APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 18th day of December, two thousand twenty.

Present: ROSEMARY S. POOLER,
RICHARD C. WESLEY,
SUSAN L. CARNEY,
Circuit Judges.

ROBERT L. SCHULZ,

Plaintiff-Counter-Defendant-Appellant,

v. 19-1253-cv

UNITED STATES OF AMERICA,

Defendant-Counter-Claimant-Appellee.[1]

(Filed Dec. 18, 2020)

Appearing for Appellant: Robert Schulz, pro se, Queensbury, N.Y.

Appearing for Appellee: Karen G. Gregory, Tax Division, Department of Justice (Bruce R. Ellisen, Richard E. Zuckerman, Principal Deputy Assistant Attorney General, *on the brief*)

Antoinette T. Bacon, Acting United States Attorney for the Northern District of New York, Syracuse, N.Y.

Appeal from a judgment of the United States District Court for the Northern District of New York (Sannes, *J.*).

[1] The Clerk of Court is directed to amend the caption as above.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Robert Schulz appeals from the March 27, 2019 judgment of the United States District Court for the Northern District of New York (Sannes, *J.*) granting the government summary judgment and imposing a penalty of $4,430 on Schulz for operating an abusive tax shelter in violation of 26 U.S.C. § 6700. In 2007, the district court imposed a permanent injunction on Schulz and two nonprofit entities of his creation, We the People Foundation for Constitutional Education, Inc. and We the People Congress, Inc. (collectively "WTP"), barring them from distributing documents designed to convince companies and workers that the income tax is fraudulent. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

We review a grant of summary judgment de novo, construing the evidence in the light most favorable to the non-moving parties and drawing all reasonable inferences in their favor. *See Sotomayor v. City of N.Y.*, 713 F.3d 163, 164 (2d Cir. 2013). "A dispute regarding a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Redd v. Wright*, 597 F.3d 532, 536 (2d Cir. 2010) (internal quotation marks omitted).

We affirm for substantially the reasons set out in the district court's well-reasoned decision. The district court properly determined that WTP was an alter ego of Schulz for liability purposes. Because the issue pertains to "the internal affairs of corporations—for profit or not-for profit—" the question of whether WTP was an alter ego is decided "in accordance with the law of the place of incorporation," in this case New York. *United States v. Funds Held in the Name or for the Benefit of Wetterer*, 210 F.3d 96, 106 (2d Cir. 2000).

In determining whether a corporation qualifies as an alter ego, courts consider such factors as "the absence of the formalities and paraphernalia that are part and parcel of the corporate existence" such as "election of directors," the use of "common office space" with the alleged dominating person, "the amount of business discretion" the corporation displayed independent of the dominating person, and "the payment or guarantee of debts of the dominated corporation" by the dominator. *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 139 (2d Cir. 1991). Moreover, "the intermingling of corporate and personal funds," the "siphoning of corporate funds" by the alleged dominator, and the "nonfunctioning of other officers and directors" also point to a corporation being an alter ego. *William Wrigley Jr. Co. v. Waters*, 890 F.2d 594, 600-01 (2d Cir. 1989).

Schulz argues that the board of directors retained control over WTP, such that it was not an alter ego. The record evidence shows, however, that Schulz served as the president, chief executive officer, and chairman of WTP, and exercised total control over the composition and functions of the nominal board of directors. Regarding common office space, WTP's sole physical location was Schulz's home, in which he and his wife were the sole people managing the corporation. Schulz reported that WTP had no employees, although-his wife worked as a volunteer. Despite the presence of a board, Schulz was by all accounts the only person directing WTP's affairs and drafting its message; personally writing and publishing all of its petitions and public statements and serving as the self-proclaimed "voice of the organization."

Moreover, Schulz's activities with WTP displayed the same "intermingling of corporate and personal funds" associated with an alter ego. *Wrigley Jr. Co.*, 890 F.2d at 600. Schulz used his personal credit cards to pay for WTP's expenses, and WTP's willingness to pay for Schulz's bills—including his personal legal expenses—shows that "funds [were] put in and taken out of the corporation for personal rather than corporate purposes" in the manner indicative of an alter ego. *Wm. Passalacqua*, 933 F.2d at 139. Considering the degree of Schulz's involvement in managing and coordinating WTP, his sole control over its message, and the intermingling of his own money with that of WTP, the district court correctly granted summary judgment to the government.

We have considered the remainder of Schulz's arguments and find them to be without merit. Accordingly, the order of the district court hereby is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

[SEAL]

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ,

Plaintiff,

v.

1:15-cv-01299 (BKS/CFH)

UNITED STATES OF AMERICA,

Defendant.

Appearances:

Plaintiff, pro se:
Robert L. Schulz
Queensbury, NY 12804

For Defendant:
Richard E. Zuckerman
Principal Deputy Assistant Attorney General, Tax Division
Michael R. Pahl
U.S. Department of Justice, Tax Division
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Hon. Brenda K. Sannes, United States District Judge:

MEMORANDUM-DECISION AND ORDER

(Filed Mar. 27, 2019)

I. INTRODUCTION

Plaintiff pro se Robert L. Schulz initiated this action under 26 U.S.C. § 6703(c)(2), alleging that the

Internal Revenue Service (the "IRS") erroneously assessed a penalty of $225,000 against him for promoting an abusive tax shelter through two nonprofit entities, We the People Foundation for Constitutional Education, Inc. and We the People Congress, Inc. (together "WTP"), in violation of § 6700 of the Internal Revenue Code, 26 U.S.C. § 6700. (Dkt. No. 8). Defendant United States (the "Government") asserted a counterclaim against Schulz, seeking a judgment for the unpaid $224,000 balance of the penalty the IRS assessed. (Dkt. No. 29, at 11–17). Having previously determined that, as a matter of law, Schulz is liable for 225 violations of § 6700, (Dkt. No. 88), and that WTP's income is attributable to Schulz, (Dkt. No. 223), all that remains for determination by the Court is the amount of the penalty to be assessed: "the amount of gross income WTP—and by extension, Schulz—derived from . . . organizing and promoting an abusive tax shelter through distribution of the 225 Blue Folders at issue in this case," (Dkt. No. 223, at 16).

Currently before the Court are the parties' motions for summary judgment, (Dkt. No. 243, 244), and their responses thereto, (Dkt. Nos. 249, 250).[1] For the reasons that follow, the parties' motions are granted in part and denied in part.

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[1] Also before the Court is Schulz's motion to appoint trial counsel. (Dkt. No. 232). Because there are no issues of fact remaining for trial, as discussed below, Schulz's motion is denied as moot.

II. FACTS

A. Procedural Background

In 2007, United States District Judge Thomas J. McAvoy granted the Government's request for an injunction against WTP and Schulz, prohibiting them from further promoting an abusive tax shelter—known as the "Blue Folder"—in violation of § 6700. *See United States v. Schulz*, 529 F. Supp. 2d 341 (N.D.N.Y. 2007) ("*Schulz I*"), *aff'd*, 517 F.3d 606 (2d Cir. 2008). Judge McAvoy also ordered Schulz and WTP to produce "a list identifying . . . all persons and entities who have been provided Defendants' tax preparation materials, forms, and other materials containing false information." *Id.* at 358. After Judge McAvoy found Schulz to be in contempt of the Court's order, *see Schulz I*, 2008 WL 2626567, at *4, 2008 U.S. Dist. LEXIS 57948, at *12 (N.D.N.Y. Apr. 28, 2008), Schulz disclosed a list of 225 individuals "showing all persons to whom [he] mailed a copy of the WTP Forms" at issue in *Schulz I*, (Dkt. No. 190-1, at 51, 53–62).

On March 5, 2015, Schulz received a tax assessment penalty from the IRS, dated March 9, 2015, in the amount of $225,000 for promoting the Blue Folders at issue in *Schulz I*. (Dkt. No. 197-2, ¶ 41). The IRS arrived at that amount using Schulz's list of 225 individuals to whom WTP had distributed Blue Folders in 2003, (Dkt. No. 244-1, at 2), penalizing the lesser of: (i) $1,000 per Blue Folder distributed ($225,000); and (ii) WTP's income reported to the IRS in 2003 ($485,351), (Dkt. No. 243-2, ¶ 7). On November 2, 2015, Schulz

initiated this action under 26 U.S.C. § 6703(c)(2), alleging that the IRS erroneously assessed a penalty of $225,000 against him for promoting an abusive tax shelter. (Dkt. No. 8). The Government then asserted a counterclaim against Schulz, seeking a judgment for the unpaid $224,000 balance of the penalty the IRS assessed, plus interest. (Dkt. No. 29, at 11–17).

On March 7, 2017, this Court granted partial summary judgment to the Government, giving preclusive effect to Judge McAvoy's findings in *Schulz I* and holding that Schulz is liable for violating § 6700 by distributing the 225 Blue Folders. (Dkt. No. 88). On July 12, 2018, this Court concluded that WTP's total gross income in 2003 was an inappropriate lodestar by which to measure "gross income . . . derived from a particular, well-defined activity." (Dkt. No. 223, at 11–12 (quoting *Barrister Assocs. v. United States (In re MDL-731 Tax Refund Litig.)*, 989 F.2d 1290, 1302 (2d Cir. 1993))). Further, the Court found that WTP was Schultz's alter ago and that WTP's income was attributable to him. (*Id.* at 16). The Court noted that "the only issue remaining for trial is the amount of gross income WTP—and by extension, Schulz—derived from the specified activities used to calculate the penalty amount under § 6700, i.e., organizing and promoting an abusive tax shelter through the distribution of the 225 Blue Folders at issue in this case." (*Id.*).

In a June 25, 2018 letter brief, Schulz indicated for the first time that, of the 225 Blue Folders at issue in this case, only 103 "copies were mailed in 2003." (Dkt. No. 220, at 2; *see also* Dkt. No. 243-2, ¶ 16; Dkt. No. 250,

¶ 16).[2] On July 6, 2018, over six months after discovery had been completed, Schulz informed the Court that he "recently discovered hundreds of documents," (Dkt. No. 222), pertaining to WTP's income from the promotion of the abusive tax shelter. Notwithstanding Schulz's dubious explanation for his belated disclosure,[3] and over the Government's objection to

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[2] Although Schulz now asserts that he "has never admitted that he 'distributed 225 Tax-Termination Packages in 2003,'" (Dkt. No. 250, ¶ 2), the Court notes that the record is replete with his representations to the contrary, (*see, e.g.*, Dkt. No. 13-1, ¶ 3 (affirming that, "[i]n 2003, . . . Schulz mailed 225 copies of a Blue Folder. . . ."); Dkt. No. 13-9, at 4; Dkt. No. 16-1, ¶ 5 ("In 2003, Schulz . . . petitioned the government for redress of grievances. . . . He also . . . mailed 225 copies to those who requested a copy and who voluntarily sent the organization up to $20."); *id.* ¶ 20 (summarizing the penalty as "$1,000 for each of the 225 Blue Folders . . . that were mailed to people in 2003"); Dkt. No. 197-2, ¶ 29 (calculating total expense of 225 Blue Folders, or $4,500, as a percentage of WTP's 2003 gross revenue); Dkt. No. 214, at 1-2 (stating that the "'abusive tax shelter' according to *Schulz I* was WTP's distribution in 2003 of 225 copies of a Blue Folder"). In any event, the year in which Schulz actually mailed each folder is immaterial to the Court's analysis, as discussed *infra* Part IV.B.1.

[3] Schulz states that his wife, who "is not able to competently testify concerning these matters because of her cognitive impairment," presented him with "hundreds of documents related to the issue at hand," of which Schulz was unaware because they were in "folders . . . set up and maintained by [his wife] years ago." (Dkt. No. 233-1, ¶¶ 3, 7). The Court further notes that the timing of Schulz's disclosure is also suspect, as he "discovered" documents showing proof of income only when confronted—for the first time—with the need to affirmatively establish that WTP derived less than $225,000 in 2003 from distribution of the 225 Blue Folders. (*See* Dkt. No. 216). Indeed, Schulz admits that his earlier disclosures relating to WTP's income were intended only to "prove

reopening discovery, the Court permitted Schultz to attempt to use the records in this case, and set a schedule for additional, limited discovery on the issue. (*See* Text Minute Entry, July 26, 2018; Dkt. Nos. 234, 237, 240). The Court then permitted the parties to submit additional motions for summary judgement addressing whether, in light of the new documents, there remained a triable issue of fact as to the amount of gross income derived from the 225 Blue Folders distributed in violation of § 6700. (*See* Dkt. No. 241; October 1, 2018 Telephone Conference). The facts relevant to determining the instant motions are as follows.

B. Factual Background[4]

In March 2003, WTP promoted the Blue Folder "by posting its entire content on WTP's website," making it available "for free downloaded [sic] by any person."

[he] derived no income directly from" distribution of the Blue Folders. (Dkt. No. 233-1, ¶ 8).

[4] The Court assumes familiarity with the complete procedural and factual history of this case, as set out in *Schulz I*, as well as the Court's previous decisions dated February 11, 2016, May 6, 2016, March 7, 2017, and July 12, 2018 (Dkt. Nos. 23, 25, 88, 223). Only those facts relevant to the parties' motions are set out below and are drawn from the parties' statements of material facts (Dkt. Nos. 243-2, 244-1), responses thereto (Dkt. Nos. 249-1, 250), as well as docket entries incorporated by reference therein and the exhibits attached to the parties' submissions, to the extent that they would be admissible as evidence. Where facts stated in a party's statement of material facts are supported by testimonial or documentary evidence and denied with only a conclusory statement by the other party, the Court has found such facts to be true. *See* N.D.N.Y. L.R. 7.1(a)(3); Fed. R. Civ. P. 56(e).

Dkt. No. 250-1, at 10–11). WTP also offered physical copies of the Blue Folder for a suggested donation of $20.00 "to cover . . . printing and mailing costs." (Dkt. No. 250-1, at 10–11). In 2003, WTP distributed 103 Blue Folders by mail, (Dkt. No. 250, ¶ 19), and received "voluntary donations" of varying amounts in connection with all but three, for an average donation of $18.64 per folder, (Dkt. No. 250, ¶ 16). WTP received payments by cash, by check, and through online payment processing services Paypal and Linkpoint. (Dkt. No. 250, ¶ 16). Paypal and Linkpoint "charged WTP a fee for their services, reducing WTP's gross revenue to approximately $19.12" for each $20.00 payment processed online. (Dkt. No. 250, at 4 nn. 11–12). Not including amounts withheld by Paypal and Linkpoint, "WTP received $1,920.48 in voluntary donations for 103 copies of the Blue Folder" distributed in 2003. (Dkt. No. 250, ¶ 19; *see also* Dkt. No. 243-4, at 21–22; Dkt. No. 244-1, ¶ 16; Dkt. No. 251, at 10). WTP mailed an additional 122 Blue Folders between 2004 and 2007. (Dkt. No. 243-4, at 13–14). Schulz has not submitted any documentary evidence establishing the amount of income WTP derived from each.[5]

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[5] Schulz has submitted more than 2,000 pages of documentation relating to WTP's sources of income in 2003 other than the Blue Folders at issue in this case. (Dkt. Nos. 244-6 to 244-15). That information, however, is irrelevant to the amount of "gross income derived (or to be derived)," 26 U.S.C. § 6700, from the 225 Blue Folders Schulz is liable for promoting.

III. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(a), summary judgment may be granted only if all the submissions taken together "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). The moving party bears the initial burden of demonstrating "the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. A fact is "material" if it "might affect the outcome of the suit under the governing law," and is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248; *see also Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir. 2005) (citing *Anderson*). The movant may meet this burden by showing that the nonmoving party has "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322; *see also Selevan v. N.Y. Thruway Auth.*, 711 F.3d 253, 256 (2d Cir. 2013) (summary judgment appropriate where the nonmoving party fails to "come forth with evidence sufficient to permit a reasonable juror to return a verdict in his or her favor on an essential element of a claim" (internal quotation marks omitted)).

If the moving party meets this burden, the nonmoving party must "set out specific facts showing a genuine issue for trial." *Anderson*, 477 U.S. at 248, 250;

see also Celotex, 477 U.S. at 323–24; *Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009). "When ruling on a summary judgment motion, the district court must construe the facts in the light most favorable to the nonmoving party and must resolve all ambiguities and draw all reasonable inferences against the movant." *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 780 (2d Cir. 2003). Still, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), and cannot rely on "mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986) (quoting *Quarles v. Gen. Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985)). Furthermore, "[m]ere conclusory allegations or denials cannot by themselves create a genuine issue of material fact where none would otherwise exist." *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010) (internal quotation marks omitted).

Where a plaintiff proceeds pro se, the Court must read his or her submissions liberally and interpret them "to raise the strongest arguments that they suggest." *McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir. 1999) (quoting *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994)). However, a pro se party's "'bald assertion,' completely unsupported by evidence, is not sufficient to overcome a motion for summary judgment." *Jordan v. New York*, 773 F. Supp. 2d 255, 268 (N.D.N.Y. 2010) (citing *Carey v. Crescenzi*, 923 F.2d 18, 21 (2d Cir.

1991)); *see also Wagner v. Swarts*, 827 F. Supp. 2d 85, 92 (N.D.N.Y. 2011).

IV. DISCUSSION

Schulz argues that: (i) the penalty should be limited to gross income derived from the 103 Blue Folders distributed in 2003, or $1,920.48; (ii) the calculation of WTP's "gross income" from each folder should exclude the processing fees charged by the online vendors; and (iii) WTP was not his alter ego. (Dkt. No. 244, at 3–5). The Government argues that Schulz's penalty should be assessed at $4,500, or $20.00 for each of the 225 Blue Folders distributed, as the amount of income he "earned—or expected to earn"—without regard to the year in which the folder was distributed or the transaction fees withheld by Paypal and Linkpoint. (Dkt. No. 243-1, at 7–8).

A. Blue Folders Distributed in 2003

1. Inclusion of Processing Fees in Gross Income

Schulz argues that processing fees charged by PayPal or Linkpoint should not be included in the calculation of WTP's gross revenue derived from distribution of the folders. (Dkt. No. 250, ¶ 16 nn.10–11). The Government, on the other hand, argues that the fees should be included because "the penalty is based on gross income, not income less fees or costs or costs of goods sold." (Dkt. No. 249, at 8).

Because it is undisputed that WTP and Schulz derived less than $1,000 per Blue Folder, Schulz's penalty is properly assessed as "100 percent of the gross income derived (or to be derived) by such person from such activity." 26 U.S.C. § 6700. Gross income means "all income from whatever source derived." 26 U.S.C. § 61(a). "The definition extends broadly to all economic gains not otherwise exempted," and a "taxpayer cannot exclude an economic gain from gross income by assigning the gain in advance to another party." *Comm'r v. Banks*, 543 U.S. 426, 433 (2005). Because it "is not necessary that the income be deposited or received so long as the taxpayer has an unfettered right to receive it," "deductible credit card processing fees would reduce the amount of petitioners' net . . . profit or loss"—they do "not affect . . . gross receipts." *Patel v. Comm'r*, 96 T.C.M. (CCH) 202 (2008).

