

FILED: September 29, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1059
(3:19-cv-00104)

DIANNE MICHELE CARTER

Plaintiff - Appellant

v.

THOMAS PELLICANE, SOUSM, U.S Marshals Service W/NC; BARBARA YATES, DUSM- U.S Marshals Service W/NC; GREGORY ALLYN FOREST, U.S. Marshal

Defendants - Appellees

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Harris, and Judge Richardson.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: May 21, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1059
(3:19-cv-00104)

DIANNE MICHELE CARTER

Plaintiff - Appellant

v.

THOMAS PELLICANE, SOUSM, U.S Marshals Service W/NC; BARBARA YATES, DUSM- U.S Marshals Service W/NC; GREGORY ALYN FOREST, U.S. Marshal

Defendants - Appellees

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 20-1059

DIANNE MICHELE CARTER,

Plaintiff - Appellant,

v.

THOMAS PELLICANE, SOUSM, U.S. Marshals Service W/NC; BARBARA YATES, DUSM- U.S. Marshals Service W/NC; GREGORY ALLYN FOREST, U.S. Marshal,

Defendants - Appellees.

Appeal from the United States District Court for the Western District of North Carolina at Charlotte. Cameron McGowan Currie, Senior District Judge. (3:19-cv-00104)

Submitted: May 19, 2020

Decided: May 21, 2020

Before NIEMEYER, HARRIS, and RICHARDSON, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Dianne Michele Carter, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Dianne Michele Carter appeals the district court's order accepting the recommendation of the magistrate judge and denying relief on her complaint filed pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and related claims. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Carter v. Pellicane*, No. 3:19-cv-00104 (W.D.N.C. Dec. 20, 2019). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Dianne Michele Carter,

C/A. No. 3:19-104-CMC-SVH

Plaintiff

v.

Thomas Pellicane, SOUSM, U.S. Marshals Service W/NC; Barbara Yates, DUSM- U.S. Marshals Service W/NC; and Gregory Allyn Forest, U.S. Marshal,

Opinion and Order

Defendants.

This matter is before the court on Plaintiff Dianne Michele Carter's ("Carter") *pro se* Complaint, construed as one pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).¹ ECF No. 1. Carter alleges violations of her constitutional rights when Deputy United States Marshals arrested her on an outstanding bench warrant at a house she claims belongs to the Moorish Holy Temple of Science. Defendants filed a motion to dismiss, or in the alternative, for summary judgment. ECF No. 12. Because Carter is proceeding *pro se*, the Magistrate Judge entered an order pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), advising her of the importance of the motion and the need to file an adequate response. ECF No. 13. Carter filed a response in opposition (ECF No. 15), Defendants filed a reply (ECF

¹ On March 7, 2019, the undersigned was designated by Chief Judge Gregory to sit with the United States District Court for the Western District of North Carolina pursuant to 28 U.S.C. § 294(c) in connection with this case. ECF No. 24.

No. 16), and Carter filed a sur-reply (ECF No. 17). Carter also filed a motion to amend her Complaint. ECF No. 20.

In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02 (B)(2)(d), DSC, this matter was referred to United States Magistrate Judge Shiva V. Hodges for pre-trial proceedings and a Report and Recommendation (“Report”).² On November 6, 2019, the Magistrate Judge issued a Report recommending Defendants’ motion to dismiss be granted and Carter’s motion to amend be denied as futile. ECF No. 21. The Magistrate Judge advised Carter of the procedures and requirements for filing objections to the Report and the serious consequences if she failed to do so. Carter filed objections to the Report on November 20, 2019. ECF No. 22.

I. Background

Carter was a tax preparer who operated Carter Sensible Tax Service. *United States v. Dianne M. Carter*, 3:16-cv-673 (W.D.N.C. Sept. 14, 2018) (ECF No. 12-2 at 1)³ (“*Carter I*”).⁴ In 2014, the Internal Revenue Service (“IRS”) reviewed sixty-three tax returns prepared by Carter between 2011 and 2014 and concluded thirty of these returns had evidence of improper conduct. *Id.* at 2. Twenty-five of the returns were federal income tax returns prepared for inmates at Nash Corrections Institution. *Id.* at 4. The returns were allegedly based on entirely fabricated incomes and withholdings, *id.* at 6, and claimed refunds ranging from \$7,924 to \$19,996. *Id.* at 3; *see, e.g.*, ECF No. 12-3 at 2. Five of the returns reviewed by the IRS were prepared on behalf of purported

² Magistrate Judge Hodges was designated for service in this matter by Order filed March 11, 2019. ECF No. 3.

³ References to ECF docket numbers in the Background section refer to the docket of the underlying case, *Carter I*.

⁴ As noted by the Magistrate Judge, this court may take judicial notice of the prior case.

trusts. ECF No. 12-2 at 3. These returns listed no income for the “trusts,” *id.* at 5, yet claimed refunds ranging from \$750,000 to \$8,035,560. *Id.* at 3.

The IRS rejected refunds in all but one of these tax returns. *Id.* at 12. However, the IRS mistakenly issued a \$750,000 refund to one of the purported trusts. *Id.* at 11–12. To recover this refund, the IRS brought a collections action against the fiduciary of the trust and was able to recover \$749,949.10. *Id.* at 12. As a consequence of investigating Carter’s activities, the IRS accrued at least \$23,000 in administrative costs. *Id.* On September 16, 2016, the United States filed a Complaint primarily seeking an injunction to stop Carter from acting as a tax preparer and filing any other tax returns on behalf of others. ECF No. 1.

The United States moved for summary judgment, requesting a permanent injunction and other equitable relief. ECF No. 12. After full briefing, the court granted the United States’ motion for summary judgment and issued an Injunction on October 2, 2017 ordering Carter to permanently cease acting as a federal income tax return preparer in any capacity; to notify, by November 1, 2017, all persons for whom she prepared, or assisted in preparing, federal tax returns to inform them of the permanent injunction entered against her; and to provide counsel for the United States, by November 1, 2017, a list of all persons for whom Carter had prepared a federal income tax return, amended return, or refund claim since January 1, 2010. Finally, Carter was ordered to file with the Clerk of the Court in North Carolina a sworn certificate of compliance by December 1, 2017. *See* ECF No. 16. The docket reflects this Order and the Judgment were served on Carter by US mail.

Shortly after the entry of the Order, on October 12, 2017, Carter filed a document docketed as a “Pro se Response re Order on Motion for Summary Judgment” and entitled “Objection to Order and Jurisdictional Challenge,” which challenged the court’s jurisdiction based on sovereign

citizen type arguments. ECF No. 18. About six weeks later, on November 28, 2017 she filed a notice of appeal, which included a request to stay the case until the Fourth Circuit ruled on her appeal. ECF No. 19. No stay was granted. On December 14, 2017, the United States filed a motion for Order to Show Cause why Carter should not be held in contempt for failing to comply with the court's Order and Injunction. ECF No. 24. The court entered an Order on December 21, 2017 setting a January 5, 2018 hearing for Carter to show cause why she had not complied with the court's October 2017 Order and why she should not be held in contempt for non-compliance. ECF No. 25. The court ordered Carter to be served in accordance with Rule 4(e) of the Federal Rules of Civil Procedure. *Id.* at 2. This Order also denied Defendant's motion to stay pending appeal as moot. *Id.* On December 22, 2017, Carter filed a motion to dismiss the motion to show cause, contending the district court did not have jurisdiction because the case was on appeal. ECF No. 27. The court denied this motion by text order the next day, holding "no court has issued a stay of the implementation of the subject order in this case. Therefore the court retains jurisdiction to enforce the subject order."

