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United States Court of Appea
Tenth Circuit

March 27, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DANIELA BOWMAN,

Plaintiff - Appellant,

v.

CORDELIA FRIEDMAN,

Defendant - Appellee.

No. 23-2115
(D.C. No. 1:21-CV-00675-JB-SCY)
(D. N.M.)

ORDER AND JUDGMENT*

Before **MATHESON**, **EID**, and **CARSON**, Circuit Judges.

After a state court dismissed Daniela Bowman's lawsuit against the New Mexico Taxation and Revenue Department (the "Department") and the dismissal was affirmed on appeal, she filed a pro se federal lawsuit against Cordelia Friedman, the lawyer who had represented the Department. Ms. Bowman alleged that in defending the Department, Ms. Friedman violated her Fourteenth and Fourth Amendment

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

rights. The district court dismissed the case for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and denied her motion for reconsideration. Ms. Bowman appeals. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

A. *State Court Proceedings*

Ms. Bowman sued the New Mexico Taxation and Revenue Department in state district court for recovery of gross receipt taxes she had paid in 2017. Cordelia Friedman, an attorney for the Department, was assigned to the case.

Ms. Bowman alleged the issue to be determined was "whether [she] was an employee or independent contractor at the company [where] she worked in 2011, an employment issue not a tax issue." ROA at 8. During discovery, the Department requested the production of Ms. Bowman's federal income tax return to "review whether . . . [Ms. Bowman] took deductions on her Federal Return consistent with having business income rather than wage income." *Id.* at 13 (emphasis and quotations omitted).

Ms. Bowman, contending the tax return was irrelevant, refused to produce it. The Department moved to compel production. On July 19, 2018, the court held a hearing and ordered Ms. Bowman to produce the tax return or provide proof she had requested it from the IRS. When Ms. Bowman refused to sign an order reflecting the court's ruling, the court held a second hearing and entered an order compelling the production of the tax return by July 31, 2018.

After Ms. Bowman failed to comply with the court's order, the Department moved for dismissal of the lawsuit as a sanction. In response, Ms. Bowman asserted the tax return was privileged. After a third hearing, the court rejected that assertion and ordered Ms. Bowman to request a copy of her tax return from the IRS by October 5, 2018. Ms. Bowman alleges now that she was not permitted to leave the courtroom until she completed the request.

Ms. Bowman failed to submit the request by the deadline, so the Department renewed its motion. On November 1, 2018, the court held a fourth hearing, determined Ms. Bowman had not complied with the court's discovery orders, and dismissed the case. Ms. Bowman appealed. The New Mexico Court of Appeals affirmed. The New Mexico Supreme Court denied Ms. Bowman's petition for writ of certiorari.

B. ***Federal District Court Proceedings***

After the state litigation concluded, Ms. Bowman sued Ms. Friedman in federal district court under 42 U.S.C. § 1983, alleging that Ms. Friedman had violated her rights under the Fourteenth and Fourth Amendments during the state court proceedings.

In support of her Fourteenth Amendment claim, she alleged that Ms. Friedman made false statements to the court concerning the relevancy of Ms. Bowman's federal tax return, causing the district court to dismiss her lawsuit and thereby deprive her of a due process right to a decision on the merits.

Ms. Bowman claimed Ms. Friedman violated her Fourth Amendment rights because the discovery order Ms. Friedman obtained compelling the production of her tax return amounted to an unlawful "search and seizure." ROA at 26 (quotations omitted). She also alleged that, because of Ms. Friedman's arguments, the court detained her in the courtroom until she signed a tax return request form.

Ms. Friedman moved to dismiss, arguing that Ms. Bowman (1) failed to state a claim for procedural due process because she received all the process she was due, and (2) failed to state a Fourth Amendment claim because no seizure occurred. The magistrate judge recommended granting the motion, and the district court adopted the recommendation over Ms. Bowman's objections. Ms. Bowman then filed a motion for reconsideration. The magistrate judge recommended denying the motion, and the district court again adopted the recommendation over Ms. Bowman's objections. This appeal followed.

II. DISCUSSION

We review a Rule 12(b)(6) dismissal de novo. *Serna v. Denver Police Dep't*, 58 F.4th 1167, 1169 (10th Cir. 2023). We accept as true all well-pleaded facts in Ms. Bowman's complaint, view them in the light most favorable to her, and draw all reasonable inferences in her favor. *See Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1281 (10th Cir. 2021). We do not, however, assume the truth of conclusory allegations. *See id.* "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*

Twombly, 550 U.S. 544, 570 (2007)); *see Strain v. Regalado*, 977 F.3d 984, 989 (10th Cir. 2020).[1]

A. ***Fourteenth Amendment Claim***

"We engage in a two-step inquiry in determining whether an individual's procedural-due-process rights were violated: (1) Did the individual possess a protected property interest to which due process protection was applicable? (2) Was the individual afforded an appropriate level of process?" *Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1219 (10th Cir. 2006) (brackets and quotations omitted). The district court concluded the due process claim fails because, even assuming Ms. Bowman had a protected property interest, she received all the process she was due under the Fourteenth Amendment. We agree.

"[O]rdinarily one who has a protected property interest is entitled to some sort of hearing before the government acts to impair that interest, although the hearing need not necessarily provide all, or even most, of the protections afforded by a trial." *Id.* at 1220. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quotations omitted).

The allegations in Ms. Bowman's complaint show she was afforded a meaningful opportunity to be heard in state court. Over six months, she engaged in

[1] Because Ms. Bowman proceeds pro se, we liberally construe her filings, but we do not assume the role of advocate. *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

discovery, filed multiple pleadings, and addressed the state district court judge in at least four hearings. She appealed and received a written decision from the New Mexico Court of Appeals. Ms. Bowman was afforded an appropriate level of process.[2]

Citing a New Mexico Supreme Court case, Ms. Bowman argues that she was entitled to no fewer than seven procedural safeguards. Aplt. Opening Br. at 18 (quoting *Bd. of Educ. v. Harrell*, 882 P.2d 511, 519 (N.M. 1994)). The *Harrell* decision, however, merely quoted a passage of an administrative treatise, which listed "[t]he essential elements of the adversary process, some or all of which may be required." 882 P.2d at 519. The court observed that "[d]ue process considerations are flexible" and "the circumstances of the case determine the requirements." *Id.* *Harrell* does not support Ms. Bowman's assertion that she was entitled to every listed safeguard, particularly when she circumvented the usual process by disobeying the state court's orders and was afforded the right to appeal the dismissal of her case to the New Mexico Court of Appeals.

Ms. Bowman also argues she was entitled to a written decision in her state court litigation, citing a state statute setting forth the procedures for claiming a tax refund. *See* N.M. Stat. Ann. § 7-1-26 (West 2023). Under § 7-1-26(E), a person seeking a refund

[2] Ms. Bowman additionally argues that she sufficiently pled a procedural due process claim because Ms. Friedman's alleged perjury in the state district court tainted the court proceedings. Aplt. Opening Br. at 26. But the alleged perjury did not prevent Ms. Bowman from receiving a meaningful opportunity to be heard.

may pursue either an administrative protest or a civil action in state district court. In an administrative protest, the statute requires a written decision on the merits. *See* § 7-1B-8(I). Ms. Bowman insists, without citation to any authority, that the procedures for an administrative protest apply to taxpayers who pursue a civil action in state district court. Under this logic, one could commence a civil action under § 7-1-26(E), defy all of the court's discovery orders, and still be entitled to a ruling on the merits. We reject this argument as lacking reason or merit. Having chosen a civil action, Ms. Bowman was subject to the procedural requirements set forth in the New Mexico Rules of Civil Procedure, including the discovery and sanctions provisions.[3]

In sum, we discern no error in the district court's dismissal of Ms. Bowman's Fourteenth Amendment claim.

B. *Fourth Amendment Claim*

"To state a claim under the Fourth Amendment, plaintiffs must show both that a seizure occurred and that the seizure was unreasonable." *Childress v. City of Arapaho*, 210 F.3d 1154, 1156 (10th Cir. 2000) (quotations omitted).[4] Ms. Bowman maintains that, based on the discovery order, Ms. Friedman seized her "private papers." Aplt.

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[3] Ms. Bowman alleges, without evidence, that no other New Mexico taxpayer has been denied a decision on the merits of their claim for a tax refund. She does not allege that any other New Mexico taxpayer has defied a state district court's discovery order and was still afforded a decision on the merits.

[4] The Fourth Amendment applies against state officials as incorporated through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

Opening Br. at 31. The record shows, however, that Ms. Bowman never produced the tax return that was the subject of the discovery order.[5] And although she asserts in her opening brief that Ms. Friedman seized the IRS form Ms. Bowman had filled out, her complaint contains no such allegation. We agree with the district court that Ms. Bowman failed to allege a seizure of any of her tax documents.

Ms. Bowman also alleges she was arrested within the meaning of the Fourth Amendment. But she does not allege that Ms. Friedman detained her. Instead, she contends the state district court detained her as a result of Ms. Friedman's legal arguments, which Ms. Bowman characterizes as "false statements." ROA at 17. Ms. Bowman cites decisions finding a Fourth Amendment violation for a law enforcement officer to make false statements knowingly or recklessly in support of a search warrant if the statements were material to the finding of probable cause. *See, e.g.*, *Briedenbach v. Bolish*, 126 F.3d 1288, 1292 (10th Cir. 1997). Such decisions, however, have no application to a discovery order alleged to have been fraudulently obtained in a civil lawsuit. And the state court's instruction to Ms. Bowman to remain in the courtroom after the third hearing to sign a tax form request document in compliance with the court's order was reasonable under the Fourth Amendment. *See Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (stating "the ultimate touchstone of the Fourth

[5] Ms. Bowman argues at length that her claim for a tax refund in New Mexico district court did not place her tax return at issue and she therefore maintained an expectation of privacy in her tax return. But because she never produced the return, we need not address this argument.

Amendment is 'reasonableness'"); *In re Jade G.*, 30 P.3d 376, 382 (N.M. App. 2001) ("a court may exercise authority that is essential to the court's fulfilling its judicial functions").

Because Ms. Bowman failed to adequately allege that any unlawful seizure occurred, we agree with the district court that Ms. Bowman failed to state a Fourth Amendment claim for which relief may be granted.

III. CONCLUSION

We affirm the district court's dismissal of Ms. Bowman's claims.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

DANIELA BOWMAN,

Plaintiff,

vs. No. CIV 21-0675 JB/SCY

CORDELIA FRIEDMAN,

Defendant.

MEMORANDUM OPINION AND ORDER ADOPTING THE MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER comes before the Court on the Plaintiff's Motion to Alter or Amend a Judgment, filed September 27, 2022 (Doc. 56)("Motion"). In the Motion, Plaintiff Daniela Bowman asks the Court to reconsider its prior Memorandum Opinion and Order Adopting the Magistrate Judge's Proposed Findings and Recommended Disposition, filed August 31, 2022 (Doc. 54)("MOO"), which dismisses this case. See Motion at 1; MOO at 20. Bowman is proceeding pro se. The Court referred this matter to the Honorable Steven C. Yarbrough, United States Magistrate Judge for the United States District Court for the District of New Mexico. See Order of Reference Relating to Non-Prisoner Pro Se Cases at 1, filed January 31, 2022 (Doc. 44). Judge Yarbrough entered the Proposed Findings and Recommended Disposition Regarding Motion to Alter or Amend a Judgment, filed February 1, 2023 (Doc. 61)("PFRD"). The PFRD recommends that the Court deny Bowman's Motion. See PFRD at 17. Bowman timely filed the Plaintiff's Objections to Court's Proposed Findings and Recommended Disposition Regarding Motion to Alter or Amend a Judgment, filed February 13, 2023 (Doc. 62)("Objections").

The Court has considered: (i) Bowman's Motion; (ii) the Defendant's Response in Opposition to Plaintiff's Motion to Alter or Amend a Judgment, filed October 17, 2022 (Doc. 58);

(iii) the Plaintiff's Reply in Support of Her Motion to Alter or Amend a Judgment, filed October 26, 2022 (Doc. 59); (iv) Magistrate Judge Yarbrough's PFRD; and (v) Bowman's Objections, in light of the legal standards described below. The Court also has conducted a de novo review of the portions of the PFRD to which Bowman objects. The Court concludes that Bowman's Objections to Magistrate Judge Yarbrough's PFRD lack a sound basis in the relevant facts and applicable law, and therefore overrules the Objections.

PROCEDURAL BACKGROUND

On July 21, 2021, Bowman filed her Civil Rights Complaint Pursuant to 42 U.S.C. § 1983 (Doc. 1)("Complaint"). The Complaint alleges violations of Bowman's due process rights under the Fourteenth Amendment to the Constitution of the United States of America, U.S. const. amend. XIV, and Bowman's rights to be free of unreasonable seizure under the Fourth Amendment, U.S. const. amend. IV. See Complaint ¶¶ 1-54, at 1-22. Bowman's claims arise out of allegations that, in a separate State court proceeding regarding whether Bowman should have filed a refund of gross receipt taxes as an employee or as an independent contractor, Defendant Cordelia Friedman made false statements to the State court, causing that court to enter an allegedly illegal discovery order and to dismiss the case before trial. See Complaint ¶¶ 5-6, at 2; id. ¶ 9, at 4. Friedman moved to dismiss this action on October 27, 2021. See Defendant Cordelia Friedman's Motion to Dismiss, filed October 27, 2021 (Doc. 19). The Court referred the case to Magistrate Judge Yarbrough to propose findings of fact and recommend the case's ultimate disposition. See Order of Reference Relating to Non-Prisoner Pro Se Cases at 1. Magistrate Judge Yarbrough submitted his Proposed Findings and Recommended Disposition Regarding Motion to Dismiss, filed June 7, 2022 (Doc. 52)("MTD PFRD"). In response to the MTD PFRD, Bowman filed the Plaintiff's Objections to Court's Proposed Findings and Recommended Disposition Regarding Motion to

Dismiss, filed June 21, 2022 (Doc. 53). The Court adopted Magistrate Judge Yarbrough's recommendations, overruled Bowman's objections to the MTD PFRD, and dismissed the case on August 31, 2022. See MOO at 20; Final Judgment at 1, filed August 31, 2022 (Doc. 55).

More specifically, in the MOO, the Court overrules Bowman's five objections. First, the Court overrules Bowman's objection that the compulsory production of a person's private papers is a search and seizure under the Fourth Amendment and concludes that Bowman does not allege satisfactorily a search and seizure, because Bowman does not allege that she was arrested and does not allege that anyone seized her private papers. See MOO at 10-13. Second, the Court overrules Bowman's objection that the MTD PFRD did not accept her factual allegations and used the wrong procedural due process standard, concluding that Bowman's disagreement with the State court proceeding's outcome is not sufficient to establish a due process violation, and that Magistrate Judge Yarbrough did not err in concluding that Bowman did not state facts demonstrating that she did not receive due process. See MOO at 13-15. Third, the Court overrules Bowman's objections to the MTD PFRD's recommendation that the Court deny Bowman's request for a surreply. See MOO at 15-16. Fourth, the Court overrules Bowman's objection to the MTD PFRD's recommendation that the Court consider only the allegations in the Complaint. See MOO at 16-17. Fifth, the Court overrules Bowman's objection that, because she did not put her federal tax returns at issue in the case, and because they are private papers not subject to discovery, her federal tax returns were not relevant to the case. See MOO at 17-20. The Court overrules this objection, agreeing with the Court of Appeals of New Mexico's conclusion in the underlying State case that her tax returns were neither privileged nor irrelevant, and determining that the returns were at issue in the State case. See MOO at 17-20 (citing Bowman v. Manforte, No. A-1-CA-37874, 2020 WL

1322248, ¶ 5, at *1 (N.M. Ct. App. February 28, 2020); Breen v. State Taxation and Rev. Dep't, 2012-NMCA-101 ¶ 27, 287 P.3d 379, 388).

Bowman filed the present Motion on September 27, 2022. See Motion at 1. In the Motion, Bowman asserts that the Court made eighteen mistakes in deciding to dismiss the case in its MOO. See Motion at 1-32. The Court summarizes them briefly here. First, Bowman asserts that the Court did not rule on the Plaintiff's Objections to Court's Memorandum Opinion and Order Denying Motion for Sanctions, filed April 21, 2022 (Doc. 49)("Sanctions Objections"). See Motion at 1-2. Second, she argues that the Court misunderstands her allegations, and that she has not "alleged that if her tax returns were at issue they are not subject to discovery ***because they are private papers***." Motion at 3 (emphasis in original). Third, she argues that the Court misinterpreted Breen v. State Taxation and Revenue Department and that the Court of Appeals of New Mexico's opinion in that case does not require Bowman to disclose her tax information under N.M.S.A. § 7-1-8.4. See Motion at 3-6. Fourth, Bowman argues that the Court should not have agreed with the Court of Appeals of New Mexico's conclusion that Bowman's federal tax returns are relevant to whether she is an employee or independent contract, because "the Court is not authorized to accept the 'truth of matters asserted therein,'" and that Friedman's alleged perjury tainted the Court of Appeals of New Mexico's decision. Motion at 6-8 (quoting Tal v. Hogan, 453 F.3d 1244, 1265 n.24 (10th Cir. 2006)). Fifth, Bowman asserts that: (i) the Court "believed Friedman's false statements in her MTD" and that the Court therefore states incorrectly that, "'[b]ecause Bowman is contesting her tax liability, she has put the taxpayer's own liability for taxes at issue'"; and (ii) she puts only her gross receipt taxes at issue and not her federal income taxes. Motion at 8-12 (no citation given for quotation)(alteration in Motion).

