No. 25-

IN THE

Supreme Court of the United States

FRANCIS MCLAIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Can a district court properly deny a motion under Rule 60(b)(4), F.R.Civ.P., to vacate a criminal conviction where the motion shows the conviction is void for failure of the indictment to allege all the component essential elements of the offense, and/or void for the failure to instruct the jury on all the component essential elements of the crime charged?

II. Can a district court's finding of "arguable-basis" jurisdiction overcome a Rule 60(b)(4) Motion showing that a criminal judgment under 26 U.S.C. § 6672 is void for lack of *in personam* or subject-matter jurisdiction?

III. Can the United States pursue a civil action to recover "trust fund recovery penalties" under 26 U.S.C. § 6672 that arose from a criminal conviction where the sentencing court found no actual tax loss and awarded no restitution under 26 U.S.C. § 7202?

IV. Does the Constitutional bar against double jeopardy preclude the United States from pursuing a trust fund recovery penalty under 26 U.S.C. § 6672 if the same actions were already punished under 26 U.S.C. § 7202 and there is no showing that the civil penalty is remedial?

V. Does the five-year statute of limitations under 28 U.S.C. § 2462 bar the United States from pursuing a trust fund recovery penalty under 26 U.S.C. § 6672 if the alleged trust fund violations accrued over nine years earlier?

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- The United States of America, Intervenor-Defendant-Appellee; the United States is the Respondent in this Court.

- Francis McLain, Defendant-Appellant; Francis McLain is the Petitioner in this Court.

- Caroline McLain, Defendant-Appellant – not participating in this Petition.

- Alakhi Joy McLain, Defendant-Appellant – not participating in this Petition.

- Sohnja May McLain, Defendant-Appellant – not participating in this Petition.

- Dane Sehaj McLain, Defendant-Appellant – not participating in this Petition.

LIST OF PROCEEDINGS

United States District Court for the District of Montana, Billings Division, Case No.CV-16-36 -BLG-SPW: *The United States of America vs. Francis McLain, individually, and as Co-Manager of Tera Bani Retreat Ministries; Caroline McLain, individually, and as Managing Director of Tera Bani Retreat Ministries; and Alakhi Joy McLain, Sohnja May McLain, and Dane Sehaj McLain, as Beneficiaries of the E-3 Ranch Trust.*

Judgment was entered on March 1, 2023.

United States Court of Appeals for the Ninth Circuit, Case Nos. 23-35304 & 23-4221: *Faith McLain, as beneficiary of the Estate of Bernard McLain; et. al. v. Francis McLain, Individually and as Co-Manager of Tera Bani Retreat Ministries, v. United States of America and Carolinde McLain, Individually and as Managing Director of Tera Bani Retreat Ministries, et. al.*

Judgment was entered on February 19, 2025, and took effect on May 9, 2025.

United States District Court for the District of Minnesota, Case No. 08-CR-10: *United States of America v. Francis Leroy McLain.*

Judgment was entered on September 11, 2009.

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OPINIONS BELOW

The following opinions and orders are all unpublished:

*Memorandum of the United States Court of Appeals for the Ninth Circui*t, filed February 19, 2025, is set out at Appendix A, beginning at page 1a.

Order of The United States District Court for The District of Montana, Billings Division, filed September 29, 2023, is set out at Appendix B, beginning at page 13a.

Order of the United States District Court for the District of Montana, Billings Division, filed March 1, 2023, is set out at Appendix C, beginning at page 23a.

Order of the United States District Court for the District of Montana, Billings Division, filed May 24, 2022, is set out at Appendix D, beginning at page 51a.

Order of the United States District Court for the District of Montana, Billings Division, filed December 7, 2021, is set out at Appendix E, beginning at page 54a.

Order Re Motion for Clarification of the United States District Court for the District of Montana, Billings Division, filed April 8, 2021, is set out at Appendix F, beginning at page 60a

Order of the United States District Court for the District of Montana, Billings Division, filed March 1, 2021, is set out at Appendix G, beginning at page 64a.

Findings And Recommendations of the United States District Court for the District of Montana, Billings

Division, filed January 13, 2021, is set out at Appendix H, beginning at page 72a.

Order of the United States District Court for the District of Montana, Billings Division, filed November 9, 2020, is set out at Appendix I, beginning at page 82a.

Findings And Recommendations of the United States District Court for the District of Montana, Billings Division, filed August 3, 2020, is set out at Appendix J, beginning at page 99a

Order of the United States District Court for the District of Montana, Billings Division, filed March 6, 2018, is set out at Appendix K, beginning at page 118a.

Findings And Recommendations of the United States District Court for the District of Montana, Billings Division, filed January 17, 2018, is set out at Appendix L, beginning at page 124a.

Order of the United States District Court for the District of Montana, Billings Division, filed February 23, 2017, is set out at Appendix M, beginning at page 141a.

Findings And Recommendations of the United States Magistrate Judge In the United States District Court for the District of Montana, Billings Division, filed October 24, 2016, is set out at Appendix N, beginning at page 158a.

Order of the United States Court of Appeals for the Ninth Circuit, filed May 1, 2025, is set out at Appendix O, beginning at page 194a.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on February 19, 2025. A petition for rehearing was denied on May 1, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent text of the following Constitutional and statutory provisions is set out at Appendix P:

- Fifth Amendment
- Sixth Amendment
- Eighth Amendment
- Tenth Amendment
- 26 U.S.C. § 3402(d) – Income tax collected at source
- 26 U.S.C. § 6671 – Rules for application of assessable penalties
- 26 U.S.C. § 6672 – Failure to collect and pay over tax, or attempt to evade or defeat tax
- 26 U.S.C § 7202 – Willful failure to collect and pay over tax

- 26 U.S.C. § 7501 – Liability for taxes withheld or collected

- 28 U.S.C. § 2462 – Time for commencing proceedings

STATEMENT OF THE CASE

A. Background

This case arises out of a Montana state court lawsuit to quiet title to a small ranch property in Park County, Montana. Caroline McLain is the owner of record of the property, and this suit was initiated in July 2014 by the siblings of her husband Francis ("Frank") McLain (or their successors) to challenge Caroline's ownership of the property.

In 2016, the United States intervened in the case and removed it to the U.S. District Court for the District of Montana. The United States sought to enforce liens it asserted against the property of Frank McLain, and claimed that Frank's conveyance of his interest in the ranch property in the chain of title was fraudulent, and that Caroline held title to the property as the "nominee" of Frank McLain.

The liens the United States claimed against Frank McLain were premised in large part[1] on "trust fund recovery penalties" that Frank allegedly owed to the United States stemming from a 2008 criminal case in the U.S. District of Minnesota.

1. Portions of the liens premised on criminal fines imposed on Frank McLain have been discharged.

(1) McLain's 2008 Criminal Prosecution for Employment Tax Evasion

Frank had been a manager of Kirpal Nurses, LLC, a small temporary nursing service in the State of Minnesota. With advice of accountants and lawyers, Kirpal Nurses treated its temporary nurses and nursing assistants as independent contractors. On January 8, 2008, Frank was indicted in the U.S. District of Minnesota on tax charges stemming from his management of the now-defunct nurse temp staffing service. *United States v. McLain*, Case 0:08-cr-00010. The primary allegation was that Kirpal should have treated the nursing temp workers as "employees" rather than independent contractors.

McLain was indicted as a "responsible person" who allegedly had a duty to truthfully account for and pay over quarterly employment taxes of Kirpal Nurses, LLC, but who then willfully failed to do so.

Kirpal's temp nurses selected their own availability to work, bought their own uniforms and tools, drove themselves to the health care facilities, and provided their own education, insurance and licensing. They were issued 1099 Forms at the end of the year. Thus, significantly, Kirpal's nurses paid their own personal income and self-employment taxes.

Although Frank was prosecuted for failure to account for and pay over the employment taxes of the workers treated as independent contractors, no assessment was made showing the government had sustained a tax loss. The indictment was about hypothetical *employment* tax monies that should have been withheld if the workers had

been treated as employees. Significantly, the indictment made no claim that trust funds were missing.

McLain was convicted on Nov. 18, 2008 after a jury trial in the District of Minnesota, of nine counts (corresponding to nine quarterly reporting periods) of failing to account for and pay over employment taxes under 26 U.S.C. § 7202. But the IRS never litigated an assessment regarding either Kirpal Nurses or Frank McLain. And, in fact, the government never objected to a finding of zero restitution at McLain's sentencing in 2009, because Kirpal's temp workers had personally paid all taxes that were not withheld by Kirpal Nurses, LLC.

At McLain's 2008 trial, IRS Special Agents Shauna Snider and Mark Kennedy admitted the IRS had performed no assessments – and had not given McLain notice of any assessment – of any tax deficiencies. *See Trial Transcripts of Nov. 13, 2008* in the U.S. District Court of Minnesota.

Nor was the jury instructed to evaluate any alleged tax losses. The jury was instructed that a guilty verdict could be reached if the jury determined that "at least one individual" who worked for Kirpal should have been treated as an employee during each of the nine quarters charged in the indictment. *See Jury Instructions*, ECF No. 188-3, p. 7, Instruction No. 21.

In a sentencing hearing on April 23, 2009, the Court accepted the probation officer's PSR that no trust funds were embezzled by McLain. The United States did not object or follow up with any proffer, claim, information, or evidence of actual tax losses which it attributed to

McLain. McLain's sentencing court put quotation marks around the phrase "tax losses;" to indicate the "losses" described by the court were hypothetical, not actual, for purposes only of calculating a prison sentence.

Final judgment of conviction and sentencing was imposed on September 11, 2009 (ECF 94-5, originally filed on Oct. 26, 2009). Frank McLain was sentenced to 48 months in prison, and an assessment of $900 and a criminal fine of $75,000 was adjudged. But the Court imposed no restitution of any alleged tax loss. The United States did not appeal or thereafter argue that McLain's zero-restitution order was an illegal sentence. In all the annals of Federal criminal justice, Frank McLain appears to be the only person imprisoned for tax evasion where the IRS made no claim that it had actually lost tax money.

Frank appealed his conviction and sentence to the Eighth Circuit Court of Appeals, raising mainly the *lack of:*

- Responsible person liability for quarterly *employment taxes. See, e.g., United States v. Farr*, 536 F.3d 1074 (10th Cir. 2008) – Opinion by Justice Gorsuch ("The difficulty for the government in this particular case is that the difference between the quarterly employment taxes and the trust fund recovery penalty is not merely a semantic one under our precedent. We have previously held that the trust fund recovery 'penalty is distinct from and in addition to the employer's liability for [the employment] taxes,' … and we are of course bound by that holding.")

- An actual tax deficiency;
- Trust fund violations as defined by 26 U.S.C. § 7501;
- Affirmative acts of untruthfulness.

The Eighth Circuit denied substantive relief to McLain. *See United States v. McLain*, 646 F.3d 599 (8th Cir. 2011). McLain also filed a Petition for a Writ of Certiorari to the Supreme Court in the fall of 2011 regarding the essential elements necessary for a felony tax crime under 26 U.S.C. § 7202. On March 19, 2012, McLain's Petition (No. 11-937) was denied without explanation.

(2) Illegal Assessment of a Trust Fund Recovery Penalty in 2014

After McLain was released from prison, the IRS began the process of assessing Frank with a trust fund recovery penalty. On Feb. 13, 2013, the IRS assessment officer Jacqueline Jacobson from Minnesota interviewed Frank over the phone. During that interview, Frank asked her how there could be a trust fund missing when *no withholding had been done by the alleged employer*. She replied that the entire amount to be assessed was based upon the employment taxes that *should have been withheld* by the employer.

This interpretation by IRS officer Jacobson is contrary to the trust fund definition penned by Congress at 26 U.S.C. § 7501. It is also contrary to the definition of "trust fund" found in the Internal Revenue Manual. It is contrary as well to this Court's holdings in *Slodov v.*

United States, 436 U.S. 238 (1978) and *Begier v. I.R.S.*, 496 U.S. 53 (1990) *Slodov* and *Begier* state unequivocally that a trust fund recovery penalty is limited to the amount of taxes *actually withheld* per § 7501.

The Criminal Tax Manual from the Department of Justice states that the only restitution to be sought under 26 U.S.C. § 7202 are the trust funds that were withheld and never paid over by the alleged employer. Since the District Court in Minnesota did not order any restitution, it is axiomatic that no actual trust funds are due and owing. Again, no employment taxes were ever withheld, and no "trust fund" ever existed.

In 2014, the IRS nevertheless assessed Trust Fund Recovery Penalties under § 6672 against Frank McLain totaling $492,451.38. *See Intervenor Complaint*, pp. 4-5, ¶ 12 (ECF 20); *See also IRS Assessment forms* (ECF 171-1).

B. Proceedings below

(1) District Court Proceedings

After the intervention of the United States, and the removal of this matter to Federal Court in 2016, Frank McLain was relentless in challenging the United States' actions. In the United States District Court for the District of Montana, McLain objected, moved to dismiss, filed petition after petition, and even sued the United States. In McLain's first answer to the government's intervenor complaint (ECF 79), McLain asserted that "The claims contained in the Intervenor Complaint are barred by the operative statute(s) of limitation." ECF 79, p. 11.

Without any supporting evidence, in their first reply brief, the United States began representing its claims as if its six-figure 'tax losses' had already been proven, citing 26 U.S.C. § 2410, and claiming that any challenges to these phantom 'tax losses' were barred by *res judicata*.

McLain challenged the government's standing and the U.S. District Court's *in personam* and subject-matter jurisdiction numerous times. McLain repeatedly raised the argument that his underlying criminal conviction under Section 7202 was void for lacking numerous essential elements of the crime and for lacking constitutional due process. He verified and filed four detailed Rule 60(b)(4) motions. *See* ECF 213, 239, 241, and 248. The District Court denied these motions without findings of fact or conclusions of law and without any analysis regarding the lack of jurisdiction claimed by McLain. In denying these motions, the District Court relied on an "arguable-basis" theory for jurisdiction.

The District Court accepted all of the United States' assertions and arguments, granted the United States' lien claims and even the stated dollar amounts without any evidentiary hearing. The Court overruled all of McLain's objections, denied all of McLain's motions, and dismissed all of McLain's petitions and counterclaims.

A bench trial was held in the District Court on November 14, 2022 on the quiet title issues remaining in the case, and the District Court's judgment was entered on March 1, 2023. The McLains prevailed on the United States' fraudulent conveyance and nominee theories. Frank, Caroline, and their three children (the defendants in the quiet title action) nonetheless filed a Rule 59(e),

F.R.Civ.P., motion to amend the judgment to address the District Court's division of the property and other issues. The Rule 59(e) motion was denied by the District Court on September 29, 2023.

(2) The Ninth Circuit's Memorandum Opinion

Frank McLain was denied due process, has been subjected to double jeopardy and excessive fines, and has been prosecuted beyond the statute of limitations. After the entry of judgment in the District Court, Frank appealed the issues relating to the United States' tax claims to the Ninth Circuit Court of Appeals.[2]

McLain appealed the District Court's orders (ECF 227 & 234) regarding subject matter jurisdiction, the District Court's orders (ECF 263 & 285) denying McLain's motions for relief under Rule 60(b)(4) (ECF 239, 241 & 248), as well as the district court's rulings that McLain is liable for restitution (or "tax losses," or "trust fund penalties") which were never awarded in McLain's 2008 case.

In its Memorandum Opinion issued on February 19, 2025, the Ninth Circuit denied all relief requested by McLain. The Ninth Circuit panel gave scant attention to the substantive tax law issues raised by Frank – upholding the District Court's orders and specifically denying

2. Frank, Caroline and their three children also appealed the District Court's rulings regarding the quiet title issues to the Ninth Circuit. The quiet title issues are not raised in the present Petition, and this Petition is addressed solely to the tax issues appealed by Frank McLain to the Ninth Circuit Court of Appeals.

McLain's statute of limitations and double jeopardy claims. The panel made no comment on the Rule 60(b)(4) Motions, on McLain's challenges to *in personam* and subject-matter jurisdiction, on the component essential elements of Section 7202, on the importance that Section 7501 plays when applying the penalties of Sections 6672 and 7202, or on the lack of constitutional due process that took place in procuring McLain's conviction.

REASONS FOR GRANTING THE PETITION

I. Guidance from this Court is necessary regarding the essential elements of 26 U.S.C. § 7202.

The liens asserted by the United States in this matter against the property of Frank McLain are premised on "Trust Fund Recovery Penalties" that were assessed against McLain pursuant to 26 U.S.C. § 6672 after his conviction for failing to pay employment taxes under 26 U.S.C. § 7202. McLain asserts that the criminal conviction underpinning the assessment of the Trust Fund Recovery Penalty is void for several reasons.

First and foremost, the criminal indictment filed against Frank in his criminal case failed to state the essential elements of 26 U.S.C. § 7202. "An indictment must set forth each element of the crime that it charges." *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998). "A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void. … [A] court has no authority to leave in place a conviction or sentence that violates a substantive rule." *Montgomery v. Louisiana*, 577 U.S. 190, 136 S.Ct. 718, 731 (2016) (emphasis added.)

In 1943 this Court in *Spies v. United States*, 317 U.S. 492, ruled on § 7202's predecessor statute at large. The original statute at large contained both current §§ 7201 and 7202 and was labeled as the capstone of all tax crimes by the *Spies* court. The Court laid out four essential elements of a felony for tax evasion:

- the person who is required or liable for the alleged violation
- the existence of a tax deficiency
- an affirmative act of deceitfulness or evasion (not just a passive act of omission)
- willfulness – the *mens rea* knowledge that one's actions are violations of the law

After the codifiers split the statute at large and made 7201 and 7202 into two distinct sections in 1954, the government in 7202 prosecutions has left off an affirmative act as an essential element and has prepared indictments that allege tax felonies for the same actions that comprise only tax misdemeanors under § 7203 – contravening the exact reason why the Supreme Court overturned the Spies' conviction in 1943. The *Spies* court held that felony tax crimes must have more essential elements than the misdemeanor tax crimes defined by the Internal Revenue Code (IRC).

The indictment against McLain was fatally flawed in numerous respects for not alleging all the component essential elements necessary for a 7202 crime to exist. It did not allege three of the above essential elements:

- The required person essential element ("responsible person") did not match the alleged tax deficiency at issue (employment taxes). *See, e.g., United States v. Farr,* 536 F.3d 1174 (10th Cir. 2008) – Opinion by Justice Gorsuch (""Liability for the penalty and employer's liability for withholding and employment taxes are separate and distinct … Liability for quarterly employment taxes extends only to employers,...The quarterly employment taxes … specified in the indictment … are not, as the government argues, synonymous with the trust fund recovery penalty.") (citing 26 U.S.C. §3403; *Slodov v. United States*, 436 U.S. 238, 243 (1978)

- No affirmative act was alleged.

- Willfulness was alleged, but no specific statute was named of which McLain as an alleged "responsible person" could have had the *mens rea* to intentionally violate it

Further, the indictment did not take into consideration § 7501 as informing the penalty under 7202 per the *Slodov* court. Since 7501 is all about trust fund violations, it mandates that the subject-matter of 7202 must be about trust fund violations. No such trust fund violations were alleged in the indictment.

The indictment did not take into account the pre-requisite due process steps which the Code mandates in order to "break the corporate veil" and make a "responsible

person" liable for a civil penalty tax. *See* §§ 6671(a), 6672(a) & (b) and 6751 giving statutory notice and assessment and procedural rights to the alleged responsible person.

Likewise, the criminal trial court's instructions to the jury did not reflect all the essential elements necessary. The tax deficiency essential element was not instructed, nor was there any instruction about a trust fund violation per § 7501, nor an affirmative act instruction, nor any of the prerequisite due process which triggers liability for a "responsible person" in the IRC.

II. The canon of *in pari materia* mandates that 26 U.S.C. § 7202 be interpreted and applied in conjunction with 26 U.S.C. § 7501.

Slodov v. United States, 436 U.S. 238 (1978) holds that 26 U.S.C. § 7501 informs the scope of the civil penalty of § 6672 (and likewise, its counterpart § 7202). § 7501 is the only section of law in the IRC which defines the trust fund. Its title reveals and congeals its purpose: "Liability for withheld or collected taxes." § 7501(b) specifically refers to § 7202 as the criminal penalty for violations of § 7501(a). § 7501(b) is the only such reference of § 7202 in the entire IRC. Thus, its impact must be considered when interpreting the intention of Congress. Applying the law according to the canon of *in pari materia*, a trust fund violation must be an essential element of any crime charged under § 7202.

"We decide … that § 7501 properly may be regarded as informing the scope of the duty imposed by § 6672." *Slodov v. United States*, 436 U.S. 238, 255 FN 18 (1978). "The courts are not at liberty to pick and choose among

congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (emphasis added).

III. A criminal conviction only exists if all the component essential elements of the statutory crime were alleged, instructed and proven to the jury beyond a reasonable doubt.

In our judicial system all criminal defendants enter the Court presumed as innocent:

> Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. (underlines added).

In Re Winship, 397 U.S. 358, 364 (1970) (emphasis added).

IV. Void judgments that are based upon constitutional due process violations should not be allowed to be enforced by relying on vague declarations of "arguable-basis" jurisdiction.

Federal Rule of Civil Procedure 60(b)(4) provides relief from a "void" judgment. As articulated by this Court in *United States Student Aid Funds, Inc. v. Espinosa*, 559

U.S. 260, 269 (2010), "Rule 60(b) … provides an 'exception to finality' that 'allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances.'" 559 U.S. at 269 (quoting *Gonzalez v. Crosby*, 545 U.S. 524, at 529 (2005). That is so because "[a] void judgment is a legal nullity." *Id.* at 270. Indeed, "the whole purpose" of Rule 60 "is to make an exception to finality," and the "policy consideration [of finality], standing alone, is unpersuasive in view" of Rule 60. *Gonzalez*, 545 U.S. at 529.

"[A] void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final." *Id.* But, "[a] judgment is not void … simply because it is or may have been erroneous." *Id.* Indeed, "Rule 60(b)(4) is not a substitute for a timely appeal." *Id.* "Instead, Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process … " *Id.* at 271 (emphasis added).

As pertinent here, a judgment lacking constitutional due process or Article III subject matter jurisdiction is void under Rule 60(b)(4). *See, e.g., Schwartz v. United States*, 976 F.2d 213, 217 (4th Cir. 1992) (A judgment is "'void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law.' 11 Wright and Miller, *Federal Practice and Procedure: Civil* § 2862 at 198-200 (1973)."). Decisions on Rule 60(b)(4) motions are reviewed *de novo.*

Here, McLain contends that his criminal conviction is void because it was procured upon violations of

fundamental due process under the Fifth, Sixth, Eighth and Tenth Amendments to the Constitution. When violations of constitutional due process occur, this Court should not allow a federal court to deny remedy for such violations on a nebulous "arguable-basis" jurisdiction standard. "This court has indicated on a number of occasions that a judgment may be void for purposes of Rule 60(b)(4) if entered in a manner inconsistent with due process." *Orner v. Shalala*, 30 F.3d 1307, 1310 (10th Cir. 1994) (emphasis added).

No court should be authorized to endorse or enforce any alleged criminal judgment that has been procured via a Grand Jury indictment that does not allege all the component essential elements or via a verdict from a trial jury that has not been instructed to find all the essential elements of the crime charged.

V. The Court should decide whether the existence of an "arguable basis" for *in personam* or subject matter jurisdiction forecloses a "voidness" determination under Rule 60(b)(4)

McLain asserts that the criminal court lacked *in personam* jurisdiction over him as a "responsible person" when only employment tax violations are alleged. He further asserts the court lacked subject-matter jurisdiction under § 7202 since there were no allegations of trust fund violations as intended by Congress.

The *Espinosa* court held that the requisite infirmity may include a "certain type of jurisdictional error." *Id.* at 271. As this Court observed, "Federal courts considering Rule 60(b)(4) motions that assert a judgment is void

because of a jurisdictional defect generally have reserved relief only for the exceptional case in which the court that rendered that judgment lacked even an 'arguable basis' for jurisdiction." *Id.* (emphasis added).

Of course, this use of the phrase "arguable basis" was descriptive, not normative. And it offered no definitional aid for future cases. Moreover, this Court in *Espinosa* declined to articulate the nature of a jurisdictional defect sufficient to warrant Rule 60(b)(4) relief: "This case presents no occasion to engage in such an 'arguable basis' inquiry or *to define the precise circumstances in which a jurisdictional error will render a judgment void* because [petitioner] United does not argue that the Bankruptcy's error was jurisdictional." *Id.* (emphasis added). While dictum, this Court recognized that the "arguable basis" standard is not the sole basis for Rule 60(b)(4) relief on jurisdictional grounds.

Although Rule 60(b)(4) was promulgated over 75 years ago (in 1946), *Espinosa* remains the only decision of this Court to touch on its metes and bounds. This vacuum of controlling authority has resulted in substantial divergence among the courts of appeals. Guidance is essential.

A. The courts of appeals are split regarding applicability of the "arguable basis" standard for purposes of assessing "voidness" under Rule 60(b)(4).

Numerous circuits (i.e., First, Second, Third, Fourth, Sixth, Ninth and Tenth) have grafted onto the Rule 60(b)(4) analysis the "arguable basis" test for evaluating

whether vacatur is warranted for want of subject matter jurisdiction. *See Baella-Silva v. Hulsey*, 454 F.3d 5, 9-10 (1st Cir. 2006); *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1985); *Metropolitan Edison Co. v. Pennsylvania Public Utility Comm'n*, 767 F.3d 335, 364 (3d Cir. 2014); *FTC v. Ross*, 74 F.4th 186, 192 (4th Cir. 2023); *Eglington v. Loyer*, 340 F.3d 331, 336 (6th Cir. 2003); *Hunter v. Underwood*, 362 F.3d 468, 476 (8th Cir. 2004); *FTC v. Hewitt*, 68 F.4th 461, 466 (9th Cir. 2023); *Johnson v. Spencer*, 950 F.3d 680, 695 (10th Cir. 2020). In this way, *Espinosa's* descriptive phrase within dictum has gained vitality as if it were a normative holding of this Court.

In contrast stands a number of other circuits (i.e., Fifth, Seventh, Eleventh and Federal) that have not in any reported decision known to Petitioner applied the "arguable basis" test in evaluating whether *in personam* or subject matter jurisdiction was lacking in connection with a Rule 60(b)(4) motion. *See, Mitchell Law Firm, L.P. v. Bessie Jeanne Worthy Revocable Trust*, 8 F.4th 417, 420 (5th Cir. 2021); *Hill v. Baxter Healthcare Corp.*, 405 F.3d 572, 574-77 (7th Cir. 2005); *Architectural Ingenieria Siglo XXI, LLC v. Dominican Republic*, 788 F.3d 1329, 1339-41 (11th Cir. 2015); *Garber v. Chicago Mercantile Exch.*, 570 F.3d 1361, 1364-66 (Fed Cir. 2009).

Collectively, the foregoing cases demonstrate inconsistent application of the "arguable basis" standard. Guidance from this Court is needed.

B. This Court should clarify that an "arguable basis" fails to justify the erroneous exercise of *in personam* jurisdiction or of subject matter jurisdiction.

The Court in *Espinosa* noted merely that federal courts granting Rule 60(b)(4) relief "generally have reserved relief for the exceptional case in which the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." *Id.,* 559 U.S. at 271 (emphasis added). As noted, this was descriptive, not normative. It accordingly does not stand for any sweeping requirement that McLain must negate an "arguable basis" for subject matter jurisdiction as a predicate for Rule 60(b)(4) relief. Indeed, the Rule does not say "inarguably void," it just says "void." The District Court erred in holding to the contrary, and the Ninth Circuit erred in affirming this holding.

Petitioner found no instance in which this Court afforded a lower court discretion in the assessment of subject matter jurisdiction. It is a binary determination. A court either has subject matter jurisdiction or it does not. *See, Jackson v. FIE Corp.,* 302 F.3d 515, 524 (5th Cir. 2002) ("'the judgment is either void or it is not.'" (internal quotations omitted)); *Burke v. Smith*, 252 F.3d 1260, 1267 (11th Cir. 2001) (same). "Rule 60(b)(4) motions leave no margin for consideration of the district court's discretion as the judgments themselves are by definition either legal nullities or not." *SEC v. Novinger*, 40 F.4th 297, 301 (5th Cir. 2022). "[T]he whole point of Rule 60(b)(4) is to undo a district court's erroneous assertion of subject-matter jurisdiction." *Mitchell*, 8 F.4th at 421 (emphasis added). No "arguable basis" inquiry somehow transfers subject matter jurisdiction to a court lacking it in the

first instance. Further, most (if not all) circuits, apply *de novo* review to voidness determinations under Rule 60(b)(4). But the "arguable basis" standard incongruously and inherently permits a range of discretion when it comes to assessments of subject matter jurisdiction.

Further, recognizing an "arguable basis" escape valve would, as a practical matter, read Rule 60(b)(4) out of the Federal Rules. Every court believes it has more than an "arguable basis" for its own rulings, including rulings that it possesses Article III jurisdiction. "I erred inarguably" is not something judges are expected to say.

Indeed, this Court has long instructed that judgments and orders in excess of subject matter jurisdiction "are not voidable, but simply void." *Elliot v. Peirsol's Lessee*, 26 U.S. 328, 340 (1828) (cited in *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1181 (DC Cir. 2013); *accord Gonzalez*, 545 U.S. at 534 ("Rule [60(b)] also preserves parties' opportunity to obtain vacatur of a judgment that is void for lack of subject matter jurisdiction … since absence of jurisdiction altogether deprives a federal court of the power to adjudicate the rights of the parties." (emphasis added)); *Costello v. United States*, 365 U.S. 265, 285 (1961) ("[F]undamental jurisdictional defects … render a judgment void and subject to collateral attack, such as lack of jurisdiction over the person or subject matter."). "A judgment remains void even after final judgment if the issuing court lacked subject-matter jurisdiction, regardless of whether there existed an 'arguable basis' for jurisdiction." *Bell* 734 F.3d at 1181 (DC Cir. 2013).

VI. 26 U.S.C. § 3402(d) bars a § 6672 civil penalty case that is based upon hypothetical employment taxes that were never withheld by the employer.

26 U.S.C. § 3402(d) provides, "If the employer, in violation of the provisions of this chapter, fails to deduct and withhold the tax under this chapter, and thereafter the tax against which such tax may be credited is paid, the tax so required to be deducted and withheld shall not be collected from the employer …"

At sentencing in the underlying criminal matter, the government stipulated that the independent contractors paid their own income and self-employment taxes. The sentencing court likewise resoundly found that Frank McLain owed no restitution. The government conceded the point—offering nothing to rebut the finding; not even able to point to a single penny of tax loss suffered by the United States government. Nor did the government object; or appeal from the zero-restitution finding. The government therefore conceded that there are no trust fund taxes due. The § 6672 civil penalty imposed on McLain is not supported by the law.

VII. An alleged "civil penalty" action violates double jeopardy if it is not remedial.

After a criminal prosecution when the government instigates a civil prosecution for the alleged same behavior, the double jeopardy clause bars such a prosecution if the punishment sought cannot be shown to be remedial:

> We … hold that under the Double Jeopardy Cause a defendant who already has been

> punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

United States v. Halper, 490 U.S. 435, 448-449 (1989)

The U.S. District Court for Minnesota—after hearing no claim (let alone evidence) that the government suffered any tax loss, and after considering and turning down McLain's proffer of evidence and witnesses, and after ordering the government to object if the government had objections—issued its sentencing judgment that McLain owed no restitution. And when filling out a sentencing judgment form with checkboxes to indicate if any restitution questions remained open, the court did not mark such checkboxes.

Then, more than five years after the government both declined to object and refused to turn over Brady material which would have allowed McLain to prove the absence of tax losses—the government swooped in to enforce "tax liens" bearing unexplained dollar amounts to take McLain's (and others') property. The present case involved the government fabricating a claim from whole cloth; years after a no-restitution order had slammed the door on *the same exact claim* by another court.

VIII. The five-year statute of limitations of 28 U.S.C. § 2462 applies to civil penalties.

On its face 26 U.S.C. § 6672 is an assessable *penalty*. Congress is presumed to know the meanings of the words

it uses. 28 U.S.C. § 2462 is a catch-all statute of limitations for civil penalties:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued …

Congress has not specifically declared that § 2462 does not apply to the penalty authorized under § 6672. Under its terms, this statute therefore *does apply* to assessable tax penalties. Furthermore, the Internal Revenue Code specifically refers to 28 U.S.C. § 2462 as the Statute of Limitations for civil penalties arising out of the Code. *See* 26 U.S.C. § 6533(1), which provides: "For period of limitation in respect of civil actions for fines, penalties, and forfeitures, see section 2462 of Title 28 of the United States Code."

§ 2462 plainly deprived the U.S. District Court for the District of Montana of both subject matter and personal jurisdiction. Even if the government's assertions weren't otherwise invalid, the District Court below should have dismissed the action for being beyond the statute of limitations.

The Minnesota indictment was filed against McLain on Jan. 8, 2008. The indictment alleged that McLain failed to truthfully account for and pay over quarterly employment taxes on the wages of employees for Kirpal Nurses, LLC for the nine quarters beginning Oct. 1, 2002 through Dec. 31, 2004—all alleged as a violation of 26 U.S.C. § 7202.

