APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14464

D.C. Docket No: 8:17-cv-00826-MSS-AEP

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SAID RUM,

Defendant-Appellant

Appeal from the United States District Court

for the Middle District of Florida

(April 23, 2021)

Before ROSENBAUM, LUCK, and ANDERSON, Circuit Judges. PER CURIAM:

This case involves the Government's suit brought in the district court to enforce the IRS assessment of a penalty against Rum for failing for

the year 2007 to file a Report of Foreign Bank and Financial Accounts ("FBAR") pursuant to 31 U.S.C. § 5321. The district court granted summary judgment in favor of the Government, enforcing the IRS assessment of a penalty for a willful violation. This is Rum's appeal. He argues on appeal: (A) that the district court applied an incorrect standard of willfulness (by holding that willfulness as used in 31 U.S.C. § 5321(a)(5)(C) includes a reckless disregard of a known or obvious risk); (B) that the district court erred in concluding that there were no genuine issues of material fact as to whether his conduct rose to required level of willfulness/recklessness; (C) that the district court erred in refusing to recognize that 31 C.F.R. § 1010.820(g)(2) limits the amount of a willful violation to $100,000; (D) that the district court erred when it held that the IRS's factfinding procedures were sufficient and therefore applied the arbitrary and capricious rather than a de novo standard of review with respect to the amount of the penalty; (E) that, even assuming the arbitrary and capricious standard applies, the district court erred in failing to conclude that the IRS factfinding procedures were arbitrary and capricious; and finally, (F) that the district court erred in rejecting Rum's challenge to the additions to the base amount (interest and late fees). In our Part III Discussion below, we address each of Rum's arguments in turn.

I. FACTS AND PROCEDURAL HISTORY

Rum has been a naturalized citizen of the United States since 1982 and can read, write, and

comprehend English. After obtaining a two-year degree, Rum owned and operated several businesses including a delicatessen, a pet supply store, and a convenience store. In 1998, Rum opened his first foreign bank account

("UBS account") by depositing $1.1 million from his personal checking account. Rum opened the UBS account to conceal money from potential judgment creditors, although Rum provided two inconsistent versions concerning the details of the lawsuits giving rise to the judgment creditors. In one version, he was in a car accident and was sued by the victim of the accident; in the second, he was sued by a customer who slipped and fell inside his store. Rum alleged that his lawyer advised him to place the money in a foreign bank account for concealment purposes. Rum chose to have a numbered, rather than a named, account, and elected to have his mail held at UBS, rather than sent to his U.S. address. UBS charged a fee to retain his mail and all retained mail was deemed to have been duly received by him.

Rum gave inconsistent statements on why he failed to return the money to the U.S. earlier. Rum stated that he was afraid of being penalized with a fee for closing the foreign bank account, but he also declared that he was satisfied with returns on investment and thus decided to leave the funds undisturbed. Rum admitted that "he was very active with communicating investment strategies to UBS" because he "wanted to ensure he was getting

the best return on his investment with UBS." For that reason, he visited Switzerland several times to meet with bank officers and manage his account.

From 2002 to 2008, UBS sent bank statements to Rum that included the following notice on the cover: "The information contained herein is intended to provide you with information which may assist you in preparing your US federal income tax return. It is for information purposes only and is not intended as formal satisfaction of any government reporting requirements." UBS informed Rum in 2002 that earnings from U.S. securities had to be reported to the IRS. However, Rum declined to complete Form W-9 and instead directed UBS not to invest in U.S. securities. While in Switzerland, in 2004, Rum signed a document entitled "Supplement for new Account US Status" that contains the following statement: "In accordance with the regulations applicable under US law relating to withholding tax, I declare, as the holder of the above-mentioned account, that I am liable to tax in the USA as a US person." Rum's UBS account balance greatly exceeded the reportable amount in 2007 and his UBS account earned income each year, except for 2006. Rum owned the UBS account until October 26, 2008, when he closed it to transfer nearly $1.4 million to Arab Bank, another bank located in Switzerland. Rum admitted that while he did not disclose the UBS account on his tax returns or the Free Application for Federal Student Aid ("FAFSA"), he disclosed the account on his

mortgage application to demonstrate his strong financial position.

Rum asserts that he used a tax preparer to complete his returns. However, Rum's 2007 tax return is one of at least two tax returns that is marked as "Self-Prepared" on the tax preparer's signature line. Rum signed the 2007 tax return on February 27, 2008; this signature is found on Form 1040 immediately below the following standard provision: "Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete." Rum asserts that he provided his tax preparer with the documents necessary to prepare the returns. Rum admits that he never told the tax preparer about his foreign bank account and claims that the tax preparer never asked him about the existence of a foreign bank account. Line 7a of Schedule B of the 2007 Form 1040 tax return contains the following question: "At any time during 2007, did you have an interest in or a signature or other authority over a financial account in a foreign country, such as a bank account, securities account, or other financial account? See instructions for exceptions and filing requirements for Form TD F 90-22.1 [FBAR]." Rum's 2007 tax return, and each of his returns for several preceding years, stated that Rum had no such foreign account.

In 2008, Rum was audited for the 2006 tax year. Rum told the agent that he had closed his UBS

account but failed to tell her that he opened the new one at Arab Bank. Although the agent imposed additional taxes, she did not impose an FBAR penalty.

Rum failed to file an FBAR repeatedly prior to tax year 2008; in fact, Rum filed an FBAR for tax year 2008 only because on October 6, 2009, UBS sent a written notice to Rum stating that Rum's account with UBS appeared to be within the scope of the IRS Treaty Request it had received. Nine days later, Rum belatedly filed his first FBAR form, on October 15, 2009, for tax year 2008.

In November 2009, Arab Bank advised Rum that it was closing his account, so he transferred the funds—which were approximately $1.4 million—to a U.S. account. In February 2010, Rum filed a tax return for the 2009 year that reported approximately $40,000 of the $300,000 of investment income generated by the UBS and Arab Bank accounts.

In 2011, the IRS commenced an examination that encompassed Rum's 2005 and 2007 through 2010 tax years and led to an examination of his failure to report his foreign accounts during that period. Agent Marjorie Kerkado determined that Rum had understated his income by hundreds of thousands of dollars during the years at issue and therefore asserted tax deficiencies and civil fraud penalties. She initially proposed a non-willful FBAR penalty against Rum, which her supervisor, Terry Davis, approved subject to the approval of area

counsel. Kerkado and Davis initially proposed a non-willful penalty instead of a willful penalty based on the failure of the IRS agents to raise an FBAR penalty in Rum's 2006 audit. Area counsel's approval of the non-willful penalty was accompanied by the following language:

> It is our understanding that the revenue agent did not propose a willful penalty in this case because the prior revenue agent failed to raise the issue of filing FBAR forms in the earlier examination. In the absence of additional facts not stated in this memorandum, this office believes that there is sufficient evidence to impose the willful penalty should the Commissioner make that determination. Any evidence that the prior revenue agent failed to raise the FBAR issue should be inadmissible in a court proceeding as not relevant to determining the taxpayer's intent at the time the violations were committed.

Once Kerkado and Davis realized that their initial reasoning was based on an irrelevant "factor when it comes to willful definition," Kerkado reconsidered Rum's case and proposed a willful penalty. Both Davis and area counsel approved Kerkado's proposal and Kerkado never thereafter recommended

anything lower than a willful penalty of 50% of the account balance at the time of the violation.

Both Davis and area counsel agreed with Kerkado that Rum was ineligible under the mitigation guidelines because of the proposed civil tax fraud penalty. The Internal Revenue Manual ("I.R.M.") provides that if the maximum balance of the account exceeds a million dollars at the time of the violation, the FBAR statutory maximum applies. It is undisputed that the account exceeded a million dollars during tax year 2007; however, the I.R.M. mitigation guidelines provide for an exception such that the statutory maximum could be reduced if a taxpayer meets four mitigating factors. One of those four that Rum clearly did not meet provided: "IRS did not determine a fraud penalty … due to the failure to report income related to any amount in a foreign account." I.R.M. § 4.26.16-1.

Kerkado submitted a Summary Memo detailing the basis for why a willful penalty was resubmitted instead of the non-willful penalty, in which she specifically noted that the mitigation guidelines were considered and determined not to be applicable due to a civil fraud penalty being proposed and appealed. Kerkado's FBAR Examination Lead Sheets also contain a notation demonstrating that she considered the I.R.M. mitigation guidelines in Rum's exam.

On June 3, 2013, at the conclusion of Rum's IRS examination, the IRS sent Rum a Letter 3709 stating that it was "proposing a penalty" for willful

failure to file the FBAR; the letter cited the amended statute that provided for the maximum penalty of 50% of the account at the time of violation. The previous year Kerkado had sent Rum a letter informing him that because an agreement could not be reached pursuant to her offer of a reduced FBAR penalty (20% of the balance of his account) in exchange for agreeing to the civil fraud penalty, the maximum statutory penalty would apply for one tax year. The June 3, 2013, Letter 3709 further explained that Rum could accept the penalty, appeal the decision, or do nothing and the IRS would assess the penalty and begin collection procedures. Along with the Letter 3709, Rum was provided with a Form 886-A Explanation of Items. The Form set forth the detailed basis upon which the IRS proposed the willful penalty against Rum. While Kerkado had the authority to recommend the assessment of the willful FBAR penalty against Rum for several tax years, she exercised her discretion to recommend the imposition solely for tax year 2007.

On July 2, 2013, Rum elected to appeal the proposed willful penalty by stating that he sought the "discretionary Assessment whereby the Penalty cannot exceed $10,000." Appeals Officer Svetlana Wrightson issued an Appeals Memorandum that sustained the willful FBAR penalty against Rum.

Rum then filed a petition with the Tax Court, challenging the IRS's civil fraud penalty determination under 26 U.S.C. § 6663. The Tax Court entered a stipulated order based on a

settlement whereby Rum would not be subject to a civil fraud penalty but imposed accuracy-related penalties under § 6662 for underpayment of tax required to be shown on a return.[1]

The Government then brought this action against Rum to collect the outstanding FBAR penalty under 31 U.S.C. § 5321(a)(5)(C) for calendar year 2007. The district court referred the matter to the magistrate judge who recommended granting the Government's motion for summary judgment and denying Rum's. The magistrate judge rejected Rum's arguments that willfulness did not include recklessness and that the court should employ the maximum penalty found at 31 C.F.R. § 1010.820(g)(2) rather than the one found at 31 U.S.C. § 5321. It further found that no genuine issue of material fact existed concerning his willfulness. Turning to the penalty itself, the magistrate judge held that the IRS had not acted arbitrarily or capriciously when it imposed the 50% penalty. The magistrate judge set forth in detail the considerable evidence which supported the civil fraud penalty and the imposition of the maximum FBAR penalty. It also rejected Rum's arguments that the IRS decision should be reviewed de novo because of evidence of the IRS's bad faith and/or because he did not receive proper notice of the penalty. The district court

[1] The Government does not argue that Rum's challenge in this action to the FBAR penalty is precluded by res judicata or otherwise. See *Williams v. Comm'r*, 131 T.C. 54 (2008) (holding that challenges to FBAR penalties do not fall within its jurisdiction).

adopted the recommendation, and Rum now appeals.

II. STANDARD OF REVIEW

The parties have cited, and we have uncovered, no case in our Court—in the context of an IRS suit to enforce its assessment of an FBAR penalty—establishing the appropriate standard of review of the willfulness issue or the issue of the exercise of discretion by the IRS with respect to imposition of the penalty and the amount thereof. Indeed, the parties provided no such briefing at all either in the district court or on appeal. Because of the lack of briefing and because our independent research has revealed no definitive resolution of the appropriate standard of review, we assume arguendo, but expressly decline to decide, that the standards of review are the standards of review urged by the parties both in the district court and on appeal. The court below employed the same standards. The parties ask us to review de novo the willfulness issue, and because the posture is one of summary judgment, whether or not there existed genuine issues of material fact with respect to whether or not Rum's failure to file the FBAR reports was willful.[2] Similarly, we address legal

[2] Other courts have employed de novo review where the government has brought an action to collect FBAR penalties. See, e.g., *United States v. Horowitz*, 978 F.3d 80 (4th Cir. 2020) (using, without discussing, de novo standard in appeal from grant of motion for summary judgment); *United States v. Williams*, No. 1:09-cv-437, 2010 WL 3473311 (E.D. Va. Sept. 1, 2010), rev'd on other grounds, 489 F. App'x 655 (4th Cir. 2012)

issues de novo, including whether the district court applied the correct legal standard of willfulness, and the propriety of using § 5321 for determining the maximum penalty rather than the regulation found at 31 C.F.R. § 1010.820(g)(2). With respect to the other issues raised, we employ the arbitrary and capricious standard pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), as do the parties.

III. DISCUSSION

A. The meaning of willfulness

1. Willfulness includes recklessness

Rum argues that the district court erred when it applied a standard of willfulness that includes reckless disregard of a known or obvious risk of nonpayment. He argues that the proper standard should be violation of a known legal duty, which is the standard used in criminal cases under the Bank Secrecy Act.

(using de novo review, noting that § 5321 contained no guidance on the legal standards to be employed in the action for collection it authorized, and comparing section to review of Tax Court and other agency decisions). We further note that this Court, in *United States v. McMahan*, 569 F.2d 889 (5th Cir. 1978) (en banc), held that a defendant, in an action brought by the United States to collect unpaid withholding taxes and associated penalties, has the right to a jury trial to determine if he is the responsible person. That decision addressed the right to trial by a jury when the claims to be tried involve both legal and equitable claims; it made no mention of the arbitrary and capricious standard.