The show cause hearing was held on January 5, 2018. Carter did not appear. The minute entry on the docket reveals "the AUSA informed the court of all attempts to serve [Carter] with the Show Cause Order. Court issued a bench warrant for failure to comply with the court's October 2, 2017 Order."⁵ The bench warrant showed the offense as "contempt of court for failure to comply with the Court's October 2, 2017 Order." ECF No. 28. On January 17, 2018, the United States

⁵ The process server had attempted to serve the show cause order six times, but was unable to do so. See ECF No. 29-1 at 2.

filed a motion for an Order authorizing all necessary actions to execute the bench warrant. ECF No. 29. The Government stated Carter appeared to be attempting “to evade arrest by refusing to leave her home.”⁶ ECF No. 29-1 at 1. On January 25, 2018, the court issued an Order authorizing all necessary actions to execute the bench warrant. ECF No. 30. The Fourth Circuit denied a stay and affirmed the district court’s grant of summary judgment on February 16, 2018. ECF No. 31.

Carter was arrested pursuant to the bench warrant on February 26, 2018. ECF No. 34. The same day, a contempt hearing was held. The court indicated it would release Carter from custody when she complied with the October 2, 2017 Order. ECF No. 36 (hearing transcript). She represented she was not at home when the Marshal came to arrest her, and she “didn’t know why they couldn’t find me.” *Id.* at 11, 15. However, the court stated “You were informed by show cause orders and other things you weren’t in compliance,” and Carter replied “[t]hat’s true.” *Id.* at 41. Carter told the court she would comply with its Order, but the required information was in her files at her home. The court decided she could not be released from custody before complying, and the Government was ordered to find an officer to accompany Carter to her home and supervise while she retrieved the information.⁷

On August 14, 2018, Carter filed a *pro se* motion to vacate the show cause order, bench warrant, and order authorizing all necessary actions to effect bench warrant. ECF No. 37. She

⁶ Deputy Marshal Yates had attempted to serve the bench warrant at Carter’s home and knocked on the door for 45 minutes with no answer, despite lights being turned on and off during the period and both of Carter’s cars being parked in the garage. ECF No. 29-1 at 3. The Government indicated this meant Carter “was present at the home but refusing to voluntarily surrender to law enforcement.” *Id.*

⁷ The record is devoid of information regarding how quickly this occurred and when Carter was released from custody.

argued the show cause order was not properly served on her, and therefore the court's orders and warrant were void. *Id.* The court construed her motion as one for relief from judgment under Rule 60 and denied it on September 14, 2018. ECF No. 38. On September 24, 2018, Carter filed a *pro se* motion requesting another judge rehear the motion to vacate. ECF No. 39. The court construed this as a motion to recuse and denied it on September 25, 2018. Carter filed a notice of appeal of the Order denying her motion to vacate on November 6, 2018. She then filed a motion for relief captioned as a "Jurisdiction Challenge" the following day. ECF No. 40. Her motion argued there was insufficient service of process and the court acted in excess of jurisdiction, and requested the "judgments reversed as void and a nullity." *Id.* at 1. On November 14, 2018, the court denied her motion and held its exercise of jurisdiction proper. ECF No. 41. Carter was also put on notice in that Order her filings were frivolous and sanctions would be considered if she continued to make frivolous filings. *Id.* Finally, on April 8, 2019, the Fourth Circuit affirmed the district court's decision on Carter's post judgment motion. ECF No. 46.

Carter has now filed the instant case alleging Defendants broke into a house where she resides and arrested her without lawful authority to do so. 3:19-cv-00104 at ECF No. 1. She alleges constitutional and non-constitutional grounds for relief, including claims under the Americans with Disabilities Act ("ADA") and 42 U.S.C. § 1983. *Id.* She requests actual and punitive damages for her false arrest and imprisonment. *Id.* at 9.

II. Standard

The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the court. *See Mathews v. Weber*, 423 U.S. 261 (1976). The court is charged with making a *de novo* determination of any portion of the Report of the Magistrate Judge to which a specific objection

is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or recommit the matter to the Magistrate Judge with instructions. *See* 28 U.S.C. § 636(b).

III. Discussion

The Report recommends granting the motion to dismiss as to all claims.⁸ ECF No. 21. Carter has filed objections to the Report. ECF No. 22. Her objections regarding her claims will be discussed below. As an initial matter, Carter states the Magistrate Judge ignored her “Response to Motion to Dismiss” dated 22 July 2019, the “Response to Defendants Reply filed 8/01/19” dated 5 Aug 2019, and her “Petition to Amend to Enjoin Parties dated 1 November 2019.” *Id.* at 4. However, it is clear from the Report the Magistrate Judge did consider Carter’s filings in response to Defendants’ motion to dismiss, as well as her motion to amend.⁹ *See* ECF No. 21 at 2 (“The motion having been fully briefed [ECF Nos. 15-17] it is ripe for disposition.”).

a. Non-Constitutional Claims

Dismissal is recommended as to the non-constitutional claims due to lack of jurisdiction, because only the United States is amenable to suit under the Federal Tort Claims Act (“FTCA”) but is not a Defendant in this case, and for failure to exhaust an FTCA claim against the Untied States. ECF No. 21 at 6. As to the claim under the Americans with Disabilities Act (“ADA”), the Report recommends dismissal because the ADA does not apply to the United States. *Id.* at 10.

⁸ When resolving a motion to dismiss, a court may consider facts and document subject to judicial notice without converting the motion into one for summary judgment. *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 557 (4th Cir. 2013) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)).

⁹ Carter, in fact, objects to the Report’s conclusion regarding the motion to amend.

Carter does not set forth specific objections to these recommendations by the Report. For example, she does not discuss exhaustion under the FTCA, nor does she seek to amend to add the United States as a defendant for an FTCA claim. She does not object to the Report's recommendation regarding the ADA claim. Therefore, the Report's conclusions on these claims are reviewed for clear error. Finding none, the court adopts the portions of the Report regarding Carter's non-constitutional and ADA claims. These claims are dismissed with prejudice.

b. Constitutional Claims

The Report finds Carter has not shown Defendants violated the Constitution in arresting her, as she was arrested pursuant to a valid bench warrant. ECF No. 21 at 8. Carter objects to the Report. ECF No. 22. She alleges she "has no constitutional rights," but then states her "unalienable rights are protected by the constitution." *Id.* at 1-2. She objects to the factual background, stating the show cause order in the underlying case was not served on her, and therefore she failed to attend the show cause hearing, after which a bench warrant was issued for her arrest. Carter contends, therefore, "[e]very court order issued on and after January 5, 2018 was issued in excess of jurisdiction and is void because of insufficient service of process." *Id.* at 2. Carter argues she is a "real party in interest" to the property in which she was arrested, as she is the "trust administrator and beneficiary of the house defendants broke into." *Id.* Because Defendants did not have a valid warrant, Carter contends, her arrest was unconstitutional. *Id.*

Carter also argues the bench warrant issued for her arrest was invalid because unsupported by oath or affirmation; therefore, the warrant (and order allowing reasonable force) were "in excess of jurisdiction." *Id.* Carter contends she was not provided notice to appear at the hearing in the underlying case and therefore could not be "in contempt of an order of which she had no knowledge." *Id.*

So far as Carter objects based on lack of service of the order to show cause and notice of show cause hearing, the court notes both were mailed to Carter at the address she provided to that court. *See* C/A No. 3:16-cv-673 at ECF No. 25 (noting, in part “Pro se litigant served by US Mail”); court note on docket showing Notice of hearing and Order mailed to Carter at address provided). That docket also shows a Minute Entry from the show cause hearing held January 5, 2018, in which the “AUSA informed Court of all attempts to serve defendant with Show Cause Order.” It is clear the United States attempted to serve the Order on Carter personally, including six attempts to serve her at the address she provided to the court, and she does not appear to dispute receiving the Order and Notice via mail from the court.

