No.

IN THE

Supreme Court of the United States

BRIAN KENNER AND KATHLEEN KENNER,

Petitioners,

V.

ERIN KELLY ET AL,

Respondents.

Petition for a Writ of Certiorari and Mandamus to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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PRO SE

I. QUESTIONS PRESENTED

Federal statute 26 USC § 7433 is the federal tax code's exclusive taxpayer remedy against the United States for negligent, reckless, and/or intentional violations of title 26 statutes and promulgated regulations. It is United States' preferred taxpayer remedy statute

For this dispute, the United States and federal courts have insisted that our relief be confined to §7433 even as IRS employees have engaged in a *pattern of racketeering*—a violation of RICO - 18 USC Chapter 96. By contrast, it is our contention that §7433 has actually enabled and fostered IRS employees' pattern of racketeering resulting in a denial of our Due Process rights under the 5th Amendment.

1. Does a court have the authority to dismiss and deny non title 26 claims against IRS defendants solely because the plaintiffs' complaint is not based upon §7433, the preferred United States' remedy statute for IRS employee misconduct?
2. Does the exclusivity provision of §7433 defeat deterrence for IRS employees' intentional violations of the law and thereby enable consequence-free illegal invasions of a taxpayers' property rights, effectively circumventing a taxpayers' Due Process rights prior to such invasion?

In Pierson v. Ray, the Supreme Court found that judges have immunity for their discretionary

decisions even when "acting maliciously and corruptly" (bad motives) Pierson v. Ray, 386 US 547 at 554 (1967). It is un-clear if judges also enjoy immunity from personal liability for intentional violations of the law (unlawful actions).

3. Does a lack of deterrence for intentional violation of the law through judicial immunity also provide federal judges with the power to engage in consequence-free illegal invasions of a litigant's right to Due Process?

II. LIST OF PARTIES

Petitioners

Brian and Kathleen Kenner are the plaintiffs in the underlying RICO lawsuit and petitioners for this petition for *writ of certiorari* and *writ of mandamus*.

Respondents

Defendants *Erin Kelly*, an individual (IRS Revenue Officer, Emp. #: 33-05034), *Carol Rose*, an individual (IRS Offer In Compromise Specialist, Emp.#: 33-08058), *Mary Pittner*, an individual (Supervisory Revenue Officer, ID: 1000151076), *Patricia Blizzard*, an individual (Supervisory Revenue Officer, ID: 1000150698), *C. John Crawford*, an individual (IRS Area Director), and *Charlotte Becerra*, an individual (Revenue Officer, ID: 1000621757) are citizens of and reside in the State of California. Defendant *David Alito*, an individual (IRS Director), is presently a citizen of and resides in the State of Georgia. Defendant *Jennifer Plasky*, an individual (IRS Process Examiner, Emp. #: 0202115) is a citizen of and resides in the State of Tennessee. Defendant *Mindy Meigs*, an individual (IRS Attorney, ID: 409366) is a citizen of and resides in the State of California. Defendant *Silvia Shaughnessy*, an individual (IRS Attorney, ID: 408761) is a citizen of and resides in the State of California. All have been sued in their individual capacity as RICO persons operating or managing a RICO enterprise.

Defendant *Barbara Dunn*, an individual (an attorney), is a citizen of and resides in the State of California. Defendant *Lacey, Dunn, & Do* is A Professional Corporation with its place of business in La Crescenta, California. Defendants Dunn, Lacey, Dunn & Do, and the IRS defendants have been sued for conspiracy to a violation of RICO.

Other respondents:

Federal District Court Judge Dana Sabraw, Ninth Circuit Justice Richard Tallman, Ninth Circuit Justice Milan Smith, and Ninth Circuit Justice Andrew Hurwitz are respondents to the petition for a *writ of mandamus*.

III. CORPORATE DISCLOSURE STATEMENT (SUPREME COURT RULE 29.6)

No corporations are involved in this proceeding.

IV. TABLE OF CONTENTS

V. AUTHORITIES

A. Cases

B. Constitutional and Statutory Provisions

C. Other Authorities

VI. OPINIONS BELOW

On November 18, 2010, Judge Barry Ted Moskowitz *sua sponte* dismissed with leave the Kenner RICO lawsuit (Appendix B - Decision).

On May 27, 2011, Judge Battaglia dismissed with prejudice the Kenner RICO lawsuit (Appendix C - Decision).

The RICO lawsuit's appeal was dismissed on June 20, 2013 (Appendix A – Decision Memorandum).

NOTE: A panel rehearing was requested (June 28, 2013, 11-56062, Dkt 44). No order or decision is provided because this petition has neither been granted nor denied.

VII. BASIS FOR JURISDICTION

The Ninth Circuit affirmed the district court dismissal of the lawsuit on June 20, 2013 (Appendix A and 11-56052, Dkt 40). Petitioners timely filed a petition for panel rehearing on June 28, 2013 (11-56052, Dkt 44).

The Ninth Circuit has neither granted nor denied our rehearing request or issued its decision mandate. The status of the dispute is uncertain.

Petitioners seek a *writ of certiorari* as authorized by 28 USC § 1254(1). Petitioners also, either additionally or in the alternative, seek a *writ of mandamus* as authorized by 28 USC § 1651(a).

VIII. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. The Due Process Clause of the 5th Amendment to the United States' Constitution

Relevant clauses are emphasized:

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.

B. 26 USC § 7433 - Civil damages for certain unauthorized collection actions

Petitioners challenge the exclusivity clause of 26 USC § 7433 for intentional violations of the IRC. The entire text of §7433 is set forth in Appendix D of this petition.

IX. STATEMENT

A. Basis for Federal Jurisdiction

The United States District Court for the Southern District of California had subject matter jurisdiction over this action against Erin Kelly, Jennifer Plasky, Carol Rose, Mary Kay Pittner, C. David Crawford, Patricia Blizzard, Charlotte Becerra, Silvia Shaughnessy, David Alito, and Mindy Meigs, and, Barbara Dunn, and Lacey Dunn and Do, PC pursuant to 15 USC § 1121, and 28 USC § 1331 and 28 USC § 1332.

B. The RICO Lawsuit

In the years 2000 and later, we, petitioners Brian and Kathleen Kenner, were harmed by our accountants, attorneys, and stock broker through numerous malicious and dishonest acts. We sued all three. We did this mostly *pro se,* having learned not to trust our representatives. The dishonest actions taken by our accountant and attorneys left us with a considerable tax liability.

We won or settled to our benefit all the lawsuits. The first party to settle was tax attorney Michael Shaff[1]. Michael Shaff was caught lying under oath in his deposition for our lawsuit against him. Mr. Shaff promptly settled for the limits of his insurance policy. He was represented by law firm Lacy Dunn and Do, PC—a party to this RICO

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[1] Michael Shaff, before we encountered him, had been an employee of the IRS as an attorney

dispute. Law firm partner Barbara Dunn, apparently unhappy that we should receive any of the settlement proceeds from Shaff's insurance company, called IRS Defendants (IRS Manager Mary Pittner) and asked what she could do to insure that we receive no benefit from the Shaff settlement funds. After the conversation with Ms. Dunn, IRS Defendant Pittner concluded that it was in the "best interest of the public" to take our assets. She then directed her employees to "work out the terms".

We had planned to use the Shaff settlement funds to settle our liability with the IRS through an Offer in Compromise (26 USC § 7122). RICO Defendant Dunn and the IRS resorted to a dishonest scheme to deny us the Shaff settlement funds and any hope of resolution of the IRS liability. Eventually, two more settlements would come from the civil lawsuits against our representatives. With the Offer in Compromise still pending, the IRS resorted to other acts of deceit or dishonesty in order to illegally confiscate those funds.

On October 8, 2010, we filed RICO lawsuit 10-cv-2105 ("RICO Lawsuit #1") in the Southern District of California against 10 IRS employees in their individual capacities. Fifty six separate and diverse RICO predicate acts were alleged against the RICO Defendants. The lawsuit was dismissed (Appendix B and C) and subsequently appealed. RICO Lawsuit #1's appeal decision is the subject of this *writ of certiorari* and *mandamus* petition.

On June 20, 2013, the Ninth Circuit affirmed the district court's dismissal (Appendix A – Ninth Circuit Decision Memorandum). We petitioned to have the Ninth Circuit rehear our appeal (June 28, 2013, 11-56062, Dkt 44), requesting that the court take care to address the citations and findings set forth in the rehearing petition. The Ninth Circuit has neither granted nor denied our rehearing petition.