Accordingly, the gross income derived from distribution of the Blue Folders is properly calculated without regard to fees charged by Paypal or Linkpoint.

2. Calculation of Penalty

Regarding "the size of the penalty[,] . . . the government [is] entitled to a presumption that its assessment of the penalties [is] correct." *In re MDL-731 Tax Refund Litig.*, 989 F.2d at 1303. The Government argues that, for the 103 Blue Folders distributed in 2003, the penalty is properly assessed at $20.00 per Blue Folder. As indicated above, however, Schulz has adduced evidence establishing that WTP derived no

income from distribution of three folders, $10.00 from one folder, and $20.00 from 99 folders. (Dkt. No. 244-1, at 3). Accordingly, there is no dispute of material fact as to the gross income derived from the 103 Blue Folders distributed in 2003, and the penalty is properly assessed at $1,990.00.

B. Blue Folders Distributed After 2003

1. Assessment on an Annualized Basis

Schulz argues that, because "*Schulz I* was directed at an activity undertaken by WTP in 2003," he is only liable for the amount of gross income derived from the 103 Blue Folders distributed in 2003. (Dkt. No. 250, ¶ 2). The Government, on the other hand, argues that a penalty under § 6700 is "computed on a 'transactional' basis, not an 'annual' basis, based on the total income the promoter derived from the scheme." (Dkt. No. 243-1, at 7).

The Second Circuit has explained that the "Internal Revenue Code . . . does not obligate the IRS to assess Section 6700 penalties only on income actually earned during discrete taxable periods." *In re MDL-731 Tax Refund Litig.*, 989 F.2d at 1301. The tax year in which the conduct occurred is irrelevant because "the assessment of a Section 6700 penalty turns on income earned from specific conduct—the organization or promotion of an abusive tax shelter—that may occur at times different from those in which income is actually realized." *Id.* "This is in contrast to other Internal Revenue Code penalties, which depend on whether,

and how often, an individual avoids certain tax obligations arising in a particular taxable period." *Id.*

Here, Schulz's theory rests entirely on the wording of this Court's June 11, 2018 Text Order, which directed the parties to address whether there was as "material issue of fact as to whether WTP derived more than $225,000 in gross income in 2003." (Dkt. No. 216). Schulz, however, ignores the fact that the issue then before the Court was whether his penalty should be assessed at $1,000 per folder—using WTP's 2003 reported "total revenue" of $485,351 as the measure of the "gross income derived . . . from such activity," 26 U.S.C. § 6700—or some lesser amount. That issue was resolved by this Court's July 12, 2018 decision, which expressly rejected the Government's reliance on the "gross annual income method" for calculating Schulz's penalty, and instead concluded that the proper method is to measure the income derived, or to be derived, from the "particular, well-defined activity" of "225 distributions of the Blue Folder." (Dkt. No. 223, at 11–12).

In sum, this Court has already found that: (i) Schulz is liable for distributing 225 Blue Folders in violation of § 6700; and (ii) under that statute, the penalty is properly measured as 100% of the "gross income derived or to be derived" from each Blue Folder distributed. Schulz fails to identify anything in either *Schulz I*, the law of this case, or other caselaw that limits his liability to activities undertaken in 2003.[6] Accordingly,

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[6] As discussed above, Schulz's confusion over the relevant timeframe is entirely of his own making, as he has repeatedly

the Court finds unpersuasive Schulz's attempt to narrow the scope of activities for which he may be penalized to 2003 only.

2. Calculation of Penalty

As discussed above, the Government contends that the income reasonably expected "to be derived" from each Blue Folder was $20.00. (*See* Dkt. No. 243-1, at 7–8 (quoting *In re MDL-731 Tax Refund Litig*, 989 F.2d at 1301–02)). Schulz has failed to adduce any evidence regarding the amount of gross income WTP derived from each of the 122 Blue Folders distributed after 2003. It is undisputed, however, that: (i) WTP requested a payment of $20.00 for each copy of the Blue Folder mailed; (ii) in 2003, nearly every individual who requested a Blue Folder paid WTP $20.00; and (iii) WTP mailed an additional 122 Blue Folders between 2004 and 2007. Accordingly, the Court finds there is no genuine issue of material fact remaining for trial as to the amount of gross income WTP reasonably expected to derive from the additional 122 Blue Folders distributed after 2003, and the penalty for that activity is properly assessed at $20.00 for each. The Court therefore grants the Government's motion for summary judgment to the extent that Schulz's penalty for distributing 122 Blue Folders between 2004 and 2007 is $2,440.00, for a total penalty of $4,430.00.

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represented to the IRS and this Court that he distributed 225 folders in 2003. *See supra* n.2.

C. WTP as Schulz's Alter Ego

Schulz argues that WTP's income should not be attributed to him for the purposes of determining the amount of gross income he derived from the 225 Blue Folders. (*See, e.g.*, Dkt. No. 244, at 4–5). As noted above, however, this Court has already reached the opposite conclusion. (Dkt. No. 223). Schulz's argument is therefore barred by the law-of-the-case doctrine, which "commands that 'when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case' unless 'cogent and compelling reasons militate otherwise.'" *Johnson v. Holder*, 564 F.3d 95, 99 (2d Cir. 2009) (quoting *United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002)). Such reasons include "an intervening change in controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Amore v. City of Ithaca*, No. 04-cv-176, 2008 WL 8928574, at *2, 2008 U.S. Dist. LEXIS 45328, at *4 (N.D.N.Y. June 9, 2008) (quoting *New York State Nat'l Org. for Women v. Terry*, 961 F.2d 390, 395–96 (2d Cir. 1992)).

Here, Schulz asserts that three affidavits he recently procured from former WTP board members, in addition to documents related to WTP's income in 2003, "reopen[] the alter ego issue." (Dkt. No. 244, at 4; Dkt. Nos. 244-2, -3, -4, -6 to -15). This evidence, however, is not newly available; Schulz has provided no explanation as to why he could not have submitted the affidavits previously. Furthermore, Schulz acknowledges that documents he recently "discovered" have

been in his possession for the entirety of this litigation. (Dkt. No. 222). The Court finds no basis for re-examination of its prior decision.[7]

V. CONCLUSION

For these reasons, it is hereby

ORDERED that the Government's motion for summary judgment (Dkt. No. 243) is **GRANTED** to the extent that Schulz's penalty under 26 U.S.C. § 6700 is properly assessed at $4,430.00, and is **DENIED in all other respects**; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of the Government on its counterclaim (Dkt. No. 29) against Schulz in the amount of $4,430.00, plus statutory interest accruing from March 9, 2015, the date of the assessment; and it is further

ORDERED that Schulz's motion for summary judgment (Dkt. No. 244) is **DENIED**; and it further

ORDERED that Schulz's Amended Complaint (Dkt. No. 8) is **DISMISSED with prejudice**; and it is further

ORDERED that Schulz's motion to appoint counsel, (Dkt. No. 232), is **DENIED as moot**; and it is further

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[7] In any event, even were the Court to consider the affidavits, their content does not change the Court's analysis and determination that WTP's income is attributable to Schulz.

ORDERED that the Clerk is directed provide a copy of this Memorandum-Decision and Order to the parties in accordance with the Local Rules; and it is further

ORDERED that the Clerk is respectfully directed to close this case.

IT IS SO ORDERED.

/s/ Brenda K. Sannes
Brenda K. Sannes
U.S. District Judge

Dated: March 27, 2019
Syracuse, New York

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JUDGMENT IN A CIVIL CASE

ROBERT L. SCHULZ,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

CASE NUMBER: 1:15-CV-1299 (BKS/CFH)

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Defendant's motion for summary judgment is **GRANTED** to the extent that Plaintiff's penalty under 26 U.S.C. § 6700 is properly assessed at $4,430.00 and is **DENIED** in all other respects. Judgment is entered in favor of Defendant on its counterclaim against Plaintiff in the amount of $4,430.00, plus statutory interest accruing from March 9, 2015, the date of the assessment. Plaintiff's motion for summary judgment is **DENIED** and Plaintiff's amended complaint is **DISMISSED with prejudice.**

All of the above in accordance with the Order of the Honorable Brenda K. Sannes dated March 27, 2019.

Dated: March 27, 2019

/s/ John Domurad
Clerk of Court [SEAL]

/s/ Renata Hohl
Renata Hohl
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ,

Plaintiff,

v.

No. 1:15-cv-01299 (BKS/CFH)

UNITED STATES OF AMERICA,

Defendant.

APPEARANCES:

Plaintiff, pro se:
Robert L. Schulz
Queensbury, NY 12804

For Defendant:
Michael R. Pahl
U.S. Department of Justice, Tax Division
Ben Franklin Station
P.O. Box 7238
Washington, DC 20044

Hon. Brenda K. Sannes, United States District Judge:

MEMORANDUM-DECISION AND ORDER

(Filed Oct. 9, 2019)

Presently before the Court is Plaintiff pro se Robert Schulz's motion seeking reconsideration (Dkt. No. 224) of the Court's July 12, 2018 Memorandum-Decision and Order, (Dkt. No. 223), granting in part and denying in part Defendant's motion for summary judgment

(Dkt. No. 196) and denying Schulz's motion for summary judgment, (Dkt. No. 197).[1]

In general, a motion for reconsideration may only be granted upon one of three grounds: "(1) an intervening change in law, (2) the availability of evidence not previously available, and (3) the need to correct a clear error of law or prevent manifest injustice." *Shannon v. Verizon. N.Y. Inc.*, 519 F. Supp. 2d 304, 307 (N.D.N.Y. 2007); *see also Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992) (same) (citing 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4478 at 790). "[A] motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). "The standard for reconsideration is strict and is committed to the discretion of the court." *S.E.C. v. Wojeski*, 752 F. Supp. 2d 220, 223 (N.D.N.Y. 2010) *aff'd sub nom. Smith v. S.E.C.*, 432 F. App'x 10 (2d Cir. 2011).

In his motion, Schulz states that he "does not seek to present the case under any new theory," but intends only to point to "controlling decisions and data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court to prevent clear error of law and prevent manifest injustice." (Dkt. No. 224-2, at 2). Specifically, Schulz argues that (i) Agent Gordon "did not get prior

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[1] The Court has also considered Schulz's supplemental letters and his reply in support of his motion seeking reconsideration. (Dkt. Nos. 225, 229, 231).

written approval of the penalty determination from his supervisor," (*id.* at 3) and (ii) WTP was not Schulz's alter ego in 2003, (*id.* at 7–25).[2] In support of these assertions, however, Schulz merely presents the same arguments the Court expressly addressed in its July 12, 2018 Memorandum-Decision and Order deciding the parties' motions for summary judgment, (*See* Dkt. No. 223, at 9 n.2, 12–16), and elsewhere, (Dkt. No. 188, at 8).[3] As Schulz's motion seeks only to relitigate issues

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[2] Schulz also argues that, [a]ssuming *arguendo*[] WTP was Schulz's alter ego in respect to the transaction attacked[,] . . . there is no issue of fact" that the penalty owed is $2,060, which "the court could as a matter of law impose . . . without a trial." (Dkt. No. 224-2, at 25). Schulz's subsequent discovery of documents which, according to Schulz, establish a gross revenue of "no more than $1901.36," (Dkt. No. 222, 233-1, at 4), and other developments, (October 1, 2018 Text Minute Entry), render his argument moot. Schulz's pending letter motions, (Dkt. No. 233, 235), seeking permission to file supplemental exhibits in support of his motion for summary judgment, (Dkt. No. 197), are also denied as moot.

[3] Schulz here repeats his assertion that the IRS agent assigned to his case "did not obtain the written approval of his penalty determination by his supervisor or higher official designated by the Treasury Secretary before issuing his penalty letter on November 24, 2014." (Dkt. No. 224-2, at 4–5). As discussed in the July 12, 2018 Memorandum-Decision and Order, however, evidence in the record demonstrates that the agent's supervisor did approve the penalty determination on November 18, 2014. (Dkt. No. 190-2, at 48). Schulz's allegation that this evidence is fraudulent is speculative, conclusory, and unsupported any evidence in the record. (Dkt. No. 224-2, at 4–5). Furthermore, Schulz does not dispute that the penalty determination was issued on November 24, 2014. (Dkt. No. 90-1, at 11). Schulz failed to raise an issue of material fact as to whether the agent received "written approval of the initial penalty determination no later than the date the IRS

already decided, he has failed to demonstrate the need to either correct a clear error of law or prevent manifest injustice.

For these reasons, it is hereby

ORDERED that Plaintiff's motion for reconsideration (Dkt. No. 224) is **DENIED**; and it is further

ORDERED that Plaintiff's letter motions (Dkt. No. 233, 235) seeking permission to file exhibits in support of his motion for summary judgment (Dkt. No. 197) are **DENIED**; and it is further

ORDERED that the Clerk of Court serve a copy of this Memorandum-Decision and Order on the Plaintiff in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: October 9, 2018
Syracuse, New York

/s/ Brenda K. Sannes
Brenda K. Sannes
U.S. District Judge

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issue[d] the notice of deficiency . . . asserting such penalty." *Chai v. Comm'r of Internal Revenue*, 851 F.3d 190, 221 (2d Cir. 2017).

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ,

Plaintiff,

v.

UNITED STATES,

Defendant.

1:15-cv-01299
(BKS/CFH)

APPEARANCES:

For Plaintiff:
Robert L. Schulz, pro se
Queensbury, NY 12804

For Defendant:
Michael R. Pahl
U.S. Department of Justice, Tax Division
Ben Franklin Station
P.O. Box 7238
Washington, DC 20044

Hon. Brenda K. Sannes, United States District Judge:

MEMORANDUM-DECISION AND ORDER

(Filed Jul. 12, 2018)

I. INTRODUCTION

Plaintiff pro se Robert L. Schulz brings this action against Defendant United States (the "Government") under 26 U.S.C. § 6703(c)(2), alleging that the Internal Revenue Service (the "IRS"): (i) erroneously assessed a

penalty of $225,000 against him for promoting an abusive tax shelter; and (ii) seeking to bar the Government from retaliating against him. (Dkt. No. 8). On May 20, 2016, the Government asserted a counterclaim against Schulz, seeking a judgment for the unpaid $224,000 balance of the penalty the IRS assessed. (Dkt. No. 29, at 11). On March 7, 2017, the Court granted partial summary judgment to the Government, finding Schulz liable for promoting an abusive tax shelter under 26 U.S.C. § 6700, "leaving only the issue of the penalty due . . . which Schulz may challenge on the basis that lie received no income from the abusive tax shelter." (Dkt. No. 88, at 10). Currently pending before the Court are: (i) the Government's motion for summary judgment, (Dkt. No. 196), which Schulz opposes, (Dkt. No. 213); and (ii) Schulz's motion for summary judgment, (Dkt. No. 197), which the Government opposes, (Dkt. No. 211). On June 11, 2018, the Court directed the parties to submit additional briefing as to whether We the People ("WTP"), "derived more than $225,000 in gross income in 2003 from the 'activity' at issue in this case, that is, organizing, selling, or participating in the organization of abusive tax shelters." (Dkt. No. 216). The Government and Schulz submitted their letter briefs on the issue on June 22, 2018 and June 25, 2018, respectively.[1] (Dkt. Nos. 219, 220). For the following reasons, the Government's motion for summary judgment

[1] On July 6, 2018, Schulz informed the Court that he "recently discovered hundreds of documents" related to requests for Blue Folders and communications from donors. (Dkt. No. 222). This does not alter the Court's determination that there are material issues of fact remaining for trial.

is granted in part and denied in part; Schulz's motion for summary judgment is denied.

II. BACKGROUND[2]

A. WTP's Operations

Schulz is the founder of two not-for-profit entities known as We The People for Constitutional Education and We The People Congress, together known as "WTP." (Dkt. No. 197-2, ¶ 2). Schulz claims that he,

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[2] The Court assumes familiarity with the procedural and factual history of this case, as set out in *United States v. Schulz*, 529 F. Supp. 2d 341 (N.D.N.Y. 2007), *aff'd*, 517 F.3d 606 (2d Cir. 2008) ("*Schulz I*"), as well as the Court's previous decisions dated February 11, 2016, May 6, 2016, and March 7, 2017, (Dkt. Nos. 23, 25, 88). Only those facts relevant to the parties' motions are set out below, and are drawn from the parties' statements of material facts (Dkt. Nos. 196-15, 197-2), responses thereto (Dkt. Nos. 211-1, 213-1), and exhibits attached to the parties' submissions, to the extent that they would be admissible as evidence. Where facts stated in a party's statement of material facts are supported by testimonial or documentary evidence, and denied with only a conclusory statement by the other party, the Court has found such facts to be true. *See* N.D.N.Y. L.R. 7.1(a)(3); Fed. R. Civ. P. 56(e). Furthermore, Schulz's response (Dkt. No. 213-1) to the Government's statement of material facts (Dkt. No. 196-15) denies and objects to nearly all of the Government's factual assertions, primarily on the basis that any activity he performed was not as an individual, but in his "official capacity as an officer" of WTP, (*see, e.g.*, Dkt. No. 213-1, ¶¶ 1-5, 7, 8, 13, 15, 17). As explained in Section IV.B., *infra*, such objections are irrelevant to the Court's analysis. Finally, Schulz has filed a "Reply to United States' Response to Schulz Statement of Material Facts" (Dkt. No. 214), along with his reply papers (Dkt. No. 214-1). Even if the Local Rules permitted such a reply, which they do not, *see* N.D.N.Y. L.R. 7.1, the contents of this submission are immaterial to the disposition of the pending motions.

through the activities of WTP, has devoted "his life to helping people understand the history, meaning, effect and significance of the provisions of the Declaration of Independence and their State and Federal constitutions and how to hold their public officials accountable to the rule of law pursuant to the First Amendment's Petition Clause." (*Id.*, ¶ 4). Schulz has served as WTP's Chairman, President, and Chief Executive Officer since he founded the organization in 1997. (Dkt. No. 196-5, at 2; Dkt. No. 196-12, at 3). Schulz personally performed the administrative tasks required to establish and maintain WTP. (Dkt. No. 197-2, ¶¶ 9–11, 13–17, 20–21). WTP's corporate address has always been the same as Schulz's home address, and its offices have always been located in Schulz's home. (Dkt. No. 196-5, at 3–5). Schulz, however, has never received rent in exchange for providing the space, nor has he taken a deduction on his tax returns for donating the space to WTP. (*Id.*, at 3–4). Other than Schulz's wife, only Schulz has an office at WTP. (Dkt. No. 196-12, at 6).