Further, the bench warrant was issued not for Carter’s failure to attend the show cause hearing, but for her failure to comply with the court’s October 2017 Order requiring her to turn over certain information to the United States. It is clear from Carter’s filings and her testimony at the contempt hearing she received the October 2017 Order containing the injunction and ordering certain information produced to the Government, yet she failed to do so in the time ordered. The court therefore agrees with the Report a valid bench warrant existed and Carter was arrested pursuant to it. *See id.* at ECF No. 28. Accordingly, the Deputy Marshals did not violate Carter’s constitutional rights when they arrested her pursuant to the valid bench warrant and order authorizing all necessary actions to execute the warrant.

c. Defendant Forest

The Report recommends dismissal of Defendant Forest because Carter did not allege he personally acted in her arrest, and there is no basis for supervisory liability. ECF No. 21 at 8-9. Carter argues the “Office of the USMS is liable for acts of its employees,” and “the Marshal is liable in his capacity as Marshal regardless of when he took office.” ECF No. 22 at 4.

Defendant Forest is subject to dismissal because, as explained by the Magistrate Judge, the doctrine relied upon by Carter in her claims against Forest, supervisory liability, is generally inapplicable in actions pursuant to *Bivens*, absent a policy or custom that results in illegal action. As the court has determined no illegal action occurred, supervisory liability may not attach. There are no allegations against Defendant Forest individually, as he was appointed United States Marshal after Carter's arrest. Therefore, any claims against Defendant Forest are dismissed.

d. Carter's Motion to Amend

Finally, the Report recommends Carter's motion to amend to add State Defendants be denied as futile, because Carter has failed to show a violation of a constitutional right required to support a federal cause of action against the State Defendants. ECF No. 21 at 10. Carter objects to the recommendation and argues she cannot bring her claims against the State Defendants in State Court due to a conflict of interest. ECF No. 22 at 4-5.

The court agrees with the Report's conclusion Carter's motion to amend to add new parties is futile. Carter wishes to add four defendants: Sheriff's Department of Mecklenburg County, the State of North Carolina, the Town of Matthews, and the Matthews Police Department. She alleges these proposed defendants conspired with the Marshals regarding her arrest. However, as the claims in Carter's current Complaint will be dismissed by this Order, and Carter's proposed amendments do not alter these conclusions, it would be futile to add these proposed defendants.

IV. Conclusion

After reviewing the record of this matter, the applicable law, the Report and Recommendation of the Magistrate Judge, and Carter's objections, the court agrees with the conclusions of the Magistrate Judge. Accordingly, the court adopts and incorporates the Report and Recommendation by reference as supplemented in this Order. Defendants' motion to dismiss

(ECF No. 12) is granted, and Carter's motion to amend (ECF No. 20) is denied as futile. Because "the grounds of the dismissal make clear that no amendment could cure the defects" in Plaintiff's case, this matter is dismissed with prejudice. *Goode v. Central Virginia Legal Aid Society, Inc.*, 807 F.3d 619, 625 (4th Cir. 2015).

IT IS SO ORDERED.

s/Cameron McGowan Currie
CAMERON MCGOWAN CURRIE
Senior United States District Judge

Columbia, South Carolina
December 19, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Dianne Michele Carter,

C/A. No. 3:19-104-CMC-SVH

Plaintiff

v.

Thomas Pellicane, SOUSM, U.S. Marshals Service W/NC; Barbara Yates, DUSM- U.S. Marshals Service W/NC; and Gregory Allyn Forest, U.S. Marshal,

Order

Defendants.

This matter is before the court on Plaintiff Dianne Michele Carter's ("Carter") *pro se* Notice of Jurisdictional Challenge. ECF No. 23. Carter challenges the jurisdiction of Magistrate Judge Hodges over her case, which was filed in the Western District of North Carolina. She has attached a letter from Ms. Blume, the Clerk of Court in the District of South Carolina, which noted the case is not proceeding in the District of South Carolina but directed her to the header, which states "United States District Court for the North Carolina Western District." ECF No. 23-1.

Carter filed her Complaint in the Western District of North Carolina on March 4, 2019. ECF No. 1. On March 7, 2019, the undersigned was designated by Chief Judge Gregory to sit with the United State District Court for the Western District of North Carolina pursuant to 28 U.S.C. § 294(c) in connection with this case. ECF No. 24. Because a Magistrate Judge in the Western District of North Carolina was unavailable to assist the undersigned, Magistrate Judge Hodges was appointed by the Chief Judge of the Western District of North Carolina, with the concurrence of the Chief Judge of the District of South Carolina. ECF No. 3. The Order sets forth the statutory authority for the designation of Magistrate Judge Hodges under 28 U.S.C. §

636(f). The docket reveals a copy of this Order was served on Carter, a *pro se* litigant, by US Mail.

As Magistrate Judge Hodges was designated and assigned to this case in accordance with federal law, her jurisdiction is proper.¹ Carter's Jurisdictional Challenge is dismissed.

IT IS SO ORDERED.

s/Cameron McGowan Currie
CAMERON MCGOWAN CURRIE
Senior United States District Judge

Columbia, South Carolina
December 19, 2019

¹ The court notes the Magistrate Judge's Report and Recommendation did contain a Notice of Right to File Objections that directed Carter to file such objections with the Clerk of Court for the District of South Carolina. However, this was a scrivener's error, as Carter's case is filed in the Western District of North Carolina. Plaintiff has timely filed objections to the Report in the Western District of North Carolina; therefore, no prejudice has resulted from this error.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Dianne Michele Carter,)	C/A No.: 3:19-104-CMC-SVH
)	
Plaintiff,)	
)	
vs.)	
)	
Thomas Pellicane, SOUSM, U.S.)	REPORT AND
Marshals Service W/NC; Barbara)	RECOMMENDATION
Yates, DUSM- U.S. Marshals)	
Service W/NC; and Gregory Allyn)	
Forest, U.S. Marshal, ¹)	
)	
Defendants.)	
)	

Dianne Michele Carter (“Plaintiff” or “Carter”), proceeding pro se and in forma pauperis, brings this action alleging a violation of her constitutional rights against the above-named defendants (“Defendants”). Plaintiff’s constitutional claims are construed as brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

This matter comes before the court on Defendants’ motion to dismiss. [ECF No. 12]. Pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), the court advised Plaintiff of the dismissal procedures and the possible

¹ It is unclear whether Plaintiff intended to name Forest personally or instead intended to sue the United States Marshal Service for the Western District of North Carolina. For the reasons herein, both would be entitled to dismissal.

consequences if she failed to respond adequately to Defendants' motion. [ECF No. 13]. The motion having been fully briefed [ECF Nos. 15–17], it is ripe for disposition.

Pursuant to the Order of Designation docketed as ECF No. 3, the undersigned United States Magistrate Judge has been assigned to perform any and all judicial duties provided for under 28 U.S.C. § 636 (a)–(c) in this matter. Because the motion is dispositive, this report and recommendation is entered for the district judge's consideration. Having carefully considered the parties' submissions and the record in this case, the undersigned recommends the district judge grant Defendants' motion to dismiss.

I. Factual Background

Plaintiff was the defendant in a civil action titled *United States of America v. Dianne M. Carter*, C/A No. 3:16CV673 (“*Carter I*”).² Because Carter failed to comply with an order, the *Carter I* court issued a show cause order, directing her to appear on January 5, 2018. *Carter I* at 25. The court also directed the government to serve the order on Carter in accordance with Fed. R. Civ. P. 4. *Id.* Carter failed to attend a show cause hearing on January 5, 2018.