A 2nd RICO lawsuit was filed to preserve rights not protected by RICO Lawsuit #1

Earlier, on July 7, 2011, a 2nd RICO lawsuit was filed (11-cv-1538) to preserve Kenner rights not protected by the 1st RICO lawsuit. New claims were added to the original allegations: a 26 USC § 7432 real property claim and several constitutional claims. *Fireman's Fund*, a corporation, was added as a new defendant.

The 2nd RICO lawsuit was initially assigned to Judge Dana Sabraw. Judge Sabraw transferred the 2nd RICO lawsuit to the courtroom of Judge Battaglia. Judge Battaglia has now recused himself of both RICO lawsuits. The lawsuits have thus returned to the Sabraw Court.

Federal judges Barry Moskowitz and Anthony Battaglia participated in a conspiracy to unlawfully defeat RICO Lawsuit #1

Both district courts dismissed RICO Lawsuit #1 for failure to state the United States' preferred

remedy[2]. On November 18, 2010, Judge Barry Moskowitz *sua sponte* dismissed RICO Lawsuit #1 for failure to state a §7433 claim (Appendix C). Judge Moskowitz threatened[3] us to modify our complaint into one based on 26 USC § 7433 causes of action or face complete dismissal of our claims. Judge Moskowitz's specific *dismissal with leave* was for failure to state a 26 USC § 7433 claim based on the fact that federal defendants are immune from RICO allegations because of sovereign immunity. For our first amended complaint, we again pleaded RICO. In response, Judge Moskowitz neither denied defendants motions to dismiss nor dismissed the RICO lawsuit.

On March 7, 2011, Judge Anthony Battaglia was confirmed to the federal bench. One week later, Judge Battaglia replaced Judge Moskowitz on the 1st RICO lawsuit. On May 27, 2011, Judge Battaglia dismissed RICO Lawsuit #1 on the grounds that he lacked subject matter jurisdiction based on sovereign immunity (Appendix C). Judge Battaglia found that our RICO complaint was not frivolous. In his dismissal, Judge Battaglia nevertheless threatened[4] the possibility of future

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[2] Not a statutory requirement but an unspoken policy. 26 USC § 7433 (the preferred remedy) achieves de-facto total personal immunity for IRS employees when a pattern of racketeering is undertaken for the benefit of the United States.

[3] A violation of the Bane Act: *Cal. Civ. Code § 52.1*

[4] A violation of the Bane Act: *Cal. Civ. Code § 52.1*

sanctions should we further pursue our RICO claims against IRS defendants.

On June 21, 2011, Judge Battaglia's dismissal was appealed (Ninth Circuit appeal 11-56062). Twenty months after final appeal arguments were filed (December 11, 2012 until June, 2013), the Ninth Circuit decided the case. The court's decision moved forward the Battaglia and initial Moskowitz district court conclusion that our lawsuit was inadequate because we had not filed complaint based on 26 USC § 7433 causes of action. The Ninth Circuit found no fault with the sufficiency of the RICO allegations.

The Extended Controversy:

C. A civil rights lawsuit was filed by Kenner that was based, in part, upon the California Bane Act (Cal. Civ. Code § 52.1). National Bank Capital One and Federal Judges Anthony Battaglia and Ted Moskowitz are additional parties to this suit having been drawn into the controversy

1. A third lawsuit was filed in order to: one, stem federal employee lawlessness taken to defeat the RICO lawsuits, and two, protect threatened Kenner assets

A California state lawsuit was filed (37-2011-00070473-CU-CR-EC) with claims based, in part,

upon on the Bane Act (*Cal. Civ. Code § 52.1*[5]). This lawsuit was removed to San Diego federal court by IRS defendants and numbered 11-cv-2520. Lawsuit 11-cv-2520 is hereafter referred to as the "Bane Act Lawsuit". IRS Defendants, Federal judges Anthony Battaglia and Ted Moskowitz, and Capital One are parties to the lawsuit.

On July 25, 2011, IRS Defendants, or colleagues on their behalf, illegally threatened confiscation of *all* our property and assets. Our RICO Lawsuit #1 appeal opening brief was due shortly thereafter. Because of claims set forth in the earlier federal lawsuits, IRS employees were without legal authority to engage in collection activity against us. Consequently, we filed the Bane Act lawsuit and sought the protection of: (1) the Sabraw Court with a TRO request; (2) the Battaglia Court with a TRO request; (3) the Battaglia Court with a request for notice of *lis pendens*; (4) the Ninth Circuit Court of Appeals with a TRO request, and then finally (5) a supplemental TRO request at the Ninth Circuit. The *lis pendens* was granted. Though a TRO was not granted, IRS employees did abandon their threatened collection action against us.

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[5] When a "person or persons, whether or not acting under color of law, interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States […]", they violate the Bane Act (*Cal. Civ. Code § 52.1*).

Defendant Capital One also abandoned their noticed initial foreclosure sale of the Kenner property scheduled for August 1, 2011, as a consequence of notice of our application for *lis pendens*. However, on September 26, 2011, 3 days before our appeal in the RICO lawsuit was due, Capital One mailed us a "3 day notice", demanding that we vacate the property. In the notice, Capital One declared that they had taken ownership of the property just days before. We alleged in the Bane Act Lawsuit that Capital One obtained ownership of the property wrongfully and in collaboration with IRS Defendants to disrupt RICO Lawsuit #1's appeal (no.11-56062). Almost a year later, and because of the Bane Act Lawsuit appeal[6], Capital One rescinded the sale of the property, stating in their *notice of rescission* filed with the County of San Diego that they *should not have proceeded*.

2. Further deceit and abuse of process by new RICO lawsuit conspirator Capital One resulted in yet another state lawsuit against them

On December 18, 2011, Capital One deceptively served two nearly identical (two word difference) unlawful detainer lawsuits upon us ("37-2011-362**48**" and "37-2011-362**69**"). By state

[6] Judge Benitez attempted to trick us into failing to timely file our appeal on Bane Act Lawsuit. Once it was apparent that we would successfully obtain our right of appeal, and thus get the lawsuit alleging claims against Capital One into appeal, Capital One and its agents rescinded the "sale" of the Kenner property.

law, we had five days to answer or otherwise act on the lawsuit(s). Two days after service of process however, Capital One noticed us in writing that *the unlawful detainer lawsuit* had been dismissed. Unaware at that time that *two* identical lawsuits had been filed, but also unaware at that time that "the unlawful detainer lawsuit" had been dismissed, we timely filed an answer to one lawsuit. We eventually discovered the second lawsuit and attempted to answer it, but by then, Capital One had dismissed it. The multiple unlawful detainer lawsuits were a scheme designed to obtain a default judgment against us on the property.

We sued Capital One and others for these new unlawful and abusive acts in a yet another state lawsuit (no. 37-2012-65080). This lawsuit was improperly denied as *res judicata* based on the claims set forth in the earlier and still pending (at appeal) Bane Act Lawsuit. However, the Bane Act Lawsuit had been dismissed on jurisdictional grounds and thus could not be *res judicata* for the claims of state lawsuit 37-2012-65080. Moreover, the events of the Capital One unlawful detainer scheme described above occurred after the Bane Act Lawsuit's district court dismissal and thus, for this additional reason, cannot be *res judicata*. Lawsuit 37-2012-65080 was not appealed because the court in that lawsuit sanctioned us to deter the appeal and to keep this dispute out of state court.

3. Federal judge Roger Benitez and DOJ employee Kaycee Sullivan became potential

conspirators to the controversy for unlawful acts carried out to defeat the Bane Act Lawsuit

On January 13, 2012, DOJ attorneys were granted permission to substitute the United States[7] for IRS Defendants (11-cv-2520: Doc 28) in the Bane Act Lawsuit. This was accomplished by assuming implied FTCA (28 U.S.C. Chapter 171) claims in the lawsuit. There are however, *at least*[8] two problems with this Benitez Court act. Problem number one: we did not plead FTCA causes of action in the Bane Act Lawsuit, and we are of course "master[s] to decide what law [we] will rely upon" Caterpillar Inc. v. Williams. We alleged the California Bane Act, Abuse of Process, and other remedies for various intentional unlawful acts in the lawsuit. Problem number two: as a matter of law, the FTCA may not be used as a remedy for intentional violations of the law, and explicitly, for a violation of *Abuse of Process*[9]. This move by the Benitez Court could easily be challenged in court or later undone at appeal. However, the DOJ and

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[7] The United States had not waived its sovereign immunity. This substitution scheme would have effectively ended the lawsuit against IRS Defendants if the Bane Act Lawsuit appeal could be denied.