Even under the most extravagantly pro-government construction of when "the claim first accrued," the five-year limitation period at § 2462 would have ended years before the government launched this enforcement action. The United States had all the information it needed to charge McLain with crimes relating to these same facts in early 2008.

The Supreme Court unanimously concluded that the five-year limitations period for federal enforcement actions seeking civil penalties generally begins to run when the *offending act* is committed or finished, not when it is discovered. In an opinion authored by Chief Justice Roberts in *Gabelli v. Securities and Exchange Commission*, 568 U.S. 442 (2013), the Court sustained the "standard rule" that a civil damages claim accrues "when the plaintiff has a complete and present cause of action." *Wallace v. Kato*, 549 U.S. 384, 388 (2007). That rule has governed since the 1830s when the predecessor to § 2462 was enacted. See *Bank of United States v. Daniel*, 12 Pet. 32, 56 (1838). And that definition appears in dictionaries from the 19th century up until today. See, *e.g.*, 1 A. Burrill, *A Law Dictionary and Glossary* 17 (1850) ("an action accrues when the plaintiff has a right to commence it").

It is self evident that the government had a right to commence the action very soon after the tax filing periods at issue (2002-2004). The government launched its criminal action in January 2008. It could have easily launched its civil action within the statutory period as well. That period ended in 2007 or 2008.

IX. This case presents an ideal vehicle for certiorari.

Under Supreme Court Rule 10, compelling reasons warrant review here. Convictions under 26 U.S.C. § 7202 have never been specifically reviewed by this Court since this Section was split from its original statute at large in 1954. Because of this, prosecutors are misapplying the law and not giving significance to all its essential elements for a felony tax crime. They are disregarding the precedents of the *Spies* Court and the *Slodov* Court to unjustly convict and punish innocent souls like McLain when no actual tax deficiency has occurred. This Court's clarification of Congress' intent for a felony under Section 7202 is sorely needed, and McLain's conviction under Rule 60(b)(4) should be deemed null and void in violation of constitutional due process under the Fifth, Sixth and Eighth Amendments.

Likewise, this Court has never substantively addressed Rule 60(b)(4) on the critical Article III issue of circumstances in which judgments may be voided for want of subject matter jurisdiction or for want of *in personam* jurisdiction. Courts of Appeals are divided over the "arguable-basis" standard for which review is sought, and more often than not use this standard as normative to deny the very reason for the existence of Rule 60 as an exception to finality. Petitioner respectfully requests that this Court exercise its supervisory power to reconcile the split among the Courts of Appeals and provide much-needed guidance on the metes and bounds of Rule 60(b) relief.

Further, this Court has not specifically ruled on the applicable statute of limitation period for a civil penalty

under 26 U.S.C. § 6672 and whether or not such penalty is in violation of the double jeopardy clause as further punishment of a defendant who has already been severely punished for the same actions under § 7202.

The issues presented are percolated and ripe, and the purity of how the issues arrived in this Court means that no other factual or legal ground might cloud this Court's analysis.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED FEBRUARY 19, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-35304
No. 23-4221
D.C. No. 1:16-cv-00036-SPW

FAITH MCLAIN, AS BENEFICIARY OF THE ESTATE OF BERNARD MCLAIN; *et al.*,

Plaintiffs,

v.

FRANCIS MCLAIN, INDIVIDUALLY AND AS CO-MANAGER OF TERA BANI RETREAT MINISTRIES,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA,

Intervenor-Defendant-Appellee,

and

CAROLINE MCLAIN, INDIVIDUALLY AND AS MANAGING DIRECTOR OF TERA BANI RETREAT MINISTRIES; *et al.*,

Defendants.

Appendix A

Appeal from the United States District Court
for the District of Montana
Susan P. Watters, District Judge, Presiding

Submitted February 4, 2025*
Portland, Oregon

Before: BEA, KOH, and SUNG, Circuit Judges.

MEMORANDUM**

Defendant-appellants appeal the district court's decision that determined title to the disputed E-3 Ranch ("Ranch") in Park County, Montana.[1] Frank alone collaterally attacks the liens that served as the basis of the United States' intervention in this case. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we **AFFIRM**.

A district court's grant of summary judgment is reviewed de novo. *Mull for Mull v. Motion Picture Indus. Health Plan*, 865 F.3d 1207, 1209 (9th Cir. 2017). Findings of fact are reviewed for clear error, and conclusions of law are reviewed de novo. *Id*; *Chaudhry v. Aragón*, 68 F.4th 1161, 1171 (9th Cir. 2023).

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* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1. Defendants are Francis "Frank" McLain, Caroline McLain, Alakhi McLain, Sohnja McLain, and Dane McLain. We refer to individuals by first name.

Appendix A

1. *Validity of the E-3 Ranch Trust.* Ruling on summary judgment, the district court determined that the E-3 Ranch Trust ("Trust") was invalid under Montana law. After a bench trial, the district court declined to change its prior ruling. The district court correctly determined that the Trust is invalid as an ordinary trust and as a business trust.

In *Ruby Mountain v. Montana Department of Revenue*, the Supreme Court of Montana assessed the validity of an ordinary trust that the parties agree is much like the E-3 Ranch Trust. 2000 MT 166, 300 Mont. 297, 303, 3 P.3d 654 (2000). The court concluded that because the ordinary trust at issue had "objective indicia of a business organization," it was "not to be regarded as a trust under Montana law." *Id.* at 302.[2] Here, the Trust (which Defendants claim is an ordinary trust) has the same objective indicia of business organizations, including certificates to be issued to beneficiaries.

Defendants do not contest the similarity of the Trust to the disputed trust in *Ruby Mountain*. Rather, Defendants challenge the application of *Ruby Mountain*

2. The court in *Ruby Mountain* conducted its analysis pursuant to MCA § 72-33-108(4), which excludes from its definition of a legitimate trust "business trusts providing for certificates to be issued to beneficiaries." 300 Mont. at 302. Although MCA § 72-33-108(4) has since been amended, it was the governing law at the time of the creation of the E-3 Trust. Courts apply the law that was in effect at the time of the creation of a trust to determine a trust's validity. *See New Hope Lutheran Ministry v. Faith Lutheran Church of Great Falls*, 2014 MT 69, 374 Mont. 229, 248, 328 P.3d 586 (2014); *Gibbs v. Altenhofen*, 2014 MT 200, 376 Mont. 61, 68 n.3, 330 P.3d 458 (2014).

to their case, arguing that *Ruby Mountain* is limited to assessing the validity of trusts "for tax purposes" and cannot be relied upon to assess ownership of real property. The district court did not err in rejecting this argument. While it is true that *Ruby Mountain* arose in the context of a tax case, the court in *Ruby Mountain* characterized "the only disagreement between the parties" as "the legal question of the validity of the Trust." 300 Mont. at 301. Although the court in *Ruby Mountain* does use the term "for tax purposes" throughout the opinion, it never limited its analysis of the validity of a trust under Montana law to the tax context. The district court is correct that "[t]here is no indication that the *Ruby Mountain* Court would have found the trust valid for any other purpose." Because the Trust here has the same objective indicia of business organizations discussed in *Ruby Mountain*, the district court did not err in determining that the Trust is invalid as an ordinary trust under Montana law.

The district court also did not err in refusing to find the E-3 Ranch Trust valid as a business trust. Montana Code Annotated § 35-5-201 requires business trusts seeking to transact business in the state of Montana to make certain filings with the Montana secretary of state. Business trusts that conduct business without making these filings are invalid under Montana law. *See Johnston v. Palmer*, 2007 MT 99, 337 Mont. 101, 112, 158 P.3d 998 (Mont. 2007); *see also Estate of Reeder v. Olsen*, No. DA 10-0303, 2011 MT 70N, 361 Mont. 534 at *2, 264 P.3d 516 (Mont. 2011) (unpublished). It is undisputed that the Trust failed to file this paperwork, which renders the Trust invalid as a business trust.

Defendants argue that the Trust is exempt from MCA § 35-5-201's filing requirement because it conducted no business. Defendants do not provide any legal support for the position that a trust that fails to meet MCA § 35-5-201's filing requirement may still be a valid business trust if it does not actually conduct business. Additionally, Defendants' only evidence that the Trust conducted no business is a conclusory statement in Frank's affidavit to this effect. The district court, after "[h]aving considered the entire record," found that Defendants' bare assertion that the Trust did not conduct business was insufficient to create a genuine issue of material fact on that question. By contrast, evidence of business activity by the Trust in the record includes the Trust's transfer of 20 acres to Brad Hall in 2003 and the Trust's sale of property to Daryl Williams in 2004. "A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact." *See F.T.C. v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997). The district court did not err in determining that the Trust is invalid as a business trust.

2. *Reformation of the Trust.* In its findings of fact and conclusion of law issued after the bench trial, the district court declined to reform the E-3 Ranch Trust. The district court did not err in so doing.

Montana law permits courts to reform trusts "to correct mistakes" "to conform the terms to the settlor's intention if it is proved by clear and convincing evidence

what the settlor's intention was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement." MCA § 72-38-415.

Defendants argued that the "mistakes" in the terms of the Trust were "those attributes listed by the District Court that prompted the Court to deem the Trust invalid." But the attributes of the structure of the Trust that led to its invalidation (e.g., the Trust's issuance of shares, the appointment of a trustee and managing director, the Trust's limited liability) are not mistakes of fact or law. Nor do Defendants argue that the Trust's failure to file paperwork pursuant to MCA § 35-5-201 constitutes a mistake. The structure of the Trust here does not warrant reformation due to a mistake of fact or law, and the district court did not err in declining to reform the Trust.

3. *Imposition of a Constructive Trust.* In its findings of fact and conclusions of law issued after the bench trial, the district court declined to impose a constructive trust. The district court found that while it would be inequitable for the estate of Bernard McLain to retain title to the Ranch, a construction trust vested in the Trust was "inappropriate because the Trust is not the victim of any unjust enrichment." The district court did not err in declining to impose a constructive trust.

"A constructive trust arises when a person holding title to property is subject to an equitable duty to convey it to another on the ground that the person holding title

would be unjustly enriched if the holder were permitted to retain it." MCA § 72-38-123. "A person seeking to impose a constructive trust" must "prove that the title holder would be unjustly enriched if they were permitted to retain title." *In re Marriage of Moss*, 1999 MT 62, 293 Mont. 500, 507, 977 P.2d 322 (1999).

As the district court noted, Defendants failed to identify at trial in whom the constructive trust should vest. A constructive trust arises when a person holding title to property is subject to an equitable duty to convey it *to another*. MCA § 72-38-123. It is this "another" that Defendants failed to identify. In the absence of this identification, the district court is correct that the E-3 Ranch Trust is the most sensical party in whom the constructive trust would vest. The district court is also correct that the Trust is not the victim of unjust enrichment, a necessary requirement for the imposition of a constructive trust, as the Trust was merely a passive recipient of the land and did not make any improvements that would have unjustly enriched Bernard's estate. The district court therefore did not err in declining to impose a constructive trust.

4. *Validation of the Trust Conveyances.* In its findings of fact and conclusions of law issued after the bench trial, the district court declined to ratify the conveyances of the voided Trust. This decision was not error.

Where a trust "is void under Montana law, any transfer of property to the [trust] is likewise void." *Ruby*

Mountain, 300 Mont. at 306. "Ratification exists upon the concurrence of three elements: (1) acceptance by the principal of the benefits of the agent's act, (2) with full knowledge of the facts and (3) circumstances or an affirmative election indicating an intention to adopt the unauthorized arrangement." *Scott D. Erler, D.D.S. Profit Sharing Plan v. Creative Fin. & Invs., L.L.C.*, 2009 MT 36, 349 Mont. 207, 217, 203 P.3d 744 (2009) (alteration adopted).

The district court did not err in declining to validate the conveyances. As the Trust is void, so are the transfers of property made by the Trust. *Ruby Mountain*, 300 Mont. at 306.

Defendants argue that the transfer from Bernard's estate to the Trust was valid because Mary McLain, Trustee of the E-3 Ranch Trust and former Plaintiff, ratified the Trust through "many actions." Defendants, however, fail to describe the actions taken by Mary or explain why those actions constitute ratification. Additionally, that a parcel of the Ranch was vested by a quiet title action in Daryl Williams in 2018 by Montana state court does not require a finding that the district court erred in declining to validate the Trust conveyances here. Defendants therefore fail to prove that the district court erred.

5. *Adverse Possession*. In its findings of fact and conclusions of law issued after the bench trial, the district

court found that Caroline did not adversely possess the Ranch. The district court did not err in this conclusion.

To gain title to land by adverse possession, the claimant's possession of the land must be "open, notorious, exclusive, adverse, continuous, and uninterrupted for the full statutory period." *Burlingame v. Marjerrison*, 204 Mont. 464, 470-71, 665 P.2d 1136 (1983). Montana's statutory period for adverse possession is five years. MCA § 70-19-402. The claimant must also have paid the property taxes throughout the relevant statutory period. *Burlingame*, 204 Mont. at 470. When a titleholder dies, a person claiming adverse possession must adversely possess the land as to the titleholder's devisees. *Commercial Bank & Trust Co. v. Jordan*, 85 Mont. 375, 278 P. 832, 835 (Mont. 1929).

Because the Trust and its conveyances are void, the district court is correct that the titleholders of the Ranch are Caroline (1/4 interest), Frank (1/4 interest), and Bernard's estate (1/2 interest). Caroline did not adversely possess the Ranch as to the other titleholders of the land, Frank (Caroline's husband) or Bernard (Caroline's father-in-law). Caroline lived on the Ranch without Frank only for four years and ten months, which is less than the five-year statutory period required to gain title through adverse possession. The district court also found that Caroline had not adversely possessed the land as to Bernard's estate because Caroline's possession of the Ranch was neither exclusive nor hostile as to Bernard (Caroline's

father-in-law), who lived on the Ranch from before the start of the adverse possession period until January 3, 2009. After Bernard's death, there was also no evidence that Caroline's possession was hostile or exclusive as to Bernard's devisees, which included Frank, and their children Alakhi, Dane, and Sohnja.

Defendants do not argue that the district court erred in its conclusion that Caroline failed to adversely possess the Ranch as to Frank and Bernard's estate. Rather, Defendants argue that Caroline should be required only to prove the elements of adverse possession as to the E-3 Ranch Trust. But Caroline cannot adversely possess land through possession that is adverse to an entity *other than* the titleholder. The district court did not err in determining that Caroline did not adversely possess the Ranch.

6. *Frank's Collateral Attacks.* In separate briefing, Frank challenges the validity of the United States' liens against him and the underlying criminal conviction that gave rise to them. A taxpayer, however, "may not use a section 2410 action to collaterally attack the merits of an assessment." *Elias v. Connett*, 908 F.2d 521, 527 (9th Cir. 1990). "Rather, the taxpayer may only contest the procedural validity of a tax lien." *Id.* Therefore, even were Frank's challenges to the merits of the tax assessments meritorious, this Court could not hear those claims.

Frank disputes the procedural validity of the tax liens by asserting that the Certificates of Assessments

provided by the Government are merely "papers bearing various typings." The district court did not err in finding that the United States had valid tax liens pursuant to the tax assessments. The Government provided the Certificates of Official Record for Forms 4340, "Certificate of Assessments, Payments, and Other Specified Matters." This Court has already determined that Forms 4340 "are admissible evidence that valid assessments have been made." *Hughes v. United States*, 953 F.2d 531, 540 (9th Cir. 1992). These Forms, which were certified under seal, are "admissible as self-authenticating domestic public documents under Fed. R. Evid. 902(1)." *Id.* Frank's challenge to the procedural validity of the tax liens therefore fails.

Frank also argues that the United States' action is barred by the statute of limitations pursuant to 28 U.S.C. § 2642's five-year limit on "the enforcement of any civil fine, penalty, or forfeiture." The correct statute, however, is 26 U.S.C. § 6502, which governs tax "collection after assessment" and provides a ten-year statute of limitations. 26 U.S.C. § 6502; *see also United States v. Bacon*, 82 F.3d 822, 825 (9th Cir. 1996).

Frank filed a countersuit seeking a refund of the civil penalty imposed under 26 U.S.C. § 6672. An individual seeking a refund of a penalty levied pursuant to 26 U.S.C. § 6672 must show that he was either not a "responsible person" under the statute, or that his conduct was not "willful." *See United States v. Jones*, 33 F.3d 1137, 1139

(9th Cir. 1993). Here, a jury convicted Frank for nine counts of violating 26 U.S.C. § 7202 "willfully." This conviction serves as collateral estoppel of the claim that Frank was not a responsible person who acted willfully. The district court did not err in dismissing Frank's counterclaim.

Frank asserts that this Court lacks jurisdiction in this case, arguing that "[a] court outside the jurisdiction of a sentencing court has no authority to resentence a criminal defendant." Here, however, the district court was not "resentencing" Frank; it correctly permitted the United States to intervene in the quiet title action to foreclose on its outstanding civil liens. Frank's collateral attacks therefore fail.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION, FILED SEPTEMBER 29, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CV 16-36-BLG-SPW

THE UNITED STATES OF AMERICA,

Intervenor Defendant,

vs.

FRANCIS MCLAIN, INDIVIDUALLY, AND AS CO-MANAGER OF TERA BANI RETREAT MINISTRIES; CAROLINE MCLAIN, INDIVIDUALLY, AND AS MANAGING DIRECTOR OF TERA BANI RETREAT MINISTRIES; AND ALAKHI JOY MCLAIN, SOHNJA MAY MCLAIN, AND DANE SEHAJ MCLAIN, AS BENEFICIARIES OF THE E-3 RANCH TRUST,

Defendants.

Filed September 29, 2023

Before the Court is Defendants Francis McLain, *et al.*'s Motion to Alter Judgment pursuant to Federal Rule of Civil Procedure 59(e). (Doc. 338). Defendants argue that the Court made a variety of errors in its Findings

of Fact, Conclusions of Law, and Judgment (Doc. 336) and asks the Court to alter its judgment to remedy the allege errors. Intervenor-Defendant The United States of America maintains that the Court's conclusions were correct. (Doc. 339).

For the following reasons, the Court denies Defendants' motion.

I. Background

The facts of this case are extensively laid out in the Court's Findings of Fact. (Doc. 336 at 2-11). As such, it will only briefly summarize those facts pertinent to the motion.

This case began as a property ownership dispute between family members and has since evolved into the United States seeking to foreclose on that property—the E-3 Ranch ("the Ranch")—in pursuit of its validly-held tax liens against Defendant Francis McLain ("Frank"). After the resolution of a variety of motions and the stipulated dismissal of the McLain Plaintiffs, the case proceeded to a bench trial on November 14, 2022.

By trial, the title holders of record of the Ranch were Frank (1/4 interest), Caroline (1/4 interest), and the Estate of Bernard McLain ("Bernard's estate") (1/2 interest). Both parties sought to upset title. The United States asserted that Frank actually owned a 3/4 interest in the Ranch based on its theories of nominee and fraudulent transfer. (Doc. 317). Defendants argued the United States could not prove the elements of those theories, and that

Caroline held title to the Ranch via adverse possession. (*Id.* at 3). Defendants alternatively argued that the Court should reform the E-3 Ranch Trust ("the Trust"), which the Court invalidated on summary judgment, or declare a constructive trust to effectuate the intentions of the Trust with respect to the Ranch. (*Id.*).

On March 1, 2023, the Court issued its Findings of Fact, Conclusions of Law, and Judgment. (Doc. 336). The Court rejected Defendants' adverse possession argument, as well as the United States' fraudulent conveyance and nominee theories. It also declined to reform the Trust or create a constructive trust. As a result, it held that Frank held 1/4 interest in the Ranch, Caroline held a 1/4 interest, and Bernard's estate held a 1/2 interest.

On March 29, 2023, Defendants moved to alter the Court's judgment. (Doc. 338). Frank also filed a notice of appeal on April 27, 2023 (Doc. 341), which the Ninth Circuit is holding in abeyance pending the resolution of the instant motion. Clerk Order, Faith McLain v. Francis McLain, No. 23-35304 (9th Cir. June 12, 2023), ECF No. 4.

II. Legal Standard

Rule 59(e) allows a party to move to alter or amend a judgment within 28 days after the entry of the judgment. Fed. R. Civ. P. 59(e). "[A] Rule 59(e) motion is an 'extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.'" *Wood v. Ryan,* 759 F.3d 1117, 1121 (9th Cir. 2014) (per curiam) (quoting *Kona Enters., Inc. v. Est. of Bishop,* 229 F.3d 877, 890 (9th Cir. 2000)). "A district court

may grant a Rule 59(e) motion if it 'is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law.'" *Id.* (quoting *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (en banc)) (emphasis omitted). "'The Rule 59(e) motion may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.'" *U.S. Fidelity & Guar. Co. v. Lee Invs. LLC*, 551 F. Supp. 2d 1069, 1073 (E.D. Cal. 2008) (quoting Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2810.1).[1] District courts have "considerable discretion" in deciding Rule 59(e) motions. *Turner v. Burlington N. Santa Fe R.R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003).

III. Analysis

Defendants urge the Court to amend three parts of its judgment. Though they do not expressly state the basis for requesting the amendments, the Court reads their motion as asserting that the Court's conclusions were clear error and must be overturned. The Court will address each alleged error in tum.

A. Constructive Trust

Defendants first assert that the Court erred in refusing to create a constructive trust even though the

1. The case does not specify what edition and year of *Federal Practice and Procedure* it is citing to. However, the current edition contains the same language. Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2801.1 (3 ed. 2023).

Court found a constructive trust was appropriate. (Doc. 338 at 4). "A constructive trust arises when a person holding title to property is subject to an equitable duty to convey it to another on the ground that the person holding title would be unjustly enriched if the holder were permitted to retain it." Mont. Code Ann. § 72-38-123. To prove unjust enrichment in the context of a constructive trust, a party must show (1) a benefit conferred upon the title holder of the property; (2) an appreciation or knowledge of the benefit by the title holder of the property; and (3) the acceptance or retention of the benefit by the recipient under such circumstances that would make it inequitable for the recipient to retain the benefit without payment of its value. *N. Cheyenne Tribe v. Roman Catholic Church,* 296 P.3d 450, 457 (Mont. 2013).

Defendants argued at trial that the Court should create a constructive trust to effectuate the purposes of the voided Trust. The Court refused to create a constructive trust because, although Defendants satisfied the requisite elements, Defendants "did not expressly state at trial or in its proposed findings of fact and conclusions of law *who* should hold the constructive trust." (Doc. 336 at 22-23). Since Defendants did not identify the trust holder but generally argued that the Trust is the proper owner of the Ranch, the Court assumed Defendants intended to argue the constructive trust should vest in the Trust. (*Id.* at 23). The Court found a constructive trust in the Trust was inappropriate because the Trust did not financially contribute to the Ranch and thus was not the victim of any unjust enrichment. (*Id.*). Because the Court determined it could not create a constructive trust, the result was

that Bernard's estate held a 1/2 interest, Frank held a 1/4 interest, and Caroline held a 1/4 interest in the Ranch. (*Id.*).

Defendants now argue the Court erred in refusing to create a constructive trust since the Court found a constructive trust was appropriate. (Doc. 338 at 4). Defendants primarily assert that the Court erroneously faulted Defendants for not identifying in whom the trust should vest. (*Id.* at 5-6). Defendants maintain that "the party in whom a constructive trust should vest is identified right in" Montana Code Annotated § 72-38-123, namely the "person holding title to the property." (*Id.* at 6). The persons holding title to the Ranch were Frank and Bernard's estate, so they "would be the persons upon whom constructive trust would be imposed, and they [would be] obligated to convey the property according to the intentions of the voided Trust." (*Id.*).

Defendants misconstrue what the Court found as the fatal flaw in their constructive trust argument. The Court understands that Frank and Bernard's estate were the title hold the "persons holding title" to the Ranch. What it was seeking from Defendants was the "another" mentioned in the statute, or who the person or entity to whom Frank and Bernard's estate must convey the Ranch. Defendants repeatedly state that Frank and Bernard's estate must convey the Ranch according to the intentions of the Trust. But, as the Court found based on Frank and Caroline's testimony, the intention of the Trust—to avoid estate taxes—was mooted when the estate tax limit was raised above the value of the Ranch.

So, the Court is left with the same question it asked at trial and in its Findings of Pact and Conclusions of Law: If the purpose of the Trust is moot, then who would receive the property pursuant to a constructive trust? The only answer Defendants give in briefing in this motion is Caroline because the Trust at one point conveyed the property to her. However, Defendants never argued, nor did the testimony reveal, that conveyance to Caroline was ever a purpose of the Trust.[2] Deciding it to be now would be not only a misapplication of the facts to law but also improper under Rule 59(e).

Defendants additionally assert that the Court cannot simultaneously find that it would be inequitable for Bernard's estate to retain the property but then ultimately give Bernard's estate an interest. (Doc. 338 at 5). The Court disagrees. Defendants had the burden to not only prove that a constructive trust was appropriate but also provide to the Court the means by which it could redress the wrong created by the lack of a constructive trust. Though Defendants succeeded at the former, it absolved itself of the duty to do the latter. Without such direction, the Court cannot just pick at random to whom the property will be transferred pursuant to the constructive trust. As such, the Court settled on the most logical option based on Frank and Caroline's testimony-the Trust-applied the law, and concluded that vesting the constructive trust in the Trust would be erroneous. Because a constructive trust

2. In fact, in the Final Pretrial Order, Defendants write that the Trust was an estate planning device to lawfully avoid taxes and ensure Frank's *children* and the spiritual retreat owned the property. (Doc. 317 at 17).

was improper, the status quo based on the Court's other rulings remained and kept title in, in part, Bernard's estate.

Defendants' other objections to the Court's conclusion concerning the constructive trust are immaterial given the unreconciled issue of the "another" who would receive the Ranch pursuant to the constructive trust. Thus, the Court finds it did not commit clear error with respect to the constructive trust.

B. Additional Judicial Action

Defendants next argue that the Court's decision to vest ownership of the Ranch, in part, in Bernard's estate would not render complete justice because it would lead to the re-opening of Bernard's probate proceedings. (Doc. 338 at 7-8). As Defendants write, "[t]he entire purpose of this litigation was to sort out the ownership of the E-3 Ranch property, but the Court's judgment punts the final resolution of this issue to the state probate court[.]" (Doc. 340 at 9). Defendants generally contend that further probate proceedings would cause them hardship and provide the former plaintiffs in this action another opportunity to challenge the ownership of the Ranch. (Doc. 338 at 8-11).

The potential for further judicial proceedings is not a reason for the Court to amend its judgment under Rule 59(e). Further, the Court did not "punt" on the ultimate question presented in this case. The Court conclusively decided property ownership: Bernard's estate holds a 1/2

interest, Frank holds a 1/4 interest, and Caroline holds a 1/4 interest. Since the Court cannot decide probate matters given the limits on its jurisdiction, that is the extent of its decision-making powers. Thus, the Court did not commit clear error.

C. Adverse Possession

Defendants last contend that the Court erroneously concluded that Caroline did not adversely possess the Ranch because she did not possess the property adversely to Frank, Bernard, and/or Frank and Caroline's children. (Doc. 338 at 11). Defendants specifically argue that the Court erred in requiring Defendants to identify the person/entity against whom Caroline adversely possessed, and that the Court erroneously based its assessment of the title holder on the retroactive voiding of the Trust. (*Id.* at 11-14).

The Court did not raise the issue of the identification of the person/entity against whom Caroline was adversely possessing the Ranch for the first time in its Findings of Fact and Conclusions of Law. Rather, the Court told Defendants they needed to identify such a person/entity at the Final Pretrial Conference and at trial. By raising the issue yet again on a Rule 59(e) motion, Defendants are merely trying to relitigate issues on which they lost without new argument or caselaw.

Defendants also do not provide any legal support for its contention that the Court's retroactive voiding of the transfers was erroneous. Without legal citation to

demonstrate the Court's error, the Court cannot amend its judgment under Rule 59(e).

As such, the Court finds it did not commit clear enor and sustains its conclusion on the adverse possession issue.

IV. Conclusion

IT IS ORDERED that Defendants Frank McLain, *et al.*'s Motion to Alter Judgment (Doc. 338) is DENIED.

DATED this 29th day of September, 2023.

/s/ Susan P. Watters
SUSAN P. WATTERS
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION, FILED MARCH 1, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CV 16-36-BLG-SPW

THE UNITED STATES OF AMERICA,

Intervenor Defendant,

vs.

FRANCIS MCLAIN, INDIVIDUALLY, AND AS CO-MANAGER OF TERA BANI RETREAT MINISTRIES; CAROLINE MCLAIN, INDIVIDUALLY, AND AS MANAGING DIRECTOR OF TERA BANI RETREAT MINISTRIES; AND ALAKHI JOY MCLAIN, SOHNJA MAY MCLAIN, AND DANE SEHAJ MCLAIN, AS BENEFICIARIES OF THE E-3 RANCH TRUST,

Defendants.

Filed March 1, 2023

INTRODUCTION

This civil action was originally brought in 2014 by now-dismissed plaintiffs in Montana state court to resolve

a probate dispute among members of the McLain family. Intervenor Defendant The United States of America removed the case to this Court in 2016 to foreclose on the property at issue in the probate dispute pursuant to certain federal tax liens.

The Court held a bench trial on November 14, 2022. Ryan Watson and Chelsea Bissell argued for the United States, and Alexander Roots argued for Defendants Francis ("Frank") McLain, *et al.* ("Defendants"). Following the trial, the parties filed proposed findings of fact and conclusions of law for the Court's consideration. (Doc. 328, 329).

Having heard the arguments and reviewed the evidence and proposed findings of fact and conclusions of law, the Court now makes the following findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52.

FINDINGS OF FACT

Background

E-3 Ranch

1. On June 21, 1996, Frank McLain and Brad Hall purchased the E-3 Ranch ("Ranch") in Park County, Montana. Frank received a 1/2 interest, and Hall received a 1/2 interest.

2. At the time of this purchase, the Ranch was a 329-acre property.

3. To purchase the Ranch, Frank and Hall co-signed on a $1 million loan from American Bank of Montana, secured by a mortgage on the Ranch.

4. On June 18, 2003, 20 acres of the Ranch were quitclaimed to Hall as repayment for co-signing on the mortgage.

5. On August 31, 2004, 34 acres of the Ranch were quitclaimed to Daryl Williams. The Montana Sixth Judicial District Court in Park County quiet titled this parcel in Williams on October 2, 2018.

6. As a result of these transfers, the Ranch is presently 275 acres.

Creation of the E-3 Ranch Trust

7. On February 16, 1998, Frank created an irrevocable living trust, called the E-3 Ranch Trust ("Trust"), as an estate planning device. Specifically, Frank wanted to protect the Ranch—which was valued at about $2 million—from federal estate taxes. At the time, the federal estate tax exemption was $600,000. By 2013, the estate tax exemption had risen to $5.25 million.

8. Richard Humpal, who Frank met at a financial planning conference in the Paradise Valley, was the original trustee. The beneficiaries were Frank's children—Alakhi J. McLain, Dane S. McLain, and Sohnja M. McLain—and his spiritual retreat, Tera Bani Retreat Ministries. Each beneficiary received 25 units of beneficial interest in the Trust.

Appendix C

Frank's Businesses

9. Frank has worked in nursing care and operated nursing staffing agencies for more than three decades.

10. During most of the 1980s and 1990s, Frank operated Lifelines Cooperative Care, which became Lifelines Care, Inc. ("Lifelines") in 1988.

11. Starting in the mid-1980s, Frank's parents—Bernard and Kathryn McLain—began loaning money to Lifelines. Frank and Caroline McLain, Frank's wife, fell behind on payments for this loan. On November 30, 1996, Frank and Caroline mortgaged the Ranch to Bernard and Kathryn to secure the loan. Frank and Caroline also personally guaranteed the loan.

12. In May 1990, an IRS agent began auditing Lifelines and found that Lifelines had impermissibly classified employees as independent contractors on tax forms. In August 1998, Lifelines settled with the IRS for $500,000.

13. Lifelines fell behind on payments to the IRS and was advised by an IRS agent to file for bankruptcy. Lifelines filed for Chapter 11 bankruptcy in January 1999 and Chapter 7 bankruptcy in March 1999.

14. The bankruptcy discharged Lifeline's debt from the IRS settlement and the loan from Bernard and Kathryn. Bernard and Kathryn took a $150,000 bad debt deduction on their federal income taxes to

account for the discharged debt. However, because Frank and Caroline personally guaranteed the loan from Bernard and Kathryn, their liability was not discharged.

15. Following Lifeline's bankruptcy and closure of Lifelines, Frank operated Kind Hearts, Kirpal Nurses, and All Heart Service.

16. In January 2008, Frank was indicted for tax evasion for failing to pay employment taxes while operating Kirpal Nurses for tax years 2002, 2003, and 2004. In April 2009, he was convicted and sentenced to prison. He was released from prison in November 2012.

Conveyances of the Ranch

17. Lifelines' bankruptcy divested Frank and Caroline of their primary source of income, so they were unable to continue paying off Lifeline's loan to Bernard and Kathryn. Frank and Caroline quitclaimed Frank's 1/2 interest in the Ranch to Bernard and Kathryn on December 15, 1999, in exchange for $1, prohibiting foreclosure on the Ranch, and excusing Frank and Caroline from the payment schedule on the loan.