² This court may take judicial notice of the prior case. *Aloe Creme Labs., Inc. v. Francine Co.*, 425 F.2d 1295, 1296 (5th Cir. 1970); *see also Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) (“We note that ‘the most frequent use of judicial notice is in noticing the content of court records.’”); *Mann v. Peoples First Nat'l Bank & Trust Co.*, 209 F.2d 570, 572 (4th Cir. 1954) (approving district court’s taking judicial notice of prior suit with same parties).

See Carter I, January 5, 2018 Minute Entry. The court issued a bench warrant for Carter's arrest. *Id.* at ECF No. 28. On January 25, 2018, the court granted the United States's motion for an order "authorizing all necessary actions to execute bench warrant against defendant." *Id.* at ECF No. 30. The order provided that, because the United States Marshals Service ("USMS") had been unable to procure Carter's voluntary surrender to the January 5, 2018, bench warrant, the USMS was "authorized and directed to take all reasonable actions, including but not limited to the use of reasonable force, necessary to execute the bench warrant and procure [Carter's] attendance before the Court." *Id.*

According to the complaint in this action, Supervisory United States Marshal Thomas Pellicane ("Pellicane") and Deputy United States Marshal Barbara Yates ("Yates") participated in arresting Carter on February 26, 2018. [ECF No. 1 at 2]. Carter alleges Defendants "broke into the house belonging to the Moorish Holy Temple of Science of the World/Moorish Science Temple of America" and arrested her. *Id.* at 2. She alleges she was arrested without a warrant and that Defendants violated her constitutional rights in entering the house, searching it, and arresting her. *Id.*³ She further alleges Defendants violated her rights under the American with Disabilities Act, 42 U.S.C § 12101

³ Carter also alleges Defendants failed to secure the property "which is the proximate cause of the house being burglarized." [ECF No. 1 at 2]. However, she has failed to show that she has any ownership interest in the property.

(“ADA”), by detaining her in a jail with criminals, aggravating her psychic disorder she identifies as “Legal Abuse Syndrome Post Traumatic Street Disorder.” *Id.* at 3.

Plaintiff’s complaint purports to be bringing claims for abuse of process, “assumption of duty,” breach of fiduciary duty, conspiracy, constructive fraud, intentional infliction of emotional distress, negligence, and a claim under 42 U.S.C. § 1983. [ECF Nos. 3–9].

II. Discussion

A. Standard on Motion to Dismiss

Dismissal is appropriate under Fed. R. Civ. P. 12(b)(1) where the court lacks subject-matter jurisdiction and under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. A motion to dismiss under Rule 12(b)(1) examines whether a complaint fails to state facts upon which jurisdiction can be founded. It is the plaintiff’s burden to prove jurisdiction, and the court is to “regard the pleadings’ allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.” *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). A motion to dismiss under Rule 12(b)(6) examines the legal sufficiency of the facts alleged on the face of the plaintiff’s complaint. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243–44 (4th Cir. 1999). To survive a Rule 12(b)(6) motion, “a complaint

must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The court is “not required to accept as true the legal conclusions set forth in a plaintiff’s complaint.” *Edwards*, 178 F.3d at 244. Indeed, “[t]he presence of a few conclusory legal terms does not insulate a complaint from dismissal under Rule 12(b)(6) when the facts alleged in the complaint cannot support the legal conclusion.” *Young v. City of Mount Ranier*, 238 F.3d 567, 577 (4th Cir. 2001).

Pro se complaints are held to a less stringent standard than those drafted by attorneys. *Gordon v. Leake*, 574 F.2d 1147, 1151 (4th Cir. 1978). A federal court is charged with liberally construing a complaint filed by a pro se litigant to allow the development of a potentially meritorious case. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). When a federal court evaluates a pro se complaint, the plaintiff’s allegations are assumed to be true. *Fine v. City of N.Y.*, 529 F.2d 70, 74 (2d Cir. 1975). The mandated liberal construction afforded to pro se pleadings means if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so. Nevertheless, the requirement of liberal construction does not mean the court can ignore a clear failure in the pleading to allege facts that set forth a claim currently cognizable in a federal district court. *Weller v. Dep’t of Soc. Servs.*, 901 F.2d 387, 390–91 (4th Cir. 1990).

B. Analysis

1. Non-constitutional claims

a. Subject matter jurisdiction

Defendants argue all Plaintiff's non-constitutional claims⁴ must be dismissed for lack of subject matter jurisdiction, as a suit pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346 ("FTCA"), lies only against the United States. The FTCA waives sovereign immunity⁵ and allows suits against the United States for personal injuries caused by government employees acting within the scope of their employment. 28 U.S.C. § 1346. Under the FTCA, a plaintiff may recover a monetary award from the United States for damages "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope . . . of employment." 28 U.S.C. § 1346(b)(1). As the court lacks jurisdiction over a FTCA claim against defendants other than the United States, the undersigned is constrained to find that Plaintiff's claim, in its current stature, is subject to dismissal.

b. Exhaustion

Even if Plaintiff had correctly named the United States for her tort

⁴ Defendants do not concede that all of the claims asserted are viable causes of action, such as "assumption of duty," but nevertheless note that these Defendants may not be sued for Plaintiff's non-constitutional claims.

⁵ To the extent the FTCA does not apply to Plaintiff's claims, they are barred by sovereign immunity. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

claims, it appears she failed to exhaust her administrative remedies. The FTCA requires Plaintiff to exhaust her administrative remedies through the appropriate agency before bringing suit. 28 U.S.C. § 2675(a). The FTCA states:

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

28 U.S.C. § 2675(a). The presentment of an administrative claim is jurisdictional and cannot be waived. *Henderson v. United States*, 785 F.2d 121, 123 (4th Cir. 1986).

Defendants submitted the affidavit of USMS General Counsel Gerald M. Auerbach that states Plaintiff filed no administrative claim. [ECF No. 12-2]. Plaintiff does not dispute her failure to exhaust. Therefore, the undersigned finds that Plaintiff failed to exhaust her non-constitutional tort claims.

2. Constitutional Claims

Although Plaintiff claims she was arrested without a warrant, court records reveal a signed bench warrant commanding her arrest, and an additional order allowing the USMS to use reasonable force. *Carter I* at ECF Nos. 28, 30. Plaintiff argues that because the government was unable to effect

service of the show cause hearing on her, the court's orders commanding her arrest were unlawful and unconstitutional. [ECF No. 15 at 1].⁶ The court's order directing the government to serve her pursuant to Fed. R. Civ. P. 4 was an attempt to ensure Carter be provided notice, but the court had already exercised proper jurisdiction over her and had jurisdiction to hold her in contempt of court, as referenced in the bench warrant. Further, there are no allegations in the complaint demonstrating that Defendants acted unreasonably in the manner of arresting Plaintiff. Therefore, because Carter has not shown that Defendants violated the Constitution in complying with the court's order to arrest her, the undersigned recommends the motion to dismiss be granted.

3. Forest

Gregory Allyn Forest is named as a defendant in his capacity as the United States Marshal for the Western District of North Carolina. [ECF No. 1]. Forest should also be dismissed because there is no *Bivens* claim for supervisory liability, and Plaintiff has not alleged that Forest personally participated in her arrest. The doctrine of supervisory liability is generally inapplicable to § 1983 and *Bivens* suits, such that an employer or supervisor is not liable for the acts

⁶ Although Plaintiff states her claim is brought pursuant to 42 U.S.C. § 1983, that statute applies only to state actors. The undersigned construes this claim as one brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

of his employees, absent an official policy or custom that results in illegal action. *See Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978); *Fisher v. Washington Metro. Area Transit Authority*, 690 F.2d 1133, 1142–43 (4th Cir. 1982). The Supreme Court explains that “[b]ecause vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.” *Iqbal*, 556 U.S. at 676; *see Slakan v. Porter*, 737 F.2d 368, 372–74 (4th Cir. 1984) (finding officials may be held liable for the acts of their subordinates, if the official is aware of a pervasive, unreasonable risk of harm from a specified source and fails to take corrective action as a result of deliberate indifference or tacit authorization).