Schulz used WTP funds to defend himself in IRS actions and litigation, regardless of whether WTP was a named defendant.[3] (Dkt. No. 196-5, at 73). Schulz paid corporate expenses with personal credit cards,

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[3] Schulz denies this fact, arguing that "[o]ther than the first case in 1978 and a case in 2004," these cases "almost always included other members and supporters of the organization," "there were probably other plaintiffs," and, in some instances, involved efforts to quash IRS efforts to obtain WTP records. (Dkt. No. 213-1, ¶ 38). Taking judicial notice of the cases that the Government has identified, (Dkt. No. 196-15,1137 n.49), however, the Court notes that WTP is a party in none of them.

after which "WTP sent payments to American Express [and Chase] to reimburse Schulz for his WTP related expenses if WTP had the funds to do so." (Dkt. No. 1964, at 48–49). "Otherwise[,] the amount was considered as an unsecured loan from Schulz to WTP." (*Id.*). Schulz estimates that he made more than $100,000 in unsecured loans, in the form of "unreimbursed expenses," to WTP. (Dkt. No. 196-12, at 13).

Although Schulz claims that WTP had no employees,[4] (Dkt. No. 196-5, at 5), he acknowledges that WTP was his "full-time" occupation. (Dkt. No. 213-1, ¶ 14; Dkt. No. 196-3, at 160). Schulz himself carried out WTP's activities: he personally "Petitioned the federal government" and "distributed copies of that Petition," (Dkt. No. 8, ¶ 13–14), including by mailing 225 copies of the petition materials to requesting individuals across the country, (Dkt. No. 196-15, at ¶ 8). At deposition, Schulz described his role at WTP as "the voice of the organization." (Dkt. No. 196-12, at 11). WTP's 2003 "Chairman's Reports," which are simply posts authored by Schulz and posted to WTP's website, indicate that Schulz alone determined WTP's mission, message, and strategy. (*See, e.g.*, Dkt. No. 197-3, at 12–160; Dkt. No. 197-4, at 1–113). Although the WTP organizations had various board members and officers since its founding, (Dkt. No. 196-5, at 26, 54, 58; Dkt. No. 197-9,

[4] An undated document indicates that WTP's board passed a resolution stating that Schulz "shall be compensated at the rate of $12,000 per calendar year for his services." (Dkt. No. 196-5, at 55). Schulz disputes, and the record does not indicate, whether he ultimately received any of the salary due from WTP. (Dkt. No. 213-1, ¶ 25).

at 9, 69, 89), Schulz was the only person constantly affiliated with WTP in an official capacity throughout its existence.

In 2003, the board accepted Schulz's strategy to reform the WTP board with a national focus and granted Schulz "the power to remove and add members to the Board based solely upon his discretion." (Dkt. No. 196-5, at 55–61). In October 2003, explaining that he had "settled on a reorganization plan for" WTP, Schulz used this power to remove all but two members of WTP's board—himself and Burr Deitz, who also served as Secretary and Treasurer. (Dkt. No. 196-4, at 113). In January 2004, Schulz and Deitz—the only remaining board members—authorized Schulz "to have WTP continue to pay out-of-pocket expenses related to" the IRS's investigation into WTP and Schulz's violations of § 6700. (Dkt. No. 196-5, at 73).[5] In March 2006, Schulz and Deitz authorized WTP to "continue paying" for the litigation costs associated with several cases without regard to whether WTP was itself a litigant, but "provided those activities are directly related to

[5] The record indicates that Deitz, an electrician by trade with no accounting experience, was the sole other board member from October 2003 until January 2007, (Dkt. No. 196-5, at 70), when he resigned and was replaced by Vanessa Astrup as Secretary, (Dkt. No. 196-12, at 6). Schulz testified that he asked Deitz to resign after Deitz "fell victim to an online scam" and wrote himself checks for $8,700 from WTP's bank account. (*Id.*). Although Schulz testified that he verbally informed the board—which consisted of only himself and Astrup—he did not "think it was appropriate" to report the incident to police. (*Id.* at 6–7). WTP reported the amount under "loans receivable" on its 2007 federal tax return. (Dkt. No. 196-3, at 111).

and further the objectives" of WTP's mission. (Dkt. No. 196-7, at 68).

B. The Blue Folder

One of WTP's goals was to "claim[] and exercis[e]" what Schulz has described as his "First Amendment Right to Petition the Government for Redress of Grievances" for the purpose of "obtaining the answers to important questions by Petitioning the leaders of the federal government." (Dkt. No. 8, ¶¶ 7, 11). To that end, WTP "repeatedly petitioned Defendant United States to respond to Petitions for Redress of Grievances related to alleged violations by the United States of," *inter alia*, "the Constitution's tax clauses (via the direct, un-apportioned tax on labor)." (Dkt. No. 197-2, ¶ 6). WTP's "written Petition for Redress of Grievances regarding tax withholding" was packaged in a blue folder titled "Legal Termination of Tax Withholding for Companies, Workers and Independent Contractors" (the "Blue Folder"). (*Id.* ¶ 8). The Blue Folder contained materials that "encouraged companies, workers and independent contractors to submit the content of the Blue Folder to their corporate lawyers and CPAs for a 'rigorous review' of its accuracy with the goal of . . . legally ending tax withholding." (*Id.* ¶ 9). WTP distributed physical copies of the Blue Folder at WTP events and through the mail; a digital version was available by download from the WTP website. (*Id.* ¶¶ 11–13). Schulz argues that WTP never sold the contents of the Blue Folder, but only requested a "nominal donation of $20" from individuals who requested a physical copy to

offset costs associated with printing and mailing the materials.[6] (*Id.* ¶¶ 12, 15, 23). It is undisputed that WTP distributed 225 copies of the Blue Folder to individuals by mail, "some of whom volunteered to send $20 to cover the cost of printing and mailing; WTP did not send invoices to any of these individuals and did not require any payment or donation to be made prior to mailing the Blue Folder." (*Id.* ¶ 24).[7]

WTP reported $485,351 in "total revenue" to the IRS in 2003. (Dkt. No. 196-3, at 8). Schulz argues that, during that period, WTP's "Blue Folder-related activities took up an insignificant amount of WTP's time and resources," and were "small and unimportant in view of WTP's overall activities, total revenues and total expenses." (Dkt. No. 197-2, ¶ 28). The record indicates that WTP solicited and received donations in support of its other efforts to, *inter alia*, organize and sponsor a "Give Me Liberty national conference" and to "bring an action in 2004 against the United States . . . for a declaration of the Rights of People and the obligations of the government under the last ten words of the First Amendment—that is, the 'petition clause.'" (*Id.*, ¶ 30).

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[6] The Government states that WTP's website offered the Blue Folder for sale for $39.95, citing to *Schulz I* in support of the factual proposition. (Dkt. No. 196-15, ¶ 7). Schulz disputes that the Blue Folders were ever "for sale," and contends that they were offered for free, with a requested donation of $20. (Dkt. No. 197-2, ¶ 24).

[7] Altogether, WTP prepared at least "three thousand, five hundred (3,500) copies of the Blue Folder," which were "available for pick up, free of charge and anonymously" during events held across the United States in 2003. (Dkt. No. 197-2, ¶ 20).

Schulz asserts that, cumulatively calculated, the "gross revenue of 225 [Blue Folder] donations of $20 would represent .84% of WTP's [g]ross [r]evenue" as reported in 2003.[8] (*Id.*, ¶ 29).

III. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(a), summary judgment may be granted only if all the submissions taken together "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party bears the initial burden of demonstrating "the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. A fact is "material" if it "might affect the outcome of the suit under the governing law," and is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248; *see also Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir. 2005) (citing *Anderson*). The movant may meet this burden by showing that the nonmoving party has

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[8] The Government objects to Schulz's calculation on the basis that "the question of gross *income* derived from the scheme (as opposed to gross *revenue* as stated by Schulz) is a legal conclusion [and] not a 'fact' for summary judgment purposes." (Dkt. No. 211-1, ¶ 29). Construing Schulz's statement liberally, however, his argument that any hypothetical revenue directly derived from donations requested in exchange for each of the 225 Blue Folders ($4,500) comprises a comparatively minor proportion of WTP's reported gross income ($485,351) is not unfounded.

"fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322; *see also Selevan v. N.Y. Thruway Auth.*, 711 F.3d 253, 256 (2d Cir. 2013) (summary judgment appropriate where the non-moving party fails to "come forth with evidence sufficient to permit a reasonable juror to return a verdict in his or her favor on an essential element of a claim" (internal quotation marks omitted)).

If the moving party meets this burden, the nonmoving party must "set out specific facts showing a genuine issue for trial." *Anderson*, 477 U.S. at 248, 250; *see also Celotex*, 477 U.S. at 323-24; *Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009). "When ruling on a summary judgment motion, the district court must construe the facts in the light most favorable to the nonmoving party and must resolve all ambiguities and draw all reasonable inferences against the movant." *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 780 (2d Cir. 2003). Still, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), and cannot rely on "mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986) (quoting *Quarles v. Gen. Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985)). Furthermore, "[m]ere conclusory allegations or denials cannot by themselves create a genuine issue of material fact

where none would otherwise exist." *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010) (internal quotation marks omitted).

Where a plaintiff proceeds pro se, the Court must read his or her submissions liberally and interpret them "to raise the strongest arguments that they suggest." *McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir. 1999) (quoting *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994)). However, a pro se party's "'bald assertion,' completely unsupported by evidence, is not sufficient to overcome a motion for summary judgment." *Jordan v. New York*, 773 F. Supp. 2d 255, 268 (N.D.N.Y. 2010) (citing *Carey v. Crescenzi*, 923 F.2d 18, 21 (2d Cir. 1991)); *see also Wagner v. Swarts*, 827 F. Supp. 2d 85, 92 (N.D.N.Y. 2011).

IV. DISCUSSION

A. Calculation of Penalty Under § 6700

The Government assessed penalties against Schulz pursuant to 26 U.S.C. § 6700 for promoting an abusive tax shelter. (Dkt. No. 197-2, ¶ 41). As the Court has already ruled that Schulz is liable for promoting an abusive tax shelter by virtue of WTP's distribution of the Blue Folders, (Dkt. No. 88), the only remaining issue is the propriety of the penalty assessed against him.[9] Section 6700 provides that any person who

[9] Schulz also argues that the penalty assessed against him is invalid because "IRS Agent Gordon did not get written approval of the initial penalty determination from his supervisor prior to the date the IRS issued the Notice of Penalty" in violation of 26

violates the statue "shall pay, with respect to each activity [proscribed by the statute], a penalty equal to $1,000 or, if the person establishes that it is lesser, 100 percent of the gross income derived (or to be derived) by such person from such activity." 26 U.S.C. § 6700.[10]

U.S.C. § 6751. (Dkt. No. 213, at 6–11). Although the Government responds that the issue was settled when Schulz failed to raise the issue before the Court's March 7, 2017 ruling as to Schulz's liability, (Dkt. No. 215, at), it appears that the Form 8278 giving rise to Schulz's argument was first disclosed to Schulz on December 4, 2017, (Dkt. No. 190). In any event, the record indicates that an IRS supervisor approved the penalty on November 18, 2014, (Dkt. No. 190-2, at 48), and that the IRS subsequently issued the Notice of Penalty on March 9, 2015, (Dkt. No. 13-I, at 6). Accordingly, even were the Court to consider Schulz's argument here, it would be rejected.

[10] Congress amended § 6700 in 1989, significantly changing the method by which the IRS calculated penalties for promoting an abusive tax shelter. The parties do not dispute that the relevant version of the statute was in effect from 1989 to 2004:

> Promoting abusive tax shelters, etc.
>
> (a) imposition of penalty. Any person who—
>
> (1) (A) organizes (or assists in the organization of)—
>
> (i) a partnership or other entity,
>
> (ii) any investment plan or arrangement, or
>
> (iii) any other plan or arrangement, or
>
> (B) participates (directly or indirectly) in the sale of any interest in an entity or plan or arrangement referred to in subparagraph (A), and
>
> (2) makes or furnishes or causes another person to make or furnish (in connection with such organization or sale)—
>
> (A) a statement with respect to the allowability of any deduction or credit, the excludability of any

The Government is entitled to a presumption that the size of the calculated penalty is correct. *In re MDL-731 Tax Refund Litig.*, 989 F.2d 1290, 1303 (2d Cir. 1993). Thus, a "taxpayer is liable for a $1,000 penalty for each violation of section 6700 unless the taxpayer can establish that the amount of gross income derived from the activity was less than $1,000." *Gardner v. C.I.R.*, 145 T.C. 161, 179 (2015), *aff'd sub nom. Gardner v. Comm'r of Internal Revenue*, 704 F. App'x 720 (9th Cir. 2017). "Accordingly, when the Government establishes that a defendant sold a certain number of materials, the burden shifts to the defendant to show that the income derived was less tha[n] $1,000 per transaction." *United States v. Alexander*, No. 08-cv-03760, 2010 WL 1643425, at *7, 2010 U.S. Dist. LEXIS 40108, at *17–18 (D.S.C. Apr. 22, 2010), *aff'd*, 434 F. App'x 246 (4th

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> income, or the securing of any other tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which the person knows or has reason to know is false or fraudulent as to any material matter, or
>
> (B) a gross valuation overstatement as to any material matter,
>
> shall pay, with respect to each activity described in paragraph (1), a penalty equal to the $ 1,000 or, if the person establishes that it is lesser, 100 percent of the gross income derived (or to be derived) by such person from such activity. For purposes of the preceding sentence, activities described in paragraph (I)(A) with respect to each entity or arrangement shall be treated as a separate activity and participation in each sale described in paragraph (1)(B) shall be so treated.

26 U.S.C. § 6700 (2000).

Cir. 2011) (granting Government's motion for summary judgment and imposing "per activity" penalty where taxpayer failed to adduce evidence that he derived less than $1,000 for each tax avoidance package sold).

The Government calculated Schulz's penalty by first determining that the 225 Blue Folders Schulz distributed by mail constitute the "activities" that violated § 6700. (*See* Dkt. No. 215, at 6 ("Here, the *transaction attacked* is Schulz's organization, promotion, and distribution of the Tax Termination Packages in 2003.")). The Government then asserts that the "gross income" Schulz derived from those activities is properly considered as the gross revenue that WTP reported to the IRS in 2003, or $485,351. The Government therefore concludes that the penalty is correctly assessed at $225,000, i.e., the lesser of the "per activity" calculation and WTP's gross income.[11]

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[11] Schulz argues that, because $1,000 "was meant to be a flat amount," the "IRS improperly calculated the penalty . . . by imposing a monetary amount with regard to each Blue folder." (Dkt. No. 197-1, at 9). The cases he cites in support of this proposition are either inapposite or pertain only to the pre-1989 version of the statute. *See Hargrove & Costanza v. United States*, No. 06-cv-046, 2008 WI, 4133928, at *7, 2008 U.S. Dist. LEXIS 79606, at * (E.D. Cal. Sept. 4, 2008) (declining to determine validity of assessment of penalty on motion for summary judgment, but indicating that 1989 amendment to Section 6700 requires a penalty calculation based on the number of issuances rather than the total number of individual bonds sold); *Emanuel v. United States*, 705 F. Supp. 434, 436 (N.D. Ill. 1989) (applying pre-1989 amendment statute).

"For purposes of calculating a Section 6700 penalty," however, "the government is concerned only with gross income to be derived from a particular, well-defined activity." *In re MDL-731 Tax Refund Litig.*, 989 F.2d at 1302; *see also Gardner*, 145 T.C. at 179 ($47,000 penalty calculated by identifying "47 corporations sole organized by petitioners and *correlat[ing] payments made by the customers*" (emphasis added)); *Alexander*, 2010 WL 1643425, at *7, 2010 U.S. Dist. LEXIS 40108, at *17–18 (penalty of $1,152,000 appropriate where business record indicated 1,152 transactions and defendant's wife "burned all other records" of income from sales of tax shelter). Here, the particular activities at issue, as defined by the Government, are 225 distributions of the Blue Folder. Viewed in the light most favorable to Schulz, the evidence that the Blue Folders were offered for a suggested donation of $20 is sufficient to raise a question of fact as to whether WTP received less than $1,000 in gross income from each Blue Folder it distributed. (Dkt. No. 197-2, ¶ 24; Dkt. No. 211-1, ¶ 24). Furthermore, because there is evidence in the record indicating that WTP solicited and received donations in support of a variety of activities other than its distribution of 225 copies of the Blue Folder, (*see, e.g.*, Dkt. Nos. 197-3; 197-4), there are material issues of fact as to whether WTP's total gross income—$485,351—constitutes the "gross income derived" from the specified activities by which the Government calculated the penalty.[12] (*See* Dkt. No. 197-2,

[12] Although arising in the context of the "full-payment rule," *Humphrey v. United States* explains that "no matter if a sale

at ¶ 28–29, 62 ("Defendant has admitted [that] the IRS made no effort to determine if any copies of the Blue Folder were sold and what gross income was derived from the sale(s).")).

Thus, without evidence correlating the amount of WTP's annual gross in 2003 with the amount of gross income WTP derived from distribution of each of the 225 Blue Folders, there remains a dispute of material

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requires a penalty of $1,000, or some lesser amount, that penalty is always a function of a single sale." 854 F. Supp. 2d 1301, 1307 (N.D. Ga. 2011). In *Humphrey*, the plaintiff tax preparer was penalized the "gross income she received for all of her sales" of tax shelters, calculated by "totaling the annual gross reflected in [her] 1099-B's" from sales that year. *Id.* at 1307. The court concluded that, while "practical," this "gross annual income method" improperly rendered the penalty indivisible:

> Section 6700 clearly requires a per sale method for calculating a penalty: (1) if the taxpayer grossed at least $1,000 from an individual sale, the penalty is $1,000; and (2) if the taxpayer can show that she grossed less than $1,000 from an individual sale, the penalty is the gross from that individual sale. The statute does not compel or allow the use of an annual gross income method. No matter the amount of the penalty or the income earned from a sale, the relevant quantum is an individual sale.

Id. at 1308 (citation omitted). Here, the Government has not attempted to demonstrate how WTP's gross income exceeded $1,000 with respect to each of the 225 Blue Folders "sold." Rather, relying entirely on its presumption of correctness, the Government simply asserts that 100% of WTP's annual gross revenue for 2003 is attributable to distribution of the Blue Folder. The record is devoid of evidence indicating what proportion of WTP's annual revenue, if any, corresponds to the distribution of all 225 Blue Folders collectively let alone what income may be attributed to the sale of each Blue Folder individually.

fact as to whether the penalty is properly assessed at $225,000 or some lesser amount.

