PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1935

UNITED STATES OF AMERICA

v.

RICHARD COLLINS,
Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 2-18-cv-01069)
District Judge: Hon. Cathy Bissoon

Argued on April 27, 2022

Before: HARDIMAN, RENDELL, and FISHER, *Circuit Judges*

(Filed: June 6, 2022)

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OPINION OF THE COURT

HARDIMAN, *Circuit Judge.*

Richard Collins appeals the District Court's order imposing civil penalties for his failure to report ownership of multiple foreign bank accounts. Because the Court did not err when it held that Collins's failure to report these accounts was a willful violation of the Bank Secrecy Act, we will affirm.

I

Enacted in 1970, the Bank Secrecy Act requires United States citizens to report interests in foreign

accounts with a value exceeding $10,000. 31 U.S.C. § 5314; 31 C.F.R. §§ 1010.306(c), 1010.350(a); *see* Pub. L. No. 91-508, 84 Stat. 1114 (1970). Citizens must disclose these accounts through a Form TD-F 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR). An FBAR is not a tax form and need not be filed with a tax return. *See* 31 C.F.R. §§ 1010.306(c), 1010.350(a). Yet the Internal Revenue Service has the authority to enforce reporting requirements, investigate violations, and assess and collect penalties. *Id.* § 1010.810(g). Congress also has authorized the Secretary of the Treasury to impose "a civil money penalty on any person" who fails to report a foreign account. 31 U.S.C. § 5321(a)(5)(A).

There is no dispute in this case that Richard Collins failed to report his foreign accounts. Collins is a dual citizen of the United States and Canada who, since the 1960s, has worked as a professor in the United States, France, and Canada. He opened bank accounts in all three countries to deposit his earnings. Collins also opened a Swiss bank account in the 1970s, though he never lived in Switzerland. Since Collins moved to the United States in 1994, he has maintained his foreign accounts and continued to receive small pension contributions into his French and Canadian accounts, which he would periodically sweep into his Swiss account. By late 2007, the balance of his Swiss account exceeded $800,000.

Collins did not report any of his foreign bank accounts until he voluntarily amended his tax returns in 2010. At that time, the IRS accepted Collins into its

Offshore Voluntary Disclosure Program, and his accountant prepared amended returns for 2002 to 2009, which yielded modest refunds stemming from large capital losses in 2002. Upon filing the amended returns, Collins withdrew from the Voluntary Disclosure Program, prompting an audit that uncovered an unforeseen issue. Because Collins invested in foreign mutual funds, his Swiss holdings were subject to an additional tax on passive foreign investment companies, 26 U.S.C. § 1291 *et seq.*, which he failed to compute in his amended returns. The IRS audit determined that Collins owed an additional $71,324 for 2005, 2006, and 2007, plus penalties. Collins made payment towards these overdue taxes and associated penalties.

Still worse for Collins, in June 2015 the IRS determined that since he withdrew from the Overseas Voluntary Disclosure Program, Collins was liable for civil penalties under 31 U.S.C. § 5321(a)(5) for his "willful failure" to report foreign accounts. App. 417. The maximum FBAR penalty for the willful failure to report a foreign bank account is the *greater* of $100,000 or 50 percent of the account balance at the time of the violation. *See* 31 U.S.C. § 5321(a)(5)(C)(i), (D)(ii). Fortunately for Collins, the statute grants the agency some discretion, *see id.* § 5321(a)(2)—and specifies a cap for the FBAR penalty, *see id.* § 5321(a)(5)(C)(i). The IRS found Collins eligible for mitigation and assessed a civil penalty totaling $308,064 for 2007 and 2008. After Collins failed to pay, the Government sued to recover the penalty.

The District Court conducted a one-day bench trial and affirmed the agency's penalty calculation. *See United States v. Collins*, 2021 WL 456962, at *4, *11 (W.D. Pa. Feb. 8, 2021). The Court found a "decades-long course of conduct, omission and scienter" by Collins in failing to disclose his foreign accounts, *id.* at *4, before also finding that the IRS's penalty determination was neither arbitrary and capricious nor an abuse of discretion. *Id.* at *5-7. The Court imposed the same FBAR penalty as the IRS, *id.* at *11, and under the Federal Claims Collection Act (the Collection Act), 31 U.S.C. § 3717, awarded 1% per annum interest and a 6% per annum penalty for failure to pay pre- and post-judgment. As of the date of the judgment, the interest and penalties totaled $98,200.

Collins filed this timely appeal.

II

The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1345, and 1355 because this matter arises under a federal statute and the United States is the plaintiff seeking to recover civil penalties. We have jurisdiction under 28 U.S.C. § 1291 to review the District Court's final order imposing Collins's FBAR penalty.

III

Collins claims the District Court erred when it found that he willfully failed to report his foreign bank

accounts in 2007 and 2008 and that the IRS's penalty calculation was an abuse of discretion. Collins also argues the District Court erred by limiting his discovery regarding the IRS's penalty computation and by imposing interest and penalties pursuant to 31 U.S.C. § 3717. We consider each argument in turn.

A

Collins first challenges the District Court's finding that his failure to report the foreign accounts was willful. That finding was significant because the Bank Secrecy Act caps the penalty at $10,000 if the violation is not willful, 31 U.S.C. § 5321(a)(5)(B)(i). We review the District Court's finding of a willful FBAR violation for clear error. *Bedrosian v. United States*, 912 F.3d 144, 152 (3d Cir. 2018). We also apply the usual civil standard of willfulness, which encompasses recklessness, to FBAR penalties. *Id.* at 152. Recklessness is "conduct that violates 'an objective standard: action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" *Id.* at 153 (quoting *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 58, 127 S.Ct. 2201, 167 L.Ed.2d 1045 (2007)). The dispositive question here is whether Collins knew or "(1) clearly ought to have known that (2) there was a grave risk" that he was not complying with the reporting requirement, "and if (3) he . . . was in a position to find out for certain very easily." *Id.* (quoting *United States v. Carrigan*, 31 F.3d 130, 134 (3d Cir. 1994)).

Collins argues that the voluntary correction of his tax returns and application for amnesty prior to any investigation evidences a simple, honest mistake rather than willfulness. He faults the District Court for not considering that neither he, his accountant, nor his lawyer believed he owed any tax prior to the audit. He also points to his prompt payment towards the passive foreign investment company tax as evidence of good faith compliance inconsistent with willfulness. Finally, Collins contends he could not have been expected to know about the FBAR requirement since his experienced accountant was unaware of the reporting requirement and believed it to be new. (In fact, the requirement has been in place since the 1970s.)

The District Court concluded that Collins's failure to disclose his foreign accounts was willful—not just reckless, but with "an actual intent to deceive." *Collins*, 2021 WL 456962, at *1. A "sophisticated taxpayer," Collins was aware of his foreign accounts when he approved his tax filings and intentionally managed the accounts to avoid disclosure. *Id.* For example, Collins purposefully avoided receiving mail from his Swiss bank in the United States and, at one point, expressed a desire to "discreetly" transfer funds to the United States for a mortgage transaction. *Id.*

Collins offered various explanations over the years to justify his conduct, but the District Court found them unpersuasive. In 2010, Collins claimed he believed filing an IRS Form W-9 with his Swiss bank satisfied all reporting requirements—including those banks for which he did not file a Form W-9. In 2013, he

justified his failure to report by citing his reliance on advice in the 1970s from an official at the U.S. Embassy in Paris. He next justified his non-disclosure in 2014 by explaining that his Swiss bank advised that withholding at the source absolved him of any further tax obligations. Finally, in 2015 Collins excused his failure to report by suggesting that Swiss law had prohibited him from even acknowledging the existence of his private bank accounts. The District Court found these justifications "objectively unreasonable." *Collins* 2021 WL 456962, at *1.