18. Though the record does not contain the loan balance when Frank and Caroline transferred their interest in the Ranch to Bernard and Kathryn, the balance was $200,111.66 a year earlier at the end of December 1998.

19. Other than Bernard and Kathryn, Frank's only other creditors when he transferred the Ranch to his parents were the banks holding the mortgages on the Ranch and a home he owned in Minneapolis, Minnesota, as well as debts on some credit cards.

20. The record does not provide Frank's total assets at the time of the transfer. Since his business and primary source of income had gone bankrupt less than a year prior, his financial assets were presumably low. Frank also owned the home in Minneapolis and a property in La Plata County, Colorado, though the record does not contain the value of either of these properties.

21. Between 1999 and 2002, Frank and Caroline continued to live fulltime on the Ranch after quitclaiming their interest to Bernard and Kathryn. Frank paid for the property taxes in 2000, property insurance, and tens of thousands of dollars in improvements.

22. Between 1999 and 2002, Defendants also paid Bernard $186,205 for the Ranch.

23. In February 2002, Kathryn died. Pursuant to Kathryn's will, which she amended in 2000, Bernard received her interest in the Ranch from her estate in July 2002.

24. Bernard also amended his will in 2000, directing his interest in the Ranch to be devised in the following manner: If Kathryn preceded him in death, 1/4 to be divided equally among his six children, Frank,

Christeen A. McLain, Harley J. McLain, Faith McLain Kirchdofer, Mary McLain Bram, and John Bernard McLain; 1/4 to Alakhi; 1/4 to Dane; and 1/4 to Sohnja.

25. On July 22, 2002, Bernard transferred his interest in the Ranch to the Trust. By that time, Frank had repaid the loan from Bernard and Kathryn to Lifelines that Frank personally guaranteed, so Bernard's return of the Ranch to the Trust was a standard return of the collateral that secured the Lifeline's loan.

26. By returning the Ranch to the Trust, Bernard implicitly understood that the Ranch would now be subject to the terms of the Trust.

27. On May 5, 2008, Hall quitclaimed his 1/2 interest in the Ranch to Frank and Caroline. Each received a 1/4 interest. The deed was recorded on April 23, 2010.

28. Frank and Caroline were not immediately aware of this conveyance. While in prison, Frank backdated a deed conveying his 1/4 interest to the Trust "as of the 5th day of May, 2008." Ex. 19.

29. On February 27, 2013, the Trust conveyed its 3/4 interest in the Ranch to Caroline because the estate tax exemption was raised to $5.25 million. Frank and Caroline sought to refinance the loan on the Ranch, which Caroline was best suited to do because of her strong credit. They were nevertheless unable to obtain refinancing.

Appendix C

Occupation and Maintenance of the Ranch

30. Beginning as late as 1999, Frank and Caroline lived on the Ranch fulltime. Except for the time between September 2004 and May 2005, when Frank, Caroline, and their children lived at their house in Minneapolis, they both lived on the Ranch continuously until Frank's indictment in January 2008.

31. From the time Frank purchased the Ranch through 2008, Frank put 880 hours or more in labor toward the Ranch each year. Upon returning to the Ranch from prison in November 2012, Frank provided 100 hours of labor in 2012, and 1,000 hours in both 2013 and 2014.

32. For each year until 2010, Caroline dedicated 720 hours of labor to the Ranch. From 2010 to 2014, Caroline logged 400, 400, 600, 720, and 720 hours of labor.

33. Among the physical maintenance and improvements done by Frank and Caroline at the Ranch were extensive renovations of existing buildings, clearing meadows, fixing fences, constructing roads and bridges, and managing noxious weeds. From 1996 through 2014, the estimated cost of a partial list of improvements was nearly $300,000.

34. Frank paid the full mortgage on the Ranch until at least early 2008, possibly until April 2009, part of the mortgage from 2012 until 2018, and then the full mortgage again starting in 2018. When Frank could

not pay the mortgage in full, Caroline fully or partially satisfied the mortgage.

35. Frank also paid the utilities from the time he purchased the Ranch until he went to prison. Though it is not clear when he resumed paying for utilities, he was paying for at least some of the utilities at the time of the trial in this case.

36. Frank paid most of the property taxes on the Ranch until 2006. Caroline paid the property taxes on the Ranch for the tax assessments due in 2006 through 2022, except for one payment made by her son, Dane, for the first half of 2012. Dane paid the taxes in exchange for Caroline working for his company, Soul Care, LLC.

37. Dane and his sister, Alakhi also worked on the Ranch as adults while Frank was imprisoned. Alakhi and Dane spent eight months laboring on the Ranch each in 2009 and 12 months each in 2010, 2011, and 2012.

38. Bernard began living on the Ranch with Frank and Caroline after being removed from a nursing home in June 2006. He lived there until his death on January 3, 2009.

39. Bernard did not pay any property taxes on, mortgage payments for, or other costs associated with the Ranch.

40. The Trust did not pay for any portion of the Ranch, its upkeep, or other expenses.

Appendix C

Franks Criminal Conviction and Liabilities

41. Frank was imprisoned for employment tax evasion in April 2009. Like in the 1990s with Lifelines, Frank wrongfully classified employees as independent contractors. Pursuant to the judgment in the case, Frank owed $75,900 in restitution. A restitution lien was filed on the Ranch and Frank's property in Minnesota on October 5, 2009. The lien was discharged on February 8, 2022.

42. Frank also was convicted of damage to government property in the District of Montana in 2010. Pursuant to the judgment in the case, Frank owed $25,025 in restitution. A restitution lien was filed on the Ranch on January 25, 2010.

43. On September 2, 2014, the IRS filed a civil Trust Fund Recovery Penalty assessment against Frank based on his criminal tax evasion conviction and unpaid employment taxes. The assessment balance was $469,156.24. Pursuant to the assessment, a federal tax lien was placed on the Ranch. The United States intervened in this litigation and removed it to federal court in order to foreclose on this lien.

Procedural History

44. On September 19, 2013, formal probate of Bernard's estate commenced in the Montana Sixth Judicial District Court, Park County. On June 11, 2014, the state court stayed formal probate pending determination of the title to the Ranch.

45. In August 14, 2014, Faith, Christeen, John, Mary, Harley's daughters Molly McLain and Mira McLain, and Harley's son Matthew ("Plaintiffs"), as beneficiaries for Bernard's estate, filed the complaint in this case against Frank, Caroline, Alakhi, Dane, and Sohnja in the Montana Sixth Judicial District Court, Park County. They sought a declaration that the Trust and its transfers are void, and so the Ranch is an asset of Bernard's estate.

46. In April 2016, the United States intervened and removed the case to this Court to foreclose on its outstanding tax liens against Frank that were attached to the Ranch, among the other properties and property rights held by Frank. The United States named Plaintiffs, Hall, and American Bank of Montana as counterdefendants because of the potential interest each held in the Ranch.

47. On November 23, 2016, the Court dismissed Hall from the case after he verified that he had no interest in the Ranch.

48. On May 8, 2018, the Court excused American Bank of Montana from participation in the case after it stipulated with the United States to the priority of the liens on the Ranch.

49. On September 13, 2021, the Court granted a stipulated dismissal of all Plaintiffs' claims. On September 22, 2021, the Court granted a stipulated dismissal of Plaintiffs.

50. From 2016 until the trial, the parties also filed a variety of summary judgment motions. In resolving those motions, the Court decided that the Trust was void, and any transfers of the Ranch made by the Trust were void.

51. Defendants subsequently requested the Court reconsider its determination that the Trust and transfers were void, rather than voidable, because declaring it void would be inconsistent with the state court's validation of the Trust's transfer of 34 acres to Daryl Williams. The Court refused to entertain this argument, holding that the law of the case doctrine applied and Defendants had not proven that one of the exceptions to the doctrine applied.

52. The Court also held on summary judgment that disputed material facts existed as to whether Caroline adversely possessed the Ranch, and whether the Trust could be revived through a variety of equitable remedies.

CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction because the United States brought its complaint pursuant to 28 U.S.C. § 2410, which allows the United States to be a party in any civil action in any U.S. district court where the United States is seeking to foreclose on a lien on the subject property. The Court has personal jurisdiction and venue is proper because the Ranch—the subject of the litigation—is located in Park County, Montana.

2. At trial, the United States argued that Frank owns a 3/4 interest in the Ranch on which it can foreclose pursuant to its tax liens because (1) his conveyance of his 1/2 interest in the Ranch to his parents on December 15, 1999, was fraudulent, and (2) even if the conveyance was not fraudulent and Bernard's estate owns the 1/2 interest in the Ranch, Bernard's estate holds title to the Ranch as Frank's nominee.

3. Defendants disagree, arguing that the United States failed to produce sufficient evidence to prove either claim. Additionally, Defendants contend that Caroline adversely possessed the 1/2 interest in the Ranch from Bernard's estate. Further, Defendants request that the Court reform the invalidated Trust, or create a constructive trust, to effectuate the purposes of the Trust. Finally, Defendants argue that the Court should validate the conveyances of the Ranch by the Trust to be consistent with the state court's quiet title of the 34 acres of the Ranch in Williams.

Reformation of the Trust

4. The terms of a trust may be reformed if clear and convincing evidence demonstrates the trust does not align with the settler's intent due to a mistake of law or fact. Mont. Code Ann. § 72-38-415.

5. This Court already has determined that Bernard is the settlor with respect to his contribution of his 1/2 interest in the Ranch to the Trust. (Doc. 221 at 12).

6. Bernard's intent in transferring the Ranch to the Trust was to return the collateral that secured the loan from Bernard to Frank after Frank repaid the loan.

7. Once the Ranch was returned to the Trust, it was subject to the purpose and terms of the Trust.

8. Frank created the trust. His purpose in creating the Trust was to avoid estate taxes, since the estate tax exemption was $600,000.

9. Because the estate tax exemption is now $5.25 million, and thus more than the value of the Ranch, the purpose of the Trust no longer exists and reformation is not appropriate.

10. At this stage in the analysis, because reformation of the trust is not appropriate, Bernard's estate holds a 1/2 interest, Caroline holds a 1/4 interest, and Frank holds a 1/4 interest in the Ranch.

Fraudulent Conveyance

11. A transfer of property made by a debtor is fraudulent as to a creditor, regardless of whether the creditor's claim arose before or after the transfer was made, if the debtor made the transfer either: (1) with actual intent to hinder, delay, or defraud any creditor of the debtor, or (2) with constructive intent to hinder, delay, or defraud any creditor of the debtor. Mont. Code Ann. § 31-2-333(1)(a), (b).

Appendix C

Actual Intent

12. In determining whether the debtor had actual intent to defraud the creditor, the Court can consider the following non-exhaustive factors:

    (a) the transfer was to an insider;

    (b) the debtor retained possession or control of the property transferred after the transfer;

    (c) whether the transfer was disclosed or concealed;

    (d) before the transfer was made, the debtor had been sued or threatened with suit;

    (e) the transfer was of substantially all the debtor's assets;

    (f) the debtor absconded;

    (g) the debtor removed or concealed assets;

    (h) the value of the consideration received by the debtor for the property was reasonably equivalent to the value of the asset transferred;

    (i) the debtor was insolvent or became insolvent shortly after the transfer was made;

(j) the transfer occurred shortly before or shortly after a substantial debt was incurred; or

(k) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Id.

13. If the debtor is an individual, an insider includes a relative of the debtor. Mont. Code Ann. § 31-2-328(7)(a)(i).

14. These factors are known as "badges of fraud" that can "afford grounds of inference from which the court . . . [is] authorized to conclude that a transaction surrounded by them is fraudulent." *Humbird v. Arnet,* 44 P.2d 756, 761 (Mont. 1935). However, the existence of such badges does not per se constitute fraud or provide conclusive proof. *Id.* Instead, their weight depends on their "intrinsic character and the special circumstances attending the case." *Id.*

15. The United States fails to prove actual intent. Though Frank transferred the property to an insider, retained possession and control of the property, and was insolvent before the transfer of the Ranch, he was neither sued nor threatened with suit *before* the transfer, and Bernard provided consideration for the property in the form of security for the loan. Given the focus of the statute is the invalidation of a conveyance

made in order to avoid creditors, the Court gives great weight to these factors.

16. Further, it is not clear if the Ranch was substantially all of Frank's assets, because, though Frank had just declared bankruptcy for Lifelines—his main source of income—the record contains no evidence of the value of Frank's· properties in Colorado and in Minnesota. Since, at the time of transfer, Frank owned both properties, their value is necessary for the Court to determine Frank's total assets and the percentage that the Ranch represents in his asset portfolio.

17. Finally, Frank did not conceal his other assets—namely his house in Minnesota—from creditors.

18. The factors rebutting actual intent have greater weight than those that support actual intent given the facts of this case, and thus the United States fails to prove actual intent.

Constructive Intent

19. Constructive intent exists when the debtor, without receiving equivalent value in exchange for the transfer of property, either (1) was engaged or was about to engage in a business or transaction for which the debtor's remaining assets were unreasonably small in relation to the business or transaction, or (2) intended to incur, or reasonably should have believed that the debtor would incur debts beyond the debtor's ability to pay as they became due. *Id.* § 31-2-333(1)(b)(i)-(ii).

20. The United States has not met its burden of showing constructive intent. First, the United States failed to rebut Defendant's evidence that Bernard provided consideration for the transfer in the form of security for the loan.

21. Second, Frank's responsibility for the mortgage on the Ranch is not a relevant business or transaction in which Frank was engaged because Frank intended the Ranch to serve as collateral for the loan from Bernard and Kathryn. As such, the transfer of the Ranch was a means of dealing with another outstanding debt, not a discarding of assets in lieu of not paying the mortgage.

22. Third, the United States' argument that Frank must have reasonably believed that he would have oncoming tax debts at the time of transfer fails because Frank did not resume classifying employees as independent contractors until 2002—three years after the transfer of the Ranch. Though the Court is not convinced that Frank believed his conduct was legal, this temporal gap coupled with the consideration provided negates a finding of constructive intent.

23. As such, the United States cannot prove constructive intent.

24. Since the United States cannot prove actual or constructive intent, Frank's transfer of the Ranch to Bernard and Kathryn in December 1999 was not a fraudulent conveyance.

25. At this stage in the analysis, since the conveyance of the Ranch from Frank to his parents was not fraudulent, Bernard's estate holds a 1/2 interest, Caroline holds a 1/4 interest, and Frank holds a 1/4 interest in the Ranch.

Adverse Possession

26. "For a claim of adverse possession to succeed, the claimant must prove that the property was claimed under color of title or by actual, visible, exclusive, hostile and continuous possession for the full statutory period of five years." *Y A Bar Livestock Co. v. Harkness,* 887 P.2d 1211, 1213 (Mont. 1994).

27. The claimant also must have paid the taxes on the property throughout the entire statutory period. *Smithers v. Hagerman,* 797 P.2d 177, 182 (Mont. 1990).

28. Each element of adverse possession must be proven by clear and convincing evidence. *Meadow Lake Estates Homeowners Ass'n v. Shoemaker,* 178 P.3d 81, 88 (Mont. 2008).

29. Claims of adverse possession against a family member carry a presumption of permission that must be rebutted with evidence of hostility. 4 Tiffany Real Prop. § 1889 (3d ed. 2022).

Adverse Possession of Frank's 1/4 Interest

30. Defendants fail to demonstrate that Caroline's possession of the Ranch was hostile or exclusive for

the statutory period as to Frank. Even excluding the months Frank lived part-time on the Ranch and part-time in Minnesota after being indicted in January 2008, Caroline only lived on the Ranch without Frank from January 2008 to November 2012—four years and 10 months. This is less than the statutory period required for exclusivity.

31. Second, Defendants presented no evidence that Caroline's possession of the property was hostile to—or without the permission of—Frank. In fact, at trial, Defendants repeatedly characterized Caroline's and Frank's possessions as shared, since they are married, supporting the proposition that Caroline's presence on the Ranch was permissive.

32. Accordingly, Defendants fail to demonstrate that Caroline's possession of the Ranch was exclusive and hostile as to Frank. Thus, their adverse possession claim with respect to Frank's 1/4 interest fails.

Adverse Possession of Bernard/Bernard's Estate's 1/2 Interest

33. Defendants fail to demonstrate that Caroline's possession was hostile and exclusive against Bernard and his estate for the statutory period.

34. First, though Defendants aver that Caroline's adverse possession began on May 5, 2008, Bernard was still alive and living on the Ranch at that point. As such, Caroline's possession from May 5, 2008, until

Bernard's death on January 3, 2009, was not exclusive. Additionally, Defendants presented no evidence that Caroline was living on the property without Bernard's permission, so her possession from May 5, 2008, until Bernard's death on January 3, 2009, was not hostile.

35. When the owner of property dies, the claimant must adversely possess against their devisees. *Commercial Bank & Trust Co. v. Jordan,* 278 P. 832, 835 (Mont. 1929).

36. Defendants fail to show that Caroline adversely possessed against Bernard's devisees, namely Frank, Alakhi, Dane, and Sohnja. As described, Caroline's possession against Frank was neither exclusive for the statutory period nor hostile. Further, Alakhi and Dane lived on the Ranch for eight months of 2009, and all of 2010-2012, thus interrupting any period of adverse possession beginning on May 5, 2008. Defendants also presented no evidence that Caroline possessed the property without the permission of Alakhi or Dane.

37. Accordingly, Caroline did not adversely possess the Ranch against Bernard or his estate.

38. At this stage of the analysis, since Defendants cannot prove adverse possession by Caroline against Bernard/his estate and Frank, Bernard's estate holds a 1/2 interest, Frank holds a 1/4 interest, and Caroline holds a 1/4 interest in the Ranch.

Appendix C

Constructive Trust

39. "A constructive trust arises when a person holding title to property is subject to an equitable duty to convey it to another on the ground that the person holding title would be unjustly enriched if the holder were permitted to retain it." Mont. Code Ann. § 72-38-123.

40. A constructive trust claim should be limited to situations in which no other remedy exists. *Id.*

41. For the Court to find a constructive trust exists, the party must "prove that the title holder would be unjustly enriched if they were permitted to retain title." *In re Marriage of Moss,* 977 P.2d 332, 337 (Mont. 1999).

42. To prove unjust enrichment in the context of a constructive trust, a party must show (1) a benefit conferred upon the title holder of the property; (2) an appreciation or knowledge of the benefit by the title holder of the property; and (3) the acceptance or retention of the benefit by the recipient under such circumstances that would make it inequitable for the recipient to retain the benefit without payment of its value. *N. Cheyenne Tribe v. Roman Catholic Church,* 296 P.3d 450, 457 (Mont. 2013) (internal citation omitted).

43. A claim for a constructive trust must be established by clear and convincing evidence. *Johnson v. Kenneth D. Collins Agency, Inc.,* 865 P.2d 312, 313 (Mont. 1993).

44. The Court already has found that Defendants have satisfied the first two elements of a constructive trust. (Doc. 221).

45. As to the third element, Bernard held title to the Ranch as collateral for the loan to Lifelines, so the evidence that the loan was paid off demonstrates that Bernard's estate has not contributed financially to the Ranch. Retaining a property for which they did not pay is inequitable, so a constructive trust is appropriate.

46. Critically, though, Defendants did not expressly state at trial or in its proposed findings of fact and conclusions of law *who* should hold the constructive trust. The United States also has not provided any clarity on this issue. Since the Defendants generally assert that the Trust is the proper owner of the Ranch, the Court will assume Defendants intended to argue that the constructive trust should vest in the Trust.

47. A constructive trust in the Trust is inappropriate because the Trust is not the victim of any unjust enrichment. The Trust did not purchase or contribute funds to the property, nor participate in its maintenance and improvement. It was merely a passive recipient and owner of the Ranch, prior to its invalidation by the Court.

48. Accordingly, the Court declines to create a constructive trust for the Ranch in the Trust. The policy behind equitable remedies for trusts—to effectuate the

purposes of the trust unless illegal—is still satisfied since the non-entity beneficiaries of the Trust—Alakhi, Dane, and Sohnja—still receive interests in the Ranch pursuant to Bernard's will.

49. At this stage of the analysis, since Defendants fail to assert in whom the constructive trust should vest, Bernard's estate holds a 1/2 interest, Frank holds a 1/4 interest, and Caroline holds a 1/4 interest in the Ranch.

Validation of the Trust Conveyances

50. Without an applicable exception, a court cannot revisit a prior ruling without abusing its discretion. *United States v. Alexander,* 106 F.3d 874, 876 (9th Cir. 1997).

51. The exceptions are: (1) the first decision was clearly erroneous; (2) an intervening change in the law has occurred; (3) the evidence on remand is substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result.

52. The Court already has applied the law of the case doctrine to Defendants' reoccurring argument that the trust conveyances—specifically the conveyance to Caroline in 2013—should be validated so as to be consistent with the state court's quiet title of the 34 acres transferred by the Trust to Williams.

53. Defendants again fail to demonstrate, let alone argue, that any of the exceptions to the law of the case doctrine apply here.

54. Accordingly, the Court refuses to validate the voided conveyances of the Ranch by the Trust.

55. Without validating the voided conveyances, and given the Court's findings on the previous issues, the Court holds that Bernard's estate has a 1/2 interest, Frank has a 1/4 interest, and Caroline has a 1/4 interest in the Ranch.

Nominee

56. Federal tax liens attach to property held by a taxpayer in his own name and also to property held by the taxpayer's nominee. *Fourth Inv. LP v. United States,* 720 F.3d 1058, 1066-69 (9th Cir. 2013); *Towe Antique Ford Found. v. IRS,* 791 F. Supp. 1450, 1453 (D. Mont. 1992).

57. "A nominee is one who holds bare legal title to property for the benefit of another." *Fourth Inv. LP,* 720 F.3d at 1067 (quoting *Scoville v. United States,* 250 F.3d 1198, 1202 (8th Cir. 2001)).

58. In determining whether a person is the nominee of another individual, the Court considers the following factors:

    (a) No consideration or inadequate consideration paid by the nominee;

    (b) Property placed in the name of the nominee in anticipation of a suit or occurrence

of liabilities while the transferor continues to exercise control over the property;

(c) Close relationship between transferor and the nominee;

(d) Failure to record conveyance;

(e) Retention of possession by the transferor; and

(f) Continued enjoyment by the transferor of benefits of the transferred property.

Towe Antique Ford Found., 791 F. Supp. at 1454.

59. The United States has not met its burden of showing Bernard/Bernard's estate is Frank's nominee. Though the United States presented evidence that Bernard and Frank had a close relationship as father and son, and that Frank continued to possess and enjoy the benefits of the Ranch after the transfer, Defendants demonstrated that Bernard paid consideration for the property by accepting the Ranch as security for the loan he issued to Frank, and that Frank was not anticipating any suits or new liabilities when he transferred the Ranch.

60. The bad debt deduction alone does not outweigh the evidence showing that since Frank paid Bernard and Kathryn back for the Lifelines loan—which he had personally guaranteed, as his parents' son—the

same year that Bernard transferred the Ranch back to the Trust, Bernard provided consideration for the transfer of the Ranch.

61. Accordingly, Bernard/Bernard's estate is not Frank's nominee.

Conclusion

62. The Trust and the conveyances from the Trust are void.

63. The Trust cannot be revived by any equitable remedies.

64. Frank's conveyance of the Ranch to Bernard and Caroline on December 15, 1999, is not fraudulent.

65. Caroline did not adversely possess the Ranch from Frank or Bernard/Bernard's estate.

66. Thus, Bernard's estate holds a 1/2 interest, Frank holds a 1/4 interest, and Caroline holds a 1/4 interest in the Ranch.

67. No entity or individual serves as Frank's nominee. Thus, the United States can foreclose only on Frank's 1/4 interest in the Ranch pursuant to its tax liens.

ORDER

Accordingly, IT IS HEREBY ORDERED that the Clerk of Court shall enter judgment in favor of

Appendix C

Intervenor Defendant The United States of America on Count III of the Intervenor Complaint (Doc. 20), and in favor of Defendants on Counts I and II of the Intervenor Complaint (*Id.*). The Clerk of Court shall close the case.

DATED this 1st day of March, 2023.

/s/ Susan P. Watters
SUSAN P. WATTERS
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION, FILED MAY 24, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CV 16-36-BLG-SPW

FAITH MCLAIN, *et al.*,

Plaintiffs,

vs.

FRANCIS MCLAIN, *et al.*,

Defendants.

THE UNITED STATES OF AMERICA,

Intervenor Defendant.

Filed May 24, 2022

ORDER

Before the Court are two motions filed by Defendant Francis McLain ("Frank"): a Motion for Judicial Notice (Doc. 270) and a Motion for Clarification (Doc. 273). Both motions are deemed ripe and ready for adjudication.

Both motions regard Frank's continued assertion that the Court and Government lack jurisdiction to continue the current matter because his previous convictions were unconstitutional. In his Motion for Judicial Notice, Frank lists several alleged due process violations that he believes the Government has conceded by not addressing the merits of the arguments. The Government responds that because Frank's prior convictions were either affirmed by the Eighth Circuit Court of Appeals or denied on post-conviction relief, the law of the case doctrine precludes this Court from unilaterally attacking the convictions and Frank has not demonstrated that any exception to that doctrine exists here. (Doc. 275 at 5-6). The Court has previously rejected Frank's arguments multiple times based on its own determination regarding collateral estoppel and the law of the case doctrine. (*See* Docs. 131, 220, and 227). It is unclear what relief Frank seeks from his Motion for Judicial Notice, but the Court remains unconvinced of Frank's ability to collaterally attack his prior convictions and the Court reaffirms the reasoning expressed in those prior decisions.

Regarding Frank's Motion for Clarification, Frank requests that the Court clarify its prior decision denying Frank's Motion for Relief under Fed. R. Civ. P. 60(b)(4). The Court determined relief under Rule 60(b)(4) was not appropriate because an arguable basis existed for jurisdiction, as demonstrated by two Eighth Circuit Court of Appeals decisions, a denial of postconviction relief by the U.S. District Court of Minnesota, and a denial of postconviction relief by the U.S. District Court of Montana. (Doc. 263 at 4-5). Frank now contends that

the Court's determination was vague and asks the Court to specify which law or constitutional provision provides the grounds for jurisdiction based on several arguments Frank has repeatedly presented to the Court. The Court determined, and previously determined multiple times before, that Frank's arguments fail to reach Rule 60's high bar of demonstrating how the prior convictions were wholly void of jurisdiction. The Court's prior order was sufficiently clear, and the Court denies Frank's Motion for Clarification. Therefore,

IT IS HEREBY ORDERED that Defendant Francis McLain's Motion for Judicial Notice (Doc. 270) and Motion for Clarification (Doc. 273) are **DENIED.**

The Clerk of Court is directed to notify the parties of the making of this Order.

DATED this 24th day of May, 2022.

/s/ Susan P. Watters
SUSAN P. WATTERS
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION, FILED DECEMBER 7, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CV 16-36-BLG-SPW

FAITH MCLAIN, *et al.*,

Plaintiffs,

vs.

FRANCIS MCLAIN, *et al.*,

Defendants.

THE UNITED STATES OF AMERICA,

Intervenor Defendant.

Filed December 7, 2021

ORDER

Before the Court are several motions filed by Defendant Francis McLain including a Motion for Relief under Fed. R. Civ. P. 60(b)(4) from the Final Judgment in the U.S. District Court of Montana (Doc. 239), a Challenge

to the Government's Jurisdiction (Doc. 240), a Motion for Relief under Fed. R. Civ. P. 60(b)(4) from the Final Judgment in the U.S. District Court of Minnesota (Doc. 241), and a supplemental Motion for Relief from Final Judgment in the U.S. District Court of Minnesota (Doc. 248). The Government opposes each of the motions. (Docs. 246, 254). The Motions are deemed ripe and ready for adjudication. For the following reasons, the Court denies Defendant's Motions.

McLain once again challenges his criminal judgments in the U.S. District Courts of Minnesota and Montana by arguing the judgments are void and therefore this Court has no jurisdiction to proceed with the Government's current lien claims.

In 2008, McLain was convicted of nine counts of Failure to Account for and Pay Over Employment Taxes in the U.S. District Court of Minnesota. *See United States v. Francis L. McLain,* 08-CR-10-PJS-FLN (D. Minn. 2008). This conviction was affirmed in two published opinions by the Eighth Circuit Court of Appeals and McLain's request for postconviction relief was denied. *See United States v. McLain,* 646 F.3d 599 (8th Cir. 2011); *United States v. McLain,* 709 F.3d 1198 (8th Cir. 2013); *United States v. McLain,* 2013 WL 5566503 (D. Minn. 2013). In 2010, McLain was convicted of Damage to Government Property in the U.S. District Court of Montana. *See United States v. McLain,* 08-CR-138-BLG-RDC (D. Mont. 2010). McLain did not appeal the conviction and his request for postconviction relief was denied. *Id.*

Appendix E

McLain submits his latest challenge under Fed. R. Civ. P. 60(b)(4), asserting his prior convictions are void and that this Court has no jurisdiction to enforce convictions obtained in violation of the Constitution. Fed. R. Civ. P. 60(b)(4) states that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons . . . the judgment is void." However, a court cannot grant relief simply because a previous judgment may have been made in error. "Instead, Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *Federal Trade Commission v. John Beck Amazing Profits, LLC,* 2021 WL 4313101, *2 (C.D. Cal. Aug. 19, 2021) (quoting *United States Aid Funds, Inc. v. Espinosa,* 559 U.S. 260, 270 (2010)). "Total want of jurisdiction must be distinguished from an error in the exercise of jurisdiction, and only rare instances of a clear usurpation of power will render a judgment void." *Id.* A motion under Rule 60(b)(4) "is not a substitute for a timely appeal." *Espinosa,* 559 U.S. at 270 (internal citations omitted).

Here, McLain points to arguments he previously made in several motions that the Court has rejected. Specifically, McLain argues that his Montana judgment was made in violation of his 5th and 6th Amendment rights because the Government did not assert *mens rea* as an element of the crime charged. McLain confesses that he acted knowingly and consciously but because he did not know that his conduct was illegal, and because the Government

allegedly did not inform him that intent was an element of the crime to be proven, McLain argues no crime took place.

McLain also references arguments that his conviction out of the U.S. District Court of Minnesota was made in violation of his 5th and 6th Amendments rights. McLain asserts several grounds for allegedly finding his prior judgment void including: (1) the indictment failed to allege all elements of the crime stated; (2) the Government and court did not have personal jurisdiction over McLain; (3) the Government had no authority to pursue a penalty against a member or manager of an LLC under Minnesota law; (4) the Government and district court did not have subject-matter jurisdiction over McLain in regards to employment taxes; (5) the essential element of "willfulness" cannot exist without a statutory legal duty; (6) a "responsible person" cannot be held criminally liable for employment taxes under the law; (7) the indictment and jury instructions created a crime that did not exist; and (8) at sentencing, the district court conducted fact-finding in violation of the 6th Amendment.

The Court finds that McLain, despite his numerous and persistent attempts, has presented no argument that qualifies either judgment for relief under Rule 60(b)(4). "Federal courts considering Rule 60(b)(4) motions that assert a judgment is void because of a jurisdictional defect generally have reserved relief only for the exceptional case in which the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." *Espinosa,* 559 U.S. at 271. The assertions presented by McLain

have at least an arguable basis for jurisdiction. Further, McLain's judgments were reviewed and upheld in two Eighth Circuit Court of Appeals decisions, in the denial of his postconviction relief by the U.S. District Court of Minnesota, and in the denial of his postconviction relief by the U.S. District Court of Montana. A Rule 60(b)(4) motion is not a substitute for a timely appeal and McLain has been afforded numerous avenues for appeals previously whether he chose to take advantage of them or not. Therefore, the Court finds that McLain fails to reach the high bar set by Rule 60(b)(4) to show that his previous judgments were wholly void of jurisdiction or that McLain was deprived of his due process opportunity to noticed and heard.

The Court admonishes McLain that Local Rule 7.1(d)(2) limits the length of a brief in support of a motion to 6500 words unless the party obtains leave of the Court to extend the word-limit. In support of his Motion for Relief from the Minnesota Judgment, McLain submitted a brief totalling 47 pages with no certification of word count and a supplemental motion brief with a word count of 7,585 words. McLain did not seek the Court's approval to extend the word limit for either brief. While the Court proceeded to consider McLain's arguments this time, the Court will not indulge McLain in the future. Furthermore, "[f]iling serial motions to avoid word limits may result in denial of all such motions." Rule 7.1(d)(2)(D).

IT IS HEREBY ORDERED that Defendant Francis McLain's Motion for Relief from the Final Judgment in the U.S. District Court of Montana (Doc. 239), Motion for Relief from the Final Judgment in the U.S. District Court

of Minnesota (Doc. 241), Challenge to the Government's Jurisdiction (Doc. 240), and Supplemental Motion for Relief from the Final Judgment in the U.S. District Court of Minnesota (Doc. 248) are **DENIED**.

The Clerk of Court is directed to notify the parties of the making of this Order.

DATED this 7th day of December, 2021.

/s/
SUSAN P. WATTERS
United States District Judge

APPENDIX F — ORDER RE MOTION FOR CLARIFICATION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION, FILED APRIL 8, 2021

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
BILLINGS DIVISION

CV 16-36-BLG-SPW

FAITH MCLAIN, *et al.*,

Plaintiffs,

vs.

FRANCIS MCLAIN, *et al.*,

Defendants.