Plaintiff has not alleged an official policy or custom resulting in the alleged constitutional violations. She has also failed to allege Forest was deliberately indifferent to a pervasive, unreasonable risk of harm.⁷ Therefore, the undersigned recommends Plaintiff’s claims be dismissed against Forest.

4. ADA claim

To the extent Plaintiff attempts to bring an ADA claim, such claim should be dismissed because the ADA does not apply to the United States. *See* 42 U.S.C. § 12111(5)(B) (excluding the United States from definition of an

⁷ According to Defendants, Forest was not appointed as United States Marshal until May 14, 2018, almost three months after Plaintiff’s arrest.

employer"); 42 U.S.C. § 12131 (defining public entity as State or local governments).

C. Plaintiff's motion to amend

After Defendants' motion to dismiss was fully briefed, Plaintiff filed a "Petition to Amend to Enjoin Parties." [ECF No. 20]. Plaintiff seeks to add the Sheriff's Department of Mecklenburg County, the State of North Carolina, the Town of Matthews, and Matthews Police Department (collectively "State Defendants") as defendants in this action. *Id.* at 20-1 at 1. Plaintiff argues the proposed defendants conspired with the USMS in her arrest. She also alleges Matthews Police Department knew her arrest was forthcoming, but did nothing to prevent the arrest and imprisonment.

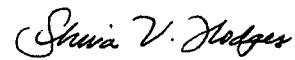
"[L]eave [to amend] shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). "A motion to amend should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile." *HCMF Corp. v. Allen*, 238 F.3d 273, 276 (4th Cir. 2001) (internal quotation marks omitted). If the district judge accepts the recommendation on Defendants' motion to dismiss, Plaintiff's motion to amend should be denied as futile, as Plaintiff has not shown any violations of her constitutional rights, precluding a federal claim against State Defendants. To the extent Plaintiff believes she has viable state law claims against State Defendants, she may pursue them in state

court. If the district judge does not accept this recommendation, the motion to amend may be remanded for future consideration.

III. Conclusion

For the foregoing reasons, the undersigned recommends Defendants' motion to dismiss [ECF No. 12] be granted and Plaintiff's motion to amend [ECF No. 20] be denied as futile.

IT IS SO RECOMMENDED.



November 6, 2019
Columbia, South Carolina

Shiva V. Hodges
United States Magistrate Judge

The parties are directed to note the important information in the attached "Notice of Right to File Objections to Report and Recommendation."

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. “[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must ‘only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.’” *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

No. 18-5050

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Jun 12, 2020

DEBORAH S. HUNT, Clerk

PHILLIP L. GILLIAM,

)

Petitioner-Appellee,

)

v.

)

UNITED STATES OF AMERICA,

)

Respondent-Appellant.

)

)

)

O R D E R

BEFORE: COLE, Chief Judge; CLAY and NALBANDIAN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

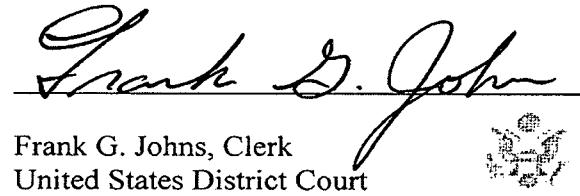
United States District Court
Western District of North Carolina
Charlotte Division

Dianne Michele Carter,)	JUDGMENT IN CASE
)	
Plaintiff(s),)	3:19-cv-00104
)	
vs.)	
)	
)	
Thomas Pellicane et al		
Defendant(s).)	

DECISION BY COURT. This action having come before the Court and a decision having been rendered;

IT IS ORDERED AND ADJUDGED that Judgment is hereby entered in accordance with the Court's December 20, 2019 Order.

December 20, 2019



Frank G. Johns, Clerk
United States District Court



UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT****No. 18-2368**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DIANNE MICHELE CARTER,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Frank D. Whitney, Chief District Judge. (3:16-cv-00673-FDW-DCK)

Submitted: April 4, 2019

Decided: April 8, 2019

Before NIEMEYER and HARRIS, Circuit Judges, and SHEDD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Dianne Michele Carter, Appellant Pro Se. Francesca Ugolini, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit.

Appendix A1

PER CURIAM:

Dianne Michele Carter appeals the district court's order denying her postjudgment motion in the underlying action filed by the Government seeking injunctive relief. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *United States v. Carter*, No. 3:16-cv-00673-FDW-DCK (W.D.N.C. Nov. 14, 2018). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: April 8, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2368
(3:16-cv-00673-FDW-DCK)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DIANNE MICHELE CARTER

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
DOCKET NO. 3:16-cv-00673-FDW-DCK

UNITED STATES OF AMERICA,)
Plaintiff,)
vs.)
DIANNE M. CARTER,) ORDER
Defendant.)

)

THIS MATTER is before the Court on Defendant's "Jurisdictional Challenge." (Doc. No. 40). The Court construes Defendant's filing as yet another motion for relief from this Court's previous orders. In her filing, Defendant argues that this Court did not have personal or subject matter jurisdiction when the Court issued a show cause order, bench warrant, and subsequent order to facilitate execution of that warrant. (Doc. No. 40, p. 1). Defendant's motion is DENIED for the reasons stated below.

The Court has subject matter jurisdiction in this matter. According to 28 U.S.C. § 1343, "[e]xcept as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions . . . commenced by the United States . . ." 28 U.S.C. § 1343. In addition, this Court is explicitly authorized to issue injunctions regarding tax filings under the Internal Revenue Code. See 26 U.S.C. § 7402(a) ("The district courts of the United States . . . shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction . . . and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the

internal revenue laws."); see also 28 U.S.C. § 1340 ("The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue . . .").

Here, this case was filed by the United States seeking an injunction to keep Defendant from filing fraudulent tax returns. Thus, the Court had subject matter jurisdiction to decide this case, enjoin Defendant from preparing more tax returns, and order Defendant to turn over a list of names of individuals that she had prepared tax returns for on October 2, 2017. (Doc. No. 16). After two months, Defendant showed no indications of compliance with the Court's order and the Court ordered Defendant to appear before this Court to explain her noncompliance. This Order to Show Cause was mailed to Defendant on December 21, 2017. In addition, the United States attempted multiple times to personally serve Defendant with the Show Cause Order. When Defendant failed to show at this hearing, *or make any other indications that she would comply*, the Court issued a bench warrant pursuant to its authority under 18 U.S.C. § 401. See 18 U.S.C. § 401 ("A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority . . ."). These orders were all made under the Court's valid exercise of statutory and constitutional authority.

This Court also has personal jurisdiction over Defendant. Defendant was served with the initial summons in this case and admits to being a domiciliary of North Carolina.¹ (Doc. No. 5, p. 3). See Fed. R. Civ. P. 4(k) ("Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located . . ."). Defendant argues that she never received

¹ Defendant has also waived any objections to insufficient service of process by failing to raise the issue in her earlier Motion to Dismiss. (See generally Doc. No. 7; see also Fed. R. Civ. P. 12(h) (stating that Rule 12(b)(2)-(b)(5) defenses are waived if the party fails to make it in a motion)).

2 *Wife occurred*
on 10-25-17

Appendix B
B2

personal service of this Court's Show Cause Order, and thus, this Court lacked personal jurisdiction over her to issue a bench warrant. However, the Defendant is not entitled to personal service of every single document in litigation; rather, this Court's personal jurisdiction over her attached when she was served with the complaint and summons in this case. The Clerk of Court mailed Defendant a copy of the Show Cause Order upon its entry on December 21. In the Show Cause Order, the Court did give directions to serve the order in accordance with Rule 4(e), (Doc. No. 25, p. 1-2), but these directions were merely additional attempts to compel Defendant's presence before this Court. The fact this order was not personally served on Defendant does not excuse Defendant from her refusal to follow the Court's orders for over two months and certainly does not strip the Court of personal jurisdiction over her.