Our review of the record leads us to conclude that the District Court committed no error, much less clear error, when it found that Collins's failure to disclose his foreign accounts was willful. Schedule B of IRS Form 1040 contains a check-the-box question (line 7a) that places a taxpayer on notice of this obligation. IRS, OMB No. 1545-0074, Schedule B (Form 1040) (2007). Schedule B directs taxpayers to check "Yes" if they had authority over, or an interest in, a foreign account. *Id.* ("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 [FBAR]"). Collins repeatedly checked "No" and filed no FBAR until 2010. He filed returns indicating he had no foreign financial accounts while managing investments worth hundreds of thousands of dollars in his French, Canadian, and Swiss accounts (even after engaging an accountant in 2005). So we agree with the

District Court that Collins did not plausibly claim he should not have known about the FBAR filing requirement. *See Kimble v. United States*, 991 F.3d 1238, 1242-43 (Fed. Cir. 2021), *cert. denied*, 142 S. Ct. 98 (2021) (holding that a taxpayer has inquiry notice of the FBAR reporting requirement even if failing to read line 7a of Schedule B).

Collins claims the District Court gave insufficient weight to his voluntary filing of amended returns, prompt payment of overdue taxes, and subjective belief that he did not owe tax. But disagreement with the District Court's weighing of evidence does not establish clear error. And it is wrong to suggest that "a voluntary correction . . . should be legally sufficient to negate willfulness as a matter of law." Collins Br. 38; *United States v. Klausner*, 80 F.3d 55, 63 (2d Cir. 1996) ("[E]ventual cooperation with the government does not negate willfulness."). The penalties imposed under the Bank Secrecy Act stem from Collins's failure to disclose foreign assets, not his failure to pay overdue tax. A subjective belief he owed no tax is, at best, tangential to the core inquiry of a § 5314 violation—whether a taxpayer "clearly ought to have known" of his obligation to report his interest in foreign financial accounts. *Bedrosian*, 912 F.3d at 153. Put simply, Collins should have known of that obligation.

Collins had undisclosed foreign accounts, constructive knowledge of the requirement to disclose his accounts, and falsely represented that he had no such accounts. Therefore, the District Court did not clearly

err when it held that Collins willfully violated the reporting requirement of § 5314.

B

Collins next challenges the IRS's imposition of a $308,064 penalty under the Bank Secrecy Act. We review de novo the affirmance of the IRS's penalty calculation. *See*, *e.g.*, *Pennsylvania, Dep't of Pub. Welfare v. U.S. Dep't of Health & Hum. Servs.*, 647 F.3d 506, 511 (3d Cir. 2011). So we apply the same standard of review as the District Court to the underlying agency decision. *Id.*

Courts will set aside the IRS's determination of a penalty only if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See*, *e.g.*, *Kimble*, 991 F.3d at 1242. Under this standard, we will uphold an agency determination where there is a "rational connection between the facts found and the choice made." *Frisby v. U.S. Dep't of Hous. and Urb. Dev.*, 755 F.2d 1052, 1055 (3d Cir. 1985) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Moreover, because the IRS "is charged with choosing the means by which to enforce and achieve the goals" of the Bank Secrecy Act, "heightened deference is due to the agency's penalty assessment." *See Sultan Chemists, Inc. v. U.S. EPA*, 281 F.3d 73, 83 (3d Cir. 2002). The court "must ensure that, in reaching its decision, the agency examined the relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts

found and the choice made." *Prometheus Radio Project v. FCC*, 373 F.3d 372, 389-90 (3d Cir. 2004) (internal quotation marks omitted). Only rarely are IRS proceedings considered "so insufficient as to mandate de novo review." *Rum v. United States*, 995 F.3d 882, 893 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 591 (2021).

Prior to trial, the District Court said it would review the validity of the IRS's penalty calculation de novo. The District Court observed that some courts have reviewed FBAR penalty assessments under an abuse of discretion standard borrowed from § 706 of the Administrative Procedure Act, but opined that the application of this standard is "limited in the FBAR context because Congress did not enumerate factors for the Secretary to consider in calculating the FBAR penalty." *Collins*, 2021 WL 456962 at *5. In its decision, however, the District Court modified its approach somewhat, upholding the IRS's $308,064 FBAR penalty under both de novo, *id.* at *4, and abuse of discretion standards, *id.* at *6-7. Collins labels the Court's abuse of discretion analysis an "impermissible change," but does not explain why it was improper or how it worked to his detriment. Collins Br. 52.

In this case, the IRS's proceedings were not so insufficient as to require de novo, rather than the usual abuse of discretion, review. Contrary to Collins's complaint of "scant evidence" to support the determination of his penalty, Collins Br. 42, the record demonstrates the facts on which the IRS relied and the process by which the IRS computed, mitigated, and assessed Collins's penalty. The record shows the IRS's penalty

calculation was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See* 5 U.S.C. § 706(2)(A). The IRS revenue agent's worksheet demonstrates that she determined foreign balances from Collins's bank accounts and his belated FBAR disclosures. The revenue agent also found that Collins qualified for mitigation under the Internal Revenue Manual (the Manual). She then calculated the mitigated penalty based on the 2007 and 2008 account balances and assigned half to each year. The revenue agent then found this mitigated penalty "excessive" given Collins's facts and circumstance and further reduced the proposed penalty for each year. The amounts ultimately assessed against Collins, while substantial, represented an additional 50% reduction of the mitigated penalty for which he qualified—an overall reduction of 75% below the maximum penalty. The evidence is far from "scant"—the record supports the agency's computation, mitigation, and further reduction of the penalties assessed against Collins. The revenue agent followed the Manual and the agency did not act arbitrarily. Collins's penalty is well below the amount permitted by law and the administrative record supports a rational connection between the agency's findings and the penalty assessed. So the District Court did not err when it held that the IRS did not abuse its discretion.

IV

Collins also argues he should have been able to take discovery regarding internal IRS discussions

about the computation of his FBAR penalty. "We review a district court's discovery orders for abuse of discretion, and will not disturb an order absent a showing of actual and substantial prejudice." *Anderson v. Wachovia Mortg. Corp.*, 621 F.3d 261, 281 (3d Cir. 2010). To demonstrate an abuse of discretion, Collins "must show that the court's decision was arbitrary, fanciful or clearly unreasonable." *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 673 F.3d 192, 201 (3d Cir. 2012) (internal quotation omitted). He has not done so.

In a protective order, the magistrate judge held "that the opinions, conclusions, and reasoning of IRS officials are irrelevant to the ultimate issue in dispute, i.e., a determination of whether the Defendant's conduct was willful." App. 2. The order noted that the United States "agree[d] to produce a witness regarding the 2007 and 2008 FBAR audit of the Collins[es] which is at issue," App. 2, and permitted Collins to take discovery regarding the audit, but only "other than to seek information about the opinions, conclusions, and reasoning of government officials." App. 5.

The District Court concluded it possessed the "fundamental documents" that formed the basis of the IRS's penalty calculations. They included: Collins's Offshore Voluntary Disclosure Program submissions, FBAR filings, correspondence with the IRS, foreign account statements, and the IRS's FBAR decision documents. *Collins*, 2021 WL 456962 at *6. Moreover, the revenue agent responsible for calculating Collins's penalty testified at trial. Collins contends that he is entitled to discovery from the revenue agent's supervisor,

as well, who he alleges overruled the agent's initial, lower penalty calculation against the Manual's guidance.