B. Whether WTP is Schulz's Alter-Ego

Regardless of whether the penalty is properly assessed as the gross income "derived . . . from such activity" or calculated on a "per activity" basis, no penalty can be assessed against Schulz unless WTP's income—as derived from the distribution of the 225 Blue Folders at issue here—can be imputed to him as an individual. The Government argues that it is entitled to summary judgment because the "undisputed evidence shows" that WTP functioned as Schulz's alter-ego at the time the income was generated, and that, therefore, any income generated by WTP can be imputed to Schulz in his individual capacity. (*Id.* at 16–23). Schulz, on the other hand, argues that he is entitled to summary judgment because the Government "has failed to show a factual basis . . . against Schulz's claim that the penalty should be zero because he derived no income from the activity." (Dkt. No. 197-1, at 7).

"Questions relating to the internal affairs of corporations—for profit or not-for-profit—are generally decided in accordance with the law of the place of incorporation." *United States v. Funds Held in the Name or for the Benefit of Wetterer*, 210 F.3d 96, 106 (2d Cir. 2000). The parties do not dispute that the two WTP entities were incorporated in New York. (Dkt. No. 1963, at 1; Dkt. No. 196-5, at 33). "New York law permits a court to disregard the corporate form whenever

necessary to prevent a fraud or to achieve equity." *United States v. Cohn*, 682 F. Supp. 209, 216 (S.D.N.Y. 1988). "Under New York law, an entity is a taxpayer's alter ego . . . where the taxpayer exercised control over the entity at issue, such that the entity has become a mere instrumentality of the taxpayer, and the taxpayer used this control to commit a fraud or other wrong resulting in unjust loss or injury." *Magesty Sec. Corp. v. IRS*, No. 10-cv-0638, 2012 WL 1425100, at *4, 2012 U.S. Dist. LEXIS 57514, at *12 (S.D.N.Y. Apr. 24, 2012)); *see also Morris v. N.Y. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993) (stating that, in New York, "piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury"). "The mere claim that the corporation was completely dominated by the defendants, or conclusory assertions that the corporation acted as their 'alter ego,' without more, will not suffice to support the equitable relief of piercing the corporate veil." *Flushing Plaza Assocs. No. 2 v. Albert*, 102 A.D.3d 737, 739 (2d Dep't 2013).

Furthermore, "in determining whether to pierce the corporate veil," New York courts consider multiple factors including: "the absence of the formalities . . . that are part and parcel of the corporate existence, i.e., . . . election of directors, keeping corporate records and the like," "whether funds are put in and taken out of the corporation for personal rather than corporate

purposes," "overlap in ownership, officers, directors, and personnel," "common office space, address and telephone numbers of corporate entities," "the amount of business discretion displayed by the allegedly dominated" entity, and "whether the corporation in question had property that was used by other of the corporations as if it were its own." *Weinreich v. Sandhaus*, 850 F. Supp. 1169, 1178-79 (S.D.N.Y.) (citing *Win. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 138 (2d Cir. 1991)). Considering all of these factors in tandem with the significant harm Schulz sought and inflicted upon the Government, both prevention of fraud and promotion of equity require attributing the gross income WTP derived from promoting the abusive tax shelters to Schulz personally as WTP's alter ego.

First, even viewed in the light most favorable to Schulz, the evidence in the record indicates that Schulz maintained virtually exclusive control over WTP, its activities, and its assets. With regard to operations and finances, it is difficult to distinguish where Schulz ends and where the organization begins. WTP was Schulz's sole occupation, and Schulz was WTP's sole animating force. In addition to functioning as the "voice" of the organization, Schulz alone determined WTP's mission, how to pursue that mission through programming and strategic decisions, and whether and when to change course. Schulz simultaneously served as WTP's President, Chief Executive Officer, and Chairman of WTP's Board of Directors. WTP's only permanent physical presence was inside Schulz's own

home, where only he and his wife maintained offices. Schulz was the only person authorized to draw a salary from WTP. Schulz used WTP funds to pay for his health insurance, as well as portions of his electric and telephone bills. Schulz used WTP funds for litigation and other legal expenses, regardless of whether WTP was a named party. Schulz mixed WTP and personal expenses, paying WTP expenses with his personal credit cards and using WTP funds directly to make payments on those cards. Altogether, Schulz acknowledges that he made more than $100,000 in "unsecured loans" to WTP. At Schulz's direction, WTP "loaned" over $8,000 to Burr Deitz after Deitz stole that money from WTP. Finally, Schulz had the power to add or remove board members authority to fire board members "on his sole discretion." And Schulz exercised that power when he removed all board members, except one, in 2003.[13]

Second, as described above, *Schulz I* already determined that together, Schulz and WTP promoted an abusive tax shelter in violation of § 6700, and that the "gravity of harm" caused by their conduct is "manifest." *See Schulz I*, 529 F. Supp. 2d at 346-53 (explaining that although "the exact cost of Defendants' conduct appears to be unknown," the estimated cost to the

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[13] Schulz disputes the relevance of this fact, arguing that he removed these board members with the intention of replacing them with a more regionally diverse group. (Dkt. No. 213-1, ¶ 35). Schulz fails to recognize, however, that it is his intent that is irrelevant—the mere fact that he was able to effectively dissolve the board at his discretion is indicative of the degree of his dominion and control over the entity. *See Evseroff*, 270 Fed. App'x at 77 ("[T]he critical issue . . . is not motive, but control. . . .).

United States Treasury is approximately $4.8 million). Infliction of such an injury is at the core of Schulz's stated mission: enabling "companies, workers, and independent contractors" to "stop withholding, filing and paying," (Dkt. No. 197-3, at 4), a "tax [that] is fraudulent in its origin and illegal in its operation" for the purpose of "execut[ing] a mass-movement to Cut Government Funding," (*id.*, at 14).[14]

The record indicates that Schulz exercised dominion and control over the entity to such a degree that WTP is more accurately understood as his mere instrumentality, and that he used that instrumentality to organize and promote abusive tax shelters in violation of § 6700, causing significant injury to the Government. Accordingly, there is no issue of material fact as to whether WTP's income derived from the distribution of the Blue Folders is properly imputed to Schulz as his alter ego. The only issue remaining for trial is the amount of gross income WTP—and by extension, Schulz—derived from the specified activities used to calculate the penalty amount under § 6700, i.e., organizing and promoting an abusive tax shelter through

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[14] The Court need not further explore the degree to which courts have repeatedly rejected this and similar arguments. *See Schulz I*, 529 F. Supp. 2d at 350 (finding that Schulz "relied on fringe opinions of known tax protestors whose theories have repeatedly been rejected by courts across the country," and noting that "[s]everal of the people on whom Defendants claim to rely have been convicted of tax crimes").

distribution of the 225 Blue Folders at issue in this case.[15]

V. CONCLUSION

For these reasons, it is hereby

ORDERED that the Government's motion for summary judgment (Dkt. No. 196) is **GRANTED on the issue of whether WTP was Schulz's alter ego, but is otherwise DENIED**; and it is further

ORDERED that Schulz's motion for summary judgment (Dkt. No. 197) is **DENIED.**

IT IS SO ORDERED.

Dated: July 12, 2018
Syracuse, New York

/s/ Brenda K. Sannes
Brenda K. Sannes
U.S. District Judge

[15] Schulz makes an additional claim that, because distribution of the Blue Folder constitutes protected speech, the penalty assessed against him is invalid. (Dkt. No. 8, at 18). As the Government notes, this argument was already litigated and rejected in *Schulz I*, 529 F. Supp. 2d at 355–57. Accordingly, the Court need not further address the issue here.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ,

Plaintiff,

v.

1:15-cv-01299 (BKS/CFH)

UNITED STATES
OF AMERICA,

Defendant.

APPEARANCES:

Plaintiff Pro Se
Robert L. Schultz
Queensbury, NY 12804

For the United States:
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Hon. Brenda K. Sannes, United States District Judge:

MEMORANDUM DECISION AND ORDER

(Filed Aug. 24, 2017)

INTRODUCTION

Plaintiff pro se Robert Schulz appeals a Text Order (Dkt. No. 120) issued by United States Magistrate

Judge Christian F. Hummel on June 21, 2017, which granted in part and denied in part Plaintiff's request for the issuance of subpoenas (Dkt. No. 112) and stated in relevant part: "The Court grants permission to issue subpoenas for David Gordon, Dorothy Nelson and Michael Sciame, denying the issuance of subpoena as to Lois Lerner." (Dkt. No. 124). The United States opposes Schulz's appeal. (Dkt. No. 131). On July 21, 2017, Schulz requested permission to file a reply (Dkt. No. 133), which the Court granted (Dkt. No. 134), and Schulz replied on August 14, 2017 (Dkt. No. 144). For the following reasons, Magistrate Judge Hummers June 21, 2017 Text Order is affirmed.

PROCEDURAL HISTORY[1]

On November 2, 2015, Schulz filed a Complaint against the United States, the Internal Revenue Service ("IRS"), and John Koskinen as Commissioner, under 26 U.S.C. § 6703(c)(2), alleging that he received an erroneous tax assessment penalty from the IRS in the amount of $225,000 related to his promotion of an abusive tax shelter. (Dkt. No. 1). On January 4, 2016, Schulz filed an Amended Complaint, further alleging that the IRS filed a notice of federal tax lien against his property for the $224,000 unpaid balance of the assessment. (Dkt. No. 8). The only issue remaining in this case is whether Schulz owes a penalty for the abusive

[1] The Court assumes familiarity with the full history detailed in Dkt. Nos. 23, 25, 88.

tax shelter based on the amount of income, if any, he derived from it. (*See* Dkt. No. 88).

On June 12, 2017, Schulz filed a request for the issuance of subpoenas as to four witnesses: Michael Sciame, David Gordon, Dorothy Nelson, and Lois Lerner. (Dkt. No. 112). The United States opposed Schulz's request for a subpoena as to Lerner, the former director of the Tax Exempt Organizations Unit of the IRS, on the basis that "she is a former high-ranking IRS official with no personal knowledge of the gross income that Schulz earned from his tax-fraud scheme." (Dkt. No. 115, p. 2). The United States argued that Schulz failed to demonstrate any exceptional circumstances to justify the deposition of a high-ranking government official. (*Id.*). The United States further indicated that the information Schulz sought "can [be] obtained through other, less burdensome or intrusive means, namely, the depositions of the three other IRS agents named above." (*Id.*, p. 3).

Schulz filed a letter in response, arguing among other things that "Lois Lerner had decision making authority for many years—including those which are central to this instant case—concern WTP[2] and my work. She is the signer of a critical document that was not handled properly by the IRS, according to its own rules and regulations." (Dkt. No. 117, p. 1). Further, Schulz stated his belief that Lerner "was directly involved with strategies and decisions concerning WTP and Bob

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[2] WTP refers to Schulz's "We The People" organizations. (*See* Dkt. No. 25, pp. 2-3).

Schulz." (*Id.*). On June 19, 2017, Magistrate Judge Hummel held a hearing regarding various discovery matters (Dkt. No. 119), and on June 21, 2017, granted permission to issue subpoenas for Gordon, Nelson, and Sciame, but denied the issuance of a subpoena for Lerner. (Dkt. No. 120). Schulz was also permitted to file a motion to compel discovery by July 7, 2017. (*Id.*). Schulz filed the instant appeal on July 5, 2017, and then on July 7, 2017, he filed a motion to compel discovery. (Dkt. No. 126). That motion did not address the issue of deposing Lerner.

DISCUSSION

Schulz appeals the portion of Magistrate Judge Hummel's June 21, 2017 Text Order denying Schulz's request for the issuance of a subpoena as to Lois Lerner. (Dkt. No. 124, p. 1). Schulz asserts that he informed Magistrate Judge Hummel at the June 19, 2017 discovery hearing that "there was significant and substantial circumstantial evidence demonstrating that Lerner was part of a politically motivated set-up of Schulz and his organizations and that Lerner was directly involved in enforcement actions against Schulz and his organizations, including but not limited to her Exempt Organization Division's lengthy and detailed audit of the organizational and financial activities of the organizations." (*Id.*, pp. 1-2). "Schulz argued his evidence included a principal document that was signed by Lerner during the audit." (*Id.*, p. 2). Schulz further states that "Lerner, Sciame and Gordon were all directly involved in managing the enforcement

actions against Schulz between 2003 and 2008," and that he "needs to depose all three, as any one of the three would have knowledge about Schulz's earning from the activity, or lack thereof, not possessed by any of the other two deponents." (*Id.*).

In response, the United States argues that Schulz's appeal should be denied because Magistrate Judge Hummel "has not issued a final determination of a non-dispositive matter under Local Rule 72.1." (Dkt. No. 131, p. 5). Local Rule 72.1 provides that any party "may file objections to a Magistrate Judge's determination of a non-dispositive matter." N.D.N.Y. L.R. 72.1(b). Essentially, the United States contends that since Schulz did not file a motion to compel the deposition of Lerner, Magistrate Judge Hummel's decision to deny a subpoena for Lerner does not constitute *a final* determination of a non-dispositive matter, and therefore, Schulz cannot appeal under Local Rule 72.1(b). (Dkt. No. 131, pp. 6-7). At the discovery hearing, Magistrate Judge Hummel explained the court's decision as follows:

> There's no indication on the record before this Court that Ms. Lerner has any knowledge, information or anything remotely relevant to the issues which remain in this litigation. The only issue in this litigation is the amount of what gross – what amount if any gross income . . . did Mr. Schulz derive from the tax scheme or plan and there's no indication that Ms. Lerner has any knowledge with respect to those issues. And as such, Mr. Schulz's request for a

> subpoena to be issued to depose Ms. Lerner is denied.

(*See* Transcript of Discovery Hearing held on June 19, 2017, at pp. 19-20). The court also discussed a potential motion by Schulz to compel additional information, and the June 21, 2017 Text Order permitted Schulz to file a motion to compel discovery. (Dkt. No. 120).

Assuming without deciding that Magistrate Judge Hummel's decision to deny a subpoena for Lerner does constitute a final determination of a non-dispositive matter, the Court's review of a non-dispositive discovery order is limited to determining whether the order is "clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A). "Under this highly deferential standard, magistrate judges are 'afforded broad discretion in resolving discovery disputes, and reversal is appropriate only if that discretion is abused.'" *Storms v. United States*, No. 13 Civ. 0811, 2014 WL 3547016, at *4, 2014 U.S. Dist. LEXIS 96665, at *15 (E.D.N.Y. July 16, 2014) (citation omitted).

After careful review of the record, the Court finds that Magistrate Judge Hummel's decision to deny a subpoena for Lerner was neither clearly erroneous nor contrary to the law.[3] As the United States previously pointed out, the Second Circuit has held that "to depose a high-ranking government official, a party must demonstrate exceptional circumstances justifying the deposition—for example, that the official has unique

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[3] Schulz does not specify the ground on which his appeal is premised.

first-hand knowledge related to the litigated claims or that the necessary information cannot be obtained through other, less burdensome or intrusive means." *Lederman v. New York City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013). At the discovery hearing, Schulz made the same bald assertions about Lerner that he repeats in his appeal, and Magistrate Judge Hummel found there was no indication that Lerner had any relevant knowledge or information, let alone unique first-hand knowledge, as to the narrow issue of what if any income Schulz derived from promoting an abusive tax shelter. Moreover, then and now, Schulz has failed to show that the information he seeks cannot be obtained through other, less burdensome or intrusive means, such as the depositions of the three other IRS officials, which Magistrate Judge Hummel allowed.

In sum, the Court finds that Magistrate Judge Hummel's decision was neither clearly erroneous nor contrary to the law, and that it was well within his discretion to deny a subpoena for Lerner. *See also Moriah v. Bank of China Ltd.*, 72 F. Supp. 3d 437, 440 (S.D.N.Y. 2014) (quashing subpoena for deposition of former House Majority Leader Eric Cantor where "Plaintiffs cannot demonstrate exceptional circumstances that would allow a deposition of Cantor because they cannot establish that Cantor 'has unique first-hand knowledge' related in any manner to this litigation.") (quoting *Lederman*, 731 F.3d at 203).

CONCLUSION

For these reasons, it is hereby

ORDERED that the Text Order (Dkt. No. 120) is **AFFIRMED** and Schulz's Appeal (Dkt. No. 124) is DENIED.

IT IS SO ORDERED.

August 24, 2017
Syracuse, New York

/s/ Brenda K. Sannes
Brenda K. Sannes
U.S. District Judge

APPENDIX F

U.S. District Court
Northern District of New York—Main Office (Syracuse) [NextGen CM/ECF Release 1.5 (Revision 1.5.3)] (Albany)
CIVIL DOCKET FOR CASE #: 1:15-cv-01299-BKS-CFH

(Filed Jun. 21, 2017)

Schulz v. United States

Docket No. 120

TEXT ORDER granting in part and denying in part 112 Letter Request to issue subpoenas. The Court grants permission to issue subpoenas for David Gordon, Dorothy Nelson and Michael Sciame, denying the issuance of subpoena as to Lois Lerner. Plaintiff is also permitted to file a Motion to Compel Discovery. Motion to Compel to be filed by 7/7/2017. Defendants response to such a motion is due 7/28/2017. All Depositions are to be completed by 7/14/2017. The Plaintiff is directed to submit amended proposed Subpoenas for Gordon, Nelson and Sciame, with the deposition date and place indicated, for the Clerk to issue. SO ORDERED. Authorized by Magistrate Judge Christian F. Hummel on 6/19/2017. (Copy served via regular mail on 6/21/2017)(tab) (Entered: 06/21/2017)

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ,

Plaintiff,

v. 1:15-cv-01299 (BKS/CFH)

UNITED STATES
OF AMERICA,

Defendant.

APPEARANCES:

Plaintiff Pro Se
Robert L. Schulz
Queensbury, NY 12804

For the United States:
Michael Richard Pahl
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P.O. Box 7238
Washington, DC 20044

Hon. Brenda K. Sannes, United States District Judge:

DECISION AND ORDER

(Filed May 4, 2017)

Presently before the Court are four letter motions from Plaintiff pro se Robert Schulz (Dkt. Nos. 96-99), relating to: 1) the Court's March 7, 2017

Memorandum-Decision & Order (Dkt. No. 88), which denied Schulz's motion for an Order to Show Cause, granted the Government's motion for partial summary judgment, denied Schulz's motion for summary judgment, and denied Schulz's motion to re-litigate, and 2) the Court's April 14, 2017 Decision & Order (Dkt. No. 95), which denied Schulz's motion to reconsider the March 7, 2017 decision. The Court will discuss each of Schulz's motions in turn.