[8] A third reason is that the IRS Defendants themselves argued (using 28 USC § 2680 (c) – Exceptions) that the United States should not have been substituted for IRS Defendants. In bad faith, they did this once the Bane Act Lawsuit was dismissed for the United States' sovereign immunity after the substitution.

[9] 28 USC § 2680 (h) – *Exceptions*.

Judge Benitez would together undertake further dishonest acts to protect the wrongful substitution scheme from appeal.

On the same day the substitution act was granted by Judge Benitez, Judicial Defendants, IRS Defendants, and Capital One Defendants were dismissed from the lawsuit (11-cv-2520: Doc 29) using a court minute order (minute order header stating: "WARNING: CASE CLOSED on 01/13/2012")[10]. The United States had requested substitution of the United States for IRS Defendants without proper notice to plaintiffs. DOJ attorneys dishonestly declared, in collaboration with Judge Benitez's substitution and minute order dismissal scheme, that they had timely served us. They had not. We provided evidence to support our allegations of DOJ perjury to the Benitez Court. Our allegations were unfairly rejected. The DOJ had, in fact, noticed us of their request for substitution 12 days after they served the notice on the court[11], and 4 days after the Bane Act Lawsuit had been dismissed.

We timely filed our first appeal for the Bane Act Lawsuit on February 10, 2012 (12-55287). Four days later, on February, 14, 2012, the United States filed a motion to dismiss the United States within the Benitez Court (11-cv-2520). In response,

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[10] Minute order dismissals are ambiguous when compared to entry of final judgment using *Federal Rule of Civil Procedure 58*.

[11] Notice to the Court on January 5, 2012 and notice to Kenner on January 17, 2012.

we moved to have the Benitez Court enter final judgment (*Federal Rule of Civil Procedure 58*). This proper request was denied. Judge Benitez apparently hoped that we, as *pro se* litigants, would not understand that a court minute order can be considered entry of final judgment for the purposes of appeal.

On February 28, 2012, 18 days after our first notice of appeal, the United States filed a motion to dismiss the appeal (12-55287: Doc 6) at the Ninth Circuit. We opposed the United States' motion and attached a declaration stating that we had neither served the United States nor obtained a waiver of sovereign immunity from the United States[12] (plaintiffs have the burden of proof to establish that the United States has waived it sovereign immunity). The Ninth Circuit nevertheless granted the United States' motion, finding that it did not have jurisdiction over the appeal (12-55287: Doc 9). In truth, because of the minute order and the content of Kenner declaration, the district court did not, and could not, have jurisdiction of the Bane Act Lawsuit against the United States once our Notice of Appeal was timely filed.

On March 27, 2012, the Benitez Court granted the United States' motion to dismiss using a second minute order. Judge Benitez would later opine in his dismissal order that he did not have personal jurisdiction of the United States or subject

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[12] The United States did waive its immunity for the acts underlying the RICO lawsuit claims. We had not sued the United States in the RICO lawsuit however.

matter jurisdiction of the lawsuit against the United States[13]. The new minute order plainly stated "APPEAL" in its header (instead of "WARNING: CASE CLOSED …" as the first minute order had done). We appealed once again (12-55758). We suspected that if we did not timely appeal the lawsuit's dismissal, the word "APPEAL" would be declared sufficient notice to us that the lawsuit had been dismissed so as to justify a jurisdictional denial of a subsequent appeal. This time the Ninth Circuit *sua sponte* dismissed the appeal using the same justification as on the first appeal dismissal (12-55758: Doc 2). We *again* moved the Benitez Court to enter final judgment. It did. We appealed a third time. This time our appeal efforts were not denied (Appeal 12-56358 docketed July 23, 2012).

The Bane Act Lawsuit Notice of Appeal was timely filed 3 times. The Ninth Circuit fairly had jurisdiction of the lawsuit all three times. The entire district court dismissal con was an effort to trick us into missing the jurisdictional appeal timeline in aid of the unlawful FTCA substitution scheme.

Within the district court dismissal of the United States, Judge Benitez ruled that IRS DOJ attorney Kaycee Sullivan had "likely" not engaged in perjury when she, as we allege, intentionally misrepresented to the court under oath that she

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[13] The Benitez District Court therefore, paradoxically, overruled the prior Ninth Circuit decision.

had timely served us on the notice of substitution. Judge Benitez has no authority to find fact on this question since he was without jurisdiction[14]. His decision abetted defendant attorney Kaycee Sullivan's perjury.

Finally, without subject matter or personal jurisdiction, Judge Benitez attached to his United State's dismissal order an ORDER TO SHOW CAUSE ("OSC"), compelling us to explain to the court why Judge Benitez should not formally deny us access to the courts without the court's permission. We did not respond to the Benitez OSC, and revealingly, he did not issue the order.

4. Capital One and the Trustee for Capital One attempted to reverse their involvement in the RICO conspiracy with federal employees, by rescinding their "purchase" of the Kenner property, once it became apparent that we would not fall for the Benitez Court's dismissal minute order ruse.

Capital One used the trustee facilitated sale of our property as "proof" that they had properly purchased it. Capital One had no doubt assumed that Judge Benitez would prevent our Bane Act Lawsuit from reaching appeal, thereby protecting Capital One's dishonest acquisition of the property. Capital One's "purchase" of the Kenner property was rescinded on May 25, 2012, sheepishly stating on the recorded "NOTICE OF RECISION OF

[14] No jurisdiction means Judge Benitez is also liable for harm inflicted for another violation of the California Bane Act.

SALE" that "the foreclosure sale that occurred on [left blank] should not have proceeded".

At appeal for the Bane Act Lawsuit, Capital One argued that our complaint against them should be dismissed because they had properly purchased the Kenner property, as evidenced by the trustee's notice of sale filed with the San Diego County recorder. However, Capital One filed their *notice of rescission* for the sale of the Kenner property with the county of San Diego before they made their arguments at the Ninth Circuit. Deceptively, we were not noticed that the *rescission of sale* had been recorded. Capital One's opposition brief before the Ninth Circuit was therefore an act of perjury.

D. A fifth lawsuit was filed challenging de-facto personal immunity federal employees enjoy for intentional violation of the law when the United States is the beneficiary

We filed federal lawsuit 12-cv-1011 ("Constitutional Challenge to IRC§7433"), challenging the constitutionality of statutes and other common law enabling federal employees, including federal judges, to intentionally break the law when it is in the best interest of the United States to do so. We included, by reference, the earlier lawsuits as the basis and standing for the claims of this lawsuit.

The lawsuit was initially assigned to Judge Battaglia's court. In response to United States' motion to dismiss, we suggested that it is a conflict of interest for Judge Battaglia to maintain control

of this lawsuit. Judge Battaglia subsequently disqualified himself from the three Kenner cases he then controlled. The two RICO lawsuits and the Constitutional Challenge to IRC§7433 lawsuit were then transferred to the courtroom of Federal Judge Dana Sabraw. Days later, the Constitutional Challenge to IRC§7433 lawsuit was mysteriously transferred to the courtroom of federal Judge Michael Anello. The Constitutional Challenge to IRC§7433 lawsuit was then dismissed on bogus grounds—for, among other reasons, that we had not established a case or controversy. The Constitutional Challenge to IRC§7433 lawsuit was dismissed without an opportunity to amend. The dismissal has been appealed and a decision is pending.

Judge Anello was once a partner in the law firm representing parties to *this* RICO lawsuit. Barbara Dunn and law firm Lacy, Dunn, and Do, PC. Barbara Dunn became a RICO conspirator when she conspired with IRS employees to defraud Kenner of settlement from an earlier lawsuit. Both these parties are represented by Charles Grebing. Charles Grebing and Michael Anello were partners in the law firm WINGERT, GREBING, ANELLO & BRUBAKER.

