 217, 105 S. Ct. at 24.

---

[6] Even construed as "tax" claims, the arbitration agreement makes no explicit exceptions for claims arising from potential tax liability. The FAA creates a "presumption in favor of arbitrability[,]" and so parties must clearly express their intent to exclude certain claims from their arbitration agreements. *Paladino v. Avnet Computer Techs.*, 134 F.3d 1054, 1057 (11th Cir. 1998).

IV.

Finally, Bufkin appeals the clerk's entry of the judgments against him. He argues that the clerk lacked the authority to sign the judgments and that the exercise of such authority by the clerk amounted to an impermissible delegation of the district judge's adjudicative power, which none of the parties consented to. Bufkin contends that for a judgment to be valid, it must be signed by the judge. But the Federal Rules of Civil Procedure provide that "the clerk must, without awaiting the court's direction, promptly prepare, *sign,* and enter the judgment when... the court denies all relief." Fed. R. Civ. P. 58(b)(1)(c). The District Court in this case had denied all of Bufkin's requested relief when it granted the government parties' motion to dismiss and dismissed Bufkin's claims against Scottrade for failure to comply with the Court's previous orders mandating arbitration. As such, the clerk properly signed and entered the judgments in accordance with Rule 58(b). [⊥ 16]

V.

Finally, the government parties ask us to impose $8,000 in sanctions against Bufkin for maintaining this frivolous appeal.[7] Under Rule 38 of the Federal

---

[7] Rather than asking the District Court to calculate exact damages, the government parties ask this Court to impose a flat damages award of $8,000. That figure is lower than the average expense of $12,500 that the Department of Justice claims it typically incurs in the defense of frivolous taxpayer appeals. We have previously noted that "this procedure is in the appellant's interest as he would be liable for the additional costs and attorney's fees

Rules of Appellate Procedure, "[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." Fed. R. App. P. 38. "Rule 38 sanctions have been imposed against appellants who raise clearly frivolous claims in the face of established law and clear facts." *Farese v. Scherer,* 342 F.3d 1223, 1232 (11th Cir. 2003) (quotation marks omitted). For purposes of Rule 38 sanctions, a claim is frivolous if it is "utterly devoid of merit." *Bonfiglio v. Nugent,* 986 F.2d 1391, 1393–94 (11th Cir. 1993). Although we are generally reluctant to impose Rule 38 sanctions on *pro se* appellants, *Woods v. I.R.S.*, 3 F.3d 403,404 (11th Cir. 1993), we have imposed sanctions on *pro se* appellants who had been explicitly warned that their claims were frivolous, *see United States v. Morse,* 532 F.3d 1130, 1132–33 (11th Cir. 2008) (per curiam) (imposing sanctions on *pro se* appellant who had been warned in the district court that his tax claims were "utterly without merit"); [⊥ 17] *Pollard v. Comm'r,* 816 F.2d 603, 604–05 (11th Cir. 1987) (per curiam) (imposing sanctions on *pro se* appellant who brought tax claims that were already determined to be frivolous in a previous suit, *and for* which appellant had already been sanctioned).

As explained above, we have consistently rejected "tax protest" arguments challenging the general applicability of tax liability. *See Biermann,* 769 F.2d

---

incurred during any proceedings on remand." *Stubbs v. Comm'r of I.R.S.,* 797 F.2d 936, 939 (11th Cir. 1986).

at 708 ("These arguments are patently frivolous, have been rejected by courts at all levels of the judiciary, and, therefore, warrant no further discussion."). Not only is it well-established that such arguments are patently without merit, but we have also already warned Bufkin, in his previous appeal to this Court, that his arguments regarding a voluntary tax system are frivolous and that his claims are barred by sovereign immunity. *See Bufkin,* 522 F. App'x at 532–33. Rule 38 sanctions are therefore appropriate here. *See Morse,* 532 F.3d at 1133; *Pollard,* 816 F.2d at 605.

Accordingly, we affirm the District Court's orders and grant the government parties' motion for sanctions in the amount they requested.

AFFIRMED; the motion for sanctions in the amount of $8,000 is **GRANTED.**

Rule 14.1(i)(ii)—Additional Orders

[58] M.D.Fla. (Dec. 21, 2017) – First Dismissal (IRS-related parties).