Congress passed the Bank Secrecy Act in 1970 in response to "serious and widespread use of foreign financial facilities located in secrecy jurisdictions for the purpose of violating American law." H.R. Rep. No. 91-975 (1970), reprinted in 1970 U.S.C.C.A.N. 4394, 4397. Under 31 U.S.C. § 5321(a)(5)(A), the Secretary of the Treasury has the authority to impose civil money penalties on any person who fails to file a required FBAR. From 1986 to 2004, § 5321 only authorized penalties for willful violations and capped such penalties at $100,000. In 2004, Congress amended § 5321 to authorize penalties up to $10,000 for non-willful violations and to increase the maximum penalty for willful violations to the greater of $100,000 or fifty percent of the balance in the account at the time of the violation. 31 U.S.C. § 5321(a)(5)(A)–(D).

In civil cases, willfully has traditionally been interpreted to include recklessness. In *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47, 127 S. Ct. 2201 (2007), while examining the Fair Credit Reporting Act, the Court noted that "'willfully' is a word of many meanings whose construction is often dependent on the context in which it appears, and where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well." 551 U.S. at 57, 127 S. Ct. at 2208 (internal quotations and citations omitted). Like the Bank Secrecy Act, the Fair Credit Reporting Act contained both criminal and civil penalties and both included willfulness as the standard for violations. However,

the Court rejected the call to require actual knowledge for both, limiting that higher standard to the criminal penalties. *Id.* at 60, 127 S. Ct. at 2210.

Other courts addressing this issue in the context of FBAR civil penalties have held that willfulness includes reckless disregard. "Though 'willfulness' may have many meanings, general consensus among courts is that, in the civil context, the term often denotes that which is intentional, or knowing, or voluntary, as distinguished from accidental, and that it is employed to characterize conduct marked by careless disregard whether or not one has the right so to act." *Bedrosian v. United States*, 912 F.3d 144, 152 (3d Cir. 2018) (internal quotations and citations omitted); see also *United States v. Horowitz*, 978 F.3d 80, 89 (4th Cir. 2020) (discussing *Safeco* and holding in the context of a civil penalty that a "willful violation" of the FBAR reporting requirement includes reckless violations); *Norman v. United States*, 942 F.3d 1111, 1115 (Fed. Cir. 2019) (citing *Safeco* and holding "that willfulness in the context of § 5321(a)(5)(C) includes recklessness").

In *United States v. Malloy*, 17 F.3d 329 (11th Cir. 1994), we rejected a taxpayer's similar willfulness argument in a suit brought by the government to collect unpaid withholding taxes pursuant to 26 U.S.C. § 6672. We noted that we had previously held that willfully, under § 6672,

> is defined by prior cases as meaning, in general, a voluntary, conscious, and

> intentional act, such as payment of other creditors in preference to the United States, although bad motive or evil intent need not be shown. The willfulness requirement is satisfied if the responsible person acts with a reckless disregard of a known or obvious risk that trust funds may not be remitted to the Government, such as by failing to investigate or to correct mismanagement after being notified that withholding taxes have not been duly remitted.

17 F.3d at 332 (quoting *Mazo v. United States*, 591 F.2d 1151, 1154 (5th Cir. 1979).[3] We emphasized that something less than actual knowledge was sufficient to be liable and specifically restated the test of "a reckless disregard of a known or obvious risk." Id.

Following our precedent interpreting the analogous language in § 6672, we hold that willfulness in § 5321 includes reckless disregard of a known or obvious risk. In so doing, we join with every other circuit court that has interpreted this provision.

2. The meaning of recklessness

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[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

The Safeco Court stated that "[w]hile the term recklessness is not self-defining, the common law has generally understood it in the sphere of civil liability as conduct violating an objective standard: action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known." 551 U.S. at 68, 127 S. Ct. at 2215 (internal quotations and citations omitted).

Both the Fourth Circuit and the Third Circuit have adopted the Safeco standard in the context of the FBAR penalty:

> [C]ivil recklessness requires proof of something more than mere negligence: "It is [the] high risk of harm, objectively assessed, that is the essence of recklessness at common law." *Safeco*, 551 U.S. at 69, 127 S. Ct. 2201. Thus, as the Third Circuit has held, when imposing a civil penalty for an FBAR violation, willfulness based on recklessness is established if the defendant "(1) clearly ought to have known that (2) there was a grave risk that an accurate FBAR was not being filed and if (3) he was in a position to find out for certain very easily." *Bedrosian*, 912 F.3d at 153 (cleaned up).

Horowitz, 978 F.3d at 89; accord *Norman*, 942 F.3d at 1115 (citing Safeco and Bedrosian and holding: "the failure to learn of the filing requirements

coupled with other factors, such as efforts taken to conceal the existence of the accounts and the amounts involved, may lead to a conclusion that the taxpayer acted willfully" (internal quotation omitted)).

We join our sister circuits in holding that the appropriate standard of willfulness to warrant the FBAR penalty is—borrowing from Safeco—"an objective standard: action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known."

We turn next to address Rum's argument that, in applying the Safeco standard of recklessness, the district court erred in failing to conclude that there were genuine issues of fact.

B. Genuine issue of material fact

Rum argues that the district court erred when it determined that no genuine issue of material fact existed as to his willfulness (i.e., recklessness pursuant to our holding above). Pursuant to the summary judgment standard, he correctly asserts that he is entitled to all inferences in his favor, but he argues that the district court ignored this standard. Rum's primary argument is that his signature on the tax return is not sufficient, by itself, to conclude that he had constructive knowledge of the negative answers on his tax returns about the existence of a foreign bank account. However, we need not rely solely on Rum signing his returns. As we demonstrate below, Rum's signature on his

returns is but one among many facts that constitute overwhelming evidence that Rum acted in a manner that at least rises to the level of the recklessness standard described above.

Based on Rum's conduct, we agree with the district court that there are no genuine issues of material fact regarding Rum's willfulness or recklessness. Rum admits that he started his first overseas account to hide assets from a judgment creditor (although his story changed about the origins of that judgment). He opened a numbered account so as to conceal his ownership and paid an extra fee to UBS for not receiving his statements. Additionally, he opened his second account as a numbered account, thus continuing to conceal his identity.[4] He spurned repeated advice—in his UBS bank statements—indicating that the bank statements could assist him in preparing his U.S. federal tax return, and thus suggesting that his account would give rise to liability for U.S. federal taxes. Although he did not receive these bank statements contemporaneously, he personally visited UBS in Switzerland several times and would have seen the statements then. All of this was well before his 2007 tax return was filed and his 2007 FBAR report was due. Indeed, in 2002, Rum's UBS adviser explained that income from U.S. securities

[4] In a "numbered" account, a number rather than a name identifies the account. This, together with the "hold mail" service, "allowed U.S. clients to eliminate the paper trail associated with the undeclared assets." *Horowitz*, 978 F.3d at 83; see also *Norman*, 942 F.3d at 1116.

was required to be reported to the IRS, that Rum would have to file a W-9 form, and that the bank would be required to withhold. Rum declined to complete the W-9, but instead directed UBS not to invest in U.S. securities. Moreover, in 2004, on a visit to UBS in Switzerland, he signed a form expressly declaring that: "In accordance with regulations applicable under US law relating to withholding tax, I declare, as the holder of the above-mentioned account, that I am liable to tax in the USA as a US person."

Rum reported the account when applying for a mortgage, to demonstrate his financial strength. However, he did not report the account when applying for financial aid for his children's college expenses, or when filing his tax returns. That is, he reported the account only when beneficial to him.

Although he stated that he thought he was not obligated to pay taxes on his earnings until they were repatriated, he reported only $40,000 of the $300,000 that he earned when he did repatriate the funds. Rum admitted that "he was very active with communicating investment strategies to UBS" because "he wanted to ensure he was getting the best return on his investment with UBS," and visited Switzerland several times to meet with bank officers and manage his account.

Rum filed numerous years of tax returns on which he answered "no" to the question of whether he had any interest in a foreign bank account. He now states that some of the returns were prepared

by a professional tax preparer but Rum concedes he did not tell the preparer about the accounts. Although he now says he used a paid preparer, his returns indicated they were self-prepared, which would mean that he even more probably read the instructions and would have seen Line 7a of Schedule B of the 2007 Form 1040 tax return, which asks: "At any time during 2007, did you have an interest in or a signature or other authority over a financial account in a foreign country, such as a bank account, securities account, or other financial account? See instructions for exceptions and filing requirements for Form TD F 90-22.1 [FBAR]." In any event, whether or not Rum prepared the returns himself, or paid a preparer, Rum signed all of his returns immediately below the warning: "Under penalties of perjury, I declare that I have examined this return and the accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete."

When audited in 2008, for the 2006 tax year, Rum sent the revenue agent a bank statement from UBS showing zero income and told the agent the account had been closed. However, at that time the UBS account had been closed about a year, and Rum did not tell the revenue agent that the UBS funds had simply been transferred to another Switzerland bank, thus evidencing his intent to conceal.

Rum filed only one FBAR for all of the years that he was required to do so. That FBAR was filed, belatedly in October 2009, for the tax year 2008. It

was filed only after UBS informed him that his account appeared to be within the scope of the treaty request it had received, and that UBS had disclosed to the IRS the existence of his account. Significantly, Rum did not file an FBAR for the tax year 2009 despite affirmatively knowing of his responsibility as a result of filing the 2008 FBAR.

In sum, the evidence was overwhelming that Rum sought to hide his overseas accounts from the United States government. Repeatedly he took steps to conceal the accounts and not report his income to the government. And this was notwithstanding that in 2004, on occasion of a visit to UBS in Switzerland, he signed a form expressly acknowledging that, as a holder of the UBS account, he was liable to tax in the United States, and that as early as 2002 it was explained to him that the income from his account was taxable in the U.S. Even viewing the evidence in the light most favorable to him, it is clear that he chose to act in a manner that at least rises to the level of "entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Safeco*, 551 U.S. at 68, 127 S. Ct. at 2215. There is no genuine issue of material fact to the contrary.

C. The maximum penalty is established by the 2004 amendment to the statute, not by the regulation in 31 C.F.R. § 1010.820(g)(2)

Rum argues that the district court erred when it held that the 2004 amendments to § 5321 implicitly superseded the regulation found at 31

C.F.R. § 1010.820(g)(2). Before 2004, § 5321 created penalties only for willful violations and the regulation merely effectuated the statute—i.e. setting the maximum at the statutory maximum of $100,000 at the time. In 2004, Congress introduced a penalty for non-willful violations and raised the maximum penalty for willful non-filers. The Financial Crimes Enforcement Network ("FinCEN") is charged with creating the regulations, and Rum argues that FinCEN has declined to amend the regulation to set forth the new maximum penalty. He argues this represents FinCEN's policy to limit penalties for willful non-filings to $100,000. For the reasons that follow we disagree.

The plain text of § 5321(a)(5)(C) makes it clear that a willful penalty may exceed $100,000 because it states that the maximum penalty "shall be . . . the greater of (I) $100,000, or (II) 50 percent of the amount determined under subparagraph (D)," which is the balance of the account. The regulation was promulgated in 1987 and mirrored the language of the statute at that time but was never updated. "[T]he statute's language is hardly consistent with an intent by Congress to allow the Secretary to impose a lower maximum penalty by regulation; rather, Congress itself set a specific 'maximum penalty' for a willful violation." *Horowitz*, 978 F.3d at 91; *see also Norman*, 942 F.3d at 1117–18 (rejecting same argument and noting that accepting it would mean that all regulations had to be updated before conflicting statutes took effect).

We join our sister circuits and hold that the maximum penalty for a willful violation is established by § 5321(a)(5)(C) and (D)—not by the regulation found at 31 C.F.R. § 1010.820(g)(2).

D. Entitlement to de novo review of the penalty amount

As noted above in Part II, Rum assumes that the IRS determination and assessment of the FBAR penalty, and the amount thereof, would ordinarily be subject to the usual arbitrary and capricious standard of review under the Administrative Procedure Act. However, Rum argues that the assessment of the penalty, and the amount thereof, should be subject to de novo review in his case because, he argues, his case falls within the exception provided for in 5 U.S.C. § 706(2)(F) "when the action is adjudicatory in nature and the agency factfinding procedures are inadequate." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 91 S. Ct. 814, 823 (1971), abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980 (1977).[5]

[5] In *Citizens to Preserve Overton Park*, the Court rejected the plaintiffs' argument that de novo review should be employed, limiting such review to cases where "the action is adjudicatory in nature and the agency factfinding procedures are inadequate" and "when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." 401 U.S. at 415, 91 S. Ct. at 823. The net effect of this ruling, the Fifth Circuit has commented, is that "de novo review of agency adjudications has virtually ceased to exist." *Sierra Club v. Peterson*, 185 F.3d 349, 368 (5th Cir. 1999), vacated on reh'g en banc and rev'd on other grounds, 228 F.3d

Rum proffers several reasons why the IRS factfinding proceedings here were so insufficient as to mandate de novo review rather than the usual arbitrary and capricious review. We address in turn each of his reasons and conclude that they are wholly without merit. However, we note at the outset that his reasons all rely upon the Internal Revenue Manual ("I.R.M."), which "does not have the force of law," but is instead merely "persuasive authority." *Romano-Murphy v. Comm'r*, 816 F.3d 707, 719 (11th Cir. 2016).