The next six mistakes that Bowman asserts concern her Fourth Amendment claim. See Motion at 13-22. Sixth, Bowman argues that the Court made the mistaken determination that she had not been searched or seized, because she asserts that, when the State court required her to stay in the courtroom to fill out Internal Revenue Service ("IRS") Form 4506, [1] the State court's show of force amounted to an arrest, and that the Court should have considered the MTD Objections' framing of this event as an arrest, even though she does not describe it as an arrest in the Complaint. See Motion at 13-15. Seventh, Bowman argues that the Court misunderstood the facts when it determined that Bowman does not allege that Friedman ever obtained Bowman's tax returns after Bowman filled out IRS Form 4506 and that Bowman therefore does not state an unlawful-seizure claim. See Motion at 15-16. Bowman asserts instead that she does not allege that Friedman seized her tax returns, but that IRS Form 4506 itself became a part of her personal papers once she signed it, and that Friedman seized that document unlawfully after Bowman completed it in the courtroom. See Motion at 15-16. Eighth, Bowman argues: (i) that the Court misquotes and relies on inapposite caselaw in explaining that, to state a Fourth Amendment claims, she must allege: (a) that a seizure occurred, and (b) that the seizure was unreasonable; (ii) that she does not need to show an actual seizure occurred; and (iii) that she cites the proper caselaw on the protections afforded to private papers and on the review that court should apply to the veracity of affidavits used to support warrants or writs. See Motion at 16-19. Ninth, Bowman argues that the Court ignored that "Friedman testified that the document she was seeking from Plaintiff cannot be obtain [sic] from IRS," and that "[t]his fact alone supports the unreasonableness of the warrant Friedman

[1] IRS Form 4506, also called a "Request for Copy of Tax Return," allows taxpayers to request copies of their tax returns or designate third parties to receive tax returns. About Form 4506, Request for Copy of Tax Return, IRS (Jan. 27, 2023), https://www.irs.gov/forms-pubs/about-form-4506 (last visited June 5, 2023).

obtained via deception giving rise to Plaintiff's Fourth Amendment claim." Motion at 20 (citing Complaint ¶ 21, at 10). Tenth, Bowman asserts that the Court did not consider that, in the underlying State litigation, Bowman supplied a personal copy of her federal tax return, even though Friedman insisted on an IRS-certified copy. See Motion at 20. Eleventh, Bowman argues that the Court "did not recognize the constitutional right of a person to invoke the Fifth Amendment protection when refusing to disclose personal information," which she invoked in her State lawsuit, because, as she asserts, she was under threat of criminal charges for making fraudulent or false tax returns. Motion at 21-22.

The final seven mistakes that Bowman asserts concern her due process claim. See Motion at 22-32. Twelfth, Bowman argues that the Court's assertion that Bowman received an appropriate level of process is improper, because the Court did not have sufficient information at the motion-to-dismiss stage to make that determination. See Motion at 23. Thirteenth, Bowman argues that the Court determined improperly that she did not "plainly state what constitutionally protected rights she was deprived of, the circumstances of deprivation and that the person responsible acted under the color of law," that the Court did not consider that: "1) Plaintiff did not have a trial, 2) Plaintiff did not present any evidence on her issue because 3) Friedman committed perjury." Motion at 23. Fourteenth, Bowman argues that the Court's determination that Bowman participated proactively in her lawsuit is not the standard the Court should have used to determine whether she was afforded an appropriate level of due process, but that the Court instead should have considered whether she had: (i) an opportunity to make an oral presentation; (ii) an opportunity to present evidence and witnesses; (iii) the opportunity to cross-examine witnesses and confront evidence used against her; and (iv) a right to an attorney to present her case. See Motion at 24-25 (citing Bd. of Educ. Of Carlsbad Mun. Schs. v. Harrell, 1994-NMSC-096, ¶ 25,

118 N.M. 470, 478, 882 P.2d 511, 519). Fifteenth, Bowman argues that the Court did not consider fully her allegation that Friedman lied to the State court, "automatically giv[ing] rise to 'denial of due process' claim," because the State court's orders and proceedings are not valid. Motion at 25-26. Sixteenth, Bowman argues that the Court "did not consider the State specific due process afforded to New Mexico taxpayers when it dismissed the claim," and that she did not receive a review of her gross receipt tax assessment or a written determination of liability or nonliability, in violation of the New Mexico Taxpayer Bill of Rights, N.M.S.A. § 7-1-4.2. Motion at 26-28. Seventeenth, Bowman argues that, "[i]f this Court is going to judge the merits of the due process afforded to Plaintiff, the Court must establish the substantive law on the issue raised," and argues that New Mexico gross receipt tax regulations do not permit Friedman to dictate which evidence is necessary to prove Bowman's tax dispute. Motion at 29-30 (citing N.M.A.C. 3.2.105.7; Eaton v. Bureau of Rev., 1972-NMCA-114, ¶ 12, 84 N.M. 226, 228, 501 P.2d 670, 672). Eighteenth, Bowman argues that the Court misconstrued her argument to be that she is unhappy with the State court's decision, and not with the violation of her due process rights, and argues that Friedman singled her out for discriminatory treatment. See Motion at 30-31.

Magistrate Judge Yarbrough addresses each of Bowman's arguments in the PFRD. See PFRD at 1-17. First, he determines that Bowman's argument about her Sanctions Objections is moot, because the Court since has entered an order overruling them. See PFRD at 3 (citing Memorandum Opinion and Order Overruling Plaintiff's Objections to the Magistrate Judge's Order Denying Motion for Sanctions, filed October 11, 2022 (Doc. 57)). Second, Magistrate Judge Yarbrough determines that Bowman's argument that she did not allege that her tax returns were not subject to discovery, because they are private papers, "appears to be [an argument] that she never made a privacy objection and that if her tax returns had been relevant, she would have turned

them over without making a privacy objection," an argument which he determines to be "simply a rehashing of her argument that her tax returns were not relevant." PFRD at 4. Third, Magistrate Judge Yarbrough considers Bowman's argument that the Court misinterpreted N.M.S.A. § 7-1-8.4, and concludes that the Court did not extend the statute's plain language, but applied its reasoning to an individual tax litigant, and that Bowman has not shown that the Court's reasoning was clear error. See PFRD at 4-5. Fourth, Magistrate Judge Yarbrough reviews Bowman's argument that the Court relied improperly on the Court of Appeals of New Mexico's reasoning and concludes that Bowman's reliance on caselaw regarding judicial notice applies to the State court's factual findings, but that the Court examined Bowman's allegations without relying on the State court's factual findings and came to the same conclusion on its own. See PFRD at 6-7. Fifth, Magistrate Judge Yarbrough reviews Bowman's argument that "she only put her gross receipt tax liability at issue, not her income tax returns," and determines that this argument repeats her previous arguments, that Bowman may not now argue that Friedman made false statements in the MTD briefing, when she should have done so during the briefing process, and that she "offers no reason why the Court should revisit these issues." PFRD at 7.

Sixth, Magistrate Judge Yarbrough considers Bowman's argument that she was seized when the State court judge ordered her to stay in the courtroom until she completed IRS Form 4506, and determines that Bowman does not present allegations that Friedman violated her Fourth Amendment rights for the State court judge's detaining her in the courtroom. See PFRD at 8-9. Seventh, Magistrate Judge Yarbrough reviews Bowman's argument that IRS Form 4506 was part of her personal papers and that Friedman illegally seized that, and notes that she does not make this allegation in her Complaint and makes "no reference in the complaint of Defendant Friedman ever having possession of it or using it." PFRD at 9 (citing Complaint ¶ 23, at 10-11). Eighth,

Magistrate Judge Yarbrough considers Bowman's argument that the Court should not have held that "no actual search or seizure ever occurred of her tax returns because she never produced them in response to the state-court's order," and determines that "[t]his is simply a repeat of arguments Plaintiff made in response to the motion to dismiss and in her objections to the PFRD and she fails to explain why reconsideration is warranted." PFRD at 10. Ninth, Magistrate Judge Yarbrough addresses Bowman's argument that the Court did not consider that the IRS could not have delivered her federal tax return, and determines that "this argument appears to be attacking the grounds upon which the state court issued its discovery order, but does not address the Court's holding in the Dismissal Order that Plaintiff failed to assert that either a search or a seizure actually occurred." PFRD at 10. Tenth, Magistrate Judge Yarbrough addresses Bowman's argument that the Court did not consider that she supplied a personal copy of her federal tax return, and concludes that, "[t]o the extent Plaintiff is arguing that Defendant did seize and search her tax returns because Plaintiff turned part of them over, this allegation does not appear in her complaint," and concludes that her allegation that she offered her personal copy of the form to the court "only support[s] the Court's conclusion . . . that Plaintiff never actually produced her tax returns involuntarily and so neither a search nor seizure ever occurred." PFRD at 10-11 (citing Complaint ¶ 50, at 21-22). Eleventh, Magistrate Judge Yarbrough considers Bowman's argument that the Court did not recognize her Fifth Amendment right to refuse to disclose personal information, concluding that "this argument appears to attack the validity of the state-court discovery order," and does not address the Court's conclusion that Bowman does not state a Fourth Amendment claim, because she does not allege that a search or seizure ever occurred. PFRD at 11.

Twelfth, Magistrate Judge Yarbrough considers Bowman's argument that the Court cannot determine at the motion-to-dismiss stage whether she received an appropriate level of process, and

concludes that the Court did not review the evidence, but considered only the allegations in Bowman's Complaint. See PFRD at 12-13. Thirteenth, Magistrate Judge Yarbrough considers Bowman's argument that the Court determined improperly that she did not meet the requisite pleading requirements, and concludes that "[t]his argument is a repeat of her argument made in response to the motion to dismiss and in her objections which the Court already considered and rejected." PFRD at 13. Fourteenth, Magistrate Judge Yarbrough considers Bowman's argument that the Court did not apply the correct procedural due process standard, and concludes that Bowman misunderstands that the elements that the Supreme Court of New Mexico explains in Board of Education of Carlsbad Municipal Schools v. Harrell are not strict requirements, but that due process considerations are flexible. See PFRD at 14-15 (citing Bd. of Educ. Of Carlsbad Mun. Schs. v. Harrell, 1994-NMSC-096, ¶¶ 23, 25, 118 N.M. at 478, 882 P.2d at 519). Fifteenth, Magistrate Judge Yarbrough reviews Bowman's argument that Friedman's alleged lies automatically give rise to a due process claim, and concludes that "the Dismissal Order held that 'even assuming Defendant made lies and misrepresentations to the state court, those lies did not exclude Plaintiff from engaging in the state court process,'" and that Bowman does not explain why the Court should reconsider this conclusion. PFRD at 15 (quoting MOO at 14). Sixteenth, Magistrate Judge Yarbrough considers Bowman's arguments that: (i) the Court did not consider State-specific due process provisions which apply to New Mexico taxpayers; (ii) Bowman has a right to a written determination of liability of nonliability of gross receipt taxes; and (iii) Friedman deprived Bowman of the opportunity to meet her burden to present evidence on the disputed tax assessment. See PFRD at 15-16. Magistrate Judge Yarbrough concludes that: (i) the Court determined that Bowman has had a review of her tax protest; (ii) Bowman misunderstands New Mexico tax law, because the N.M.S.A. § 7-1-4.2(I) provision is not applicable to the situation in

this case, where Bowman has not entered into a compromise or closing agreement with the tax secretary; and (iii) Bowman's third point is a repeat of arguments which the Court rejected previously. See PFRD at 15-16. Seventeenth, Magistrate Judge Yarbrough considers Bowman's argument that Friedman has lied whether her federal tax returns are relevant evidence, and concludes that this argument repeats her previous arguments, and that the "Court has concluded that Plaintiff's complaint alleges that she had an opportunity to be heard in the state court, including an opportunity to address Defendant's alleged lies." PFRD at 17 (citing MOO at 14). Eighteenth, Magistrate Judge Yarbrough considers Bowman's argument that her lawsuit is not about her having lost her State case, but about the vindication of her due process rights, and concludes that the Court has concluded that the "Plaintiff's allegations make clear that she was afforded appropriate process in the state court. Plaintiff offers no reason to reconsider that holding." PFRD at 18. Accordingly, Magistrate Judge Yarbrough recommends that the Court decline to reconsider its MOO on all of Bowman's eighteen grounds and that it deny the Motion. See PFRD at 1-18. Bowman filed her Objections to the PFRD on February 13, 2023. See Objections at 1-21. The Court summarizes and considers her Objections in the Analysis section below.

LAW REGARDING OBJECTIONS TO PROPOSED FINDINGS AND RECOMMENDATIONS

District courts may refer dispositive motions to a Magistrate Judge for a recommended disposition. See Fed. R. Civ. P. 72(b)(1) ("A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement."); 28 U.S.C. § 636(b)(1)(B). Rule 72(b)(2) of the Federal Rules of Civil Procedure governs objections to a

Magistrate Judge's recommended disposition: "Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations." Fed. R. Civ. P. 72(b)(2). See 28 U.S.C. § 636(b)(1). When resolving objections to a Magistrate Judge's recommended disposition, "[t]he district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3). Similarly, 28 U.S.C. § 636 provides:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

28 U.S.C. § 636(b)(1)(C).

"The filing of objections to a magistrate's report enables the district judge to focus attention on those issues -- factual and legal -- that are at the heart of the parties' dispute." United States v. 2121 E. 30th St., Tulsa, Okla., 73 F.3d 1057, 1059 (10th Cir. 1996)("2121 East 30th Street")(quoting Thomas v. Arn, 474 U.S. 140, 147 (1985)). As the United States Court of Appeals for the Tenth Circuit has noted, "the filing of objections advances the interests that underlie the Magistrate's Act,[2] including judicial efficiency." 2121 East 30th Street, 73 F.3d at 1059 (citing Niehaus v. Kan. Bar Ass'n, 793 F.2d 1159, 1165 (10th Cir.1986); United States v. Walters, 638 F.2d 947, 950 (6th Cir. 1981)).

[2]Congress enacted the Federal Magistrates Act, 28 U.S.C. §§ 631-39, in 1968.

The Tenth Circuit holds "that a party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." 2121 East 30th Street, 73 F.3d at 1060. "To further advance the policies behind the Magistrate's Act, [the Tenth Circuit], like numerous other circuits, ha[s] adopted 'a firm waiver rule' that 'provides that the failure to make timely objections to the magistrate's findings or recommendations waives appellate review of both factual and legal questions.'" 2121 East 30th Street, 73 F.3d at 1059 (quoting Moore v. United States, 950 F.2d 656, 659 (10th Cir. 1991)). "[O]nly an objection that is sufficiently specific to focus the district court's attention on the factual and legal issues that are truly in dispute will advance the policies behind the Magistrate's Act." 2121 East 30th Street, 73 F.3d at 1060. In addition to requiring specificity in objections, the Tenth Circuit has stated that "[i]ssues raised for the first time in objections to the magistrate judge's recommendation are deemed waived." Marshall v. Chater, 75 F.3d 1421, 1426 (10th Cir. 1996). See United States v. Garfinkle, 261 F.3d 1030, 1030-31 (10th Cir. 2001)("In this circuit, theories raised for the first time in objections to the magistrate judge's report are deemed waived."). In an unpublished opinion, the Tenth Circuit states that "the district court correctly held that [a petitioner] had waived [an] argument by failing to raise it before the magistrate." Pevehouse v. Scibana, 229 F. App'x 795, 796 (10th Cir. 2007)(unpublished).[3]

[3]Pevehouse v. Scibana is an unpublished opinion, but the Court can rely on an unpublished Tenth Circuit opinion to the extent its reasoned analysis is persuasive in the case before it. See 10th Cir. R. 32.1(A) ("Unpublished decisions are not precedential, but may be cited for their persuasive value."). The Tenth Circuit has stated:

> In this circuit, unpublished orders are not binding precedent, . . . and we have generally determined that citation to unpublished opinions is not favored. However, if an unpublished opinion or order and judgment has persuasive value with respect to a material issue in a case and would assist the court in its disposition, we allow a citation to that decision.