First, Schulz requests "reassignment to a jury of my peers of the adjudication of the question whether *United States v Schulz, et al.*, 529 F. Supp. 2d 341 (N.D.N.Y. 2007) *aff'd United States v. Schulz*, 517 F.3d 606 (2d Cir. 2008) ("*Schulz I*") was fully, fairly and completely litigated." (Dkt. No. 96). Schulz states that "[s]aid question is currently before the Court on my motion of March 21, 2017 for reconsideration of the Court's Order filed March 7, 2017." (*Id.*). Schulz seeks reassignment under 28 U.S.C. § 144, which states that:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the

> proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 144. In his supporting affidavit, Schulz asserts the following basis for reassignment:

> Due to the inherent, unavoidable personalization of the "outside influence" of the perception of consequences adverse to their interests that would accompany a restoration of the First Amendment Right to Petition the Government for Redress of Grievances, namely a significant shift in the ultimate power in the United States of America from the Government of the United States to the People, all individuals representing the Government of the United States as the triers of said factual question would be inherently biased against Plaintiff Schulz and the restoration of the First Amendment Right to Petition the Government for Redress of Grievances.
>
> The trier of fact before whom this matter is pending, and all others similarly situated, are inherently biased and prejudiced against Schulz and the restoration of the First Amendment Right to Petition the Government for Redress of Grievances.

(Dkt. No. 96-1, ¶¶ 4-5). Schulz goes on to rehash his motion for reconsideration. (Dkt. No. 92). Schulz concludes, among other things, that "all federal judges

would be so inherently biased should the adjudication of the question be reassigned to one of them." (Dkt. No. 96-1, ¶ 50). However, 28 U.S.C. § 144 does not permit reassignment to a jury, only another judge, and Schulz's allegation that the entire judiciary is biased against him is not a valid basis for reassignment. Therefore, Schulz's motion may be denied for this reason alone.[1] Moreover, Schulz's motion must be denied as moot, inasmuch as the Court denied Schulz's motion for reconsideration on April 14, 2017, the same day he requested reassignment. (Dkt. No. 96).

Second, Schulz requests that "judgment be set out in a separate document" for the Court's March 7, 2017 Memorandum-Decision & Order and the Court's April 14, 2017 Decision & Order. (Dkt. No. 97). Under Rule 58 of the Federal Rules of Civil Procedure, a party may "request that judgment be set out in a separate document as required by Rule 58(a)." Fed. R. Civ. P. 58(d). Rule 58(a) states that, with certain exceptions not relevant here, "[e]very judgment and amended judgment must be set out in a separate document." Fed. R. Civ. P. 58(a). Further, Rule 54(a) states that "'judgment' as used in these rules includes a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). In other words, the judgment must be a final order. Since the Court's previous decisions only addressed Schulz's

[1] It is also worth noting that the legal question of whether an issue in a prior proceeding was fully and fairly litigated for purposes of collateral estoppel must be resolved by the court. *See New York v. Julius Nasso Concrete Corp.*, 202 F.3d 82, 86 (2d Cir. 2000).

liability under 26 U.S.C. § 6700, and not any related damages, the Court will not enter judgments for these non-final orders. *See* Fed. R. Civ. P. 54(b); *see also Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976) ("We turn to consider whether the District Court's order might have been appealed by petitioner to the Court of Appeals under any other theory. The order, viewed apart from its discussion of Rule 54(b), constitutes a grant of partial summary judgment limited to the issue of petitioner's liability. Such judgments are by their terms interlocutory . . . and where assessment of damages or awarding of other relief remains to be resolved have never been considered to be 'final' within the meaning of 28 U.S.C. § 1291.").

Third, Schulz requests "an explanation for the Court's Decision to pre-maturely deny my 3/21/17 Motion for Reconsideration." (Dkt. No. 98). Schulz points out that a text notice was entered by the Court clerk on March 23, 2017, directing the Government to file any response to Schulz's motion for reconsideration by April 17, 2017, and setting a motion hearing for May 4, 2017. (Docket Entry dated March 23, 2017). The text notice also stated, however, that the motion "would be taken on submission of papers, with no oral argument, unless otherwise directed." Moreover, the Court entered decision on Schulz's motion for reconsideration before the Government's response date, and without having heard from the Government in any manner, for the simple reason that no response was necessary, since Schulz only repeated past arguments which

the Court had previously rejected. (*See* Dkt. Nos. 23, 88).

Fourth, Schulz seeks a court order pursuant to Rule 7(b)(1) of the Federal Rules of Civil Procedure, amending the Court's April 14, 2017 Decision & Order by: "a. Removing the footnote on page 3 because it is wholly unfair and misleading, and b. Modifying the first sentence of the second paragraph on page 2 because as it is, it is wholly unfair and misleading." (Dkt. No. 99). Having reviewed Schulz's supporting affidavit (Dkt. No. 99, pp. 2-6), the Court finds no basis to make the requested modifications.

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that Plaintiff's Motion for Reassignment (Dkt. No. 96) is **DENIED**; and it is further

ORDERED that Plaintiff's Motion Requesting that a Judgment be Entered (Dkt. No. 97) is **DENIED**; and it is further

ORDERED that Plaintiff's Motion for Clarification (Dkt. No. 98) is **GRANTED**, as explained above; and it is further

ORDERED that Plaintiff's Motion Requesting Modification (Dkt. No. 99) of the Court's April 14, 2017 Decision & Order is **DENIED**; and it is further

ORDERED that the Clerk of the Court serve a copy of this Decision and Order on the Plaintiff.

IT IS SO ORDERED.

May 4, 2017
Syracuse, New York

/s/ Brenda K. Sannes
Brenda K. Sannes
U.S. District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ,

Plaintiff,

v. 1:15-cv-01299 (BKS-CFH)

UNITED STATES
OF AMERICA,

Defendant.

APPEARANCES:

Plaintiff Pro Se
Robert L. Schultz
Queensbury, NY 12804

For the United States:
Michael Richard Pahl
U.S. Department of Justice – Tax Division
Ben Franklin Station
P.O. Box 7238
Washington, DC 20044

Hon. Brenda K. Sannes, United States District Judge:

DECISION AND ORDER

(Filed Apr. 14, 2017)

Presently before the Court is a motion from Plaintiff pro se Robert Schulz (Dkt. No. 92) seeking reconsideration of the Court's March 7, 2017

Memorandum-Decision & Order (Dkt. No. 88), which denied Schulz's motion for an Order to Show Cause, granted the Government's motion for partial summary judgment, denied Schulz's motion for summary judgment, and denied Schulz's motion to re-litigate. (*See* Dkt. Nos. 36, 38, 39, 41).

In general, a motion for reconsideration may only be granted upon one of three grounds: "(1) an intervening change in law, (2) the availability of evidence not previously available, and (3) the need to correct a clear error of law or prevent manifest injustice." *Shannon v. Verizon N.Y., Inc.*, 519 F. Supp. 2d 304, 307 (N.D.N.Y. 2007); *see also Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992) (same) (citing 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4478 at 790). "[A] motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). "The standard for reconsideration is strict and is committed to the discretion of the court." *S.E.C. v. Wojeski*, 752 F. Supp. 2d 220, 223 (N.D.N.Y. 2010) *aff'd sub nom. Smith v. S.E.C.*, 432 F. App'x 10 (2d Cir. 2011).

Here, Schulz "seeks only to prevent clear error of law and prevent manifest injustice." (Dkt. No. 92-1, p. 5). Specifically, Schulz argues that: 1) the First Amendment Petition Clause issue was not fully and fairly litigated in *Schulz I*; 2) the parties' material facts in genuine dispute were not fully and fairly litigated in *Schulz I*; and 3) the Anti-Injunction Act is inapplicable. (*Id.*, pp. 6-27). *Schulz I* refers to a 2008 decision

wherein the Government successfully enjoined Schulz (and two corporate defendants he founded) from promoting an abusive tax shelter pursuant to § 6700 of the Internal Revenue Code, 26 U.S.C. § 6700. *See United States v. Schulz*, 529 F. Supp. 2d 341 (N.D.N.Y. 2007) (McAvoy, J.) *aff'd*, 517 F.3d 606 (2d Cir. 2008) *and enforcement granted*, No. 1:07-CV-0352, 2008 WL 2626567, 2008 U.S. Dist. LEXIS 57948 (N.D.N.Y. Apr. 28, 2008).

Since *Schulz I* determined Schulz's liability under § 6700,[1] and this Court has already concluded that the issue was fully and fairly litigated in that proceeding and that Schulz may not re-litigate *Schulz I* in this action, Schulz's first two arguments for reconsideration are unavailing. (*See* Dkt. No. 88, pp. 7-10). As to Schulz's third argument, the Court twice previously concluded that the Anti-Injunction Act, 26 U.S.C. § 7421, barred Schulz's requests for a preliminary injunction against the Government. (*See* Dkt. No. 23, pp. 3-9; Dkt. No. 88, pp. 5-6). In sum, Schulz seeks only to relitigate issues already decided, and he has not shown the need to correct a clear error of law or prevent manifest injustice.

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[1] In finding that Schulz violated § 6700, Judge McAvoy concluded, among other things, that [b]ecause Defendants have actually persuaded others, directly or indirectly, to violate the tax laws, Defendants words and actions were directed toward such persuasion, and the unlawful conduct was imminently likely to occur, the First Amendment does not afford protection." *Schulz I*, 529 F. Supp. 2d at 357.

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that Plaintiffs Motion for Reconsideration (Dkt. No. 92) is **DENIED**; and it is further

ORDERED that the Clerk of the Court serve a copy of this Decision and Order on the Plaintiff.

IT IS SO ORDERED.

April 14, 2017
Syracuse, New York

/s/ Brenda K. Sannes
Brenda K. Sannes
U.S. District Judge

APPENDIX I

15-1299UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ,

Plaintiff,

v. 1:15-cv-01299 (BKS-CFH)

UNITED STATES
OF AMERICA,

Defendant.

APPEARANCES:

Plaintiff Pro Se
Robert L. Schultz
Queensbury, NY 12804

For the United States:
Michael Richard Pahl
U.S. Department of Justice – Tax Division
Ben Franklin Station
P.O. Box 7238
Washington, DC 20044

Hon. Brenda K. Sannes, United States District Judge:

MEMORANDUM-DECISION AND ORDER

(Filed Mar. 7, 2017)

I. INTRODUCTION

Plaintiff pro se Robert L. Schulz brings this action against Defendant United States ("the Government"),

under 26 U.S.C. § 6703(c)(2), alleging that he received an erroneous tax assessment penalty from the Internal Revenue Service ("IRS") in the amount of $225,000 related to his promotion of an abusive tax shelter, and that the IRS wrongfully filed a notice of federal tax lien against his property for the $224,000 unpaid balance of the assessment. (Dkt. No. 8). Several motions are currently pending before the Court: 1) Schulz's motion for an Order to Show Cause requesting partial removal of the federal tax lien, which the Court construes as a motion for a preliminary injunction (Dkt. No. 36); 2) the Government's motion for partial summary judgment (Dkt. No. 38); 3) Schulz's motion for summary judgment; (Dkt. No. 39); and 4) Schulz's motion to "relitigate" a decision in a related case (detailed below). (Dkt. No. 41).

II. PROCEDURAL HISTORY

In 2007, the Government brought a civil action against Schulz seeking to enjoin him (and two corporate defendants he founded) from promoting an abusive tax shelter pursuant to § 6700 of the Internal Revenue Code, 26 U.S.C. § 6700. *United States v. Schulz*, 529 F. Supp. 2d 341 (N.D.N.Y. 2007) *aff'd*, 517 F.3d 606 (2d Cir. 2008) and *enforcement granted*, No. 1:07-CV-0352, 2008 WL 2626567, 2008 U.S. Dist. LEXIS 57948 (N.D.N.Y. Apr. 28, 2008) ("*Schulz I*"). The action related to Schulz's distribution of a "Tax Termination Package" (also known as the "Blue Folder") in 2003 to help individuals to stop withholding, paying, and filing federal taxes. *Id.* United States District

Judge Thomas J. McAvoy found that Schulz was promoting an abusive tax shelter, and enjoined him from further doing so. *Id.*

On March 9, 2015, Schulz received a tax assessment penalty from the IRS in the amount of $225,000 for promoting the abusive tax shelter at issue in *Schulz I*. (Dkt. No. 13-1, p. 6). Pursuant to § 6700, the IRS calculated the penalty by multiplying the number of Tax Termination Packages that Schulz mailed to individuals in 2003 by $1,000.[1] (Dkt. No. 15-2, ¶¶ 3-5). On April 6, 2015, Schulz appealed the penalty to the IRS, arguing that he was not subject to any statutory penalty under § 6700(a)(2)(B) because he did not receive any income from the alleged tax shelter. (Dkt. No. 13-1, ¶¶ 8-9). Schulz also paid $1,000 towards the penalty as part of the appeal and requested a refund. (*Id.*, ¶ 8). On November 2, 2015, "having received no word from the IRS regarding its resolution" of his appeal and refund, Schulz commenced this action to determine his tax penalty liability pursuant to § 6703(c)(2). (*Id.*, ¶ 12). On November 24, 2015, the IRS filed a notice of federal tax lien against Schulz's property for the $224,000 unpaid balance of the penalty (Dkt. No. 13-1, pp. 24-27), which Schulz objected to in the Amended Complaint he filed on January 4, 2016. (Dkt. No. 8).

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[1] Under § 6700, any person who promotes an abusive tax shelter "shall pay, with respect to each activity described in paragraph (1), a penalty equal to the $1,000 or, if the person establishes that it is lesser, 100 percent of the gross income derived (or to be derived) by such person from such activity." 26 U.S.C. § 6700(a).

In January 2016, Schulz moved for a preliminary injunction to prohibit the Government "from engaging in any lien or levy collection activity" against him and to remove the notice of federal tax lien. (Dkt. Nos. 9, 13). In a Memorandum-Decision & Order dated February 11, 2016, the Court denied Schulz's request for a preliminary injunction on the grounds that it was barred as a matter of law by the Anti-Injunction Act, 26 U.S.C. § 7421. (Dkt. No. 23).

Meanwhile, the Government filed a partial motion to dismiss the Amended Complaint (Dkt. No. 11), which Schulz opposed. (Dkt. No. 16). Schulz also cross-moved for summary judgment on his claim related to the tax penalty assessment. (*Id.*). On April 12, 2016, Schulz filed an Order to Show Cause, again seeking the removal of the federal tax lien, and also to expedite determination of his cross-motion for summary judgment. (Dkt. No. 24).

In a Memorandum-Decision & Order dated May 6, 2016, the Court granted the Government's partial motion to dismiss, and denied Schulz's cross-motion for summary judgment and Order to Show Cause. (Dkt. No. 25). The Court denied Schulz's cross-motion for summary judgment as premature, "without prejudice to renew at the close of discovery." (*Id.*, p. 13). The Court denied Schulz's Order to Show Cause, referring back to the same reasons stated in the Court's previous Memorandum-Decision & Order dated February 11, 2016. (*Id.*, p. 14).

On May 20, 2016, the Government answered the Amended Complaint and asserted a counterclaim against Schulz, seeking "to reduce to judgment penalties assessed under 26 U.S.C. § 6700 against Schulz for his participation in the organization, promotion and sale of the so-called 'Tax Termination Package' in 2003, which falsely and fraudulently claimed to enable participants who followed its instructions to stop paying federal employment and income taxes." (Dkt. No. 29, p. 11). The Government asserted that "Schulz is collaterally estopped from relitigating the *Schulz I* court's decision . . . and is legally bound by the ruling that he engaged in penalty conduct by virtue of his distribution of the Tax Termination Package," and that "Schulz is liable to the United States for the unpaid balance of the assessment described in . . . this counterclaim, in the amount of $224,000 plus interest." (*Id.*, p. 17).

On July 6, 2016, Schulz filed his pending motion for a preliminary injunction (Dkt. No. 36), which the Government opposed. (Dkt. No. 37). On July 22, 2016, the Government filed the pending motion for partial summary judgment (Dkt. No. 38), which Schulz opposed. (Dkt. No. 50). On July 22, 2016, Schulz filed his own motion for summary judgment (Dkt. No. 39), which the Government opposed. (Dkt. No. 47). Finally, on July 25, 2016, Schulz filed his motion to re-litigate (Dkt. No. 41), which the Government opposed. (Dkt. No. 48).

III. FACTUAL BACKGROUND

The Court assumes familiarity with the factual background in this case, as set forth in *Schulz I*, as well as the Court's previous decisions dated February 11, 2016 and May 6, 2016. (Dkt. Nos. 23, 25).

IV. SCHULZ'S MOTION FOR A PRELIMINARY INJUNCTION

Schulz seeks an "an order for *partial* removal of the Federal Tax Lien – that is, that part covering two vacant parcels of his real property representing a small fraction of the assessed value of Schulz's overall land holdings." (Dkt. No. 36-5, p. 7). Schulz argues that "[r]emoval of the two parcels from the Lien will provide Schulz with the opportunity to sell those parcels and thus put an end to the ongoing, *irreparable* injury he is experiencing due to the loss of his Sixth Amendment Right to counsel." (*Id.*). Schulz further contends that "removal of the two parcels from the Lien will not adversely affect the Government's security interest in Schulz's property. The value of the remaining seven parcels is 3.2 times that needed to enable Schulz to satisfy the full tax assessment penalty pending a final determination." (*Id.*).

In response, the Government argues that Schulz's motion "is time-barred because it is an untimely motion for reconsideration," and moreover, "the relief that Schulz seeks is barred by the Anti-Injunction Act." (Dkt. No. 37, pp. 7-8). The Court agrees on both counts. Schulz previously sought removal of the federal tax

lien in two separate motions (Dkt. Nos. 9, 13, 24), which the Court denied. (Dkt. Nos. 23, 25). Although Schulz now only seeks *partial* removal of the federal tax lien, the motion essentially constitutes one for reconsideration of the Court's previous judgments, and is untimely under Local Rule 7.1(g). *See* N.D.N.Y. L.R. 7.1(g) (requiring motions for reconsideration to be filed no later than fourteen days after entry of the challenged judgment).

Moreover, Schulz's motion fails on the merits, for the same reasons explained in the Court's previous decisions. Specifically, Schulz's motion is barred as a matter of law by the Anti-Injunction Act, which states that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). Although there are certain exceptions to this general rule, the Court previously found that they do not apply here. (Dkt. No. 23, pp. 4-8). Schulz argues that partial removal of the federal tax lien would allow the Government to retain a security interest in his property to potentially satisfy the tax assessment. (Dkt. No. 36-5, p. 7). However, Schulz does not point to any authority for an exception to the rule against *any* restraint on the assessment or collection of taxes, permitting partial removal of the federal tax lien, and the Court is aware of none.