Collins mischaracterizes the exchange between the revenue agent and her supervisor, as well as the relevant Manual guidelines. The revenue agent's activity record—a journal of actions taken during the audit—shows that the supervisor felt the agent's penalty determination was "too low" or expressed disagreement with its value, *see*, *e.g.*, App. 632-37 (entries for 2/17/15, 5/1/15, 5/7/15, and 6/25/15), but Collins still received a penalty determination well below the original mitigated value. Far from depriving the revenue agent of her due discretion, as Collins alleges, the Manual's guidelines on FBAR penalty mitigation require an agent to "make [the FBAR penalty] determination with the written approval of that [agent's] manager." App. 629. The supervisor was empowered to reject the revenue agent's proposal as too low before the agent selected an appropriate penalty. So the record demonstrates the IRS adhered to its own guidelines, and even Collins concedes the IRS does not act arbitrarily when it follows the Manual. In sum, Collins cannot show any prejudice regarding the scope of his discovery.

V

Finally, Collins challenges the District Court's addition of interest and a failure-to-pay penalty under the Federal Claims Collection Act. Collins contends that, if his other arguments are rejected, he should owe

$308,064 plus 1% interest accruing from March 15, 2021—the date the District Court entered judgment—pursuant to 28 U.S.C. § 1961. Whether the provisions of the Collection Act at 31 U.S.C. § 3717 apply to the FBAR penalty is a question of law subject to de novo review. *Abraham v. St. Croix Renaissance Grp., L.L.L.P.*, 719 F.3d 270, 275 n.5 (3d Cir. 2013).

The Bank Secrecy Act offers no independent authority for the Government to collect additional failure-to-pay penalties on FBAR penalties through the Collection Act. *See* 31 U.S.C. § 5321(b). Accordingly, Collins contends the Collection Act's application is ambiguous, and the canon of strict construction of revenue statutes dictates resolution of ambiguity in the taxpayer's favor. Collins also cites our *Bedrosian* decision to argue that the FBAR penalty is a tax that is statutorily untethered from the Collection Act. *Bedrosian*, 912 F.3d at 151 ("Our take is the FBAR statute is part of the IRS's machinery for the collection of federal taxes; thus it is an act 'providing for internal revenue.'").

But even if the FBAR provision is a revenue statute for jurisdictional purposes, the FBAR penalty is not a tax within the statutory context of failure-to-pay penalties of the Collection Act. The Collection Act provides for interest and late-payment penalties on "debt[s]," 31 U.S.C. § 3717(a), (e), which are defined as "any amount of funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States." *Id.* § 3701(b)(1). This includes "any fines or penalties assessed by an

agency." *Id.* § 3701(b)(1)(F). The interest and late-payment penalty provisions of § 3717, however, do not apply to debts under "the Internal Revenue Code of 1986 (26 U.S.C. 1 *et seq.*)." 31 U.S.C. § 3701(d)(1).

Unfortunately for Collins, his FBAR penalty is not a debt under the Internal Revenue Code; it arises under 31 U.S.C. § 5321(a)(5) for a violation of the Bank Secrecy Act. As a nontax debt, the FBAR penalty falls within the auspices of the Collection Act. *See* 31 U.S.C. § 3701(a)(8) (defining "nontax" debts as any debts "other than [debts] . . . under the Internal Revenue Code of 1986."). *Bedrosian* should not be read to hold otherwise. *Cf. Bedrosian*, 912 F.3d at 151 (concluding only that the Bank Secrecy Act penalties " 'provid[e] for internal revenue' within the meaning of [the jurisdictional statute] 28 U.S.C. § 1295(a)(2)").

Collins sees ambiguity where there is none. The provisions of the Collection Act apply unless another statute "explicitly fixes the interest or charges" on a particular type of federal claim, in which case the more specific statute governs. *United States v. Hyundai Merch. Marine Co., Ltd.*, 172 F.3d 1187, 1192 (9th Cir. 1999) (emphasis omitted) (quoting 31 U.S.C. § 3717(g)(1)). Since the Bank Secrecy Act does not fix interest or similar charges, or otherwise deprive § 3717 of its effect, § 3717 controls—and requires—the imposition of pre-judgment interest and penalties on the debt Collins owes to the United States.

Collins further argues that imposing the 7% interest and failure-to-pay penalty pre-judgment is unjust,

as the rules pertaining to taxpayer challenges to FBAR claims were "Kafkaesque" before *Bedrosian* clarified jurisdictional questions in 2018. Collins Br. 61. He points to pre-*Bedrosian* uncertainty over whether his route to judicial challenge lies through full or partial payment of his penalty, and whether he should have filed in a federal district court or the Court of Federal Claims. Collins's uncertainty over the proper judicial forum, however, does not create statutory ambiguity regarding the Collection Act's application. Nor is his decision not to pre-pay his FBAR penalty reason to disregard the Collection Act. The accumulation of prejudgment interest is a risk inherent in that litigation strategy. There is no basis now to excuse Collins from the consequences of his own choice. Because the Government timely filed suit to reduce the assessment to judgment, interest and penalties under § 3717 are appropriate.

Collins's argument that the Collection Act failure-to-pay penalty applies only to claims or debts, but not judgments, fares no better. There is no basis to conclude § 3717 ceases to apply to a "debt" once that debt is reduced to judgment. Section 3717 requires interest and late-payment penalties "on an outstanding debt on a United States claim." 31 U.S.C. § 3717(a). A debt is no less a claim of the United States simply because the Government has sued to collect and a court confirms that it is owed. In such circumstances, interest and penalties apply under § 3717—and are mandatory.

* * *

The disparity between Collins's putative income tax-liability and his FBAR penalty is undeniably stark. Yet it is consistent with the Bank Secrecy Act, which forces Collins to suffer the consequence of his willful failure to disclose foreign accounts. We will therefore affirm the District Court's order assessing penalties and interest in full.

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District Judge: Hon. Cathy Bissoon

Argued on April 27, 2022

Before: HARDIMAN, RENDELL, and FISHER, *Circuit Judges*

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Western District of Pennsylvania and was argued on April 27, 2022. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered March 15, 2021, be and the same is hereby AFFIRMED. All in accordance with the Opinion of this Court.

Costs to be taxed against Appellant.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: June 6, 2022

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA**

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Civil Action No. 18-1069
v.	)	Judge Cathy Bissoon
RICHARD COLLINS,	)	
Defendant.	)	

**FINDINGS OF FACTS,
CONCLUSIONS OF LAW & ORDER**

(Filed Feb. 8, 2021)

Having conducted a one-day Bench Trial on February 18, 2020, the Court hereby rules as follows.

FINDINGS OF FACT

Defendant's willful failure to report his foreign accounts

1. Defendant Richard Collins ("Mr. Collins") is a sophisticated taxpayer, with a sophisticated understanding of finance, financial obligations and financial consequences that are well beyond that of an average person. (Trial Tr. at 220:15–19.)

2. Mr. Collins knew that, when he approved his tax submissions in 2007 and 2008, he held financial accounts in foreign countries. (Trial Tr. at 220:21–23.)

a. Mr. Collins identified an interest in keeping his foreign accounts secret in the United States and consciously avoided disclosing his accounts. (Trial Tr. at 221:1–4.)

b. Mr. Collins's course of conduct reflects an actual intent to deceive the IRS and others about the existence of his foreign accounts, including his effort to avoid receiving mail from UBS in the United States, as well as his express desire to "discreetly" transfer funds from Switzerland to the United States in connection with a mortgage transaction. (Trial Tr. at 221:5–19; *id.* at 129:13–133:19; Pl.'s Exs. P25–P28.)

c. Mr. Collins has sought to excuse his conduct based on a multitude of objectively unreasonable beliefs, including those that:

i. By filing an IRS Form W-9 with UBS, he satisfied his reporting obligations for all of his foreign accounts (including those for which he did not file a W-9) (Pl.'s Ex. P63);

ii. The U.S. Embassy in Paris advised Mr. Collins, in the 1970s, that he did not have any obligations to the IRS (Pl.'s Ex. P56);

iii. As long as his foreign banks withheld taxes, Mr. Collins was not obligated to disclose his accounts to the IRS (though Mr. Collins did not ensure that UBS actually withheld funds) (Pl.'s Ex. P58 at *14; Doc. 42 at 7);

iv. Disclosing his accounts to his U.S. accountant, Dale Cowher, would increase the costs required for Mr. Cowher to perform any

necessary paperwork (Pl.'s Ex. P35, Pl.'s Ex. P58 at *14); and

v. Swiss bank secrecy laws precluded Mr. Collins from disclosing his foreign accounts to his U.S. accountants (Pl.'s Ex. P54).