X. REASONS FOR GRANTING THE WRIT

Petitioners pray that the Supreme Court of the United States grant our *writ of certiorari* to the Court of Appeals for the Ninth Circuit for the questions set forth herein. Petitioners also pray that the Supreme Court grant, in addition to, or in the alternative of our *writ of certiorari*, a *writ of mandamus* enabling or compelling Federal Judge Dana Sabraw[15], in the Federal District Court for the Southern District of California, to move the Kenner RICO lawsuit to trial.

A. Summary

In support of our petition for a *writ of certiorari*, we argue below that IRS employees' respect for the rule of law has been undone by an act of Congress and the Court of Appeals in this lawsuit. Federal employees' unsurpassed respect for the rule of law is required to guarantee the preservation of Americans' Constitutional rights. *Lex est tutissima cassis*[16] (The Law is the safest

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[15] Judge Sabraw was recently assigned the RICO lawsuit and temporarily assigned the Kenner lawsuit challenging the constitutionality of certain 26 USC § 7433 provisions. He has not interfered with the constitutional rights of Kenner.

[16] Edward Coke "considered every important public question from the standpoint of the supremacy of the law, from the standpoint that the common law is the heritage of every British subject, who cannot be deprived of the rights it gives him excepting by his own consent manifested through an

shield) says Lord Coke, the father of judicial immunity. Some federal employees have begun to believe that the rule of law is not supreme. We argue that federal statute IRC § 7433 has enabled this result because the statute has eliminated deterrence for intentional violations of the IRC. Corrupt agency policies can now pressure IRS employees to break the law to benefit the United States.

The *writ of mandamus* and *writ of certiorari* petition is also proper because, as the facts presented herein establish, we are being deliberately and systematically denied due process to pursue our chosen legal remedy against federal defendants, where, as a matter of federal law, it is our legal right to do so.

First, the district and appeals courts have dismissed the Kenner RICO lawsuit on the grounds that we did not plead claims using the United States preferred remedy. Prior Supreme Court decisions have clearly established that courts cannot direct a plaintiff to use a remedy of the courts' choosing. Second, the RICO lawsuit is unresolved at the court of appeals. The Court of Appeals has neither granted nor denied our petition for panel rehearing. This leaves petitioners with no means to obtain relief. Finally, in their decisions, the district and appeals courts have created the conditions under which IRS Defendants now believe they have implied personal immunity

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act of Parliament." 1929 Hastings Lyon; Herman Block, *Edward Coke - Oracle of the Law* 170 and 186 1929

for a *pattern of racketeering* when the United States is the beneficiary.

B. The Due Process guarantor for all taxpayers has been eliminated by an act of Congress: statute 26 USC § 7433 has undone deterrence for IRS employees' intentional violations of the IRC. A Court of Appeals has compounded taxpayers' constitutional vulnerabilities and additionally decided that IRS employees should not be deterred from a pattern of racketeering when the United States is the beneficiary[17]

1. Due Process will be lost for some taxpayers because the supremacy of the rule of law has been undone for all taxpayers[18]

The supremacy of the rule of law, as it relates to its capacity to confine IRS employees to powers designated under the Constitution, has been undermined. Shouldn't federal employees be deterred from intentional violations of the law? … *even or especially when the United States is the beneficiary*? Federal employees and the courts have argued that some immunity is necessary so that

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[17] We argue below that 26 USC § 7433 has undone deterrence for intentional violations of the law. The Court of Appeals has dismissed our RICO lawsuit for failure to state a 26 USC § 7433 claim. Thus, the Appeals Court decision effectively concludes that IRS employees shall not be deterred, even from a pattern of racketeering, an element of RICO.

[18] That is, all taxpayers are at risk.

they may more efficiently administer government. We argue, and will prove if permitted, that federal employees' immunity for intentional violation of the law has resulted in both a pattern of racketeering and a violation of our Due Process rights under the 5th Amendment.

It is true that other taxpayers (but not necessarily us now)[19] have the right to seek relief from the United States after their property has been wrongfully confiscated by IRS employees. However, the deterrence defeating form of §7433 has virtually guaranteed that the rule of law, with its due process protections, will not be prospectively respected by IRS employees. The District and affirming Appeals Court decisions for this lawsuit, have only made matters worse.

Though it is also a waiver of United States sovereign immunity, in truth, §7433 enhances[20] United States' due process protections over those ordinarily possessed by other Americans. §7433 has nothing specifically to do with a taxpayer's own due process. Instead, the taxpayer's due process protections are theoretically achieved through the statutes and promulgated regulations of the IRC. But §7433's elimination of deterrence for intentional violations of the IRC ensures that IRS employees do not respect it. IRS employees need

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[19] See Appendix A and the Court of Appeals decision memorandum where the decision to dismiss our claim with prejudice was affirmed.

[20] Administrative process first, no jury trial, limit to claims, etc.

only to conclude that confiscation of a taxpayer's assets is in the best interest of the public in order to rationalize (immunize) the unlawful acts required to accomplish it. Governmental "efficiency" is achieved by making it possible for IRS employees themselves to decide what assets belong to the United States first. The taxpayer may later elect use statutes designed to protect the United States' due process (i.e. §7433) to argue why their assets should no longer remain in United States' possession. Because the taxpayer's due process protections were unconstitutionally circumvented, the burden of proof has unfairly shifted to them.

We pray that §7433's threat to taxpayer's rights is clear. Nevertheless, in this dispute, the United States and courts have decided that we shall have our claim entirely denied (without due process), because we alleged RICO. As sole justification for the denial, the United States and courts asserted that we should have made §7433 claims. Thus, §7433 was also explicitly and directly used to defeat our due process in this dispute.

The supremacy of rule of law must not, in any way, be undermined; otherwise the property rights of all taxpayers are vulnerable to unhindered IRS employee trespass.

2. 26 USC § 7433 has enabled IRS employee managers to thwart the will of the people

§7433 permits actions against the United States for intentional violations of the IRC. §7433 is the plaintiff's exclusive remedy for such claims

(the tortfeaser is thus immune—our constitutional problem with the statute). Also and acceptably, a plaintiff may not sue the United States for deterring damages. Yet, the United States has no appetite for punishing IRS employees' intentional violations of the law when the United States is the beneficiary. [21] *Ipso facto*, §7433 has undone the possibility[22] of any deterring penalties for employees' intentional violations of the IRC. The problem has become acute and *apparently*[23]

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[21] "We nevertheless maintain that the language in *Wilkie*, as well as the principles underlying that decision, are broad enough to bar a RICO suit against government employees in any situation where the employees are acting for the financial benefit of the United States." Emphasis Added (Deputy Assistant Attorney General Tamara Ashford, United States Ninth Circuit RICO Appeal Opposition, 11-56062: Doc. 18; pg. 31, ¶2).

[22] Because the DOJ could theoretically prosecute the wrongful acts of federal employees, this statement is not literally true. We believe however, that the statement here is nevertheless true in reality. We offer as evidence the numerous abuses of the justice system set forth in this petition. See also the above footnote where Deputy Assistant Attorney General Tamara Ashford argued in their appeals that IRS Defendants should have immunity for a pattern of racketeering when the United States is the beneficiary. We also sought out the help of our Congressman (Rep. Duncan Hunter). An employee at Rep. Hunter's office told us that the House Ways and Means committee did not want to change IRS employees' behavior.

[23] "Even if the Court were to find that plaintiffs had established a constitutional or statutory right that they claimed the IRS Defendants had violated, which they cannot, the actions taken by the IRS Defendants in investigating and collecting outstanding tax liabilities

resulted in IRS employees' inability to tell right from wrong. Predictably, a *pattern of racketeering* by IRS employees to benefit the United States has come to pass.

RICO was designed to ensnare the heretofore un-indictable policy maker of a corrupted organization. Bosses were unaccountable because their directives were non-specific and expressly not linkable to the wrongful acts of the organization. In RICO, the presence of a *pattern of racketeering* is used to establish the corresponding presence of a corrupting policy maker.

Because deterrence is defeated, 26 USC § 7433, by comparison, enables an agency policy maker to non-specifically encourage lawless behavior in the furtherance an unlawful policy. IRS managers are "immune" because their proclamations are non-specific, while employees are "immune" because deterrence (i.e. personal liability) for intentional violation of the law has been eliminated. §7433 unmistakably enables that which the RICO statute was uniquely constructed[24] to stop.

IRS managers have exploited §7433 to set policy for the wrongful acts of our dispute. For example, see the Kenner RICO complaint in 11-cv-

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cannot be said to be 'clearly unlawful' to a reasonable officer in that situation." (San Diego United States Attorney Laura Duffy, 10-cv-02105: Doc. 63, pg. 11, ¶2).