Case 2:17-cv-00281-JES-UAM Document 58 Filed 12/21/17 Page 1 of 11 PageID 583

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MICHAEL EDWARD BUFKIN,
Plaintiff,
v. Case No: 2:17-cv-281-FtM-29CM

SCOTTRADE, INCORPORATED, JACOB J. LEW, Secretary, the Department of the Treasury, TIMOTHY F. GEITHNER, Secretary, the Department of the Treasury, JOHN KOSKINEN, Commr, Internal Revenue Service, DOUGLAS SHULMAN, Commr, Internal Revenue Service, STEVEN T. MILLER, Acting Commr, Internal Revenue Service, DANIEL WERFEL, Acting Commr, Internal Revenue Service, WILLIAM J. WILKINS, Chief Counsel, Internal Revenue Service, C.D. BAILEY, Revenue Officer, Internal Revenue Service, CALVIN BYRD, Revenue Officer, Internal Revenue Service, and UNITED STATES OF AMERICA,

Defendants.

OPINION AND ORDER

This matter comes before the Court on review of defendant United States of America's Motion to Dismiss (Doc. #26) [1] filed on [⊥ 2] October 11, 2017. Plaintiff filed a "Preliminary Response to United States' Motion(s) to Dismissal" (Doc. #53) on November 27, 2017. The United States seeks to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

I.

Rule 12(b)(1) motions challenging the subject

---

[1] The motion was filed on behalf of the individuals sued in their official capacity only.

matter jurisdiction of the court come in two forms, a "facial" attack motion and a "factual" attack motion. Morrison v. Amway Corp., 323 F.3d 920, 924 n.5 (11th Cir. 2003). A facial attack challenges subject matter jurisdiction based on the allegations in the complaint, and the court takes the allegations in the complaint as true in deciding the motion. Id. at 924 n.5. The complaint may be dismissed for a facial lack of standing only "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Jackson v. Okaloosa County, 21 F.3d 1531, 1536 n.5 (11th Cir. 1994) (citation omitted).

In deciding a Rule 12(b)(6) motion to dismiss, the Court must accept all factual allegations in a complaint as true and take them in the light most favorable to plaintiff, Erickson v. Pardus, 551 U.S. 89 (2007), but "[l]egal conclusions without adequate factual support are entitled to no assumption of truth," *Mamani v. Berzain*, 654 F.3d 1148, 1153 (11th Cir. 2011) (citations omitted). [⊥ 3]

II.

On May 22, 2017, plaintiff Michael Edward Bufkin (Bufkin) filed his Original Complaint (Doc. #1) asserting that he is not a taxpayer and remains a non-taxpayer, and that the Internal Revenue Service has no documentation to support the assertion that Bufkin "volunteered" to be a taxpayer. (Id., ¶ 25.) Plaintiff alleges that defendants Jacob J. Lew, Timothy F. Geithner, John Koskinen, Douglas Shulman, Steven T. Miller, Daniel Werfel, William J. Wilkins, and C.D. Bailey, acting jointly and severally, conspired to obtain possession of Bufkin's funds from his Scottrade accounts. Bufkin alleges that he made a demand for the return of the

property. (Id., ¶ 31.)

Bufkin seeks $50,000 for "Administrative sanctions" against the IRS-related actors. Bufkin asserts a Bivens claim against defendants. (Id., ¶ 37.) Bufkin argues that defendants must have evidence of plaintiff having volunteered to be a taxpayer before taking property under the guise of tax collection. (Id., ¶ 39.) Plaintiff alleges that he confirmed through a FOIA request that the IRS has no documents to support a finding that plaintiff volunteered to be a taxpayer. Plaintiff argues that he has the right not to contract with the IRS, and has renewed this right every year. (Id., ¶ 40.)

Plaintiff also asserts a conspiracy to violate plaintiff's "right not to contract", the failure to prevent the conspiracy, [⊥ 4] and the deliberate indifference of Wilkins for failing to train Bailey, Lew, Geit[h]ner, Koskinen, Shulman, Miller, and Werfel for each of the identified years between 2002 and 2007. (Id., ¶¶ 47, 56-57, 65-76.)

Bufkin states that Calvin Byrd asserted that taxes were due for 2004 and 2005, and that plaintiff had a duty to file a return for 2012, 2013, 2014, and 2015, or be subject to an audit. (Id., ¶83.) Plaintiff also seeks administrative sanctions in the amount of $50,000 against Byrd because his position is substantially unjustified. (Id. ¶¶ 84-85.) Bufkin alleges a Bivens claim against Byrd, and a conspiracy with Koskinen, Wilkins, with Byrd. (Id., ¶¶ 87, 97.)