First, Rum argues that the Revenue Agent has discretion to determine whether to assess the penalty and in what amount, citing I.R.M. § 4.26.16.6.7. Rum argues, however, that Kerkado indicated that she had no discretion and that her manager, Davis, ordered her to change the penalty from non-willful to willful and to charge the

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559 (5th Cir. 2000); *Cmty. for Creative Non-Violence v. Lujan*, 908 F.2d 992, 998 (D.C. Cir. 1990) ("Only in the rare case in which the record is so bare as to frustrate effective judicial review will discovery be permitted under the second exception noted in Overton Park."); see also *Porter v. Califano*, 592 F.2d 770, 782–84 (5th Cir. 1979) (applying the § 706(2)(F) exception and holding the agency factfinding procedures there were inadequate where the officials accused of corruption by the plaintiff played a "pervasive role" in the factfinding). We need not in this case decide precisely where the line should be drawn, but the caselaw suggests that the ordinary arbitrary and capricious standard of review should apply in the absence of an insufficiency in the factfinding procedures of considerable significance. As our discussion in the text below indicates, Rum's several arguments in this regard are wholly without merit, and he fails to come close to that line.

maximum penalty. We conclude that Rum's argument is wholly without merit. In § 5321(a)(5), Congress authorized the Secretary to exercise discretion when setting the penalty amount. Although the I.R.M. provides the examining agent with the discretion to set the amount of the penalty, it requires "written approval of the examiner's manager," I.R.M. § 4.26.16.4.7(2) (2008),[6] and submission to area counsel for review, I.R.M. § 4.26.17.4.3 (2008). Thus, the examining agent did not have unfettered discretion; rather, under the I.R.M. the IRS had discretion to set the penalty through its various employees.

Second, Rum argues that the IRS improperly withheld from him the mitigation guidelines, thus preventing him from a fair opportunity to contest the amount of the penalty in the appeals process and to argue for mitigation. Rum's argument in this respect is wholly without merit for several reasons. The mitigation guidelines are publicly available on the IRS website as well as Westlaw and LexisNexis, and thus were available to Rum and counsel.

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[6] This older version of the I.R.M., which was in force at the time of the Rum audit, reads: When a penalty is appropriate, IRS has established penalty mitigation guidelines to aid the examiner in applying penalties in a uniform manner. The examiner may determine that a penalty under these guidelines is not appropriate or that a lesser penalty amount than the guidelines would otherwise provide is appropriate or that the penalty should be increased (up to the statutory maximum). The examiner must make such a determination with the written approval of the examiner's manager and document the decision in the workpapers.
I.R.M. § 4.26.16.4.7(2) (2008).

Moreover, his argument—that not having the mitigation guidelines deprived him of an opportunity to argue that the facts and circumstances of his case warranted an exercise of discretion for the imposition of no penalty or a reduced penalty—is belied by the fact that he did, in fact, make those arguments in the appeals process. Also, Rum does not identify in his opening brief on appeal what additional facts and circumstances he might have argued had he had access to the mitigation guidelines. Finally, because the IRS at every level did in fact determine and sustain the fraud penalty, the mitigation guidelines on their face indicate that they could be of no benefit to Rum.

Third, Rum argues more generally that Kerkado failed to explain why the willful penalty was imposed and why the penalty was set at 50% of the value of Rum's UBS account, thus depriving him of a fair opportunity to contest the penalty in the appeals process. We readily reject this argument. The Form 886-A—which Rum acknowledges receiving before the appeals conference—amply explains both the factual and legal basis for imposing the penalty. The Form 886-A sets out the relevant statutes and regulations and sets forth extensively the factual basis on which Kerkado was relying in imposing the penalty. That factual basis included, inter alia: that his UBS advisor had explained to him in 2002 that the income from his account was taxable in the U.S., but he failed to complete the required W-9 form (thus concealing the existence of his account from the IRS); that he

knowingly and willfully failed to report his income from his Switzerland accounts in his tax returns for 2005, 2007 and 2008; that he filed every tax return checking a box indicating that he did not have any interest in a foreign account; and that in 2008, during the audit of his 2006 tax return, he had an opportunity to disclose his then-existing Arab Bank account, but failed to do so, disclosing only the UBS account of which he thought the IRS was already aware, and stating that he had closed the UBS account. Rum's argument that he was denied a fair opportunity to contest the penalty in the appeals process is totally without merit.

Fourth, Rum argues that Kerkado improperly merged his FBAR penalty examination and the tax return examination when she offered him an improper bargain. Initially, we note that Rum cites the I.R.M. for the proposition that the two examinations cannot be merged. However, this merger argument was not presented during the IRS proceedings and is therefore waived. Moreover, nothing in the cited provision of the I.R.M. precludes settlement offers, as made by Kerkado in this case. Indeed, Congress has expressly authorized the IRS to negotiate compromised penalties under 26 U.S.C. §§ 7121 (Closing Agreements) and 7122 (Compromises). Employing her discretion, Kerkado offered Rum the same terms he would have received had he qualified for the Offshore Voluntary Disclosure Program in return for not contesting his civil fraud penalty: 20% instead of the 50% that would otherwise be imposed. There was no improper

bargaining here. Rather, Kerkado proposed a global settlement; it was an authorized settlement offer, not a threat of unwarranted penalties as a bargaining point.

Fifth, Rum makes a conclusory argument that Appeals Officer Wrightson created a new issue at the appeals level by denying the use of the mitigation guidelines because Rum did not cooperate with the IRS during the investigation. The I.R.M. prohibits the consideration of new issues at the appeals level, I.R.M. § 8.6.1.6.2(1) (2013), but permits consideration of "new theories and/or alternative legal arguments," I.R.M. § 8.6.1.6.2(3) (2013). This argument too is wholly without merit. It is not certain that Rum's complaint involves a new "issue" not permitted by the I.R.M. In any event, Appeals Officer Wrightson cited Rum's lack of cooperation merely as an alternative reason that he did not qualify for the mitigation guidelines, the fraud penalty being the primary reason.

In sum, Rum's several arguments that the IRS factfinding proceedings were so insufficient as to warrant de novo review—in departure from the usual arbitrary and capricious review—are wholly without merit.

E. Arbitrary and capricious review

Raising the same alleged flaws in the process, Rum argues that this Court should hold that the IRS's actions in determining his FBAR penalty were arbitrary and capricious. However, because we

determined above that the actions were not improper, we hold that the IRS's actions were not arbitrary and capricious.

F. Additions to the base amount

Rum argues that the imposition of interest and late fees should be voided because the IRS did not provide sufficient explanation as why he was assessed the maximum penalty. Rum again relies on the same alleged flaws in the IRS's factfinding process. For the reasons stated above, Rum's arguments in this regard are wholly without merit, and are accordingly rejected.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No: 8:17-cv-826-T-35AEP

SAID RUM,

Defendant.

ORDER

THIS CAUSE comes before the Court for consideration of Defendant Said Rum's Motion for Summary Judgment, (Dkt. 30); the Response in opposition thereto filed by the United States, (Dkt. 55); the United States' Motion for Summary Judgment, (Dkt. 31); and, the Response in opposition thereto filed by Defendant. (Dkt. 58)

On August 2, 2019, United States Magistrate Judge Anthony E. Porcelli issued a Report and Recommendation ("R&R"), recommending that the United States' Motion for Summary Judgment, (Dkt. 31) be GRANTED, and Defendant's Motion for Summary Judgment, (Dkt. 30), be DENIED. (Dkt. 71) On August 16, 2019, Defendant timely filed his Objections to the Magistrate Judge's R&R, (Dkt. 72),

and on September 13, 2019, a Response in opposition thereto was filed by the United States. (Dkt. 75)

After conducting a careful and complete review of the findings and recommendations, a district judge may accept, reject or modify the Magistrate Judge's report and recommendation. 28 U.S.C. § 636(b)(1); *Williams v. Wainwright*, 681 F.2d 732, 732 (11th Cir. 1982), cert. denied, 459 U.S. 1112 (1983). A district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). This requires that the district judge "give fresh consideration to those issues to which specific objection has been made by a party." *Jeffrey S. v. State Bd. of Educ.*, 896 F.2d 507, 512 (11th Cir.1990) (quoting H.R. 1609, 94th Cong. § 2 (1976)). In the absence of specific objections, there is no requirement that a district judge review factual findings de novo, *Garvey v. Vaughn*, 993 F.2d 776, 779 n.9 (11th Cir. 1993), and the court may accept, reject, or modify, in whole or in part, the findings and recommendations. 28 U.S.C. § 636(b)(1)(C). The district judge reviews legal conclusions de novo, even in the absence of an objection. See *Cooper-Houston v. Southern Ry.*, 37 F.3d 603, 604 (11th Cir. 1994).

> Defendant Rum lodged several objections to the R&R. Specifically he contends:

The Magistrate Erred When He Found That as a Factual Matter, Rum Did Not Qualify for Mitigation.

The Magistrate wrongly misconstrued that 31 U.S.C. § 5321 superseded or invalidated 31 C.F.R. § 1010.820(g)(2). Therefore, the Magistrate erroneously held that the IRS properly applied 31 U.S.C. § 5321 when assessing the willful penalty against Rum for 50% of the balance of his account.

The Magistrate Misstated an Important Question of Law That Was Proposed by Rum's Pleadings. Rum Thus Argues that the Magistrate Erroneously Applied the Arbitrary and Capricious Standard of Review as to the Amount of His FBAR Penalty Instead of the De Novo Standard of Review.

The Magistrate Erred by Stating That There Was No Issue of Fact Regarding Willfulness. Namely, the Magistrate Does Not Point to Any Direct Evidence Showing That Rum Knew He Had to File the FBAR Report; Therefore, there is Still A Major Question of Fact, Which Shouldn't Be Decided by the Magistrate.

> The Magistrate Erroneously Concluded That the IRS Did Not Act Arbitrarily and Capriciously When Assessing the Maximum Statutory Penalty.
>
> The Magistrate Wrongly Considered the Question of What Evidence This Court May Consider in Reviewing Rum's Administrative Procedure Act Claim.
>
> The Magistrate erroneously ignored the Supreme Court's recent decision in [Dep't of Commerce v. New York, 139 S. Ct. 2551 (2019)] by confining this Court to the administrative record.
>
> The Magistrate Erred by Concluding That Rum Received Proper Notice.
>
> The Magistrate Did Not Apply the Correct Standard of Review for A Motion for Summary Judgment.

(Dkt. 72)

Having reviewed the R&R, the full record, the Objections, and the Response to the Objections, the Court finds that the R&R should be ADOPTED in all respects. The Magistrate Judge correctly: (A) found that the amount of the penalty was not limited by a superseded regulation (Objection II); (B) applied the correct standard of review (Objection III); (C) limited his review to the existing administrative record (Objections I, V, VI and VII); (D) found that the IRS

gave sufficient notice and a reasoned explanation for its decision (Objection VIII); and (E) did not make inappropriate findings as to the Agency's willfulness or Mr. Rum's credibility (Objections IV and IX). Just for clarity, the Court responds specifically to a few of the challenges.

First, with regard to Rum's Objection that the "Magistrate wrongly misconstrued that 31 U.S.C. § 5321 superseded or invalidated 31 C.F.R. § 1010.820(g)(2)," (Dkt. 72 at 3), Rum's challenge fails. In short, the Court concurs with the Magistrate Judge's ruling that the Agency is without authority to modify the maximum penalty allowable under the statute. While it may, in its discretion, impose a lower penalty, the Agency cannot implement Rules that alter the statutory maximum. Thus, any penalty that is otherwise justifiable on the record which does not exceed the statutory maximum cannot be found to be in violation of the statute. As the Defendant properly notes, the Magistrate Judge's finding in this regard is

> in line with the vast majority of the courts that have considered the issue and the better reasoned decisions. See *United States v. Schoenfeld*, No. 3:16-CV-1248-J-34PDB, 2019 WL 2603341, at *4 (M.D. Fla. June 25, 2019); *United States v. Garrity*, No. 3:15-CV-243(MPS), 2019 WL 1004584, at *2 (D. Conn. Feb. 28, 2019); *Norman v. United States*, 138 Fed. Cl. 189, 196 (2018);

> *Kimble v. United States*, 141 Fed. Cl. 373, 388 (2018); *United States v. Horowitz*, 361 F. Supp. 3d 511, 515–16 (D. Md. 2019); *United States v. Park*, 389 F. Supp. 3d 561, 571-74 (N.D. Ill. 2019). Indeed, 'every court to have considered this issue since *Wahdan* and *Colliot* [the cases cited by Mr. Rum] has concluded that the statute and the regulation conflict, the statute controls, and, as such, the IRS is not bound by the limit in the regulation.' Schoenfeld, 2019 WL 2603341, at *4.

(Dkt. 75 at 6)

Additionally, in Objection IV and Objection IX, Mr. Rum incorrectly argues that the Magistrate Judge applied the incorrect legal standard in affirming the Agency's finding of willfulness. (Dkt. 72 at 7–10, 13–17) Rum's contention that willfulness in the civil context requires "proof of a disregard of known legal duty," (Dkt. 72 at 7), or that the Agency had to demonstrate that he subjectively knew of the FBAR reporting requirement, (Dkt. 72 at 20), is incorrect. His reliance on *Ratzlaf v. United States*, 510 U.S. 135 (1994), for those assertions is misplaced. Ratzlaf involved an alleged violation of a criminal statute: the monetary penalty at issue in Mr. Rum's case is a civil penalty. Under the appropriate civil standard, the United States need not show that Mr. Rum subjectively knew or was criminally culpable when he failed to meet the filing

requirements. A showing of reckless disregard of his statutory duty is sufficient, and this is an objective standard that evaluates whether an action entails "an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Bedrosian v. United States*, No. 2:15-cv-5853, 2017 WL 4946433 at *4 (E.D. Pa. 2017) (quoting *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007)). The Magistrate Jude correctly found that the record sufficiently supported the Agency's finding in this regard.