Mr. Collins's 2007 foreign account balances

3. On or about August 13, 2013, Mr. Collins signed a Report of Foreign Bank Accounts (known as an "FBAR") for 2007 in which he reported his interests in foreign accounts with HSBC (located in Canada), Le Credit Lyonnais (located in France) and UBS (located in Switzerland). (Pl.'s Ex. P14.) Those interests totaled $885,913. (*Id.*)

4. Mr. Collins admits that his three HSBC accounts had a maximum aggregate balance of at least $10,696 in 2007. (Pl.'s Ex. P14.)

5. Mr. Collins admits that his Le Credit Lyonnais account had a maximum balance of at least $13,516.12 in 2007. (Pl.'s Ex. P14.)

6. Mr. Collins admits that his UBS account had a maximum balance of at least $861,700 in 2007. (Pl.'s Ex. P14.)

Mr. Collins's 2008 foreign account balances

7. On or about August 13, 2013, Mr. Collins signed an FBAR for 2008 in which he reported his interests in foreign accounts with HSBC, Le Credit Lyonnais and

UBS. (Pl.'s Ex. P15.) Those interests totaled $906,004. (*Id.*) Mr. Collins did not report his interest in his Wegelin account (located in Switzerland). (*Id.*)

8. Mr. Collins admits that his four HSBC accounts had a maximum aggregate balance of at least $12,624 in 2008. (Pl.'s Ex. P15.)

9. Mr. Collins admits that his Le Credit Lyonnais account had a maximum balance of at least $31,681 in 2008. (Pl.'s Ex. P15.)

10. Mr. Collins admits that his UBS account had a maximum balance of at least $861,700 in 2008. (Pl.'s Ex. P15.)

11. Mr. Collins's UBS account had at least $302,715 in October 2008. (Pl.'s Ex. P22.)

12. In October 2008, Mr. Collins closed his UBS account and transferred all of its funds to his Wegelin account. (Doc. 72 (Trial Tr.) at 150:20–25; Pl.'s Ex. P29.)

13. Mr. Collins's Wegelin account had a maximum balance of at least $397,519 in 2008. (Pl.'s Ex. P62.)

IRS's civil FBAR penalty assessments against Mr. Collins

14. On June 26, 2015, the IRS informed Mr. Collins via letter of its determination to propose civil FBAR penalties assessments against him for 2007 and 2008. (Pl.'s Ex. P58 at 4–29.)

15. The IRS proposed civil FBAR penalties against Mr. Collins of: (a) $154,032 for his willful failure to report his foreign accounts on an FBAR for 2007; and (b) $154,032 for his willful failure to report his foreign accounts on an FBAR for 2008. (Pl.'s Ex. P58 at 4–8.)

16. The IRS's June 26, 2015 letter was accompanied by FBAR lead sheets explaining the decision, (Pl.'s Ex. 58 at 9–29), and a penalty calculation chart entitled "Willful Penalty Calculation – Mitigation," (Pl.'s Ex. P58 at 8; *see also* Pl.'s Ex. P42). The chart detailed how the IRS calculated the proposed penalty assessments. (*Id.*)

17. For each unreported account and for each year that the account was not reported in a timely filed FBAR, Congress authorized the Secretary of the Treasury to assess a civil willful FBAR penalty of $100,000 or $50% of the balance in the account at the time of the violation, whichever is greater. 31 U.S.C. §§ 5321(a)(5)(C)(i), 5321(a)(5)(D)(ii).

18. The proposed penalty assessment amounts against Mr. Collins were based on the maximum account balances of his foreign accounts for 2007 and 2008, and/or the balances of his foreign accounts on the FBAR filing dates. (Trial Tr. at 48:2–50:17; Pl.'s Exs. P14, P15, P22, P42, P62.)

a. With the exception of two accounts, maximum balances were taken from what Mr. Collins reported on his 2007 and 2008 FBARs. (*Compare* Pl.'s Ex. P42 (Column 1) *with* Pl.'s Exs. P14 & P15.)

b. Although Mr. Collins reported a maximum balance of $861,700 for his UBS account on his 2008 FBAR, the IRS used $302,715 as the maximum UBS account balance for that year based on a October 2008 UBS account statement. (Pl.'s Ex. P42 (Column 1) & n.2; *compare* Pl.'s Ex. P15 *with* Pl.'s Ex. P22.)

c. Although Mr. Collins did not report his Wegelin account on his 2008 FBAR, the IRS used a maximum balance of $397,519 for that account and year based on a December 2008 Wegelin account statement. (Pl.'s Ex. P62.)

d. For the balance of Mr. Collins's UBS account on June 30, 2008, the IRS used $760,490, based on a UBS treaty document showing a June 2008 monthly balance of 776,113.89 in Swiss Francs and a conversion rate of 0.97987. (Pl.'s Ex. P42 (Column 2) & n.1; Pl.'s Ex. P30.)

e. For the balance of Mr. Collins's Wegelin account on June 30, 2009, the IRS used $397,519. This was lower of the Wegelin account balance as of December 31, 2008, and the Wegelin account balance as of December 31, 2009 (which was $721,953). (Pl.'s Ex. P42 (Column 2) & n.3; Pl.'s Ex P62 at 1; Pl.'s Ex. P32 at 12.)

19. The proposed penalty assessment amounts against Mr. Collins were also informed by the IRS's (non-binding) internal guidance regarding when taxpayers are eligible for mitigation from the statutory maximum. (Pl.'s Exs. P42, P58; Trial Tr. at 46:4–47:2, 48:21–50:17; I.R.M. 4.26.16.4.6.1, 4.26.16.4.6.3.)

a. The penalty calculation chart identifies four mitigation levels that the IRS could apply to the penalty amounts as to each account for each year. (*Id.*)

20. Under this internal mitigation guidance, the IRS would have assessed civil FBAR penalties against Mr. Collins of: (a) $382,666 for his willful failure to report his foreign accounts on an FBAR for 2007; and (b) $233,462 for his willful failure to report his foreign accounts on an FBAR for 2008. (Pl.'s Ex. P42; Trial Tr. at 49:15–50:12.)

21. Notwithstanding the foregoing, the IRS further reduced the mitigated penalties after considering the facts and circumstances of Mr. Collins's case. (Pl.'s Ex. P58 at 9.)

22. The IRS ultimately proposed willful FBAR penalty assessments for 2007 and 2008 that were each half of the average of the penalties calculated under the mitigation guidelines. (Pl. Ex. P42; Trial Tr. at 49:15–50:17.)