In 2121 East 30th Street, the Tenth Circuit, in accord with other Courts of Appeals, expanded the waiver rule to cover objections that are timely but too general. See 2121 East 30th Street, 73 F.3d at 1060. The Supreme Court of the United States of America -- in the course of approving the United States Court of Appeals for the Sixth Circuit's use of the waiver rule -- notes:

> It does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a de novo or any other standard, when neither party objects to those findings. The House and Senate Reports accompanying the 1976 amendments do not expressly consider what sort of review the district court should perform when no party objects to the magistrate's report. See S. Rep. No. 94-625, pp. 9-10 (1976)(hereinafter Senate Report); H.R. Rep. No. 94-1609, p. 11 (1976), U.S. Code Cong. & Admin. News 1976, p. 6162 (hereinafter House Report). There is nothing in those Reports, however, that demonstrates an intent to require the district court to give any more consideration to the magistrate's report than the court considers appropriate. Moreover, the Subcommittee that drafted and held hearings on the 1976 amendments had before it the guidelines of the Administrative Office of the United States Courts concerning the efficient use of magistrates. Those guidelines recommended to the district courts that "[w]here a magistrate makes a finding or ruling on a motion or an issue, his determination should become that of the district court, unless specific objection is filed within a reasonable time." See Jurisdiction of United States Magistrates, Hearings on S. 1283 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 24 (1975)(emphasis added)(hereinafter Senate Hearings). The Committee also heard Judge Metzner of the Southern District of New York, the chairman of a Judicial Conference Committee on the administration of the magistrate system, testify that he personally followed that practice. See id., at 11 ("If any objections come in, . . . I review [the record] and decide it. If no objections come in, I merely sign the magistrate's order."). The Judicial Conference of the United States, which supported the de novo standard of review eventually incorporated in § 636(b)(1)(C), opined that in most instances no party would object to the magistrate's recommendation, and the litigation would terminate with the judge's adoption of the magistrate's report. See Senate Hearings, at 35, 37. Congress apparently assumed, therefore, that any party who was dissatisfied for any reason with the magistrate's report would file objections, and those objections would trigger district court review. There is no

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United States v. Austin, 426 F.3d 1266, 1274 (10th Cir. 2005). The Court finds that Pevehouse v. Scibana, Goings v. Sumner Cnty. Dist. Atty's Off., 571 F. App'x 634 (10th Cir. 2014), Hunter v. Hirsig, 660 F. App'x 711 (10th Cir. 2016), Reed v. Heimgartner, 579 F. App'x 624 (10th Cir. 2014), and Leek v. Androski, No. 21-3165, 2022 WL 1134967 (10th Cir. April 18, 2022), have persuasive value with respect to a material issue, and will assist the Court in its disposition of this Memorandum Opinion and Order.

> indication that Congress, in enacting § 636(b)(1)(C), intended to require a district judge to review a magistrate's report to which no objections are filed. It did not preclude treating the failure to object as a procedural default, waiving the right to further consideration of any sort. We thus find nothing in the statute or the legislative history that convinces us that Congress intended to forbid a rule such as the one adopted by the Sixth Circuit.

Thomas v. Arn, 474 U.S. at 150-52 (footnotes omitted).

The Tenth Circuit also notes, "however, that '[t]he waiver rule as a procedural bar need not be applied when the interests of justice so dictate.'" 2121 East 30th Street, 73 F.3d at 1060 (quoting Moore v. United States, 950 F.2d at 659 ("We join those circuits that have declined to apply the waiver rule to a pro se litigant's failure to object when the magistrate's order does not apprise the pro se litigant of the consequences of a failure to object to findings and recommendations.")). Cf. Thomas v. Arn, 474 U.S. at 154 ("Any party that desires plenary consideration by the Article III judge of any issue need only ask. [A failure to object] does not preclude further review by the district judge, *sua sponte* or at the request of a party, under a de novo or any other standard."). In 2121 East 30th Street, the Tenth Circuit notes that the district judge had decided sua sponte to conduct a de novo review despite the objections' lack of specificity, but the Tenth Circuit holds that it would deem the issues waived on appeal, because waiver would advance the interests underlying the waiver rule. See 73 F.3d at 1060-61 (citing cases from other Courts of Appeals where district courts elected to address merits despite potential application of waiver rule, but courts of appeals opted to enforce waiver rule).

When a party files timely and specific objections to the Magistrate Judge's PFRD, "on . . . dispositive motions, the statute calls for a de novo determination, not a de novo hearing." United States v. Raddatz, 447 U.S. 667, 674 (1980). The Tenth Circuit states that a de novo determination, pursuant to 28 U.S.C. § 636(b), "requires the district court to consider relevant

evidence of record and not merely review the magistrate judge's recommendation." In re Griego, 64 F.3d 580, 583-84 (10th Cir. 1995). The Supreme Court notes that, although a district court must make a de novo determination of the objections to recommendations under 28 U.S.C. § 636(b)(1), the district court is not precluded from relying on the Magistrate Judge's PFRD. See United States v. Raddatz, 447 U.S. at 676 ("[I]n providing for a 'de novo determination' rather than *de novo* hearing, Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations." (no citation given for quotation)); Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42 of Stephens Cnty., Okla., 8 F.3d 722, 724-25 (10th Cir. 1993)(holding that the district court's adoption of the Magistrate Judge's "particular reasonable-hour estimates" is consistent with a de novo determination, because "the district court 'may *accept*, reject, or modify, *in whole or in part*, the findings or recommendations made by the magistrate" (quoting 28 U.S.C. § 636(b)(1))(emphasis in Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42 of Stephens Cnty., Okla. but not in 28 U.S.C. § 636(b)(1))). "'Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations.'" Andrews v. Deland, 943 F.2d 1162, 1170 (10th Cir. 1991)(quoting United States v. Raddatz, 447 U.S. at 676).

Where no party objects to the Magistrate Judge's PFRD, the Court has, as a matter of course in the past, and in the interests of justice, reviewed the Magistrate Judge's recommendations. For example, in Thurlo v. Guiding Star LLC, No. CIV 12-0889 JB/LFG, 2012 WL 5378963 (D.N.M. September 26, 2012)(Browning, J.), the Court conducted a review even where the plaintiff failed to respond to the Magistrate Judge's PFRD, although the Court determined that the plaintiff "has waived his opportunity for the Court to conduct review of the factual and legal findings in the

PFRD." 2012 WL 5378963, at *3. The Court generally does not review, however, the Magistrate Judge's PFRD de novo and determine independently necessarily what it would do if the issues had come before the Court first, but rather adopts the PFRD where "[t]he Court cannot say that the Magistrate Judge's recommendation . . . is clearly erroneous, arbitrary, [obviously][4] contrary to law, or an abuse of discretion." Thurlo v. Guiding Star LLC, 2012 WL 5378963, at *3. This review, which is deferential to the Magistrate Judge's work when there are no objections, nonetheless provides some review in the interest of justice, and is more consistent with the waiver rule's intent than no review at all or a full-fledged review. Accordingly, the Court considers this standard of review appropriate. See Thomas v. Arn, 474 U.S. at 151 ("There is nothing in those

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[4]The Court previously used as the standard for review when a party does not object to the Magistrate Judge's PFRD whether the recommendation is "clearly erroneous, arbitrary, contrary to law, or an abuse of discretion," thus omitting "obviously" in front of "contrary to law." Solomon v. Holder, No. CIV 12-1039 JB/LAM, 2013 WL 499300, at *4 (D.N.M. January 31, 2013)(Browning, J.)(adopting the recommendation to which there was no objection, stating: "The Court determines that the PFRD is not clearly erroneous, arbitrary, contrary to law, or an abuse of discretion, and accordingly adopts the recommendations therein."); O'Neill v. Jaramillo, No. CIV 11-0858 JB/GBW, 2013 WL 499521, at *7 (D.N.M. January 31, 2013) (Browning, J.)("Having reviewed the PRFD under that standard, the Court cannot say that the Magistrate Judge's recommendation is clearly erroneous, arbitrary, contrary to law, or an abuse of discretion. The Court thus adopts Judge Wormuth's PFRD.")(citing Workheiser v. City of Clovis, 2012 WL 6846401, at *3); Galloway v. JP Morgan Chase & Co., No. CIV 12-0625 JB/RHS, 2013 WL 503744, at *4 (D.N.M. January 31, 2013)(Browning, J.)(adopting the Magistrate Judge's recommendations upon determining that they were not "clearly contrary to law, or an abuse of discretion."). The Court concludes that "contrary to law" does not reflect accurately the deferential standard of review that the Court intends to use when there is no objection. Finding that a Magistrate Judge's recommendation is contrary to law would require the Court to analyze the Magistrate Judge's application of law to the facts or the Magistrate Judge's delineation of the facts -- in other words performing a de novo review, which is required only when a party objects to the recommendations. The Court concludes that adding "obviously" better reflects that the Court is not performing a de novo review of the Magistrate Judges' recommendations. Going forward, therefore, the Court will review, as it has done for some time now, Magistrate Judges' recommendations to which there are no objections for whether the recommendations are clearly erroneous, arbitrary, obviously contrary to law, or an abuse of discretion.

Reports, however, that demonstrates an intent to require the district court to give any more consideration to the magistrate's report than the court considers appropriate."). The Court is reluctant to have no review at all if its name is going to go at the bottom of the order adopting the Magistrate Judge's PFRD.

RELEVANT LAW REGARDING MOTIONS TO RECONSIDER

The Federal Rules of Civil Procedure do not recognize motions for reconsideration. See Computerized Thermal Imaging, Inc. v. Bloomberg, L.P., 312 F.3d 1292, 1296 n.3 (10th Cir. 2002). Instead, a motion for reconsideration "may be construed in one of two ways: if filed within [28][5] days of the district court's entry of judgment, it is treated as a motion to alter or amend the judgment under Rule 59(e); if filed more than [28] days after entry of judgment, it is treated as a motion for relief from judgment under Rule 60(b)." See Computerized Thermal Imaging, Inc. v. Bloomberg, L.P., 312 F.3d at 1296 n.3 (citing Adams v. Reliance Standard Life Ins. Co., 225 F.3d 1179, 1186 n.5 (10th Cir. 2000)). Under the rule 59(e) standards, a court may grant a motion for reconsideration in three circumstances: when there is "an intervening change in the controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice." Brumark Corp. v. Samson Res. Corp., 57 F.3d 941, 948 (10th Cir. 1995). A motion to reconsider is not an opportunity "to revisit issues already addressed or advance arguments that could have been raised earlier." United States v. Christy, 739 F.3d 534, 539 (10th Cir. 2014).

[5]Since the Tenth Circuit published Computerized Thermal Imaging, Inc. v. Bloomberg, L.P. in 2002, the relevant rule 59(e) period has changed from 10 days to 28 days.

RELEVANT LAW REGARDING PRO SE FILINGS

When plaintiffs proceed pro se, the Court generally construes their pleadings liberally, holding them to a less stringent standard than those filed by a party represented by counsel. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). The Court therefore makes allowance for a pro se litigant's "failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." Hall v. Bellmon, 935 F.2d at 1110. The Court will not, however, construct arguments or search the record for the pro se party. See Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 840 (10th Cir. 2005). A pro se litigant waives issues if the pro se party's briefing "consists of mere conclusory allegations with no citations to the record or any legal authority for support." Garrett v. Selby Connor Maddux & Janer, 425 F.3d at 840.

ANALYSIS

The Court has considered the Motion and briefing thereon, the PFRD, and Bowman's Objections to the PFRD's recommendation that the Court dismiss the Motion. Bowman's Motion requests relief pursuant both to rule 59(e) and rule 60(b) without arguing why either should apply. See Motion at 1. Bowman filed her Motion on September 27, 2022, which was twenty-seven days after the MOO's and Final Judgment's entry. See Motion at 1; MOO at 1; Final Judgment at 1. Accordingly, the Court treats her Motion as a request to alter or amend the judgment under rule 59(e). See Computerized Thermal Imaging, Inc. v. Bloomberg, L.P., 312 F.3d at 1296 n.3. Bowman makes three objections to Magistrate Judge Yarbrough's handling in the PFRD of the eighteen mistakes which she raises in the Motion. First, she objects to Magistrate Judge Yarbrough's recommendation that the Court "deny amending its determination that Plaintiff's have [sic] put her tax return at issue during her state litigation," because "[s]uch determination is

premature, . . . against the standard of review for motion under Rule 12(b)(6), and . . . factually and legally wrong." Objections at 1. Second, she "objects to the Court ignoring the law, case law and the facts in the Complaint when the PFRD recommended dismissing Plaintiff's claim for violations of the Fourth Amendment on arbitrary grounds." Objections at 6. Third, she "objects to the recommendation of the Court to dismiss her due process claim based on the arbitrary determination of the Court inconsistent with the judiciary standard of review of MTD for failure to state a claim." Objections at 12. The Court addresses each of Bowman's objections in turn.

I. THE COURT OVERRULES BOWMAN'S OBJECTION THAT SHE DID NOT PUT HER TAX RETURNS AT ISSUE DURING THE STATE LITIGATION.

In the MOO, the Court determines that Bowman fails to state a claim for unreasonable search and seizure, because her tax returns were an appropriate subject of discovery in the state court case. See MOO at 17. Bowman moves the Court to reconsider this decision, see Motion at 3-12, a motion which Magistrate Judge Yarbrough recommends denying, see PFRD at 3-7. Bowman now objects to Magistrate Judge Yarbrough's recommendation. See Objections at 1-6.

First, Bowman argues that the Court did not follow the rule 12(b)(6) standard, because it did not accept all her factual allegations in the Complaint as true when deciding the motion to dismiss, as rule 12(b)(6) requires. See Objections at 2-5. Indeed, when evaluating a motion to dismiss under rule 12(b)(6), a court must "accept as true 'all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff.'" Schrock v. Wyeth, Inc., 727 F.3d 1273, 1280 (10th Cir. 2013)(quoting Kerber v. Qwest Grp. Life Ins. Plan, 647 F.3d 950, 959 (10th Cir. 2011)). Rule 12(b)(6) does not require, however, the Court to accept conclusions of law or the asserted application of law to the alleged facts. See Hackford v. Babbitt, 14 F.3d 1457, 1465 (10th Cir. 1994). Nor does it require the Court to accept as true legal

conclusions that are masquerading as factual allegations. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

Here, Bowman alleges in her Complaint that the only issue in the State court case was whether she was an employee or independent contractor, and that Friedman incorrectly told the State court that Bowman's tax returns were at issue. See Complaint ¶ 6, at 2-3; id. ¶ 24, at 11-12. Bowman argues that the Court erred by not accepting these statements as true and holding instead that she put her tax returns at issue. See Objections at 1-3. The Court disagrees that it erred, because Bowman's argument that she did not put her tax returns at issue in the State court is a legal conclusion, and not a factual statement. Thus, the Court did not need to accept the legal conclusion as true, but evaluated instead her factual statements and concluded that, accepting them as true, her tax returns were a proper subject of discovery in the State court case as a legal matter.

Next, Bowman argues that she never made a privacy objection to production of her gross receipt tax returns, but only to the production of her income tax returns, and that the Court "cannot distinguish between the meaning of the words 'gross receipt taxes' and 'Federal income taxes.'" Objections at 3-4, 5-6 (no citation given for internal quotation). The Court agrees with the PFRD that "this argument is simply a rehashing of her argument that her tax returns were not relevant to the state court proceedings and thus should not have been turned over." PFRD at 4. See id. at 7. The Court already declined to agree with this argument, and Bowman does not explain why reconsideration is warranted.

Last, Bowman argues that the Court misapplied N.M.S.A. § 7-1-8.4 in the MOO. See Objections at 4. Magistrate Judge Yarbrough addresses this argument in the PFRD, explaining that

> the Court reasoned in its Dismissal Order that, "While a taxpayer's tax returns are, in most cases, confidential, New Mexico law lifts this protection 'during judicial proceedings when the taxpayer is a party, and tax administration is the gist of the case.'" Doc. 54 at 18 (citing *Breen v. State Tax. & Rev. Dep't*, 2012-NMCA-101, ¶ 27 & NMSA § 7-1-8.4(A)(3)). The Court went on to reason that, "Although N.M.S.A. § 7-1-8.4(A) refers specifically to a NMTRD employee's revelation of a taxpayer's tax return or return information, such a reading extends reasonably to requiring a taxpayer to reveal that same information in the same proceedings." Doc. 54 at 19 (citing *Breen*, 2012-NMCA-101, ¶ 42 (Sutin, J., concurring)).
>
> . . . .
>
> Plaintiff is correct that Section 7-1-8.4 only applies to employees of the NMTRD releasing tax information, not to taxpayers themselves. But the Court did not attempt to extend the plain language of Section 7-1-8.4 or hold that Section 7-1-8.4 implicitly applies to taxpayers. Instead, the Court looked at the reasoning behind the section and applied that reasoning to the present case to conclude that taxpayers must also release their tax returns that they put at issue in a lawsuit. *See* Doc. 54 at 19 ("Although N.M.S.A. § 7-1-8.4(A) refers specifically to a NMTRD employee's revelation of a taxpayer's tax return or return information, such a reading extends reasonably to requiring a taxpayer to reveal that same information in the same proceedings.").

PFRD at 4-5. The Court agrees with this reasoning and overrules Bowman's objection.

II. THE COURT OVERRULES BOWMAN'S OBJECTION THAT THE PFRD RECOMMENDS DISMISSING HER FOURTH AMENDMENT CLAIM ARBITRARILY.

The Court concludes in the MOO that Bowman fails to state a claim for a Fourth Amendment violation, because she does not allege that a search or seizure ever occurred. See MOO at 10-13. Bowman asks the Court to reconsider this conclusion, see Motion at 12-22, a request which the PFRD recommends denying, see PFRD at 7-11. Bowman now objects to the PFRD. See Objections at 6-11.

First, Bowman argues that a violation of the Fourth Amendment occurred, because she was detained in the courtroom after Defendant "lied" to the State court. Objections at 6-8. As discussed in the MOO, the Court considered this argument and determines that

> Bowman . . . falls short of alleging the occurrence of a search and seizure for two reasons. First, she does not allege that she was arrested, but only that the State court detained her in the courtroom and that she "almost lost her freedom." Complaint ¶ 23, at 11. Bowman's Complaint, likewise, does not allege a Fourth Amendment violation against Friedman for the State court detaining Bowman in the courtroom. See Complaint ¶¶ 32-48, at 16-21.