THE UNITED STATES OF AMERICA,

Intervenor Defendant and Counter/Cross-Claimant.

vs.

FAITH MCLAIN, *et al.*,

Counterclaim Defendants and

Appendix F

FRANCIS MCLAIN, *et al.*,

Crossclaim Defendants and

AMERICAN BANK OF MONTANA, *et al.*,

Additional Defendants on United States' claims.

Filed April 8, 2021

ORDER RE MOTION FOR CLARIFICATION

Before the Court is Defendant Francis ("Frank") McLain's Motion for Clarification (Doc. 229), filed March 15, 2021.

I. Procedural Background

United States Magistrate Judge Cavan filed Findings and Recommendations (Doc. 224) on January 13, 2021, regarding Frank's Motion to Acknowledge Fatal Flaws in Underlying Indictments (Doc. 213). Magistrate Cavan recommended denying the motion on the basis that the deadline for filing motions challenging the United States' indictments had passed and the 'law of the case' doctrine precluded the Court from revisiting prior rulings. (Doc. 224 at 9). Frank timely objected to Magistrate Cavan's Findings and Recommendations. (Doc. 225). The Court adopted Magistrate Cavan's Findings and Recommendations in full. (Doc. 227). Frank now moves for clarification of the Court's order adopting the Findings and Recommendations. (Doc. 229).

II. Discussion

Frank seeks clarification on a number of issues, almost all of which pertain to the merits of Frank's underlying indictments and the subject matter jurisdiction of this Court to preside over the case. Essentially, Frank attempts to collaterally attack Magistrate Cavan's and this Court's prior rulings through the use of a so-called motion for clarification. The Court finds this practice inappropriate and without legal basis.

Further, Frank's motion for clarification misconstrues the Court's prior order adopting Magistrate Cavan's Findings and Recommendations. For instance, Frank's first request for clarification pertains to the Court's decision to remove a portion of Magistrate Cavan's factual recitation describing how Frank was originally charged with failure to collect employment taxes. Frank objected to this statement by arguing that he was never charged with failure to collect. The Court removed the specific reference from its order but only after stating that the objection did not affect the Court's overall ruling on the matter. (Doc. 227 at 2-3). Frank construes this act of removal as a concession that Frank's objection had merit. That was not the determination of the Court. Instead, the Court agreed with Magistrate Cavan's findings that the deadline for motions challenging the United States' claims had long since passed and that the 'law of the case' doctrine precluded the Court from reconsidering the previously resolved issues. The Court's decision to remove a contentious portion of Magistrate Cavan's factual recitation played no part in reaching the merits of the

Court's ruling and should not be construed as a finding by the Court that Frank's objection had merit.

Frank's remaining requests for clarification represent nothing more than inappropriate attempts to relitigate his argument that his underlying indictments are fatally flawed. The Court's ruling and the basis for that ruling were sufficiently laid out in its previous order adopting Magistrate Cavan's Findings and Recommendations. (See Docs. 227 & 224).

III. Conclusion

IT IS ORDERED that Frank's Motion for Clarification (Doc. 229) is DENIED.

DATED this 8th day of April, 2021.

/s/ Susan P. Watters
SUSAN P. WATTERS
United States District Judge

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION, FILED MARCH 1, 2021

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
BILLINGS DIVISION

CV 16-36-BLG-SPW

FAITH MCLAIN, *et al.*,

Plaintiffs,

vs.

FRANCIS MCLAIN, *et al.*,

Defendants.

THE UNITED STATES OF AMERICA,

Intervenor Defendant and Counter/Cross-Claimant.

vs.

FAITH MCLAIN, *et al.*,

Counterclaim Defendants and

FRANCIS MCLAIN, *et al.*,

Crossclaim Defendants and

AMERICAN BANK OF MONTANA, *et al.*,

Additional Defendants on United States' claims.

Filed March 1, 2021

Appendix G

ORDER RE MAGISTRATE'S FINDINGS AND RECOMMENDATIONS

The United States Magistrate Judge filed Findings and Recommendations on January 13, 2021. (Doc. 224). The Magistrate recommended that Defendant Francis McLain's ("Frank") Motion for this Court to Acknowledge that the Underlying Indictments are Fatally Flawed and Violate the Fifth Amendment be denied. (Doc. 224 at 9). Frank objected to the Findings and Recommendations on January 27, 2021. (Doc. 225). The United States responded to Frank's objections on February 10, 2021. (Doc. 226). For the following reasons, Judge Cavan's Findings and Recommendations are adopted in full.

I. Relevant Background

The background of this case has been extensively and repeatedly described in prior orders from this Court. Frank makes one objection to Judge Cavan's description of the charges filed against Frank in his 2008 District of Minnesota conviction.[1] (Doc. 225 at 9). As this objection does not affect the Court's overall determination, the description at issue shall be removed from Judge Cavan's factual recitation. The remaining recitation is adopted and repeated here for convenience:

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1. Judge Cavan states that "[t]he nine counts related to Frank's failure to collect, account for, and pay over the employment taxes of Kirpal Nurses, LLC." (Doc. 224 at 4). Frank denies that he was ever charged with failure to collect. (Doc. 225 at 9).

Appendix G

In November 2008, Frank was convicted of nine counts of Failure to Account for and Pay Over Employment Taxes, in violation of 26 U.S.C. § 7202, in *United States v. Francis L. McLain*, 08-CR-10-PJS-FLN, U.S. Dist. Court, District of Minnesota. (Docs. 121 at 4; 131 at 3). The nine counts related to Frank's failure to account for and pay over the employment taxes of Kirpal Nurses, LLC. (*Id.*). The nine counts corresponded to nine quarters spanning from December 31, 2002 through December 31, 2004. (*Id.*). Frank was sentenced to prison and ordered to pay a $75,000 fine and $900 special assessment. (Doc. 94-5). Thereafter, the United States Attorney's Office for the District of Minnesota filed a Notice of Lien for Fine and/or Restitution with the Park County, Montana Clerk and Recorder in the amount of $75,900. (Doc. 171-3).

Frank's conviction was affirmed by the Eighth Circuit Court of Appeals in two published opinions. *United States v. McLain*, 646 F.3d 599 (8th Cir. 2011); *United States v. McLain*, 709 F.3d 1198 (8th Cir. 2013). His request for post-conviction relief under 28 U.S.C. § 2255 was also denied. *United States v. McLain*, 2013 WL 5566503 (D. Minn. Oct. 8, 2013).

In January 2010, Frank was convicted of Damage to Government Property in violation of 18 U.S.C. § 1361, in *United States v. McLain*, 08-CR-138-BLGRFC, U.S. District Court, District of Montana. Frank was ordered to pay restitution to the United States Forest Service in the amount of $25,000 and a special assessment of $25 was imposed. (*Id.*). He did not appeal his sentence, and his request for post-conviction relief under 28 U.S.C. § 2255

was denied. (*Id.* at Doc. 63, 69). On January 24, 2010, the United States Attorney's Office for the District of Montana filed a Notice of Lien for Fine and/or Restitution with the Park County, Montana Clerk and Recorder in the amount of $25,025. (Doc. 171-4).

On May 5, 2014, the IRS assessed civil penalties against Frank under 26 U.S.C. § 6672, for willful failure to truthfully account for and pay over the employment taxes of Kirpal Nurses for the same nine quarters that were at issue in his criminal case. (Doc. 171-1). The IRS subsequently filed a Notice of Federal Tax Lien for Frank's § 6672 assessments in the amount of $469,156.24 with the Park County, Montana Clerk and Recorder. (Doc. 171-5).

On July 8, 2014, Plaintiffs Faith McLain, Christeen McLain, John McLain, Mary McLain, Molly McLain, Mira McLain, and Matthew McLain (collectively the "McLain Plaintiffs") brought this action in Montana state court for declaratory judgment concerning the ownership of the E-3 Ranch against Defendants Frank McLain, Caroline McLain, Alakhi Joy McLain, Sohnja May McLain, and Dane Sehaj McLain (collectively the "McLain Defendants"). (Doc. 1).

On March 11, 2016, the state court granted the United States' motion to intervene. (Doc. 1-3). On April 8, 2016, the United States removed, invoking the Court's jurisdiction under 28 U.S.C. § 1441. (Doc. 1).

On March 15, 2017, the McLain Defendants answered the Intervenor Complaint, and Frank filed a Counterclaim

for tax refund against the United States, challenging the underlying tax assessments. (Doc. 79). On March 6, 2018, the Court dismissed Frank's counterclaim with prejudice. (Doc. 131).

On July 3, 2019, the Court issued an Amended Scheduling Order in this case setting September 30, 2019 as the deadline for the filing of motions. (Doc. 167). Subsequently, the Court extended the deadline for Frank to file any motion relating to the United States to October 19, 2019. (Doc. 182). Frank never sought, nor was granted, any extension of that deadline.

Thereafter, the United States and Frank timely filed motions for partial summary judgment concerning the United States' claims against Frank. (Docs. 169, 187). On November 9, 2020, the Court adopted Magistrate Judge Cavan's August 3, 2020 Findings and Recommendations (Doc. 208), and granted partial summary judgment in favor of the United States, finding that the United States has a valid tax lien against all property and rights of property belonging to Frank, and that if Frank is determined to have an ownership interest in the E-3 Ranch through this litigation, the United States' liens attach to that interest and the United States is entitled to foreclose its liens. (Doc. 220). The Court also denied Frank's motion for partial summary judgment, which sought to invalidate the federal liens stemming from his criminal convictions. (*Id.*).

Now, Frank once again attempts to collaterally attack his underlying convictions in an effort to avoid the United States' valid liens, by arguing the underlying indictments were defective. (Doc. 213).

II. Legal Standard

Parties are entitled to de novo review of those portions of Judge Cavan's findings and recommendations to which they timely and properly object. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). The Court may accept, reject, or modify, in whole or in part, those findings and recommendations properly objected to. 28 U.S.C. § 636(b)(1). "A party makes a proper objection by identifying the parts of the magistrate's disposition that the party finds objectionable and presenting legal argument and supporting authority, such that the district court is able to identify the issues and the reasons supporting a contrary result." *Lance v. Salmonson*, 2018 WL 4335526, at *1 (D. Mont. Sept. 11, 2018) (quoting *Montana Shooting Sports Ass 'n v. Holder*, 2010 WL 4102940, at *2 (D. Mont. Oct. 18, 2010)). Simply restating the party's argument previously made before the magistrate judge is not a sufficient objection. *Id.*

Absent an objection, a court reviews a magistrate's findings and recommendations for clear error. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Clear error exists if the Court is left with a "definite and firm conviction that a mistake has been committed." *United States v. Syrax*, 235 F.3d 422, 427 (9th Cir. 2000).

III. Discussion

Judge Cavan found that Frank's motion should be denied for several reasons: (1) the motion appears to express substantially similar arguments Frank made in his objections to a previous Findings and Recommendations

and, therefore, should be denied for the reasons previously articulated by this Court when adopting those Findings; (2) Frank's motion was filed ten months after the deadline for motions concerning the United States' claims and is untimely; and (3) the 'law of the case' doctrine precludes this Court from reconsidering a previously resolved issue and Frank failed to satisfy any exception to that rule.

Aside from the factual recitation objection addressed earlier, Frank makes two additional objections to Judge Cavan's Findings. Frank claims that the law of case' doctrine does not preclude a review of his prior convictions because "[t]he Court's Order denying [his] statutory right to a refund suit under 26 U.S.C. § 7422 is clearly erroneous." (Doc. 225 at 9). Frank explains that the cases relied on in the prior order, *Sananikone* and *Jones*," clearly support [his] argument that the trust fund recovery penalty is based only upon *withheld taxes*, not upon employment taxes." (*Id.* at 10). Thus, Frank contends the Court erred by misinterpreting the law.

Frank also objects to Judge Cavan's finding that no manifest injustice would result from applying the 'law of the case' doctrine. He explains that "since the criminal judgment upon which the [trust fund recovery penalty] assessment was based is void, it is obvious that the manifest injustice that I have already suffered from the unconstitutional taking of my liberty without due process of law will now be exasperated by the manifest injustice of the unconstitutional taking of my property without due process of law." (*Id.* at 10-11).

These arguments do not persuade the Court that it should depart from the 'law of the case' doctrine. As noted by Judge Cavan, Frank has moved previously to set aside his prior convictions and was unsuccessful. Frank's convictions were upheld twice by the Eighth Circuit and Frank presents no compelling argument here for why those decisions should be overturned. However, even if the Court were to entertain Frank's objections, Frank did not object to Judge Cavan's other findings that Frank's motion is untimely. Without objection, the Court must review Judge Cavan's findings for clear error. *See Reyna-Tapia*, 328 F.3d at 1121. The Court sees no clear error in Judge Cavan's findings and Frank's motion is untimely.

IV. Conclusion

IT IS ORDERED that the proposed Findings and Recommendations entered by the United States Magistrate Judge (Doc. 224) are ADOPTED IN FULL.

IT IS FURTHER ORDERED that Frank's Motion for this Court to Acknowledge that the Underlying Indictments are Fatally Flawed and Violate the Fifth Amendment (Doc. 213) is DENIED.

DATED this 1st day of March, 2021.

/s/
SUSAN P. WATTERS
United States District Judge

APPENDIX H — FINDINGS AND RECOMMENDATIONS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION, FILED JANUARY 13, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CV 16-36-BLG-SPW-TJC

FAITH MCLAIN, CHRISTEEN MCLAIN, JOHN MCLAIN, MOLLY MCLAIN, MIRA MCLAIN, AND MATTHEW MCLAIN, AS BENEFICIARIES OF THE ESTATE OF BERNARD MCLAIN, AND MARY MCLAIN, INDIVIDUALLY AS BENEFICIARY OF THE ESTATE OF BERNARD MCLAIN AND AS TRUSTEE OF THE E-3 RANCH TRUST,

Plaintiffs,

vs.

FRANCIS MCLAIN, INDIVIDUALLY AND AS CO-MANAGER OF TERA BANI RETREAT MINISTRIES, CAROLINE MCLAIN, INDIVIDUALLY AND AS MANAGING DIRECTOR OF TERA BANI RETREAT MINISTRIES, ALAKHI JOY MCLAIN, SOHNJA MAY MCLAIN, AND DANE SEHAJ MCLAIN, AS PURPORTED CERTIFICATE HOLDERS OF THE E-3 RANCH TRUST,

Defendants.

Appendix H

THE UNITED STATES OF AMERICA,

Intervenor Defendant and Counter/Cross-Claimant,

vs.

FAITH MCLAIN, CHRISTEEN MCLAIN, JOHN MCLAIN, MOLLY MCLAIN, MIRA MCLAIN, AND MATTHEW MCLAIN, AS BENEFICIARIES OF THE ESTATE OF BERNARD MCLAIN; AND MARY MCLAIN, AS BENEFICIARY OF THE ESTATE OF BERNARD MCLAIN, AND AS TRUSTEE OF THE E-3 RANCH TRUST,

Counterclaim Defendants and

FRANCIS MCLAIN, INDIVIDUALLY, AND AS CO-MANAGER OF TERA BANI RETREAT MINISTRIES; CAROLINE MCLAIN, INDIVIDUALLY, AND AS MANAGING DIRECTOR OF TERA BANI RETREAT MINISTRIES; AND ALAKHI JOY MCLAIN, SOHNJA MAY MCLAIN, AND DANE SEHAJ MCLAIN, AS BENEFICIARIES OF THE E-3 RANCH TRUST,

Crossclaim Defendants and

Appendix H

AMERICAN BANK OF MONTANA
AND BRAD D. HALL,

Additional Defendants on United States' claims.

Filed January 13, 2021

FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

The United States has filed an intervenor claim to foreclose federal tax liens against Defendant Francis ("Frank") McLain's interest in a ranch located in the Paradise Valley, known as the E-3 Ranch. (Doc. 20.) Currently, the E-3 Ranch is also the subject of an ownership dispute between two factions of the McLain family.[1]

Judge Watters has referred the case to the undersigned under 28 U.S.C. § 636(b)(1)(B). (Doc. 80.) Presently before the Court is Frank's "Motion for this Court to Acknowledge that the Underlying 'Indictments' are Fatally Flawed and Violate the Fifth Amendment." (Doc. 213). The motion is fully briefed and ripe for the Court's review. (Docs. 217, 219.)

1. The facts of this case are well-known to the Court and the parties, and will not be repeated at length here.

Having considered the parties' submissions, the Court **RECOMMENDS** Frank's motion (Doc. 213) be **DENIED**.

I. PROCEDURAL BACKGROUND[2]

In November of 2008, Frank was convicted of nine counts of Failure to Account for and Pay Over Employment Taxes, in violation of 26 U.S.C. § 7202, in *United States v. Francis L. McLain*, 08-CR-10-PJS-FLN, U.S. Dist. Court, District of Minnesota. (Docs. 121 at 4; 131 at 3.) The nine counts related to Frank's failure to collect, account for, and pay over the employment taxes of Kirpal Nurses, LLC. (*Id.*) The nine counts corresponded to nine quarters spanning from December 31, 2002 through December 31, 2004. (*Id.*) Frank was sentenced to prison and ordered to pay a $75,000 fine and $900 special assessment. (Doc. 94-5.) Thereafter, the United States Attorney's Office for the District of Minnesota filed a Notice of Lien for Fine and/or Restitution with the Park County, Montana Clerk and Recorder in the amount of $75,900. (Doc. 171-3.)

Frank's conviction was affirmed by the Eighth Circuit Court of Appeals in two published opinions. *United States*

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2. Federal Rule of Evidence 201 permits a court to take judicial notice of the judicial record of another court. Fed.R.Evid. 201; *Harris v. Cnty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012) ("[The Court] may take judicial notice of undisputed matters of public record, including documents on file in federal or state courts.") (internal citation omitted). Accordingly, the Court will take judicial notice of Frank's prior criminal convictions and appeals in the District of Minnesota, the Eighth Circuit, and the District of Montana.

v. McLain, 646 F.3d 599 (8th Cir. 2011); *United States v. McLain*, 709 F.3d 1198 (8th Cir. 2013). His request for post-conviction relief under 28 U.S.C. § 2255 was also denied. *United States v. McLain*, 2013 U.S. Dist. LEXIS 145142, 2013 WL 5566503 (D. Minn. Oct. 8, 2013).

In January 2010, Frank was convicted of Damage to Government Property in violation of 18 U.S.C. § 1361, in *United States v. McLain*, 08-CR-138-BLGRFC, U.S. District Court, District of Montana. Frank was ordered to pay restitution to the United States Forest Service in the amount of $25,000 and a special assessment of $25 was imposed. (*Id.*) He did not appeal his sentence, and his request for post-conviction relief under 28 U.S.C. § 2255 was denied. (*Id.* at Doc. 63, 69.) On January 24, 2010, the United States Attorney's Office for the District of Montana filed a Notice of Lien for Fine and/or Restitution with the Park County, Montana Clerk and Recorder in the amount of $25,025. (Doc. 171-4.)

On May 5, 2014, the IRS assessed civil penalties against Frank under 26 U.S.C. § 6672, for willful failure to collect, truthfully account for, and pay over the employment taxes of Kirpal Nurses for the same nine quarters that were at issue in his criminal case. (Doc. 171-1.) The IRS subsequently filed a Notice of Federal Tax Lien for Frank's § 6672 assessments in the amount of $469,156.24 with the Park County, Montana Clerk and Recorder. (Doc. 171-5.)

On July 8, 2014, Plaintiffs Faith McLain, Christeen McLain, John McLain, Mary McLain, Molly McLain, Mira

McLain, and Matthew McLain (collectively the "McLain Plaintiffs") brought this action in Montana state court for declaratory judgment concerning the ownership of the E-3 Ranch against Defendants Frank McLain, Caroline McLain, Alakhi Joy McLain, Sohnja May McLain, and Dane Sehaj McLain (collectively the "McLain Defendants"). (Doc. 1.)

On March 11, 2016, the state court granted the United States' motion to intervene. (Doc. 1-3.) On April 8, 2016, the United States removed, invoking the Court's jurisdiction under 28 U.S.C. § 1441. (Doc. 1.)

On March 15, 2017, the McLain Defendants answered the Intervenor Complaint, and Frank filed a Counterclaim for tax refund against the United States, challenging the underlying tax assessments. (Doc. 79.) On March 6, 2018, the Court dismissed Frank's counterclaim with prejudice. (Doc. 131.)

On, July 3, 2019 the Court issued an Amended Scheduling Order in this case setting September 30, 2019 as the deadline for the filing of motions. (Doc. 167.) Subsequently, the Court extended the deadline for Frank to file any motion relating to United States to October 19, 2019. (Doc. 182.) Frank never sought, nor was granted, any extension of that deadline.

Thereafter, the United States and Frank timely filed motions for partial summary judgment concerning the United States' claims against Frank. (Docs. 169, 187.) On November 9, 2020, Judge Watters adopted this Court's August 3, 2020 Findings and Recommendations (Doc.

208), and granted partial summary judgment in favor of the United States, finding that the United States has a valid tax lien against all property and rights of property belonging to Frank, and that if Frank is determined to have an ownership interest in the E-3 Ranch through this litigation, the United States' liens attach to that interest and the United States is entitled to foreclose its liens. (Doc. 220.) The Court also denied Frank's motion for partial summary judgment, which sought to invalidate the federal liens stemming from his criminal convictions. (*Id.*)

Now, Frank once again attempts to collaterally attack his underlining convictions in an effort to avoid the United States' valid liens, by arguing the underlying indictments were defective. (Doc. 213.)

II. DISCUSSION

First, Frank's motion appears to be intended to buttress his Objections to the Court's Findings and Recommendations that were issued on August 3, 2020.[3] For example, in his Objections, Frank argued the underlying indictments "are defective on their faces for not specifically alleging all the essential elements that make up the crimes charged." (Doc. 215 at 6.) Frank, therefore, requested the Court "acknowledge that the

3. The Court notes that the instant motion and Frank's Objections were filed within three days of each other, further indicating the motion simply provides further argument in support of his Objections. (*See* Doc. 213 (motion filed October 20, 2020); Doc. 216 (Objection Part 1 filed October 21, 2020); and Doc. 217 (Objection Part II filed October 23, 2020).)

purported 'indictments' are fundamentally flawed and are not indictments at all, and that the criminal judgments in those matters are void." (*Id.*) In the instant motion, Frank expounds upon his argument why he believes that the indictments were fundamentally flawed. (Doc. 213.) Then, just like in his Objections, Frank argues the Court should "acknowledge" the purported flaws and deem the underlying criminal judgments and resulting liens void. (Doc. 213 at 1, 22.) Frank's motion, therefore, should be denied for the reasons set forth in the Court's November 9, 2020 Order adopting the Findings and Recommendations. (Doc. 220.)

Second, to the extent Frank's motion is deemed a stand-alone motion, it is untimely. Frank's deadline for filing motions concerning the United States' claims was October 18, 2019. (Doc. 182.) The instant motion was not filed until August 20, 2020, approximately 10 months past the deadline. (Doc. 213.) Frank did not request an extension of time, nor has he endeavored to show any compelling reason why this motion attacking his convictions from 2008 and 2010 could not have been timely filed. His motion should therefore be summarily rejected.

Finally, even if the Court were to entertain Frank's motion, it should be denied. Frank again attempts to collaterally attack his underlying convictions, which he unsuccessfully tried to do in his counterclaim and his previous motion for partial summary judgment. (*See* Docs. 188, 201, 208, 220.)

For example, Frank previously challenged the

tax assessments through his counterclaim for refund. (Doc. 79.) The Court found Frank failed to establish the elements necessary to prove his claim. (Docs. 121, 131). As a result, his counterclaim was dismissed with prejudice. (*Id.*) In reaching its decision, the Court noted that Frank raised a myriad of arguments that had already been decided against him by the District of Minnesota and the Eighth Circuit, which he echoes in the instant motion, including that he was not a responsible person who owed employment taxes; a § 6672 assessment was not imposed on him prior to his indictment in the criminal case; and he never created a trust fund to collect or account for employment taxes in the first place, therefore a trust fund penalty could not be assessed against him under § 6672. (Doc. 121.)

"Under the 'law of the case' doctrine, 'a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case.'" *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (quoting *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir.)). A court may depart from the law of the case only if: "1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result." *Id.*

None of these conditions are present here. Frank has not demonstrated the Court's prior decisions rejecting his challenges to the underlying convictions were clearly erroneous. Nor has he shown there has been an intervening

change in the law, the evidence, or other circumstances, or that a manifest injustice would result. Accordingly, the Frank's latest attempt to collaterally attack his underlying convictions should be denied.

III. CONCLUSION

Based on the foregoing, **IT IS RECOMMENDED** that Frank's "Motion for this Court to Acknowledge that the Underlying 'Indictments' are Fatally Flawed and Violate the Fifth Amendment" (Doc. 213) be **DENIED**.

NOW, THEREFORE, IT IS ORDERED that the Clerk shall serve a copy of the Findings and Recommendations of United States Magistrate Judge upon the parties. The parties are advised that pursuant to 28 U.S.C. § 636, any objections to the findings and recommendations must be filed with the Clerk of Court and copies served on opposing counsel within fourteen (14) days after service hereof, or objection is waived.

IT IS ORDERED.

DATED this 13th day of January, 2021.

/s/ Timothy J. Cavan
TIMOTHY J. CAVAN
United States Magistrate Judge

APPENDIX I — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION, FILED NOVEMBER 9, 2020

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
BILLINGS DIVISION

CV 16-36-BLG-SPW

FAITH MCLAIN, *et al.*,

Plaintiffs,

vs.

FRANCIS MCLAIN, *et al.*,

Defendants.

THE UNITED STATES OF AMERICA,

Intervenor Defendant and Counter/Cross-Claimant.

vs.

FAITH MCLAIN, *et al.*,

Counterclaim Defendants and

FRANCIS MCLAIN, *et al.*,

Crossclaim Defendants and

AMERICAN BANK OF MONTANA, *et al.*,

Additional Defendants on United States' claims.

Filed November 9, 2020

Appendix I

ORDER RE MAGISTRATE'S FINDINGS AND RECOMMENDATIONS

This matter comes before the Court on Magistrate Judge Cavan's Findings and Recommendations submitted August 3, 2020. (Doc. 208). Magistrate Cavan recommended that the United States' Motion for Partial Summary Judgment be granted, and that Defendant Francis McLain's ("Frank") Motion for Partial Summary Judgment be denied. (Doc. 208 at 3). Defendants Caroline McLain, Alakhi McLain, Sohnja McLain, and Dane McLain ("McLain Defendants") filed objections to the Magistrate's recommendations on August 21, 2020. (Doc. 214). Defendant Frank McLain filed an objection in two parts on August 21, 2020 and August 23, 2020. (Doc. 216 and 217)[1]. The United States filed a reply to the various

1. As an initial matter, the Court must address the timing of the objections filed by Frank and the McLain Defendants. The Magistrate filed his findings and recommendations on August 3, 2020 and notified the parties that objections must be filed within 14 days of that date—August 17, 2020. Frank, acting solely on his own behalf, filed a motion for extension of time to file objections (Doc. 210) on August 13, 2020. The Court granted that motion and extended Frank's deadline to file objections to August 21, 2020 (Doc. 211). Both Frank and the McLain Defendants proceeded to file objections on August 21, 2020 (Doc. 214 and 216). This filing would make the McLain Defendants' objection untimely. However, due to the nature of representation for Frank and the McLain Defendants, the Court assumes that the McLain Defendants mistakenly believed the extension applied to their filing date as well and the Court will consider the merits of objections despite the timing issue. Frank's objections were filed in two parts with the first part filed on August 21, 2020 (Doc. 216) and the second part on August 23, 2020 (Doc. 215). The Court's order unquestionably set the time to file by August 21, 2020 making the second part of

objections on September 4, 2020. (Doc. 218). For the following reasons, the Court will adopt the Magistrate's findings and recommendations in full.

I. RELEVANT BACKGROUND

The facts of this case are now well-known to the Court and only those events relevant to the Court's decision need be repeated here.

What began as a property ownership dispute between family members has since grown more complicated with the introduction of the United States seeking to foreclose federal tax liens filed against Defendant Frank McLain's interest in the E-3 Ranch property.

The Magistrate's findings and recommendations here (Doc. 208) pertain primarily to the issue of the 2014 United States' federally assessed tax lien. The issues began in 2008 when Frank was convicted for nine counts of Failure to Account for and Pay Over Employment Taxes in *United States v. Francis L. McLain*, 08-CR-10-PJS-FLN, U.S. Dist. Court, District of Minnesota. (Docs. 121 at 4; 131 at 3)[2]. Frank was sentenced to prison and

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Frank's objection untimely. Frank noted that a computer glitch prevented him from filing both objections on August 21, 2020, yet he failed to move for an additional extension or seek alternative remedies. Therefore, the second part of Frank's objection is barred as untimely filed.

2. As noted by Magistrate Cavan, the Court may take judicial notice of the judicial records of another court under Federal Rule of Evidence 201. The Court takes judicial notice of Frank's criminal convictions and appeals as reflected in the judicial records of the

ordered to pay a fine of $75,000 and a special assessment of $900. Frank appealed the conviction, but the Eighth Circuit Court of Appeals affirmed the verdict. *See United States v. McLain*, 646 F.3d 599 (8th Cir. 2011) and *United States v. McLain*, 709 F.3d 1198 (8th Cir. 2013). Frank's request for post-conviction relief was also denied. *See United States v. McLain*, 2013 WL 5566503 (D. Minn. Oct. 8, 2013). The United States Attorney's Office for the District of Minnesota filed a Notice of Lien for Fine and/or Restitution with the Montana Clerk and Recorder's office in Park County on October 5, 2009 for $75,900.

Several months later, in January 2010, the District of Montana convicted Frank of Damage to Government Property in *United States v. McLain*, 08-CR-138-BLG-RFC, U.S. Dist. Court, District of Montana. The conviction resulted in a restitution sentence of $25,000 and a special assessment of $25. Frank did not appeal this sentence and his request for post-conviction relief was denied. (Doc. 63, 69). The United States Attorney's Office for the District of Montana filed a Notice of Lien for Fine and/or Restitution with the Montana Clerk and Recorder's Office in Park County for $25,025 on January 24, 2010. (Doc. 171-4).

On May 5, 2014, the IRS assessed civil penalties against Frank under 26 U.S.C. § 6672 for willful failure to collect, truthfully account for, and pay over the employment taxes of Kirpal Nurses, the same business and activities at issue

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District of Minnesota, the Eighth Circuit Court of Appeals, and the District of Montana.

in his Minnesota criminal conviction. The United States submitted Forms 4340 for each assessment made against Frank. The IRS also filed a Notice of Federal Tax Lien for those assessments on September 2, 2014. The lien amount asserted was for $469,156.24. Frank has not fully paid the amounts due on this federal tax lien or the liens for fines and/or restitution. The United States is now seeking to foreclose on this tax lien assessed at $469,156.24.

The United States intervened in the underlying property dispute case in order to foreclose on the federal tax liens attached to the subject property, the E-3 Ranch. To that effect, the United States filed a motion for partial summary judgment asking the Court to (1) determine, adjudge, and decree that the United States has valid and perfected federal tax liens against all property and rights to property of Frank; and (2) to the extent Frank is found at trial to have an ownership interest in the E-3 Ranch: (a) the United States' federal tax liens attach to the real property; (b) the tax liens shall be foreclosed upon the real property; (c) the real property be sold; and (d) at a later date, the proceeds of the sale be distributed to the United States in satisfaction of the federal tax liens, and all other creditors (including the United States' lines for the fines and/or restitution) after the Court determines the interests of the parties in the real property and their respective priority to a distribution of the proceeds from the sale.

Frank moves for summary judgment seeking an invalidation of the federal tax liens assessed against him and the October 5, 2009 lien for fine and/or restitution

stemming from his criminal conviction in the District of Minnesota.

II. LEGAL STANDARD

Summary judgment is appropriate where the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is a sufficient evidence for a reasonable factfinder to return a verdict for the nonmoving party. *Id.* "Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party can satisfy this burden in two ways: (1) by presenting evidence that negates an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *Id.* at 322-23. If the moving party fails to discharge this initial burden, summary judgment must be denied, and the court need not consider the nonmoving party's evidence. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 15960 (1970).

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In attempting to establish the existence of this factual dispute, the opposing party must "go beyond the pleadings and by 'the depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)). The opposing party cannot defeat summary judgment merely by demonstrating "that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586; *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) ("The mere existence of a scintilla of evidence in support of the nonmoving party's position is not sufficient.") (citing *Anderson*, 477 U.S. at 252).

When making this determination, the Court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. *See Matsushita*, 475 U.S. at 587. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when] he [or she] is ruling on a motion for summary judgment." *Anderson*, 477 U.S. at 255.

III. DISCUSSION

a. Whether the Intervenor Complaint states a claim under 28 U.S.C. § 2410.

The United States moved for partial summary judgment on the question of whether the federal tax liens at issue are brought pursuant to 28 U.S.C. § 2410 arguing that the Intervenor Complaint properly referenced this statute as the source of the Government's intervention. Frank and the McLain Defendants argued that because § 2410 is not directly cited in the Intervenor Complaint, the standards of 26 U.S.C. § 7403 should apply. The distinction is important as a party cannot challenge the merits of the underlying tax assessments under § 2410, but the party can make a challenge under a § 7403 action. *See Hughes v. United States*, 953 F.2d 531, 537-38 (9th Cir. 1992) ("A taxpayer may not use a section 2410 action to collaterally attack the merits of an assessment."); *United States v. O'Connor*, 291 F.2d 520, 526 (2d Cir. 1961) (holding that a taxpayer may challenge the merits of an assessment under § 7403).