Schulz also argues that the judicially created exception to the Anti-Injunction Act applies in this case because "equity jurisdiction exists" and "under no

circumstances can the Government ultimately prevail." (Dkt. No. 36-5, pp. 8-15). The Court has already squarely rejected this argument and will not belabor it again here. (Dkt. No. 23, pp. 5-8). The Court will only add that, to the extent Schulz contends that imposition of the federal tax lien violates his Sixth Amendment right to counsel and thereby causes him irreparable harm (since he cannot liquidate the property in order to pay for an attorney) (Dkt. No. 36-5, pp. 8-10), "it is well-settled that, except when faced with the prospect of imprisonment, a litigant has no legal right to counsel in civil cases." *Guggenheim Capital, LLC v. Birnbaum*, 722 F.3d 444, 453 (2d Cir. 2013).[2]

Accordingly, Schulz's motion for a preliminary injunction must be denied, for the same reasons stated in the Court's previous decisions. (Dkt. No. 23, 25).

V. THE GOVERNMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT & SCHULZ'S MOTION TO RE-LITIGATE

The Government's motion for partial summary judgment and Schulz's motion to relitigate both center on what effect, if any, the decision in *Schulz I* should have on this case. The Government argues that it is entitled to partial summary judgment because "the doctrine of collateral estoppel bars the relitigation here

[2] Although Plaintiff cites the recent Supreme Court decision in *Luis v. United States*, 136 S. Ct. 1083, 1099 (2016), that case involved a criminal defendant's right to counsel, and thus is inapposite.

of Schulz's liability under § 6700," which was previously established in *Schulz I.* (Dkt. No. 38-1, p. 3). In response, Schulz argues that "the doctrine of collateral estoppel is no bar to re-litigation of *Schulz I*." (Dkt. No. 50-3, pp. 5-11). In his motion to re-litigate, Schulz explicitly asks for a complete do-over of *Schulz I.* (Dkt. No. 41). The gist of Schulz's argument for purposes of both motions is that he did not get a full and fair opportunity to litigate the issues in *Schulz I.* Thus, the Court must decide whether collateral estoppel applies here.

"Issue preclusion, or collateral estoppel, which applies not to claims or to causes of action as a whole but rather to issues, bars litigation of an issue when '(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits.'" *Proctor v. LeClaire*, 715 F.3d 402, 411 (2d Cir. 2013) (quoting *Ball v. A.O. Smith Corp.*, 451 F.3d 66, 69 (2d Cir. 2006)). "The burden of showing that the issues are identical and were necessarily decided in the prior action rests with the party seeking to apply issue preclusion," whereas "the burden of showing that the prior action did not afford a full and fair opportunity to litigate the issues rests with . . . the party opposing the application of issue preclusion." *Kulak v. City of New York*, 88 F.3d 63, 72 (2d Cir. 1996).

The Government argues that "the issue of Schulz's liability under § 6700 was the identical issue raised in *Schulz I*." (Dkt. No. 38-1, p. 7). In that case, Judge McAvoy addressed the issues of: 1) whether Schulz engaged in conduct subject to penalty under § 6700; and 2) whether injunctive relief was appropriate to prevent recurrence of such conduct. *Schulz*, 529 F. Supp. 2d at 346. The first issue is also a predicate part of this case, since Schulz now challenges the imposition of the penalty, which the Government seeks to collect. (Dkt. Nos. 8, 29). Schulz argues, however, that the conduct at issue in *Schulz I* "was not then and never has been *conduct subject to penalty under Section 6700* because Section 6700 exempts conduct from penalty where the record shows 100 percent of the income derived (or to be derived) from 'the conduct' amounts to zero ($0.00), and where the record shows the Blue Folder has not and was never intended to be sold, and was always intended to be distributed free of charge, and neither Schulz nor WTP[3] derived any income from the Conduct." (Dkt. No. 50-3, p. 6). But this argument goes to the separate issue of whether (and how much) Schulz profited from the abusive tax shelter. *Schulz I* did not reach that issue, since the Government sought only to enjoin Schulz's conduct. Judge McAvoy found that Schulz's conduct violated § 6700, and this same threshold issue must be decided in this case before a penalty can be imposed.

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[3] WTP refers to the two corporate entities founded by Schulz, which were also sued in *Schulz I* and enjoined from promoting an abusive tax shelter. *See Schulz*, 529 F. Supp. 2d at 345.

Next, the Government argues that the issue of Schulz's liability under § 6700 was actually litigated and decided in *Schulz I*. (Dkt. No. 38-1, p. 8). Schulz disputes this argument, (Dkt. No. 50-3, p. 5), but in finding a violation of § 6700, Judge McAvoy addressed all the elements of the statute and cited supporting evidence. *Schulz*, 529 F. Supp. 2d at 346-52. The Government also argues that "resolution of Schulz's conduct under § 6700 was necessary to support a final judgment on the merits in *Schulz I*." (Dkt. No. 38-1, p. 9). As stated above, Judge McAvoy's finding that Schulz violated § 6700 was the underlying basis for the injunction to enjoin such conduct. Thus, resolution of the issue of Schulz's liability was necessary to support the injunction under § 7408.

Schulz mainly argues that *Schulz I* was not fully and fairly litigated, because the "Court hastily granted the United States' motion for summary judgment under 26 U.S.C. Section 7408 without determining if Schulz's conduct was liable for penalty under Section 6700." (Dkt. No. 50-3, p. 3). Schulz complains that Judge McAvoy held no hearing "on any of the dozens of material facts that were in genuine dispute." (*Id.*, p. 10). As the party opposing issue preclusion, Schulz bears the burden of showing "that the prior action did not afford a full and fair opportunity to litigate the issues." *Kulak*, 88 F.3d at 72. He has not met that burden here. Rather, the record shows that after Schulz "submitted numerous materials outside of the pleadings in support of [his] motion to dismiss" in *Schulz I*, the United States cross-moved for summary judgment,

and Schulz "had an opportunity to reply to the cross-motion." *Schulz*, 529 F. Supp. 2d at 357 n.12. In finding that Schulz violated § 6700, Judge McAvoy cited evidence including Schulz's declaration, responsive statement of facts, and numerous exhibits. The court decided the motion based on the undisputed evidence—no evidentiary hearing was required. Thereafter, Schulz appealed the decision to the Second Circuit, arguing, *inter alia*, that his "actions were not violative of 26 U.S.C. §§ 6700 or 6701." *United States v. Schulz*, 517 F.3d 606, 607 (2d Cir. 2008). The Circuit affirmed, finding Schulz's arguments to be "without merit." *Id.* Schulz even appealed to the United States Supreme Court, but his petition for a writ of certiorari was denied. *Schulz v. United States, 555* U.S. 946 (2008).

In sum, the record shows that Schulz received a full and fair opportunity in *Schulz I* to litigate the issue of his liability under § 6700. Thus, Judge McAvoy's determination that Schulz violated § 6700 by promoting an abusive tax shelter is entitled to preclusive effect in this case. As a result, the Government is entitled to summary judgment on the issue of Schulz's liability under § 6700, leaving only the issue of the penalty due (which Schulz may challenge on the basis that he received no income from the abusive tax shelter). *See Gardner v. C.I.R.*, 145 T.C. 161, 177 (Tax 2015) (applying collateral estoppel as to plaintiffs' liability for § 6700 penalties based on earlier injunction against abusive tax shelter, where "the District Court necessarily determined that they engaged in conduct subject

to the section 6700 penalty"). For the same reasons, Schulz's motion to re-litigate *Schulz I* must be denied.

VI. SCHULZ'S MOTION FOR SUMMARY JUDGMENT

Schulz seeks summary judgment on his claim challenging the tax penalty assessment, arguing that the undisputed evidence shows that he received no income from the abusive tax shelter, and therefore, the penalty should be zero. (Dkt. No. 39-2). In response, the Government argues that Schulz's "second motion for summary judgment should be denied because it defies the Court's prior order and because it is premature under Rule 56(d)." (Dkt. No. 47, p. 7). Schulz previously filed an almost identical motion for summary judgment, (Dkt. No. 16), which the Court denied as premature, "without prejudice to renew *at the close of discovery*." (Dkt. N 25, p. 13) (emphasis added). Discovery is still ongoing in this matter. (*See* Dkt. Nos. 86, 87). Accordingly, Schulz's motion is still premature, and must be denied once more, for the reasons explained in the Court's May 6, 2016 decision. Once again, Schulz is reminded that should he renew his motion, *after discovery is complete*, he must comply with Local Rule 7.1(a)(3).

VII. CONCLUSION

It is therefore

ORDERED that Schulz's motion for an Order to Show Cause (Dkt. No. 36) is **DENIED**; and it is further

ORDERED that the Government's motion for partial summary judgment (Dkt. No. 38) is **GRANTED**; and it is further

ORDERED that Judge McAvoy's determination in *Schulz I* that Schulz violated § 6700 by promoting an abusive tax shelter is entitled to preclusive effect in this case; and it is further

ORDERED that Schulz's motion for summary judgment (Dkt. No. 39) is **DENIED**; and it is further

ORDERED that Schulz's motion to re-litigate (Dkt. No. 41) is **DENIED**; and it is further

ORDERED that the Clerk provide a copy of this Memorandum-Decision and Order to the parties.

IT IS SO ORDERED.

March 7, 2017
Syracuse, New York

/s/ Brenda K. Sannes
Brenda K. Sannes
U.S. District Judge

APPENDIX J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ,

Plaintiff,

v.

UNITED STATES, INTERNAL REVENUE SERVICE, JOHN KOSKINEN, Commissioner,

Defendants.

1:15-cv-01299 (BKS/CFH)

APPEARANCES:

Plaintiff Pro Se
Robert L. Schulz
Queensbury, NY 12804

For Defendant United States:
Gregory S. Seador
U.S. Department of Justice – Tax Division
Ben Franklin Station
P.O. Box 7238
Washington, DC 20044

Hon. Brenda K. Sannes, United States District Judge:

MEMORANDUM-DECISION AND ORDER

(Filed May 6, 2016)

I. INTRODUCTION

On November 2, 2015, Plaintiff Robert Schulz, acting pro se, filed a Complaint against Defendants

United States, the Internal Revenue Service ("IRS), and John Koskinen as Commissioner, under 26 U.S.C. § 6703(c)(2), alleging that he received an erroneous tax assessment penalty from the IRS in the amount of $225,000 related to his promotion of an abusive tax shelter. (Dkt. No. 1). On January 4, 2016, Schulz filed an Amended Complaint, further alleging that, on November 24, 2015, the IRS filed a notice of federal tax lien against his property for the $224,000 unpaid balance of the assessment. (Dkt. No. 8).[1] On January 4, 2016, Schulz also moved for a preliminary injunction to stay the enforcement of the tax assessment penalty and remove the federal tax lien (Dkt. Nos. 9, 13), which the Court denied in a Memorandum-Decision & Order dated February 11, 2016. (Dkt. No. 23). The United States has now made a partial motion to dismiss, seeking to dismiss or strike what it refers to as "Count C" of the Amended Complaint,[2] and seeking to dismiss the IRS and IRS Commissioner John Koskinen as defendants. (Dkt. No. 11). Schulz opposed the United

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[1] Although the United States contends that the Amended Complaint is untimely (Dkt. No. 11-1, p. 4 n.1), a party may amend its pleading once as a matter of course within 21 days after service of a motion under Rule 12(b). Fed. R. Civ. P. 15(a)(1)(B). Here, the Amended Complaint was timely filed on January 4, 2016, the same day the United States filed its motion to dismiss. *(See* Dkt. Nos. 8, 11).

[2] Schultz's allegation regarding the statute of limitations and laches is in a paragraph within the first cause of action under the heading "C. Statute of Limitations and/or Laches Prevents Imposition of the Penalty." For ease of reference, and consistency with the United States' motion, the Court refers to this as "Count C."

States' motion and cross-moved for summary judgment. (Dkt. No. 16). On April 12, 2016, Schulz filed an Order to Show Cause, again seeking the removal of the federal tax lien, and also to expedite determination of his cross-motion for summary judgment. (Dkt. No. 24).

For the reasons that follow, the United States' partial motion to dismiss is granted, Schulz's cross-motion for summary judgment is denied, and the Order to Show Cause is denied.

II. FACTS[3]

In 2003, in his official capacity as Chairman of We the People Foundation for Constitutional Education, Inc., Schulz petitioned the federal government "for Redress of Grievances regarding the legality of the government's practice of forcing employers to withhold taxes from paychecks before those taxes were due and owing" (the "Petition"). (Dkt. No. 8, ¶ 13). Schulz had founded We The People Foundation for Constitutional Education, Inc., and We The People Congress, Inc., "for the purpose of helping all citizens to become better informed about their Rights under their State and Federal Constitutions and the laws pursuant thereto." (*Id.*, ¶ 10). Schulz distributed copies of the Petition to

[3] The following facts are taken from the Amended Complaint and, unless otherwise indicated, are assumed to be true for the purposes of this decision. *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011). As discussed *infra*, the Court concludes that Schulz's cross-motion for summary judgment is premature under Rule 56(d) of the Federal Rules of Civil Procedure, and thus does not set forth the undisputed facts in this case.

workers and company officials: it was placed on the organizations' website where it could be downloaded for free; 3,500 copies were placed in "Blue Folders" and given out for free at public meetings; and 225 copies were mailed to individuals, "whether or not they volunteered to cover the organization's cost of preparing and mailing each copy of the Petition, estimated to be $20." (*Id.*, ¶ 14). In response to the Petition, the IRS launched an investigation and summoned Schulz's 2003 books as well as those of the two organizations. (*Id.*, ¶ 15). Schulz further alleges that, in 2006, the IRS conducted an audit of both organizations and received records including income and expense records and bank statements for 2003. (*Id.*, ¶ 18). Schulz alleges that the audit "demonstrated Schulz had not received any income from the organizations." (*Id.*).

In 2007, the IRS sued Schulz and the two organizations for distributing the Blue Folders in 2003, "an activity the IRS equated to the promotion of an abusive tax shelter." (*Id.*, ¶ 19). Schulz alleges that "the IRS did not request a financial penalty and the District Court did not include a financial penalty in its August 2007 decision that granted IRS's motion for summary judgment against the two organizations and Schulz, who was pro se." (*Id.*). Schulz alleges that, "[m]ore than seven years later, in November of 2014, notwithstanding the Court's prior decision and Schulz's lack of income from the described activity, IRS Agent David Gordon wrote a letter to Schulz saying he had made a determination that Schulz, in his individual capacity, should be penalized $225,000, $1,000 for each of the

225 copies of the Blue Folder which were mailed to people in 2003." (*Id.*, ¶ 20). Schulz alleges that the tax penalty he received from the IRS was in error because "a financial penalty cannot be imposed on a person found to have promoted an abusive tax shelter in violation of Section 6700, if the gross income derived (or to be derived) by the promoter from the forbidden activity was zero." (*Id.*, ¶ 2). Finally, Schulz alleges that the tax penalty is barred by the statute of limitations and the doctrine of laches. (*Id.*, ¶ 71).

III. THE 2007 CASE

In 2007, the United States brought an action against Schulz seeking to enjoin him, and the two organizations he founded, from promoting an abusive tax shelter pursuant to § 6700 of the Internal Revenue Code, 26 U.S.C.A. § 6700. *United States v. Schulz*, 529 F. Supp. 2d 341 (N.D.N.Y. 2007) *aff'd*, 517 F.3d 606 (2d Cir. 2008), *enforcement granted*, No. 1:07-CV-0352, 2008 WL 2626567, 2008 U.S. Dist. LEXIS 57948 (N.D.N.Y. Apr. 28, 2008). The action related to Schulz's distribution of the Petition, also known as the "Tax Termination Package," in 2003 to help individuals to stop withholding, paying, and filing federal taxes. *Schulz*, 529 F. Supp. 2d at 345. United States District Judge Thomas J. McAvoy found that Schulz was promoting an abusive tax shelter, and enjoined him from further doing so.[4] *Id.* at 357. Judge McAvoy noted that

[4] To obtain an injunction, the government had to prove the following five elements:

"[a]lthough there are some questions of fact concerning whether Defendants sold their materials," the United States did not have to make such a showing to obtain an injunction, because Defendants "clearly 'organized' the materials for presentation." *Id.* at 348. Judge McAvoy further noted: "The evidence in the record is that Defendants provided the program materials and gave seminars for free. The evidence also demonstrates that Defendants used the materials to solicit donations to the organizations and to encourage people to join their organization for a fee." *Id.* at 348 n.3.[5]

> (1) the defendants organized or sold, or participated in the organization or sale of, an entity, plan, or arrangement; (2) they made or caused to be made, false or fraudulent statements concerning the tax benefits to be derived from the entity, plan, or arrangement; (3) they knew or had reason to know that the statements were false or fraudulent; (4) the false or fraudulent statements pertained to a material matter; and (5) an injunction is necessary to prevent recurrence of this conduct.

Schulz, 529 F. Supp. 2d at 346.

[5] Judge McAvoy also highlighted a previous case involving Schulz, where it was noted that:

> Robert Schulz is the self proclaimed founder and Chairman of the We The People Foundation for Constitutional Education (We The People Foundation). Schulz has not filed an income tax return since the year 2000. The Internal Revenue Service (IRS) is currently investigating whether Schultz has had any taxable income for the tax periods of December 31, 2001, December 31, 2002, December 31, 2003, and December 31, 2004. Through its investigation, revenue officer Terry Cox, discovered that the We The People Foundation's website invites visitors to make a donation to the

IV. APPPLICABLE LEGAL STANDARDS

A. Motion to Dismiss

To survive a motion to dismiss, "a complaint must provide 'enough facts to state a claim to relief that is plausible on its face.'" *Mayor & City Council of Balt. v. Citigroup, Inc.*, 709 F.3d 129, 135 (2d Cir. 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plaintiff must provide factual allegations sufficient "to raise a right to relief above the speculative level." *Id.* (quoting *Bell*, 550 U.S. at 555). The Court must accept as true all factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. *See E.E.O.C. v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 253 (2d Cir. 2014) (citing *ATSI Commc'ns, Inc.*

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organization via credit card to PayPal or by mail directly to the We the People Foundation. The address given for the We The People Foundation is Schultz's home address. The website also contains an on-line store where products can be purchased through PayPal. One of the products sold over the website is the "Tax Termination Package," which is offered for sale for 539.95. The product is described as "Bob Schulz, Chairman of the We The People Foundation, stopped paying income taxes and filing returns. These are the materials he sent to the IRS. Make sure to get a copy for your personal records." Cox has also learned that the We The People Foundation filed IRS Form 990 for the years ending December 31, 2001, December 31, 2002, and December 31, 2003 and the returns indicate that the organization showed considerable revenue for each year.