For this reason, too, Mr. Rum's challenge to the Magistrate Judge's decision on the basis that the Judge "Did Not Apply the Correct Standard of Review for A Motion for Summary Judgment" also fails. (Dkt. 72 at 19) Mr. Rum seems to suggest that the Magistrate Judge improperly engaged in fact-finding at the summary judgement stage of the case. (Dkt. 72 at 20) This assertion is plainly wrong. The Magistrate Judge was not making a de novo determination that Mr. Rum's testimony was not credible or deciding whether Mr. Rum acted willfully. Rather, the Magistrate Judge reviewed the administrative record, as he was constrained to do,[1]

[1] This disposes of Objection VII in which Rum suggests the Magistrate Judge committed error in declining to go outside the administrative record to consider his challenges to the Agency's decision. (Dkt. 72 at 17–18) The Magistrate Judge correctly observed that "a court shall only review the record before it to ensure that the agency engaged in reasoned decision-making." (Dkt. 71 at 20). The Supreme Court's decision in *Dep't of Commerce v. New York*, 139 S. Ct. 2551

to determine whether the record supported the Agency's decision that Mr. Rum acted willfully. His evaluation of that record was sound, and his conclusion was correct.[2]

In sum, the Court adopts the Magistrate Judge recommendation that the Court affirm the Agency's decision that Mr. Rum willfully failed to report his foreign account and that the IRS did not abuse its discretion in assessing the maximum penalty for a willful violation of the FBAR reporting requirement. Upon consideration of the Magistrate Judge's thorough and well-reasoned Report and Recommendation, and in conjunction with an independent examination of the file, the Court is of the opinion that the Report and Recommendation should be adopted, confirmed, and approved in all respects.

Accordingly, it is ORDERED that:

1. The Report and Recommendation, (Dkt. 71), is CONFIRMED and ADOPTED as part of this Order; and

2. The United States' Motion for Summary Judgment, (Dkt. 31), is GRANTED, and Defendant's

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(2019), does not alter that longstanding precedent except in very limited circumstances not present on this record.

[2] The remaining objections, not specifically addressed herein, are either bound up in the matters here discussed, or are just a rehash of arguments made in the summary judgment motion, which were thoroughly and correctly disposed of by the Magistrate Judge's Report and Recommendation.

Motion for Summary Judgment, (Dkt. 30), is DENIED.

3. The Clerk is DIRECTED to enter FINAL JUDGMENT in favor of the United States. After entry of final judgment, the Clerk shall terminate any pending motions and CLOSE this case.

DONE and ORDERED in Tampa, Florida, this 26th day of September, 2019.

/s/ Mary S. Scriven
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 8:17-cv-826-T-35AEP

SAID RUM,

Defendant.

_____/

REPORT AND RECOMMENDATION

The Government brought this action against Said Rum ("Rum") to collect outstanding civil penalties assessed against Rum under 31 U.S.C. § 5321(a)(5)(C) for willful failure to report an interest in a foreign bank account for tax year 2007 (Doc. 1). Each party moved for summary judgment and filed responses thereto (Docs. 30, 31, 55, 58, 60, 61, 66, 67). A hearing was conducted on the matter on May 28, 2019. For the reasons that follow, it is recommended that the Government's Motion for Summary Judgment (Doc. 31) be granted and Rum's Motion for Summary Judgment (Doc. 30) be denied.[1]

[1] The district judge referred the matter for issuance of a Report and Recommendation (Doc. 62). See 28 U.S.C. § 636; M.D. Fla. R. 6.01.

I. BACKGROUND

Rum has been a naturalized citizen of the United States since 1982 (Doc. 31, Declaration of Said Rum ("Rum Dep."), at 11). Rum can read, write, and comprehend English (Doc. 58-5). After college, Rum owned and operated several businesses, including a delicatessen, a pet supply store, and a convenience store (Rum Dep., at 17-19). In 1998, Rum opened his first foreign bank account ("UBS account") by depositing $1.1 million from his personal checking account at Chase Manhattan Bank in New York (10/30/08 closing slip at Ex. 6, Bates UBS00050; Rum Dep., at 20-22). The box checked at the top of Rum's UBS AG account opening document shows that he owned a "numbered account" rather than a "name account" (Rum Dep., at 24; UBS Account Opening at Ex. 6, Bates UBS00044-45). Further, the UBS bank records show that Rum elected to have his mail held at UBS, rather than sent to his U.S. address (Kerkado Decl., at ¶8). Rum was charged a fee for UBS AG to retain his mail and all retained mail was deemed to have been duly received by him (UBS Account Opening at Ex. 6, Bates UBS0044-45). Further, the UBS AG Change of Domicile form memorializing Rum's change of address in 2004 provided that "[r]etained mail service remains in force" (Change of Domicile Form at Ex. 6, Bates UBS00049). Agent Marjorie Kerkado ("Kerkado"), the IRS agent assigned to conduct Rum's examination, declared that withholding mail helps avoid disclosure of foreign bank accounts to the IRS

(Kerkado Decl., at ¶9). Rum opened the UBS account to conceal money from potential judgment creditors (Rum Dep., at 42). Interestingly, in the Appeals Case Memorandum written by Appeals Officer Svetlana Wrightson ("Wrightson"), as well as in Kerkado's Declaration, it is noted that Rum provided two inconsistent versions concerning the lawsuit judgment creditors he was attempting to conceal the money at issue from (Doc. 30-29; Kerkado Decl., at ¶10). For instance, Wrightson noted that, "[p]er one version of the Taxpayer's story, in 1998 he was in a car accident and was sued by the victim of the accident. Per a second version, the Taxpayer was sued by his customer who slipped and fallen inside his business store." (Doc. 30-29).

To that effect, Rum alleged that his lawyer advised him to place the money in a foreign bank account for concealment purposes (Rum Dep., at 45-47). Rum gave inconsistent statements on why he failed to return the money to the U.S. earlier. For example, Rum declared that he was afraid of being penalized with a fee for closing the foreign bank account, but then also declared that he was satisfied with returns on investment, and thus decided to leave the funds in the foreign bank account (Doc. 58-30, Kerkado's Response to Rum's Protest Letter). Rum admitted that "he was very active with communicating investment strategies to UBS" because "he wanted to ensure he was getting the best return on his investment with UBS" (Doc.

31-11, Petition for Determination of Notice of Deficiency).

From 2002 to 2008, UBS sent bank statements to Rum that included the following notice on the cover:

> The information contained herein is intended to provide you with information which may assist you in preparing your US federal income tax return. It is for information purposes only and is not intended as formal satisfaction of any government reporting requirements.

(Income Statements USA at Exhibit 6, Bates UBS00378-44). Further, in 2004, Rum signed a document in Switzerland titled "Supplement for New Account US Status" (Supplement at Ex. 6, Bates UBS00048). The signed document contains the following statement: "In accordance with the regulations applicable under US law relating to withholding tax, I declare, as the holder of the above-mentioned account, that I am liable to tax in the USA as a US person." *Id.* In 2007, Rum was the owner of a foreign bank account at UBS AG in Switzerland and had exclusive signature authority on the account (Rum Dep., at 20-35). Rum's UBS AG account balance exceeded $10,000 in 2007 (Kerkado Decl., at ¶4; Monthly balance at Ex. 6, Bates UBS00010; UBS Bank Statements at Ex. 6, Bates UBS00378 – 444). Rum's UBS account earned income each year, except for 2006 (UBS

bank statements at Ex. 6, Bates UBS00011 and UBS00378-444; Kerkado Decl., at ¶11; Rum Dep., at 66). Rum owned the UBS account until October 26, 2008, when he closed it to transfer $1.4 million to Arab Bank, another bank located in Switzerland.[2] *Id.*

Rum alleged that he used a tax preparer to complete his returns; nevertheless, Rum's 2007 tax return is one of several tax returns that is marked as "Self-Prepared" on the tax preparer's signature line (2007 Forms 1040 at Ex. 2; Rum Dep., at 97-98).[3] Rum signed the 2007 tax return on February 27, 2008; this signature is found on Form 1040 immediately below the following standard provision: "Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete." (2007 Form 1040 at Ex. 2; Rum Dep., at 97). Further, Rum alleged that he provided his tax preparer with the documents necessary to prepare the returns (Rum Dep., at 78-

[2] During a 2008 IRS examination, Rum did not disclose the foreign bank account he maintained at Arab Bank, after closing the UBS account for financial reasons (Kerkado Decl., at ¶20).

[3] Rum claimed in his answers to interrogatories and during his deposition that George Hershkowicz prepared his returns from 1999 to 2007, a man who is now deceased (Rum Interrogatory Response No. 10 at Ex. 9; Rum Dep., at 74). However, Rum claimed in his Petition to the Tax Court that Steve Mermel Stein prepared his tax returns, a man who owned the firm where George Hershkowicz worked (Doc. 31-11, Petition for Determination of Notice of Deficiency).

79). Nonetheless, Rum admits that he never told the tax preparer about his foreign bank account and claims that the tax preparer never asked him about the existence of a foreign bank account (Rum Dep., at 79). Line 7a of Schedule B of the 2007 Form 1040 tax return contains the following question: "At any time during 2007, did you have an interest in or signature or other authority over a financial account in a foreign country, such as a bank account, securities, or other financial account? See instructions for exceptions and filing requirements for Form TD F 90-22.1 [FBAR]." (Kerkado Decl., at ¶7; 2007 Form 1040 at Ex. 2). Due to ownership of the UBS account, Rum was required to file the FBAR on or before June 30, 2008, for tax year 2007 (Kerkado Decl., at ¶4). Instead, Schedule B of Rum's 2007 tax return is one of several tax returns that represented that Rum did not have an interest in a foreign financial account; specifically, a "no" was marked on Question 7(a) of Schedule B (2007 Form 1040 at Ex. 2; Rum Dep., at 97-98). Rum failed to file an FBAR repeatedly prior to tax year 2007; in fact, Rum only filed an FBAR for tax year 2008 (Kerkado Decl., at ¶¶6-7). Specifically, on October 6, 2009, UBS sent a written notice to Rum stating, in relevant part, that Rum's account with UBS appears to be within the scope of the IRS Treaty Request (10/6/2009 Letter at Ex. 13; Rum Dep., at 53-54). Nine days later, Rum filed his first FBAR form, on October 15, 2009, for tax year 2008 (2008 FBAR at Ex. 17; Kerkado Decl., at ¶6). Further, Rum admitted that

while he did not disclose the UBS account on his tax returns or the Free Application for Federal Student Aid ("FAFSA"), he disclosed the account on his mortgage application to demonstrate his strong financial position (Kerkado Decl., at ¶12).

Upon an initial review by the IRS of Rum's case, Kerkado proposed a non-willful FBAR penalty against Rum (Doc. 58, Deposition of Terry Davis ("Davis Dep."), at 15-16). Terry Davis, her supervisor, approved the proposal, subject to the approval of area counsel (Davis Dep., at 19). Davis then sent it to area counsel for approval (Davis Dep., at 15-16). Kerkado and Davis initially proposed a non-willful penalty instead of a willful penalty based on the prior inaction of New York IRS agents, who had failed to raise an FBAR penalty in Rum's case. Specifically, Davis testified that this was not a close call in terms of willfulness; instead, both him and Kerkado "were initially bothered by the fact that the FBAR penalty wasn't raised initially by the service." (Davis Dep., at 79). Kerkado similarly testified that they did not feel they had "a leg to stand on" (Kerkado Dep., at 72-73). However, area counsel's approval of the non-willful penalty was accompanied by the following language:

> It is our understanding that the revenue agent did not propose a willful penalty in this case because the prior revenue agent failed to raise the issue of filing FBAR forms in the

> earlier examination. In the absence of additional facts not stated in this memorandum, this office believes that there is sufficient evidence to impose the willful penalty should the Commissioner make that determination. Any evidence that the prior revenue agent failed to raise the FBAR issue should be inadmissible in a court proceeding as not relevant to determining the taxpayer's intent at the time the violations were committed.

(Doc. 58-8, Office of Chief Counsel Internal Revenue Service Memorandum). As such, the memorandum's language invited the agents to reconsider Rum's case (Doc. 58-8, Office of Chief Counsel Internal Revenue Service Memorandum). Once Kerkado and Davis ultimately realized, through the memorandum's language, that their initial reasoning was based on an irrelevant "factor when it comes to willful definition," Rum's case was reconsidered and a willful penalty was proposed (Davis Dep., at 79). Then, both Davis and area counsel approved Kerkado's proposal for a willful penalty (Davis Dep., at 77-84). Kerkado never recommended anything lower than 50% of the account balance at the time of the violation for a willful penalty (Davis Dep., at 82-83). Both Davis and area counsel agreed that Rum was ineligible for mitigation because of the proposed civil tax fraud penalty (Davis Dep., at 95). Notably, the

Internal Revenue Manual ("I.R.M.") provides that, if the maximum balance of the account exceeds a million dollars at the time of the violation, the FBAR statutory maximum applies. Exhibit 4.26.16-2. Normal FBAR Penalty Mitigation Guidelines for Violations Occurring After October 22, 2004, 2A I.R.M. Abr. & Ann. §4.26.16-2. Here, it is undisputed that the account exceeded a million dollars during tax year 2007 (10/30/08 closing slip at Ex. 6, Bates UBS00050; Rum Dep., at 20-22; Rum Dep., at 11:15-22 at Ex. 5; 20:24-21:21, 35:7-12 at Ex. 5; Kerkado Decl. ¶4 at Ex. 7; Monthly balance at Ex. 6, Bates UBS00010; UBS Bank Statements at Ex. 6, Bates UBS00378 – 444; Stip. Facts ¶¶1-3; Doc. 58-5). However, the I.R.M. also provides for an exception, that is, the statutory maximum could be reduced if a taxpayer meets four mitigating factors. Here, the only mitigation factor at issue is the civil tax fraud penalty.[4] The I.R.M. provides that, if the IRS determines or sustains a fraud penalty, then mitigation of the maximum statutory penalty cannot apply. Exhibit 4.26.16-2. Normal FBAR Penalty Mitigation Guidelines for Violations Occurring After October 22, 2004, 2A I.R.M. Abr. & Ann. § 4.26.16-2; IRM 4.26.16.4.6.1(2)(d) (July 1, 2008).[5]

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[4] During the hearing before the undersigned on May 28, 2019, the parties conceded that the only mitigating factor at issue is the civil tax fraud penalty.