Magistrate Cavan found that the United States did intervene in the case under 28 U.S.C. § 2410. Although the Intervenor Complaint did not directly cite § 2410, the statute the Complaint did cite, 26 U.S.C. § 7424, references § 2410 and states that "[t]he provisions of section 2410 of title 28 of the United States Code . . . shall apply in any case in which the United States intervenes. . . ." Therefore, the Magistrate determined that the Intervenor Complaint 'undoubtedly' asserted a claim under § 2410.

The Court agrees with Magistrate Cavan's findings. The United States' Intervenor Complaint states:

> This Intervenor Complaint is brought pursuant to 26 U.S.C. § 7424, which grants the United States the right to intervene in this action because the United States asserts a lien interest in the property that is the subject of this action.
>
> The United States' claims are brought pursuant to 26 U.S.C. §§ 7401 at the direction of the Attorney General of the United States and with the authorization and request of the Chief Counsel of the Internal Revenue Service ("IRS"), a delegate of the Secretary of the Treasury of the United States.

(Doc. 20 at 3).

Frank and the McLain Defendants are correct that § 2410 is not directly referenced anywhere in the Intervenor Complaint. However, as noted by the Magistrate, § 7424 is directly referenced as the statute providing the Government with authority to intervene in the underlying case and assert its lien interests in the subject property. § 7424 states that "Nile provisions of section 2410 of title 28 of the United States Code . . . shall apply in any case in which the United States intervenes as if the United States had originally been named a defendant in such action or suit." Thus, under the statutory terms expressed, § 2410 applies to the present intervention regardless of whether

that section was specifically identified in the Intervenor Complaint or not.

The McLain Defendants place great weight on a statement the United States made in its reply brief supporting intervention that the United States sought intervention in order to foreclose its federal tax lien under 26 U.S.C. § 7403. (Doc. 3-8 at 46). The McLain Defendants argue this reference proves the United States intended to pursue the federal lien interest under more than one statute and opened the door for the Defendants to properly raise arguments about the merits of the tax assessment. As further proof, the McLain Defendants point out that the Intervenor Complaint lists § 7401 as a source of statutory authority as well as § 7424. However, neither of these arguments are persuasive.

The language of § 7424 is conclusive that when the United States intervenes to assert a lien under that title, the provisions of § 2410 "shall apply" in the same manner as if the United States were an original party to the case. 26 U.S.C. § 7424. Because the United States referenced § 7403 in a reply brief does not change the controlling nature of the statutes actually listed in the Intervenor Complaint. The McLain Defendants' argument that the Intervenor Complaint also references § 7401 does not diminish this conclusion. § 7401 merely provides notice that the civil action is authorized by the Secretary of the U.S. Department of the Treasury and the Attorney General. 26 U.S.C. § 7401. The statute says nothing about which statutory scheme will control the civil action. Therefore, the Magistrate was correct in his finding that

§ 2410 controls the United States' intervention in this matter.

Frank also argues that § 7403 should apply in this matter because it is a more specific statute for actions that affect liens on property than § 2410. However, as noted above, § 2410 clearly explains that it applies to intervention actions brought pursuant to § 7424, which is the case here. Frank has cited no caselaw or statutory language that bring into question the clear applicability of § 2410 in § 7424 intervention actions.

b. Whether the McLain Defendants have Standing to Challenge the Merits of Frank's Tax Assessment.

Magistrate Cavan found that the McLain Defendants, as third parties, did not have standing to challenge the tax assessment of Frank because third parties are generally precluded from making such a challenge. *See Graham v. United States*, 243 F.2d 919, 922 (9th Cir. 1957). The McLain Defendants object that while this might be the general rule, the United States Supreme Court has recognized exceptions to that rule in *United States v. Williams*, 514 U.S. 527 (1995). The Magistrate did not believe any of the exceptions applied to the present case. The McLain Defendants assert that the transferee exception should apply because the Government's actions put the McLain Defendants at risk of substantial injury to their interests in the property and because "the United States claims . . . that the various conveyances of the property at issue here were fraudulent and should be set

aside." (Doc. 214 at 13). The Government responds that no exception applies because the McLain Defendants have not paid Frank's outstanding tax assessment, they are not his fiduciary, and they have not personally been subject to a tax assessment under 26 U.S.C. § 6901.

The Magistrate is accurate in his review of *Williams'* holding and this Court agrees that the third-party exceptions described by the Supreme Court do not apply to the McLain Defendants. *Williams* concerned an ex-wife's refund suit against the IRS for a tax lien placed on property transferred to the ex-wife by the ex-husband. 514 U.S. at 530. Williams was unaware of the tax lien until after the transfer and paid the tax under duress in order to proceed with the sale of the property. *Id.* Of foremost concern to the Supreme Court was the issue of sovereign immunity and the breadth of the immunity waiver found in 28 U.S.C. § 1346(a)(1). The *Williams* Court stressed that "[i]n resolving this question, we may not enlarge the waiver beyond the purview of the statutory language." *Id.* at 531 (citing *Department of Energy v. Ohio*, 503 U.S. 607, 614-616 (1992)). Instead, the Court was constrained by Congress's "unequivocally expressed" intent of the statute with all ambiguities resolved in favor of immunity. *Id.* (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33, (1992)). It was this careful review of the statutory language in § 1346(a)(1) that led the Supreme Court to determine that an individual "from whom taxes are erroneously or illegally collected" may sue for a refund of those taxes regardless of whether the tax was originally assessed against that individual. *Id.* at 536.

As part of its decision, the *Williams* Court also addressed concerns raised by the Government that allowing a third-party refund suit would undermine the general principle that third parties may not challenge the tax liabilities of others and lead to wide-spread abuse. *Id.* at 538-39. The Court found this argument untenable as limited exceptions to the general rule already existed including that found in 26 U.S.C. § 6901(a)(1)(A). *Id.* at 539. Under that statute, the Court explained that "certain transferees may litigate the tax liabilities of the transferor; if the transfer qualifies as a fraudulent conveyance under state law . . . " *Id.* The statute treated the transferee as the original taxpayer in that situation allowing the transferee to contest the liability in tax court or a § 1346(a)(1) refund suit. *Id.*

The McLain Defendants claim that the transferee exception in § 6901(a)(1)(A) should apply to the situation present here. However, the McLain Defendants have provided no argument for why the transferee exception applies other than a general assertion that the United States claims the underlying property conveyances were fraudulent. In order to qualify as the liable transferee under § 6901, the party must meet the definition of transferee under federal law and the transfer must be considered fraudulent under state law. *Slone v. Comm'r*, 810 F.3d 599, 604 (9th Cir. 2015). The McLain Defendants, however, have failed to demonstrate how the United States' Intervenor Complaint alleges an action under § 6901(a)(1)(A) to hold the McLain Defendants liable for Frank's tax assessment.

Appendix I

Noted above, the United States seeks summary judgment on the issue of the tax assessment against Frank and asserts its interest on that assessment pursuant to § 2410. There is no claim under § 6901 listed in the Intervenor Complaint against the McLain Defendants and the United States explains as much in its response brief to the McLain Defendants' objections. (Doc. 218 at 5). The Intervenor Complaint states that the United States is seeking to void the various transfers of the subject property, including the transfer to Caroline McLain, as fraudulent transfers under Mont. Code Ann. § 31-2-333. Should the United States succeed in this endeavor, the lien will attach to the subject-property ranch as ownership reverts to Frank. The United States will then seek to foreclose on the property in fulfillment of the outstanding tax liens. (Doc. 20 at 13-14). This is not the scenario envisioned in *Williams* when the IRS seeks compensation from the transferee for the debts of the transferor and the transferee steps into the shoes of the transferor to challenge the merits. *Williams*, 514 U.S. at 539 ("the Code treats the transferee as the taxpayer . . . so the transferee may contest the transferor's liability"). To hold as such would strain the language of § 6901 past the "unequivocally expressed" intent of Congress. Therefore, because no exception applies to the present claim, the general principle applies that the McLain Defendants lack standing to challenge the tax liabilities of Frank. *Williams*, 514 U.S. at 539.

c. Whether the United States has a Valid Tax Lien against the Property of Frank McLain.

The Magistrate found that because the United States' intervention was governed by 28 U.S.C. § 2410, the underlying tax assessment was beyond meritorious challenge by Frank and represented a valid tax lien supported by Certificates of Assessments, Payments and Other Specified Matters (Forms 4340). The Magistrate further found that, even if the court were to consider Frank's challenge to the merits of the tax lien, the matter would be barred under the law of the case doctrine. Specifically, the Magistrate points to Frank's previous attempts to challenge the merits of the tax liens, often making similar if not identical arguments as those made against the present motion for summary judgment. Those attempts include Frank's previous challenge to the tax assessments through a refund counterclaim (Doc. 79) which was dismissed with prejudice because of Frank's failure to establish the necessary elements of a refund claim by this Court. (Docs. 121 and 131). Finally, the Magistrate found that while a taxpayer may challenge the procedural merits of a § 2410 action, Frank failed to raise such a procedural challenge.

Frank and the McLain Defendants object to these findings by arguing that the underlying jury verdicts assessing penalties against Frank for failing to pay employment taxes were flawed. Specifically, the parties assert that the jury instructions were not sufficient "as the number of employees and the dollar amount of the unpaid employment taxes were not part of the jury's

veridict" (Doc. 214 at 11) and that the Sept. 14, 2014 lien was not based on valid TFRP assessments (Doc. 216 at 4). However, these arguments are barred by § 2410 as collateral attacks on the underlying tax assessments.

First, as determined above, the McLain defendants have no standing to challenge the merits of Frank's tax assessments.

Second, a quiet title action under § 2410 provides only a limited waiver of sovereign immunity. *Hughes v. United States*, 953 F.2d 531, 538 (1992). A taxpayer may challenge the procedural validity of the tax lien, but the waiver does not extend to attacking the merits of the lien itself. *United States v. Cabral*, 2008 U.S. Dist. LEXIS 73968, *14 (E.D. Cal. Aug. 13 2008); *Elias v. Connett*, 908 F.2d 521, 527-28 (9th Cir. 2001). Thus, "[t]he taxpayer cannot contest the existence or validity of the tax assessment in an action under § 2410." *Cabral*, 2008 U.S. Dist. LEXIS at *14-15. Here, Frank's only argument in Part I of his objections represents a direct challenge to the validity of the tax liens by arguing that the Sept. 14, 2014 lien is not based on a valid TFRP. This challenge is barred under a § 2410 action and this argument is dismissed as improper.

IV. CONCLUSION

The Court concurs with the Magistrate and finds that the United States has a valid tax lien, that arose at the time the assessments were made and continues until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time, against

all property and rights of property belonging to Frank. 26 U.S.C. § 6322. To the extent Frank is determined to have an ownership interest in the E-3 Ranch through this litigation, the United States' liens attach to that interest, and the United States should be entitled to foreclose its federal tax liens. Therefore,

IT IS HEREBY ORDERED that the Findings and Recommendations of the United States Magistrate Judge (Doc. 208) are **ADOPTED IN FULL**.

IT IS FURTHER ORDERED that the United States' Motion for Partial Summary Judgment. (Doc. 169) is **GRANTED**. Defendant Frank McLain's Motion for Partial Summary Judgment (Doc. 187) is **DENIED**.

DATED this _9th_ day of November, 2020.

/s/
Honorable Susan P. Watters
United States District Judge

APPENDIX J — FINDINGS AND RECOMMENDATIONS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION, FILED AUGUST 3, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CV 16-36-BLG-SPW-TJC

FAITH MCLAIN, CHRISTEEN MCLAIN, JOHN MCLAIN, MOLLY MCLAIN, MIRA MCLAIN, AND MATTHEW MCLAIN, AS BENEFICIARIES OF THE ESTATE OF BERNARD MCLAIN, AND MARY MCLAIN, INDIVIDUALLY AS BENEFICIARY OF THE ESTATE OF BERNARD MCLAIN AND AS TRUSTEE OF THE E-3 RANCH TRUST,

Plaintiffs,

vs.

FRANCIS MCLAIN, INDIVIDUALLY AND AS CO-MANAGER OF TERA BANI RETREAT MINISTRIES, CAROLINE MCLAIN, INDIVIDUALLY AND AS MANAGING DIRECTOR OF TERA BANI RETREAT MINISTRIES, ALAKHI JOY MCLAIN, SOHNJA MAY MCLAIN, AND DANE SEHAJ MCLAIN, AS PURPORTED CERTIFICATE HOLDERS OF THE E-3 RANCH TRUST,

Defendants.

Appendix J

THE UNITED STATES OF AMERICA,

Intervenor Defendant and Counter/Cross-Claimant,

vs.

FAITH MCLAIN, CHRISTEEN MCLAIN, JOHN MCLAIN, MOLLY MCLAIN, MIRA MCLAIN, AND MATTHEW MCLAIN, AS BENEFICIARIES OF THE ESTATE OF BERNARD MCLAIN; AND MARY MCLAIN, AS BENEFICIARY OF THE ESTATE OF BERNARD MCLAIN, AND AS TRUSTEE OF THE E-3 RANCH TRUST,

Counterclaim Defendants and

FRANCIS MCLAIN, INDIVIDUALLY, AND AS CO-MANAGER OF TERA BANI RETREAT MINISTRIES; CAROLINE MCLAIN, INDIVIDUALLY, AND AS MANAGING DIRECTOR OF TERA BANI RETREAT MINISTRIES; AND ALAKHI JOY MCLAIN, SOHNJA MAY MCLAIN, AND DANE SEHAJ MCLAIN, AS BENEFICIARIES OF THE E-3 RANCH TRUST,

Crossclaim Defendants and

AMERICAN BANK OF MONTANA AND BRAD D. HALL

Additional Defendants on United States' claims.

Filed August 3, 2020

Appendix J

FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

The United States has filed an intervenor claim to foreclose federal tax liens against Defendant Francis ("Frank") McLain's interest in a ranch located in the Paradise Valley, known as the E-3 Ranch. (Doc. 20.) Currently, the E-3 Ranch is also the subject of an ownership dispute between two factions of the McLain family.[1]

Judge Watters has referred the case to the undersigned under 28 U.S.C. § 636(b)(1)(B). (Doc. 80.) Presently before the Court are the United States' Motion for Partial Summary Judgment (Doc. 169) and Frank's Motion for Partial Summary Judgment (Doc. 187). The motions are fully briefed and ripe for the Court's review. (Docs. 170, 188, 194, 199, 201, 204, 205, 206.)

Having considered the parties' submissions, the Court **RECOMMENDS** the United States' Motion for Partial Summary Judgment (Doc. 169) be **GRANTED**, and Frank's Motion for Partial Summary Judgment (Doc. 187) be **DENIED**, as set forth below.

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1. The Court has previously described the factual background and relationship of the parties in this case at length in the October 24, 2016 Findings and Recommendations (Doc. 67) and March 14, 2017 Opinion and Order (Doc. 78).

Appendix J

I. BACKGROUND

A. Factual Background[2]

In November of 2008, Frank was convicted of nine counts of Failure to Account for and Pay Over Employment Taxes, in violation of 26 U.S.C. § 7202, in *United States v. Francis L. McLain*, 08-CR-10-PJS-FLN, U.S. Dist. Court, District of Minnesota. (Docs. 121 at 4; 131 at 3.) The nine counts related to Frank's failure to collect, account for, and pay over the employment taxes of Kirpal Nurses, LLC. (*Id.*) The nine counts corresponded to nine quarters spanning from December 31, 2002 through December 31, 2004. (*Id.*) Frank was sentenced to prison and ordered to pay a $75,000 fine and $900 special assessment. (Doc. 94- 5.)

Frank's conviction was affirmed by the Eighth Circuit Court of Appeals in two published opinions. *United States v. McLain*, 646 F.3d 599 (8th Cir. 2011); *United States v. McLain*, 709 F.3d 1198 (8th Cir. 2013). His request for post-conviction relief under 28 U.S.C. § 2255 was also denied. *United States v. McLain*, 2013 WL 5566503 (D. Minn. Oct. 8, 2013).

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2. Federal Rule of Evidence 201 permits a court to take judicial notice of the judicial record of another court. Fed.R.Evid. 201; *Harris v. Cnty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012) ("[The Court] may take judicial notice of undisputed matters of public record, including documents on file in federal or state courts.") (internal citation omitted). Accordingly, the Court will take judicial notice of Frank's prior criminal convictions and appeals in the District of Minnesota, the Eighth Circuit, and the District of Montana.

Appendix J

On October 5, 2009, the United States Attorney's Office for the District of Minnesota filed a Notice of Lien for Fine and/or Restitution with the Park County, Montana Clerk and Recorder in the amount of $75,900. (Doc. 171-3.)

In January 2010, Frank was convicted of Damage to Government Property in violation of 18 U.S.C. § 1361, in *United States v. McLain*, 08-CR-138-BLGRFC, U.S. District Court, District of Montana. Frank was ordered to pay restitution to the United States Forest Service in the amount of $25,000 and a special assessment of $25 was imposed. (*Id.*) He did not appeal his sentence, and his request for post-conviction relief under 28 U.S.C. § 2255 was denied. (*Id.* at Doc. 63, 69.)

On January 24, 2010, the United States Attorney's Office for the District of Montana filed a Notice of Lien for Fine and/or Restitution with the Park County, Montana Clerk and Recorder in the amount of $25,025. (Doc. 171-4.)

On May 5, 2014, the IRS assessed civil penalties against Frank under 26 U.S.C. § 6672, for willful failure to collect, truthfully account for, and pay over the employment taxes of Kirpal Nurses for the same nine quarters that were at issue in his criminal case. (Doc. 171-1) The United States has submitted Forms 4340 for each of the § 6672 assessments against Frank. (*Id.*)

On September 2, 2014, the IRS filed a Notice of Federal Tax Lien for Frank's § 6672 assessments with the Park County, Montana Clerk and Recorder. (Doc. 171-5.) The lien was asserted in the amount of $469,156.24. (*Id.*)

Frank has not fully paid the amounts due on the federal tax lien or the liens for fines and/or restitution. (Doc. 171-2 at 5-6, 9-10.)

The United States now seeks to foreclose on federal tax liens arising from the assessments through a sale of the E-3 Ranch. (Doc. 20.)

B. Procedural Background

Plaintiffs Faith McLain, Christeen McLain, John McLain, Mary McLain, Molly McLain, Mira McLain, and Matthew McLain (collectively the "McLain Plaintiffs") brought this action for declaratory judgment concerning the ownership of the E-3 Ranch against Defendants Frank McLain, Caroline McLain, Alakhi Joy McLain, Sohnja May McLain, and Dane Sehaj McLain (collectively the "McLain Defendants").

The case was originally filed in Montana state court on July 8, 2014. (Doc. 1.) On March 11, 2016, the state court granted the United States' motion to intervene. (Doc. 1-3.) On April 8, 2016, the United States removed, invoking the Court's jurisdiction under 28 U.S.C. § 1441. (Doc. 1.)

On March 15, 2017, the McLain Defendants answered the Intervenor Complaint, and Frank filed a Counterclaim for tax refund against the United States, challenging the underlying tax assessments. (Doc. 79.) On March 6, 2018, the Court dismissed Frank's counterclaim with prejudice. (Doc. 131.)

The United States now requests the Court grant partial summary judgment in its favor, as follows:

1. Determine, adjudge, and decree that the United States has valid and perfected federal tax liens against all property and rights to property of Frank; and

2. To the extent Frank is found at trial to have an ownership interest in the E-3 Ranch at issue in this matter: (a) the United States' federal tax liens attach to the real property; (b) the tax liens shall be foreclosed upon the real property; (c) the real property be sold; and (d) at a later date, the proceeds of the sale be distributed to the United States in satisfaction of the federal tax liens, and all other creditors (including the United State's liens for the fines and/or restitution) after the Court determines the interests of the parties in the real property and their respective priority to a distribution of the proceeds from the sale.

Frank also moves for partial summary judgment, requesting the Court invalidate the federal tax liens and the October 5, 2009 lien for fine and/or restitution arising from his criminal conviction in the District of Minnesota.

II. LEGAL STANDARD

Summary judgment is appropriate where the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Material facts are those which may

affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable fact-finder to return a verdict for the nonmoving party. *Id.* "Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party can satisfy this burden in two ways: (1) by presenting evidence that negates an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *Id.* at 322-23. If the moving party fails to discharge this initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 159-60 (1970).

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In attempting to establish the existence of this factual dispute, the opposing party must "go beyond the pleadings and by 'the depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine

issue for trial.'" *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)). The opposing party cannot defeat summary judgment merely by demonstrating "that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586; *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) ("The mere existence of a scintilla of evidence in support of the nonmoving party's position is not sufficient.") (citing *Anderson*, 477 U.S. at 252).

When making this determination, the Court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. *See Matsushita*, 475 U.S. at 587. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when] he [or she] is ruling on a motion for summary judgment." *Anderson*, 477 U.S. at 255.

III. DISCUSSION

A. The Intervenor Complaint States a Claim Under 28 U.S.C. § 2410

In its motion for partial summary judgment, the United States explains this action involves claims by the United States to assert and protect federal tax liens the Government has against Frank under 28 U.S.C. § 2410. (Doc. 170 at 2.) The McLain Defendants and Frank argue the claims asserted by the United States do not arise under 28 U.S.C. § 2410. They argue § 2410 is not cited or referenced anywhere in the Intervenor Complaint. As

such, they contend the United States' motion for partial summary judgment is premised on a misrepresentation of the claim the United States is asserting. Rather, they argue the standards applicable to a claim under 26 U.S.C. § 7403 should apply.[3] The McLain Defendants and Frank are incorrect.

The Intervenor Complaint states:

> This Intervenor Complaint is brought pursuant to 26 U.S.C. § 7424, which grants the United States the right to intervene in this action because the United States asserts a lien interest in the property that is the subject of this action.

(Doc. 20 at ¶ 2.)

Section 7424, in turn, refers directly to 28 U.S.C. § 2410. Section 7424 provides in relevant part:

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3. Generally, the IRS may enforce a federal tax lien by: (1) bringing an action under 26 U.S.C. § 7403; (2) seeking to have its lien satisfied in proceedings instituted by third parties in which the United States is named as a party pursuant to 28 U.S.C. § 2410; or (3) exercising redemption rights under 26 U.S.C. § 7425(d) if another party forecloses on the property. In an action under § 2410, the merits of the underlying tax assessments are not subject to challenge. *Hughes v. United States*, 953 F.2d 531, 537-38 (9th Cir. 1992). Whereas, in an action under § 7403, the taxpayer may challenge the merits of the assessment. *See e.g., United States v. O'Connor*, 291 F.2d 520, 526 (2d Cir. 1961). Here, § 7403 does not appear anywhere in the Intervenor Complaint.

> If the United States is not a party to a civil action or suit, the United States may intervene in such action or suit to assert any lien arising under this title on the property which is the subject of such action or suit. *The provisions of section 2410 of title 28 of the United States Code . . . shall apply in any case in which the United States intervenes* as if the United States had originally been named a defendant in such action or suit.

26 U.S.C. § 7424 (emphasis added).

Accordingly, the Intervenor Complaint undoubtedly asserts a claim under § 2410.

B. Whether the McLain Defendants Have Standing

Next, the McLain Defendants argue they have standing to challenge the tax assessments in this case because the United States has alleged that Caroline McLain is holding the E-3 Ranch fraudulently as the nominee of Frank McLain. They cite *United States v. Williams*, 514 U.S. 527 (1995) in support of their argument.

In general, third parties are precluded from challenging the tax liabilities of others. *Graham v. United States*, 243 F.2d 919, 922 (9th Cir. 1957) ("We believe that only the taxpayer may question the assessment for taxes . . . "). But the United States Supreme Court has recognized certain exceptions to this general rule.

Williams, 514 U.S. at 539 ("Although parties generally may not challenge the tax liabilities of others, this rule is not unyielding.").

In *Williams*, the Supreme Court held that where a delinquent taxpayer's ex-wife paid her ex-husband's outstanding tax assessment to remove a lien from property he had transferred to her, the ex-wife had standing to sue for a refund. *Williams*, 514 U.S. at 529. The Court determined the ex-wife had stepped into the shoes of her ex-husband by paying the assessment. *Id.* In support of its holding, the Court noted there were other scenarios when a third party might have standing to challenge a taxpayer's liability. For example, the Court indicated a taxpayer's fiduciary could litigate the taxpayer's tax liability. *Id.* The Court also noted that "certain transferees may litigate the tax liabilities of the transferor; if the transfer qualifies as a fraudulent conveyance under state law, the Code treats the transferee as the taxpayer, see 26 U.S.C. § 6901(a)(1)(A)." *Id.* The Court stated in that circumstance, the transferee may contest the transferor's liability in tax court, or in a refund suit. *Id.*

None of the situations described in *Williams* are present in this case. The McLain Defendants have not paid Frank's outstanding tax assessments. None of the McLain Defendants are Frank's fiduciary. Further, the United States has not made assessments against the McLain Defendants under § 6901, and the McLain Defendants have denied they are the beneficiaries of a fraudulent transfer. (Doc. 79.) As such, *Williams* does not provide the McLain Defendants a basis for standing.

But even assuming the McLain Defendants have standing, they may not collaterally attack the underlying tax assessments, as more fully discussed below. *Hughes v. United States*, 953 F.2d 531, 537-38 (9th Cir. 1992).

Further, to the extent the McLain Defendants have standing and are challenging the procedural validity of the liens, they have failed to identify any disputed issue of material fact that would preclude summary judgment. For example, the McLain Defendants purportedly dispute that the September 2, 2014 Notice of Federal Tax Lien "reflects a genuinely valid tax liability, or creates a valid lien." (Doc. 195 at ¶ 4.) But they do not cite or introduce any evidence to support their contention.

C. Whether the United States has a Valid Tax Lien Against the Property of Frank McLain

28 U.S.C. § 2410 governs quite title actions to "real or personal property on which the United States has or claims a mortgage or other tax lien." 28 U.S.C. § 2410. The reach and application of § 2410 is "strictly limited." *Hughes*, 953 F.2d at 538. Section 2410 does not permit the taxpayer to collaterally attack the substantive merits of the underlying tax assessment that led to the lien, but it does permit challenges based on procedural irregularities. *Id. See also Elias v. W.H. Connett*, 908 F.2d 521, 527 (9th Cir. 1990) ("A taxpayer may not use a section 2410 action to collaterally attack the merits of an assessment. Rather, the taxpayer may only contest the procedural validity of a tax lien.") (citations omitted); *Kulawy v. United States*, 917 F.2d 729, 733 (2d Cir. 1990) (stating § 2410 "does not authorize a taxpayer to challenge an IRS assessment of

his tax liability."); *Pollack v. United States*, 819 F.2d 144, 145 (6th Cir. 1987) ("A suit under 28 U.S.C. § 2410 is proper only to contest the procedural regularity of a lien; it may not be used to challenge the underlying tax liability."); *Aqua Bar & Lounge, Inc. v. U. S. Dep't of Treasury*, 539 F.2d 935, 938-39 (3d Cir. 1976) (noting courts "have uniformly held that a taxpayer may not mount a collateral attack on the merits of the tax assessment under §2410").

Accordingly, Frank may not collaterally attack the underlying federal tax assessments. Moreover, even if the Court were to consider Frank's substantive challenge to the assessments, his arguments are foreclosed by prior court rulings.

Frank previously challenged the tax assessments through his counterclaim for refund.[4] (Doc. 79.) The Court found Frank failed to establish the elements necessary to prove his claim.[5] (Docs. 121, 131). As a result, his counterclaim was dismissed with prejudice. (*Id.*)

4. When the IRS has assessed a civil penalty under § 6672, the taxpayer is permitted to challenge the assessment by bringing suit for a tax refund under 26 U.S.C. § 7244. *Sananikone v. United States*, 623 Fed.Appx. 324, 325 (9th Cir. 2015).

5. To establish entitlement to a refund, a taxpayer must show, by a preponderance of the evidence, that "he either (1) is not a 'responsible person' within the meaning of § 6672; or (2) did not act 'willfully' in failing to collect or pay over the withheld taxes." *Sananikone*, 623 Fed.Appx. at 325 (citing *Jones*, 33 F.3d at 1139). The Court previously found Frank's refund claim failed as a matter of law because he was collaterally estopped from claiming he is not a "responsible person," and that he did not act "willfully." (Docs. 121, 131.)

In reaching its decision, the Court noted that Frank raised a myriad of arguments that had already been litigated and decided against him by the District of Minnesota and the Eighth Circuit, including that § 6672 penalties were not legally assessed because the workers of Kirpal Nurses were treated as independent contractors; Frank was not a responsible person who owed employment taxes; a § 6672 assessment was not imposed on him prior to his indictment in the criminal case; he did not act willfully because he relied on the advice of counsel; the § 6672 penalty unconstitutionally violates his freedom to contract; and because he never created a trust fund to collect or account for employment taxes in the first place, a trust fund penalty could not be assessed against him under § 6672. (Doc. 121.)

Here, Frank once again seeks to relitigate these issues, which he unsuccessfully raised in his counterclaim. (*See* Docs. 188, 201.) The Court finds he should be precluded from doing so.

"Under the 'law of the case' doctrine, 'a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case.'" *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (quoting *Thomas v. Bible,* 983 F.2d 152, 154 (9th Cir.)). A court may depart from the law of the case only if: "1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result." *Id.*

None of these conditions are present here. Frank has not persuaded the Court that its decision to dismiss the counterclaim was clearly erroneous. Nor has he shown there has been an intervening change in the law, the evidence, or other circumstances, or that a manifest injustice would result. "Failure to apply the doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of discretion." *Alexander*, 106 F.3d at 876. Accordingly, the Court finds Frank's substantive challenge to the assessments fail as a matter of law.

The Court will therefore turn to the procedural validity of the federal tax lien. Notably, Frank has not raised any procedural challenges to the validity of the lien, or proffered any evidence indicating noncompliance with any IRS procedure.

The United States has submitted Certificates of Assessments, Payments and Other Specified Matters (Forms 4340) for each of the assessments against Frank. (Doc. 171-1.) "Official certificates, such as Form 4340, can constitute proof of the fact that the assessments actually were made." *Hughes*, 953 F.2d at 535. Forms 4340 are admissible as self-authenticating official records of the United States, and carry a presumption of correctness. *Id.* at 540; *Huff v. United States*, 10 F.3d 1440, 1445 (9th Cir. 1993) (recognizing that courts have generally held "IRS Form 4340 provides at least presumptive evidence that a tax has been validly assessed").

The Forms 4340 submitted by the United States show that assessments were made on May 4, 2014 and May 12,

2014, and that notice was provided to Frank. (Doc. 171-1.) The federal tax lien for Frank's § 6672 assessments was recorded on September 2, 2014.[6] Frank admitted that the lien was filed with the Park County Recorder. (Doc. 171-2 at 9.) Frank has also admitted that he has not fully paid the amount due on the federal tax lien. (*Id.* at 9-10.)

Section 6321 provides that "[i]f any person liable to pay any tax neglects or refuses to pay the same after

6. In addition, liens for fines and/or restitution related to Frank's criminal convictions in the District of Minnesota and the District of Montana were recorded on October 5, 2009 and January 25, 2010. The United States is not seeking foreclosure of the liens related to Frank's criminal convictions. (Doc. 205 at 10.) However, it does request those liens, which appear to be senior to the federal tax lien, be paid through the sale of the E-3 Ranch if Frank is found to have an ownership interest in the property. Frank acknowledged that the fines and/or restitution liens were recorded in Park County, and that he has not paid the amounts due in full. (Doc. 171-2 at 4-6.) Frank argues, however, that the judgment of restitution issued by the District of Montana in *United States v. McLain*, 08-CR-138-BLG-RFC, Doc. 58 (D. Mont. Jan. 14, 2010) be set aside because he received ineffective assistance of counsel in that case. Frank was sentenced on January 14, 2010. (*Id.*) He never appealed his sentence. Approximately one year later, he filed a motion for post-conviction relief under 28 U.S.C. § 2255, which was denied. (*Id.* at Doc. 63.) His subsequent request for a certificate of appealability was denied. (*Id.* at 69.) Frank's attempt to challenge the underlying restitution judgment should be denied because he has waived the issue. *See United States v. Gianelli*, 543 F.3d 1178, 1184 (9th Cir. 2008) (rejecting the defendant's argument that the government was barred from enforcing a restitution judgment, and holding the defendant waived his ability to appeal the restitution order by failing to file a direct appeal from the restitution judgment).

demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." 26 U.S.C. § 6321. The language in § 6321 "is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have." *Drye v. United States*, 528 U.S. 49, 56 (1999) (citing *United States v. Nat'l Bank of Commerce*, 472 U.S. 713 (1985)).

Here, the United States has shown that the § 6672 assessments were made, and notice and demand for payment on the assessments was provided to Frank. (Doc. 171-1.) Thereafter, a federal tax lien was recorded. To date, Frank has not fully paid the amount due. Frank has failed to adduce any evidence to raise a genuine dispute of material fact as to the procedural validity of the federal tax lien.