MOO at 12. In her Objections, Bowman acknowledges that Friedman did not seize her, but asserts that "[t]here is no doubt that perjury by an affiant is a violation of the Fourth Amendment when it leads to the actual seizure (arrest, detention) of a person." Objections at 7. Bowman supports this assertion with citations to cases that discuss probable cause and false statements made in affidavits for search warrants. See Objections at 7, 10 (citing United States v. Basham, 268 F.3d 1199, 1204 (10th Cir. 2001); United States v. Royce, No. 22-CR-163-JFH, 2023 WL 253136, at *2 (N.D. Okla. January 18, 2023)(Heil, J.)(quoting United States v. Danhauer, 229 F.3d 1002, 1006 (10th Cir. 2000)). Such cases are inapplicable here, and Bowman does not offer any further reasoning for the Court to reconsider its prior decision.

Second, Bowman asserts that a seizure occurred when she was forced to sign and submit Internal Revenue Service ("IRS") Form 4506. See Objections at 8. That is, although the Complaint never alleges that Friedman used the form to obtain Bowman's tax returns, Bowman argues that being forced to sign the form and present it to Friedman was itself an unreasonable seizure of that specific form. See Objections at 8-9. As the PFRD notes, Bowman raises this issue for the first time in her Motion. See PFRD at 9. Bowman's Complaint alleges only that the State court's discovery order for her federal tax returns is an unreasonable search and seizure of her tax returns, and not that signing a form is an unreasonable seizure of that form. See Complaint ¶¶ 43, 46, at 20-21. A motion to reconsider, however, is not an opportunity to "advance arguments that could have been raised earlier." United States v. Christy, 739 F.3d 534, 539 (10th Cir. 2014).

Moreover, as the Court concludes in the MOO, Bowman put her federal tax returns at issue in the State court case, see MOO at 19-20, and turning over a form to gather those tax returns is thus not an unreasonable seizure.

Third, Bowman argues that the standard for a Fourth Amendment violation is whether an unreasonable search or seizure occurred, and not whether an actual search or seizure occurred. See Objections at 9, 11. In other words, Bowmans takes issue with the Court's holding in the MOO that she does not allege that a search or seizure ever actually occurred and thus failed to state a Fourth Amendment claim. See MOO at 10-13. Bowman's present argument repeats the arguments which she made previously, and she does not explain why reconsideration of the MOO is warranted.

Last, Bowman argues that "[t]he Court must consider all factual matter in the Complaint" and points to the allegation in the Complaint that she produced her Schedule C form in response to the state court's discovery order.[6] Objections at 10. Indeed, in the complaint Bowman alleges that she "offered to [Defendant] form Schedule C from her copy of the Federal Return." Complaint ¶ 50, at 21. The Complaint goes on to allege, however, that Friedman "did not accept it." Complaint ¶ 50, at 21. Thus, accepting these facts as true, Bowman's Complaint does not allege that a search or seizure of her federal tax returns actually occurred.

[6]The Form 1040 Schedule C allows taxpayers "to report income or loss from a business [they] operated or a profession [they] practiced as a sole proprietor." About Schedule C (Form 1040), Profit or Loss from Business (Sole Proprietorship), IRS (June 2, 2023), https://www.irs.gov/forms-pubs/about-schedule-c-form-1040 (last visited June 15, 2023).

III. THE COURT OVERRULES BOWMAN'S OBJECTION THAT THE PFRD'S RECOMMENDATION THAT THE COURT DISMISS HER DUE PROCESS CLAIM IS INCONSISTENT WITH RULE 12(b)(6).

Finally, regarding Bowman's procedural due process claim, the Court determines in the MOO that her "Complaint does not state facts demonstrating that she did not receive the appropriate level of process." MOO at 15. Bowman moves for reconsideration, see Motion at 22-32, a motion which the PFRD recommends that the Court deny, see PFRD at 12-17. Bowman now objects to that recommendation. See Objections at 12-20.

First, Bowman argues that she was denied due process, because she did not receive a trial in the State court or a mandatory hearing. See Objections at 12-17. As the Court held previously, however, the facts in her Complaint demonstrate that Bowman was afforded significant process in the State court, including responding to discovery, pleadings, and motions; addressing the court at hearings; and appealing to the Court of Appeals of New Mexico. See MOO at 13-15; Complaint ¶¶ 15, 17, at 6-8; id. ¶ 19, at 9; id. ¶¶ 23, 25, at 10-12; id. ¶ 31, at 16. Similarly, Bowman repeats arguments that she made previously that Friedman lied to the State court, thus depriving her of her right to procedural due process. See Objections at 16. As the Court determines in the MOO, however "'even assuming Defendant made lies and misrepresentations to the state court, those lies did not exclude Plaintiff from engaging in the state court process.'" MOO at 14 (quoting MTD PFRD at 8). Bowman offers no reason to reconsider these holdings, and the Court declines to change its reasoning.

Second, Bowman asserts that she is entitled to a written determination of liability under N.M.S.A. § 7-1-4.2(I). See Objections at 17-18. As the PFRD explains:

> Plaintiff brought her lawsuit under Section 7-1-26(C)(2) for disputing liabilities and claiming credits, rebates, or refunds. *See* Doc. 1 ¶ 5. Section 7-1-4.2(I), however, relates to a different process: taxpayers have "the right to seek a compromise of an

> asserted tax liability by obtaining a written determination of liability or nonliability when the secretary in good faith is in doubt of the liability as provided in Section 7-1-20 NMSA 1978." Section 7-1-20, for its part, allows the taxpayer and the secretary to enter into a compromise, known as a closing agreement, if the secretary "in good faith is in doubt of the liability of payment." NMSA § 7-1-20. Section 7-1-4.2(I) reiterates that the taxpayer is entitled to seek a compromise when the secretary in good faith is in doubt of the liability. Neither Section 7-1-20 nor Section 7-1-4.2(I) apply to Plaintiff's case as her case does not concern a compromise or closing agreement. And Section 7-1-4.2(I) does not entitle Plaintiff to a "'written determination of liability or nonliability' of gross receipt taxes" as she alleges. Doc. 56 at 27.

PFRD at 16. In her Objections, Bowman disputes this recommendation, asserting that "Section 7-1-4.2(I) applies fully to Plaintiff" and that "[t]here is no reason to believe that the tax agency will not enter into a 'closing agreement' with Plaintiff in the future." Objections at 17. The Court agrees with the PFRD, however, that Bowman misreads § 7-1-4.2(I) and that it is not applicable to her case.

Last, Bowman cites Eaton v. Bureau of Revenue, 1972-NMCA-114, 84 N.M. 226, 501 P.2d 670, for the proposition that she is entitled to tax protest hearing in the State court case. See Objections at 19. Eaton v. Bureau of Revenue involves an appeal from the Commissioner of the Bureau of Revenue regarding whether the plaintiff was an employee or independent contractor. See 1972-NMCA-114, ¶¶ 1-3, 84 N.M. at 227, 501 P.2d at 671. Eaton v. Bureau of Revenue did not involve a due process claim and is not applicable to Bowman's case. As the Court has stated many times in this case, Bowman's disagreement with the State court case's outcome is not the same as alleging facts showing that she received insufficient process.

IT IS ORDERED that: (i) Plaintiff's Objections to the Court's Proposed Findings and Recommended Disposition Regarding Motion to Alter or Amend a Judgment, filed February 13, 2023 (Doc. 62), are overruled; (ii) the Proposed Findings and Recommended Disposition Regarding Motion to Alter or Amend a Judgment, filed February 1, 2023 (Doc. 61), is adopted;

and (iii) Plaintiff's Motion to Alter or Amend a Judgment, filed September 27, 2022 (Doc. 56), is denied.

UNITED STATES DISTRICT JUDGE

Parties and counsel:

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Plaintiff pro se

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

DANIELA BOWMAN,

Plaintiff,

vs. No. CIV 21-0675 JB\SCY

CORDELIA FRIEDMAN,

Defendant.

MEMORANDUM OPINION AND ORDER ADOPTING THE MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER comes before the Court on: (i) the Proposed Findings and Recommended Disposition Regarding Motion to Dismiss; (ii) Defendant Cordelia Friedman's Motion to Dismiss, filed October 27, 2021 (Doc. 19)("MTD"); and (iii) Plaintiff's Motion for Leave to File Sur-reply in Opposition to Defendant's Motion to Dismiss, filed November 17, 2021 (Doc. 30)("Surreply Motion"). Plaintiff Daniela Bowman is proceeding pro se. The Court referred these matters to the Honorable Steven C. Yarbrough, United States Magistrate Judge for the United States District Court of the District of New Mexico, see Order of Reference Relating to Non-Prisoner Pro Se Cases, filed January 31, 2022 (Doc. 44), who entered the Proposed Findings and Recommended Disposition Regarding Motion to Dismiss, filed June 7, 2022 (Doc. 52)("PFRD"). In the PFRD, Magistrate Judge Yarbrough recommends that the Court deny the Surreply Motion and grant the MTD. See PFRD at 9. On June 21, 2022, Bowman timely objected to the PFRD. See Plaintiff's Objections to Court's Proposed Findings and Recommended Disposition Regarding Motion to Dismiss, filed June 21, 2022 (Doc. 53)("Objections"). Bowman's Objections are now before the Court.

The Court has considered Defendant Cordelia Friedman's MTD, Plaintiff's Response to Defendant Cordelia Friedman's Motion to Dismiss, filed October 29, 2021 (Doc. 22), Defendant Cordelia Friedman's Reply in Support of Her Motion to Dismiss, filed November 12, 2021 (Doc. 26)("Reply"), Bowman's Surreply Motion, Defendant Cordelia Friedman's Response in Opposition to Plaintiff's Motion for Leave to File Sur-reply in Opposition to Defendant's Motion to Dismiss, filed November 29, 2021 (Doc. 34), Plaintiff's Reply in Support of Her Motion for Leave to File Sur-reply, filed November 30, 2021 (Doc. 36), the PFRD, and Bowman's Objections, in light of the legal standards described below and has conducted a de novo review of the PFRD portions to which Bowman objects. Based on the Court's review, the Court concludes that Bowman's Objections to Magistrate Judge Yarbrough's PFRD are not sound and therefore grants the MTD and denies the Surreply Motion.

LEGAL STANDARD REGARDING OBJECTIONS TO PROPOSED FINDINGS AND RECOMMENDATIONS

District courts may refer dispositive motions to a Magistrate Judge for a recommended disposition. See Fed. R. Civ. P. 72(b)(1)("A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement."). Rule 72(b)(2) of the Federal Rules of Civil Procedure governs objections: "Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations." Fed. R. Civ. P. 72(b)(2). Finally, when resolving objections to a Magistrate Judge's proposal, "[t]he district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the

matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3). Similarly, 28 U.S.C. § 636 provides:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

28 U.S.C. § 636(b)(1)(C).

"The filing of objections to a magistrate's report enables the district judge to focus attention on those issues -- factual and legal -- that are at the heart of the parties' dispute." United States v. One Parcel of Real Property, With Buildings, Appurtenances, Improvements, and Contents, Known As: 2121 East 30th Street, Tulsa Okla., 73 F.3d 1057, 1059 (10th Cir. 1996)("One Parcel")(quoting Thomas v. Arn, 474 U.S. 140, 147 (1985)). As the United States Court of Appeals for the Tenth Circuit has noted, "the filing of objections advances the interests that underlie the Magistrate's Act,[1] including judicial efficiency." One Parcel, 73 F.3d at 1059 (citing Niehaus v. Kansas Bar Ass'n, 793 F.2d 1159, 1165 (10th Cir. 1986)); United States v. Walters, 638 F.2d 947, 950 (6th Cir. 1981)).

The Tenth Circuit has held "that a party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." One Parcel, 73 F.3d at 1060. "To further advance the policies behind the Magistrate's Act, [the Tenth Circuit], like numerous other circuits, ha[s] adopted 'a firm waiver rule' that 'provides that the failure to make timely objections to the magistrate's findings or recommendations waives appellate review of both factual and legal

[1]Congress enacted the Federal Magistrate Act, 28 U.S.C. §§ 631-39, in 1968.

questions.'" One Parcel, 73 F.3d at 1059 (quoting Moore v. United States, 950 F.2d 656, 659 (10th Cir. 1991)). "[O]nly an objection that is sufficiently specific to focus the district court's attention on the factual and legal issues that are truly in dispute will advance the policies behind the Magistrate's Act." One Parcel, 73 F.3d at 1060. In addition to requiring specificity in objections, the Tenth Circuit has stated that "[i]ssues raised for the first time in objections to the magistrate judge's recommendation are deemed waived." Marshall v. Chater, 75 F.3d 1421, 1426 (10th Cir. 1996). See United States v. Garfinkle, 261 F.3d 1030, 1030-31 (10th Cir. 2001)("In this circuit, theories raised for the first time in objections to the magistrate judge's report are deemed waived."). In an unpublished opinion, the Tenth Circuit states that "the district court correctly held that [a petitioner] had waived [an] argument by failing to raise it before the magistrate." Pevehouse v. Scibana, 229 F. App'x 795, 796 (10th Cir. 2007)(unpublished).[2]

In One Parcel, in accord with other Courts of Appeals, the Tenth Circuit expanded the waiver rule to cover objections that are timely but too general. See One Parcel, 73 F.3d at 1060. The Supreme Court of the United States of America -- in the course of approving the United States

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[2]Pevehouse v. Scibana is an unpublished opinion, but the Court can rely on an unpublished Tenth Circuit opinion to the that extent its reasoned analysis is persuasive in the case before it. See 10th Cir. R. 32.1(A)("Unpublished decisions are not precedential, but may be cited for their persuasive value."). The Tenth Circuit has stated:

> In this circuit, unpublished orders are not binding precedent, . . . and we have generally determined that citation to unpublished opinions is not favored. However, if an unpublished opinion or order and judgment has persuasive value with respect to a material issue in a case and would assist the court in its disposition, we allow a citation to that decision.

United States v. Austin, 426 F.3d 1266, 1274 (10th Cir. 2005). The Court concludes that Pevehouse v. Scibana has persuasive value with respect to a material issue, and will assist the Court in its disposition of this Memorandum Opinion and Order.

Court of Appeals for the Sixth Circuit's use of the waiver rule -- has noted:

> It does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a de novo or any other standard, when neither party objects to those findings. The House and Senate Reports accompanying the 1976 amendments do not expressly consider what sort of review the district court should perform when no party objects to the magistrate's report. See S. Rep. No. 94-625, pp. 9-10 (1976)(hereinafter Senate Report); H.R. Rep. No. 94-1609, p. 11 (1976), U.S. Code Cong. & Admin. News 1976, p. 6162 (hereinafter House Report). There is nothing in those Reports, however, that demonstrates an intent to require the district court to give any more consideration to the magistrate's report than the court considers appropriate. Moreover, the Subcommittee that drafted and held hearings on the 1976 amendments had before it the guidelines of the Administrative Office of the United States Courts concerning the efficient use of magistrates. Those guidelines recommended to the district courts that "[w]here a magistrate makes a finding or ruling on a motion or an issue, his determination should become that of the district court, unless specific objection is filed within a reasonable time." See Jurisdiction of United States Magistrates, Hearings on S. 1283 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 24 (1975)(emphasis added)(hereinafter Senate Hearings). The Committee also heard Judge [Charles] Metzner of the Southern District of New York, the chairman of a Judicial Conference Committee on the administration of the magistrate system, testify that he personally followed that practice. See id., at 11 ("If any objections come in, . . . I review [the record] and decide it. If no objections come in, I merely sign the magistrate's order."). The Judicial Conference of the United States, which supported the de novo standard of review eventually incorporated in § 636(b)(1)(C), opined that in most instances no party would object to the magistrate's recommendation, and the litigation would terminate with the judge's adoption of the magistrate's report. See Senate Hearings, at 35, 37. Congress apparently assumed, therefore, that any party who was dissatisfied for any reason with the magistrate's report would file objections, and those objections would trigger district court review. There is no indication that Congress, in enacting § 636(b)(1)(C)), intended to require a district judge to review a magistrate's report to which no objections are filed. It did not preclude treating the failure to object as a procedural default, waiving the right to further consideration of any sort. We thus find nothing in the statute or the legislative history that convinces us that Congress intended to forbid a rule such as the one adopted by the Sixth Circuit.

Thomas v. Arn, 474 U.S. at 150-52 (footnotes omitted).

The Tenth Circuit also has noted, "however, that '[t]he waiver rule as a procedural bar need not be applied when the interests of justice so dictate.'" One Parcel, 73 F.3d at 1060 (quoting

Moore v. United States, 950 F.2d at 659. The Tenth Circuit joins "those circuits that have declined to apply the waiver rule to a pro se litigant's failure to object when the magistrate's order does not apprise the pro se litigant of the consequences of a failure to object to findings and recommendations." Moore v. United States, 950 F.2d at 659. Cf. Thomas v. Arn, 474 U.S. at 154 ("Any party that desires plenary consideration by the Article III judge of any issue need only ask. [A failure to object] does not preclude further review by the district judge, sua sponte or at the request of a party, under a de novo or any other standard."). In One Parcel, the Tenth Circuit noted that the district judge had decided sua sponte to conduct a de novo review despite the lack of specificity in the objections, but the Tenth Circuit held that it would deem the issues waived on appeal, because it would advance the interests underlying the waiver rule. See 73 F.3d at 1060-61 (citing cases from other Courts of Appeals where district courts elected to address merits despite potential application of waiver rule, but Courts of Appeals opted to enforce waiver rule).