For each year at issue, 2002 through 2007, plaintiff seeks $1 million in actual damages, and $1 million in punitive damages for the confiscation of his property based on tax claims. Alternatively, plaintiff seeks injunctive/mandamus relief regarding

his status as a non-taxpayer.

Attached to the Complaint is a responsive letter to plaintiff's Freedom of Information Act (FOIA) request dated February 12, 2014. (Doc. #1-1, Exh. P-3.) Also attached to the Complaint are plaintiff's "demand" letters dated May 19, 2015, and February 11, 2016 as his "administrative process" compliance. (Doc. #1-1, p. 3.) The first letter is addressed to Lew, Koskinen, Wilkins, and Bailey to "address all matters of immunity and [⊥ 5] administrative process" and presents many of the claims incorporated into the Complaint. (Doc. #1-1, Exh. DL-1.) The second letter is addressed to Koskinen, Assistant Attorney General Ciraolo, Wilkins, and Byrd in response to the "demands" of Byrd in a letter dated May 14, 2015, and focuses on plaintiff's disagreement with the label of taxpayer. (Doc. #1-1, Exh. DL-2.)

III.

As a preliminary matter, plaintiff's arguments that he is not a taxpayer, that it has not been proven that he is a taxpayer, and that he did not volunteer to pay taxes are patently frivolous and have been rejected "by courts at all levels of the judiciary, and, therefore, warrant no further discussion." Biermann v. C.I.R., 769 F.2d 707, 708 (11th Cir. 1985). Any request for injunctive or declaratory relief regarding plaintiff's status as a taxpayer will be dismissed without further discussion. See also Stubbs v. Comm'r of I.R.S., 797 F.2d 936, 938 (11th Cir. 1986) (argument that wages were not taxable income rejected as patently frivolous); Herriman v. C.I.R., 521 F. App'x 912, 913 (11th Cir. 2013) (rejecting as without merit argument that withholding of taxes from wages is an unconstitutional direct income tax

without apportionment).

IV.

Sovereign immunity protects the federal government and its agencies from civil liability unless the federal government consents to suit. JBP Acquisitions, LP v. U.S. ex rel. F.D.I.C., [⊥ 6] 224 F.3d 1260, 1263 (11th Cir. 2000); Zajac v. Clark, No. 2:13-CV-714-FTM-29, 2015 WL 179333, at *3 (M.D. Fla. Jan. 14, 2015). The waiver must be "unequivocally expressed" to be effective. United States v. Nordic Vill. Inc., 503 U.S. 30, 33 (1992). Absent some waiver, the Court does not have subject-matter jurisdiction.

The Federal Tort Claims Act (FTCA) provides a limited waiver of sovereign immunity for tort claims, Dalrymple v. United States, 460 F.3d 1318, 1324 (11th Cir. 2006), however an administrative claim with the agency remains a prerequisite to filing a tort action, Motta ex rel. A.M. v. United States, 717 F.3d 840, 843 (11th Cir. 2013). The Court will consider the various bases to exercise jurisdiction over plaintiff's claims.

A. Recovery Action

The district courts have original jurisdiction over civil actions against the United States "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internalrevenue laws." 28 U.S.C. § 1346(a)(1). However, "[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of

any penalty claimed to have been collected without authority, or of any sum alleged to have [⊥ 7] been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary." 26 U.S.C. § 7422(a).

Other than making a FOIA request regarding his taxpayer status, and sending two letters that did not actually assert a claim, plaintiff does not allege that he filed a formal claim for refund or recovery of the Scottrade account funds. Further, the plaintiff explicitly rejects the argument that he is seeking a refund under Section 1346. (Doc. #1, ¶¶ W & 11.) Therefore, to the extent plaintiff is seeking *recovery* of those funds, the motion to dismiss will be granted.

B. Collection Action

If plaintiff is seeking to bring suit against an officer or employee of the IRS regarding the *collection* of taxes, a "taxpayer may bring a civil action for damages against the United States in a district court of the United States" if any officer or employee of the IRS "recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title." 26 U.S.C. § 7433(a). To obtain damages, a plaintiff must still exhaust administrative remedies available within the IRS.