As such, the Court finds the United States has valid tax liens against all property and rights to property belonging to Frank, as of the date the assessments were made. 26 U.S.C. § 6322. To the extent Frank is determined to have an ownership interest in the E-3 Ranch through this litigation, the United States' liens attach to that interest, and the United States should be entitled to foreclose its federal tax liens.

IV. CONCLUSION

Based on the foregoing, **IT IS RECOMMENDED** that:

1. The United States Motion for Partial Summary Judgment (Doc. 169) be **GRANTED**; and

2. Frank McLain's Motion for Partial Summary Judgment (Doc. 187) be **DENIED**.

NOW, THEREFORE, IT IS ORDERED that the Clerk shall serve a copy of the Findings and Recommendations of United States Magistrate Judge upon the parties. The parties are advised that pursuant to 28 U.S.C. § 636, any objections to the findings and recommendations must be filed with the Clerk of Court and copies served on opposing counsel within fourteen (14) days after service hereof, or objection is waived.

IT IS ORDERED.

DATED this 3rd day of August, 2020.

/s/
TIMOTHY J. CAVAN
United States Magistrate Judge

APPENDIX K — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION, FILED MARCH 6, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Civil No. 1:16-cv-00036-SPW

FAITH MCLAIN, CHRISTEEN MCLAIN, JOHN MCLAIN, MOLLY MCLAIN, MIRA MCLAIN, AND MATTHEW MCLAIN, AS BENEFICIARIES OF THE ESTATE OF BERNARD MCLAIN, AND MARY MCLAIN, INDIVIDUALLY AS BENEFICIARY OF THE ESTATE OF BERNARD MCLAIN AND AS TRUSTEE OF THE E-3 RANCH TRUST,

Plaintiffs,

v.

FRANCIS MCLAIN, INDIVIDUALLY AND AS CO-MANAGER OF TERA BANI RETREAT MINISTRIES, CAROLINE MCLAIN, INDIVIDUALLY AND AS MANAGING DIRECTOR OF TERA BANI RETREAT MINISTRIES, ALAKHI JOY MCLAIN, SOHNJA MAY MCLAIN, AND DANE SEHAJ MCLAIN, AS PURPORTED CERTIFICATE HOLDERS OF THE E-3 RANCH TRUST,

Defendants.

Appendix K

THE UNITED STATES OF AMERICA,

Intervenor Defendant and Counter/Cross Claimant,

v.

FAITH MCLAIN, CHRISTEEN MCLAIN, JOHN MCLAIN, MOLLY MCLAIN, MIRA MCLAIN, AND MATTHEW MCLAIN, AS BENEFICIARIES OF THE ESTATE OF BERNARD MCLAIN; AND MARY MCLAIN, AS BENEFICIARY OF THE ESTATE OF BERNARD MCLAIN, AND AS TRUSTEE OF THE E-3 RANCH TRUST,

Counterclaim Defendants,

and

FRANCIS MCLAIN, INDIVIDUALLY, AND AS CO-MANAGER OF TERA BANI RETREAT MINISTRIES; CAROLINE MCLAIN, INDIVIDUALLY, AND AS MANAGING DIRECTOR OF TERA BANI RETREAT MINISTRIES; AND ALAKHI JOY MCLAIN, SOHNJA MAY MCLAIN, AND DANE SEHAJ MCLAIN, AS BENEFICIARIES OF THE E-3 RANCH TRUST,

Crossclaim Defendants,

and

Appendix K

AMERICAN BANK OF MONTANA,

Additional Defendant on United States' Claims

Filed March 6, 2018

Before the Court are United States Magistrate Judge Timothy Cavan's findings and recommendations filed January 17, 2018. (Doc. 121). Judge Cavan recommends this Court grant the United States' motion to dismiss (Doc. 79) Francis ("Frank") McLain's counterclaim seeking a tax refund.

Frank filed timely objections to the findings and recommendations. (Doc. 126 and 128). Frank is entitled to de novo review of those portions of Judge Cavan's findings and recommendations to which Frank properly objects. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3).

The Court has carefully reviewed Frank's multiple objections but declines to address them because they do not relate to the dispositive issue before the Court. At best, Frank's objections can be characterized as arguments for the dismissal of the United States' claim against him. But the objections contain no argument for denying the United States' motion to dismiss Frank's counterclaim.

In 2008, Frank was convicted on nine counts of failing to collect employment taxes in violation of 27 U.S.C. § 7202. (Doc. 121 at 4). In 2014, the United States assessed a civil penalty against Frank under 26 U.S.C. § 6672 for

the same taxes at issue in the 2008 criminal case. (Doc. 121 at 5). Frank's counterclaim seeks a refund for the civil penalty imposed under § 6672. (Doc. 79 at 17-39).

The Internal Revenue Code requires employers to withhold federal income taxes from their employees' wages and pay the taxes over to the Internal Revenue Service. *United States v. Jones*, 33 F.3d 1137, 1139 (9th Cir. 1994). To enforce collection and payment of federal employment taxes, Congress imposed both civil and criminal liability on persons responsible for the collection and payment of such taxes. § 7202, the criminal liability statute, provides:

> Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. § 6672(a), the civil liability statute, provides:

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof,

> shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

Taxpayers are permitted to challenge a civil penalty imposed under § 6672(a) by filing a claim for a tax refund. To establish entitlement to a refund, the taxpayer must show, by a preponderance of the evidence, that he either (1) is not a responsible person within the meaning of § 6672; or (2) did not act willfully in failing to collect or pay over the withheld taxes. *Sananikone v. United States*, 623 Fed.Appx. 324, 325 (9th Cir. 2015) (citing *United States v. Jones*, 33 F.3d 1137, 1139 (9th Cir. 1994)).

Issue preclusion bars the relitigation of issues actually adjudicated in previous litigation between the same parties. *Beauchamp v. Anaheim Union High School Dist.*, 816 F.3d 1216, 1225 (9th Cir. 2016). Issue preclusion applies when: (1) the issue is identical to one alleged in prior litigation; (2) the issue was "actually litigated" in the prior litigation; (3) and the determination of the issue in the prior litigation was "critical and necessary" to the judgment. *Beauchamp*, 816 F.3d at 1225.

Here, issue preclusion bars relitigating the two elements necessary for Frank to establish a claim for relief. In order to convict Frank under § 7202, it was critical and necessary for the jury to determine beyond a reasonable doubt both whether Frank was a person responsible for the collection of employment taxes and whether Frank willfully failed to do so. Because Frank

cannot establish the elements necessary to prove his claim, his counterclaim fails to state a claim for which relief can be granted. The United States' motion to dismiss Frank's counterclaim is granted.

Accordingly, it is hereby ordered:

1. Judge Cavan's findings and recommendations (Doc. 121) are adopted in full;

2. Frank's objections are overruled;

3. The United States' motion to dismiss (Doc. 79) is granted; and

3. Frank's counterclaim (Doc. 94) is dismissed with prejudice

Dated this 6th day of March, 2018.

/s/ Susan P. Watters
Susan P. Watters
United States District Court Judge

APPENDIX L — FINDINGS AND RECOMMENDATIONS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION, FILED JANUARY 17, 2018

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION

CV 16-36-BLG-SPW-TJC

FAITH MCLAIN, CHRISTEEN MCLAIN, JOHN MCLAIN, MOLLY MCLAIN, MIRA MCLAIN, AND MATTHEW MCLAIN, AS BENEFICIARIES OF THE ESTATE OF BERNARD MCLAIN, AND MARY MCLAIN, INDIVIDUALLY AS BENEFICIARY OF THE ESTATE OF BERNARD MCLAIN AND AS TRUSTEE OF THE E-3 RANCH TRUST,

Plaintiffs,

vs.

FRANCIS MCLAIN, INDIVIDUALLY AND AS CO-MANAGER OF TERA BANI RETREAT MINISTRIES, CAROLINE MCLAIN, INDIVIDUALLY AND AS MANAGING DIRECTOR OF TERA BANI RETREAT MINISTRIES, ALAKHI JOY MCLAIN, SOHNJA MAY MCLAIN, AND DANE SEHAJ MCLAIN, AS PURPORTED CERTIFICATE HOLDERS OF THE E-3 RANCH TRUST,

Defendants.

Appendix L

THE UNITED STATES OF AMERICA,

Intervenor Defendant and Counter/Cross-Claimant,

vs.

FAITH MCLAIN, CHRISTEEN MCLAIN, JOHN MCLAIN, MOLLY MCLAIN, MIRA MCLAIN, AND MATTHEW MCLAIN, AS BENEFICIARIES OF THE ESTATE OF BERNARD MCLAIN; AND MARY MCLAIN, AS BENEFICIARY OF THE ESTATE OF BERNARD MCLAIN, AND AS TRUSTEE OF THE E-3 RANCH TRUST,

Counterclaim Defendants and

FRANCIS MCLAIN, INDIVIDUALLY, AND AS CO-MANAGER OF TERA BANI RETREAT MINISTRIES; CAROLINE MCLAIN, INDIVIDUALLY, AND AS MANAGING DIRECTOR OF TERA BANI RETREAT MINISTRIES; AND ALAKHI JOY MCLAIN, SOHNJA MAY MCLAIN, AND DANE SEHAJ MCLAIN, AS BENEFICIARIES OF THE E-3 RANCH TRUST,

Crossclaim Defendants and

AMERICAN BANK OF MONTANA AND BRAD D. HALL,

Additional Defendants on United States' claims.

Appendix L

FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

The United States has filed an intervenor claim to foreclose federal tax liens against Defendant Francis ("Frank") McLain's interest in a ranch located in the Paradise Valley, known as the E-3 Ranch. (Doc. 20.) Currently, the E-3 Ranch is also the subject of an ownership dispute between two factions of the McLain family.[1] In response, Frank has filed a Counterclaim against the United States seeking a tax refund. (Doc. 79.)

Judge Watters has referred the case to the undersigned under 28 U.S.C. § 636(b)(1)(B). (Doc. 80.) Presently before the Court is the United States' Motion to Dismiss the Counterclaim. (Doc. 94.) The motion is fully briefed and ripe for the Court's review. (Docs. 94, 109, 115.)

Having considered the parties' submissions, the Court **RECOMMENDS** the United States' Motion to Dismiss be **GRANTED**, as set forth below.

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1. The Court has previously described the factual background and relationship of the parties in this case at length in the October 24, 2016 Findings and Recommendations (Doc. 67) and March 14, 2017 Opinion and Order (Doc. 78).

Appendix L

I. BACKGROUND

A. Factual Background[2]

In November of 2008, Frank was convicted of nine counts of Failure to Account for and Pay Over Employment Taxes, in violation of 26 U.S.C. § 7202, in *United States v. Francis L. McLain*, 08-CR-10-PJS-FLN, U.S. Dist. Court, District of Minnesota. (Doc. 79 at ¶ 11; Doc. 94-3; 94-4.) The nine counts related to Frank's failure to collect, account for, and pay over the employment taxes of Kirpal Nurses, LLC. (Doc. 94-3.) The nine counts corresponded to nine quarters spanning from December 31, 2002 through December 31, 2004. (*Id.*)

Frank's conviction was affirmed by the Eighth Circuit Court of Appeals in two published opinions. *United States v. McLain*, 646 F.3d 599 (8th Cir. 2011); *United States v. McLain*, 709 F.3d 1198 (8th Cir. 2013). His request for

2. The United States requests the Court take judicial notice of Frank's criminal conviction in *United States v. McLain*, Case No. 08-cr-00010 (D. Minn. 2011), his subsequent appeal in *United States v. McLain*, Nos. 08-3192, 09-1472, 09-3292 and 11-3402 (8th Cir.), and the trial and appellate court's related findings of fact and legal conclusions. (Doc. 94-1 at 5, n.1.) In his response brief, Frank does not object to the Court taking judicial notice of the prior criminal proceedings. (Doc. 109.) Federal Rule of Evidence 201 permits a court to take judicial notice of the judicial record of another court. Fed.R.Evid. 201; *Harris v. Cnty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012) ("[The Court] may take judicial notice of undisputed matters of public record, including documents on file in federal or state courts.") (internal citation omitted). Accordingly, the United States' request is granted, and the Court takes judicial notice of Frank's prior criminal conviction and appeal.

post-conviction relief under 28 U.S.C. § 2255 was also denied. *United States v. McLain*, 2013 U.S. Dist. LEXIS 145142, 2013 WL 5566503 (D. Minn. Oct. 8, 2013).

In May 2014, the United States assessed civil penalties against Frank under 26 U.S.C. § 6672, for willful failure to collect, truthfully account for, and pay over the employment taxes of Kirpal Nurses for the same nine quarters that were at issue in his criminal case. (Doc. 79 at ¶ 39; Doc. 20 at ¶ 12.)

Franks submitted an administrative claim to the IRS for a refund of the amounts he paid towards the § 6672 penalties. (Doc. 79 at ¶ 51.) The IRS denied the administrative claim on September 14, 2016. (*Id.* at ¶ 61.)

The United States now seeks to foreclose on federal tax liens arising from the assessments through a sale of the E-3 Ranch. (Doc. 20.)

B. Procedural Background

Plaintiffs Faith McLain ("Faith"), Christeen McLain ("Christeen"), John McLain ("John"), Mary McLain ("Mary"), Molly McLain ("Molly"), Mira McLain ("Mira"), and Matthew McLain ("Matthew") brought this action for declaratory judgement concerning the ownership of the E-3 Ranch against Defendants Frank McLain ("Frank"), Caroline McLain ("Caroline"), Alakhi Joy McLain ("Alakhi"), Sohnja May McLain ("Sohnja"), and Dane Sehaj McLain ("Dane").

Appendix L

The case was originally filed in the Montana state court on July 8, 2014. (Doc. 1.) On March 11, 2016, the state court granted the United States' motion to intervene. (Doc. 1-3.) On April 8, 2016, the United States removed, invoking the Court's jurisdiction under 28 U.S.C. § 1441. (Doc. 1.)

Thereafter, Defendants filed a motion to dismiss the United States' Intervenor Complaint.[3] (Doc. 23.) On February 23, 2017, Judge Watters adopted the Findings and Recommendations of Magistrate Judge Ostby and denied Defendants' motion to dismiss the United States' Intervenor Complaint.[4] (Doc. 75.) On March 15, 2017, Defendants answered the Intervenor Complaint, and Frank filed a Counterclaim against the United States. (Doc. 79.)

In the Counterclaim, Frank asserts a claim for tax refund under 26 U.S.C. § 7422 relating to the § 6672 assessments levied against him.[5] (Doc. 79.)

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3. Plaintiffs and Defendants also filed cross-motions for summary judgment regarding adverse possession (Docs. 23, 30), and Plaintiffs filed a motion for summary judgment regarding the validity of the E-3 Ranch Trust. (Doc. 36.)

4. On February 23, 2017, Judge Watters also adopted the Findings and Recommendations of Magistrate Judge Ostby denying the parties' cross-motions for summary judgment regarding adverse possession (Doc. 75), and on March 14, 2017, granted Plaintiff's motion for summary judgment regarding the validity of the E-3 Trust. (Doc. 78.)

5. Frank alleges he has paid $2,215.65 towards the § 6672 assessments. (Doc. 79 at ¶¶ 41, 54.) $1,765.65 was levied from his

On June 16, 2016, the United States filed the instant Motion to Dismiss the Counterclaim. (Doc. 94.)

II. LEGAL STANDARD

"Dismissal under Rule 12(b)(6) is proper when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory." *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir.

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income tax refunds and social security checks, and Frank paid a nominal $50 payment for each of the nine quarters at issue. (*Id.*) The Government alleges that as of January 15, 2016, the unpaid balance Frank owes the IRS is approximately $492,451.38. (Doc. 20 at ¶12.) Generally, the entire amount of the tax assessment must be made as a prerequisite to bringing a refund claim in federal court. *Flora v. United States*, 362 U.S. 145, 80 S. Ct. 630, 4 L. Ed. 2d 623, 1960-1 C.B. 660 (1960); *Boynton v. United States*, 566 F.2d 50 (9th Cir.1977) ("It has long been established that partial payment of assessed taxes or a proposed deficiency is insufficient to support jurisdiction on the District Court of a refund suit."). There is an exception, however, for divisible tax assessments, such as those imposed under § 6672. *Boynton*, 566 F.2d at 52. "A taxpayer assessed under section 6672 need only pay the divisible amount of the penalty assessment attributable to a single individual's withholding before instituting a refund action." *Id.* Here, Frank alleges generally that he has paid $2,215.65 towards the § 6672 assessment. (Doc. 79 at ¶¶ 41, 54.) However, he does not tie the payment to any individual employee's withholding. Frank's failure to plead necessary facts to show the amount he allegedly paid the IRS represents withholding taxes of any one employee casts doubt on the Court's jurisdiction over the Counterclaim. Even assuming the pleading defect does not deprive the Court of jurisdiction, the Court nevertheless finds Frank fails to state a claim upon which relief can be granted.

2013) (quoting *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008)). The Court's standard of review under Rule 12(b)(6) is informed by Rule 8(a)(2), which requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 677-678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Fed. R. Civ. P 8(a)).

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A plausibility determination is context specific, and courts must draw on judicial experience and common sense in evaluating a complaint. *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014).

A court considering a Rule 12(b)(6) motion must accept as true the allegations of the complaint and must construe those allegations in the light most favorable to the nonmoving party. *See e.g., Wyler Summit P'ship v. Turner Broad. Sys., Inc.* 135 F.3d 658, 661 (9th Cir. 1998). However, "bare assertions . . . amount[ing] to nothing more than a 'formulaic recitation of the elements'...for the purposes of ruling on a motion to dismiss are not entitled to an assumption of truth." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555). Such assertions do nothing more than state a legal

conclusion, even if the conclusion is cast in the form of a factual allegation. *Id.*

As a general rule, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion without converting the motion into one for summary judgment. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (citation omitted). There is an exception to this rule, however, where a court takes judicial notice of matters of public record. *Id.* at 688-89. Taking judicial notice does not convert a motion to dismiss into one for summary judgment. *See United States v. 14.02 Acres of Land More or Less in Fresno Cnty.*, 547 F.3d 943, 955 (9th Cir. 2008).

III. DISCUSSION

The United States moves to dismiss Frank's Counterclaim on grounds that it is barred by collateral estoppel and does not state any plausible claim for relief. The United States contends Frank's arguments in support of his refund claim were either raised and adjudicated in his criminal case, or do not provide any basis to support a claim for a refund.

Frank principally alleges he is entitled to a tax refund on grounds that the § 6672 penalties were not legally assessed because the workers of Kirpal Nurses were treated as independent contractors. Frank raises a myriad of other arguments including: that he was not a responsible person who owed employment taxes; a § 6672 assessment was not imposed on him prior to his indictment

in the criminal case; he did not act willfully because he relied on the advice of counsel; and the § 6672 penalty unconstitutionally violates his freedom to contract. Frank further contends that because he never created a trust fund to collect or account for employment taxes in the first place, a trust fund penalty cannot be assessed against him under § 6672.

The Internal Revenue Code requires employers to withhold Federal Insurance Contributions Act ("FICA") and federal income taxes from their employees' wages, and pay the amounts over to the IRS. *United States v. Jones*, 33 F.3d 1137, 1139 (9th Cir. 1994); 26 U.S.C. §§ 3102 (requires employers to withhold FICA taxes); § 3402 (requires employers to withhold income taxes); § 6302 (requires employers to deposit the withheld taxes either monthly or semi-weekly). The withheld taxes are often referred to as "trust fund taxes." *Slodov v. United States*, 436 U.S. 238, 243, 98 S. Ct. 1778, 56 L. Ed. 2d 251 (1978).

The IRS has several means at its disposal to ensure that federal employment taxes are paid, including holding the officers or employees of an employer personally responsible for willfully failing to effectuate the collection and payment of trust fund taxes. *Slodov*, 436 U.S. at 243-245. Criminal liability may be imposed under 26 U.S.C. § 7202, and civil penalties[6] may be may be assessed under 26 U.S.C. § 6672. *Id.* at 245. Section 7202 provides:

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6. "Although denominated a "penalty" in the statute, the liability imposed under section 6672 is not penal in nature, but rather is a means of ensuring that withholding taxes are paid." *United States v. Pepperman*, 976 F.2d 123, 126 (3d Cir. 1992).

> Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. § 7202.

Under § 6672, "the IRS may assess a 100% penalty on responsible persons who willfully fail to collect, account for, and pay over the taxes to the United States." *Jones*, 33 F.3d at 1139; *Slodov*, 436 U.S. at 245. Section 6672 provides:

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

26 U.S.C. § 6672(a). A "person" includes "an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is

under a duty to perform the act in respect of which the violation occurs." 26 U.S.C. § 6671.

When the IRS has assessed a civil penalty under § 6672, the taxpayer is permitted to challenge the assessment by bringing suit for a tax refund under 26 U.S.C. § 7422. *Sananikone v. United States*, 623 Fed. Appx. 324, 325 (9th Cir. 2015). To establish entitlement to a refund, the taxpayer must show, by a preponderance of the evidence, that "he either (1) is not a 'responsible person' within the meaning of § 6672; or (2) did not act 'willfully' in failing to collect or pay over the withheld taxes." *Id.* (citing *Jones*, 33 F.3d at 1139). "The taxpayer has the burden of proof in such actions." *Id.*

The Court finds Frank's refund claim fails as a matter of law because he is collaterally estopped from claiming he is not a "responsible person," and that he did not act "willfully." These issues have already been determined in his criminal case.

"It is well established that a prior criminal conviction may work an estoppel in favor of the Government in a subsequent civil proceeding . . . In the case of a criminal conviction based on a jury verdict of guilty, issues which were essential to the verdict must be regarded as having been determined by the judgment." *Emich Motors Corp. v. Gen. Motors Corp.*, 340 U.S. 558, 568-69, 71 S. Ct. 408, 95 L. Ed. 534 (1951). In order for collateral estoppel to apply: (1) the issue must be identical to the one alleged in prior litigation; (2) the issue must have been 'actually litigated' in the prior litigation; and (3) the determination

of the issue in the prior litigation must have been 'critical and necessary' to the judgment." *Beauchamp v. Anaheim Union High School Dist.*, 816 F.3d 1216, 1225 (9th Cir. 2016).

Here, the issues of whether Frank was a "responsible person," and whether he acted "willfully" in failing to collect or pay over withheld taxes, are identical to the issues decided in his criminal case. His criminal conviction under § 7202 and civil liability under § 6672 are based on the exact same conduct, for the exact same time periods. As the United States Supreme Court has noted, § 6672 tracks the wording of § 7202. *See Slodov*, 436 U.S. at 245. Both § 7202 and § 6672 require a finding that Frank was a person "required to collect, account for, and pay over" the employment taxes of Kirpal Nurses. *Compare* 26 U.S.C. §§ 7202 and § 6672. Both statutes also require a finding that Frank "willfully fail[ed] to collect such tax or truthfully account for and pay over such tax." *Id.*

In Frank's criminal case, the issues of responsibility and willfulness were determined by a jury beyond a reasonable doubt, and his conviction was upheld on appeal and collateral attack. *See United States v. McLain ("McLain I")*, 597 F. Supp. 2d 987 (D. Minn. 2009); *United States v. McLain ("McLain II")*, 646 F.3d 599 (8th Cir. 2011); *United States v. McLain ("McLain III")*, 709 F.3d 1198 (8th Cir. 2013); *United States v. McLain ("McLain IV")*, 2013 U.S. Dist. LEXIS 145142, 2013 WL 5566503 (D. Minn. Oct. 8, 2013).

The arguments Frank asserts regarding these issues were also considered and resolved by the District Court

and the Eighth Circuit. For example, Frank's argument that he was not the employer, and therefore cannot be liable for failing to account for and pay over employment taxes was considered and rejected. *McLain I*, 597 F. Supp. 2d at 989-990 (finding McLain could be a person required to "collect, account for and pay over" taxes even though he did not personally employ any of the staff of Kirpal Nurses) *affirmed McLain II*, 646 F.3d at 603. Likewise, Frank's contention that he did not act willfully because the nurses were independent contractors and not employees was considered and rejected. *United States v. McLain*, Case No. 08-CR-10-PJS-FLN, Docket No. 234, 2009 U.S. Dist. LEXIS 62532 (D. Minn. July 20, 2009) (finding "by a preponderance of the evidence, that the nurses who worked for Kirpal were employees of Kirpal rather than independent contractors") *affirmed McLain II*, 646 F.3d at 600.

Frank's ancillary arguments were also rejected. *See e.g. McLain II*, 646 F.3d at 602 (rejecting Frank's argument that the Government was required to prove a tax deficiency in the criminal case); *McLain IV*, 2013 U.S. Dist. LEXIS 145142, 2013 WL 5566503 at *1, *3 (rejecting Frank's argument that the government's refusal to accept his treatment of the nurses as independent contractors violates the Contract Cause, and finding the jury was thoroughly instructed on willfulness, including that it could consider Frank's reliance on the advice of counsel).

Therefore, the Court finds the two issues Frank must plead and prove to establish entitlement to a tax refund were already litigated between the parties and decided against Frank. Thus, his claim is barred by collateral estoppel.

In addition, the Court does not find any of Frank's other allegations are sufficient to state a claim. Frank contends that he cannot be penalized under § 6672 because he never created a trust fund to collect or account for employment taxes in the first place. Frank's argument, although creative, is contradicted by a plain reading of the statute, which specifically imposes liability on any person "who willfully *fails to collect* such tax, or truthfully account for and pay over such tax. § 6672(a) (emphasis added). There is no requirement under § 6672, that a trust fund be created as a prerequisite to liability, and Frank has not cited any authority in support of such a requirement.[7] Frank's interpretation of § 6672, therefore, does not give rise to a plausible claim for relief. Frank's other allegations, airing grievances about his conviction, and complaining about his interactions and correspondence with IRS employees are irrelevant, and insufficient to support his claim for a tax refund.

Accordingly, the Court finds Frank's claim for a tax refund fails as a matter of law, and the United States Motion to Dismiss should be granted.

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7. In *Slodov*, the United States Supreme Court explained that FICA taxes and the withholding tax on wages applicable to individual income taxes are "commonly referred to as 'trust fund taxes,' reflecting the Code's provision that such withholdings or collections are deemed to be a 'special fund in trust for the United States.'" *Slodov*, 436 U.S. at 243. However, the Court explained that "[t]here is no general requirement that the withheld sums be segregated from the employer's general funds," or "be deposited in a separate bank account until required to be paid to the Treasury." *Id.*

The Court further finds that any amendment to Frank's Counterclaim would be futile because the essential elements of his tax refund claim are barred by collateral estoppel. "Proposed amendments are futile if the claims would be barred by res judicata, collateral estoppel, or statutory preclusion. *See Russell v. United States Dept. of the Army*, 191 F.3d 1016, 1019-20 (9th Cir.1999) (statutory preclusion); *Onkvisit v. Board of Trustees of California State University*, 2011 U.S. Dist. LEXIS 42401, 2011 WL 2194018, *2 (N.D.Cal.2011) (res judicata); and *Rainwater v. Banales*, 2008 U.S. Dist. LEXIS 101096, 2008 WL 5233138, *9 n. 6 (C.D.Cal.2008) (collateral estoppel). A denial based on futility is appropriate if the pleading "would not be saved by any amendment." *Carvalho v. Equifax Information Services, LLC*, 629 F.3d 876, 893 (9th Cir.2010) (citation and quotation omitted)."

IV. CONCLUSION

Based on the foregoing, **IT IS RECOMMENDED** that the United States Motion to Dismiss the Counterclaim (Doc. 94) be **GRANTED** with prejudice.

NOW, THEREFORE, IT IS ORDERED that the Clerk shall serve a copy of the Findings and Recommendations of United States Magistrate Judge upon the parties. The parties are advised that pursuant to 28 U.S.C. § 636, any objections to the findings and recommendations must be filed with the Clerk of Court and copies served on opposing counsel within fourteen (14) days after service hereof, or objection is waived.

Appendix L

IT IS ORDERED.

DATED this 17th day of January, 2018.

/s/ Timothy J. Cavan
TIMOTHY J. CAVAN
United States Magistrate Judge

APPENDIX M — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION, FILED FEBRUARY 23, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Civil No. 1:16-cv-00036-SPW

FAITH MCLAIN, CHRISTEEN MCLAIN, JOHN MCLAIN, MOLLY MCLAIN, MIRA MCLAIN, AND MATTHEW MCLAIN, AS BENEFICIARIES OF THE ESTATE OF BERNARD MCLAIN, AND MARY MCLAIN, INDIVIDUALLY AS BENEFICIARY OF THE ESTATE OF BERNARD MCLAIN AND AS TRUSTEE OF THE E-3 RANCH TRUST,

Plaintiffs,

v.

FRANCIS MCLAIN, INDIVIDUALLY AND AS CO-MANAGER OF TERA BANI RETREAT MINISTRIES, CAROLINE MCLAIN, INDIVIDUALLY AND AS MANAGING DIRECTOR OF TERA BANI RETREAT MINISTRIES, ALAKHI JOY MCLAIN, SOHNJA MAY MCLAIN, AND DANE SEHAJ MCLAIN, AS PURPORTED CERTIFICATE HOLDERS OF THE E-3 RANCH TRUST,

Defendants.

Appendix M

THE UNITED STATES OF AMERICA,

Intervenor Defendant
and Counter/Cross Claimant,

v.

FAITH MCLAIN, CHRISTEEN MCLAIN, JOHN MCLAIN, MOLLY MCLAIN, MIRA MCLAIN, AND MATTHEW MCLAIN, AS BENEFICIARIES OF THE ESTATE OF BERNARD MCLAIN; AND MARY MCLAIN, AS BENEFICIARY OF THE ESTATE OF BERNARD MCLAIN, AND AS TRUSTEE OF THE E-3 RANCH TRUST,

Counterclaim Defendants,

and

FRANCIS MCLAIN, INDIVIDUALLY, AND AS CO-MANAGER OF TERA BANI RETREAT MINISTRIES; CAROLINE MCLAIN, INDIVIDUALLY, AND AS MANAGING DIRECTOR OF TERA BANI RETREAT MINISTRIES; AND ALAKHI JOY MCLAIN, SOHNJA MAY MCLAIN, AND DANE SEHAJ MCLAIN, AS BENEFICIARIES OF THE E-3 RANCH TRUST,

Crossclaim Defendants,

and

Appendix M

AMERICAN BANK OF MONTANA,

Additional Defendant
on United States' Claims.

February 22, 2017, Decided
February 23, 2017, Filed

ORDER

On July 8, 2014, the McLain Plaintiffs brought this declaratory judgment action in Montana state court against the McLain Defendants. On March 11, 2016, the state court granted the United States' Motion to Intervene. (Doc. 1-3). On April 8, 2016, the United States removed the case to federal court, invoking this Court's jurisdiction under 28 U.S.C. § 1441. (Doc. 1).

The principal issue in this case is the ownership of a ranch located in the Paradise Valley known as the E-3 Ranch. The McLain Plaintiffs and McLain Defendants filed cross-motions for summary judgment concerning whether one family member owns the ranch through adverse possession. (Docs. 23 and 30). The McLain Defendants also filed a motion to dismiss the United States' Intervenor Complaint. (Doc. 23).

On October 24, 2016, United States Magistrate Judge Carolyn Ostby issued her Findings and Recommendations recommending that this Court deny the cross-motions for summary judgment and deny the motion to dismiss. (Doc. 67). The McLain Defendants timely filed Objections to the Findings and Recommendations. (Doc. 69).

Appendix M

I. Statement of facts

The McLain Defendants do not object to the factual history contained in the Background section of Judge Ostby's Findings and Recommendations. Judge Ostby's Background section is therefore adopted in full.

II. Applicable law

A. Standard of review

A district court reviews de novo any part of a Magistrate Judge's Findings and Recommendations to which there has been proper objections. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3).

B. Summary judgment standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable fact-finder to return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248. If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue of fact exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

C. Motion to dismiss standard

A motion to dismiss for failure to state a claim is governed by Fed. R. Civ. P. 12(b)(6). Dismissal under Rule 12(b)(6) is proper only when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory. *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013). 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, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

III. Discussion

The McLain Defendants make two objections to Judge Ostby's Findings and Recommendations. First, the McLain Defendants argue the undisputed facts establish Caroline McLean obtained ownership of the E-3 Ranch by adverse possession. Second, the McLain Defendants argue the United States' Intervenor Complaint should be dismissed as a matter of law on several grounds: (a) the enforcement of a trust fund recovery penalty against Frank McLain violates Double Jeopardy; (b) the United States' claims are untimely; and (c) the United States' alternate claim to foreclose on Frank McLain's interest in Bernard McLain's estate should be dismissed because such an interest is not a cognizable property interest that can be foreclosed on.

A. Disputed facts prevent summary judgment on the McLain Defendants' adverse possession claim

In Montana, a party asserting a claim for adverse possession must prove the possession was actual, visible, exclusive, hostile, and continuous for the statutory period. *Tester v. Tester*, 2000 MT 130, 300 Mont. 5, 3 P.3d 109, 114 (Mont. 2000). An adverse possession claim may be defeated with evidence that the use was permissive. *Lyndes v. Green*, 2014 MT 110, 374 Mont. 510, 325 P.3d 1225, 1229 (Mont. 2014). Permission means more than mere acquiescence; it denotes the grant of a permission in fact or a license. *Lyndes*, 325 P.3d at 1230 (citing *Cremer v. Cremer Rodeo Land and Livestock Co.*, 192 Mont. 208,

627 P.2d 1199, 1201 (Mont. 1981)). Permissive use can ripen into hostile use if the possessor repudiates the permissive possession and gives the owner actual notice. *Martin v. Randono*, 175 Mont. 321, 573 P.2d 1156, 1160 (Mont. 1978).