23. On July 20, 2015, Mr. Collins filed a protest in response to the proposed civil FBAR penalties against him, and requested an appeal with the IRS. (Pl.'s Ex. P56.) Mr. Collins did not contest the IRS's penalty calculations, other than to: (a) challenge its determination that his failure to report his foreign accounts was willful; and (b) observe that he might have been assessed fewer penalties had he remained in one of the IRS's voluntary disclosure programs. (*Id.*)

24. On August 26, 2016, a delegate of the Secretary of Treasury, in accordance with 31 U.S.C. § 5321, assessed a civil FBAR penalty of: (a) $154,032 against Mr. Collins for his willful failure to report his foreign accounts on an FBAR for 2007; and (b) $154,032 against Mr. Collins for his willful failure to report his foreign accounts on an FBAR for 2008. (Pl.'s Ex. P43.)

25. On August 26, 2016, the delegate of the Secretary of the Treasury provided Mr. Collins with notice of the FBAR assessments against him and demanded payment thereof. (Doc. 2 ¶ 30.)

26. On September 1, 2016, the IRS Appeals Office notified Mr. Collins that it was sustaining the willful FBAR penalties assessed against him and denied his appeal. (Pl.'s Ex. P58.)

Mr. Collins's current financial situation

27. Mr. Collins reported over $1.3 million held in foreign financial accounts on his 2018 income tax return. (Pl.'s Ex. 61 at Form 8938.)

28. Mr. Collins testified he receives roughly 700 Euros a month in pension benefits in his French account. (Trial Tr. at 194:24–195:4.)

29. Mr. Collins testified he also receives around 1,000 Canadian dollars (or about 700 in U.S. dollars) a month in pension benefits in his Canadian account. (Trial Tr. at 195:5–17.)

30. Mr. Collins estimated that he receives approximately $1,200 a month in social security benefits. (Trial Tr. at 195:18–196:1.)

31. Mr. Collins owns his house, which does not have a mortgage, and which he estimates is worth around $225,000. (Trial Tr. at 196:12–17.)

32. Mr. Collins also has domestic investments, which he testified he did not know the size of. (Trial Tr. 196:18–197:5.)

33. Mr. Collins is further receiving required minimum distributions from his retirement account, which he also testified that he was unable to estimate the size of. (Trial Tr. at 197:6–15.)

34. In 2016, after the IRS proposed willful FBAR penalties against him, Mr. Collins transferred both his and his wife's assets into an irrevocable family trust whose beneficiary is his daughter. (Trial Tr. at 198:6–17) Mr. Collins testified that the trust held $2.5 million dollars. (*Id.*)

The amount of penalties now requested

35. Based on the evidence presented at trial, Plaintiff presently seeks to impose FBAR penalties totaling $308,064, inclusive of both tax years, and requests the opportunity to submit an updated calculation of Mr. Collins's liability as of the date of judgment, including fees, penalties and interest.

CONCLUSIONS OF LAW

A. Pursuant to the law of the case, the Court will apply *de novo* review in determining the validity of the FBAR penalties.

36. Consistent with its Order dated February 12, 2020 (Doc. 67), the Court applies *de novo* review. *Id.* (citing and quoting *U.S. v. Markus*, 2018 WL 3435068, *4 (D. N.J. July 17, 2018) and *Bedrosian v. U.S.*, 2017 WL 3887520, *1 (E.D. Pa. Sept. 5, 2017)).

37. Plaintiff's burdens are tested under the preponderance of the evidence standard. *Bedrosian* at *1. In satisfaction of said standard, Plaintiff has established that Mr. Collins failed to report his interests in foreign financial accounts; that his failure was willful; it has shown the balance-amounts in the relevant accounts, at the relevant times; and that, based on those balances, the penalties-imposed were within the range authorized in Section 5321(a)(5).

38. As a mixed-matter of fact and law, Mr. Collins's circumstances bring to mind the adage, "the coverup often is worse than the crime."

39. Understandably, Mr. Collins and his counsel very much wish for the Court to compare his putative tax-liability, had he properly reported his foreign accounts, against his penalty-liability under Section 5321(a)(5).

40. Such an approach appears intuitive, and the question is one likely-begged by any factfinder under the circumstances.

41. Nevertheless, the evidence reveals on the part of Mr. Collins a decades-long course of conduct, omission and *scienter*. That is the more salient inquiry, and Plaintiff has proven that the penalties-imposed are consistent with the law.

42. In support of these determinations, the Court incorporates by reference, as if fully restated, the contents of Plaintiff's Proposed Facts & Conclusions (Doc. 79) at ¶¶ 66–76.

B. In the alternative, the FBAR penalties are sustainable under the abuse-of-discretion standard, because they were the product of reasoned decision-making, and were not otherwise arbitrary, capricious, an abuse of discretion or contrary to law.[1]

i. The abuse-of-discretion standard

43. "It is old law, of course, that an agency sanction within statutory limits can be upset only if it reflects an abuse of discretion." *Haltmier v. Commodity Futures Trading Comm'n*, 554 F.2d 556, 563 (2d Cir. 1977) (citing *American Power & Light Co. v. SEC*, 329 U.S. 90, 112–13 (1946) and *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 18586 (1973)). In such

[1] The conclusions of law that follow apply if a reviewing court determines that the abuse-of-discretion standard applies. The Court having found that the penalties are sustainable under a more rigorous *de novo* standard, it stands to reason that they withstand scrutiny under the abuse-of-discretion standard; and the Court now expressly so holds.

circumstances, the agency's choice of a particular sanction can only be overturned if it is "unwarranted in law or without justification in fact." *Amanat v. SEC*, 269 F. App'x 217, 219–20 (3d Cir. 2008); *see also Sultan Chemists, Inc. v. EPA*, 281 F.3d 73, 83 (3d Cir. 2002) ("The EPA is charged with choosing the means by which to enforce and achieve the goals of FIFRA. In such a case, heightened deference is due to the agency's penalty [calculation].")

44. The FBAR penalty is one such penalty, as the Secretary of the Treasury is afforded the discretion to assess a penalty in an amount up to a statutory ceiling. *See* 31 U.S.C § 5321(a)(5)(A) ("the Secretary of the Treasury *may* impose a civil penalty") (emphasis added).[2]

45. Courts reviewing the amounts of FBAR penalty assessments have applied the "abuse of discretion" standard, borrowed from § 706 of the Administrative Procedure Act ("APA"). *See*, *e.g.*, *United States v. Rum*, No. 8:17-CV-826-T-35AEP, 2019 WL 3943250, *9 & n.22 (M.D. Fla. Aug. 2, 2019), *report and recommendation adopted*, No. 8:17-CV-826-T-35AEP, 2019 WL 5188325 (M.D. Fla. Sept. 26, 2019); *Moore v. United States*, No. C13-2063RAJ, 2015 WL 1510007, *4 n.3, *7–8 (W.D. Wash. Apr. 1, 2015); *United States v. Williams*, No. 1:09-CV-00437, 2014 WL 3746497, *1 & n.1

[2] The Financial Crimes Enforcement Network ("FinCEN"), a bureau of the Department of Treasury, has "[o]verall authority for enforcement and compliance" of the FBAR requirement. 31 C.F.R. § 1010.810. FinCEN has, however, redelegated civil FBAR examination and penalty authority to the IRS. *Id.* (g); I.R.M. 4.26.16.2.2(4).

(E.D. Va. June 26, 2014) (on remand, reviewing the penalty amount for "abuse of discretion").

46. Under § 706, "a court must hold unlawful and set aside agency actions, findings, and conclusions found to be `arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" 5 U.S.C. § 706(2)(A).

47. This standard is both narrow and deferential, as "the Court must not substitute its judgment for the agency's, and must only review the record to ensure that the agency engaged in reasoned decision-making and that there was a `rational connection between the facts found and the choice made.'" *Williams*, 2014 WL 3746497 at *1.