For these reasons, and for the reasons stated in this Court's previous order dated September 14, 2018, Defendant's current motion for relief is DENIED. This is now Defendant's third frivolous filing regarding these same issues. (See Doc. Nos. 37, 39, 40). Defendant is hereby put on notice that these filings are frivolous and in violation of Rule 11(b) of the Federal Rules of Civil Procedure. Future frivolous filings will result in the Court ordering sanctions to deter further misconduct.

IT IS SO ORDERED.

Signed: November 13, 2018



Frank D. Whitney
Chief United States District Judge


UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 17-2364

UNITED STATES OF AMERICA,**Plaintiff - Appellee,**

v.

DIANNE M. CARTER,**Defendant - Appellant.**

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Frank D. Whitney, Chief District Judge. (3:16-cv-00673-FDW-DCK)

Submitted: February 15, 2018**Decided: February 16, 2018**

Before WILKINSON, FLOYD, and THACKER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Dianne M. Carter, Appellant Pro Se. Marion E.M. Erickson, Joan Iris Oppenheimer, Francesca Ugolini, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit.

Appendix C1
C1

PER CURIAM:

Dianne M. Carter appeals the district court's order granting summary judgment to the United States on its action seeking to enjoin Carter from preparing federal income tax forms. We have reviewed the record and find no reversible error. Accordingly, although we grant leave to proceed in forma pauperis, we affirm for the reasons stated by the district court. *United States v. Carter*, No. 3:16-cv-00673-FDW-DCK (W.D.N.C. Oct. 2, 2017). We deny Carter's motions for stay pending appeal and for other relief, and we dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: February 16, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-2364
(3:16-cv-00673-FDW-DCK)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DIANNE M. CARTER

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: April 10, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-2364
(3:16-cv-00673-FDW-DCK)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DIANNE M. CARTER

Defendant - Appellant

M A N D A T E

The judgment of this court, entered 2/19/2018, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/ Patricia S. Connor, Clerk

D 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
DOCKET NO. 3:16-cv-00673-FDW-DCK

UNITED STATES OF AMERICA,)
Plaintiff,)
vs.)
DIANNE M. CARTER,) ORDER
Individually and Doing Business As)
Carter Sensible Tax Service)
Defendant.)

)

THIS MATTER is before the Court on Plaintiff's Motion for Order to Show Cause (Doc. No. 24). Plaintiff's Motion alleges that Defendant has neither provided counsel for the United States a list of the persons for whom she prepared federal income tax returns or refund claims, nor shown that she contacted individuals for whom she prepared federal tax returns to inform them of this Court's injunction as was required by this Court's October 2, 2017, Order of Permanent Injunction (Doc. No. 16). Accordingly, Plaintiff's Motion, for the reasons stated therein, is GRANTED.

IT IS THEREFORE ORDERED and the parties shall TAKE NOTICE that Defendant shall appear before this Court on Friday, January 5, 2018, at 2:00 p.m., in Courtroom #1-1 at the Charles R. Jonas Federal Building, 401 West Trade Street, Charlotte, North Carolina, 28202, whereby Defendant shall show cause why it has not complied with the terms of this Court's Order (Doc. No. 16) and why Defendant should not be held in contempt for non-compliance.

IT IS FURTHER ORDERED that:

1. A copy of this Order shall be served in accordance with Rule 4(e) of the Federal

Rules of Civil Procedure within fourteen (14) days of the date that this Order is served upon counsel for the United States or as soon thereafter as possible.

2. Proof of service done pursuant to paragraph 1, above, shall be filed with the Clerk as soon as practicable

3. Because the United States has made a prima facie showing that Defendant has violated the Court's Order, the Defendant has the burden of showing that her noncompliance justified or excused.

4. If Defendant has any defense to present or opposition to the United States' motion, such defense or opposition shall be made in writing and filed with the Clerk and copies served on counsel for the United States at least fourteen (14) days prior to the date set for the show cause hearing. The United States may file a reply memorandum to any opposition at least five (5) days prior to the date set for the show cause hearing.

5. At the show cause hearing, only those issues brought into controversy by the responsive pleadings and factual allegations supported by affidavit or declaration will be considered. Any uncontested allegation will be considered admitted.

Defendant is hereby notified that a failure to comply with this Order may subject her to sanctions for contempt of court.

IT IS FURTHER ORDERED that Defendant's Motion to Stay the Court's Order pending appeal (Doc. No. 19) is DENIED AS MOOT.

IT IS SO ORDERED.

Signed: December 21, 2017


Frank D. Whitney
Chief United States District Judge



UNITED STATES DISTRICT COURT

2010 JAN 5 PM 3:59

for the

Western District of North Carolina

US DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA

United States of America

v.

DIANNE M. CARTER

Defendant

Case No. 3:18CV673-FDW

FILED
CHARLOTTE, NC

MAR - 1 2018

US District Court
Western District of NC

BENCH WARRANT

To: Any authorized law enforcement officer

YOU ARE COMMANDED to arrest and bring before a United States District Court judge without unnecessary delay (name of person to be arrested) DIANNE M. CARTER

who is accused of an offense or violation based on the following document filed with the court:

Indictment Superseding Indictment Information Superseding Information Complaint
 Probation Violation Petition Supervised Release Violation Petition Violation Notice Order of the Court

This offense is briefly described as follows:

Contempt of Court for failure to comply with the Court's October 2, 2017 Order.

Date: 01/05/2018


Issuing officer's signature

City and state: Charlotte, NC

Chief Judge Frank D. Whitney

Printed name and title

Return

→ This warrant was received on (date) 1/5/2018, and the person was arrested on (date) 2/26/2018
at (city and state) CHARLOTTE, NC

Date: 2/26/2018


Arresting officer's signature

THOMAS PELLICANE, SDUSM
Printed name and title

Appendix E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
DOCKET NO. 3:16-cv-00673-FDW-DCK

UNITED STATES OF AMERICA,)
Plaintiff,)
vs.)
DIANNE M. CARTER,)
Individually and Doing Business as Carter)
Sensible Tax Service)
Defendant.)

)

ORDER

THIS MATTER is before the Court on Plaintiff's Motion for Order Authorizing all Necessary Actions to Execute Bench Warrant against Defendant (Doc. No. 29). Plaintiff alleges that the United States Marshals Service has been unable to procure Defendant's voluntary surrender pursuant to the bench warrant issued in this case for Defendant's failure to attend the Show Cause hearing held on January 5, 2018. For the reasons stated in the United States' motion (Doc. No. 29), the motion is GRANTED.

It is further ORDERED that, pursuant to the Bench Warrant (Doc. No. 28) issued in this action on January 5, 2018, the United States Marshals Service is authorized and directed to take all reasonable actions, including but not limited to the use of reasonable force, necessary to execute the bench warrant and procure Defendant's attendance before the Court.

IT IS SO ORDERED.

Signed: January 24, 2018


Frank D. Whitney
Chief United States District Judge



Appendix
F

Federal Rules of Civil Procedure

Rule 4. Summons

(e) Serving an Individual Within a Judicial District of the United States. Unless federal law provides otherwise, an individual ... may be served in a judicial district of the United States by:

- (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or
- (2) doing any of the following:
 - (A) delivering a copy of the summons and of the complaint to the individual personally;
 - (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or
 - (C) delivering a copy of each to an agent authorized ... to receive service of process.

(l) Proving Service.

(1) *Affidavit Required.* Unless service is waived, proof of service must be made to the court.

Except for service by a United States marshal ... proof must be by the server's affidavit.