[5] A relevant portion of the I.R.M. requires that the "IRS did not determine a fraud penalty against the person for an underpayment of income tax for the year in question due to

Here, Davis testified that the facts and circumstances of this case did not warrant a downward departure from the maximum statutory amount and the case was appropriately handled (Davis Dep., at 83, 98). Kerkado, on the other hand, testified that she did not feel she had the discretion to recommend anything lower than the maximum statutory penalty and could not recall consulting the I.R.M. (Doc. 58, Deposition of Marjorie Kerkado ("Kerkado Dep."), at 22-26, 85, 88). Nonetheless, Davis declared that Kerkado was overall a good agent that was thorough, knowledgeable, and followed the I.R.M. (Davis Dep., at 7, 71). Kerkado testified that she ultimately proposed the willful penalty sometime in March of 2013, but that it ultimately was not her decision, and that she could not recall when she put all the facts together and convinced herself that Rum was willful (Kerkado Dep., at 44, 69). While Kerkado did find Rum to be willful, she felt imposing the maximum statutory penalty "was a lot" (Kerkado Dep., at 90). Kerkado further testified that Davis and area counsel would be the best people to know if there were sufficient facts to support a willful penalty; she was simply in charge of gathering the facts and asking if they were sufficient for a certain penalty (Kerkado Dep.,

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the failure to report income related to any amount in a foreign account." IRM Exhibit 4.26.16-2 (July 1, 2008) (emphasis added). Another relevant portion provides that the "Service did not sustain a civil fraud penalty against the person for an underpayment for the year in question due to the failure to report income related to any amount in a foreign account." IRM 4.26.16.4.6.1(2)(d) (July 1, 2008) (emphasis added).

at 126). Further, Kerkado submitted a Summary Memo detailing the basis for why a willful penalty was resubmitted instead of the non-willful penalty, in which she specifically noted that the mitigation guidelines were considered and not applicable due to a civil fraud penalty being proposed and appealed (Doc. 30-24, Kerkado's Summary Memorandum in Support of FBAR Penalty). Further, Kerkado's FBAR Examination Lead Sheets also reveal a notation demonstrating that she considered the I.R.M. mitigation guidelines in Rum's exam (Doc. 67-1).

On June 3, 2013, at the conclusion of Rum's IRS examination, the IRS sent Rum Letter 3709 stating that it was "proposing a penalty" for willful failure to file the FBAR; the letter cited the amended statute that provided for the maximum penalty of 50% of the account at the time of violation (Doc. 59, at Ex. 1, "Letter 3709"). Previously, on June 11, 2012, Kerkado sent Rum a letter informing him that, since an agreement could not be reached pursuant to her offer of a reduced FBAR penalty (20% of the balance of his account) in exchange for agreeing to the civil fraud penalty, the maximum statutory penalty would apply for tax year 2007 (Doc. 58-16, Kerkado Letter to Rum). Further, Rum posits that Wrightson offered him the same deal afterwards (Doc. 58-38, Declaration of Said Rum, at 9). Specifically, Rum alleges that Wrightson said she would give him the same offer Kerkado had if he would provide proof for such offer. *Id.* However, Rum failed to provide such proof

to Wrightson. *Id.* The June 3, 2019 Letter 3709 further explained that Rum would have to accept the penalty, appeal the decision, or the IRS would assess the penalty and begin collection procedures if Rum elected to do nothing. *Id.* Along with the Letter 3709, Rum was provided with Form 886-a Explanation of Items (Doc. 58-5). The Form set forth the detailed basis upon which the IRS proposed the willful penalty against Rum. *Id.* While Agent Kerkado had the authority to recommend the assessment of the willful FBAR penalty against Rum for several tax years, she exercised her discretion to recommend the imposition solely for tax year 2007 (Kerkado Decl., at ¶24; Doc. 30-29, "Appeals Memorandum").

Pursuant to Letter 3709, on July 2, 2013, Rum elected to appeal the proposed willful penalty by stating that he sought the "discretionary Assessment whereby the Penalty cannot exceed $10,000" (Doc. 58, Ex. 27).[6] Wrightson was the Appeals Officer who issued the Appeals Memorandum that sustained the willful FBAR penalty against Rum, including the civil fraud penalty (Doc. 30-29, "Appeals Memorandum"; Doc. 58-22, Deposition of Svetlana N. Wrightson, at

[6] The amended statute's limit for non-willful violations is $10,000. 31 U.S.C. § 5321(a)(5)(B). The IRS checked the second box on Letter 3709, proposing a willful violation, rather than checking the box which provided for a non-willful violation.

114).[7] Wrightson testified that the reason for sustaining the maximum willful FBAR penalty was because the facts, circumstances, and tax law all supported it (Doc. 58-22, Deposition of Svetlana N. Wrightson, at 14). In her opinion, based on the I.R.M. language, the mitigation factors were properly applied and Rum was disqualified from mitigation based on the civil fraud penalty.[8] *Id.* Rum also filed a formal protest opposing the fraud penalty on April 16, 2013, to which Kerkado responded with a detailed letter that set forth her reasoning (Doc. 58-30, Kerkado's Response to Rum's Protest Letter, "Kerkado Response"). Rum then proceeded to file a petition with the Tax Court, challenging the IRS's fraud penalty determination under 26 U.S.C. § 6663 (Doc. 31-11, Petition for Determination of Notice of Deficiency). The Tax Court ultimately entered a stipulated order whereby Rum would not be subject to a civil fraud penalty (Doc. 58-20). The Government then brought this action against Rum to collect outstanding civil penalties under 31 U.S.C. § 5321(a)(5)(C) for willful failure to report an interest in a foreign bank account for calendar year 2007 (Doc. 1). The

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[7] Wrightson further noted in the Appeals Memorandum that Rum indeed failed to qualify for relief under the mitigation guidelines; Rum received the IRS Appeals Office notice on April 30, 2015 (Doc. 30-29, "Appeals Memorandum").

[8] Wrightson noted in the Appeals Memorandum that Rum failed to meet the mitigation threshold conditions because of both the fraud penalty and his failure to cooperate (Doc. 30-29).

parties' cross-motions for summary judgment are before the undersigned for consideration.

II. STANDARD OF REVIEW

Summary judgment is appropriate where the movant demonstrates that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1300 (11th Cir. 2012). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The existence of some factual disputes between the litigants will not defeat an otherwise properly supported summary judgment motion; "the requirement is that there be no genuine issue of material fact." *Id.* at 247-48 (emphasis in original). The substantive law applicable to the claims will identify which facts are material. *Id.* at 248. In reviewing the motion, courts must view the evidence and make all factual inferences in a light most favorable to the non-moving party and resolve all reasonable doubts about the facts in favor of the non-movant. *Dadeland Depot, Inc. v. St. Paul Fire and Marine Ins. Co.*, 483 F.3d 1265, 1268 (11th Cir. 2007) (citation omitted).

III. DISCUSSION

The parties' pleadings pose three questions before the Court: (1) whether, upon amendment, 31 U.S.C. § 5321 superseded or invalidated 31 C.F.R. § 1010.820(g)(2); (2) whether there is a genuine issue of material fact over willfulness; and finally, (3) whether the IRS acted with bad faith or arbitrarily and capriciously.

A. Interplay of statutory and regulatory law

As an initial matter, a question before the Court is whether the maximum penalty for a willful violation of 31 U.S.C. § 5321 superseded 31 C.F.R. § 1010.820(g)(2). Each year, taxpayers must report to the IRS any financial interests held in a foreign bank by completing a form commonly known as the FBAR. 31 U.S.C. § 5314(a). If a taxpayer fails to file the FBAR timely, the Secretary of the Treasury ("Secretary") can impose a civil money penalty. 31 U.S.C. 5321(a)(5(A). In 2004, Congress amended 31 U.S.C. § 5321 to reflect an increased penalty for willful FBAR violations to either the greater of $100,000 or 50% of the balance of the account at the time of the violation. See American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 821, 118 Stat. 1428, 1586 (2004) (codified at 31 U.S.C.A. § 5321 (a)(5)). Specifically, the amended statute provides that

5) Foreign financial agency transaction violation.—

> (A) Penalty authorized.--The Secretary of the Treasury may impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314.
>
> (B) Amount of penalty.--
>
> (C) Willful violations.--In the case of any person willfully violating, or willfully causing any violation of, any provision of section 5314—
>
> (i) the maximum penalty under subparagraph (B)(i) shall be increased to the greater of—
>
> (I) $100,000, or
>
> (II) 50 percent of the amount determined under subparagraph (D) . . .

31 U.S.C. § 5321 (emphasis added).[9] To this date, the Secretary has not promulgated an updated regulation that reflects these amendments. 31 C.F.R. § 1010.820(g)(2). Specifically, the regulation continues to provide that

> (g) For any willful violation committed after October 27, 1986, of any requirement of § 1010.350, § 1010.360, or § 1010.420, the Secretary may

[9] The amended statute also added a penalty for non-willful violations limited to $10,000. 31 U.S.C. § 5321(a)(5)(B).

> assess upon any person, a civil penalty:
>
> (2) In the case of a violation of §1010.350 or §1010.420 involving a failure to report the existence of an account or any identifying information required to be provided with respect to such account, a civil penalty not to exceed the greater of the amount (not to exceed $100,000) equal to the balance in the account at the time of the violation, or $25,000.

31 C.F.R. § 1010.820(g)(2) (emphasis added). While the parties agree that the applicable statute on reporting foreign bank accounts is the amended version of 31 U.S.C. § 5321, Rum argues that the IRS acted arbitrarily and capriciously because the regulation still applies. On the other hand, the Government argues that 31 C.F.R. § 1010.820(g)(2) is inconsistent with the 2004 amendments to 31 U.S.C. § 5321, and as such, the regulation was implicitly superseded or invalidated by the statute.

Under 5 U.S.C. § 706(2), "a court must hold unlawful and set aside agency actions which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). Rum argues that the IRS's action was "not in accordance with law" because the regulation was not followed when the IRS assessed the FBAR penalty for tax year 2007, and as such the court must hold the action "unlawful" and set it aside.

Rum relies on two cases, *United States v. Colliot*[10] and *United States v. Wahdan*[11], which held that, despite the statutory amendment, the regulation is still in force.12[12] Initially, *Colliot* held that 31 C.F.R. § 1010.820(g)(2) is consistent with 31 U.S.C.A. § 5321 as amended, and as such, was not superseded or invalidated; *Wahdan* then issued a congruous decision based on *Colliot*. 2018 WL 2271381; 325 F. Supp. 3d 1136. *Colliot* reasoned that the statute did not supersede or invalidate the regulation because they could be applied consistent with each other. *Id.* at 2-3. To that effect, *Colliot* noted that the amended statute vested the Treasury with the discretion to determine the amount of the willful penalty, as long as it did not exceed the ceiling set, i.e., $100,000 or 50% of the account at the time of the violation, and the Treasury cabined that discretion at $100,000 by not amending the regulation. *Id. Wahdan* held similarly by essentially noting that the amended statute "does not mandate imposition of the maximum penalty" and instead left the discretion with the Treasury, who failed to amend the regulation after fourteen years. 325 F. Supp. 3d at 1139.

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[10] No. AU-16-CA-01281-SS, 2018 WL 2271381 (W.D. Tex. May 16, 2018).

[11] 325 F. Supp. 3d 1136 (D. Colo. 2018).

[12]The only guidance on this issue from the courts originates solely from opinions issued by district courts and federal claims courts.

Nevertheless, the undersigned finds persuasive the reasoning of a recent string of cases that rejected *Colliot* and *Wahdan* and found that the statute superseded the regulation, namely, *United States v. Jung Joo Park, et al.*[13], *Norman v. United States*[14], *Kimble v. United States*[15], *United States v. Horowitz*[16], and *United States v. Garrity*[17]. Upon review of these cases, the undersigned concludes that, while the amended statute provides that the "Treasury may impose a civil money penalty . . .", Congress provided that the amount of the penalty for willful violations "shall be increased . . . ." 31 U.S.C. § 5321 (emphasis added). The regulation is no longer valid because it is inconsistent with the amended statute which "mandates that the maximum penalty be set to the greater of $100,000 or 50 percent of the balance of the account." *Norman*, 138 Fed. Cl. 189, 195-96 (July 31, 2018) (emphasis added). While the Treasury was vested with discretion in determining the penalty amounts, Congress nevertheless "used the imperative 'shall,' rather than the permissive, 'may.'" *Id.* at 196. In other words, had Congress intended to leave the discretion with the Treasury regarding the amount of the penalties, it could have easily used the word "may" again, as it did in directing who had the authority to impose the

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[13] No. 16 C 10787, 2019 WL 2248544 (N.D. Ill. May 24, 2019).
[14] 138 Fed. Cl. 189 (July 31, 2018).
[15] 141 Fed. Cl. 373 (2018).
[16] 361 F. Supp. 3d 511 (D. Md. 2019).
[17] No. 3:15-CV-243(MPS), 2019 WL 1004584 (D. Conn. Feb. 28, 2019).

penalties. Thus, the amendment "did not merely allow for a higher 'ceiling' on penalties while allowing the Treasury Secretary to regulate under that ceiling at his discretion; rather, Congress raised the ceiling itself, and in so doing, removed the Treasury Secretary's discretion to regulate any other maximum." *Id.*; see also *Jung Joo Park, et al.*, 2019 WL 2248544, at *8 (rejecting *Colliot* and *Wahdan's* reasoning by noting that, "[w]hile Congress did not establish specific reporting requirements in the BSA, leaving that to the Secretary, it did establish, in § 5321, specific parameters for civil penalties, providing what the maximum penalty for willful violations "shall" be"). As such, the regulation is no longer consistent with the amended statute as the maximum penalty remained set at $100,000 rather than to the greater of $100,000 or 50% of the balance of the account. *Norman*, 138 Fed. Cl. at 196. Thus, the regulation is no longer valid. *Id.* (citing *United States v. Larionoff*, 431 U.S. 864, 873, 97 S. Ct. 2150, 53 L. Ed. 2d 48 (1977)).