Again, there is no indication that plaintiff has taken any effort to exhaust, and any action must be brought within 2 years after the date the right of action accrued. 26 U.S.C. § [⊥ 8] 7433(d)(3). The Scottrade funds were sold and transferred to the IRS on or about May 2013, and the Complaint (Doc. #1) was filed on May 22, 2017. Even if plaintiff's letter dated May 19, 2015 threatening suit was considered as the date the right of action accrued, there are no

facts in the Complaint supporting a claim of reckless or intentional disregard of IRS regulations. The motion to dismiss will be granted.

C. Anti-Injunction Act & Declaratory Judgment Act

The Court notes that this is not plaintiff's first suit regarding his taxes. The previous suit was dismissed because the Anti-Injunction Act and Declaratory Judgment Act preclude the suit, and therefore plaintiff could not state a claim. Bufkin v. United States, No. 2:11-CV-553-FTM-29, 2012 WL 5381970, at *2 (M.D. Fla. Nov. 1, 2012). The dismissal with prejudice was affirmed on appeal because Bufkin had failed to demonstrate that the United States had waived its sovereign immunity. Bufkin v. United States, 522 F. App'x 530, 532 (11th Cir. 2013). This remains the case. Plaintiff's claims for injunctive or declaratory relief are precluded because he has not shown that sovereign immunity has been waived. The motion to dismiss will be granted.

D. Conspiracy Claims

Plaintiff asserts a conspiracy by all defendants without making any factual allegations of how each defendant participated to collude with one another. Plaintiff's theory of conspiracy [⊥ 9] stems from the collection or method of collecting levied funds from the Scottrade accounts. Even if adequately pled, plaintiff's claims of conspiracy are also foreclosed because sovereign immunity has not been waived. Ishler v. Internal Revenue, 237 F. App'x 394, 398 (11th Cir. 2007). The motion to dismiss will be granted as to the conspiracy claims.

E. Individual Capacity

Plaintiff filed several "Proofs of Service" wherein plaintiff indicates that he personally served Jeff Sessions as United States Attorney General, Jacob J. Lew, Timothy F. Geithner, John Koskinen, Douglas Shulman, Steven T. Miller, Daniel Werfel, W. Stephen Muldrow as United States Attorney for the Middle District of Florida, and Channing D. Phillips, as United States Attorney for the District of Columbia by certified mail. (Docs. ## 30-40.) None of the individuals were personally served with process in their individual capacity. Plaintiff filed Status Reports (Docs. ## 41, 42) as to Calvin Byrd and C.D. Bailey that they may no longer be employed by the IRS. Plaintiff later filed his Proofs of Service for both. (Docs. ## 45, 46.)

The United States does not represent the various defendants in their individual capacity, only in their official capacities, however a Response to Plaintiff's Proofs of Service (Doc. #47) was filed to "counter Bufkin's representation to the Court that he served the individual defendants." (Doc. #47, p. 1 n.1.) [⊥ 10] Plaintiff responded to this Response at length, treating it as an Objection, arguing why service was in compliance with "restricted delivery", and that the Department of Justice bears the burden to demonstrate that the signor was not an authorized agent for service. It remains the case that the individuals were not personally served with process, and therefore the claims against the individuals are due to be dismissed.

Even assuming service of process was proper, the claims against the individuals personally are due to be dismissed as without merit. Under Bivens [2], a

[2] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

plaintiff may sue federal officers in their individual capacity for constitutional violations. This does not include liability for conduct of subordinates under a theory of *respondeat superior.* Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009). Plaintiff vaguely alludes to a failure to train, deliberate indifference, and a conspiracy but no personal action by most of the individual defendants. As to Byrd, who sought documents from plaintiff, plaintiff's Bivens claim is precluded because plaintiff had an alternative remedy to obtain redress through the Tax Court. Topping v. U.S. Dep't of Educ., 510 F. App'x 816, 819 (11th Cir. 2013). [⊥ 11]

"Due to the comprehensiveness of the Internal Revenue Code, courts are nearly unanimous in holding that Bivens relief is not available for alleged constitutional violations by IRS officials involved in the process of assessing and collecting taxes." Zajac v. Clark, No. 2:13-CV-714-FTM-29, 2015 WL 179333, at *5 (M.D. Fla. Jan. 14, 2015) (collecting cases). The claims against the individuals in their individual capacity will be dismissed for this additional basis.

Accordingly, it is now

ORDERED:

1. Defendant's Motion to Dismiss (Doc. #26) is **GRANTED** and the Complaint is **dismissed with prejudice** as to all defendants except Scottrade, Incorporated.

2. The Clerk shall enter judgment accordingly, terminate all pending motions and deadlines as moot, and administratively close the file pending arbitration with Scottrade Incorporated.