Judge Ostby concluded disputed facts prevented summary judgment on the hostile element of the McLain Defendants' adverse possession claim. The McLain Defendants object to Judge Ostby's conclusion, arguing there is no evidence they ever received permission to use the E-3 Ranch. The Court agrees with Judge Ostby because, whether it is ultimately determined that the E-3 Ranch is owned by Bernard's estate or the E-3 Ranch Trust, numerous pieces of evidence, including the McLain Defendants' own affidavits, create disputed issues of fact regarding whether the McLain Defendants' possession of the E-3 Ranch was permissive.

For example, Frank McLain's affidavit contradicts itself. First, Frank's affidavit states the quitclaim of the E-3 Ranch to his parents "was always intended to be a temporary arrangement" and that his parents had agreed to quitclaim the E-3 Ranch back to Frank and Caroline McLain after Frank repaid the debt owed to his parents. (Doc. 3-3 at 44). Frank's affidavit continues that "[m]y parents understood that they were holding the title on a temporary basis" and "[t]here was never any question that my wife and I would continue to possess and control the property after [the quitclaim] of the E-3 Ranch to my parents." (Doc. 3-3 at 44). Next, in contradiction to those statements, Frank's affidavit states neither he nor his wife "ever sought or received any permission from either of my

parents to possess and control the property." (Doc. 3-3 at 44). Frank's affidavit does not explain how his or his wife's possession was without permission when his parents had apparently agreed to a temporary arrangement wherein there was no question Frank and his wife would continue to possess the property but the property would not be quitclaimed back to Frank until his debt was repaid.

Caroline's affidavit contains a similar contradiction. First, Caroline's affidavit states the quitclaim of the E-3 Ranch to Frank's parents "was always intended to be temporary . . . [they] understood that the property ultimately belonged to my husband Frank and me, and had verbally agreed with Frank to quitclaim it back to us or to the E-3 Ranch Trust once Frank's debt to them was repaid." (Doc. 3-3 at 88-89). Next, in contradiction to that statement, Caroline's affidavit states Frank's parents did not "give Frank or me express permission to possess and control the property." (Doc. 3-3 at 89). Similar to Frank's affidavit, Caroline's affidavit does not reconcile the absence of permission with the apparent temporary agreement regarding possession.

Mary's affidavit also indicates the McLain Defendants' possession was not hostile. Mary's affidavit states that, as power of attorney to Bernard McLain and as a Trustee of the E-3 Ranch Trust, she always believed that the McLain Defendants' use of the E-3 Ranch was with the permission of Bernard and/or the E-3 Ranch Trust. (Doc. 32-1 at 4).

Assuming the E-3 Ranch belongs to Bernard's estate, the affidavits of Frank, Caroline, and Mary create

disputed issues of fact regarding the hostile element of the McLain Defendants' adverse possession claim. *Lyndes*, 325 P.3d at 1229. The Court is unaware of any undisputed facts that establish the alleged permissive use ripened into a hostile use for the required statutory period. *Martin*, 573 P.2d at 1160.

Turning to the alternate theory that the E-3 Ranch belongs to the E-3 Ranch Trust, Frank's affidavit states he was the "managing director" of the E-3 Ranch Trust with duties to "protect the trust's assets for its Certificate Holders." (Doc. 3-3 at 43). Assuming the E-3 Ranch Trust holds title to the E-3 Ranch, the McLain Defendants do not explain how Frank or his wife possessed the E-3 Ranch without the E-3 Ranch Trust's permission when Frank, as managing director of the trust, was charged with "protect[ing] the trust's assets."

The Court agrees with Judge Ostby that disputed issues of fact prevent summary judgment on the McLain Defendants' adverse possession claim. The McLain Defendants' objection is overruled.

B. The United States' Intervenor complaint is not barred by Double Jeopardy, the statute of limitations, or due to a lack of a cognizable property interest

Judge Ostby recommended against dismissing the United States' Intervenor complaint. The McLain Defendants object, arguing the United States' Intervenor Complaint should be dismissed as a matter of law on

several grounds: (1) the enforcement of a trust fund recovery penalty against Frank McLain violates Double Jeopardy; (2) the United States' claims are untimely; and (3) the United States' alternate claim to foreclose on Frank McLain's beneficial interest in Bernard McLain's estate should be dismissed because such an interest is not a cognizable property interest that can be foreclosed on. The Court agrees with Judge Ostby.

1. The Double Jeopardy Clause does not bar the United States' claim because the United States' claim is a civil penalty not a criminal punishment

The Double Jeopardy Clause provides "No personal shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V. The Clause does not prohibit "all additional sanctions" for the same conduct; rather, it protects only against the imposition of multiple criminal punishments for the same offense. *Hudson v. U.S.*, 522 U.S. 93, 99, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). The Supreme Court has adopted a two-step process to determine whether a penalty is civil or criminal. First, the Court must determine under statutory construction principles whether Congress indicated an express or implied preference for one label or the other. *Hudson*, 522 U.S. at 99. Next, even if Congress indicated the penalty is civil, the Court must evaluate whether the statutory scheme is so punitive either in purpose or effect that it transforms the intended civil sanction into a criminal penalty. *Hudson*, 522 U.S. at 99. In making the latter determination the Court should consider:

(1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment, retribution, and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. *Hudson*, 522 U.S. at 99-100.

Judge Ostby concluded Congress intended 26 U.S.C. § 6672 to be a civil penalty and that § 6672 is not so punitive as to transform it into a criminal penalty. The McLain Defendants object, arguing the United States' claim is an attempt to punish Frank McLain for conduct for which he has already been convicted and sentenced to prison under 26 U.S.C. § 7202.

Regarding *Hudson*'s first step, the Court agrees with Judge Ostby that Congress intended § 6672 to be a civil penalty. Whereas § 7202 falls under Title 26's chapter titled "Crimes, Other Offense, and Forfeitures," § 6672 falls under Title 26's chapter titled "Additions to the Tax, Additional Amounts, and Assessable Penalties." Had Congress intended the penalty imposed by § 6672 to be a criminal punishment it would have likely placed the statute under Title 26's criminal chapter and attached any penalties to a finding of guilt.

Turning to *Hudson*'s second step, every court to consider whether § 6672 imposes a criminal punishment

has found it does not. *See U.S. v. Pepperman*, 976 F.2d 123, 127 (3rd Cir. 1992) ("[T]he liability imposed under section 6672 is not penal in nature, but rather is a means of ensuring that withholding taxes are paid."); *Erwin v. U.S.*, 591 F.3d 313, 319 (4th Cir. 2010) ("§ 6672 does not actually punish; rather, it brings the government only the same amount to which it was entitled by way of the tax.") (internal quotations and citation omitted); *Turnbull v. U.S.*, 929 F.2d 173, 178 n. 6 (5th Cir. 1991) ("[T] he government only collects the taxes due, not both the taxes due and an additional penalty equal to the amount of the taxes. Therefore, section 6672 is simply a means of ensuring that the tax which is unquestionably owed the Government is paid.") (internal quotations and citation omitted); *Finley v. U.S.*, 123 F.3d 1342, 1348 (10th Cir. 1997) ("§ 6672 does not raise a concern regarding the protection of a taxpayer from harsh, additional penalties imposed for purposes of punishment and deterrence . . . ."). The McLain Defendants cite *Mortenson v. National Union Fire Ins. Co. of Pittsburgh, PA.*, 249 F.3d 667 (7th Cir. 2001), in support of their position. However, contrary to the McLain Defendants' position, and consistent with the other circuits, *Mortenson* states "the section 6672(a) penalty is not a *criminal* penalty . . . ." 249 F.3d at 670 (emphasis original).

The McLain Defendants also argue the § 6672 penalty is punitive as applied because the Government stipulated in the criminal case that no tax loss occurred, thus any penalty imposed would not be to recover tax loss. The McLain Defendants mischaracterize the record. The Government did not stipulate to anything. United States

District Judge Patrick Schiltz stated he would assume for purposes of sentencing that no tax loss occurred because whether any tax loss occurred was irrelevant to that determination. (Doc. 24-3 at 2).

The Court agrees with Judge Ostby that, under *Hudson*, the United States' claim for a trust fund recovery penalty under § 6672 is not barred by the Double Jeopardy Clause. The McLain Defendants' objection is overruled.

2. The United States' claim is not time barred

Judge Ostby concluded the United States' claim is subject to the ten-year limitation contained in the federal collection statute, 26 U.S.C. § 6502(a)(1). The McLain Defendants object, arguing the claim is subject to the four-year limitation contained in the Montana Uniform Fraudulent Transfer Act or, in the alternative, the six-year limitation contained in the Federal Debt Collection Procedure Act (FDCPA). The Court agrees with Judge Ostby.

When the United States asserts a transfer of property by a taxpayer is a fraudulent conveyance, the claim is not limited to the time period set for a state fraudulent conveyance proceeding, but rather, is governed by the ten-year federal collection statute found in 26 U.S.C. § 6502(a)(1). *U.S. v. Bacon*, 82 F.3d 822, 822-825 (9th Cir. 1996); *Bresson v. Commissioner of Internal Revenue*, 213 F.3d 1173, 1179 (9th Cir. 2000). The McLain Defendants argue *Bacon* and *Bresson* "should be revisited" in light of *U.S v. California*, 507 U.S. 746, 113 S. Ct. 1784, 123 L. Ed. 2d 528

(1993), but fail to articulate how or why. Given *Bresson*'s lengthy discussion of *California* and other Supreme Court precedent, the Court is unpersuaded. *See Bresson*, 213 F.3d at 1175-1179.

The McLain Defendants also argue the six-year limitation contained in the FDCPA governs the United States' claim. However, the FDCPA explicitly excludes the United States' claim from its purview with the following limitation:

> (b) Limitation. — To the extent that another Federal law specifies procedures for recovering on a claim or a judgment for a debt arising under such law, those procedures shall apply to such claim or judgment to the extent those procedures are inconsistent with this chapter.

28 U.S.C. 3001(b). The FDCPA further provides;

> (b) Effect on rights of the United States. — This chapter shall not be construed to curtail or limit the right of the United States under any other Federal law or any State law--
>
> > (1) to collect taxes or to collect any other amount collectible in the same manner as a tax;

28 U.S.C. § 3003(b). By its own terms, the FDCPA does not apply to Government actions to collect taxes. *See U.S. v. Letscher*, 83 F. Supp. 2d 367, 378 (S.D.N.Y. 1999) and *U.S.*

v. Bantau, 907 F.Supp. 988, 990 (N.D. Texas 1995) (both finding the FDCPA's six-year limitation inapplicable to a government action for the collection of taxes).

The Court agrees with Judge Ostby that the United States' claim is subject to the ten-year limitation contained in the federal collection statute, 26 U.S.C. § 6502(a)(1). The McLain Defendants' objection is overruled.

3. Dismissal of the United States' alternate claim to foreclose on Frank's interest should the McLain Plaintiffs prevail is premature

Judge Ostby concluded numerous issues need to be resolved before the Court can determine whether dismissal of the United States' alternate claim is proper. Judge Ostby recommended the Court deny the motion to dismiss the United States' alternate claim with leave to renew. The McLain Defendants object, arguing that, should the McLain Plaintiffs prevail, Frank would have only an expectancy interest in the E-3 Ranch, which is not a cognizable property interest under Montana law. The Court agrees with Judge Ostby.

The United States holds a lien on all property and rights to property belonging to a person liable for unpaid taxes if the person neglects or refuses to pay the unpaid taxes upon demand by the United States. 26 U.S.C. § 6321. Whether a state-law right constitutes 'property' or 'rights to property' is a matter of federal law. *Drye v. U.S.*, 528 U.S. 49, 58, 120 S. Ct. 474, 145 L. Ed. 2d 466 (1999). "The Court looks initially to state law to determine what rights

the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of the federal tax lien legislation." *Drye*, 528 U.S. at 58.

Here, the Court cannot undertake a *Drye* analysis because numerous issues need to be resolved before Frank's interest can be determined under Montana law, such as: (1) whether Bernard's estate or the E-3 Ranch Trust owns the E-3 Ranch and (2) whether Caroline obtained ownership of the E-3 Ranch via adverse possession. The McLain Defendants argue no *Drye* analysis is necessary because even if the McLain Plaintiffs prevail, Frank has at most an expectancy interest, which is not recognized as a property interest under Montana law. The McLain Defendants are incorrect for two reasons. First, it is unclear at this point whether, should the McLain Plaintiffs prevail, Frank would only have an expectancy interest in the E-3 Ranch. Second, even if that were true, a *Drye* analysis is still necessary. State law determines what rights a person has in property, but federal law determines whether that right qualifies as a "right" or "right to property" under the federal tax statutes. *Drye*, 528 U.S. at 58. Thus, even if Frank had only an expectancy interest in the E-3 Ranch, federal law determines whether his expectancy interest constitutes a "right to property" for federal tax lien purposes.

The Court agrees with Judge Ostby that numerous issues need to be resolved before the Court can determine whether dismissal of the United States' alternate claim is proper. The McLain Defendants' objection is overruled.

IV. Conclusion

IT IS ORDERED that the proposed Findings and Recommendation entered by Judge Ostby (Doc. 67) are ADOPTED IN FULL.

IT IS FURTHER ORDERED that the McLain Defendants' Motion for Summary Judgment on Adverse Possession (Doc. 23) is DENIED.

IT IS FURTHER ORDERED that the McLain Plaintiffs' Cross-Motion for Summary Judgment on Adverse Possession (Doc. 30) is DENIED.

IT IS FURTHER ORDERED that the McLain Defendants' Motion to Dismiss the United States' Intervenor Complaint (Doc. 23) is DENIED, with leave to renew with regard to the United States' alternate claim on Frank's beneficial interest.

IT IS FURTHER ORDERED that the McLain Defendants' objections to the proposed Findings and Recommendation are OVERRULED.

Dated this 22nd day of February, 2017.

/s/ Susan P. Watters
Susan P. Watters
United States District Court
Judge

APPENDIX N — FINDINGS AND RECOMMENDATIONS OF THE UNITED STATES MAGISTRATE JUDGE IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION, FILED OCTOBER 24, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CV-16-36-BLG-SPW-CSO

FAITH MCLAIN, CHRISTEEN MCLAIN, JOHN MCLAIN, MOLLY MCLAIN, MIRA MCLAIN, AND MATTHEW MCLAIN, AS BENEFICIARIES OF THE ESTATE OF BERNARD MCLAIN, AND MARY MCLAIN, INDIVIDUALLY AS BENEFICIARY OF THE ESTATE OF BERNARD MCLAIN AND AS TRUSTEE OF THE E-3 RANCH TRUST,

Plaintiffs,

vs.

FRANCIS MCLAIN, INDIVIDUALLY AND AS CO-MANAGER OF TERA BANI RETREAT MINISTRIES, CAROLINE MCLAIN, INDIVIDUALLY AND AS MANAGING DIRECTOR OF TERA BANI RETREAT MINISTRIES, ALAKHI JOY MCLAIN, SOHNJA MAY MCLAIN, AND DANE SEHAJ MCLAIN, AS PURPORTED CERTIFICATE HOLDERS OF THE E-3 RANCH TRUST,

Defendants.

Appendix N

THE UNITED STATES OF AMERICA,

Intervenor Defendant
and Counter/Cross-Claimant,

vs.

FAITH MCLAIN, CHRISTEEN MCLAIN, JOHN MCLAIN, MOLLY MCLAIN, MIRA MCLAIN, AND MATTHEW MCLAIN, AS BENEFICIARIES OF THE ESTATE OF BERNARD MCLAIN; AND MARY MCLAIN, AS BENEFICIARY OF THE ESTATE OF BERNARD MCLAIN, AND AS TRUSTEE OF THE E-3 RANCH TRUST,

Counterclaim Defendants,

and

FRANCIS MCLAIN, INDIVIDUALLY, AND AS CO-MANAGER OF TERA BANI RETREAT MINISTRIES; CAROLINE MCLAIN, INDIVIDUALLY, AND AS MANAGING DIRECTOR OF TERA BANI RETREAT MINISTRIES; AND ALAKHI JOY MCLAIN, SOHNJA MAY MCLAIN, AND DANE SEHAJ MCLAIN, AS BENEFICIARIES OF THE E-3 RANCH TRUST,

Crossclaim Defendants,

and

Appendix N

AMERICAN BANK OF MONTANA
AND BRAD D. HALL,

Additional Defendants
on United States' Claims.

October 24, 2016, Decided
October 24, 2016, Filed

FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

I. Introduction

This case, although involving other matters, principally concerns ownership of a ranch located in the Paradise Valley roughly 15 miles south of Livingston, Montana. The action pits two factions of a family against one another, and also involves the United States, as an intervenor, attempting to assert a claim over any right one family member may have in the ranch.

On April 8, 2016, the United States timely removed the case under 26 U.S.C. § 7424, 28 U.S.C. § 2410, 28 U.S.C. § 1444, and 28 U.S.C. § 1441. *Notice of Removal (ECF No. 1) at 2-3*.[1] Now pending are (1) the family factions' cross motions for summary judgment concerning whether one family member owns the ranch through

1. "ECF No." refers to the document as numbered in the Court's Electronic Case Files. *See The Bluebook, A Uniform System of Citation, § 10.8.3*. Citations to page numbers refer to those assigned by the electronic filing system.

adverse possession, *Defts' Mtn. (ECF No. 23) and Pltfs' Mtn. (ECF No. 30)*; (2) the Defendant family faction's concurrently-filed Rule 12(b)(6)[2] motion to dismiss the United States' Intervenor Complaint, *Defts' Mtn. (ECF No. 23)*; and (3) the Plaintiff family faction's summary judgment motion concerning the validity of a trust at issue and, alternatively, the transfer of the ranch to one of the family members, *Pltfs' Summary Judgment Mtn. (ECF No. 36)*.[3]

II. The Parties and Their Claims

Plaintiffs are Faith McLain ("Faith"), Christeen McLain ("Christeen"), John McLain ("John"), Molly McLain ("Molly"), Mira McLain ("Mira"), and Matthew McLain ("Matthew"), as beneficiaries of the Estate of Bernard McLain ("Bernard's Estate"), and Mary McLain ("Mary"), as a beneficiary of Bernard's Estate and as Trustee of the E-3 Ranch Trust (collectively the "McLain Plaintiffs"). Faith, Christeen, John, and Mary are siblings and the children of Bernard and Kathryn McLain, who are now deceased. Molly, Mira, and Matthew are the children of James McLain, also known as Harley McLain ("Harley"), who is deceased and who also was one of Bernard and Kathryn McLain's children.

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2. References to rules are to the Federal Rules of Civil Procedure unless otherwise noted.

3. The undersigned reserves any recommendation on the summary judgment motion (*ECF No. 36*) concerning the validity of the E-3 Ranch Trust and, alternatively, the transfer of the ranch to one of the family members pending the District Court's final rulings on the other pending motions.

Defendants are Francis McLain, also known as Frank McLain ("Frank"), Caroline McLain ("Caroline"), Alakhi Joy McLain ("Alakhi"), Sohnja May McLain ("Sohnja"), and Dane Sehaj McLain ("Dane") (collectively the "McLain Defendants"). Frank, named as a presumed beneficiary of Bernard's Estate and the Co-Manager of Tera Bani Retreat Ministries, also is one of Bernard and Kathryn McLain's children, and is a sibling of Faith, Christeen, John, Mary, and Harley. Caroline is Frank's wife and the Managing Director of Tera Bani Retreat Ministries. Alakhi, Sohnja, and Dane are Frank and Caroline's children, and are named as purported certificate holders of the E-3 Ranch Trust.

On July 8, 2014, the McLain Plaintiffs initiated this action in Montana state court. *ECF No. 4*. On August 15, 2014, they filed their First Amended Complaint for Declaratory Judgment. *ECF No. 5*. They seek a declaration that: (1) the E-3 Ranch Trust, into which the ranch was purportedly placed, is invalid; (2) certain title transfers involving the ranch are invalid; and (3) the ranch, with certain exceptions, is an asset of Bernard's Estate, which is currently involved in a separate probate action in state court. *Id. at 13-14*. Alternatively, the McLain Plaintiffs seek a declaration that: (1) the E-3 Ranch Trust is valid; (2) certain title transfers involving the ranch are invalid; and (3) the ranch, with certain exceptions, is an asset of the E-3 Ranch Trust, and thus must be distributed accordingly in the formal probate of Bernard's Estate. *Id. at 14*.

On April 8, 2016, the United States removed the matter to this Court after first receiving the state court's

leave to intervene. *ECF No. 1*. In its Intervenor Complaint, the United States claims, *inter alia*, that: (1) Frank was convicted of nine counts under 26 U.S.C. § 7202 "for his willful failure to account for and pay over the employment taxes of Kirpal Nurses, LLC [("Kirpal")], and he was sentenced to 48 months imprisonment by the United States District Court for the District of Minnesota on September 11, 2009[,]" *Intervenor Cmplt. (ECF No. 20) at ¶ 13*; (2) in May 2014 a delegate of the Secretary of the Treasury made timely Trust Fund Recovery Penalty ("TFRP") assessments of liability arising under 26 U.S.C. § 6672 against Frank for his willful failure to collect, truthfully account for, and pay over the employment taxes of Kirpal, an entity that Frank owned, controlled, and managed, totaling $492,451.38, *id. at ¶ 12*; (3) Frank has neglected or refused to fully pay the assessed amounts, allowing interest, penalties, and statutory additions to accrue, *id. at ¶¶ 15 and 16*; (4) tax liens arose in favor of the United States on the assessment dates and attached to all of Frank's property and rights to property, including the ranch at issue in this action, *id. at ¶ 17*; (5) in addition to Frank, the United States names as crossclaim defendants Caroline, Alakhi, Sohnja, and Dane because each may claim an interest in the ranch, *id. at ¶¶ 6-9*; (6) the United States names as counterclaim defendants Faith, Christeen, John, Molly, Mira, Matthew, and Mary because each may claim an interest in the ranch, *id. at ¶ 5*; and (7) the United States names American Bank of Montana and Brad D. Hall as additional defendants on its claims because each may claim an interest in the ranch, *id. at ¶¶ 10-11*.

For its claims, the United States seeks: (1) the Court's judgment finding that Caroline holds title to the ranch as Frank's nominee or transferee and setting aside fraudulent transfers of the ranch, which would allow the United States' tax liens against Frank to attach to the ranch, *id. at* ¶¶ *40-60*; (2) foreclosure of its federal tax liens on the ranch currently held by Caroline to allow the United States to receive the proceeds from the sale of the ranch and to apply them toward satisfaction of the outstanding federal tax assessments against Frank, *id. at* ¶¶ *61-66*; and (3) alternatively, foreclosure on Frank's interest in Bernard's Estate, *id. at* ¶¶ *67-72*.

III. Background[4]

On or about June 21, 1996, a Limited Warranty Deed was executed transferring title to the following described real property, commonly referred to as the E-3 Ranch, from the Dorothy H. Malcolm Revocable Living Successor Trust to Frank and an individual named Brad D. Hall ("Hall"):

> **TOWNSHIP 4 SOUTH, RANGE 9 EAST, PMM PARK COUNTY MONTANA**
>
> Section 26: SW1/4, and portion of the SQ1/4WE1/4 lying South and West of what is known as the Mountain Road, EXCEPTING THEREFROM, two acres for a Cemetary as

4. The background facts are from the parties' submissions. Unless otherwise noted, the parties do not dispute them.

reserved in that Quit Claim Deed recorded October 22, 1904 in Volume 26, Page 264.

Section 35: All, lying North of Shorthill Creek (Reference Deed recorded in Volume 113, Page 323).

Approximately 20 acres of the E-3 Ranch ("Hall Parcel") were transferred to Hall by Special Warranty Deed on October 30, 2002.[5]

On or about November 30, 1996, Bernard and Kathryn McLain effectively loaned one of Frank's companies approximately $290,000.00 ("Loan") via credit cards, cash advances, and/or payment of expenses. Frank and Caroline personally entered into the note. The Loan was secured by a Mortgage and Security Agreement and Fixture Financing Agreement ("McLain Mortgage") encumbering the E-3 Ranch dated November 30, 1996, and recorded with the Park County Clerk and Recorder on April 7, 2000 at Book 147, Page 720.

On February 16, 1998, a Contract and Declaration for an "Irrevocable Pure Trust Organization" commonly

5. The McLain Plaintiffs note that: "The United States takes issue with the transfer to Brad Hall. The McLain Plaintiffs do not dispute that ten (10) acres of property were transferred to Brad Hall in exchange for his agreement to initially co-sign the mortgage with American Bank. The McLain Plaintiffs dispute that he ever had any title to any of the E-3 Ranch beyond the agreed upon ten (10) acres." *ECF No. 31 at 10, n.5.* And, they acknowledge that this factual dispute is not relevant to the motions now before the Court. *Id.*

referred to as the E-3 Ranch Trust ("E-3 Ranch Trust") was purportedly created at Frank's request. The McLain Plaintiffs maintain as follows: "Richard Humpal, Mary, and Harley were named as Trustees of the E-3 Ranch Trust. Richard Humpal and Harley are now deceased and successor trustees have not been appointed to fill their vacancies." The McLain Defendants dispute these statements and maintain as follows: "The Minutes of the E-3 Ranch Trust from February 16, 1998 stated:

> FURTHER, RESOLVED that Francis L. McLain be and is hereby appointed as the Successor Trustee to take office and serve at the very moment that the current Trustee, Richard J. Humpal, fails to continue as Trustee due to death and/or physical and/or mental incapacity. . . .

Based on this language, Frank McLain would have been appointed as the successor trustee to Richard Humpal upon Mr. Humpal's death on April 5, 2013." *ECF No. 44 at 8-9.*

On April 10, 1998, American Bank of Montana ("American Bank") loaned Frank and Hall approximately $1,116,856.06 pursuant to a Note that was secured by a Mortgage ("American Bank Mortgage") encumbering the E-3 Ranch.

On August 1, 1998, Frank entered into an agreement, Contractual Duties and Compensation of Managing Director, with the purported E-3 Ranch Trust. Such

duties included, among others, payment of any monthly mortgage, keeping the property in running order, and enhancing the value of the E-3 Ranch property through improvements.

On December 15, 1999, in lieu of foreclosure of the McLain Mortgage, a Quit Claim Deed was executed transferring title to the E-3 Ranch from Frank and Caroline to Bernard and Kathryn.

Beginning on April 24, 2002, until Bernard's death in 2009, Mary held a power of attorney on behalf of Bernard. On July 16, 2002, after Kathryn passed away, a Deed of Conveyance was executed by the personal representative of Kathryn's estate transferring Kathryn's interest in the E-3 Ranch to Bernard.

On July 22, 2002, a Quit Claim Deed was executed purportedly transferring Bernard's interest in the E-3 Ranch to the E-3 Ranch Trust. Bernard began living on the E-3 Ranch full time on June 11, 2006, and continued to live there until his death on January 3, 2009.

The parties disagree about what family members lived on the E-3 Ranch and during what periods of time. First, the McLain Plaintiffs maintain that beginning in 1998 until Bernard began permanently residing at the E-3 Ranch, Bernard and Kathryn would spend at least two months out of each year living on the E-3 Ranch. They maintain that Bernard began living on the E-3 Ranch full time on June 11, 2006, and continued to live there until his death in 2009. The McLain Defendants do not

dispute this latter assertion, but add that Bernard was a legal invalid during this time period, and stayed on the property under the supervision and care of Frank and his family. The McLain Defendants dispute the prior assertion concerning Bernard and Kathryn and maintain that: (1) Kathryn died on February 5, 2002; (2) Bernard stayed with Frank and Caroline at the E-3 Ranch for about two months each year in 2002 and 2003, and about one month in 2004; (3) Faith placed Bernard in an assisted living facility from January 1, 2005, until abut July 6, 2005; (4) Bernard was declared a legal invalid at the end of June 2005; (5) Frank began to care for Bernard at the E-3 Ranch from July 6, 2005, until about October 25, 2005; (6) Christeen put Bernard in the Luther Memorial Home in Mayville, North Dakota where he resided from about October 26, 2005, through June 10, 2006; and (7) Bernard stayed at the E-3 Ranch from about June 11, 2006, until his death on January 3, 2009.

Second, the McLain Plaintiffs maintain that, beginning in 2002, Harley lived on the E-3 Ranch at least six months out of each year to care for Bernard until 2006, when Harley then resided on the E-3 Ranch full time. And, Harley lived on the E-3 Ranch full time from 2006 until Bernard died in 2009. The McLain Defendants dispute these assertions. They maintain that: (1) Frank believes that Harley lived full time at his home residence from 2002 through May 2006 to care for his wife who was suffering from a terminal illness; (2) from June 2006 through January 3, 2009, Frank paid Harley to stay at the E-3 Ranch to care for Bernard; and (3) Harley did not live on the property full time until June 2006.

Third, the McLain Plaintiffs maintain that Matthew lived on the E-3 Ranch with Harley and Bernard in 2006 and 2007. The McLain Defendants dispute this, and maintain that Matthew resided on the E-3 Ranch property only during September, November, and December of 2006, and that he was 14 years old at the time.

Fourth, the McLain Plaintiffs maintain that Christeen stayed on the E-3 Ranch from July through September 2008. The McLain Defendants dispute this and maintain that Christeen did not reside on the E-3 Ranch from July through September 2008.

Fifth, the McLain Plaintiffs maintain that for any of the time periods that Kathryn, Bernard, Harley, Matthew, or Christeen lived on the E-3 Ranch, they did not seek permission from or provide notice to Frank or Caroline to reside on the E-3 Ranch. The McLain Defendants dispute the various claims made by the McLain Plaintiffs concerning the time periods when the people discussed above allegedly lived on the E-3 Ranch. They further maintain that, to the extent that any of these people did spend time on the property, none of them lived there: (1) as if they owned a title interest in the property; (2) to stake a claim to the property; and (3) to object to, challenge, or compete with Caroline's exclusive possession, management, and control of the E-3 Ranch property from 2008 through the present.

On February 27, 2013, Richard Humpal, purportedly on behalf of the E-3 Ranch Trust, signed and recorded a Quit Claim Deed attempting to transfer title to the E-3

Ranch from the E-3 Ranch Trust to Caroline, without the approval of Mary or Harley, the other trustees of the E-3 Ranch Trust. Mary did not approve of the February 27, 2013 Quit Claim Deed executed by Richard Humpal attempting to transfer title to the E-3 Ranch from the E-3 Ranch Trust to Caroline. To Mary's knowledge, Harley did not approve of the transfer either.

On September 19, 2013, formal probate of Bernard's Estate was commenced in the Montana Sixth Judicial District Court, Park County. On June 11, 2014, those proceedings were stayed pending determination of title to the E-3 Ranch in this action.

At all times, Mary, as a Trustee of the purported E-3 Ranch Trust and as Bernard's power of attorney, believed that the purpose of the E-3 Ranch Trust was to preserve the value of the E-3 Ranch for the benefit of all of Bernard's children. The McLain Defendants dispute this and contend that the E-3 Ranch Trust was for the benefit of Caroline and Frank's children — Alakhi, Sohnja, and Dane.

Sohnja lived on the E-3 Ranch property from December 15, 1999, until September 2009, and again from May 2012-2015. Alakhi lived on the E-3 Ranch property at various times throughout period from 2006-2015. Dane, also an alleged beneficiary of the E-3 Ranch Trust, has assisted with mortgage payments and the tax payments for the property.

Appendix N

Frank and Caroline are co-managers of the fourth and final purported certificate holder of the E-3 Ranch Trust, the Tera Bani Retreat Ministries.

On August 1, 1998, Frank accepted duties to protect, preserve, and enhance the E-3 Ranch Trust's assets for its certificate holders. Although the E-3 Ranch was not property of the purported Trust at the time the 1998 Contractual Duties and Compensation of Managing Director was executed by Frank, the parties agree that there is nothing in the agreement prohibiting it from applying in the future, when the E-3 Ranch was purportedly transferred. But the McLain Defendants dispute the McLain Plaintiffs' interpretation and application of the document.

The McLain Plaintiffs and the McLain Defendants dispute whether Mary, both as Trustee of the E-3 Ranch Trust and as Bernard's power of attorney, granted Caroline permission to reside on the E-3 Ranch, or whether she even had authority to do so. And, while Mary believed that Frank and Caroline and their children were living on the E-3 Ranch property to preserve it for Bernard's beneficiaries, the McLain Defendants dispute this and maintain that they have never lived on the E-3 Ranch with the purpose of preserving it for Bernard's beneficiaries.

The McLain Plaintiffs maintain that the McLain Defendants' use of the property was with the permission of the E-3 Ranch Trust as well as Bernard's beneficiaries. But the McLain Defendants dispute this and note that the

assertion derives only from Mary's belief that their use of the property was with permission. They maintain that Mary's belief is contrary to the facts and is not credible.