More so, the Treasury's inaction fails to support Rum's position that the regulation's continued existence translates to its validity in the face of the amended statute. While the regulation was not amended to reflect the statutory maximum, the IRS issued an Internal Revenue Manual ("I.R.M.") section addressing such inaction by noting that while "[a]t the time of this writing, the regulations at [31 C.F.R. § 1010.820] have not been revised to reflect the change in the willfulness

penalty ceiling," the amended statute "is self-executing and the new penalty ceilings apply." I.R.M. § 4.26.16.4.5.1. *Kimble*, 141 Fed. Cl. 373, 388 (2018) (rejecting *Colliot* and *Wahdan* by finding that the statute superseded or invalidated the regulation); *Horowitz*, 361 F. Supp. 3d 511, 515 (D. Md. 2019) (agreeing with *Kimble* in light of a recent I.R.M. provision which states that, as long as a violation occurred after October 22, 2004, "the statutory ceiling is the greater of $100,000 or 50% of the balance in the account at the time of the violation." I.R.M. § 4.26.16.6.5(3) (Nov. 6, 2015)).[18] In fact, when the statute was amended in 2004, "Congress specified that the higher penalties for willful FBAR violations would take effect immediately once the amendments were enacted," as evidenced by the language in the public law: "[t]he amendment made by this section shall apply to violations occurring after the date of the enactment of this Act." *Garrity*, 2019 WL 1004584, at *3. In *Garrity*, the court specifically found that the "Secretary could not override Congress's clear directive to raise the maximum willful FBAR penalty by declining to act and relying on a regulation parroting an obsolete version of the statute." *Id.* Further, the court in Garrity held that the Secretary need not take "some formal regulatory action before the penalty provisions of the BSA acquire the force of law," because the plain

[18] While the I.R.M. lacks the force of law, courts have used it "on a limited basis, to provide guidance in interpreting terms in regulations." *Horowitz*, 361 F. Supp. 3d at 515.

language of the amended statute fails to "suggest that additional regulations are necessary before the civil penalties can take effect." *Id.* The higher penalty requirements for willful FBAR violations took place immediately after the amendment. *Id.* Consequently, the undersigned finds that the regulation is inconsistent with the amended statute. As such, the IRS properly applied 31 U.S.C. § 5321 instead of 31 C.F.R. § 1010.820(g)(2) when assessing the willful penalty against Rum for 50% of the balance of his account.

a. Willfulness

Upon finding that the IRS properly applied 31 U.S.C. § 5321, the Court must now analyze whether the record establishes that Rum meets all the elements for a willful penalty assessed under this statute. To be subject to a willful FBAR penalty under 31 U.S.C. § 5321, the following elements must be met: (1) the person is a U.S. citizen; (2) the person had an interest in or authority over a foreign financial account; (3) the financial account had a balance that exceeded $10,000 at some point during the reporting period; and (4) the person willfully failed to disclose the account and file an FBAR form for the account. 31 U.S.C. § 5314. It is undisputed that Rum is a U.S. citizen who had interest in UBS AG, a bank account located in Switzerland, and that the account had a balance exceeding $10,000 during the reporting period (Rum Dep., at 11:15-22 at Ex. 5; 20:24-21:21, 35:7-12 at Ex. 5; Kerkado Decl., at

¶4; Monthly balance at Ex. 6, Bates UBS00010; UBS Bank Statements at Ex. 6, Bates UBS00378 – 444; Stip. Facts ¶¶1-3). As such, the Court shall focus its analysis on the sole element in dispute: willfulness.

While willfulness is not specifically defined under the statute, the Bank Secrecy Act defines the penalties as "civil money penalties." 31 U.S.C. § 5321(a)(5)(A). In the context of civil money penalties, willfulness "is generally taken [ ] to cover not only knowing violation of a standard, but reckless ones as well." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57, 127 S. Ct. 2201, 167 L.Ed.2d 1045 (2007) (citing *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 108 S. Ct. 1677, 100 L.Ed.2d 115).[19] In the FBAR context, willfulness "may be proven 'through inference from conduct meant to conceal or mislead sources of income or other financial information,' and it 'can be inferred from a conscious effort to avoid learning about reporting requirements.'" *Williams*, 489 Fed. App'x at 658 (quoting *United States v. Sturman*, 951 F.2d 1466, 1476 (6th Cir. 1991)); see, e.g., *Bedrosian v. United States*, No. 2:15-cv-5853, 2017 WL 4946433 at *3, 2017 U.S. Dist. LEXIS 154625 at *3 (E.D. Pa. 2017) (holding that recklessness establishes a willful

[19] Rum's reliance on Cheek v. United States, 498 U.S. 192, 201 (1991) is misplaced. Cheek's narrower standard for willfulness, namely, "a voluntary, intentional violation of a known legal duty" has been applied in a criminal, rather than a civil context. United States v. Sturman, 951 F.2d 1466, 1477 (6th Cir. 1991).

FBAR violation and that "every federal court to have considered the issue has found the correct standard to be the one used in other civil contexts"); *United States v. Bohanec*, 263 F. Supp. 3d 881, 888-89 (C.D. Cal. 2016) (holding that willfulness under §5321 can be shown through "reckless disregard of a statutory duty"). Further, circumstantial evidence and inferences drawn by a court based on the record suffice as "persons who fail to file an FBAR are not likely to admit they knew of the filing requirement and chose not to comply with it." *McBride*, 908 F. Supp. 2d at 1204.

Rum's contention that there is a genuine issue of material fact as to willfulness is unavailing. A taxpayer's failure to review their tax returns for accuracy despite repeatedly signing them, along with "falsely representing under penalty of perjury" that they do not have a foreign bank account (by answering "no" to question 7(a) on Line 7a of Schedule B of a 1040 tax return) in and of itself supports a finding of "reckless disregard" to report under the FBAR. *Kimble v. United States*, 141 Fed. Cl. 373, 376 (2018). Once a taxpayer signs a tax return, they are "put on inquiry notice of the FBAR requirement" and, as such, "charged with constructive knowledge" of the contents of the tax return in question. *Id.* at 385-86. *See also United States v. Williams*, 489 F. App'x 655, 659 (4th Cir. 2012) (holding that Williams wilfully violated the FBAR requirement because "William's signature is prima facie evidence that he knew the contents of the return . . . and at a minimum line 7a's

directions to '[s]ee instructions for exceptions and filing requirements for Form TD F 90-22.1' put Williams on inquiry notice of the FBAR requirement" and that failing to read his returns demonstrates a "conscious effort to avoid learning about reporting requirements . . . and his false answers on . . . his federal tax return evidence conduct that was 'meant to conceal or mislead sources of income or other financial information'"); *United States v. Doherty*, 233 F.3d 1275, 1282 (11th Cir. 2000) (noting that a defendant can be charged with knowledge of the contents of a tax return by signing a fraudulent form); *Norman v. United States*, 138 Fed. Cl. 189, 194-95 (Fed. Cl. 2018) (holding that "[a]t a minimum, Norman was 'put on inquiry notice of the FBAR requirement' when she signed her tax return for 2007, but chose not to seek further information about the reporting requirements . . . [a]lthough one of the consistent pieces of Ms. Norman's testimony was that she did not read her tax return . . . simply not reading the return does not shield Ms. Norman from the implications of its contents"); *Jarnagin v. United States*, 134 Fed. Cl. 368, 378 (2017) (holding that "any individual exercising ordinary business care and prudence" would read the information specified by the government in the tax returns and then "would have made inquiry of their account about the FBAR filing requirements after having identified the clear error in the response provided to question 7a"); *United States v. McBride*, 908 F. Supp. 2d 1186, 1206 (D. Utah 2012) (noting that

"[i]t is well established that taxpayers are charged with the knowledge, awareness, and responsibility for their tax returns, signed under penalties of perjury, and submitted to the IRS").

Here, it is undisputed that Rum signed the 2007 tax return on February 27, 2008, along with other tax returns, charging him with constructive knowledge of the FBAR requirement (Doc. 31-2, at Ex. 2; Rum Dep., at 97). Form 1040 included a plain instruction: "[y]ou must complete this part if you (a) had over $1,500 of taxable interest or ordinary dividends; or (b) had a foreign account . . ." (Doc. 31-2, at Ex. 2) (emphasis added). The instruction clarified that this applies to a person with a foreign bank account. As such, it was irrelevant whether Rum actually believed that his income was not taxable—the question simply asked if such account existed. It is undisputed that Rum knew that such account existed (Rum Dep., at 20-21, 35). Schedule B then proceeds with a plain question, question 7(a): "At any time during 2007, did you have an interest in or a signature or other authority over a financial account in a foreign country, such as a bank account, securities account, or other financial account? See page B-2 for exceptions and filing requirements for Form TD F 90-22.1 [FBAR]" (Doc. 31-2, at Ex. 2). Based on the record, either Rum or his tax accountant repeatedly typed an "X" for "No" in the relevant box (Doc. 31-2,

at Ex. 2; Kerkado Decl., at ¶¶6-7).[20] Yet again, it is undisputed that Rum had an interest in a foreign bank account in 2007 (Rum Dep., at 20-21, 35). As such, Rum's pattern of signing his tax returns without reviewing them, along with falsely answering "no" to question 7(a) suffices to support a finding of willfulness to report under the FBAR.

Further, the record includes more evidence that, while not necessary to establish willfulness, supports this finding by showing a pattern of conscious efforts to conceal and avoid learning about the FBAR reporting requirement. For instance, Rum admitted that the only reason for opening the UBS account was to conceal the money from potential judgment creditors (Rum Dep., at 42). Rum also owned a "numbered" rather than a "name account" and elected to have his UBS mail withheld abroad (Rum Dep., at 24; UBS Account Opening at Ex. 6, Bates UBS00044-45; Kerkado Decl., at ¶8). Additionally, UBS sent bank statements to Rum for numerous years explicitly noting that those statements could assist Rum in

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[20] Even if a tax accountant prepared Rum's tax returns, his reliance "upon advice that [he] never solicited nor received" may not be used as a "shield reliance" and excuse. Jarnagin v. United States, 134 Fed. Cl. 368, 378 (2017) (holding that the Jarnagins cannot use their reliance on their tax accountant as a shield when they never asked about the reporting requirements on their foreign bank account, nor received such advice). Similarly, Rum admits that he never told the tax preparer about his foreign bank account and claims that the tax preparer never asked him about the existence of a foreign bank account (Rum Dep., at 79).

preparing his US tax returns, and that they do not satisfy government reporting requirements in and of themselves (Income Statements USA at Exhibit 6, Bates UBS00378-44). Rum also admitted that he disclosed the UBS account on his mortgage application to assist him financially (Kerkado Decl., at ¶12). These circumstances, along with others,[21] allow the Court to find that Rum meant to conceal his foreign accounts and avoid learning about the FBAR filing requirement. McBride, 908 F. Supp. 2d at 1204. Consequently, because Rum is a U.S. citizen, who had an interest in a foreign bank account with a balance exceeding $10,000 during the reporting period, and willfully failed to report such account, the IRS appropriately proposed a willful FBAR penalty against Rum under 31 U.S.C. §5321.

B. Administrative Procedure Act

Upon finding that the IRS appropriately applied 31 U.S.C. § 5321 when assessing a willful penalty against Rum, the only question remaining before the Court is whether the IRS acted arbitrarily and capriciously when assessing the maximum statutory penalty, i.e., 50% of the balance of Rum's account. Under the Administrative Procedure Act ("APA"), a court must hold unlawful and set aside agency actions, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or

[21] The Court shall address in full these facts and circumstances in the forthcoming section.

otherwise not in accordance with law." 5 U.S.C. §706(2)(A).[22] Specifically,

> An agency['s] [action] would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983). The arbitrary and capricious standard "is exceedingly deferential." *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996) (emphasis added). A reviewing court may not overrule the agency's determination simply because the court would have reached a different result. *Id.* at 542 (noting that "[a]dministrative decisions should be set aside in this context ... only for substantial procedural or

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[22] There is no binding caselaw addressing the standard that applies to the judicial review of the assessment of FBAR penalties. Nevertheless, the APA provides guidance towards conducting the judicial review of an agency's decision. See Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967) (noting that judicial review of final agency actions is presumed under the APA). Further, the parties concede that the assessment of the FBAR penalty is reviewable under the APA (Docs. 31, 58).

substantive reasons as mandated by statute, ... not simply because the court is unhappy with the result reached.") (alterations in original). Indeed, a court shall only review the record before it to ensure that the agency engaged in reasoned decision-making and there was a "rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)); Fund for Animals, Inc. v. Rice, 85 F.3d 535, 541 (11th Cir. 1996). If a court finds that an agency acted arbitrarily and capriciously, the proper course "is to remand to the agency for additional investigation or explanation." Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985). An agency's selection of a penalty is within its discretion, "to be reviewed only for abuse under an arbitrary and capricious standard of review." Ekanem v. Internal Revenue Service, 1998 WL 773614, at *1 (D. Md. 1998); United States v. Williams, No. 1:09-CV-00437, 2014 WL 3746497, at *1 (E.D. Va. June 26, 2014) (holding that the APA standard applies when reviewing an FBAR penalty amount); but see United States v. McBride, 908 F. Supp. 2d, 1186, 1214 (D. Utah Nov. 8, 2012) (giving great deference to the judgment of the agency and holding that the FBAR penalties were within the range authorized by Congress, while not specifically identifying a standard of review).