48. The application of this standard is limited in the FBAR context because Congress did not enumerate factors for the Secretary to consider in calculating the FBAR penalty. *Compare* § 5321(a)(5)(C) & (D) *with* 42 U.S.C. § 256b(d)(1)(B)(vi) (providing for civil money penalties to be assessed according to standards set forth by regulation); *and* 33 U.S.C. § 1319(d) (stating factors for the court to consider in setting amount of Clean Water Act penalty).

49. Section 5321 merely states that the penalty shall be the greater of $100,000 or 50% of the balance in the account at the time of the violation. 31 U.S.C. § 5321(a)(5)(C) & (D).

ii. If the de novo standard does not apply, the Court's review of the amounts of Mr. Collins's FBAR penalties is limited to the subset of trial exhibits that comprise the administrative record.

50. Consistent with general conventions of administrative law, the reasonableness of the amounts of the IRS's assessments must be "judged in accordance with its stated reasons." *See In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1279 (D.C. Cir. 1998).

51. The Court performs its review based on the record that actually "formed the basis for the agency's decision, unless there was such a failure to explain administrative action as to frustrate effective judicial review.'" *John Doe, Inc. v. DEA.*, 484 F.3d 561, 570 (D.C. Cir. 2007).

52. To be complete, this record must include the "fundamental documents" that would have formed the basis for the agency's decisions. *NVE, Inc. v. Dep't of Health & Human Servs.*, 436 F.3d 182, 195 (3d Cir. 2006).

53. The "fundamental documents" that formed the basis of the IRS's penalty calculations here consist of Mr. Collins's OVDP submissions, his FBARs filings, his correspondence with the IRS during his audit and administrative appeal, his foreign account statements and the IRS FBAR decision documents. (Pl.'s Exs. P14, P15, 22, P30, P32, P33, P34, P42, P50, P56, P58, P62, P63.)

54. Assuming the *de novo* standard does not apply, the Court cannot consider trial exhibits or testimony beyond the documents that comprise the administrative record. *See generally NVE*, 436 F.3d at 185.

55. Even if the record reflects "less than ideal clarity," the Court must sustain the amount of the IRS's assessments "if the agency's path may reasonably be discerned." *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

56. To the extent that the Court somehow concludes that the record before the IRS does not support its computation, or the record is so lacking that the Court cannot evaluate the IRS's calculation, "the proper course is for the Court to remand the matter back to the IRS." *See generally Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985); *W.R. Grace & Co. v. EPA*, 261 F.3d 330, 338 (3d Cir. 2001); *Moore*, 2015 WL 1510007 at *10–11; *accord Rum*, 2019 WL 3943250 at *9.

57. The penalty assessments must be upheld unless the Court finds that, in assessing $154,032 for 2007 and $154,032 for 2008 (amounts considerably less than the statutory maximum), the IRS

> 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.

See State Farm, 463 U.S. at 50.

58. In making this determination, the Court is limited those documents that "formed the basis" for the IRS's decision.

59. To the extent this Court determines that the FBAR penalties were somehow arbitrary and capricious, the Court must remand the case back to the IRS, rather than substitute its judgment for that of the agency and determine an appropriate penalty amount.

iii. The IRS's penalty calculations were within statutory limits and were rational.

60. The only limit Congress placed on the IRS's discretion when calculating the willful FBAR penalty was capping the maximum penalty for each account at the greater of $100,000 or 50 percent of the balance in the account at the time of the violation. *See* 31 § 5321(a)(5)(C) & (D).

61. Although IRS internal guidelines do not bind the agency, *see Norman v. United States*, 942 F.3d 1111, 1115 (Fed. Cir. 2019), the IRS's adherence in this case to these guidelines indicates that its penalty calculations were proper. *See Estate of Duncan v. Comm'r of Internal Revenue*, 890 F.3d 192, 200 (5th Cir. 2018) ("courts can draw on IRM guidelines as factors to assess the propriety of IRS actions"); *cf. Moore v. United States*, 2015 WL 1510007 at *8 n.5.

62. These nonbinding "mitigation" guidelines assist examiners in determining whether to reduce an FBAR

penalty below the statutory maximum. (Pl.'s Exs. 42, 58 at 27.) *See generally* I.R.M. 4.26.16.4.6.1, 2008 WL 5900937 (July 1, 2008); I.R.M. 4.26.16.4.6.3, 2008 WL 5900939 (July 1, 2008). First, examiners consider whether the taxpayer's case satisfies four conditions: (a) the taxpayer has no history of FBAR penalty assessments or criminal tax or Bank Secrecy Act convictions; (b) the funds in the accounts were not from an illegal source or used to fund a criminal purpose; (c) the taxpayer cooperated during the examination; and (d) the IRS did not assess a civil fraud penalty against the taxpayer with respect to the income attributable to a foreign account. *Id.* If these conditions are met, examiners may mitigate the penalty below the statutory maximum by different amounts depending on the balances in each account. *Id.*

63. As explained in the FBAR lead sheets and penalty calculation chart, the IRS exercised its discretion in a reasoned manner when it determined that Mr. Collins was eligible for mitigation under its guidelines, calculated mitigated penalties based on those guidelines and further reduced the mitigated penalties after considering the facts and circumstances of his case. (Pl.'s Exs. P42, P58.)

64. Mr. Collins's delinquent 2007 FBAR reported five foreign accounts with an aggregate maximum balance of $885,913, and his 2008 FBAR reported six foreign accounts with an aggregate maximum balance of $906,004. (Pl.'s Exs. P14 & P15.)

65. The IRS assessed willful FBAR penalties of $154,032 for 2007 and $154,032 for 2008.

66. The $154,032 penalty for each year is well below the statutory maximum (the greater of $100,000 or 50% of the account balance for *each* unreported account).[3] *See* 31 U.S.C. § 5321(a)(5).

67. Nothing (other than the statutory maximum) precluded the IRS from assessing far higher penalties than it ultimately did. *Williams*, 2014 WL 3746497 at *2 (affirming IRS's assessment of maximum civil FBAR penalties because, although "the IRS *may* impose a lower penalty where the violating taxpayer meets certain criteria, such departures are within the discretion of the agency") (internal citation omitted).

68. There is no evidence from which the Court may conclude that the penalties were assessed for an improper purpose. *See Williams*, 2014 WL 3746497 at *2.

69. The FBAR lead sheets (Pl.'s Ex. 58 at 9–29), along with the penalty calculation chart (Pl.'s Ex. 42), demonstrate that the IRS "made a reasoned decision after considering the relevant factors." *Williams*, 2014 WL 3746497 at *2.

70. Accordingly:

a. Richard Collins is liable to the United States for a civil penalty of $154,032, plus interest and

[3] For example, the IRS could have, based on an account balance of $760,490, assessed a willful FBAR penalty of $380,245 with regard to Collins's UBS account for 2007 (for just that one account and one year). (Pl.'s Ex. P42.)

statutory additions that continue to accrue according to law as of August 26, 2016, for his willful failure to timely report his interest in foreign financial accounts for 2007; and

b. Richard Collins is liable to the United States for a civil penalty of $154,032, plus interest and statutory additions that continue to accrue according to law as of August 26, 2016, for his willful failure to timely report his interest in foreign financial accounts for 2008.

iv. FBAR penalties are not limited to $100,000, and the willful FBAR penalties assessed against Mr. Collins were well within permissible bounds.

71. In 2004, Congress increased the maximum civil penalty for willful FBAR violations (for each account) from $100,000 to the greater of $100,000 or 50 percent of the account balance. *See United States v. Cohen*, No. CV 17-1652-MWF (JCX), 2019 WL 4605709, *3 (C.D. Cal. Aug. 6, 2019). The Secretary did not amend a 1987 regulation, which had capped the penalty at $100,000, to reflect this increased statutory maximum.