[24] Maybe enacted for the mob, but constructed to ensnare the corrupting policy maker(s) as well as the individuals breaking laws.

1538 and Kenner FOIA request, pg. 13, Figure 4, where IRS manager Mary Pittner opined that it is in the "best interest of the public" to take our assets. Ms. Pittner used the IRS' communications system, the IRS ICS History database, to direct her IRS colleagues and employees, non-specifically, to "work out the terms" *id.* of the confiscation. As a matter of law, IRS employees were prevented from legally confiscating our assets because an IRS *Offer in Compromise* was pending. As the FOIA documents show (attached to the 11-cv-1538 complaint), Ms. Pittner understood this fact. IRS Defendants therefore worked outside the IRC to carry out Pittner's correspondingly unlawful collection policy against us. Pittner's written statements here are not necessary for our allegations of RICO; IRS employees' pattern of racketeering plainly exposes the presence of this dishonest policy and policy maker.

Whether accidently or on purpose, Congress must not enact laws which enable federal employee managers to either ignore the will of the people or our/their rights guaranteed under the Constitution.

3. The elimination of deterrence has disempowered federal employees

What can an honest federal employee say to a manager who has indirectly outlined a policy ostensibly to benefit the public, which can only be achieved through intentional violations of the law? Petitioners believe that the answer is simple: the employee should caution their manager that the supremacy of the rule of law is ultimately that

which is in the best interest of the public. The employee might add that this is true because the rule of law is established through democratic processes, but subordinate to the Constitution's essential protections for the rights of individuals. But, Lord Coke[25], from whom we quote, "the law is the safest shield", is a rare employee indeed; managers usually prevail. Even Lord Coke learned that it is not professionally prudent to challenge the legality of one's manager's policies. On November 14, 1616, Lord Coke was dismissed from the Chief Justiceship of the King's Bench. He had declared a royal letter illegal.

This brings the discussion to the likely meaning of the Court of Appeals decision in this lawsuit. The District Court dismissed our RICO lawsuit for failure to state a 26 USC § 7433 claim, and the Ninth Circuit affirmed. The courts' decision however, is a conflict in principle with prior Supreme Court findings (see section "E" to follow). Now, it is possible that the Ninth Circuit sought to have the Supreme Court revisit its prior finding in Caterpillar Inc. v. Williams, 482 U.S. 386, 392 n. 7, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987)—finding that "the party who brings a suit is master to decide what law he will rely upon." However, because a new and dangerous judicial usurpation of power would result from a reversal of the court's finding

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[25] Edward Coke, by taking a principled stand, established an idea that was until that time unthinkable: the King of England was also subject to the rule of law (*Case of Proclamations* and *Dr. Bonham's Case*).

in *Caterpillar Inc.*, it is more reasonable to believe that the Ninth Circuit was purposely facilitating this court's superior intervention in this dispute.

A lack of deterrence reduces the power and authority of individuals throughout the federal government, including within the justice system, to compel colleagues' adherence to the rule of law. Without deterrence federal employees' capacity to perform their jobs is unnecessarily and undesirably compromised.

4. Judicial immunity for intentional violation of the law prevents the realization of justice when a dispute is attended by significant United States' adversarial interests

The presence of a pattern of judicial lawlessness in this controversy establishes the existence of another corrupting policy maker. This particular policy maker has apparently concluded that a violation of RICO must not be proved against IRS employees. Petitioners' *Statement* herein illustrates how the justice system tried to defeat the RICO and related claims. However, it should not matter that petitioners have a provable case against specific IRS employees for RICO. For justice, judges must have the power to vote their conscience while respecting the rule of law. A proved pattern of lawlessness by the judiciary proves that policies can be established prohibiting judges from doing so.

C. The questions of this Writ of Certiorari are properly before the Supreme Court

'Our traditional rule […] precludes a grant of certiorari only when "the question presented was not pressed or passed upon below."' United States v. Williams, 504 US 36, 41 (1992)

1. The questions were raised below

The constitutionality of judicial immunity was raised in the related lawsuit herein entitled *Constitutional Challenge to IRC§7433*, numbered 12-cv-1011 in Federal District for the Southern District of California. This lawsuit was dismissed at the district court and has been appealed (12-57343). A decision is pending. The constitutionality of 26 USC § 7433 was also raised in the related lawsuit *Constitutional Challenge to IRC§7433*. 26 USC § 7433's constitutionality was also challenged in the related 2nd Kenner RICO lawsuit numbered 11-cv-1538.

2. The District Court and Court of Appeals passed on the issue

The District Court and Court of Appeals have passed on the issue by deciding that (1) Defendants are not liable for a pattern of racketeering because 26 USC § 7433 is a taxpayer's exclusive remedy, and (2) petitioners' claims against Defendants are dismissed with prejudice because petitioners did not originally sue using 26 USC § 7433. In both instances, petitioners due process rights were denied by 26 USC § 7433.

D. Writ of Mandamus

> 'The common-law writ of mandamus against a lower court is codified at 28 USC § 1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." Ex parte Fahey, 332 U.S. 258, 259-260 (1947). "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction." Roche v. Evaporated Milk Assn., 319 U. S. 21, 26 (1943). Although courts have not "confined themselves to an arbitrary and technical definition of `jurisdiction,'" Will v. United States, 389 U. S. 90, 95 (1967), "only exceptional circumstances amounting to a judicial `usurpation of power,'" *ibid.*, or a "clear abuse of discretion," Bankers Life & Casualty Co. v. Holland, 346 U. S. 379, 383 (1953), "will justify the invocation of this extraordinary remedy," *Will*, 389 U.S., at 95.'

As the writ is one of "the most potent weapons in the judicial arsenal," id., at 107, three conditions must be satisfied before it may issue. Kerr v. United States Dist. Court for Northern Dist. of Cal., 426 U. S. 394, 403 (1976). First, "**the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires**," ibid.—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process, *Fahey*, supra, at 260. Second, **the petitioner must satisfy "`the burden of showing that [his] right to issuance of the writ is "clear and indisputable."'"** *Kerr*, supra, at 403 (quoting Bankers Life & Casualty Co., supra, at 384). Third, even if the first two prerequisites have been met, **the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances**. *Kerr*, supra, at 403 (citing Schlagenhauf v. Holder, 379 U.S. 104, 112, n. 8 (1964)). These hurdles, however demanding, are not insuperable. This Court has issued the writ to restrain a lower court when its actions would threaten the separation of powers by "embarrass[ing] the executive arm of the Government," Ex parte Peru, 318 U. S. 578, 588 (1943), or result in the "intrusion

> by the federal judiciary on a delicate area of federal-state relations," *Will*, supra, at 95 (citing Maryland v. Soper (No. 1), 270 U.S. 9 (1926)). (Emphasis Added)
>
> Cheney v. United States Dist. Court, 542 U.S. 367, 380 (2004)

E. The Ninth Circuit's Kenner RICO appeal decision is wrong as a matter of law— petitioners' right to issuance of the writ is thus clear and indisputable

1. The Ninth Circuit's RICO decision conflicts with prior Supreme Court Decisions

For dismissal of RICO Lawsuit #1, the Ninth Circuit concluded:

> "In No. 11-56062, the district court properly dismissed the Kenners' RICO claims against the Internal Revenue Service ("IRS") defendants for failure to state a claim because the Kenners' allegations against the IRS defendants constitute violations of the Internal Revenue Code ("IRC") in connection with tax collection activities, and the sole remedy for such claims is under 26 U.S.C. § 7433. See 26 U.S.C. § 7433 (providing that a civil action against the United States under § 7433 "shall be the exclusive remedy for recovering damages" resulting from IRS employees' negligent, reckless, or intentional disregard of any IRC provision

> or treasury regulation in connection with any collection of federal tax)." Appendix A, pg. 2, ¶1

In this conclusion, the Ninth Circuit has concluded that we had not sufficiently stated a claim because our RICO lawsuit was not based on 26 U.S.C. § 7433 claims. The Ninth Circuit is in error. Our claims sufficiently *constitute* a violation RICO. This decision therefore conflicts with both binding Supreme Court and Ninth Circuit precedent deciding that plaintiffs are masters of their claim:

> "[C]ourts should not undertake to infer in one cause of action when a complaint clearly states a claim under a different cause of action. `[T]he party who brings a suit is master to decide what law he will rely upon.'" Id. (quoting Caterpillar Inc. v. Williams, 482 U.S. 386, 392 n. 7, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987))." O'Guinn v. Lovelock Corr. Ctr., 502 F.3d 1056 at 1060 (Ninth Cir. 2007)

Binding precedent and "the doctrine of *stare decisis* is of fundamental importance to the rule of law." Welch v. Texas Dept. of Highways and Public Transportation, 483 U. S. 468, 494 (1987).