Schulz v. United States, No. 8:05CV530, 2006 WL 1788194, at *1, 2006 U.S. Dist. LEXIS 43175, at *2 (D. Neb. June 26, 2006) *aff'd*, 240 F. App'x 167 (8th Cir. 2007).

v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007)). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint that has been filed *pro se* "must be construed liberally with 'special solicitude' and interpreted to raise the strongest claims that it suggests." *Hogan v. Fischer*, 738 F.3d 509, 515 (2d Cir. 2013) (quoting *Hill v. Curcione*, 657 F.3d 116, 122 (2d Cir. 2011)). "Nonetheless, a pro se complaint must state a plausible claim for relief." *Id.*

B. Summary Judgment

Under Federal Rule of Civil Procedure 56(a), summary judgment may be granted only if all the submissions taken together "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party bears the initial burden of demonstrating "the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. A fact is "material" if it "might affect the outcome of the suit under the governing law," and is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248; *see also Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir. 2005) (citing *Anderson*). If the moving party meets this burden, the nonmoving party must "set out specific facts showing a genuine issue for trial." *Anderson*,

477 U.S. at 248, 250; *see also Celotex*, 477 U.S. at 323-24; *Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009). "When ruling on a summary judgment motion, the district court must construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant." *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 780 (2d Cir. 2003).

V. THE UNITED STATES' MOTION TO DISMISS

The United States seeks to dismiss: 1) "Count C" of the Amended Complaint; and 2) the IRS and Commissioner Koskinen as defendants. (Dkt. No. 11).

A. "Count C" of the Amended Complaint

In paragraph 71 of the Amended Complaint, under the heading "C. Statute of Limitations and/or Laches Prevents Imposition of the Penalty," Schulz alleges the following:

> Although some courts have held no statute of limitations applies in the case of Section 6700, the issue has not been tested in Schulz's circuit. Further, if the Court concludes that no limitations period applies, Schulz believes the doctrine of laches would apply. The government was aware of the complained of activity in 2003 and actually filed a lawsuit in 2007. Waiting until 2015 to assert the penalty was dilatory and prejudicial against Schulz.

> Various circuits have indicated that in egregious cases and in cases in which there is no statute of limitations, the doctrine of laches applies, even against the federal government.

(Dkt. No. 8, ¶ 71, pp. 17-18) (citing various cases). The United States argues that these allegations are insufficient to state a claim. (Dkt. No. 11-1, p. 5). Specifically, the United States contends that Count C should be dismissed "because there is no statute of limitations for the assessment of Section 6700 penalties and the United States is not subject to the doctrine of laches as a matter of law." (*Id.*). The Court agrees: there is no applicable statute of limitations here, and the United States is not bound by laches where, as here, it seeks to enforce its sovereign rights by assessing and collecting taxes. Therefore, Schulz's claim that the IRS is time-barred from assessing penalties under § 6700 must be dismissed. *See In re MDL-731 Tax Refund Litig. of Organizers and Promoters of Inv. Plans Involving Book Props. Leasing*, 989 F.2d 1290, 1300 n.2 (2d Cir. 1993) ("No statute of limitation applies to the government's assessment of a Section 6700 penalty."); *Capozzi v. United States.*, 980 F.2d 872, 875 (2d Cir. 1992) ("The absence of a limitations period means that the IRS may assess penalties under IRC § 6700 many years after the alleged misconduct occurred."); *United States v. Summerlin*, 310 U.S. 414, 416 (1940) ("It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of [aches in enforcing its rights."); *Hatchett v. United States*, 330 F.3d 875, 887 (6th Cir. 2003) ("there is no precedent holding that the Government is subject to its

own laches in tax collection actions"); *Taylor v. C.I.R.*, 43 F.3d 1483 (10th Cir. 1994) ("laches does not provide any defense to the IRS' enforcement of tax claims"); *Dial v. Commissioner*, 968 F.2d 898, 904 (9th Cir. 1992) ("laches is not a defense to the United States' enforcement of tax claims"); *United States v. Alfano*, 34 F. Supp. 2d 827, 835 (E.D.N.Y. 1999) ("The United States acts in its sovereign capacity when it brings suit to set aside a fraudulent conveyance or to enforce a tax lien. When acting in such capacity, the Government is not bound by state statutes of limitations or subject to the defense of laches.").[6]

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[6] Schultz cites to *Sage v. United States*, 908 F.2d 18, 25 (5th Cir. 1990), where the Fifth Circuit noted in *dicta* that the doctrine of laches is "the only curb on IRS penalty-assessment power under Section 6700." (Dkt. No. 8, p. 18). Notably, however, a more recent Fifth Circuit panel held that laches did not apply in a tax case, stating that laches "may not be asserted against the United States when it is acting in its sovereign capacity to enforce a public right or protect the public interest." *Fein v. United States (In re Fein)*, 22 F.3d 631, 634 (5th Cir. 1994) (quoting *United States v. Popovich*, 820 F.2d 134, 136 (5th Cir. 1987)).

Schulz also cites *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 279 (2d Cir. 2005) in support of his claim that laches applies to the United States and bars the belated tax assessment penalty in this case. (Dkt. No. 8, ¶ 71). However, that case is inapposite: laches applied to the United States because, among other reasons, the government intervened to vindicate the interest of the Tribe, not to enforce its own sovereign rights. 413 F.3d at 279. Here, the United States seeks to enforce its sovereign rights by assessing and collecting taxes. *See P. R. Co. v. Maguire*, 87 U.S. 36, 37 (1873) ("The right of taxation is a sovereign right, and presumptively belongs to the State in regard to every species of property and to an unlimited extent."). Moreover, the Second Circuit expressly declined "to set forth broad guidelines for when the doctrine might apply." *Cayuga Indian Nation of N.Y.*, 413

B. The IRS and Commissioner Koskinen As Defendants

The United States argues that the IRS and Commissioner Koskinen are immune from suit and should be dismissed as defendants. (Dkt. No. 11-1). In response, Schulz states that "[t]he Commissioner is not meant to be a party, the Agency is." (Dkt. No. 16, p. 11). However, both Commissioner Koskinen and the IRS are indeed immune from suit, and therefore, must be dismissed as defendants.[7] *See Roberts v. I.R.S.*, 297 F. App'x 63, 65 (2d Cir. 2008)(concluding that IRS employees, "acting in their official capacities, are immune

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F.3d at 278. The Seventh Circuit case cited by Schulz is similarly distinguishable. *See Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1090 (7th Cir. 1992) (noting an exception to the "general rule" that "the United States is not subject to the equitable defense of laches in enforcing its rights," where the Equal Employment Opportunity Commission asserts the rights of individual claimants).

[7] Schulz contends that the IRS is a proper party because he characterizes his suit as a "declaratory judgment action against the IRS as an agency of the United States to determine the liability for the penalty in the first place." (Dkt. No. 16, p. 10). However, by challenging the tax penalty assessment, Schulz seeks to restrain the government from collecting the money allegedly owed, and thus the real party in interest remains the United States. *See Dugan v. Rank*, 372 U.S. 609, 620 (1963) ("A suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.") (internal quotation and citation omitted); *see also Posey v. U.S. Dept. of Treas. I.R.S.*, 156 B.R. 910, 917 (W.D.N.Y. 1993) (suits against IRS "are deemed actions against the United States"); *Frasier v. Hegeman*, 607 F. Supp. 318, 322 (N.D.N.Y. 1985) (holding that suit against IRS officer is one against the United States).

from suit under the doctrine of sovereign immunity"); *Blackmar v. Guerre*, 324 U.S. 512, 515 (1952) (holding that Congress must give express authorization for an agency to be sued in its own name); *Liffiton v. Keuker*, 850 F.2d 73, 77 (2d Cir. 1988) ("It is well-settled that the United States is immune from suit except where congress, by specific statute, has waived sovereign immunity; as to the I.R.S., no such waiver has been enacted for claims such as these.") (internal citation omitted); *Greene v. I.R.S.*, No. 1:08CV0280LEKDRH, 2008 WL 5378120, at *3, 2008 U.S. Dist. LEXIS 103986, at *8 (N.D.N.Y. Dec. 23, 2008) ("No suit may proceed against the IRS either for a refund of tax allegedly improperly collected or for monetary or injunctive relief because Congress has not authorized suit against the agency in its own name.") *aff'd*, 348 F. App'x 625 (2d Cir. 2009); *Celauro v. U.S. I.R.S.*, 411 F. Supp. 2d 257, 268 (E.D.N.Y. 2006) ("Congress has not specifically authorized suit against the IRS. Therefore, it is not a suable entity."), *aff'd sub nom. Celauro v. U.S.*, 214 F. App'x 95 (2d Cir. 2007).

VI. SCHULZ'S CROSS-MOTION FOR SUMMARY JUDGMENT

Schulz seeks summary judgment on the grounds that "[t]he fact that Schulz earned no income from the described activity [promoting an abusive tax shelter] cannot be genuinely disputed, entitling Schulz to judgment as a matter of law." (Dkt. No. 16, p. 11). In opposition, the United States argues that Schulz's motion should be denied for two reasons: "(1) the motion is

premature under Fed. R. Civ. P. 56(d) because discovery in this case has not yet begun and the United States has not yet had the opportunity to take discovery on the issue of Schulz's 'gross income derived (or to be derived)' from his promotion of his illegal tax shelter; and (2) the motion does not comply with Local Rule of Practice 7.1 because it does not contain a 'Statement of Material Facts' with numbered paragraphs and citations to record evidence making it impossible for the Government to respond." (Dkt. No. 18, pp. 3-4).

A. Schulz's Motion Is Premature

The crux of Schulz's motion is his claim that he derived no income from the abusive tax shelter enjoined in the 2007 case. Under § 6700 of the Internal Revenue Code, any person who promotes an abusive tax shelter "shall pay, with respect to each activity described in paragraph (1), a penalty equal to the $1,000 or, if the person establishes that it is lesser, 100 percent of the gross income derived (or to be derived) by such person from such activity." 26 U.S.C. § 6700. Schulz contends that the record shows that he earned no income, citing his affidavit and a series of documents annexed thereto (Dkt. No. 16-1), as well as the exhibits annexed to the Complaint. (Dkt. Nos. 1-3 through 1-18). Schulz further contends that "Defendants have *always* known Schulz derived no income from the activity, especially in 2003, the year of the alleged promotion of an abusive tax shelter." (Dkt. No. 16, p. 11). In response, the United States argues that Schulz's motion is premature under Rule 56(d) of the Federal

Rules of Civil Procedure because there has not yet been any discovery in this case, and it intends to seek discovery "on a number of topics that will create a genuine issue of material fact on the issue of Schulz's gross income." (Dkt. No. 18, p. 8).

As an initial matter, summary judgment is appropriate "[o]nly in the rarest of cases" where the nonmoving party "has not been afforded the opportunity to conduct discovery." *Heltstrom v. U.S. Dep't of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000). In general, "[t]he nonmoving party must have 'had the opportunity to discover information that is essential to his opposition' to the motion for summary judgment." *Trebor Sportswear Co., Inc. v. The Ltd. Stores, Inc.*, 86.5 F.2d 506, 511 (2d Cir. 1989) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5 (1986)). For this reason, under Rule 56(d), "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. R. Civ. P. 56(d); *see also Celotex Corp.*, 477 U.S. at 326 ("Any potential problem with such premature motions can be adequately dealt with under Rule 56(f) (now Rule 56(d)), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery."). Thus, "a party resisting summary judgment on the ground that it needs discovery in order to defeat the motion must submit an

affidavit showing (1) what facts are sought [to resist the motion] and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts." *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 303 (2d Cir. 2003) (internal quotations and citation omitted).

Here, the United States has submitted a declaration in compliance with Rule 56(d), explaining that the information it seeks through discovery would create a genuine issue of material fact for trial on the issue of Schulz's income from the abusive tax shelter. Specifically, the United States intends to seek discovery on:

> (1) the income "to be derived" from the promotion of the tax shelter; (2) the income actually derived from the promotion of the tax shelter and where that income went; (3) the income Schulz's organizations derived from the promotion of the tax shelter and where that income went; and (4) whether the income derived by Schulz's organizations can be imputed to him personally.

(Dkt. No. 18-1, ¶ 10). Since discovery has not begun in this case, the United States has not yet had the opportunity to discover this information, which may create a genuine issue of material fact for trial. Schulz argues that the record of the 2007 case "speaks for itself – that is, Defendants decided there was no reason to take advantage of their opportunity for discovery, given the results of their investigation and 'discovery'

in 2005-2006." (Dkt. No. 20-1, p. 10). However, in the 2007 case, the United States did not seek a tax penalty, and Schulz's income derived from the abusive tax shelter was not at issue. Rather, the object of that action was to enjoin illegal activity, not to measure and assess a tax penalty. Moreover, Judge McAvoy specifically noted that there were "some questions of fact concerning whether Defendants sold their materials," *Schulz*, 529 F. Supp. 2d at 348, and there was some evidence "that Defendants used the materials to solicit donations to the organizations and to encourage people to join their organization for a fee." *Id.*, at 348 n. 3. Although Schulz has submitted voluminous records related to the 2007 case in support of his motion, they are not conclusive at this early stage.[8]

In sum, this is not the rare case where summary judgment is appropriate before discovery has begun, and the United States has made a sufficient showing that it requires discovery to oppose Schulz's motion. Therefore, Schulz's motion is denied, without prejudice to renew at the close of discovery.[9] *See In re Dana*

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[8] Schulz himself suggests that the records are open to interpretation, stating in the Amended Complaint that: "the evidence shows that some (but not all) of the people who requested a copy of the Blue Folder be mailed to them voluntarily donated up to $20 to W[e] T[he] P[eople]. Even if WTP's receipts are somehow attributed to Schulz (which they should not be), the total income amounts to no more than $20 per 'activity,' which would total less than $4500." (Dkt. No. 8, ¶ 64).

[9] Because Schulz's cross-motion for summary judgment is denied as premature under Rule 56(d), the Court need not reach the United States' argument that it should also be denied because it fails to comply with Local Rule of Practice 7.1 by not containing a

Corp., 574 F.3d 129, 149 (2d Cir. 2009) ("a party against which summary judgment is sought must be afforded a reasonable opportunity to elicit information within the control of his adversaries") (internal quotations and citation omitted); *Schering Corp. v. Home Ins. Co.*, 712 F.2d 4, 10 (2d Cir. 1983) ("summary judgment should not be granted while the party opposing judgment timely seeks discovery of potentially favorable information"); *Cusamano v. Alexander*, 691 F. Supp. 2d 312, 321 (N.D.N.Y. 2009) ("Plaintiff's cross-motion for summary judgment is premature because defendants have yet to file an answer to the amended complaint."); *G-I Holdings, Inc. v. Baron & Budd*, 213 F.R.D. 146, 146-47 (S.D.N.Y. 2003) ("the summary judgment

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Statement of Material Facts. (Dkt. No. 18, p. 9). However, should Schulz renew his motion after discovery, he must comply with Local Rule 7.1(a)(3), which states:

> Any motion for summary judgment shall contain a Statement of Material Facts. The Statement of Material Facts shall set forth, in numbered paragraphs, each material fact about which the moving party contends there exists no genuine issue. Each fact listed shall set forth a specific citation to the record where the fact is established. The record for purposes of the Statement of Material Facts includes the pleadings, depositions, answers to interrogatories, admissions and affidavits. It does not, however, include attorney's affidavits. Failure of the moving party to submit an accurate and complete Statement of Material Facts shall result in a denial of the motion.

N.D.N.Y. L.R. 7.1(a)(3).

motion is now denied as premature, having been filed prior to close of discovery").[10]

VII. SCHULZ'S ORDER TO SHOW CAUSE

Schulz has also filed an "Order to Show Cause" seeking 1) the removal of the federal tax lien and 2) to expedite determination of his cross-motion for summary judgment. (Dkt. No. 24). Schulz's first request was addressed in the Court's Memorandum-Decision & Order dated February 11, 2016 (Dkt. No. 23), and is denied for the reasons stated therein. Given the Court's ruling on Schulz's cross-motion for summary judgment, the second request is denied as moot.

VIII. CONCLUSION

It is therefore

ORDERED that the Government's Partial Motion to Dismiss (Dkt. No. 11) is **GRANTED**; and it is further

ORDERED that Count C (Paragraph 71) of the Amended Complaint is **DISMISSED**; and it is further

ORDERED that the IRS and the Commissioner of the IRS, John Koskinen, are **DISMISSED** as defendants in this action; and it is further

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[10] Plaintiff may request an expedited discovery schedule at the Rule 16 Conference with Magistrate Judge Hummel.

ORDERED that Plaintiffs Cross-Motion for Summary Judgment (Dkt. No. 16) is **DENIED**; and it is further

ORDERED that Plaintiffs Order to Show Cause (Dkt. No. 24) is **DENIED**; and it is further

ORDERED that the Clerk provide a copy of this Memorandum-Decision and Order to the parties.

IT IS SO ORDERED.

May 6, 2016
Syracuse, New York

/s/ Brenda K. Sannes
Brenda K. Sannes
U.S. District Judge

APPENDIX K

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ,

Plaintiff,

v.

UNITED STATES, INTERNAL REVENUE SERVICE, JOHN KOSKINEN, Commissioner,

Defendants.

1:15-cv-01299 (BKS/CFH)

APPEARANCES:

Plaintiff Pro Se
Robert L. Schulz
Queensbury, NY 12804

For Defendant United States:
Gregory S. Seador
U.S. Department of Justice – Tax Division
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P.O. Box 7238
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Hon. Brenda K. Sannes, United States District Judge:

MEMORANDUM-DECISION AND ORDER

(Filed Feb. 11, 2016)

INTRODUCTION

On November 2, 2015, Plaintiff Robert L. Schulz, acting pro se, filed a Complaint against Defendants

United States, the Internal Revenue Service ("IRS"), and John Koskinen as Commissioner, under 26 U.S.C. § 6703(c)(2), alleging that he received an erroneous tax assessment penalty from the IRS in the amount of $225,000 related to his promotion of an abusive tax shelter. (Dkt. No. 1). On January 4, 2016, Schulz filed an Amended Complaint, further alleging that, on November 24, 2015, the IRS filed a notice of federal tax lien against his property for the $224,000 unpaid balance of the assessment. (Dkt. No. 8, ¶ 48). Schulz now moves for a preliminary injunction to prohibit the Defendants "from engaging in any lien or levy collection activity" against him and to remove the notice of federal tax lien.[1] (Dkt. Nos. 9, 13).