Where a party files timely and specific objections to the Magistrate Judge's PFRD "on . . . dispositive motions, the statute calls for a de novo determination, not a de novo hearing." United States v. Raddatz, 447 U.S. 667, 674 (1980). The Tenth Circuit has stated that a de novo determination, pursuant to 28 U.S.C. § 636(b), "requires the district court to consider relevant evidence of record and not merely review the magistrate judge's recommendation." In re Griego, 64 F.3d 580, 583-84 (10th Cir. 1995). The Supreme Court has noted that, although a district court must make a de novo determination of the objections to recommendations under 28 U.S.C. § 636(b)(1), the district court is not precluded from relying on the Magistrate Judge's proposed findings and recommendations. See Raddatz, 447 U.S. at 676 ("[I]n providing for a 'de novo determination' rather than de novo hearing, Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place

on a magistrate's proposed findings and recommendations.")(quoting 28 U.S.C. § 636(b)(1)); Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42 of Stephens Cnty., Okla., 8 F.3d 722, 724-25 (10th Cir. 1993)("Bratcher")(holding that the district court's adoption of the Magistrate Judge's "particular reasonable-hour estimates" is consistent with a de novo determination, because "the district court 'may *accept*, reject, or modify, *in whole or in part*, the findings or recommendations made by the magistrate'" (quoting 28 U.S.C. § 636(b)(1))(emphasis in Bratcher but not in 28 U.S.C. § 636(b)(1))). "'Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations.'" Andrews v. Deland, 943 F.2d 1162, 1170 (10th Cir. 1991)(quoting United States v. Raddatz, 447 U.S. at 676).

Where no party objects to the Magistrate Judge's PFRD, the Court has, as a matter of course in the past and in the interests of justice, reviewed the Magistrate Judge's recommendations. In Workheiser v. City of Clovis, No. CIV 12-0485 JB/GBW, 2012 WL 6846401 (D.N.M. December 28, 2012)(Browning, J.), where the plaintiff failed to respond to the Magistrate Judge's PFRD, although the Court determined that the plaintiff "has waived his opportunity for the Court to conduct review of the factual and legal findings in the [proposed findings and recommended disposition]," the Court nevertheless conducted such a review. 2012 WL 6846401, at *3. The Court generally does not, however, review the Magistrate Judge's PFRD de novo, and determine independently necessarily what it would do if the issues had come before the Court first, but rather adopts the PFRD where "[t]he Court cannot say that the Magistrate Judge's recommendation . . . is clearly erroneous, arbitrary, [obviously[3]] contrary

[3]The Court previously used as the standard for review when a party does not object to the Magistrate Judge's proposed findings and recommended disposition whether the recommendation

to law, or an abuse of discretion." Workheiser v. City of Clovis, 2012 WL 6846401, at *3. This review, which is deferential to the Magistrate Judge's work when there is no objection, nonetheless provides some review in the interest of justice, and seems more consistent with the intent of the waiver rule than no review at all or a full-fledged review. Accordingly, the Court considers this standard of review appropriate. See Thomas v. Arn, 474 U.S. at 151 ("There is nothing in those Reports, however, that demonstrates an intent to require the district court to give any more consideration to the magistrate's report than the court considers appropriate."). The Court, however, is reluctant to have no review at all if its name is going to go at the bottom of the order adopting the Magistrate Judge's proposed findings and recommendations.

When plaintiffs proceed pro se, the court generally construes their pleadings liberally, holding them to a less stringent standard than those a party represented by counsel files. See Hall

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was "clearly erroneous, arbitrary, contrary to law, or an abuse of discretion," thus omitting "obviously" in front of contrary to law. Solomon v. Holder, CIV 12-1039 JB/LAM, 2013 WL 499300, at *4 (D.N.M. January 31, 2013)(Browning J.)(adopting the recommendation to which there was no objection, stating: "The Court determines that the PFRD is not clearly erroneous, arbitrary, contrary to law, or an abuse of discretion, and accordingly adopts the recommendations therein"); O'Neill v. Jaramillo, CIV 11-0858 JB/GBW, 2013 WL 499521 (D.N.M. January 31, 2013)(Browning, J.)("Having reviewed the PRFD under that standard, the Court cannot say that the Magistrate Judge's recommendation is clearly erroneous, arbitrary, contrary to law, or an abuse of discretion. The Court thus adopts Judge Wormuth's PFRD.")(citing Workheiser v. City of Clovis, 2012 WL 6846401, at *3); Galloway v. JP Morgan Chase & Co., CIV 12-0625 JB/RHS, 2013 WL 503744 (D.N.M. January 31, 2013)(Browning, J.)(adopting the Magistrate Judge's recommendations upon determining that they were not "clearly contrary to law, or an abuse of discretion."). The Court does not believe that "contrary to law" accurately reflects the deferential standard of review that the Court intends to use when there is no objection. Finding that a Magistrate Judge's recommendation is contrary to law would require the Court to analyze the Magistrate Judge's application of law to the facts or the Magistrate Judge's delineation of the facts -- in other words performing a de novo review, which is required when a party objects to the recommendations only. The Court believes adding "obviously" better reflects that the Court is not performing a de novo review of the Magistrate Judges' recommendations. Going forward, therefore, the Court will, as it has done for some time now, review Magistrate Judges' recommendations to which there are no objections for whether the recommendations are clearly erroneous, arbitrary, obviously contrary to law, or an abuse of discretion.

v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). In its review, the court makes allowance for pro se litigants' "failure to cite proper legal authority, [their] confusion of various legal theories, [their] poor syntax and sentence construction, or [their] unfamiliarity with pleading requirements." Hall v. Bellmon, 935 F.2d at 1110. The court will not, however, construct arguments or search the record for the pro se party. See Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 840 (10th Cir. 2005). Issues will be waived if the pro se party's briefing "consists of mere conclusory allegations with no citations to the record or any legal authority for support." Garrett v. Selby Connor Maddux & Janer, 425 F.3d at 840

ANALYSIS

Bowman makes five Objections to the PFRD. The Objections are that: (i) Magistrate Judge Yarbrough determines arbitrarily that Bowman does not allege an unreasonable search and seizure under the Fourth Amendment to the Constitution of the United States of America, see Objections at 1; (ii) Magistrate Judge Yarbrough misapplies the legal standard for determining violations of procedural due process, see Objections at 9; (iii) Magistrate Judge Yarbrough recommends improperly denying Bowman's Surreply Motion, see Objections at 22; (iv) Magistrate Judge Yarbrough recommends improperly considering only Bowman's Civil Rights Complaint Pursuant to 42 U.S.C. § 1983, filed July 21, 2021 (Doc. 1)("Complaint")and not Plaintiff's Answer to Court's Order to Show Cause, filed August 13, 2021 (Doc. 7)("Response"), see Objections at 26; and (v) Magistrate Judge Yarbrough should not recommend that the Court need not consider the expectation of privacy issue, see Objections at 30. The Court will address each in turn.

I. BECAUSE BOWMAN DOES NOT ALLEGE THAT A SEARCH OR SEIZURE EVER OCCURRED, BOWMAN DOES NOT STATE A CLAIM FOR A VIOLATION OF THE FOURTH AMENDMENT.

In her Complaint, Bowman alleges that Friedman conducted an illegal search and seizure of her tax returns, because Friedman used lies and manipulation to the convince the State court that Bowman's tax returns were at issue and that, as a result, the State court entered a discovery order for the tax returns. See Complaint at 19-20. In the PFRD, Magistrate Judge Yarbrough recommends concluding that Bowman does not state a claim for a violation of the Fourth Amendment for this alleged illegal search and seizure, because Bowman never alleges that she complied with the discovery order. PFRD at 6. That is,

> Plaintiff cites no law, and the Court is aware of none, to support the notion that a party to a civil lawsuit conducts a search and seizure by obtaining a court order for discovery, particularly when the allegedly aggrieved party refuses to comply with the court order and so never actually produces the discovery ordered. In other words, regardless of whether Defendant made lies and misrepresentations to the state court, Plaintiff does not allege that either a search or a seizure occurred as a result of those lies and misrepresentations. Plaintiff's failure to make such an allegation is fatal to her Fourth Amendment claim.

PFRD at 6.

Bowman objects to this reasoning, arguing that "[c]ompulsory production of person's private papers is 'search and seizure' within the Fourth Amendment." Objections at 2 (no citation given for quotation). This argument, however, continues to miss the point that Friedman and Magistrate Judge Yarbrough raise that no search or seizure ever occurred, because Bowman does not allege that she produced her tax returns in response to the court order. Bowman cites numerous law review articles and cases discussing "coerced production of information," arguing that coerced production of documents is still a search or seizure even if no physical/actual intrusion into a given enclosure took place. See, e.g., Plaintiff's Answer to Court's Order to Show Cause at 10-13, filed

August 13, 2021 (Doc. 7). These authorities do not address the scenario here, where Bowman never produced her tax returns, and therefore, no search or seizure took place. See Childress v. City of Arapaho, 210 F.3d 1154, 1156 (10th Cir. 2000)("To state a claim under the Fourth Amendment, plaintiffs must show both that a 'seizure' occurred and that the seizure was 'unreasonable.'")(quoting U.S. Const. amend. IV; 42 U.S.C. § 1983).

Bowman also argues in her Objections that "physical/actual search or seizure is not required in order for a person to claim [a] violation of the Fourth Amendment," citing Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523 (1967)("Camara"). Objections at 6. In Camara, Camara, an apartment lessee, refused to allow a public health inspector to inspect his apartment without a warrant. See 387 U.S. at 525-26. After Camara refused inspection two more times, a criminal complaint was filed against him, alleging a violation of the housing code. See 387 U.S. at 526. Camara argued that the housing code section allowing inspectors to enter private dwellings without a search warrant and probable cause violated the Fourth and Fourteenth Amendments of the Constitution of the United States, and accordingly, that he may not be prosecuted for refusing to permit the unconstitutional inspection. 387 U.S. at 527. The Supreme Court held that Camara has a constitutional right to insist that the inspectors obtain a search warrant and therefore that he could not be convicted for refusing to consent to the inspection. See 387 U.S. at 540.

Camara does not hold, as Bowman argues, that an attempted search and seizure, i.e., the State court's order that Bowman produce her tax returns, is the same as an actual search and seizure such that a plaintiff can bring a § 1983 claim alleging a violation of the Fourth Amendment when no actual search or seizure ever occurred. An argument based on Camara -- that Bowman faced the difficult choice of complying with a court order to produce her tax returns that violated her

Fourth Amendment right, as she alleges, or failing to follow that order, resulting in sanctions before the State court -- would be best directed at the State court. Instead, in this case, Bowman brings a § 1983 claim alleging that Friedman violated her right to be free from unreasonable searches and seizures, but does not state that a search or seizure ever occurred.

To address the PFRD's conclusion that neither a search nor seizure ever occurred, Bowman asserts that the

> Defendant lied to the state court that Plaintiff could obtain non-existing documents through [Internal Revenue Service ("IRS")] form 4506, causing Plaintiff's arrest, and thus seized the Plaintiff[.] The Defendant personally and physically handled, gathered, and took away Plaintiff's private paper, IRS form 4506, while she was illegally arrested and thus searched and seized it.

Objections at 5 (first alteration added). She asserts that such allegations are in ¶ 23, Complaint at 10-11, of her Complaint. See Objections at 5. Paragraph 23 of her Complaint, however, contains a slightly differently narrative. See Complaint at 10-11. It alleges that, during a court hearing on July 27, 2018, Friedman lied to the State court about Bowman's deadline to submit her tax returns. See Complaint ¶ 23, at 11. The State court then detained Bowman in the courtroom and threatened her with jail, forcing her to sign a form 4506.[4] See Complaint ¶ 23, at 11. With these allegations, however, Bowman still falls short of alleging the occurrence of a search and seizure, for two reasons. First, she does not allege that she was arrested, but only that the State court detained her in the courtroom and that she "almost lost her freedom." Complaint ¶ 23, at 11. Bowman's Complaint, likewise, does not allege a Fourth Amendment violation against Friedman for the State court detaining Bowman in the courtroom. See Complaint ¶¶ 32-48, at 16-21. Second, solely

[4]According to the IRS website, a form 4506 is used to request a copy of a tax return or designate a third party to receive a tax return. IRS, About Form 4506, *Request for Copy of Tax Return*, https://www.irs.gov/forms-pubs/about-form-4506 (last visited July 12, 2022).

because Bowman filled out the form to request tax returns does not establish that a seizure of her tax returns ever occurred. Nowhere in her Complaint does she say that Friedman ever used the form 4506 to obtain her tax returns from the IRS.[5]

II. MAGISTRATE JUDGE YARBROUGH APPLIED PROPERLY THE LEGAL STANDARD FOR DETERMINING A PROCEDURAL DUE PROCESS VIOLATION.

In her Complaint, Bowman alleges that Friedman lied to the State court causing the State Court to dismiss her case. See Complaint at 21-22. She therefore alleges that Friedman interfered with her right to procedural due process under the Fourteenth Amendment. See Complaint at 22. Magistrate Judge Yarbrough recommends dismissing this claim, because, "as the facts Plaintiff describes in her complaint demonstrate, Plaintiff was afforded significant process in the state court." PFRD at 7. Magistrate Judge Yarbrough explains that

> it seems that Plaintiff's real claim is that she disagrees with the state court's rulings. That is, after hearing from the parties, the state court agreed with Defendant about the relevancy of Plaintiff's tax returns, ordered production of those returns, and ultimately dismissed the case for discovery violations. Plaintiff disagrees with those orders. Plaintiff essentially asserts that all of this process that she was given was tainted by the lies and misrepresentations Defendant made to the state court. But Plaintiff does not allege that Defendant made these lies and misrepresentations to the state court in secret. To the contrary, Plaintiff acknowledges in her complaint that, on multiple occasions, the state court afforded her the opportunity to address Defendant's alleged lies and misrepresentations.

PFRD at 8.

Bowman objects to this conclusion, asserting that the PFRD ignores the facts from her Complaint, "reads between the lines" of her Complaint, and views the facts in the light "most adverse" to her instead of in the light most favorable to her. Objections at 9-10. Although the

[5]Indeed, in her MTD, Friedman does not argue that she or the State court ever obtained Bowman's federal tax returns. See MTD at 4.

PFRD summaries Bowman's claim as a disagreement with the State court's ruling -- a characterization that Bowman does not make herself -- the PFRD makes this characterization based on Bowman's allegations in the Complaint that exemplify the process she received and her dissatisfaction with the outcome of that process. See PFRD at 8 (citing Complaint ¶¶ 15, 17, 19, 25, 31, 37, at 6-19). Bowman alleges that, "[a]t this state of the lawsuit, this Court is obligated to accept the fact that Defendant lies and misrepresented facts in front of the state court as presented in Plaintiff's Complaint." Objections at 11. The PFRD makes that assumption, reasoning that, "even assuming Defendant made lies and misrepresentations to the state court, those lies did not exclude Plaintiff from engaging in the state court process." PFRD at 8.

Bowman also objects to the PFRD's application of the legal standard for due process. See Objections at 9. In the PFRD, Magistrate Judge Yarbrough recites this legal standard: "In determining whether an individual's procedural due process [rights] were violated, the Tenth Circuit directs courts to engage in a two-step inquiry: (1) Did the individual possess a protected property interest to which due process protection was applicable? (2) Was the individual afforded an appropriate level of process?" PFRD at 7 (citing Camuglia v. The City of Albuquerque, 448 F.3d 1214, 219 (10th Cir. 2006)). Bowman now argues that the PFRD skips step one and proceeds directly to step two. See Objections at 17. This characterization of the PFRD's analysis is accurate, but Magistrate Judge Yarbrough's analysis is not an error. Magistrate Judge Yarbrough assumes in Bowman's favor that she has a protected property interest in her State court case and finds that, even if she has a property interest, she was afforded the appropriate level of process.

Bowman proceeds to explain the law regarding due process in New Mexico related to tax disputes and argues that she was denied due process, because the State court never ruled her case's merits -- whether she was an employee or independent contractor. See Objections at 12-15. Due

process does not guarantee, however, Bowman her desired case outcome.[6] Rather, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976). As Bowman alleges in her Complaint, and as the PFRD recites, the State court gave Bowman an opportunity to be heard, including an opportunity to address Friedman's alleged lies and misrepresentations. See Complaint ¶¶ 15, 17, 19, 31, at 6-9, 16; PFRD at 8. The Court concludes that there is no error in the PFRD's analysis and agrees that Bowman's Complaint does not state facts demonstrating that she did not receive the appropriate level of process.

III. BECAUSE FRIEDMAN'S REPLY RAISES NO NEW ARGUMENTS, MAGISTRATE JUDGE YARBROUGH RECOMMENDS PROPERLY DENYING BOWMAN'S SURREPLY MOTION.