2. The Ninth Circuit's Kenner RICO decision also conflicts with own prior decisions

In prior appeals, the Ninth Circuit has concluded that:

- RICO may be appropriate for use against IRS employees providing the elements of

RICO are properly pled (Major v. United States IRS, No. 05-36118 , Ninth Cir., 201 Fed. Appx. 564; 2006 U.S. App. LEXIS 23840; 98 A.F.T.R.2d (RIA) 6654, September 11, 2006, and Miller v. Yokohama Tire Corp., 358 F.3d 616, 620 (Ninth Cir. 2004) (holding that RICO has 4 elements—no mention of 26 U.S.C. § 7433))

- 26 U.S.C. § 7433 may not be applied to violations of RICO (Shwarz v. US, 234 F.3d 428 at 434 (Ninth Cir. 2000))

F. The Ninth Circuit Court of Appeals will not or cannot rule in this lawsuit—petitioners have no other adequate means to attain relief

> "The writ of mandamus is subject to the legal and equitable discretion of the court, and it ought not to be issued in cases of doubtful right. But it is the only adequate mode of relief, where an inferior tribunal refuses to act upon a subject brought properly before it." Life & Fire Ins. Co. v. Heirs of Wilson, 33 U.S. 291, 303 (1834).

The Ninth Circuit is our court of last resort before the Supreme Court. Without a final decision or rehearing by the Ninth Circuit, the RICO lawsuit remains unjustly in an undecided or otherwise indeterminate state.

G. Under the circumstances of this dispute, a mandate is proper

In accordance with the requirements of *Cheney* or the rules of this court (Supreme Court Rule 20.1), this petition for a writ of mandamus is proper. Furthermore, under the circumstances of the Ninth Circuit's decision, it is essential that the Supreme Court consider and grant this petition for a *writ of mandamus*.

The Ninth Circuit has concluded that 26 USC § 7433 is our sole remedy for IRS Defendants' *pattern of racketeering* (an element of RICO). Because of the exclusivity provisions of §7433, IRS employees enjoy total personal immunity when the United States benefits from lawless acts taken. By lumping our properly pleaded RICO claim under the protection of §7433, IRS Defendants can now enjoy total personal immunity for systemic lawlessness when the United States beneficiary.

H. Conclusion & Relief

It is clear to petitioners what happened leading up to, and during the pretrial activity for, RICO Lawsuit #1. Because of §7433, IRS employees purposely set policy for intentional violations of law to benefit the United States. Punitive or deterring damages for intentional violations of the law being prohibited, the United States need only fear that it would have to return assets wrongfully taken when a taxpayer had the courage and resources to successfully challenge the wrongful act(s). In this environment, what noble federal employee could push back upon these dishonest policies when, on

the one hand, they had no personal liability, and on the other hand, because it was policy, their job was at stake? Fortunately, the system still has limits. Federal employees are (were) still personally liable to allegations of RICO. Yet herein lies the conflict: §7433 undoes deterrence while RICO reinforces it. There is no problem of course until IRS employees are caught participating in a pattern of racketeering.

Accordingly, the federal judiciary and the DOJ, likely on behalf of other misguided unspoken federal policies, has nearly upended the justice system to defeat RICO Lawsuit #1. It seems that defendants and judges knew that the rule of law had been undermined through specific federal statutes. What judge, after all, would break the law to immunize defendants engaged in breaking laws he otherwise supports?

Federal employees' behavior is nonetheless wrong[26]. There might be some judicial agreement on this point now too. Just maybe the Ninth Circuit wants federal employee lawlessness to be curtailed by this court, because: (1) though the Ninth circuit affirmed the district court's decision in precise accordance with United States' wants, (2), that sole affirming decision fails as a matter of Supreme Court law, and (3) the court has held the rehearing of the RICO lawsuit in limbo, making this court's participation in this dispute all but unavoidable. In

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[26] Forgive our movie reference, but *possibly* comparable to defendants' "conduct unbecoming …" in the movie *A Few Good Men.*

any event, at this point, to ignore the Ninth Circuit's decision would grant federal employees an implied right to immunity for a *pattern of racketeering*. Accordingly, federal employee respect for the rule of law hangs in the balance, while 26 USC § 7433, as it is presently constructed, is a rule of law bête noire.

We respectfully request that the Supreme Court review and grant our petition for a *writ of certiorari* so that it might consider the question whether a taxpayer's due process rights can exist in the absence of deterring liability or penalties for federal employees' intentional violations of the law. Petitioners additionally request that the Supreme Court grant our *writ of mandamus* enabling or compelling Federal Judge Dana Sabraw in the Federal District Court for the Southern District of California to move the Kenner RICO lawsuit to trial.

Dated: Sept. 4, 2013 Brian Kenner

Dated: Sept. 4, 2013 Kathleen Kenner

XI. APPENDIX A - APPEALS COURT DECISION MEMORANDUM

Appeals Court Decision Memorandum:

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN & KATHLEEN KENNER Plaintiff-Appellants, v. E. KELLY, an individual, IRS employee; et al., Defendants-Appellees.	No. 11-56062 D.C. 3:10-cv- 02105-AJB-WVG MEMORANDUM*

BRIAN & KATHLEEN KENNER Plaintiff-Appellees, v. E. KELLY, an individual, IRS employee; et al., Defendants, And, BARBARA DUNN, an individual; LACY DUNN & DO, PC, Defendant-Appellants.	No. 11-56252 D.C. 3:10-cv- 02105-AJB-WVG

*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the Southern District of California
Anthony J. Battaglia, District Judge, Presiding
Submitted June 18, 2013[27]

Before: TALLMAN, M. SMITH, and HURWITZ, Circuit Judges.

Brian and Kathleen Kenner appeal pro se from the district court's judgment dismissing their action alleging that defendants violated the Racketeer Influenced and Corrupt Organizations Act ("RICO") in connection with the collection of their federal income tax liabilities. Barbara Dunn and Lacey Dunn & Do, PC ("Dunn defendants") cross appeal from the order denying their motion for sanctions under Fed. R. Civ. P. 11. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal for failure to state a claim. Odom v. Microsoft Corp., 486 F.3d 541, 545 (9th Cir. 2007) (en banc). We review for an abuse of discretion the district court's Rule 11 determination. Retail Flooring Dealers of Am., Inc. v. Beaulieu of Am., LLC, 339 F.3d 1146, 1150 (9th Cir. 2003). We affirm.

In No. 11-56062, the district court properly dismissed the Kenners' RICO claims against the Internal Revenue Service ("IRS") defendants for failure to state a claim because

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

the Kenners' allegations against the IRS defendants constitute violations of the Internal Revenue Code ("IRC") in connection with tax collection activities, and the sole remedy for such claims is under 26 U.S.C. § 7433. See 26 U.S.C. § 7433 (providing that a civil action against the United States under § 7433 "shall be the exclusive remedy for recovering damages" resulting from IRS employees' negligent, reckless, or intentional disregard of any IRC provision or treasury regulation in connection with any collection of federal tax). Accordingly, the district court properly dismissed the conspiracy claim against the Dunn defendants as well. See Howard v. Am. Online Inc., 208 F.3d 741, 751 (9th Cir. 2000) (RICO conspiracy claim fails to state a claim where underlying substantive RICO claim fails).

The district court did not abuse its discretion in dismissing the complaint without leave to amend because amendment would have been futile. See Albrecht v. Lund, 845 F.2d 193, 195 (9th Cir. 1998) (reviewing for an abuse of discretion and stating that leave to amend may be denied where amendment would be futile); see also World Wide Rush, LLC v. City of Los Angeles, 606 F.3d 676, 690 (9th Cir. 2010) (discretion to deny leave to amend is "particularly broad" where plaintiff has Case: 11-56062 06/20/2013 previously filed an amended complaint).