a. Arbitrary and Capricious

As such, the Court must determine whether there is a rational basis between the facts and the IRS's final decision to impose a 50% willful penalty against Rum. In other words, under this "exceedingly deferential" standard, did the IRS engage in reasoned decision-making, rather than act arbitrarily and capriciously? As an initial matter[23], the I.R.M. states that, if the maximum balance of the account exceeds a million dollars at the time of the violation, the FBAR statutory maximum applies. Exhibit 4.26.16-2. Normal FBAR Penalty Mitigation Guidelines for Violations Occurring After October 22, 2004, 2A I.R.M. Abr. & Ann. §4.26.16- 2. Here, it is undisputed that the account exceeded a million dollars during tax year 2007 (10/30/08 closing slip at Ex. 6, Bates UBS00050; Rum Dep., at 20-22; Rum Dep., at 11:15-22 at Ex. 5; 20:24-21:21, 35:7-12 at Ex. 5; Kerkado Decl. ¶4 at Ex. 7; Monthly balance at Ex. 6, Bates UBS00010; UBS Bank Statements at Ex. 6, Bates UBS00378 – 444; Stip. Facts ¶¶1-3; Doc. 58-5). The IRS assessed a penalty of 50% of the balance in the account penalty, as it was greater than $100,000 in Rum's case. Nevertheless, the I.R.M. provides for the following exception: the statutory maximum could be reduced if a taxpayer meets four mitigation factors. As noted previously, the only mitigation factor at issue is the civil tax fraud penalty. The two pertinent I.R.M. sections

[23] A full discussion in the willfulness section details how the record properly established a rational link between the facts and willfulness finding.

provide that the IRS must not have determined or sustained a fraud penalty to qualify for mitigation. Exhibit 4.26.16-2. Normal FBAR Penalty Mitigation Guidelines for Violations Occurring After October 22, 2004, 2A I.R.M. Abr. & Ann. § 4.26.16-2; IRM 4.26.16.4.6.1(2)(d) (July 1, 2008). As such, the Court must conduct a review, under the arbitrary and capricious standard, establishing whether the IRS had a rational basis for assessing the civil fraud penalty.

1. Civil Fraud Penalty

When imposing a civil fraud tax penalty, the IRS has the burden, by clear and convincing evidence[24], to show that an underpayment of tax exists and that some portion of that underpayment is due to fraud. 26 U.S.C. §6663; 7454(a); Rule 142(b); *Clayton v. Commissioner*, 102 T.C. 632, 646 (1994). The taxpayer's actions and conduct may be sufficient in establishing intent. *Otsuki v. Commissioner*, 53 T.C. 96, 1 05-1 06 (1969). The IRS can rely on circumstantial evidence and reasonable inferences drawn from the facts in the taxpayer's record, as direct proof of intent is rarely available. *Rowlee v. Commissioner*, 80 T.C. 1111, 1123 (1983); *Stone v. Commissioner*, 56 T.C. 213, 223-224 (1971). When considering whether the civil fraud penalty should be applied, the IRS looks to the existence of "badges of fraud." 26 U.S.C. §6663. Depending on the record, one or more badges of

[24] However, as previously noted, the Court must use an arbitrary and capricious standard here.

fraud may be sufficient to prove fraudulent intent. *Bertoli v. Commissioner*, 103 T.C. 501, 518 (1994). Courts have used the following "badges of fraud" as factors in determining the applicability of the civil fraud penalty: (1) understating income, (2) maintaining inadequate records, (3) implausible or inconsistent explanations of behavior, (4) concealment of income or assets, (5) failing to cooperate with tax authorities, (6) engaging in illegal activities, (7) an intent to mislead which may be inferred from a pattern of conduct, (8) lack of credibility of the taxpayer's testimony, (9) filing false documents, (10) failing to file tax returns, and (11) dealing in cash. *Spies v. United States*, 317 U.S. 492, 499 (1943); *Douge v. Commissioner*, 899 F.2d 164, 168 (2d Cir. 1990); *Bradford v. Commissioner*, 796 F.2d 303, 307-308 (9th Cir. 1986), aff'g T.C. Memo. 1984-601; *Recklitis v. Commissioner*, 91 T.C. 874, 910 (1988). The IRS uses several other indicators of fraud in determining a fraud penalty, such as false statements about material facts pertaining to an examination, failure to make full disclosures of relevant facts to an accountant, attorney, or return preparer, pattern of consistent failure over several years to report income fully, transferring assets for concealment purposes, and concealing bank accounts. 25.1.2 - Recognizing and Developing Fraud, 2007 WL 9246743.

Here, the record contains a plethora of implausible and inconsistent explanations of behavior, which altogether lead to a lack of

credibility of Rum's testimony. As an initial matter, the record fails to establish that Rum does not have sufficient education, experience, and diligence to fulfill his U.S. tax obligations. For instance, Mr. Rum can read and write in English and has been proven to comprehend English (Doc. 58-5, "Form"). After college, Rum owned and operated several businesses, including a delicatessen, a pet supply store, and a convenience store (Rum Dep., at 17-19). Further, Rum admitted in his petition to the Tax Court that "he was very active with communicating investment strategies to UBS" and read financial papers because "he wanted to ensure he was getting the best return on his investment with UBS" (Doc. 31-11, Petition for Determination of Notice of Deficiency). As such, the overall record paints the picture of a person who can readily understand the plain language used in tax form instructions, along with the ordinary prudence to handle his duties and affairs. For instance, the tax forms clearly instructed Rum in plain English to declare whether he owned a foreign bank account (Doc. 31-2, at Ex. 2). For numerous years, Rum undisputedly knew he did own a foreign bank account, yet repeatedly declared to the IRS that no such account existed (Rum Dep., at 20-21, 35).

Further, Rum declared that he opened the initial foreign bank account to conceal the money from potential judgment creditors[25] (Rum Dep., at 42). Nevertheless, the record reflects that he made

[25] Rum did not provide evidence supporting this allegation.

inconsistent statements regarding which lawsuit judgment creditors he was trying to conceal his money from: a car accident or a slip and fall injury (Doc. 30-29; Kerkado Decl., at ¶10). Further, Rum gave inconsistent statements on why he did not bring the money back to the United States once that was no longer a concern: Rum declared that he was afraid of being penalized with a fee for closing the foreign bank account, but then also claimed that he was satisfied with the returns on investment, and thus decided to leave the funds in the foreign bank account (Doc. 58-30, Kerkado's Response to Rum's Protest Letter).

While Rum alleges that he used a tax preparer to complete his tax returns, Rum's relevant tax returns are marked as "Self-Prepared" on the tax preparer's signature line (2007 Forms 1040 at Ex. 2; Rum Dep., at 97-98). Rum failed to provide any evidence supporting the allegation that he sought the advice of an accountant or advisor to prepare his tax returns (Doc. 58-30, Kerkado's Response to Rum's Protest Letter). Even assuming that such tax preparer existed, Rum further provided inconsistent statements about the identity of such tax preparer: Rum claimed in his answers to interrogatories and during his deposition that George Hershkowicz prepared his returns from 1999 to 2007, a man who is now deceased, but then also claimed in his Tax Court petition that Steve Mermel Stein prepared his tax returns, a man who owned the firm where George Hershkowicz worked (Rum Interrogatory Response No. 10 at Ex. 9; Rum

Dep., at 74; Doc. 31-11, Petition for Determination of Notice of Deficiency).

In addition, the record reflects a pattern of behavior that allows the Court to infer an intent to mislead and conceal. For instance, Rum's very reason for creating a foreign bank account was to unlawfully conceal his money from potential judgment creditors (Rum Dep., at 42). When opening the account, he elected to own a "numbered account" rather than a "name account," along with paying to have his mail withheld at UBS, rather than sent to the U.S. (Rum Dep., at 24; UBS Account Opening at Ex. 6, Bates UBS00044-45; Kerkado Decl., at ¶8; Change of Domicile Form at Ex. 6, Bates UBS00049). Rum also admits that he never told the tax preparer, if one existed, about his foreign bank account (Rum Dep., at 79). Further, while Rum failed to list his foreign bank account on the relevant tax returns, he did list the account on a mortgage application to benefit financially (Kerkado Decl., at ¶12). Then, while UBS advised Rum of the QI deemed sales, and the record reflects that Rum understood his obligations once briefed, Rum failed to provide a W-9 form, effectively concealing his funds from his offshore account from the IRS (Docs. 30-29, 58-5). Though Rum alleges that he held the belief that his income was not taxable, a belief unsupported by evidence as well, as Kerkado noted, if he truly held that belief, he would not have objected to UBS reporting his income to the IRS (Doc. 58-30, Kerkado's Response to Rum's Protest Letter). Quite the contrary, the

record supports that Rum was repeatedly made aware of his U.S. tax obligations and that Rum avoided fulfilling these obligations. For instance, UBS sent bank statements to Rum from 2002 to 2008 that contained the following notice on the first page:

> The information contained herein is intended to provide you with information which may assist you in preparing your US federal income tax return. It is for information purposes only and is not intended as formal satisfaction of any government reporting requirements.

(Income Statements USA at Exhibit 6, Bates UBS00378-44). Further, in 2004, Rum signed a document in Switzerland titled "Supplement for New Account US Status" (Supplement at Ex. 6, Bates UBS00048). The signed document contains the following statement: "In accordance with the regulations applicable under US law relating to withholding tax, I declare, as the holder of the above-mentioned account, that I am liable to tax in the USA as a US person." *Id.* Then, while Rum alleges that he never read his tax returns, he repeatedly signed under perjury declaring otherwise (2007 Form 1040 at Ex. 2; Rum Dep., at 97). Simply put, as Kerkado asserted, there is no evidence of misunderstandings (Doc. 58-30, Kerkado's Response to Rum's Protest Letter). Even based on Rum's allegations of good faith

misunderstandings, specifically that the money would not have to be reported until brought back to the U.S., the record shows that, even in 2009, he did not report the total income earned offshore. *Id.*

Additionally, during the audit for the 2006 tax return, Rum and his representative concealed the fact that the funds at UBS were transferred to another offshore bank account; to that effect, the IRS noted that Rum disclosed "only the account of which he thought the IRS was already aware" (Doc. 30-29; Doc. 58-5). Rum disclosed both offshore accounts only for tax year 2008 (Kerkado Decl., at ¶¶6-7). Moreover, as Kerkado noted, Rum secured a federal tax attorney to assist him with the 2006 IRS audit; nevertheless, when Offshore Voluntary Disclosure Initiative (OVDI) was open to UBS customers, the taxpayer opted instead for a quiet disclosure (Doc. 58-30, Kerkado's Response to Rum's Protest Letter). As Kerkado further noted, had Rum entered in the OVDI program, he could have avoided any fraud penalties. *Id.* Rum instead chose to continue his concealment until UBS sent him a letter indicating that his account had been disclosed to the IRS. *Id.* The UBS income was not reported on the tax returns until UBS notified the taxpayer of the disclosure to the IRS. *Id.* The offshore income was not reported correctly until IRS made contact with the taxpayer specifically about the offshore account. *Id.* Ultimately, as Kerkado concluded in her letter in response to Rum's protest, Rum secured a tax attorney two and a half years prior to the IRS making contact

regarding the UBS account, and yet, not one accurate return was filed showing the correct income earned offshore. *Id.* If his intent was to comply, he would have by then, but the record fails to establish that. *Id.*

Finally, the record supports that all the behavior detailed above constitutes a pattern of consistent failure over numerous years to report income fully, and involved a substantial amount of money. Specifically, Rum opened the first foreign bank account at UBS in 1998, and the second foreign bank account at Arab Bank in 2008, but only disclosed both of them a decade later, in his 2008 tax return (10/30/08 closing slip at Ex. 6, Bates UBS00050; Rum Dep., at 20-22; Rum Dep., at 24; UBS Account Opening at Ex. 6, Bates UBS00044-45; Kerkado Decl., at ¶¶6-7). Further, Rum's foreign bank account ranged from approximately $1.1 million in 1998 to approximately $1.4 million in 2008. *Id.* Consequently, based on the entirety of the record and Rum's behavior, the undersigned finds the numerous badges of fraud sufficient to show that the IRS had a rational basis upon which to impose the maximum statutory penalty. As such, because the IRS had a rational, reasoned basis for subjecting Rum to the maximum statutory penalty, i.e., 50% of the balance of his account, the IRS did not act arbitrarily and capriciously during the administrative process.

b. Bad Faith

Nevertheless, Rum contends that this Court should go beyond the record and review the IRS's decision under the de novo standard instead. "In applying [the arbitrary and capricious standard], the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see also Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers*, 87 F.3d 1242, 1246 (11th Cir. 1996). As such, a court cannot consider events that transpired after the IRS made its final determination of a penalty. While Rum acknowledges that precedent has established the "record rule" detailed above, exceptions exist. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U. S. 402, 420, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971). Though the Eleventh Circuit has not specified what exceptions would apply in this context, it has noted exceptions recognized by other courts, such as the D.C. Circuit in *IMS, P.C. v. Alvarez*, 129 F.3d 618 (D.C. Cir. 1997). Specifically, Rum contends that the following exception applies in this case: a strong showing of agency bad faith or improper behavior. *Id.* at 624 (holding that the plaintiff failed to make a "'strong showing of bad faith or improper behavior' required to justify supplementing the record.") When raising this exception, a claimant must make a strong showing, based on hard facts and significant evidence, that bad faith or improper behavior "infected the agency's decisionmaking process." *Saget v. Trump*,

2019 U.S. Dist. LEXIS 63773 (E.D.N.Y Apr. 11, 2019) (citing *Tummino v. Torti*, 603 F. Supp. 2d 519, 544 (E.D.N.Y. 2009)).