(m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

Rule 5. Serving and Filing Pleadings and Other Papers

(a) Service When Required.

(1) *In General.* Unless these rules provide otherwise, each of the following papers must be served on every party:

- (A) an order stating that service is required;
- (E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

(2) *If a Party Fails to Appear.* No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,) Case No. 3:16-CV-00673-FDW-DCK
v.)
DIANNE M. CARTER)
Individually And Doing Business As)
Carter Sensible Tax Service)
Defendant.)

)

**MOTION FOR ORDER AUTHORIZING
ALL NECESSARY ACTIONS TO EXECUTE
BENCH WARRANT AGAINST DEFENDANT**

The United States of America moves the Court pursuant to 26 U.S.C. § 7402 and Rule 70(e) of the Federal Rules of Civil Procedure for an Order authorizing the United States

Marshals Service (“USMS”) take any all reasonable and necessary measures necessary to execute the arrest of Dianne M. Carter pursuant to the bench warrant issued in the above-referenced action on January 5, 2018, including but not limited to entering Defendant’s home to effect her arrest. (Dkt. No. 28).

As set forth more fully in the attached memorandum, good cause exists for the order because: (1) the United States was unable to effect service of the order to show cause entered in this case on January 5, 2018, due to Plaintiff’s evasion; and (2) after Defendant did not attend the Show Cause Hearing, the U.S. Marshals charged with effecting Defendant’s arrest were unable to secure her surrender voluntarily. Accordingly, the USMS should be informed of their authority to take reasonable steps to execute the Court’s arrest warrant, including the authority to enter Ms. Carter’s home located at 1201 Gifford Drive, Matthews, NC 28105.

Appendix

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,) Case No. 3:16-cv-00673
v.)
DIANNE M. CARTER, Individually And)
Doing Business As Carter Sensible Tax Service,)
Defendant.)
DIANNE M. CARTER)
Counterclaim Plaintiff,)
v.)
UNITED STATES OF AMERICA, LORETTA)
A. LYNCH; RYAN O. MCMONAGLE; JILL)
WESTMORELAND ROSE; CAROLINE D.)
CIRAOLO; WILLIAM J. WILKINS; JOHN)
KOSKINEN)
Counterclaim Defendant.)

**UNITED STATES' BRIEF IN SUPPORT OF ITS
MOTION TO DISMISS COUNTERCLAIM**

Introduction and Summary of Argument

The United States of America brought this action under section 7402(a) and 7407 of the

- Internal Revenue Code (26 U.S.C.) to enjoin the defendant, Dianne M. Carter, from preparing or
- otherwise assisting in preparing federal tax returns. The action alleges that Carter prepares federal tax returns that overstate her clients' tax withholdings in order to claim massive refunds to which those clients are not entitled. The United States filed the complaint on September 16,

Appendix
F

18 U.S.C. § 241- Conspiracy against rights: If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, ... in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, ... or If two or more persons go in disguise on the ... premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured — They shall be fined under this title or imprisoned not more than ten years, or both; and if ... such acts include kidnapping ... they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. § 242 - Deprivation of rights under color of law: Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State ... to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, ... by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, ... shall be fined under this title or imprisoned not more than ten years, or both; and if such acts include kidnapping ... shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

Section
1

1 against Ms. Carter from acting as a tax return preparer. That
2 injunction was entered on October 2nd, 2017. Ms. Carter had
3 since appealed that judgment and requested a stay of its
4 enforcement, which was denied. And since that date her appeal
5 has also been denied. So we have a final judgment in the case
6 as well as a mandate back to the trial court.

Section
2

7 After 30 days had passed from the entry of the
8 injunction, the United States had not received what it was
9 entitled to receive from Ms. Carter pursuant to the
10 injunction, and this is paragraph 3, page 9 of the order for a
11 permanent injunction, which requiring Ms. Carter to, quote,
12 contact within 30 days after the entry of this order and
13 judgment of permanent injunction by United States mail and an
14 email address is known by email all persons, to the extent
15 that the identities and locations of such persons are within
16 the possession, custody or control of Carter for whom she
17 prepared or assisted in preparing federal tax returns to
18 inform them of the permanent injunction against her.

19 Paragraph 4 states that she was required to, quote,
20 provide to counsel for the United States within 30 days after
21 the entry of this order and judgment of permanent injunction a
22 complete list of the persons to the extent such a list is
23 within possession, custody or control of Carter for whom
24 Carter has prepared or assisted in preparing any federal
25 income tax return, amended return, or refund claim at any time

Appendix
K1

1 from January 1st, 2010, through the present, with such list to
2 include for each person the name, address, phone number, email
3 address, social security number, employer identification
4 number, or individual tax identification number, and the tax
5 periods for which each such return, amended return or refund
6 claim relates.

7 She was then required pursuant to paragraph 5 to
8 file with the Court within 60 days as the entry of the order
9 permanent injunction a, quote, sworn certificate of compliance
10 signed under penalty of perjury stating that she has complied
11 with the foregoing directives.

12 Ms. Carter did not file the required certification
13 within the 60 days period set forth in paragraph 5, which is
14 long since expired. And she has not provided to the
15 United States within 30 days, or at all, a list of her
16 clients. And we have no indication as to whether she has
17 complied with paragraph 3, which requires her to directly
18 reach out to the clients herself and inform them of the entry
19 of the injunctions against her barring her from acting as a
20 tax return preparer.

21 Without this information, you know, the
22 United States has a difficult time being able to judge whether
23 Ms. Carter is complying with the other requirements of this
24 injunction; namely, whether she is acting as a tax return
25 preparer or complying with the injunction by not preparing tax

1 do. I will notify them if I need to -- I don't have many
2 phone numbers. It's on my phone and my phone died, but I
3 can -- for the ones that I have, I can send letters. I can
4 contact -- the IRS certainly knows who I prepared taxes for.

5 THE COURT: Well, no, that's not necessarily true.
6 They -- they -- it's, you know, there's hundreds of millions,
7 maybe billions of pieces of paper the IRS has to deal with,
8 and it's not so easy for them to just go in and say, okay,
9 here's a tax preparer and pull all those documents.

10 THE DEFENDANT: Okay. Okay. I understand what
11 you're saying.

12 I don't really prepare that many tax returns. It's
13 not like I'm doing thousands a year.

14 THE COURT: No, but that's why it troubles the
15 Court, why if you're only doing it -- a few each year, why you
16 don't know your clients.

17 THE DEFENDANT: I know some of them. They don't
18 come back every year. But if I can -- if I had my records, my
19 computer, I could get some names for you. I can promise that
20 I won't do taxes for the federal government anymore. Whatever
21 you want me to do, I will do. Whatever you want. Whatever
22 you will allow me to do, I will do. I'm not trying to run. I
23 don't know why they couldn't find me.

24 THE COURT: Well, then -- most people don't carry
25 around their passports.

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K4

1 happen.

2 THE DEFENDANT: Okay.

3 THE COURT: But I'm not going to release you --

4 THE DEFENDANT: That's fine.

5 THE COURT: -- because the Court does not believe
6 you're trustworthy at all. Particularly when you're found
7 with cash and a passport. That just signals to the Court that
8 you were planning to flee.

9 THE DEFENDANT: That passport has been in my bag
10 since I got the passport.

11 THE COURT: Well, then it sounds like you've been
12 wanting to flee for some time.

13 THE DEFENDANT: I don't have anywhere to go.

14 THE COURT: Well, you -- you -- the marshals have
15 had a hard time tracking you down, and it's my understanding
16 they even saw you, but they didn't want to break into your
17 home because we didn't -- we, the Court, did not want the
18 marshal service to incur any liability from breaking into your
19 home.