In No. 11-56252, the district court did not abuse its discretion in denying the Dunn defendants' motion for sanctions under Rule 11 after determining that the allegations in the operative complaint are not sufficiently frivolous. See Christian v. Mattel, Inc., 286 F.3d 1118, 1127 (9th Cir. 2002) (listing factors that district courts must consider in determining whether to impose Rule 11 sanctions); see also Warren v. Guelker, 29 F.3d 1386, 1390 (9th Cir. 1994) (per curiam) ("Although Rule 11 applies to pro se plaintiffs, the court must take into account a plaintiff's pro se status when it determines whether the filing was reasonable.").

AFFIRMED.

XII. APPENDIX B - NOVEMBER 18, 2010 DISTRICT COURT DISMISSAL

1st RICO Lawsuit District Court Dismissal
Federal Judge Barry Ted Moskowitz

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BRIAN KENNER, AN INDIVIDUAL, AND KATHLEEN KENNER, AN INDIVIDUAL, Plaintiffs, v. E. KELLY, et al., Defendants.	Case No. 10cv2105 BTM(WVG) **ORDER DENYING APPLICATION FOR AN ORDER REQUIRING THE DISTRICT ATTORNEY TO SERVE IRS PARTIES AND DISMISSING THE COMPLAINT FOR FAILURE TO STATE A CLAIM**

Plaintiffs have filed an ex parte application requesting that the Court require the District Attorney to serve the IRS defendants with Plaintiffs' Complaint. The Court assumes that Plaintiffs actually mean the U.S. Attorney. At any rate, Plaintiffs' application is **DENIED** for the reasons discussed below.

On October 8, 2010, Plaintiffs commenced this action. Plaintiffs sue various IRS employees and agents in addition to Barbara Dunn, an attorney

for a defendant in a prior lawsuit brought by Defendants, and her firm, Lacy, Dunn, & Do. Plaintiffs bring RICO claims against Defendants based on the IRS's "illegal confiscation" of settlement funds from the prior lawsuit, pending an Offer In Compromise.

Plaintiffs Complaint fails to state a claim. Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit. Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475 (1993). As provided in 26 U.S.C. § 7433(a), "If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, *such civil action shall be the exclusive remedy for recovering damages resulting from such actions*." (Emphasis added.) Administrative remedies must be exhausted before filing suit under 26 U.S.C. § 7433(a).

Taxpayers may not circumvent the comprehensive statutory scheme established by § 7433(a) by asserting RICO claims against the IRS or its agents. See Duran v. IRS, 2009 WL 772802 (E.D. Cal. March 18, 2009). Moreover, there can be no RICO claim against the federal government. Berger v. Pierce, 933 F.2d 393, 397 (6th Cir. 1991). Plaintiffs' Complaint clearly pertains to allegedly

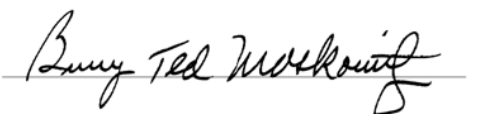
improper actions taken by the IRS defendants in the collection of Federal tax. Therefore, Plaintiffs' exclusive remedy against the IRS and its agents is under 26 U.S.C. § 7433(a). Accordingly, Plaintiffs' Complaint is dismissed as to the IRS defendants for failure to state a claim.

Plaintiffs' Complaint is also dismissed as to Dunn and her law firm because Plaintiffs have not alleged facts establishing a plausible RICO claim against them.

In conclusion, Plaintiffs' Complaint is **DISMISSED** for failure to state a claim. However, the Court grants Plaintiffs leave to file an amended complaint within 20 days of the entry of this order. Failure to do so will result in the entry of judgment dismissing this case. Plaintiffs' application for an order requiring the U.S. Attorney to serve the IRS defendants with the Complaint is **DENIED** as moot.

IT IS SO ORDERED.

DATED: November 18, 2010



s/

Honorable Barry Ted Moskowitz
United States District Judge

XIII. APPENDIX C - MAY 27, 2011 DISTRICT COURT DISMISSAL

2nd RICO Lawsuit District Court Dismissal
Federal Judge Anthony Battaglia

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Brian Kenner, an individual, and Kathleen Kenner, an individual, Plaintiff, v. E. Kelly, et al., Defendant.	Case No. 10cv2105 AJB(WVG) **ORDER GRANTING IRS DEFENDANTS' MOTION TO DISMISS; GRANTING DUNN DEFENDANTS' MOTION TO DISMISS; DENYING DUNN DEFENDANTS' MOTION FOR SANCTIONS** **[Dkt. Nos. 17, 25, 59.]**

On December 8, 2010, Plaintiffs Brian Kennar and Kathleen Kennar, proceeding *pro se* filed a First Amended Complaint against ten individual IRS employees ("IRS Defendants"); and Barbara Dunn, an attorney for a defendant in another prior lawsuit, and her firm, Lacey, Dunn and Do ("Dunn Defendants") for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). On December 13, 2010, the Dunn Defendants filed a motion to dismiss. (Dkt. No. 17.) On January 7, 2011, the Dunn Defendants also filed a motion for sanctions. (Dkt. No. 25.) On

February 15, 2011, the remaining ten IRS Defendants filed a motion to dismiss. (Dkt. No. 59.) The motion is submitted on the papers without oral argument, pursuant to Local Rule 7.1(d)(1). After a thorough review of the motions and supporting documentation, the Court GRANTS IRS Defendants' motion to dismiss for lack of subject matter jurisdiction and failure to state a claim; GRANTS Dunn Defendants' motion to dismiss for failure to state a claim and DENIES Dunn Defendants' motion for sanction pursuant to Federal Rule of Civil Procedure 11.

Procedural Background

On October 8, 2010, Plaintiffs filed a Complaint alleging RICO claims against individual IRS employees, Barbara Dunn and Lacy, Dunn & Do. (Dkt. No. 1.) On November 18, 2010, in response to Plaintiffs' *ex parte* motion, District Judge Moskowitz issued an Order Denying Application for an Order Requiring the District Attorney to Serve IRS Parties and Dismissing the Complaint for Failure to State a Claim. (Dkt. No. 10.) On December 8, 2010, a First Amended Complaint was filed. (Dkt. 14.) On December 9, 2010, Defendants Barbara Dunn and LD&D ("Dunn Defendants") filed a motion to dismiss the First Amended Complaint. (Dkt. No. 17.) On January 7, 2011, Defendants Dunn and LD&D filed a motion for sanctions. (Dkt. No. 25.) On January 20, 2011, Plaintiffs filed an opposition to the motion to dismiss and motion for sanctions. (Dkt. Nos. 30-31.) Dunn Defendants filed a reply to both motions on January 28, 2011. (Dkt. Nos. 50-51.)

On February 15, 2011, IRS Defendants filed a motion to dismiss for lack of jurisdiction, insufficient service of process and failure to state a claim upon which relief may be granted. (Dkt. No. 59.) On March 24, 2011, Plaintiffs filed an opposition[28], and on April 8, 2011, IRS Defendants filed a reply. (Dkt. Nos. 62 & 63.) On March 14, 2011, the case was transferred to the undersigned judge. (Dkt. No. 61.)

Factual Background

According to the First Amended Complaint, E. Kelly is an IRS Revenue Officer; C. Rose is an IRS Offer in Compromise Specialist; Pittner and Blizzard are IRS General Managers; Alito is an IRS Director; Crawford is an IRS Area Director; Becerra, is an Assistant General Manager; Plasky is an IRS Process Examiner; and Meigs and Shaughnessy are IRS Attorneys. (FAC at 2.) Defendant Barbara Dunn is an attorney that represented a defendant in another prior lawsuit where Plaintiffs were suing their tax professionals;

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[28] In their reply, IRS Defendants argue that the Court should strike Plaintiffs' opposition as untimely based on Local Rule 56.1(d). However, there is no local rule 56.1(d) in the United States District Court for the Southern District of California. Local Civ. R. 7.1(e)(2) provides that an opposition be filed no later than 14 calendar days prior to the noticed hearing. Local Civ. R. 7.1(e)(2). The hearing date was set for April 8, 2011. Pursuant to the local rule, Plaintiffs' opposition was due on March 25, 2011. Plaintiffs filed their opposition a day earlier on March 24, 2011. Accordingly, the Court DENIES IRS Defendants' request to strike Plaintiff's opposition as untimely.

and Lacey, Dunn & Do is the law firm where Dunn is employed. (Id. at 3.)