The PFRD recommends denying Bowman's request in her Surreply Motion to file a surreply to the MTD, because the "Plaintiff points to no new arguments that were raised in the reply and instead wishes to use the surreply to reargue points she made in her response brief." PFRD at 5. Bowman objects to this recommendation, pointing to five arguments Friedman made in her Reply that Bowman asserts are new. See Objections at 24. Those allegedly new arguments, however, are only replies that Friedman made to arguments in Bowman's response brief. Reply at 2-3, 5-6. The Court agrees that Bowman points to no new arguments in the Reply that warrant a surreply. See Navajo Health Found.-Sage Mem'l Hosp., Inc. v. Burwell, 110 F. Supp. 3d 1140,

[6] Bowman repeatedly cites N.M.S.A. § 7-1-29.1 to argue that, at the State-court level, she was entitled to a determination of the prevailing party. See Objections at 12-16. Section 7-1-29.1 sets forth no such requirement, but provides for an award of costs and fees in an administrative or court proceeding if the taxpayer is the prevailing party. See N.M.S.A. § 7-1-29.1.

1180 (D.N.M. 2015)("A surreply is appropriate and should be allowed where new arguments are raised in a reply brief.").

IV. BECAUSE BOWMAN'S RESPONSE DOES NOT CURE THE PLEADING DEFICIENCIES THAT THE PFRD IDENTIFIES, MAGISTRATE JUDGE YARBROUGH RECOMMENDS PROPERLY THAT THE COURT CONSIDER ONLY THE COMPLAINT'S ALLEGATIONS.

As explained in the PFRD, when Bowman first filed her Complaint, Magistrate Judge Yarbrough reviewed it and issued a Show Cause Order pointing out the same deficiencies before the Court in the MTD. See PFRD at 4 (citing Order to Show Cause and Order Granting Motion to File Electronically, filed July 23, 2021 (Doc. 6)("Show Cause Order")). Magistrate Judge Yarbrough ordered Bowman to show cause why this case should not be dismissed for failure to state a claim or to file an amended complaint. See Show Cause Order at 5. Bowman has not filed an amended complaint fixing the deficiencies that Magistrate Judge Yarbrough notes, but instead filed a Response, arguing that the claims in her original complaint are sufficient. See Response at 8-26. Because Bowman has not filed an amended complaint, in reviewing the sufficiency of Bowman's Complaint for the MTD, Magistrate Judge Yarbrough recommends that the Court consider only the Complaint's allegations and not her Response to the Show Cause Order. See PFRD at 4. Bowman objects to this recommendation, asserting that "the Court did not specify whether the Court is convinced that Plaintiff asserted new claims in [her Response] and thus [her Response] must be eliminated from the record, or whether the Court preferred [an] amended complaint vs. a response to its Order to Show Cause for other reasons." Objections at 26.

The Court agrees with the PFRD's recommendation that, when reviewing the Complaint's sufficiency for the MTD, it will review only those facts and claims in Bowman's Complaint. See Mobley v. McCormick, 40 F.3d 337, 340 (10th Cir. 1994)("The nature of a rule 12(b)(6) motion

tests the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true."). The Response to the Show Cause Order does not operate as an amended complaint, but as an explanation how Bowman believes her Complaint states a claim. As the PFRD notes, even if the Court considers Bowman's arguments in her Response, those arguments do not cure the pleading deficiencies the PFRD identifies. See PFRD at 4 n.1. The Court, therefore, concludes that there is no error in Magistrate Judge Yarbrough's review of the complaint. Last, because the MTD and PFRD address the same issues in the Show Cause Order, the Court quashes the Order to Show Cause.

V. BECAUSE BOWMAN'S FEDERAL TAX RETURNS ARE RELEVANT AND NON-PRIVILEGED, THEY APPROPRIATELY ARE SUBJECT TO DISCOVERY.

Bowman's objects finally to Magistrate Judge Yarbrough's decision not to analyze her arguments that her tax returns are not relevant, because she has not put her tax returns at issue, and that they would in any case be private papers not subject to discovery. See Objections at 31-32. Magistrate Judge Yarbrough does not address these arguments in the PFRD, because he recommends concluding that Friedman prevails on a different argument regarding the search and seizure -- that Bowman never produced her tax returns, so a search or seizure never occurred. See PFRD at 6. Although the Court agrees above that Friedman prevails on this theory, the Court nonetheless examines Bowman's argument that she did not put her tax returns at issue.

In her MTD, Friedman argues that Bowman does not state a claim for an unreasonable search and seizure of her tax returns, because the "Plaintiff had no expectation of privacy in her federal tax returns when she put them at issue; therefore, no unreasonable search and/or seizure occurred." MTD at 3. Particularly, Friedman argues that, although Bowman "contended she was an employee, not an independent contractor, and argued that she should not have to pay the state

gross receipts tax for that reason," she nevertheless received an IRS 1099 form.[7] MTD at 3. According to Friedman, because Bowman argued that she was an employee, Friedman was "entitled to discover if Plaintiff took deductions on her federal tax return consistent with having a business income (i.e. income as an independent contractor), rather than a wage income (i.e. income as an employee)." MTD at 3-4.

In her Objections, Bowman argues that "the issue to be resolved in the state lawsuit was Plaintiff's work status," and that Friedman provided no authority "to defend her position that the employment issue of a taxpayer converts automatically into [a] federal tax returns issue because the worker claimed to be an employee." Objections at 31. Further, Bowman argues that, even assuming that her tax returns were at issue, "[a]ny originals or copies of any tax returns and tax documents are part of the Plaintiff's personal papers when in her possession and thus they are private." Objections at 32.

Rule 1-026(b)(1) of the New Mexico Rules of Civil Procedure for the District Courts lays out the appropriate scope of discovery in civil cases, stating: "Parties may obtain discovery of any information, not privileged, which is relevant to the subject matter involved in the pending action." N.M.R.A. 1-026(b)(1). While a taxpayer's tax returns are, in most cases, confidential, New Mexico law lifts this protection "during judicial proceedings when the taxpayer is a party, and tax administration is the gist of the case." Breen v. State Taxation and Revenue Dept., 2012-NMCA-101 ¶ 27, 287 P.3d 379, 388. See N.M.S.A. § 7-1-8.4(A)(3) ("An employee of the [Taxation and Revenue] department [("NMTRD")] may reveal to . . . a district court . . . a return

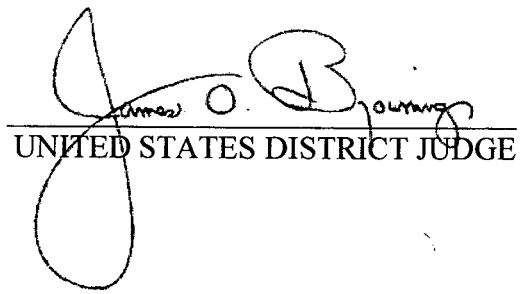
[7]The IRS 1099 form is a series of forms, which independent contractors or freelancers use frequently to report payments that do not typically come from an employer. See TurboTax, What Is an IRS 1099 Form?, https://turbotax.intuit.com/tax-tips/irs-tax-forms/what-is-an-irs-1099-form/L3NxSPMUe (last visited August 22, 2022).

or return information . . . in any matter in which the department is a party and the taxpayer has put the taxpayer's own liability for taxes at issue."). Although N.M.S.A. § 7-1-8.4(A) refers specifically to a NMTRD employee's revelation of a taxpayer's tax return or return information, such a reading extends reasonably to requiring a taxpayer to reveal that same information in the same proceedings. See Breen v. State Taxation and Revenue Dept., 2012-NMCA-101, ¶ 42, 287 P.3d at 391-92 (Sutin, J., concurring). In affirming the dismissal of the District Court, First Judicial District, County of Santa Fe, State of New Mexico, of Bowman's case on appeal, the Court of Appeals of New Mexico concludes that Bowman's tax returns are neither privileged nor irrelevant. See Bowman v. Manforte, No. A-1-CA-37874, 2020 WL 1322248, ¶ 5, at *1 (N.M. Ct. App. Feb. 28, 2020)(unpublished)("[T]he very nature of the complaint has made [Bowman's] federal return information a relevant and non-privileged matter for purposes of discovery.")(citing Stohr v. N.M. Bureau of Revenue, 1976-NMCA-118, ¶ 8, 90 N.M. 43, 559 P.2d 240). The Court agrees with this conclusion.

Although she contends that she has placed only her employment status and not her tax returns at issue in this case, Bowman brought initially this action for a refund of gross receipt taxes. See PFRD at 1. Bowman's tax liability turns on whether she is an employee or an independent contractor, but this determination arises in the context of a tax protest and amidst concerns that she may have taken certain deductions consistent with those of an independent contractor while representing that she is an employee. See MTD at 3-4. Because Bowman is contesting her tax liability, she has "put the taxpayer's own liability for taxes at issue." N.M.S.A. § 7-1-8.4(A)(3). Further, having brought the suit against John Manaforte, in his capacity as Acting NMTRD Secretary, she has put her tax liability at issue in a "matter in which the department is a party." N.M.S.A. § 7-1-8.4(A)(3). Under these circumstances, therefore, the confidentiality typically

afforded a taxpayer's tax returns and return information is not available to Bowman. See Breen v. State Taxation and Revenue Dept., 2012-NMCA-10,1 ¶ 27, 287 P.3d at 388. Thus, under rule 1-026(b)(1) of the New Mexico Rules of Civil Procedure for the District Courts, Bowman's tax returns are appropriate for discovery.

IT IS ORDERED that: (i) the Plaintiff's Objections to Court's Proposed Findings and Recommended Disposition Regarding Motion to Dismiss, filed June 21, 2022 (Doc. 53), are overruled; (ii) the Proposed Findings and Recommended Disposition Regarding Motion to Dismiss, filed June 7, 2022 (Doc. 52), is adopted; (iii) the Order to Show Cause, filed July 21, 2021 (Doc. 6), is quashed; (iv) Defendant Cordelia Friedman's Motion to Dismiss, filed October 27, 2021 (Doc. 19), is granted; (v) the Plaintiff's Motion for Leave to File Sur-Reply in Opposition to Defendant's Motion to Dismiss, filed November 17, 2021 (Doc. 30), is denied; (vi) this matter is dismissed in its entirety; and (vii) the Court will enter a separate Final Judgment.



UNITED STATES DISTRICT JUDGE

Parties and counsel:

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Attorneys for the Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

DANIELA BOWMAN,

Plaintiff,

vs. No. CIV 21-0675 JB/SCY

CORDELIA FRIEDMAN,

Defendant.

FINAL JUDGMENT

THIS MATTER comes before the Court on its Memorandum Opinion and Order Adopting the Magistrate Judge's Proposed Findings and Recommended Disposition, filed August 31, 2022 (Doc. 54)("MOO"). In the MOO, the Court dismisses without prejudice this matter in its entirety. See MOO at 18. With no more parties, claims, or issues before the Court, the Court enters Final Judgment, pursuant to rule 58(a) of the Federal Rules of Civil Procedure, disposing of this case. See Fed. R. Civ. P. 58(a).

IT IS ORDERED that: (i) this case is dismissed without prejudice; and (ii) Final Judgment is entered.

UNITED STATES DISTRICT JUDGE

Parties and counsel:

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

DANIELA BOWMAN,

Plaintiff,

v. No. 1:21-cv-00675-SCY

CORDELIA FRIEDMAN,

Defendant.

ORDER TO SHOW CAUSE AND
ORDER GRANTING MOTION TO FILE ELECTRONICALLY

THIS MATTER comes before the Court on *pro se* Plaintiff's Civil Rights Complaint Pursuant to 42 U.S.C. § 1983, Doc. 1, filed July 21, 2021 ("Complaint") and Plaintiff's Motion for Leave of Court to File Documents Electronically, Doc. 3, filed July 21, 2021.

The Complaint

Plaintiff filed a "refund of gross receipt taxes" lawsuit in state court against the New Mexico Taxation and Revenue Department which was represented by Defendant Friedman. Complaint at 2, ¶ 5. "The issue of the Lawsuit was to determine whether Plaintiff was an employee or independent contractor at the company she worked in 2011." Complaint at 2, ¶ 6.

In this case Plaintiff alleges that Defendant Friedman violated "Plaintiff's civil rights to due process, fair trial, and illegal search and seizure" by making false statements to the state court regarding facts and the relevant law, and by filing motions. Complaint at 4, ¶ 9; *see also* Complaint at 7, ¶ 16; at 10, ¶ 22; at 10-11, ¶ 23; at 11, ¶ 24. Plaintiff states she "attempt[ed] to explain the correct issue to the judge, the law and precedents. But those statements made by a Pro-Se Plaintiff were unconvincing for the judge in comparison to the state attorney's cunning false statements." Complaint at 16, ¶ 31. It appears that the state court dismissed Plaintiff's case

based on Plaintiff's failure to comply with a discovery order. *See* Complaint at 22, ¶ 51. Plaintiff alleges Defendant violated Plaintiff's right to a fair trial because "Plaintiff did not have any trial (fair or not) on her issue" of her worker status. Complaint at 22, ¶ 52. Plaintiff suggests, and state-court records indicate, the state court's decision was affirmed on appeal. *See* Complaint at 19, ¶ 37 (Defendant "Friedman was so convincing in her statement that even the New Mexico Court of Appeals repeated her statement as being true, changing more than 80 years [of] precedential history of court decisions and federal agencies (DOL, IRS, Department of Treasury) policies").

The Complaint fails to state a claim upon which the Court can grant relief for violation of her right to due process. The Court "assess[es] procedural due process claims in two steps. First, we ask whether the plaintiff had a constitutionally protected interest. Then, we ask whether the process afforded was adequate to protect that interest." *Koessel v. Sublette County Sheriff's Dept.*, 717 F.3d 736, 748 (10th Cir. 2013). "It is a well-settled principle that a litigant is entitled to a fair trial, albeit not a perfect one." *Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 515 (10th Cir. 1998) (quoting *McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548, 553 (1984)).

Plaintiff repeatedly alleges in her complaint that Defendant provided false information to the state court that misled the state court and eventually resulted in her losing the state lawsuit. Essentially, her complaint is that, during the state litigation, Defendant lied to the state judge and the state judge believed Defendant, not her. Even if true, these facts do not state a claim for procedural due process.

It appears from Plaintiff's complaint that Plaintiff had ample opportunity to present her side of the story during state court proceedings. Complaint at 7 ¶ 15 ("Plaintiff addressed all Ms. Friedman's false statements in the Answer to the Motion (RP, pages 77-85)"); Complaint at 8, ¶

17 ("The Plaintiff filed an Answer to the above mentioned motion reiterating again with more specificity why her Federal return is not relevant to the issue at hand, educating Ms. Friedman on the existing law (federal and state), precedents and federal agencies publications and procedures applicable to the issue of the Lawsuit"); Complaint at 16, ¶ 31 ("Plaintiff's [sic] made a few last attempts (court hearing 11/1/2018) to explain the correct issue to the judge, the law and precedents related to employee-employer relationship. But those statements made by a Pro-Se Plaintiff were unconvincing for the judge in comparison to the state attorney's cunning false statements."). In other words, although Plaintiff may be unhappy that the state judge chose to believe Defendant rather than her, she fails to allege facts that the process provided to her was so deficient that it violated her federal constitutional rights. To the contrary, from the face of her complaint it is apparent that she was given the opportunity to make a record in state district court and then, based on that record, appeal the state court's decision. Complaint at 19, ¶ 37 ("Ms. Friedman was so convincing in her statement that even the New Mexico Court of Appeals repeated her statement as being true"). Plaintiff's allegations that Defendant lied during state court proceedings and that the state judge believed Defendant, not her, fail to state a procedural due process claim.

The Complaint also fails to state a claim for "illegal search and seizure." Complaint at 4, ¶ 9. "To state a claim under [42 U.S.C.] § 1983 a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *Hall v. Witteman*, 584 F.3d 859, 864 (10th Cir. 2009) (quoting *West v. Atkins,* 487 U.S. 42, 48 (1988)). Plaintiff alleges that: (i) Defendant "obtained illegal discovery order by lying to the Court, and achieved dismissal of the case before the Court can rule on its merits;" (ii) "The Court awarded

[Defendant] with a Discovery Order which demanded Plaintiff's Federal Return ... [which] is illegal;" and (iii) "a discovery order is equivalent to a search and seizure warrant and when such discovery order is obtained illegally, the constitutional protection of the Fourth Amendment for the affected US citizen is violated." Complaint at 4, ¶ 9; at 20, ¶¶ 43-44.

Plaintiff fails to state a claim for illegal search and seizure against Defendant because the state court, not Defendant, issued the allegedly "illegal" order. Plaintiff has not cited, and the Court has not found, any legal authority to support her contention that "a discovery order is equivalent to a search and seizure warrant." Furthermore, Plaintiff alleges that Defendant violated her "Fo[u]rth Amendment constitutional rights *when she obtained the discovery order* using illegal means;" there are no allegations in the Complaint that Defendant or the state court actually searched or seized the document(s) that were the subject of the discovery order. Complaint at 21, ¶ 46 (emphasis added), at 22, ¶ 51 (stating Defendant "filed her Motion for Dismissal based on the fact that Plaintiff did not disclose her Federal Return"); *see also U.S. v. Gault*, 92 F.3d 990, 991 (10th Cir. 1996) ("An unconstitutional search occurs when the government violates an individual's reasonable expectation of privacy. To hold an expectation of privacy that is "reasonable," an individual must have a subjective expectation of privacy that society is prepared to recognize as objectively reasonable") (citing *Katz v. United States,* 389 U.S. 347, 361 (1967)); *Childress v. City of Arapaho*, 210 F.3d 1154, 1156 (10th Cir. 2000) ("To state a claim under the Fourth Amendment, plaintiffs must show both that a seizure occurred and that the seizure was unreasonable") (citing *Brower v. County of Inyo,* 489 U.S. 593, 599 (1989)).