The McLain Plaintiffs maintain that, other than the transfer of the E-3 Ranch property to Caroline on February 27, 2013, which was purportedly for the benefit of the E-3 Ranch Trust beneficiaries, Caroline never provided notice to the E-3 Ranch Trust or Bernard's power of attorney that Caroline's possession of the property was somehow hostile. The McLain Defendants dispute this contention and maintain that Caroline has always held herself out to be the owner of the E-3 Ranch property. And, they maintain, because Caroline's use of the property was never permissive, there is no requirement that permissive use must ripen into hostile use to establish adverse possession.

The parties dispute whether the ownership of the E-3 Ranch was at issue at the time probate of Bernard's Estate was commenced.

Caroline has stated that she was the payer of all taxes on the E-3 Ranch property save for one payment in 2012, and that payment was made by Soul Care, LLC. But, the McLain Defendants maintain, the payment by Soul Care, LLC, was made on Caroline's behalf, the money paid was money Soul Care owed Caroline in wages, and the amount paid was accounted for as part of Caroline's wages on her W-2 form in 2013.

On April 24, 2015, Caroline and Frank filed a Declaration of Homestead stating that they reside upon and claim the E-3 Ranch as their homestead.

IV. Legal Standards

A. Rule 12(b)(6) Motion to Dismiss

"Dismissal under Rule 12(b)(6) is proper only when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory." *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013) (quoting *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008)). The Court's standard of review under Rule 12(b)(6) is informed by Rule 8(a)(2), which requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 677-678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Fed. R. Civ. P 8(a)).

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* at 678. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A plausibility determination is context specific, and courts must draw on judicial experience and common sense in evaluating a complaint. *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014).

A court considering a Rule 12(b)(6) motion must accept as true the allegations of the complaint and must construe those allegations in the light most favorable to

the nonmoving party. *See, e.g., Wyler Summit Partnership v. Turner Broadcasting System, Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). "However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations." *Summit Technology, Inc. v. High-Line Medical Instruments Co., Inc.*, 922 F.Supp. 299, 304 (C.D. Cal. 1996) (*citing Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981) *cert. denied*, 454 U.S. 1031, 102 S. Ct. 567, 70 L. Ed. 2d 474 (1981)).

B. Rule 56 Motion for Summary Judgment

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable fact-finder to return a verdict for the nonmoving party. *Id.* If the moving party meets its initial

responsibility, the burden then shifts to the opposing party to establish that a genuine issue of fact exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

When parties file cross-motions for summary judgment, as here, the Court must consider each motion on its own merits. *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001). The fact that both parties have moved for summary judgment does not vitiate the Court's responsibility to determine whether disputed issues of material fact are present. *Id.*

V. Discussion

A. The McLain Defendants' Motion to Dismiss the United States' Intervenor Complaint

The McLain Defendants combined their summary judgment motion seeking a declaration that Caroline owns the E-3 Ranch via adverse possession with a Rule 12(b)(6) motion to dismiss the United States' Intervenor Complaint. The motions are interrelated to the extent of the United States' involvement in this action. Thus, the Court addresses the McLain Defendants' and the United States' arguments relating to both motions in this part of the Findings and Recommendations.

1. Summary of the Parties' Arguments

The McLain Defendants seek dismissal of the United States' claims in the Intervenor Complaint arguing that:

(1) Caroline is the legal owner of the E-3 Ranch via adverse possession that occurred before tax liens against Frank arose thus foreclosing any claim the United States might have to the property, *McLain Defts' Opening Br. (ECF No. 24) at 13, 25*[6]; (2) the United States' attempt to enforce a trust fund recovery penalty against Frank violates the Fifth Amendment's Double Jeopardy Clause, *id. at 13, 25-31*; (3) the United States' alternate claim to foreclose on Frank's interest in Bernard's Estate should be dismissed because such an expectancy interest is not a cognizable property interest under Montana law, *id. at 13-14, 31-32*; and (4) the United States' claims are time-barred, *id. at 14, 32-37.*

In response, the United States argues that: (1) the McLain Defendants' double jeopardy argument is misplaced because it conflates 26 U.S.C. § 6672's civil assessment of remedial penalties against Frank with penalties imposed for Frank's criminal conviction under 26 U.S.C. § 7202 and, while Frank may argue that some of the unpaid employment taxes underlying his § 6672 assessment have been paid, he carries the burden to prove payments have been made, *U.S.' Resp. Br. (ECF No. 29) at 4-5, 15-18*; (2) the United States' claims are not time-barred because the McLain Defendants have admitted that Frank retained beneficial ownership and control over the property at all relevant times and essentially admit that it was held in title only by a series of individuals and

6. This argument depends upon a ruling respecting the parties' cross motions for summary judgment concerning whether Caroline owns the E-3 Ranch via adverse possession. That issue is discussed in greater detail *infra*.

entities since Frank first purported to sign his interest away, *id. at 5, 12-15*; and (3) the United States' alternative claim for relief is valid because it seeks to foreclose on Frank's distinct property interest in Bernard's Estate if the McLain Plaintiffs prevail on their claims, and Frank cannot disclaim or reject his interest in Bernard's Estate to avoid his federal tax obligations, *id. at 5, 18-19*. And, to the extent the McLain Defendants seek summary judgment that Caroline owns the E-3 Ranch via adverse possession, the United States argues that: (1) the summary judgment motion is premature because the United States has only recently entered this action and has not had time to conduct discovery, *id. at 6, 19-20*; and (2) even if Caroline is deemed to have adversely possessed the property, she holds the property only as Frank's nominee subject to the United States' tax liens, *id.*

2. Analysis

a. Double Jeopardy

The Fifth Amendment to the U.S. Constitution provides that: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . .." Relevant to the case at hand, it is well-settled that the Double Jeopardy Clause "protects only against the imposition of multiple *criminal* punishments for the same offense," including monetary penalties. *Hudson v. United States*, 522 U.S. 93, 99, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997) (emphasis in original) (citations omitted); *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 769 n.1, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994)

(citations omitted). As noted, the McLain Defendants argue that the United States' assessment of penalties against Frank under 26 U.S.C. § 6672, after he already has been convicted and punished under 26 U.S.C. § 7202 for essentially the same conduct, would be in violation of the Double Jeopardy Clause. The Court is not persuaded.

The Supreme Court in *Kurth Ranch* observed that it had previously recognized that "'[t]his constitutional protection is intrinsically personal,' and that only 'the character of the actual sanctions' can substantiate a possible double jeopardy violation." *Id.* at 779 (*quoting U.S. v. Halper*, 490 U.S. 435, 447, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989)). The Court thus must determine the character of the § 6672 penalty and determine whether it is civil, which would not offend the Double Jeopardy Clause, or criminal in nature, in which case it would amount to double jeopardy.

The Supreme Court has adopted a two-step process to determine whether a penalty is civil or criminal: "(1) statutory construction to determine whether Congress indicated an express or implied preference for one label or the other; and if Congress intended to establish a civil penalty, (2) an evaluation of whether the statutory scheme [is] so punitive either in purpose or effect as to transform the intended civil sanction into a criminal penalty." *See Louis v. Commissioner of Internal Revenue*, 170 F.3d 1232, 1234 (9th Cir. 1999) (internal quotation marks omitted) (*citing Hudson v. United States*, 522 U.S. 93, 99, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997)). And, the following "useful guideposts" exist to assist in evaluating whether the second step is satisfied:

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment — retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Id. (internal citations and quotation marks omitted). "These factors are to be considered in relation to the statute on its face, and only the *clearest proof* will suffice to override legislative intent that a remedy be civil in nature." *Id.* (citations and quotation marks omitted) (emphasis added).

Respecting the first step in the *Hudson* two-step process, the Ninth Circuit has determined that "it is clear Congress intended additions to tax for fraud to be 'a civil, not a criminal, sanction.'" *Id. (quoting Helvering v. Mitchell*, 303 U.S. 391, 402, 58 S. Ct. 630, 82 L. Ed. 917, 1938-1 C.B. 317 (1938)). "*Mitchell*'s conclusion that Congress intended additions to tax for fraud to be a civil sanction is not limited to cases in which the taxpayer has previously been acquitted, rather than convicted, of criminal tax fraud." *Id. (citing Mitchell*, 303 U.S. at 401-05).

Here, the Court concludes that the conduct giving rise to Frank's conviction on nine counts under 26 U.S.C. § 7202, which the United States has characterized as "his willful failure to account for and pay over the employment taxes of Kirpal Nurses, LLC," is similarly the type of conduct for which Congress intended additions to tax to be a civil, and not criminal, sanction. *Id.* Thus, the Court further concludes that Congress intended that § 6672 penalties be civil and not criminal sanctions.

Respecting the second step, the McLain Defendants have neither persuasively argued in their Rule 12(b)(6) motion nor, at this juncture, produced the requisite "clearest proof" that the § 6682 penalty is so punitive as to overcome congressional intent that it be civil rather than criminal in nature. First, as the Ninth Circuit has concluded, such penalties "do not amount to an affirmative disability or restraint, nor have they historically been regarded as punishment." *Id. (citing Hudson*, 522 U.S. at 104). Rather, the penalties have a remedial purpose in that they "are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government" for investigation expenses and loss stemming from the taxpayer's conduct. *Id. (quoting Mitchell*, 303 U.S. at 401 *and citing I & O Publishing*, 131 F.3d 1314, 1316 (9th Cir. 1997)). And, "[e]ven if deterrence is an additional purpose for the [penalty], the Supreme Court has recognized that monetary penalties may deter others without being criminal in nature." *Id. (citing Hudson*, 522 U.S. at 105 ("[T]he mere presence of this purpose is insufficient to render a sanction criminal.").

Second, it cannot reasonably be disputed that analysis of some of the guideposts could support the conclusion that § 6672's penalty is criminal rather than civil in nature, such as whether the behavior to which the penalty applies is already a crime. Clearly it is. *See* 26 U.S.C. § 7202. But that is not sufficient to make the penalty criminal rather than civil in nature. *Louis*, 170 F.3d at 1235. As was the situation in *Louis*, although the conduct giving rise to imposition of the § 6672 penalty is the same or at least very similar to the conduct giving rise to criminal liability under § 7202, punishing such conduct cannot be said to be the primary focus of the § 6672 penalty. Rather, as the Ninth Circuit concluded in *Louis*, § 6672's penalty, imposed to address certain conduct, "is designed to ensure that the [penalty is] imposed only on taxpayers who engage in the type of deceptive behavior that is difficult and costly for the IRS to detect." *Id.* (citations omitted). Thus, this factor does not weigh convincingly on the side of finding that the § 6672 penalty is punitive. And, of course, "Congress may impose both civil and criminal penalties in connection with the same proscribed behavior without violating the Double Jeopardy Clause." *Id.* (citation omitted).

Third, the Court is not convinced that a remedial penalty such as that imposed under § 6672 is excessive. As noted, the United States has an interest in raising and protecting tax revenue, and the type of conduct giving rise to both the § 6672 penalty and § 7202 criminal liability is considered to be the most difficult and costly for the IRS to detect. *Louis*, 170 F.3d at 1235. Thus, because of the onerous burden placed on the IRS in policing such conduct, it cannot reasonably be concluded that the penalty is so excessive as to alter its nature from civil to criminal.

In considering the guideposts *in toto*, the Court concludes that they do not weigh convincingly in favor of overcoming Congress' intent that the penalty be considered civil in nature, nor has there been a showing by "the clearest proof" that Congress' intent should be overridden. *Id.* For all of these reasons, assessment of § 6672's penalty does not violate the Double Jeopardy Clause.

b. Timeliness of the United States' Claims

As noted, the McLain Defendants argue that the United States' claims in its Intervenor Complaint are time-barred. *ECF No. 24 at 14, 32-37.* They maintain that a cause of action under the Montana Uniform Fraudulent Transfer Act must be brought within 4 years of the transfer or the cause of action to set aside the transfer will be terminated. *Id. at 33.* They argue that, because the United States seeks to set aside the December 15, 1999 transfer of Frank's interest in the E-3 Ranch to his parents, Bernard and Kathryn, and all subsequent transfers of the property, the United States' action, brought 16 years after the 1999 transfer, is too late. *Id.* This argument is unpersuasive.

As this Court recently observed, "[t]he United States is subject to a limitations period only when Congress has expressly created one." *U.S. Bank v. United States Internal Revenue Service*, 2013 U.S. Dist. LEXIS 28628, 2013 WL 788079, *7 (D. Mont., Mar. 1, 2013) (*citing Guaranty Trust Co. v. United States*, 304 U.S. 126,

133, 58 S. Ct. 785, 82 L. Ed. 1224 (1938) (*citing United States v. Thompson*, 98 U.S. 486, 488-89, 25 L. Ed. 194 (1878))). "In the absence of a federal statute expressly imposing or adopting one, the United States is not bound by any limitations period." *Id.* (*quoting United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1489 (9th Cir. 1993)). Thus, "the United States is not bound by state statutes of limitations . . . in enforcing its rights." *United States v. Summerlin*, 310 U.S. 414, 416, 60 S. Ct. 1019, 84 L. Ed. 1283, 1940-2 C.B. 435 (1940).

And, as in the case at hand, in instances in which the United States asserts that a taxpayer's property transfer is a fraudulent conveyance, the United States' assertion "is not limited to the time period set for a state fraudulent conveyance proceeding, but rather is governed by the ten-year federal collection statute at 26 U.S.C. § 6502(a)(1)." *U.S. Bank*, 2013 U.S. Dist. LEXIS 28628, 2013 WL 788079, *7 (*citing United States v. Bacon*, 82 F.3d 822, 825 (9th Cir. 1996)). The Ninth Circuit confirmed this conclusion in *Bresson v. Commissioner of Internal Revenue*. 213 F.3d 1173 (9th Cir. 2000).

Under *Bresson*, the United States is allowed to assert claims to collect delinquent taxes by attempting to set aside fraudulent conveyances attempting to shield property from collection, and foreclosing on federal tax liens. *U.S. Bank*, 2013 U.S. Dist. LEXIS 28628, 2013 WL 788079, *8 (*citing Bresson, supra*). "District courts have applied *Bresson* to mean that the United States may bring fraudulent transfer actions pursuant to state law for the purpose of collecting taxes within the time

frame permitted under federal law." *Id.* (*citing Sequoia Property and Equipment Ltd. Partnership v. United States*, 2000 U.S. Dist. LEXIS 15908, 2000 WL 1728117 at *7 (E.D. Cal., Oct. 4, 2000)). That is precisely what the United States is attempting to do here. Thus, under the foregoing authority, the United States' claims, stemming from Trust Fund Recovery Penalty assessments made in May 2014 against Frank (*ECF No. 20 at 4-5*), fall within 26 U.S.C. § 6502(a)(1)'s 10-year limitation period and are not time-barred.

c. Alternate Claim to Foreclose on Frank's Expectancy Interest

The McLain Defendants next challenge the United States' alternate claim to foreclose on Frank's interest in Bernard's Estate should the McLain Plaintiffs prevail on their theory that the E-3 Ranch should be declared an asset of Bernard's Estate. *ECF No. 24 at 13-14, 31-32*. The McLain Defendants argue that the United States "cannot sustain any action to foreclose on the expectancy interests that Frank [] might obtain in the E-3 Ranch property" if either a resulting trust is created or if the McLain Plaintiffs prevail on their theory that the property should be declared an asset of Bernard's Estate. They argue that any interest that might vest in Frank under these theories would be merely an expectancy interest and would not be a cognizable property interest under Montana law that could be foreclosed upon. *Id. at 14, 31-32*.

The Court concludes that this asserted basis to dismiss the United States' alternate claim is premature. The

issue's resolution depends upon resolution of, among other issues: (1) the McLain Plaintiffs' claims; (2) the United States' claims; (3) whether Caroline owns the property via adverse possession; and (4) whether Caroline holds title to the property through a transfer and, if so, whether she is merely Frank's nominee or transferee. As reflected in the discussion herein, at least some of those issues will need to be resolved before the McLain Defendants' asserted basis to dismiss the United States' alternate claim is ready for ruling. Thus, the Court will recommend that the McLain Defendants' motion to dismiss, to the extent it relates to this issue, be denied with leave to renew.

d. Fact Issues Preclude Summary Judgment Respecting Caroline's Adverse Possession Argument

The McLain Defendants argue that Caroline assumed ownership of the E-3 Ranch via adverse possession under Montana law before the United States tax liens against Frank arose. *ECF No. 24 at 25*. Thus, they argue, any liens against property owned by Frank do not attach to the E-3 Ranch, and the Court, therefore, should grant summary judgment against the United States on its Intervenor Complaint. *Id.*

As discussed in greater detail below, genuine issues of material fact preclude summary judgment respecting whether Caroline holds title to the E-3 Ranch via adverse possession. Thus, the Court cannot recommend that the United States' Intervenor Complaint be summarily dismissed on this basis.

For all of the foregoing reasons, the Court will recommend that the McLain Defendants' motions to dismiss and for summary judgment, to the extent that they are asserted against the United States, be denied as discussed herein.

B. Cross Motions for Summary Judgment - Adverse Possession

Through cross motions for summary judgment, the McLain Plaintiffs and the McLain Defendants seek the Court's ruling on the McLain Defendants' counterclaim asserting that Caroline owns the E-3 Ranch via adverse possession.

1. Summary of the Parties' Arguments

The McLain Defendants argue that Caroline's possession of the E 3 Ranch meets all of the elements of adverse possession under Montana law. *ECF No. 24 at 19-25*. They argue that she has possessed the entire ranch property for more than the requisite 5-year period, and that such possession has been: (1) actual, because she and her immediate family have made various improvements to the property and, even when she was not physically residing there, she leased out the property to residential tenants, *id. at 19-20*; (2) visible, because it has been out in the open and never hidden, covert, or masked to deceive any other claimants, *id. at 20*; (3) exclusive, because her possession has not depended on a like right by any other person and no one else has made any necessary payments to protect, maintain, secure, conserve, repair, enhance,

or improve the property, nor has anyone else had actual possession and control of it, *id. at 20-21*; (4) continuous, because her possession has not been interrupted by an act of the owner or any other claimant, nor has she abandoned her possession of the property, *id. at 21*; and (5) hostile, because her possession has been without permission of any other person or entity, *id. at 21-23*.

The McLain Plaintiffs argue both that the McLain Defendants are not entitled to summary judgment on their adverse possession counterclaim and that the Court should grant their own summary judgment motion on that claim because the McLain Defendants cannot prove it. *ECF No. 31 at 8*. The McLain Plaintiffs advance two principal arguments.

First, the McLain Plaintiffs argue that the Court should deny the McLain Defendants' summary judgment motion because Caroline cannot establish exclusive, hostile use of the E-3 Ranch property for the requisite 5-year statutory period. *Id. at 8, 17-27.* They argue that: (1) as noted above, other family members lived on the E-3 Ranch during certain times since May 5, 2008, including Bernard, Harley, Matthew, and Christeen, *id. at 18-19*; (2) none of these family members sought permission from or provided notice to Caroline or Frank, and all of these individuals' use of the property would be considered a competing claim to title disrupting Caroline's claim to exclusive use of the property, *id.*; (3) the McLain Defendants' adverse possession claim fails under their own version of the facts because they assert that the E-3 Ranch Trust was for the benefit of Alakhi, Sohnja, and Dane, two of whom

lived on the property with Caroline during the claimed period of adverse possession, and one of whom assisted with mortgage and tax payments for the property, thus defeating Caroline's claim of exclusive possession and use, *id. at 19-20*; (4) Caroline's use of the E-3 Ranch was not hostile because her use has been permissive both because of Frank's assumption of duties to protect, preserve, and enhance the E-3 Ranch Trust's assets for its certificate holders, which makes Caroline's residence on the property permissive, and because Mary, both as Trustee of the E-3 Ranch Trust and as Bernard's power of attorney, granted Caroline permission to reside on the E-3 Ranch, *id. at 21-23*; (5) Caroline's use never ripened into hostile possession because her use was permissive and such permission was never repudiated, *id. at 23-24*; and (6) none of the McLain Defendants ever provided notice of a hostile claim to the E-3 Ranch property sufficient to oust the cotenants from the property, *id. at 24-27.*

Second, the McLain Plaintiffs argue that the Court should grant their own summary judgment motion respecting the McLain Defendants' adverse possession counterclaim. *Id. at 8, 27-29*. They argue that: (1) Caroline cannot establish actual, visible, exclusive, hostile, and continuous possession for the full statutory 5-year period by the necessary clear and convincing evidence, *id.*; and (2) Caroline has not paid all of the taxes assessed on the property for the statutory period, *id. at 29.*

2. Analysis

In Montana, a party claiming real property by adverse possession must prove such possession has been "actual,

visible, exclusive, hostile and continuous" for a period of five years. *YA Bar Livestock Co. v. Harkness*, 269 Mont. 239, 887 P.2d 1211, 1213 (Mont. 1994); *see also* MCA §§ 70-19-401, 70-19-405. As an additional element, a "claimant cannot prove adverse possession of any land on which he did not pay taxes." *Tester v. Tester*, 2000 MT 130, 300 Mont. 5, 3 P.3d 109, 114 (Mont. 2000) (citation omitted); *see also* MCA § 70-19-411.

A party asserting adverse possession via a summary judgment motion must establish each element by clear and convincing evidence in order to be entitled to judgment as a matter of law. *Meadow Lake Estates Homeowners Ass'n v. Shoemaker*, 2008 MT 41, 341 Mont. 345, 178 P.3d 81, 88 (Mont. 2008) (citations omitted). The Montana Supreme Court has adopted the following definition of "clear and convincing evidence":

> [C]lear and convincing proof is simply a requirement that a preponderance of the evidence be definite, clear, and convincing, or that a particular issue must be clearly established by a preponderance of the evidence or by a clear preponderance of proof. This requirement does not call for unanswerable or conclusive evidence. The quality of proof, to be clear and convincing, is somewhere between the rule in ordinary civil cases and the requirement of criminal procedure — that is, it must be more than a mere preponderance but not beyond a reasonable doubt.

Wareing v. Schreckendgust, 280 Mont. 196, 930 P.2d 37, 43 (Mont. 1996) (*quoting Matter of J.L.*, 277 Mont. 284, 922 P.2d 459, 462 (Mont. 1996)).

Where, as in the case at hand, a party claiming title not founded on color of title — color of title being defined as "possession based on a written instrument which purports to pass title but which in reality does not" - *YA Bar*, 887 P.2d at 1216 (*quoting Joseph Russell Realty Co. v. Kenneally*, 185 Mont. 496, 605 P.2d 1107, 1111 (Mont. 1980), continued occupation of the land at issue must be exclusive of any other's rights. *See* MCA § 70-19-409.[7] "Exclusive use" means that the claimant's right "must rest upon its own foundation, and not depend upon a like right in any other person." *Bonnie M. Combs-DeMaio Living Trust v. Kilby Butte Colony, Inc., Corp.*, 2005 MT 71, 326 Mont. 334, 109 P.3d 252, 256 (Mont. 2005) (citation omitted). And, to be "continuous and uninterrupted," use

7. The Court is mindful that Caroline claims "record ownership" of the property, or at least part of it, based on two recorded transactions: (1) "[s]he first obtained a 1/4 interest in the property via quitclaim deed executed by Brad D. Hall on May 5, 2008[,]" *ECF No. 3-3 at 7*; and (2) "[t]he remaining 3/4 interest in the property was transferred to Caroline of February 27, 2013 from the E-3 Rank Trust via a quitclaim deed[,]" *id. See also Caroline's Aff. (ECF No. 3-3) at ¶¶ 16-17 and McLain Defendants' Answer and Counterclaims (ECF No. 6) at ¶¶ 17-20*. The McLain Defendants maintain that if it is determined that Caroline has not had actual legal title as a result of these two quitclaim deeds, she has had color of title as a result of the deeds. And, of course, she claims she nevertheless should be deemed to have held the property adversely because of her continual occupation and possession of the property for the required 5 years. *Id. at ¶¶ 20-21.*

must not have been "interrupted by an act of the owner of the land or by the voluntary abandonment by the party claiming the right." *Meadow Lake Estates Homeowners Ass'n*, 178 P.3d at 89.

Here, having considered the entire record, the Court concludes that genuine issues of material fact exist that prevent the McLain Defendants from proving, by the requisite clear and convincing evidence, each of the elements of adverse possession. By the same token, fact issues also preclude summary judgment in the McLain Plaintiffs' favor on the issue of whether Caroline holds the E-3 Ranch via adverse possession. Thus, the Court must recommend that both motions for summary judgment be denied.

A genuine issue of material fact exists, for example, concerning whether Caroline's use of the E-3 Ranch was exclusive. As noted above, the McLain Defendants claim that her use was exclusive and continuous from May 5, 2008, for more than the statutory 5-year period. They have filed Caroline's affidavit and Frank's affidavit so stating. *See Caroline's Aff. (ECF No. 3-3) at 87-93; Frank's Aff. (ECF No. 3-3) at 42-48*.

But the McLain Plaintiffs have filed Mary's affidavit asserting that Caroline's use was not exclusive. Relying on Mary's affidavit, they maintain that: (1) Bernard lived on the property permanently from 2006 until he died on January 3, 2009, which falls within the statutory 5-year period; (2) Harley resided on the property from 2006 until Bernard's death, again during the 5-year period;

(3) Matthew lived on the property with Bernard and Harley, although not during the period in which Caroline claims adverse possession; and (4) Christeen lived on the property from July through September 2008, during the 5-year period. *Mary's Aff. (ECF No. 32-1) at 3-4*. Mary also states in her affidavit that: (1) she held a power of attorney on Bernard's behalf from April 24, 2002, until his death; (2) it was always her understanding that the E-3 Ranch Trust was for the benefit of Bernard's heirs, to be distributed equally to his six children at the time of his death if he died without a will; (3) neither Bernard, Harley, Matthew, nor Christeen ever requested permission from Frank, Caroline, or anyone else to live on the E-3 Ranch; and (4) she, holding Bernard's power of attorney, believed that Frank, Caroline, and their children used the E-3 Ranch with the permission of Bernard, the E-3 Ranch Trust, and Bernard's beneficiaries to maintain and preserve it for all of Bernard's children. *Id. at 3-4*.

Although the McLain Defendants contest the veracity and possibly the foundation upon which Mary's affidavit was made, those are issues more appropriately considered by the trier of fact, and not by the Court, on summary judgment motions. Thus, in light of the foregoing conflicting evidence, the Court cannot conclude that the McLain Defendants have satisfied all of the elements, by clear and convincing evidence, to establish Caroline' adverse possession of the E 3 Ranch during the statutory 5-year period. Similarly genuine issues of material fact preclude summary judgment on the issue in favor of the McLain Plaintiffs.

VI. Conclusion

Based on the foregoing, IT IS RECOMMENDED that: (1) the McLain Defendants' motion to dismiss the United States' Intervenor Complaint (*ECF No. 23*) be DENIED; and (2) the parties' cross-motions for summary judgment (*ECF No. 23 and ECF No. 30*) be DENIED.

The McLain Plaintiffs' summary judgment motion (*ECF No. 36*) concerning the validity of the E-3 Ranch Trust and, alternatively, the transfer of the ranch to one of the family members are more properly addressed after the District Court's rulings on the foregoing motions (*ECF Nos. 23 and 30*).

NOW, THEREFORE, IT IS ORDERED that the Clerk shall serve a copy of the Findings and Recommendation of United States Magistrate Judge upon the parties. The parties are advised that pursuant to 28 U.S.C. § 636, any objections to the findings and recommendation must be filed with the Clerk of Court and copies served on opposing counsel within fourteen (14) days after service hereof, or objection is waived.

DATED this 24th day of October, 2016.

/s/ Carolyn S. Ostby
United States Magistrate Judge

APPENDIX O — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MAY 1, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-35304
No. 23-4221
D.C. No. 1:16-cv-00036-SPW
District of Montana, Billings

FAITH MCLAIN, AS BENEFICIARY OF THE ESTATE OF BERNARD MCLAIN; *et al.*,

Plaintiffs,

v.

FRANCIS MCLAIN, INDIVIDUALLY AND AS CO-MANAGER OF TERA BANI RETREAT MINISTRIES,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA,

Intervenor-Defendant-Appellee,

and

CAROLINE MCLAIN, INDIVIDUALLY AND AS MANAGING DIRECTOR OF TERA BANI RETREAT MINISTRIES; *et al.*,

Defendants.

Filed May 1, 2025

Appendix O

ORDER

Before: BEA, KOH, and SUNG, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Koh and Sung voted to deny the petition for rehearing en banc, and Judge Bea so recommends.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petition for panel rehearing and the petition for rehearing en banc are therefore DENIED.

APPENDIX P — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Appendix P

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Appendix P

28 U.S. Code § 2462 – Time for commencing proceedings

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

26 U.S. Code § 3402(d) – Income tax collected at source

(d) Tax paid by recipient

If the employer, in violation of the provisions of this chapter, fails to deduct and withhold the tax under this chapter, and thereafter the tax against which such tax may be credited is paid, the tax so required to be deducted and withheld shall not be collected from the employer; but this subsection shall in no case relieve the employer from liability for any penalties or additions to the tax otherwise applicable in respect of such failure to deduct and withhold.

Appendix P

26 U.S. Code § 6671 – Rules for application of assessable penalties

(a) Penalty assessed as tax

The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

(b) Person defined

The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

Appendix P

26 U.S. Code § 6672 – Failure to collect and pay over tax, or attempt to evade or defeat tax

(a) General rule

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 or part II of subchapter A of chapter 68 for any offense to which this section is applicable.

(b) Preliminary notice requirement

(1) In general

No penalty shall be imposed under subsection (a) unless the Secretary notifies the taxpayer in writing by mail to an address as determined under section 6212(b) or in person that the taxpayer shall be subject to an assessment of such penalty.

(2) Timing of notice

The mailing of the notice described in paragraph (1) (or, in the case of such a notice delivered in person, such delivery) shall precede any notice and demand of any penalty under subsection (a) by at least 60 days.

(3) Statute of limitations

If a notice described in paragraph (1) with respect to any penalty is mailed or delivered in person before the expiration of the period provided by section 6501 for the assessment of such penalty (determined without regard to this paragraph), the period provided by such section for the assessment of such penalty shall not expire before the later of—

(A) the date 90 days after the date on which such notice was mailed or delivered in person, or

(B) if there is a timely protest of the proposed assessment, the date 30 days after the Secretary makes a final administrative determination with respect to such protest.

(4) Exception for jeopardy

This subsection shall not apply if the Secretary finds that the collection of the penalty is in jeopardy.

(c) Extension of period of collection where bond is filed

(1) In general

If, within 30 days after the day on which notice and demand of any penalty under subsection (a) is made against any person, such person—

(A) pays an amount which is not less than the minimum amount required to commence a proceeding in court with respect to his liability for such penalty,

(B) files a claim for refund of the amount so paid, and

(C) furnishes a bond which meets the requirements of paragraph (3), no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until a final resolution of a proceeding begun as provided in paragraph (2). Notwithstanding the provisions of section 7421(a), the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court. Nothing in this paragraph shall be construed to prohibit any counterclaim for the remainder of such penalty in a proceeding begun as provided in paragraph (2).

(2) Suit must be brought to determine liability for penalty

If, within 30 days after the day on which his claim for refund with respect to any penalty under subsection (a) is denied, the person described in paragraph (1) fails to begin a proceeding in the appropriate United States district court (or in the Court of Federal Claims) for the determination of his liability for such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the 30-day period referred to in this paragraph.

(3) Bond

The bond referred to in paragraph (1) shall be in such form and with such sureties as the Secretary may by regulations prescribe and shall be in an amount equal to 1½ times the amount of excess of the penalty assessed over the payment described in paragraph (1).

(4) Suspension of running of period of limitations on collection

The running of the period of limitations provided in section 6502 on the collection by levy or by a proceeding in court in respect of any penalty described in paragraph (1) shall be suspended for the period during which the Secretary is prohibited from collecting by levy or a proceeding in court.

(5) Jeopardy collection

If the Secretary makes a finding that the collection of the penalty is in jeopardy, nothing in this subsection shall prevent the immediate collection of such penalty.

(d) Right of contribution where more than 1 person liable for penaltyIf more than 1 person is liable for the penalty under subsection (a) with respect to any tax, each person who paid such penalty shall be entitled to recover from other persons who are liable for such penalty an amount equal to the excess of the amount paid by such person over such person's proportionate share of the penalty. Any claim for such a recovery may be made only

in a proceeding which is separate from, and is not joined or consolidated with—

(1) an action for collection of such penalty brought by the United States, or

(2) a proceeding in which the United States files a counterclaim or third-party complaint for the collection of such penalty.

(e) Exception for voluntary board members of tax-exempt organizationsNo penalty shall be imposed by subsection (a) on any unpaid, volunteer member of any board of trustees or directors of an organization exempt from tax under subtitle A if such member—

(1) is solely serving in an honorary capacity,

(2) does not participate in the day-to-day or financial operations of the organization, and

(3) does not have actual knowledge of the failure on which such penalty is imposed. The preceding sentence shall not apply if it results in no person being liable for the penalty imposed by subsection (a).

Appendix P

26 U.S. Code § 7202 – Willful failure to collect or pay over tax

Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Appendix P

26 U.S. Code § 7501 – Liability for taxes withheld or collected

(a) General rule

Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

(b) Penalties

For penalties applicable to violations of this section, see sections 6672 and 7202.