72. Although two earlier courts have found otherwise,[4] as the last nine courts (including the Federal Circuit) to have considered the issue have found, "[s]tatutes trump regulations." *See Cohen*, 2019 WL 4605709 at *4 (collecting cases); *Norman v. United*

[4] *See United States v. Wahdan*, 325 F. Supp. 3d 1136 (D. Colo. 2018); *United States v. Colliot*, No. 16-1281-SS, 2018 WL 2271381 (W.D. Tex. May 16, 2018).

States, 942 F.3d 1111, 1118 (Fed. Cir. 2019); *United States v. Rum*, 2019 WL 3943250 at *6–7, *report and recommendation adopted*, 2019 WL 5188325 at *2.

73. The Court rejects Mr. Collins's claim that a regulation from 1987 overrides the statutory maximum amended by Congress in 2004. *See Norman*, 942 F.3d at 1118 ("the 2004 amendment . . . rendered void the 1987 regulation").

C. The willful FBAR penalties assessed against Mr. Collins are not unconstitutionally excessive under the Eighth Amendment.

74. The Eighth Amendment prohibits excessive "fines," *United States v. Bajakajian*, 524 U.S. 321, 327–28 (1998); and a fine violates the Excessive Fines Clause only if it is "grossly disproportional to the gravity of a [defendant's] offense." *Bajakajian*, 524 U.S. at 324.

75. The penalties at issue are neither fines nor are they excessive.

i. A civil FBAR penalty is not a fine within the scope of the Eighth Amendment.

76. The civil FBAR penalties assessed against Mr. Collins are not "fines" covered by the Eighth Amendment because they are not "punishment for some offense." *Bajakajian*, 524 U.S. at 329 (internal quotation marks omitted).

77. In *Bajakajian*, the Supreme Court held that a sanction is a punishment if it is "imposed at the culmination of a criminal proceeding" and requires "conviction of an underlying" crime. *Id.* at 328.

78. Those conditions are absent in this case. The civil FBAR penalty can be imposed even where, as here, the Secretary chooses not to undertake a criminal action. *Id.*

79. In 31 U.S.C. § 5322, Congress separately provided criminal penalties to punish those who willfully fail to file FBAR forms. Congress described the criminal penalties – but not the civil penalties – as "fine[s]." 31 U.S.C. §§ 5322(a) & (b); *c.f. One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 236–37 (1972) (civil forfeiture provisions, as distinct from parallel criminal provisions, are remedial for double jeopardy purposes).

80. The civil FBAR penalty is instead at least partially remedial, which is to say that it has the "purpose of compensating the Government for a loss." *Bajakajian*, 524 U.S. at 328.

81. The penalty compensates the government for both tax loss and for the costs of enforcement of the Bank Secrecy Act.

82. When Congress enacted the Bank Secrecy Act ("BSA"), Pub. L. No. 91-508, 84 Stat. 1114 (1970), it called the use of "secret foreign bank account[s]" the "largest single tax loophole permitted by American law," and one that caused the "debilitating effect[]"

of "hundreds of millions" of dollars in lost tax revenues. H.R. Rep. No. 91-975 (1970), reprinted in 1970 U.S.C.C.A.N. 4394, 4397–98. Investigating secret bank accounts is time consuming and expensive. *Id.* at 4397.

83. The civil penalties in § 5321 serve to offset these losses to the Treasury. *See United States v. Estate of Schoenfeld*, 344 F. Supp. 3d 1354, 1369–73 (M.D. Fla. 2018) (civil penalty for willful failure to file FBAR is remedial, not punitive, in nature).

84. Viewing civil FBAR penalties as remedial is consistent with the Supreme Court's analysis in *Helvering v. Mitchell*, 303 U.S. 391, 401 (1938) (holding that civil tax penalties are remedial).[5]

85. Courts routinely have held that even very substantial civil tax penalties – such as the 75-percent civil fraud penalty (26 U.S.C. § 6663(a)) – are not fines within the meaning of the Eighth Amendment.[6] *See*,

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[5] It is true that "all civil penalties have some deterrent effect," *Hudson v. United States*, 522 U.S. 93, 102 (1997), but the fact "[t]hat a statute serves to deter future conduct does not automatically render it punitive." *Garner v. U.S. Dep't of Labor*, 221 F.3d 822, 827 (5th Cir. 2000).

[6] Although the civil FBAR penalty is not a Title 26 "tax" penalty, it is more analogous to a non-punitive civil tax penalty than to the forfeiture tied to the criminal conviction that was at issue in *Bajakajian*. The civil FBAR penalty is, accordingly, not a "fine" within the meaning of the Eighth Amendment. *Cf. Korangy v. FDA*, 498 F.3d 272, 277 (4th Cir. 2007) ("Civil fines serving remedial purposes do not fall within the reach of the Eighth Amendment."); *Cole v. United States Dep't of Agriculture*, 133 F.3d 803, 807 (11th Cir. 1998) (remedial civil penalty is not a "fine" subject to Eight Amendment scrutiny).

e.g., *Kitt v. United States*, 277 F.3d 1330, 1337 (Fed. Cir. 2002); *Louis v. Commissioner*, 170 F.3d 1232, 1236 (9th Cir. 1999); *see also Dewees v. United States*, 272 F. Supp. 3d 96, at 99–101 (D.D.C. 2017) ($120,000 in civil tax penalties for failure to report ownership of a foreign corporation over 12 years was remedial and not subject to the Eighth Amendment, even though "[t]he total penalty was based entirely on [the target's] failure to file; he was not liable for any unpaid taxes").

ii. The civil FBAR penalties at issue are not constitutionally excessive.

86. The Court need not resolve whether the civil FBAR penalties here constituted fines because, even if they did, the penalties were not excessive.

87. In addressing excessiveness challenges, the Courts of Appeals consider factors used by the Supreme Court in *Bajakajian* to determine whether a fine is grossly disproportionate, including: (1) the amount of the penalty authorized by Congress; (2) the class of persons for whom the statute at issue was principally designed; (3) the nature of the offense; (4) the harm caused by the defendant's conduct; and (5) a comparison with the potential criminal penalties, including imprisonment. *See*, *e.g.*, *United States v. Cheeseman*, 600 F.3d 270, 283–84 (3d Cir. 2010); *United States v. Bikundi*, 926 F.3d 761, 794–95 (D.C. Cir. 2019).

88. The burden of proof rests on Mr. Collins to show that the penalty is excessive under these factors.

Cheeseman, 600 F.3d at 283. He has not carried that burden.

89. The penalties assessed against Mr. Collins fall within the congressionally prescribed range, which has an upper limit for each account each year of the greater of $100,000 or 50 percent of the account balance. *See* 31 U.S.C. § 5321(a)(5)(C). The IRS-assessed penalties represent only a fraction of the overall maximum penalty Congress provided for the totality of Mr. Collins's conduct, which makes the assessments presumptively constitutional. *See Qwest Corp. v. Minn. Pub. Utils. Comm'n*, 427 F.3d 1061, 1069 (8th Cir. 2005); *Kelly v. U.S. EPA*, 203 F.3d 519, 524 (7th Cir. 2000). The first factor favors Plaintiff.

90. Acts of Congress are entitled to a strong presumption of constitutionality, *e.g.*, *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963), and the Supreme Court emphasized in *Bajakajian* that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Id.*, 524 U.S. at 336. Courts therefore give substantial deference to legislative judgments regarding the appropriate penalty. *See*, *e.g.*, *United States v. $134,750 U.S. Currency*, 535 F. App'x 232, 240 (4th Cir 2013); *Collins v. SEC*, 736 F.3d 521, 527 (D.C. Cir. 2013).