BACKGROUND

In 2007, the United States brought a civil action against Schulz seeking to enjoin him (and two corporate defendants he founded) from promoting an abusive tax shelter pursuant to § 6700 of the Internal Revenue Code, 26 U.S.C. § 6700. *United States v. Schulz*, 529 F. Supp. 2d 341 (N.D.N.Y. 2007) *aff'd*, 517 F.3d 606 (2d Cir. 2008) and *enforcement granted*, No. 1:07-CV-0352, 2008 WL 2626567, 2008 U.S. Dist. LEXIS 57948 (N.D.N.Y. Apr. 28, 2008). The action related to Schulz's distribution of a "Tax Termination Package" in 2003 to help individuals to stop withholding, paying,

[1] Schulz initially requested this relief by way of an Order to Show Cause (Dkt. No. 9), which the Court construed as a motion for a preliminary injunction, and the Court directed the parties to file appropriate briefing. (Dkt. No. 12).

and filing federal taxes. *Id.* United States District Judge Thomas J. McAvoy found that Schulz was promoting an abusive tax shelter, and enjoined him from further doing so. *Id.*

On March 9, 2015, Schulz received a tax assessment penalty from the IRS in the amount of $225,000 for promoting an abusive tax shelter. (Dkt. No. 13-1, p. 6). Pursuant to § 6700, the IRS calculated the penalty by multiplying the number of Tax Termination Packages that Schulz mailed to individuals in 2003 by $1,000. (Dkt. No. 15-2, ¶¶ 3-5). On April 6, 2015, Schulz appealed the penalty to the IRS, arguing that he was not subject to any statutory penalty under § 6700(a)(2)(B) because he did not receive any income from the alleged tax shelter.[2] (Dkt. No. 13-1, ¶¶ 8-9). Schulz also paid a partial amount of the penalty and requested a refund at that time. (*Id.*, ¶ 8). On November 2, 2015, "having received no word from the IRS regarding its resolution" of his appeal and refund, Schulz commenced this action to determine his tax penalty liability pursuant to § 6703(c)(2). (*Id.*, ¶ 12).

DISCUSSION

Schulz seeks a preliminary injunction prohibiting the Defendants "from engaging in any lien or levy

[2] Under § 6700, any person who promotes an abusive tax shelter "shall pay, with respect to each activity described in paragraph (1), a penalty equal to the $1,000 or, if the person establishes that it is lesser, 100 percent of the gross income derived (or to be derived) by such person from such activity." 26 U.S.C. § 6700.

collection activity" against him and removing the notice of federal tax lien. (Dkt. Nos. 9, 13). Because this relief amounts to a restraint on the assessment or collection of taxes, Schulz must show that his request is not barred by the Anti-Injunction Act, 26 U.S.C. § 7421.[3] The Anti-Injunction Act states that, except as provided in certain statutory exceptions, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). "The purpose of the Act is to protect the Government's need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference, and to require that the legal right to the disputed sums be determined in a suit for refund." *Randell v. United States*, 64 F.3d 101, 106 (2d Cir. 1995) (internal quotations and citations omitted).

Schulz argues that Defendants cannot impose a lien on his property until the final resolution of his case challenging the underlying tax assessment penalty, citing § 6703(c)(1), which provides an exception to the Anti-Injunction Act. (Dkt. No. 13-2, p. 4).

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[3] Generally speaking, to obtain preliminary injunctive relief against government action taken in the public interest pursuant to a statutory or regulatory scheme, a plaintiff must show irreparable harm in the absence of an injunction and a likelihood of success on the merits. *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 573-74 (2d Cir. 2002).

Section 6703(c)(1) of the Internal Revenue Code states:

> If, within 30 days after the day on which notice and demand of any penalty under section 6700 or 6701 is made against any person, such person pays an amount which is not less than 15 percent of the amount of such penalty and files a claim for refund of the amount so paid, no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until the final resolution of a proceeding begun as provided in paragraph (2).
>
> Notwithstanding the provisions of section 7421(a), the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court. Nothing in this paragraph shall be construed to prohibit any counterclaim for the remainder of such penalty in a proceeding begun as provided in paragraph (2).

26 U.S.C. § 6703(c)(1). Schulz argues that Defendants "began a levy/collection action against Plaintiff by placing a lien on Plaintiff's property. The lien is a beginning and part and parcel of an IRS collection/levy action against Plaintiff, prohibited by IRC 6703(c)." (Dkt. No. 13-2, p. 4). In response, the United States argues that the federal tax lien is not a "levy" or a "proceeding in court" under § 6703(c)(1), and therefore, Schulz's request for relief is barred by the Anti-Injunction Act. (Dkt. No. 15, pp. 6-13).

Under the limited exception in § 6703(c)(1), an individual who brings a suit in district court to determine his tax penalty liability may enjoin any "levy or proceeding in court for the collection of the remainder of the penalty" while his case is pending. However, a lien is neither a "levy" nor a "proceeding in court," and therefore, Schulz's request for relief does not fall within the statutory exception.[4] *See United States v. Na'tl Bank of Commerce*, 472 U.S. 713, 720 (1985) (distinguishing between federal tax lien, lien-foreclosure suit, and administrative levy); *Belloff v. C.I.R.*, 996 F.2d 607, 616 (2d Cir. 1993) (strictly construing § 6703(c)(1) to give plain meaning to its terms); *Nielsen v. United States*, No. 03-88-3164-H,[5] 1991 U.S. Dist. LEXIS 6811, at *3-5 (N.D. Tex. Feb. 22, 1991) (finding that a tax lien is not the beginning of a proceeding in court for collection of penalty or the equivalent of a levy under § 6703(c)(1)), *report-recommendation adopted*, 1991 U.S. Dist. LEXIS 4279 (N.D. Tex. Mar. 20, 1991).

Schulz also argues that his request for relief falls within a judicially created exception to the Anti-Injunction Act, articulated by the Supreme Court in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962). "There the Court announced a two-part test permitting an injunction suit to be maintained 'if it is

[4] The lien functions to give the government a security interest in Schulz's property, so that he may be able to satisfy the tax assessment penalty pending a final determination. *See Andrew Crispo Gallery, Inc. v. C.I.R.*, 16 F.3d 1336, 1345 (2d Cir. 1994) (noting that a lien "is simply a charge upon property as security for the payment of a debt").

[5] Westlaw citation unavailable.

clear that under no circumstances could the Government ultimately prevail,' and if equity jurisdiction otherwise exists." *Laino v. United States*, 633 F.2d 626, 629 (2d Cir. 1980) (quoting *Williams Packing*, 370 U.S. at 7). The United States argues that Schulz fails to satisfy either part of the test. (Dkt. No. 15, pp. 9-10). Schulz contends that the government cannot ultimately prevail because "[t]he evidence before the Court shows Schulz did not derive any gross income from the prohibited activity." (Dkt. No. 19, p. 17). However, "Mt is well established that the IRS's tax calculations (including calculations of interest and penalties) are presumptively valid and create *a prima facie* case of liability," which the taxpayer must overcome. *United States v. Chrein*, 368 F. Supp. 2d 278, 282 (S.D.N.Y. 2005) *aff'd*, 274 F. App'x 56 (2d Cir. 2008); *see also Hauf v. I.R.S.*, 968 F. Supp. 78, 82 (N.D.N.Y. 1997). Moreover, it not clear in this case that the government's tax assessment penalty is unfounded. Judge McAvoy previously determined that Schulz engaged in conduct subject to penalty under § 6700. *See Schulz*, 529 F. Supp. 2d at 348. Although Schulz has submitted voluminous records in support of his contention that he received no income, (see exhibits attached to the Complaint, Dkt. Nos. 1-3 through 1-18), he has failed to show that "under no circumstances could the Government ultimately prevail." *Laino*, 633 F.2d at 629.[6]

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[6] Schulz himself suggests that the records are open to interpretation, stating in the Amended Complaint that "at most" the evidence shows that some people who requested the Tax Termination Package "donated up to $20" to one of his organizations.

Schulz has also failed to show that equity jurisdiction exists in this case, i.e. that he lacks an adequate legal remedy and faces irreparable harm.[7] *Williams Packing*, 370 U.S. at 6-7; *Gallo v. U.S., Dept. of Treas., I.R.S.*, 950 F. Supp. 1246, 1249 (S.D.N.Y. 1997) ("To establish equity jurisdiction, the plaintiff must demonstrate that he will suffer irreparable injury or that he otherwise lacks an adequate remedy at law."). First, Schulz asserts that "[p]rimarily, this is a declaratory judgment action, authorized by 6703(c)(2), seeking a determination of liability for a penalty under 6700(a)." (Dkt. No. 19, p. 17). Thus, Schulz has an adequate legal remedy under § 6703(c)(2) to determine the ultimate issue in this case—his tax penalty liability. Second, the financial hardship claimed by Schulz is insufficient to establish irreparable harm. Schulz argues that he faces irreparable harm because he is "unable to pay his property tax and pay his household expenses" due to the government's tax penalty assessment and federal tax lien because the lien "is preventing Schulz from proceeding with the sale of a parcel of land that is part of his homestead." (Dkt. No. 13-2, p. 6-7). In his supporting affidavit, Schulz states that he and his wife rely entirely on the sale of their land and their monthly social security payments (totaling less than $30,000

(Dkt. No. 8, ¶ 64). Schulz argues that this money should not be attributed as income to him. (*Id.*).

[7] In general, "[a] showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (internal quotation and citation omitted).

per year) for the money needed to pay their property taxes and meet their living and household expenses and have no other source of income. (Dkt. No. 13-1, ¶ 21). Specifically, Schulz states that, due to the lien on his property, he had to borrow $5,600 to pay his school taxes and cannot pay his current property tax bill of $7,183.91. (Dkt. No. 9, ¶¶ 14-15). Schulz further states as follows:

> If the property tax is not paid by January 31, 2016 an irreparable penalty is added, and if not paid by February 28, 2016 an additional irreparable penalty is added, and if not paid by March 31, 2016 an additional irreparable penalty is added and the amount due is then added to the School tax due in September, 2016, and if not paid the County seizes the property and sells it at public auction.

(Dkt. No. 13-1, ¶ 22). Finally, Schulz states that "[u]nless the stay is granted, the harm to Schulz will be irreparable: irreparable monetary penalties will continue to be added to his property tax bill which the lien prevents him from paying.[8] (*Id.*, ¶ 24). However, it is well-established that economic injury alone does not constitute irreparable harm for purposes of equity jurisdiction. *Williams Packing*, 360 U.S. at 6; *accord Gallo*, 950 F. Supp. at 1249; *see also Griffin v. C.I.R.*, 108 F.3d 1369 (2d Cir. 1997) (finding no equity jurisdiction based on purely financial harm, which is compensable at law). Thus, Schulz has not demonstrated

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[8] Schulz indicates that the penalty is $136. (Dkt. No. 19, p. 8).

irreparable harm based on his alleged inability to pay taxes and expenses and incurring of financial penalties.

Moreover, the alleged possibility that Schulz may lose his property is too remote and speculative to constitute irreparable harm. Schulz appears to suggest that if he does not pay school taxes due in September 2016, the County will seize his property and sell it at auction. However, Schulz does not point to any evidence supporting this possibility, which would appear unlikely in light of the notice of federal tax lien on file. (Dkt. No. 13-1, p. 24). Further, such a loss cannot be considered imminent. *See Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995) ("To establish irreparable harm, the movant must demonstrate an injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages.") (internal quotation and citation omitted).

In sum, having found that no exception applies to the Anti-Injunction Act in this case, Schulz's request for a preliminary injunction is barred as a matter of law and must be denied. *See Dourlain v. United States*, No. 04-CV-372 (NAM/DEP), 2005 WL 3021858, at *2, 2005 U.S. Dist. LEXIS 24575, at *6 (N.D.N.Y. Sept. 19, 2005) (dismissing complaint seeking removal of federal tax lien as barred by Anti-Injunction Act); *Porto v. I.R.S.*, No. 88 CW. 6955 (RWS), 1989 WL 52343, at *1-2, 1989 U.S. Dist. LEXIS 4948, at *4 (S.D.N.Y. May 8, 1989) (denying motion to stay execution of tax lien "[b]ecause 26 U.S.C. § 7421(a) prohibits stays on the

collection of taxes, and because [the plaintiff] does not fit within 26 U.S.C. § 6703(c)'s exception to the anti-injunction statute, given that the IRS has not levied on any of [the plaintiff's] property or begun any legal proceeding to collect the penalty."); *Lynn v. Scanlon*, 234 F. Supp. 140, 143 (E.D.N.Y. 1964) ("Since it cannot be said that the instant case falls within the exception to the applicability of Section 7421(a) which has been drawn by the Supreme Court in *Enochs v. Williams Packing & Navigation Co.* . . . i.e., that the plaintiff has no adequate remedy at law and it is clear that under no circumstances could the Government prevail, the plaintiff's motion for summary judgment granting such an injunction and the removal of the tax lien must be denied.").

CONCLUSION

It is therefore

ORDERED that Schulz's motion (Dkt. Nos. 9, 13) for a preliminary injunction is **DENIED**; and it is further

ORDERED that the Clerk provide a copy of this Memorandum-Decision and Order to the parties.

IT IS SO ORDERED.

February 11, 2016
Syracuse, New York

/s/ Brenda K. Sannes
Brenda K. Sannes
U.S. District Judge

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: February 4, 2008 Decided: February 22, 2008)

Docket No. 07-3729-cv

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

– v. –

ROBERT L. SCHULZ, WE THE PEOPLE FOUNDATION FOR CONSTITUTIONAL EDUCATION, INC., and WE THE PEOPLE CONGRESS, INC.,

Defendants-Appellants.

Before NEWMAN, WINTER and SOTOMAYOR, *Circuit Judges.*

(Filed Feb. 22, 2008)

Defendants-appellants Robert L. Schulz, We the People Foundation for Constitutional Education, Inc., and We the People Congress, Inc., appeal an August 15, 2007 judgment of the United States District Court for the Northern District of New York (McAvoy, *J.*). We affirm the district court's order under 26 U.S.C. § 7408 permanently enjoining defendants from violating 26 U.S.C. §§ 6700 & 6701 based on their distribution of

false and misleading materials concerning corporate obligations to withhold federal taxes on wages.

ARTHUR T. CATTERALL, Attorney, Tax Division, Department of Justice, Washington, D.C. (Richard T. Morrison, Acting Assistant Attorney General, Gilbert S. Rothenberg, Acting Deputy Assistant Attorney General, Andrea R. Tebbets, Attorney, Tax Division, Department of Justice, Washington, D.C., and Glenn T. Suddaby, United States Attorney for the Northern District of New York, *on the brief), for Plaintiff-Appellee.*

ROBERT L. SHULZ, *pro se* (Mark Lane, *on the brief*), Queensbury, NY, *for Defendants-Appellants.*

PER CURIAM

Defendants-appellants Robert L. Schulz ("Schulz"), We the people Congress, Inc., and We the People Foundation for Constitutional Education, Inc. (together with We the People Congress, the "Corporations"), appeal an August 15, 2007 judgment of the United States District Court for the Northern District of New York (McAvoy, *J.*), permanently enjoining defendants from violating 26 U.S.C. §§ 6700 & 6701 based on their distribution of false and misleading tax materials concerning corporate obligations to withhold federal taxes On wages.[1] *See* 26 U.S.C. § 7408 (providing district

[1] The tax materials at issue were distributed in a packet called the "Blue Folder," which was made available by defendants both in hard copy and electronically via the internet. The district

courts authority to enjoin persons from engaging in certain "specified conduct" made illegal by the tax laws, including 26 U.S.C. §§ 6700 & 6701). The district court also ordered defendants to, *inter alia*, provide the names and contact information of the individuals who have received defendants' tax materials, and to notify such recipients of the district court's decision and order.

Defendants principally argue that the tax materials at issue constitute protected political and/or educational speech under the First Amendment of the Constitution. Defendants further argue that their actions in promoting the materials are otherwise protected under the First Amendment's Petition Clause, on the theory that the government has yet to respond to defendants' repeated inquiries as to whether, and on what basis, any information in the tax materials is false. Finally, defendants assert that their actions were, not violative of 26 U.S.C. §§ 6700 or 6701.

We have considered all of defendants' arguments and find them to be without merit. We affirm the judgment for substantially the reasons set forth in the district court's decision. *See United States v. Schulz*, ___ F. Supp. 2d ___, 2007 U.S. Dist. LEXIS 58271 (N.D.N.Y. Aug. 9, 2007).

We also vacate the stay we previously imposed with respect to Paragraph C of the injunction, which

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court found that the materials included false representations about the tax laws, as well as instructions and forms to "legally terminate withholding."

directs defendants to provide to the government the names and contact information of the individuals who have received the tax materials.[2] We find that Paragraph C is sufficiently tailored to the legal violations at issue, *see Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1251 (2d Cir. 1984) ("Injunctive relief should be narrowly tailored to fit the specific legal violations."), and that the district court did not abuse its discretion in imposing the conditions specified in that provision, *see Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 909 (2d Cir. 1993) (stating that the scope of an injunction is reviewed for abuse of discretion). The district court found that defendants' illegal activities were harming individuals, who were exposing themselves to criminal liability by following the defendants' ill-conceived instructions. *See Schulz*, 2007 U.S. Dist. LEXIS 58271, at *23. Requiring defendants to provide the identity and contact information of the recipients of the tax materials enables the government to monitor the defendants' obligation under the injunction to provide a copy of the district court's order to recipients of the tax materials. Moreover, the district court found that the defendants' illegal actions were harming the government, which was not receiving required tax payments and was forced to expend resources to collect the unpaid taxes. *Id.* at * 24. Requiring defendants to provide the identity and contact information of the recipients of the tax

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[2] On September 20, 2007, we denied defendants' motion to stay the full injunction, and instead granted their motion only with respect to Paragraph C only.

materials enables the government to monitor whether the recipients of defendants' materials are violating the tax laws. Thus, we find no abuse of discretion with respect to the district court's imposition of the reporting requirements in Paragraph C of the injunction.

Accordingly, we **AFFIRM** the district court's judgment and **VACATE** the partial stay on the district court's injunction. Moreover, we **DENY** defendants' pending motion requesting that we take judicial notice of a petition for rehearing of the Supreme Court's order denying a writ of certiorari in *We the People Foundation, Inc. v. United States*, 485 F.3d 140 (D.C. Cir. 2007), *cert. denied*, ___ S. Ct. ___, 2008 WL 59413 (Jan. 7, 2008), as, consideration of the petition for rehearing in that case is unnecessary to the disposition in this case.

APPENDIX M

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

United States of America

vs.

Robert L. Schulz, et al

JUDGMENT IN A CIVIL CASE

CASE NO. 1:07-CV-352

(Filed Aug. 15, 2007)

___ **JURY VERDICT.** This action came before this Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **DECISION BY COURT.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IS GRANTED.

IN ACCORDANCE WITH THE HONORABLE THOMAS J. MCAVOY'S DECISION AND ORDER FILED AUGUST 9, 2007.

Dated: August 14, 2007 /s/ Lawrence K. Baerman
Clerk of Court

s/ S. Potter
By: Deputy Clerk