DONE AND ORDERED at Fort Myers, Florida, this 21st day of December, 2017.

/s/ John E. Steele
JOHN E. STEELE
SENIOR UNITED STATES DISTRICT JUDGE

Copies:
Plaintiff
Counsel of record

[59] Deputy Clerk, M.D.Fla. (Dec. 22, 2017) – "Judgment" per [58].

Case 2:17-cv-00281-JES-UAM Document 59 Filed 12/22/17 Page 1 of 2 PageID 594

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MICHAEL EDWARD BUFKIN,
Plaintiff,
v. Case No: 2:17-cv-281-FtM-29CM
SCOTTRADE, INCORPORATED, JACOB J. LEW, TIMOTHY F. GEITHNER, JOHN KOSKINEN, DOUGLAS SHULMAN, STEVEN T. MILLER, DANIEL WERFEL, WILLIAM J. WILKINS, C.D. BAILEY, CALVIN BYRD, and UNITED STATES OF AMERICA,
Defendants.

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that pursuant to this Court's Order of December 21, 2017, this action is DISMISSED with prejudice as to defendants' [sic] Jacob J. Lew, Timothy F. Geithner, John Koskinen, Douglas Shulman, Steven T. Miller, Daniel Werfel, William J. Wilkins, C.D. Bailey, Calvin Byrd, and the United States of America.

December 22, 2017.

ELIZABETH M. WARREN,
Clerk

/s/ Michele L. Stress, Deputy Clerk

[73] M.D.Fla. (Mar. 28, 2019) – Second Dismissal (SCOTTRADE).

Case 2:17-cv-00281-JES-UAM Document 73 Filed 03/28/19 Page 1 of 2 PageID 642

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MICHAEL EDWARD BUFKIN,
Plaintiff,
v. Case No: 2:17-cv-281-FtM-29CM
SCOTTRADE, INCORPORATED,
apparently an Arizona corporation,
officially and individually,
Defendant.

ORDER OF DISMISSAL

This matter comes before the Court on review of defendant's Status Report (Doc. #72) filed on March 27, 2019, in response to the Court's Order (Doc. #71) directing either party to file a status as to whether plaintiff had initiated arbitration. Scottrade, Inc. reports that it has still received no statement of claim by plaintiff, or any other notice that plaintiff has initiated or attempted to initiate arbitration. In the Court's February 15, 2019, [sic] ["order" is presumed] the Court indicated that the case would be dismissed "**without prejudice and without further notice**" if plaintiff failed to take measures to initiate arbitration. (Doc. #70). As plaintiff has failed to do so, the case will be dismissed.

Accordingly, it is hereby

ORDERED: [⊥ 2]

The Clerk shall enter judgment dismissing the case without prejudice as to the remaining defendant Scottrade, Inc. for failure to comply with the Court's Order (Doc. #70), terminate all deadlines and motions, and close the file.

DONE and ORDERED at Fort Myers, Florida, this 28th day of March, 2019.

/s/ John E. Steele
JOHN E. STEELE
SENIOR UNITED STATES DISTRICT JUDGE

Copies:
Plaintiff
Counsel of record

[74] Deputy Clerk, M.D.Fla. (Mar. 29, 2019) – "Judgment" per [73].

Case 2:17-cv-00281-JES-UAM Document 74 Filed 03/29/19 Page 1 of 2 PageID 594

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MICHAEL EDWARD BUFKIN,
Plaintiff,
v. Case No: 2:17-cv-281-FtM-29UAM
SCOTTRADE, INCORPORATED,
apparently an Arizona corporation,
officially and individually,
Defendant.

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED entered on March 28, 2019, this case is hereby dismissed without prejudice as to the remaining Defendant Scottrade, Inc. For failure to comply with the Court's Order (Doc. #70).

March 29, 2019.

ELIZABETH M. WARREN, CLERK

/s/D. Nipper, Deputy Clerk

Rule 14.1(i)(iii)—Rehearing

None.

Rule 14.1(i)(iv)—Judgment of Different Date

None on appeal.

Rule 14.1(i)(v)—Statutes

The efficient focus is on reinstating FOIA.

Rule 14.1(i)(vi)—Additional materials

Reference to the Record will suffice.

There's no Record-based, assigned § 451 judge-signed, -filed, or -Served referral order.

[55] Arbitration ordered.

[70] Arbitration ordered, again.