91. The second *Bajakajian* factor also favors Plaintiff. Mr. Collins falls squarely within a class of individuals targeted by the Bank Secrecy Act – *i.e.*, he is a United States citizen who hid large sums of assets in an undisclosed financial account in a foreign county

with bank secrecy laws. *Garrity*, 2019 WL 1004584 at *7 ("The FBAR penalty targets individuals who fail to disclose their interest in foreign accounts.").

92. The third and fourth factors, the nature of Mr. Collins's actions and the harm he caused, additionally weigh against a finding of excessiveness. Mr. Collins acted willfully – which means that his actions fall into the more serious category of FBAR violations, for which Congress authorized a 50-percent penalty. 31 U.S.C. § 5321(a)(5)(C). In enacting the Bank Secrecy Act, Congress explained that "secret foreign bank accounts" have enabled the proliferation of crime, including tax evasion, securities violations and fraud. H.R. Rep. No. 91-975, at 12, *reprinted in* 1970 U.S.C.C.A.N. at 4397–98. When it increased the maximum willful FBAR penalty, Congress announced that improving compliance was "vitally important." S. Rep. No. 108-192, at 108.

93. Secretive offshore activity – like that engaged in by Mr. Collins – has "vast" consequences and significantly harms the integrity of the tax system. H.R. Rep. No. 91-975, reprinted in 1970 U.S.C.C.A.N. at 4397. That Congress based the willful FBAR penalty on the account balance reflects a judgment that the harm to the tax system increases with that balance, irrespective of the size of any correlated tax loss. *Chaplin's, Inc.*, 646 F.3d at 852 ("Congress . . . can distill the monetary value society places on harmful conduct"); *United States v. Mackby*, 339 F.3d 1013, 1019 (9th Cir. 2003) (harm of false claims "extends beyond the money paid out of the treasury").

94. As for the last *Bajakajian* factor, the penalties at issue are not excessive when compared with the potential criminal sanctions for Mr. Collins's actions. Those sanctions include imprisonment of up to five years in addition to a fine of up to $250,000 for an FBAR offense standing alone (and double that if there are other violations or a pattern of illegal activity). 31 U.S.C. § 5322(a)-(b). The criminal penalties include a substantial fine in addition to the prospect of a prison term – a consequence much more serious than even the maximum civil penalty permitted by § 5321(a)(5)(C). *Cf. Mackby*, 339 F.3d at 1018 (noting that "when courts have compared civil judgments with criminal penalties for the same conduct, they have considered the full criminal penalty").[7]

95. All of the *Bajakajian* factors weigh against the conclusion that the penalties assessed against Mr. Collins violate the Eighth Amendment.

96. Even if the Court additionally considers Mr. Collins's ability to pay under *United States v. Viloski*, 814 F.3d 104 (2d Cir. 2016) and *United States v. Levesque*, 546 F.3d 78 (1st Cir. 2008), he has not carried his burden of demonstrating that imposition of the willful FBAR penalties would deprive him of his livelihood. Among other things, Mr. Collins receives three different monthly retirement benefits, holds over $1.3 million in foreign accounts, and was unwilling or unable to estimate the

[7] The potential criminal FBAR fine amounts at issue here are a far cry from *Bajakajian*, where a $357,144 forfeiture was held grossly excessive in light of the maximum criminal fine for the same offense being only $5,000. *See* 524 U.S. at 339-40.

size of his domestic investment holdings or retirement accounts. (Trial Tr. at 194:24–197:15; Pl.'s Ex. 61 at Form 8938.) He also admitted that, after the IRS had proposed the willful FBAR penalties at issue, he transferred assets into an irrevocable family trust that currently holds $2.5 million. (Trial Tr. at 198:6–17.) These are not signs that Mr. Collins will "never recovery financially from paying this penalty." (Doc. 42 at 15.)

97. The willful FBAR penalties assessed against Mr. Collins (which were well below the statutory maximum) are not unconstitutionally excessive under the Eighth Amendment. *See*, *e.g.*, *United States v. Bussell*, 699 F. App'x 695, 696 (9th Cir. 2017) (penalty representing half of the account value for the year at issue was "not grossly disproportional to the harm [the violator] caused because [she] defrauded the government and reduced public revenues"), *cert. denied* 138 S. Ct. 1697 (2018); *Garrity*, 2019 WL 1004584 at *1, *6–9 (willful FBAR penalty of 50 percent of an account's $1,873,382 balance was not excessive); *Estate of Schoenfeld*, 344 F. Supp. 3d at 1359, 1375 (willful FBAR penalty of 50 percent of an account's $1,228,600 balance was not excessive).

Consistent with the above Findings and Conclusions, the Court hereby enters the following:

ORDER

The FBAR penalties imposed by Plaintiff, against Defendant Richard Collins, are **AFFIRMED**, **UPHELD and ORDERED**, in the total amount of **$308,064.00**

($154,032.00 for 2007, and $154,032.00 for 2008). By **February 16, 2021**, Plaintiff shall submit a proposed judgment order, including an updated calculation of Defendant's liability as of the date of judgment, including any applicable and appropriate fees, penalties and interest; and a brief containing legal authority in support thereof. Once Plaintiff's submission is made, the Court will enter an order providing Defendant a brief period (one week) to be heard regarding Plaintiff's proposals.[8]

IT IS SO ORDERED.

February 8, 2021

s/Cathy Bissoon
Cathy Bissoon
United States District Judge

cc (via ECF email notification):

All Counsel of Record

[8] Although it remains entirely the parties' prerogative, the Court urges both sides to consider whether, in exchange for finality, they can now reach agreement regarding the additional assessments, if any, that should be levied. From its inception, this case has – in the undersigned's view – remained one particularly amenable to a reasonable, amicable resolution. The Court may intuit that one or both sides were adamant, in regards to "having their day in court." That day in court having been had, it seems time for both sides to weigh the virtues of finality, and being able to move on with their lives; against the cost of continuing in protracted legal squabbles regarding whether the judgment will stand, and whether additional weight must attach to any "pound of flesh" exacted.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Civil Action No. 18-1069
v.	)	Judge Cathy Bissoon
RICHARD COLLINS,	)	
Defendant.	)	

JUDGMENT

(Filed Mar. 15, 2021)

Judgment hereby is entered, in favor of Plaintiff and against Defendant, in the amount of **$403,787.31**. This consists of penalties assessed against Defendant under 31 U.S.C. § 5321(a)(5), in the total amount of $308,064 ($154,032 for 2007 and $154,032 for 2008); *minus* payments made by Defendant in 2017, in the amount of $2,468.50; *plus* interest ($14,028.86) and penalties ($84,162.95) accruing on the unpaid portion of the original assessment, in accordance with 31 U.S.C. § 3717, at the rates of 1% and 6% per annum, respectively. Post-judgment interest under 28 U.S.C § 1961, and penalties under 31 U.S.C. § 3717(e)(2), will accrue/continue to accrue from today until the Judgment is paid.

IT IS SO ORDERED.

March 15, 2021 s/Cathy Bissoon
Cathy Bissoon
United States District Judge

cc (via ECF email notification):

All Counsel of Record

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Civil Action No. 18-1069
v.	)	Judge Cathy Bissoon
RICHARD COLLINS,	)	
Defendant.	)	

JUDGMENT ORDER

(Filed Mar. 15, 2021)

FINAL JUDGMENT hereby is entered pursuant to Rule 58 of the Federal Rules of Civil Procedure. This case has been marked closed.

IT IS SO ORDERED.

March 15, 2021 s/Cathy Bissoon
Cathy Bissoon
United States District Judge

cc (via ECF email notification):

All Counsel of Record