As an initial matter, Rum contends that the IRS's resubmission and approval of a willful penalty once a non-willful penalty was proposed and approved demonstrates bad faith. The Court finds Rum's argument unavailing. Kerkado and Davis initially proposed a non-willful penalty instead of a willful penalty based on the prior inaction of the New York agents, who had failed to previously raise an FBAR penalty in Rum's case. Indeed, Davis testified that this was not a close call in terms of willfulness; instead, both him and Kerkado "were initially bothered by the fact that the FBAR penalty wasn't raised initially by the service." (Davis Dep., at 79). Kerkado similarly testified that they did not feel they had "a leg to stand on" for a willful penalty prior to the area counsel memorandum (Kerkado Dep., at 72-73). However, while the I.R.M. provides that, once a penalty proposal is approved, the examiner will transmit Letter 3709 to the taxpayer, area counsel approved the non-willful penalty while also noting the following:

> It is our understanding that the revenue agent did not propose a willful penalty in this case because the prior revenue agent failed to raise the issue of filing FBAR forms in the earlier examination. In the absence of

> additional facts not stated in this memorandum, this office believes that there is sufficient evidence to impose the willful penalty should the Commissioner make that determination. Any evidence that the prior revenue agent failed to raise the FBAR issue should be inadmissible in a court proceeding as not relevant to *determining* the taxpayer's intent at the time the violations were committed.

(Doc. 58-8, Office of Chief Counsel Internal Revenue Service Memorandum; IRM 4.26.17.4.3). The memorandum further set forth, in detail, specific factual reasons and caselaw that would support a willful penalty against Rum. *Id.* For instance, the memorandum highlighted that Rum's fraudulent motive for opening the foreign bank account, lying on his returns about the existence of the account, and alleging that a preparer had completed the returns when only Rum had signed them all support a finding of willfulness (Doc. 58-8, Office of Chief Counsel Internal Revenue Service Memorandum). Notably, the memorandum cited United States v. Williams in support of a willfulness finding.[26] As such, the memorandum's language invited the agents to reconsider Rum's case (Doc. 58-8, Office of Chief Counsel Internal

[26] A fuller discussion on *United States v. Williams* and its applicability here can be found in the willfulness section.

Revenue Service Memorandum). Once Kerkado and Davis ultimately realized, through the memorandum's language, that their initial reasoning was based on an irrelevant "factor when it comes to willful definition," Rum's case was reconsidered and a willful penalty was proposed (Davis Dep., at 79). Then, both Davis and area counsel approved Kerkado's proposal for a willful penalty (Davis Dep., at 77-84). As such, Davis and Kerkado did not arbitrarily or in bad faith reconsider Rum's penalty: the memorandum invited them to do so despite approving the initial penalty. While Rum contends that Davis improperly interjected with this process, Kerkado herself testified that Davis and area counsel would be in the best position to know whether sufficient facts supported a willful penalty, as her recommendation was subject to their approval and she was in charge of gathering the facts and making a proposal (Kerkado Dep., at 126). Rum declared that he bases the fact that Davis controlled Kerkado's decision and was tougher on taxpayers on his intuition (Doc. 58-38, Declaration of Said Rum, at 7). "Intuition" does not amount to hard facts and significant evidence. As noted previously, the fact that Kerkado and Davis submitted an initial non-willful penalty shows that they did not act in bad faith, as they could have proposed the highest penalty available from the beginning. Further, Rum has failed to provide, and this Court's review of the record and I.R.M. has failed to reveal any, policy or rule in the I.R.M.

prohibiting the IRS from reconsidering and further developing a case in such circumstances.[27] As such, the record fails to support Rum's contention of bad faith in this respect.

Further, Rum argues that the IRS failed to fully develop and support its willful penalty decision. To reiterate, Rum's file was fully developed based on the language of the area counsel's memorandum that gave supporting facts and caselaw for a willful determination. In fact, Kerkado's Summary Memorandum in Support of the FBAR penalty notes that the memorandum provides a basis for why a willful penalty was resubmitted for approval after the initial non-willful penalty was made and approved by counsel (Doc. 30-24, Kerkado's Summary Memorandum in Support of FBAR Penalty). Among other things, Kerkado cites the same caselaw that area counsel's memorandum had provided. *Id.* Further, Rum was provided with a Form 886-a Explanation of Items that set forth, in great detail, the basis for why the IRS ultimately proposed a willful penalty against Rum (Doc. 58-5). In proposing this penalty, Kerkado exercised her discretion to subject Rum to a penalty for one year, rather than numerous penalties for numerous years. I.R.M. 4.26.16.4.7. In addition, an examiner's workpapers must only document the circumstances that make mitigation of the penalty under the guidelines appropriate.

[27] The fact that Rum's case was reevaluated upon receiving the Area counsel memo does not mean that the I.R.M. was not followed (Davis Dep., at 33).

Exhibit 4.26.16-2 (07-01-2008). As such, the I.R.M. does not mandate that agents fully document the circumstances when mitigation is inappropriate, as found here. There are several instances in the record that demonstrate that Kerkado considered the mitigation guidelines: Kerkado's Summary Memorandum in Support of FBAR Penalty, FBAR Examination Lead Sheets, and the Appeals Memorandum all support that Kerkado considered the mitigation guidelines and found them inapplicable because of the civil fraud penalty (Doc. 67-1; Doc. 30-24, Kerkado's Summary Memorandum in Support of FBAR Penalty; Doc. 30-29, "Appeals Memorandum")[28].

Rum further argues that the mitigation guidelines should have applied when assessing the penalty as the IRS merely proposed a civil fraud penalty, rather than determined or sustained one as the I.R.M. requires. IRM 4.26.16.4.6.1(2)(d) (July

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[28] 28 Rum also contends that the record shows that Wrightson acted with bad faith. Nevertheless, Wrightson testified that she sustained the 50% penalty because the facts, circumstances, and law supported it (Doc. 58-22, Deposition of Svetlana N. Wrightson, at 14). Indeed, based on the I.R.M. language, Wrightson found that Rum was properly disqualified from mitigation (Doc. 58-22, Deposition of Svetlana N. Wrightson, at 45, 112). Even though Wrightson raised the cooperation issue when Kerkado had not, the process was not tainted by that "new issue" as Wrightson sustained the penalty based on the examination which only focused on the civil fraud penalty. Finally, the only basis for Rum's allegation that Wrightson offered him the same deal as Kerkado if he supplied proof, which he failed to, is his own declaration (Doc. 58-38, Declaration of Said Rum, at 9).

1, 2008); IRM Exhibit 4.26.16-2 (July 1, 2008). Nonetheless, the fraud penalty proposed by Kerkado was sustained by the I.R.S. by both the appeals process, and Davis and area counsel (Davis Dep., at 62, 91, 77-84; Doc. 30-29, "Appeals Memorandum"; Doc. 58-22, Deposition of Svetlana N. Wrightson, at 114). Notably, the I.R.M. also uses the term "determined" for violations occurring in this timeframe. Exhibit 4.26.16-2. Normal FBAR Penalty Mitigation Guidelines for Violations Occurring After October 22, 2004, 2A I.R.M. Abr. & Ann. § 4.26.16-2 (emphasis added). Regardless, both provisions speak in terms of the I.R.S. doing something. Anything that occurred subsequently is irrelevant within the I.R.S. context, such as the Tax Court order—indeed, if anything beyond the I.R.S. examination and appeals process would prove pertinent, it would render the very mitigation guidelines moot as the I.R.S. would be unable to consider them when deciding a penalty. Rum failed to present evidence to the contrary. Even assuming arguendo that the mitigation factors could have applied to Rum, he was not entitled to a reduction of the maximum statutory penalty. The IRM explicitly provides that a person "may be subject to less than the maximum FBAR penalty depending on the amounts in the person's accounts" if the mitigation factors are met. IRM 4.26.16.4.6.1(1) (July 1, 2008) at ADM003629 (available at Doc. 31-21 at 20) (emphasis added). Because Rum's account exceeded $1 million, his violation is classified by the I.R.M. as a Level IV, which carries the

maximum statutory penalty. Exhibit 4.26.16-2. Normal FBAR Penalty Mitigation Guidelines for Violations Occurring After October 22, 2004, 2A I.R.M. Abr. & Ann. §4.26.16-2. As such, the I.R.S.'s development and computation of Rum's case and penalty fails to demonstrate a strong showing of bad faith or improper conduct as well.

Rum additionally contends that Kerkado's bargaining and offer of a deal for a reduction of the willful FBAR penalty (20% of the balance of his account at the time of the violation) in exchange for Rum agreeing to the civil fraud penalty is a strong showing of bad faith and improper conduct on the I.R.S.'s part. The I.R.M. provides that penalties should be applied in a fair and consistent matter; to that effect, "[p]enalties are not to be applied as a 'bargaining chip' or because the taxpayer was uncooperative during the examination process. The decision to assert penalties must have a legal basis." 4.10.6.4 I.R.M. Even if bargaining took place precisely as Rum alleged, it would only be relevant to the bad faith contention if the penalty itself was imposed ultimately based on the bargaining. As previously stated, the record has thoroughly established through numerous memorandums, depositions, and caselaw that the willful FBAR penalty had a legal basis. Further, as established by the record and Rum himself, Kerkado tried to

help Rum throughout this entire process[29], rather than punish him or act in bad faith. Kerkado let Rum know that many taxpayers in his position received the maximum statutory penalty under the FBAR (Doc. 58-38, Declaration of Said Rum, at 6). Because they could not reach an agreement otherwise, Kerkado had to impose what was appropriate under the statute and I.R.M. That is not the result of bad faith or punishment—instead, it is the result of the statute and I.R.M. Even in that context, Kerkado still tried to help Rum further when, in the letter informing him that regrettably they could not reach an agreement, she would still limit the willful penalty to one year, instead of multiple years (Doc. 58-16, Kerkado Letter to Rum). As such, Rum yet again failed to establish that the I.R.S.'s actions constituted bad faith here. Because the only exception raised by Rum fails to apply to the IRS's final decision regarding Rum's penalty, the Court's analysis under the arbitrary and capricious standard stands.

c. Brief Statement

The only consideration that remains before the Court is whether Rum received proper notice of this penalty. Because the IRS is not bound by any codified procedures towards assessing FBAR penalties, "only the requirements of the Due

[29] Rum admitted that Kerkado was nice to him during the course of the examination (Doc. 58-38, Declaration of Said Rum, at 6).

Process Clause and §555 of the APA apply." *Moore v. United States*, No. C13-2063RAJ, 2015 WL 1510007, at *8 (W.D. Wash. Apr. 1, 2015).[30] As Moore noted, the only relevant portion to Rum "is the requirement that an agency must give '[p]rompt notice ... of the denial in whole or in part of a written application, petition, or other request ... made in connection with any agency proceeding." 5 U.S.C. §555(e). *Id.* Specifically, 5 U.S.C. §555(e) requires that "[e]xcept in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial." *Id.* (emphasis added). Here, this requirement was satisfied because the IRS issued Rum, on June 3, 2013, both a Letter 3709, and a Form 886-a Explanation of Items (Doc. 59, at Ex. 1, "Letter 3709"; Doc. 58-5). The Letter and Form noted that the IRS was proposing a penalty for knowingly and willfully failing to file the FBAR, what options he had after this proposal, and a detailed memorandum setting forth the reasoning of the IRS in reaching this decision.[31] *Id.* Unlike in *Moore*, Rum was given a notice accompanied by an

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[30] While the IRS can elect not to comply with non-legislative rules such as IRM rules, "without an explanation for a change in interpretation of an agency practice, the court may find the 'interpretation to be an arbitrary and capricious change from agency practice." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981, 125 S. Ct. 2688, 162 L.Ed.2d 820 (2005).

[31] Form 886-a Explanation of Items consists of nine pages setting forth specific facts, caselaw, statutory authority, factual inconsistences, and lack of evidence supporting Rum's allegations to support the selection of the penalty.

explanation as to why the IRS proposed this penalty; further, the record before the Court contains a plethora of explanations for why this penalty was imposed. 2015 WL 1510007, at *8 (holding that the record was mostly "devoid of any explanation of the IRS's reasons for imposing the maximum penalty" and that the notice sent to *Moore* said "nothing at all about why it . . . [chose] a $40,000 maximum penalty as opposed to a smaller amount.") For example, the Letter, Form, Appeals Memorandum, and Kerkado's response to Rum's letter of protest to the fraud penalty all provide detailed explanations on how the IRS selected this penalty (Doc. 59, at Ex. 1; Doc. 58-5; Doc. 30-29; Doc. 58-16); *Moore*, 2015 WL 1510007, at *10 (noting that a court could rely on an Appeals Memorandum, though not disclosed during the decision-making process, as evidence for a reasoned decision that was not arbitrary and capricious). Accordingly, the undersigned finds that the IRS properly assessed the maximum penalty under 31 U.S.C. § 5321(a)(5)(C) for willful failure to report an interest in a foreign bank account for tax year 2007.

For the foregoing reasons, it is hereby RECOMMENDED:

1. Government's Motion for Summary Judgment (Doc. 31) be GRANTED.

2. Rum's Motion for Summary Judgment (Doc. 30) be DENIED.

IT IS SO REPORTED in Tampa, Florida, on this 2nd day of August, 2019.

/s/ Anthony E. Porcelli
United States Magistrate Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14464-GG

UNITED STATES OF AMERICA,

Plaintiff – Appellee

versus

SAID RUM,

Defendant – Appellant

Appeal from the United States District Court

for the Middle District of Florida

(July 22, 2021)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: ROSENBAUM, LUCK, and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46