The Complaint should be dismissed for failure to state a claim pursuant to 42 U.S.C. § 1983. The Court orders Plaintiff to either show cause why the Court should not dismiss this case for failure to state a claim or to file an amended complaint which states a claim.

Motion for Leave to File Electronically

The Court grants Plaintiff permission to file electronically in this case only. *See* Guide for Pro Se Litigants at 13, District of New Mexico (November 2019) ("approval to electronically file documents within a case must be granted by the presiding judge for each case in which the *pro se* litigant wishes to file using their CM/ECF account"). The Court will revoke permission to file electronically if Plaintiff abuses her electronic filing privilege or fails to comply with the rules and procedures in the District of New Mexico's Guide for Pro Se Litigants and the District of New Mexico's CM/ECF Administrative Procedures Manual. Account registration forms, procedure manuals, and other information can be obtained at the Court's website at http://www.nmd.uscourts.gov/filing-information. This Order only grants Plaintiff permission to participate in CM/ECF; Plaintiff is responsible for registering to become a participant. *See* CM/ECF Administrative Procedures Manual, District of New Mexico (Revised December 2019).

IT IS ORDERED that:

(i) Plaintiff shall, within 21 days of entry of this Order, either show cause why this case should not be dismissed for failure to state a claim or file an amended complaint. Failure to timely show cause or file an amended complaint may result in dismissal of this case.

(ii) Plaintiff's Motion for Leave of Court to File Documents Electronically, Doc. 3, filed July 21, 2021, is **GRANTED.**

Steve Yarbrough

UNITED STATES MAGISTRATE JUDGE

APPENDIX B

New Mexico Statutes Annotated 1978, NMSA 1978

NMSA 1978, 7-1-8.4

7-1-8.4. Information that may be revealed to judicial bodies or with respect to judicial proceedings or investigations and to administrative hearings office.

An employee of the department may reveal to:

A. a district court, an appellate court or a federal court, a return or return information:

(1) in response to an order thereof in an action relating to taxes or an action for tax fraud or any other crime that may involve taxes due to the state and in which the information sought is about a taxpayer that is party to the action and is material to the inquiry, in which case only that information may be required to be produced in court and admitted in evidence subject to court order protecting the confidentiality of the information and no more;

(2) in an action in which the department is attempting to enforce an act with which the department is charged or to collect a tax; or

(3) in any matter in which the department is a party and the taxpayer has put the taxpayer's own liability for taxes at issue, in which case only that information regarding the taxpayer that is party to the action may be produced, but this shall not prevent revelation of department policy or interpretation of law arising from circumstances of a taxpayer that is not a party;

B. the Bernalillo county metropolitan court, upon that court's request, the last known address and the date of that address for every person the court certifies to the department as a person who owes fines, fees or costs to the court or who has failed to appear pursuant to a court order or a promise to appear;

C. a magistrate court, upon the magistrate court's request, the last known address and the date of that address for every person the court certifies to the department as a person who owes fines, fees or costs to the court or who has failed to appear pursuant to a court order or a promise to appear;

D. a district attorney, a state district court grand jury or federal grand jury, information for an investigation of or proceeding related to an alleged criminal violation of the tax laws;

E. a third party subject to a subpoena or levy issued pursuant to the provisions of the Tax Administration Act, the identity of the taxpayer involved, the taxes or tax acts involved and the nature of the proceeding; and

F. the administrative hearings office, information in relation to a protest or other hearing, in which case only that information regarding the taxpayer that is a party to the action may be produced, but this shall not prevent revelation of department policy or interpretation of law arising from circumstances of a taxpayer that is not a party. The office shall maintain confidentiality regarding taxpayer information as required by the provisions of Section 7-1-8 NMSA 1978.

History: 1978 Comp., § 7-1-8.4, as enacted by Laws 2009, ch. 243, § 6; 2015, ch. 73, § 13.

NMSA 1978, 7-1-17

7-1-17. Assessment of tax; presumption of correctness.

A. If the secretary or the secretary's delegate determines that a taxpayer is liable for taxes in excess of fifty dollars ($50.00) that are due and that have not been previously assessed to the taxpayer, the secretary or the secretary's delegate shall promptly assess the amount thereof to the taxpayer.

B. Assessments of tax are effective:

(1) when a return of a taxpayer is received by the department showing a liability for taxes;

(2) when a document denominated "notice of assessment of taxes", issued in the name of the secretary, is mailed or delivered in person to the taxpayer against whom the liability for tax is asserted, stating the nature and amount of the taxes assertedly owed by the taxpayer to the state, demanding of the taxpayer the immediate payment of the taxes and briefly informing the taxpayer of the remedies available to the taxpayer; or

(3) when an effective jeopardy assessment is made as provided in the Tax Administration Act.

C. Any assessment of taxes or demand for payment made by the department is presumed to be correct.

D. When taxes have been assessed to any taxpayer and remain unpaid, the secretary or the secretary's delegate may demand payment at any time except as provided otherwise by Section 7-1-19 NMSA 1978.

History: 1953 Comp., § 72-13-32, enacted by Laws 1965, ch. 248, § 20; 1969, ch. 32, § 1; 1978 Comp., § 7-1-17; 1979, ch. 144, § 16; 1992, ch. 55, § 11; 2007, ch. 45, § 1; 2023, ch. 36, § 1.

ANNOTATIONS (selected annotations only)

Burden on protesting taxpayers to overcome presumption. — The burden is on taxpayers protesting assessment to overcome presumption that the bureau's (now department's) assessment is correct. *Archuleta v. O'Cheskey*,

1972-NMCA-165, 84 N.M. 428, 504 P.2d 638; *Tipperary Corp. v. N.M. Bureau of Revenue,* 1979-NMCA-031, 93 N.M. 22, 595 P.2d 1212, cert. denied, 92 N.M. 675, 593 P.2d 1078; *Anaconda Co. v. Prop. Tax Dep't,* 1979-NMCA-158, 94 N.M. 202, 608 P.2d 514, cert. denied, 94 N.M. 628, 614 P.2d 545 (1980); *Hawthorne v. Director of Revenue Div. Taxation & Revenue Dep't,* 1980-NMCA-071, 94 N.M. 480, 612 P.2d 710, *Carlsberg Mgmt. Co. v. State Taxation & Revenue Dep't,* 1993-NMCA-121, 116 N.M. 247, 861 P.2d 288; *MPC Ltd. v. N.M. Taxation & Revenue Dep't,* 2003-NMCA-021, 133 N.M. 217, 62 P.3d 308.

Presumption overcome when not supported by substantial evidence. — The assessment is presumed to be correct; the taxpayer may overcome the presumption of correctness of the assessment by presenting evidence and showing that the decision of the bureau (now department) is not supported by substantial evidence. *Floyd & Berry Davis Co. v. Bureau of Revenue,* 1975-NMCA-143, 88 N.M. 576, 544 P.2d 291.

Protesting taxpayer must dispute factual correctness to overcome presumption. — Since any assessment of taxes is presumed to be correct, the duty rested on the taxpayer to present evidence tending to dispute the factual correctness of the assessments and to overcome this presumption. *Champion Int'l Corp. v. Bureau of Revenue,* 1975-NMCA-106, 88 N.M. 411, 540 P.2d 1300, cert. denied, 89 N.M. 5, 548 P.2d 70.

Presumption may be overcome by disputing factual correctness. — The presumption of Subsection C need be overcome only by a taxpayer's disputing the factual correctness of an assessment. When the taxpayer challenged the interpretation of a county ordinance in its submitted memorandum of positions, the burden was properly shifted by the memorandum to the bureau (now department) to at least acknowledge the existence of the ordinance. *Co-Con, Inc. v. Bureau of Revenue,* 1974-NMCA-134, 87 N.M. 118, 529 P.2d 1239, cert. denied, 87 N.M. 111, 529 P.2d 1232.

Necessity of presenting evidence to rebut the presumption of correctness. — When the corporation contracted with an out-of-state buyer for the corporation to destroy munitions, it was entitled to the gross receipts deduction, and the hearing officer could not properly determine that use or delivery took place within the state without some affirmative evidence in the record to support that conclusion. *TPL, Inc. v. N.M. Taxation & Revenue Dep't,* 2003-NMSC-007, 133 N.M. 447, 64 P.3d 474.

NMSA 1978, 7-1-26

7-1-26. Disputing liabilities; claim for credit, rebate or refund.

A. A person who believes that an amount of tax has been paid by or withheld from that person in excess of that for which the person was liable, who has been denied a credit or rebate claimed or who claims a prior right to property in the possession of the department pursuant to a levy made pursuant to the authority of Sections 7-1-31 through 7-1-34 NMSA 1978 may claim a refund by directing to the secretary, within the time limitations provided by Subsections F and G of this section, a written claim for refund that, except as provided in Subsection K of this section, includes:

(1) the taxpayer's name, address and identification number;

(2) the type of tax for which a refund is being claimed, the credit or rebate denied or the property levied upon;

(3) the sum of money or other property being claimed;

(4) with respect to a refund, the period for which overpayment was made;

(5) a brief statement of the facts and the law on which the claim is based, which may be referred to as the "basis for the refund", which may include documentation that substantiates the written claim and supports the taxpayer's basis for the refund; and

(6) if applicable, a copy of an amended return for each tax period for which the refund is claimed.

B. A claim for refund that meets the requirements of Subsection A of this section and that is filed within the time limitations provided by Subsections F and G of this section is deemed to be properly before the department for consideration, regardless of whether the department requests additional documentation after receipt of the claim for refund.

C. If the department requests additional relevant documentation from a taxpayer who has submitted a claim for refund, the claim for refund shall not

be considered incomplete provided the taxpayer submits sufficient information for the department to make a determination.

D. The secretary or the secretary's delegate may allow the claim in whole or in part or may deny the claim. If the:

(1) claim is denied in whole or in part in writing, the person shall not refile the denied claim, but the person, within ninety days after either the mailing or delivery of the denial of all or any part of the claim, may elect to pursue only one of the remedies provided in Subsection E of this section; and

(2) department has neither granted nor denied any portion of a complete claim for refund within one hundred eighty days after the claim was mailed or otherwise delivered to the department, the person may elect to treat the claim as denied and elect to pursue only one of the remedies provided in Subsection E of this section.

E. A person may elect to pursue only one of the remedies provided in this subsection. A person who timely pursues more than one remedy is deemed to have elected the first. The person may:

(1) direct to the secretary, pursuant to the provisions of Section 7-1-24 NMSA 1978, a written protest that sets forth:

(a) the circumstances of: 1) an alleged overpayment; 2) a denied credit; 3) a denied rebate; or 4) a denial of a prior right to property levied upon by the department;

(b) an allegation that, because of that overpayment or denial, the state is indebted to the taxpayer for a specified amount, including any allowed interest, or for the property;

(c) a demand for the refund to the taxpayer of that amount or that property; and

(d) a recitation of the facts of the claim for refund; or

(2) commence a civil action in the district court for Santa Fe county by filing a complaint setting forth the circumstance of the claimed overpayment, denied credit or rebate or denial of a prior right to property levied upon by the

department alleging that on account thereof the state is indebted to the plaintiff in the amount or property stated, together with any interest allowable, demanding the refund to the plaintiff of that amount or property and reciting the facts of the claim for refund. The plaintiff or the secretary may appeal from any final decision or order of the district court to the court of appeals.

F. Except as otherwise provided in Subsection G of this section, a credit or refund of any amount of overpaid tax, penalty or interest may be allowed or made to a person if a claim is properly filed:

(1) only within three years after the end of the calendar year in which the applicable event occurs:

(a) in the case of tax paid with an original or amended state return, the date the related tax was originally due;

(b) in the case of tax paid in response to an assessment by the department pursuant to Section 7-1-17 NMSA 1978, the date the tax was paid;

(c) in the case of tax with respect to which a net-negative federal adjustment, as that term is used in Section 7-1-13 NMSA 1978, relates, the final determination date of that federal adjustment, as provided in Section 7-1-13 NMSA 1978;

(d) the final determination of value occurs with respect to any overpayment that resulted from a disapproval by any agency of the United States or the state of New Mexico or any court of increase in value of a product subject to taxation pursuant to the Oil and Gas Severance Tax Act [Chapter 7, Article 29 NMSA 1978], the Oil and Gas Conservation Tax Act [Chapter 7, Article 30 NMSA 1978], the Oil and Gas Emergency School Tax Act [Chapter 7, Article 31 NMSA 1978], the Oil and Gas Ad Valorem Production Tax Act [Chapter 7, Article 32 NMSA 1978] or the Natural Gas Processors Tax Act [Chapter 7, Article 33 NMSA 1978]; or

(e) in the case of a claim related to property taken by levy, the date the property was levied upon as provided in the Tax Administration Act;

(2) in the case of a denial of a claim for credit pursuant to the Investment Credit Act [Chapter 7, Article 9A NMSA 1978], Laboratory Partnership with

Small Business Tax Credit Act [Chapter 7, Article 9E NMSA 1978] or Technology Jobs and Research and Development Tax Credit Act [Chapter 7, Article 9F NMSA 1978] or for the rural job tax credit provided by Section 7-2E-1.1 NMSA 1978 or similar credit, only within one year after the date of the denial;

(3) in the case of a taxpayer under audit by the department who has signed a waiver of the limitation on assessments on or after July 1, 1993 pursuant to Subsection F of Section 7-1-18 NMSA 1978, only for a refund of the same tax paid for the same period for which the waiver was given, and only until a date one year after the later of the date of the mailing of an assessment issued pursuant to the audit, the date of the mailing of final audit findings to the taxpayer or the date a proceeding is begun in court by the department with respect to the same tax and the same period;

(4) in the case of a payment of an amount of tax not made within three years of the end of the calendar year in which the original due date of the tax or date of the assessment of the department occurred, only for a claim for refund of that amount of tax and only within one year of the date on which the tax was paid; or

(5) in the case of a taxpayer who has been assessed a tax on or after July 1, 1993 pursuant to Subsection B, C or D of Section 7-1-18 NMSA 1978 and an assessment that applies to a period ending at least three years prior to the beginning of the year in which the assessment was made, only for a refund for the same tax for the period of the assessment or for any period following that period within one year of the date of the assessment unless a longer period for claiming a refund is provided in this section.

G. No credit or refund shall be allowed or made to a person claiming a refund of gasoline tax pursuant to Section 7-13-11 NMSA 1978 unless notice of the destruction of the gasoline was given to the department within thirty days of the actual destruction and the claim for refund is made within six months of the date of destruction. No credit or refund shall be allowed or made to a person claiming a refund of gasoline tax pursuant to Section 7-13-17 NMSA 1978 unless the refund is claimed within six months of the date of purchase of the gasoline and the gasoline has been used at the time the claim for refund is made.

H. If, as a result of an audit by the department or a managed audit covering multiple periods, an overpayment of tax is found in any period under the audit and if the taxpayer files a claim for refund for the overpayments identified in the audit, that overpayment may be credited against an underpayment of the same tax found in another period under audit pursuant to Section 7-1-29 NMSA 1978.

I. A refund of tax paid under any tax or tax act administered pursuant to Subsection B of Section 7-1-2 NMSA 1978 may be made, at the discretion of the department, in the form of credit against future tax payments if future tax liabilities in an amount at least equal to the credit amount reasonably may be expected to become due.

J. For the purposes of this section, "oil and gas tax return" means a return reporting tax due with respect to oil, natural gas, liquid hydrocarbons, carbon dioxide, helium or nonhydrocarbon gas pursuant to the Oil and Gas Severance Tax Act, the Oil and Gas Conservation Tax Act, the Oil and Gas Emergency School Tax Act, the Oil and Gas Ad Valorem Production Tax Act, the Natural Gas Processors Tax Act or the Oil and Gas Production Equipment Ad Valorem Tax Act [Chapter 7, Article 34 NMSA 1978].

K. The filing of a fully completed original income tax return, corporate income tax return, corporate income and franchise tax return, estate tax return, special fuel excise tax return or annual insurance premium tax return that shows a balance due the taxpayer or a fully completed amended income tax return, an amended corporate income tax return, an amended corporate income and franchise tax return, an amended estate tax return, an amended special fuel excise tax return, an amended oil and gas tax return or an amended insurance premium tax return that shows a lesser tax liability than the original return constitutes the filing of a claim for refund for the difference in tax due shown on the original and amended returns.

L. In no case may a credit or refund be claimed if the related federal adjustment is taken into account by a partnership in the partnership's tax return for the adjustment year and allocated to the partners in a manner similar to other partnership tax items.

History: 1953 Comp., § 72-13-40, enacted by Laws 1965, ch. 248, § 28; 1966, ch. 30, § 4; 1971, ch. 276, § 9; 1974, ch. 32, § 1; 1975, ch. 213, § 2; 1979, ch. 144, § 25; 1982, ch. 18, § 11; 1983, ch. 211, § 27; 1985, ch. 65, § 16; 1986, ch. 20, § 17;

1989, ch. 325, § 8; 1990, ch. 86, § 7; 1993, ch. 5, § 9; 1994, ch. 51, § 5; 1996, ch. 15, § 4; 1997, ch. 67, § 3; 1999, ch. 84, § 2; 2000, ch. 28, § 9; 2001, ch. 16, § 5; 2003, ch. 398, § 9; 2007, ch. 275, § 2; 2013, ch. 27, § 8; 2015, ch. 73, § 17; 2017, ch. 63, § 26; 2019, ch. 157, § 4; 2021, ch. 83, § 3; 2023, ch. 85, § 5.