20 THE DEFENDANT: Yes, sir.

21 THE COURT: But you -- you would not come to the
22 door when the marshal service was knocking on the door, yet
23 they could see your shadow or silhouette.

24 THE DEFENDANT: No, sir. When they were there, I
25 wasn't there. When they came last night, I was there and I

1 Fourth Circuit didn't order it stayed either.

2 THE DEFENDANT: Right, they didn't.

3 THE COURT: So you violated a court order.

4 THE DEFENDANT: And I am --

5 THE COURT: And you still are violating a court
6 order.

7 THE DEFENDANT: And I am sorry, because I thought
8 the appeal would overrule the order. The appeal to the Court
9 of Appeals.

10 THE COURT: No, no. Well, you were wrong on that.

11 THE DEFENDANT: I was wrong.

12 THE COURT: Right.

13 THE DEFENDANT: And I understand that.

14 THE COURT: But you were informed by show cause
15 orders and other things that you were not in compliance. So,
16 quite honestly, I just don't believe you.

17 THE DEFENDANT: That's true.

18 THE COURT: So --

19 THE DEFENDANT: I will do it. I will do what I'm
20 supposed to do.

21 THE COURT: Well, I understand from the marshal
22 service that you're sitting there saying, I don't know what
23 records I have or anything like that, that there are records
24 all over your house and records in your bathroom and just --
25 and you're saying you don't have any records, but apparently

unlawful
Search

Appendix
K6

unlawful
Search

1 eyewitnesses saw lots and lots of documents in your house.
2

3 THE DEFENDANT: Yeah, but those are not tax returns.
4 What I had is -- I told you, W-2s. And what you're asking
5 for, they weren't asking for records. They were asking for
6 the names, the socials --

7 THE COURT: Right.

8 THE DEFENDANT: -- address.

9 THE COURT: And they're all there. That's right.
10 And they're all there. You have them. You were saying -- in
11 the earlier hearing, you were saying, well, I don't know if I
12 have them. I do have a zip drive, but I don't know if I have
13 all this other stuff. Now you're telling me you have all
14 these W-2s.

15 THE DEFENDANT: No. I'm saying I didn't have them
16 from 2011. That's what I was saying. But what they're
17 asking, I said I have it on the computer and I can get it for
18 them.

19 THE COURT: All right. Let me hear from the
20 Government.

21 MR. SULLIVAN: Hear from Mr. McMonagle if you may.

22 MR. McMONAGLE: Well, Your Honor, we tried to get in
23 touch with someone with the IRS who can accompany Ms. Carter
24 to her home to obtain all this information that she says she
25 has. I've not been able to secure anyone either on the
criminal side or the civil side that can do that today.

1 is entitled Motion for Order to Show Cause Why the Defendant
2 Should Not be Held in Contempt.

3 Another order from the Court that is dated
4 December 21st, 2017. A bench warrant issued by the Court on
5 January 5th, 2018. A motion from the United States dated
6 January 17, 2018. A motion entitled Motion for Order
7 Authorizing All Necessary Actions to Execute Bench Warrant
8 Against Defendant.

9 An order of the Court dated January 1 -- excuse me,
10 dated January 25th, 2018. A copy of the appeal from the
11 Fourth Circuit that was decided on February 16th of 2018. I'm
12 going to also read that into the record here, the appellate
13 decision.

14 It reads: "Dianne M. Carter appeals the District
15 Court's order granting summary judgment to the United States
16 on its action seeking to enjoin Carter from preparing federal
17 income tax forms, review the record and find no reversible
18 error. Accordingly, although we grant leave to proceed in
19 forma pauperis, we affirm for the reasons stated by the
20 District Court."

21 And then it cites this Court case number.

22 And the Fourth Circuit continues to say: "We deny
23 Carter's motion for stay pending appeal and for other relief,
24 and we dispense its oral argument because the facts and legal
25 contentions are adequate and presented in material before

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K10

1 this Court, and argument should not aid in the decisional
2 process."

3 And then final word it says "affirmed," meaning that
4 the District Court's opinion was affirmed.

5 So I'll ask the Clerk of Court to hand these
6 documents up to Ms. Carter.

7 Ms. Carter, I think we'll have this all resolved by
8 tomorrow afternoon, but I can't guarantee that. But we are --
9 I'm telling the Government to move quickly because I do
10 understand your detention is not unlimited. I have to
11 consider your constitutional rights at the same time I'm
12 considering the legitimate concerns of the United States in
13 making sure you comply with the Court order that -- which
14 would result in the Government getting the names and addresses
15 of your clients.

16 All right. Anything else, Counsel?

17 MR. SULLIVAN: Not from me, Your Honor.

18 MR. McMONAGLE: No, Your Honor.

19 THE COURT: Ms. Carter, any questions?

20 THE DEFENDANT: No, sir. Thank you.

21 THE COURT: Thank you. We'll be in recess.

22 (The proceedings were recessed at 3:30 p.m.)

23 * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,) Case No. 3:16-CV-00673-FDW-DCK
v.)
DIANNE M. CARTER)
Individually And Doing Business As)
Carter Sensible Tax Service)
Defendant.)

DECLARATION OF BARBARA YATES

I, Barbara Yates, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a Deputy United States Marshal in the United States Marshal's Office for the Western District of North Carolina. As part of my duties as a Deputy United States Marshal, I execute bench warrants issued by the United States District Court for the Western District of North Carolina. I have personal knowledge of the facts asserted in this declaration and if called as a witness could testify competently thereto.
- 2. On January 9, 2018, I was assigned to the above-referenced case to execute a bench warrant for the arrest of Dianne M. Carter for violating an order of the court.
3. At approximately 10:30 a.m. on January 9, 2018, I interviewed Defendant's neighbor for the purpose of ascertaining Defendant's whereabouts and schedule.
4. At approximately 11:00 a.m., after speaking with Defendant's neighbor, I surveilled Defendant's home, located at 1201 Gifford Drive, Matthews, North Carolina, 28105. I noted at that time that lights were on in the Defendant's home.

5. At 3:40 p.m., I contacted members of the Violent Offender Task Force from the United States Marshals Office for the Western District of North Carolina, and local police officers from the Matthews, North Carolina Police Department, to assist in executing the bench warrant for Ms. Carter's arrest.

6. At 5:30 p.m., a team of six United States Marshals, and three Matthews, North Carolina police officers arrived at Defendant's address.

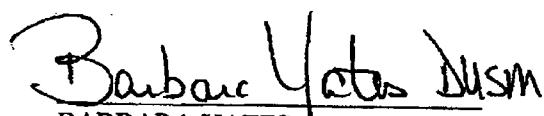
7. Soon after the arrest teams arrived, the lights inside the house were turned off. I then viewed the garage and noted that two cars belonging to Ms. Carter were parked inside.

8. I, the six other United States Marshals, and the three Matthews, North Carolina police officers who were present, knocked on the front door of 1201 Gifford Drive for approximately forty-five minutes.

9. At no time did Defendant appear at the door, or otherwise communicate with me, the other United States Marshals, or the local police officers.

10. During that forty-five minute period, however, the lights inside of the home turned on and off, indicating to me that Carter was present.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on January 17, 2018 at Charlotte, North Carolina.


BARBARA YATES
Deputy United States Marshal

Universal Declaration of Human Rights

Article 01. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 02. Everyone is entitled to all the rights and freedoms set forth in this Declaration

Article 03. Everyone has the right to life, liberty and security of person.

Article 04. No one shall be held in slavery or servitude; slavery and the slave trade 04 shall be prohibited in all their forms.

Article 05. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 07. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 08. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 09. No one shall be subjected to arbitrary arrest, detention or exile.

Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11. (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. (2) No one shall be held guilty of any penal offence on

account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13. (1) Everyone has the right to freedom of movement and residence within the borders of each State. (2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 17. (1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.

Article 30. Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.