NMSA 1978, 7-1-29.1

7-1-29.1. Awarding of costs and fees.

A. In an administrative proceeding or court proceeding brought by or against a taxpayer and conducted in connection with the determination, collection or refund of a tax or the interest or penalty for a tax governed by the Tax Administration Act, the taxpayer shall be awarded a judgment or a settlement for reasonable administrative costs and reasonable litigation costs and attorney fees incurred in connection with the proceeding if the taxpayer is the prevailing party.

B. As used in this section:

(1) "administrative proceeding" means any procedure or other action before the department or the administrative hearings office;

(2) "court proceeding" means any civil action brought in state district court;

(3) "reasonable administrative costs" means:

(a) any administrative fees or similar charges imposed by the department or the administrative hearings office; and

(b) actual charges for: 1) filing fees, court reporter fees, service of process fees and similar expenses; 2) the services of expert witnesses; 3) any study, analysis, report, test or project reasonably necessary for the preparation of the party's case; and 4) fees and costs paid or incurred for the services in connection with the proceeding of attorneys, certified public accountants, employees of a New Mexico licensed certified public accounting firm or enrolled agents who are authorized to practice in the context of an administrative proceeding; and

(4) "reasonable litigation costs and attorney fees" means:

(a) reasonable court costs; and

(b) actual charges for: 1) filing fees, court reporter fees, service of process fees and similar expenses; 2) the services of expert witnesses; 3) any study, analysis, report, test or project reasonably necessary for the preparation of the party's case; and 4) fees and costs paid or incurred for the services of attorneys in connection with the proceeding.

C. For purposes of this section:

(1) the taxpayer is the prevailing party if the taxpayer has:

(a) substantially prevailed with respect to the amount in controversy; or

(b) substantially prevailed with respect to most of the issues involved in the case or the most significant issue or set of issues involved in the case;

(2) the taxpayer is not the prevailing party if the administrative hearings office finds that the position of the department in the proceeding was based upon a reasonable application of the law to the facts of the case. For purposes of this paragraph, the position of the department shall be presumed not to be based upon a reasonable application of the law to the facts of the case if:

(a) the department did not follow applicable published guidance in the proceeding; or

(b) the assessment giving rise to the proceeding is not supported by substantial evidence determined at the time of the issuance of the assessment;

(3) as used in Subparagraph (a) of Paragraph (2) of this subsection, "applicable published guidance" means:

(a) department or administrative hearings office regulations, information releases, instructions, notices, technical advice memoranda and announcements; and

(b) private letter rulings and letters issued by the department to the taxpayer; and

(4) the determination of whether the taxpayer is the prevailing party and the amount of reasonable litigation costs or reasonable administrative costs shall be made by agreement of the parties or:

(a) in the case of an administrative proceeding, by the hearing officer; or

(b) in the case of a court proceeding, by the court.

D. An order granting or denying in whole or in part an award for:

(1) reasonable litigation costs and attorney fees pursuant to Subsection A of this section in a court proceeding may be incorporated as a part of the court's decision or judgment and are subject to appeal in the same manner as the decision or judgment; and

(2) reasonable administrative costs pursuant to Subsection A of this section in an administrative proceeding are reviewable in the same manner as a decision of the administrative hearings office.

E. An agreement for or award of reasonable administrative costs or reasonable litigation costs in any administrative proceeding or court proceeding pursuant to Subsection A of this section shall not exceed the lesser of twenty percent of the amount of the settlement or judgment or seventy-five thousand dollars ($75,000).

F. The department shall annually report to the legislative finance committee and the revenue stabilization and tax policy committee on the costs it incurs pursuant to this section.

History: 1978 Comp., § 7-1-29.1, enacted by Laws 2003, ch. 398, § 12; 2015, ch. 73, § 18; 2019, ch. 157, § 5.

NMSA 1978, 7-1B-8

7-1B-8. Tax protests; procedures.

A. Upon timely receipt of a tax protest filed in accordance with the provisions of Section 7-1-24 NMSA 1978, the taxation and revenue department shall promptly acknowledge the protest by letter to the protesting taxpayer or the taxpayer's representative. If the department determines that the protest has not been filed in accordance with that section, the department shall, within twenty-one days of receipt of the protest, inform the taxpayer of the deficiency and provide the taxpayer, within twenty-one days of the taxpayer being informed, one opportunity to correct it. If the taxpayer corrects the deficiency, the protest shall be considered timely if the initial protest was filed within ninety days in accordance with Subsection D of Section 7-1-24 NMSA 1978. A determination by the department that a protest has not been filed in accordance with that section may be protested by the taxpayer.

B. Within one hundred eighty days, but no earlier than sixty days after the date of the protest, the taxation and revenue department shall request a hearing with the administrative hearings office. A taxpayer may request in writing an informal conference with the department within sixty days after the date of the protest, and the department shall conduct the requested informal conference within thirty days of the receipt of the request. Whether or not a taxpayer requests an informal conference with the department, a taxpayer may request a hearing with the administrative hearings office no earlier than sixty days from the date of the protest.

C. The taxation and revenue department shall include with its request for a hearing an answer to the protest describing the legal and factual bases supporting the department's position beyond an assertion of the presumption of correctness and articulating the remaining protested issues.

D. In the event the taxpayer first requests a hearing with the administrative hearings office, the taxation and revenue department shall, within thirty days of service of the taxpayer's request for a hearing, file its answer to the protest describing the legal and factual bases supporting the department's position beyond an assertion of the presumption of correctness. The department may amend its answer to the protest up until ten days before the scheduled hearing or other deadline specified in a controlling scheduling order; provided that if the administrative hearings office determines that the department's amended

answer unfairly prejudices the taxpayer, the administrative hearings office may disallow the amended answer. The hearing shall be limited to the grounds provided in the taxpayer's protest letter and in the department's answer to the protest.

E. If the hearing officer finds that the taxation and revenue department failed to comply with the deadlines set forth in Subsections A and B of this section, the hearing officer may order that no further interest may accrue on the protested liability.

F. If the taxpayer files the request for a hearing, the chief hearing officer shall set a hearing to take place within ninety days of the taxation and revenue department's answer to the protest, but in no case later than one hundred twenty days after the taxpayer's request for a hearing. If the department files the request for hearing with the answer to the protest, the chief hearing officer shall set a hearing to take place within ninety days of that request. Absent a conflict of interest requiring the assigned hearing officer to recuse from the case pursuant to the administrative hearings office code of conduct or an unforeseen emergency circumstance such as an accident, unexpected medical condition or illness, or vacancy of the position of the assigned hearing officer, the chief hearing officer shall not reassign a hearing officer to a case without giving the department and the taxpayer notice of that reassignment at least fourteen days before the hearing. Either party may, within ten days of notice of hearing assigning a hearing officer or notice of reassignment of a hearing officer, exercise one time the peremptory right to excuse the hearing officer designated to conduct the hearing; provided that the party has not moved for a discretionary ruling from the assigned hearing officer, nor previously exercised its right of peremptory excusal. Once a hearing officer has been peremptorily excused, that hearing officer shall not be assigned to the case again.

G. The administrative hearings office shall rule on a dispositive motion, including a motion for summary judgment, a motion for partial summary judgment or a motion to dismiss, filed by the taxation and revenue department or the taxpayer at least thirty days before the hearing unless the parties consent to a different deadline in a scheduling order.

H. A taxpayer may appear at the hearing on the taxpayer's own behalf, may appear through a bona fide employee or may be represented by an attorney, a certified public accountant, an employee of a New Mexico licensed certified public accounting firm whose authorization by the firm and by the taxpayer to

appear is evidenced in writing or an enrolled agent. An attorney, a certified public accountant, an employee of a New Mexico licensed certified public accounting firm or an enrolled agent shall abide by their respective controlling professional or ethical standards of conduct at all stages of the administrative proceeding before the administrative hearings office. If the taxation and revenue department and the taxpayer agree, the hearing may be conducted via video conference. At the beginning of the hearing, the hearing officer shall inform the taxpayer of the taxpayer's right to representation. A hearing shall be closed to the public except upon request of the taxpayer. A hearing officer may postpone or continue a hearing at the hearing officer's discretion. As used in this subsection, "enrolled agent" means a federally licensed tax practitioner with unlimited rights to represent taxpayers before the internal revenue service.

I. Within thirty days after the hearing, the hearing officer shall inform the taxation and revenue department and the taxpayer in writing of the decision and, in accordance with Section 7-1-25 NMSA 1978, of the aggrieved party's right to, and the requirements for perfection of, an appeal from the decision to the court of appeals and of the consequences of a failure to appeal. The written decision shall embody:

(1) an order granting or denying the relief requested or granting or denying a part of the relief requested, as appropriate; and

(2) findings of fact and law and a thorough discussion of the reasoning used to support the order with citations to the record and applicable law.

J. A taxpayer with two or more protests containing related issues may request that the protests be combined and heard jointly. The hearing officer shall grant the request to combine protests unless it would create an unreasonable burden on the administrative hearings office or the taxation and revenue department.

K. Nothing in this section shall be construed to authorize a criminal proceeding or to authorize an administrative protest of the issuance of a subpoena or summons.

History: Laws 2015, ch. 73, § 8; 2019, ch. 157, § 8.

NMSA 1978, 7-9-17

7-9-17. Exemption; gross receipts tax; wages.

Exempted from the gross receipts tax are the receipts of employees from wages, salaries, commissions or from any other form of remuneration for personal services.

History: 1953 Comp., § 72-16A-12.5, enacted by Laws 1969, ch. 144, § 10.

New Mexico Rules Annotated (NMRA)
ARTICLE 5
Privileges

Rule 1-026 NMRA (excerpt)

1-026. General provisions governing discovery.

A. Discovery methods. Parties may obtain discovery by any of the following methods: depositions; interrogatories; requests for production or to enter land; physical and mental examinations and requests for admission.

B. Scope of discovery. Unless otherwise limited by the court in accordance with these rules, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery of any information, not privileged, which is relevant to the subject matter involved in the pending action. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. A party responding to discovery requests shall provide all non-privileged responsive information then known to the party, subject to the limitations in these rules or as ordered by the court.

(2) Limitations. The court shall limit use of discovery methods set forth in this rule if it determines that:

(a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(b) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(c) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

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Rule 11-502 NMRA

11-502. Required reports privileged by statute.1

A. Scope of the privilege. Should any law require a return or report to be made and the law mandating the creation of that return or report provides for its confidentiality, the person or entity, in either a public or private capacity, making the return or report has a privilege to refuse to disclose, or to prevent any other person from disclosing, the return or report.

B. Exceptions. The privilege does not cover a return or report that does not comply with the law that mandates its creation, nor actions involving perjury, false statements, or fraud in the return or report.
[As amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

Rule 11-511 NMRA

11-511. Waiver of privilege by voluntary disclosure.
A person who possesses a privilege against disclosure of a confidential matter or communication waives the privilege if the person voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is a privileged communication.
[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

New Mexico Administrative Code (NMAC)

3.1.6.12 NMAC

3.1.6.12 PRESUMPTION OF CORRECTNESS OF ASSESSMENT:
A. Once a "Notice of Assessment of Taxes" has been mailed or personally delivered to a taxpayer, the statutory presumption of the correctness of the assessment will apply. The effect of the presumption of correctness is that the taxpayer has the burden of coming forward with some countervailing evidence tending to dispute the factual correctness of the assessment made by the secretary. Unsubstantiated statements that the assessment is incorrect cannot overcome the presumption of correctness.

B. The presumption exists even if the secretary has issued assessments using alternative methods of reconstruction of a tax or has estimated the tax.

[7/19/67, 11/5/85, 8/15/90, 10/31/96; 3.1.6.12 NMAC - Rn, 3 NMAC 1.6.12, 1/15/01]

3.2.105.7 NMAC

3.2.105.7 DEFINITIONS - EMPLOYEE:
A. In determining whether a person is an employee, the department will consider the following indicia:

(1) is the person paid a wage or salary;

(2) is the "employer" required to withhold income tax from the person's wage or salary;

(3) is F.I.C.A. tax required to be paid by the "employer";

(4) is the person covered by workmen's compensation insurance;

(5) is the "employer" required to make unemployment insurance contributions on behalf of the person;

(6) does the person's "employer" consider the person to be an employee;

(7) does the person's "employer" have a right to exercise control over the means of accomplishing a result or only over the result (control does not mean "mere suggestion").

B. If all of the indicia mentioned Subsection A of Section 3.2.105.7 NMAC are present, the department will presume that the person is an employee. However, a person may be an employee even if one or more of the indicia are not present.

[9/29/67, 12/5/69, 3/9/72, 11/20/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.105.7 NMAC - Rn, 3 NMAC 2.17.7 & A, 5/15/01]

22.600.3.24 NMAC

22.600.3.24 EVIDENCE AT HEARING:

A. Every party shall have the right of notice, cross-examination, presentation of evidence, objection, motion, argument and all other rights essential to a fair hearing.

B. The taxpayer shall have the burden of proof, except as otherwise provided by law. Because the taxpayer must overcome the presumption of correctness or otherwise establish entitlement to the claim or relief sought during the protest, the taxpayer will ordinarily present their case first, followed by TRD, except as otherwise provided by law or as otherwise ordered by the hearing officer for good cause. The party with the burden in the case shall have an opportunity to make a final rebuttal argument at the hearing. However, in the event closing argument is submitted after the hearing in writing, the hearing officer may require that each side submit simultaneous written closing arguments in the matter without an opportunity for rebuttal argument.

C. The New Mexico rules of evidence and New Mexico rules of civil procedure shall not apply in any matter before the administrative hearings office unless otherwise expressly and specifically prescribed by statute, regulation, or order of the hearing officer. Relevant and material evidence shall be admissible. Irrelevant, immaterial, unreliable, or unduly repetitious evidence may be excluded. Immaterial or irrelevant portions of an otherwise admissible document shall be segregated or redacted and excluded so far as is practicable. The hearing officer shall consider and give appropriate weight to all relevant and material evidence admitted in rendering a final decision on the merits of a matter.

D. Reliable hearsay evidence is admissible during the protest proceeding.

E. An adverse party, or an officer, agent or employee thereof, and any witness who appears to be hostile, unwilling or evasive may be interrogated by leading questions and may also be contradicted and impeached by the party calling that person.

F. The parties may agree to, and the hearing officer may accept, the joint submission of stipulated facts relevant to the issue or issues. The hearing officer may order the parties to stipulate, subject to objections as to relevance or materiality, to uncontested facts and to exhibits. The hearing officer may also order the parties to stipulate to the admissibility of basic documents concerning the controversy, such as audit reports of TRD, assessments issued by TRD, returns and payments filed by taxpayer, correspondence between the parties, and to basic facts concerning the identity and business of a taxpayer, such as the taxpayer's business locations in New Mexico and elsewhere, the location of its business headquarters and, if applicable, the state of its incorporation or registration.

G. The hearing officer may take administrative notice of facts not subject to reasonable dispute that are generally known within the community, capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably disputed, or as provided by an applicable statute. Administrative notice may be taken at any stage in the proceeding whether or not requested by the parties. A party is entitled to respond as to the propriety of taking administrative notice which shall include the opportunity to refute a noticed fact.

H. Parties objecting to evidence shall timely and briefly state the grounds for the objection. Rulings on evidentiary objections may be addressed on the record at the time of the objection, or reserved for ruling in a subsequent written order.

I. Formal exception to an adverse ruling is not required.

J. When an objection to admission of an exhibit or to a question propounded to a witness is sustained, the proponent may make a specific offer of what the representative expects to prove by introduction of the exhibit or by the answer of the witness, or the hearing officer may, with discretion, receive and have reported the evidence in full. Excluded exhibits, adequately marked for identification, may be retained in the record so as to be available for consideration by any reviewing authority.

K. In general, documentary evidence should be no larger than 8.5 inches by 11 inches unless expressly allowed by the hearing officer. The hearing officer may admit a documentary exhibit presented at hearing which exceeds 8.5 inches by 11 inches or which cannot be folded, provided the proponent of such exhibit

provide the administrative hearings office a copy of the exhibit reduced to 8.5 inches by 11 inches. After the hearing at which the exhibit was admitted, the reduced copy shall be substituted for the larger exhibit and made part of the record of the hearing. The administrative hearings office may permit the proponent of a large exhibit to make arrangements to obtain a reduced copy, provided that a failure by the proponent to provide a reduced copy shall be construed as a withdrawal of the exhibit. For the purposes of maintaining an adequate record for submission to the Court of Appeals upon an appeal of either party, the hearing officer may request or require the submission of electronic copies of all tendered exhibits either in addition to or in lieu of the physical copies of tendered exhibits.

L. Objects introduced as exhibits shall be returned to the proponent at the conclusion of the hearing unless otherwise ordered by the hearing officer. In lieu of the object itself, the hearing officer may require the moving party to submit a photograph, video, or other appropriate substitute such as verbal description of the pertinent characteristics of the object for the record. If an object is retained for the record, it may be returned to the proponent no less than 45 days after a final decision and order is rendered on the merits of a protest provided that a party has not filed a notice of appeal.

[22.600.3.24 NMAC - Rp. 22.600.3.23 NMAC, 8/25/2020]