Plaintiffs present four distinct "criminal episodes" that encompass six different predicate acts under RICO. The predicate acts alleged are extortion, mail fraud, wire fraud, bank fraud, racketeering and witness tampering. In the first episode, Plaintiffs claim that Defendants Kelly, Plasky, Pittner, Alito, Crawford, Dunn and LD&D unlawfully obtained settlement funds from another prior lawsuit against their tax professionals while an Offer in Compromise was pending. (FAC ¶ 12.) In the second episode, Plaintiffs assert that Defendants Rose, Kelly, Pittner, Alito, Crawford, Blizzard, Becerra, Shaughnessy and Meigs fraudulently returned the Offer in Compromise in order to gain access to the settlement funds. (Id. ¶ 30.) Third, Plaintiffs contend that Defendants Rose, Kelly, Plasky, Pittner, Alito, Crawford, Blizzard, Becerra, Shaughnessy, and Meigs made a second attempt to fraudulently return Plaintiffs' Offer in Compromise in order to gain access to the lawsuit settlement funds. (Id. ¶ 44.) Lastly, Plaintiffs complain they filed two Freedom of Information Act requests in December 2009 and the summer of 2010. (Id. ¶ 55.) Prior to receiving a response to their second request, Plaintiffs filed an administrative complaint against the IRS. (Id.) Defendants Kelly, Plasky, Pittner, Alito, Crawford, Becerra, Shaughnessy and Meigs used the content of the administrative complaint and altered the computer program, ICS-HISTORY, to conceal their dishonest activities. (Id.)

In the first cause of action, Plaintiffs present a RICO claim against Defendants Plasky, Kelly, Pittner, Alito, and Crawford. The second cause of action alleges a RICO cause of action against Defendants Rose, Kelly, Pittner, Alito, Crawford, Blizzard, Becerra, Shaughnessy, and Meigs. On the third cause of action, Plaintiffs allege a RICO action against Defendants Kelly, Plasky, Pittner, Alito, Crawford, Rose, Blizzard, Becerra, Shaughnessy and Meigs. The fourth cause of action presents a claim of conspiracy to commit RICO against Defendants Dunn, and LD&D. Lastly, Plaintiffs allege that Kelly, Plasky and Rose conspired with the remaining IRS Defendants to commit RICO on the third cause of action.

Discussion

(I.) LEGAL STANDARD PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(1)

Federal Rule of Civil Procedure 12(b)(1) allows a dismissal for "lack of subject matter jurisdiction." Fed. R. Civ. P. 12(b)(1). A plaintiff has the burden to establish that subject matter jurisdiction is proper. Kokkonen v. Guardian Life Ins., Co., 511 U.S. 375, 377 (1994).

Under Rule 12(b)(1), a jurisdictional attack may either be "facial" or "factual." White v. Lee, 227 F.3d 1213, 1242 (9th Cir. 2000). When a defendant challenges jurisdiction "facially," all material allegations in the complaint are assumed true, and the question for the court is whether thelack of federal jurisdiction appears from the face of the

pleading itself. Thornhill Publishing Co. v. Gen. Tel. Elec., 594 F.2d 730, 733 (9th Cir. 1979); Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). In a factual attack, the "defendant disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). A challenge for lack of subject matter jurisdiction may be raised at any time by either party or *sua sponte* by the court. Fleming v. Gordon & Wong Law Group, P.C., 723 F. Supp. 2d 1219, 1222 (N.D. Cal. 2010) (citing Olson Farms, Inc. v. Barbosa, 134 F.3d 933, 937 (9th Cir. 1998)). It appears that IRS Defendants are challenging jurisdiction, "facially."

A. RICO Claims Against IRS Government Employees

Sovereign immunity shields the federal government and its agencies from suit unless it has expressly waived such immunity. United States v. Shaw, 309 U.S. 495, 500-01 (1940); see also F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1993). "A court lacks subject matter jurisdiction over a claim against the United States if it has not consented to be sued on that claim." Balser v. DOJ, Office of U.S. Trustee, 327 F.3d 903, 907 (9th Cir. 2003). Therefore, an action against employees of the federal government sued in their official capacities are immune from suit. Atkinson v. O'Neill, 867 F.2d 589, 590 (9th Cir. 1989) (citation omitted); Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985) (suit against IRS employees in their official capacities is a suit

against the United States). "Where an action is one against named individual defendants, but the acts complained of consist of actions taken by defendants in their official capacity as agents of the United States, the action is in fact one against the United States." Id. Furthermore, there can also be no RICO claim against the federal government. Lancaster Comm. Hosp. v. Antelope Valley Hosp., 940 F.2d 397, 404 (9th Cir. 1991) ("government entities are incapable of forming a malicious intent.") cert denied. 502 U.S. 1094 (1992).

In the original complaint filed on October 8, 2010, Plaintiffs sued the IRS Defendants in their official capacities as employees of the IRS. (Dkt. No. 1.) On November 18, 2010, District Judge Moskowitz dismissed the complaint for failure to state a claim based on sovereign immunity. (Dkt. No. 10.) The Court also determined that the complaint "clearly pertains to allegedly improper actions taken by the IRS defendants in the collection of Federal tax." (Id.) Therefore, the Court concluded that 26 U.S.C. § 7433(a) is the exclusive remedy for Plaintiffs to recover damages from the IRS resulting from employees' reckless, intentional or negligence acts. (Id.) The Court stated that a taxpayer may not circumvent the comprehensive statutory scheme established by section 7433(a) by asserting RICO claims against the IRS or its employees. (Id.)

In response to the Court's dismissal order, on December 9, 2010, Plaintiffs filed a First Amended Complaint. The First Amended Complaint was amended to state that Plaintiffs are not suing the

IRS, The Department of the Treasury or the United States but they are suing the individual IRS Defendants in their individual capacities. (Dkt. No. 14 ¶¶ 1, 7, 8.) An examination of the First Amended Complaint reveals that the only significant change from the original complaint is stating that Plaintiffs are suing the individual IRS Defendants in their individual capacities. The remaining RICO allegations and supporting facts are an exact duplicate of the original complaint. Plaintiffs are attempting to circumvent the sovereign bar by asserting RICO claims against the individual IRS agents in their individual capacities. The allegations presented show that Plaintiffs are not suing Defendants in their individual capacities but in their official capacities as IRS employees, responsible for collecting federal taxes. Accordingly, the Court GRANTS IRS Defendants' motion to dismiss for lack of subject matter jurisdiction based on sovereign immunity. Alternatively, if the Court has subject matter jurisdiction, the Court looks at whether Plaintiffs have stated a RICO claim pursuant to Federal Rule of Civil Procedure 12(b)(6) and 9(b).

(II.) LEGAL STANDARD PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6)

Federal Rule of Civil Procedure 12(b)(6) permits dismissal for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Dismissal under Rule 12(b)(6) is appropriate where

the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory. See Balistreri v. Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir. 1990). A complaint may survive a motion to dismiss only if, taking all well-pleaded factual allegations as true, it contains enough facts to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, --- U.S. ----, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "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. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. "In sum, for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009) (quotations omitted). In reviewing a Rule 12(b)(6) motion, the Court accepts as true all facts alleged in the complaint, and draws all reasonable inferences in favor of the plaintiff. al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009).

However, because Plaintiffs are proceeding *pro se*, their complaint "must be held to less stringent standards than formal pleadings drafted by lawyers" and must be "liberally construed." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (*per curiam*) (reaffirming standard reviewing *pro se* complaints post-Twombly). The Ninth Circuit has

concluded that the court's treatment of *pro se* filings after Twombly and Iqbal remained the same and *pro se* pleadings must continue to be liberally construed. Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010); see also McGowan v. Hulick, 612 F.3d 636, 640-42 (7th Cir. 2010); Bustos v. Martini Club Inc., 599 F.3d 458, 461-62 (5th Cir. 2010); Harris v. Mills, 572 F.3d 66, 71-72 (2d Cir. 2009) (noting that even following Twombly and Iqbal, "we remain obligated to construe a *pro se* complaint liberally").

A. RICO Action May Not be Maintained Against Federal Government Employees on behalf of the United States

IRS Defendants argue that a RICO action cannot be maintained against Federal Government employees where the United States government is the beneficiary of the action. Plaintiffs disagree.

The United States Supreme Court held that alleged violations of the federal extortion statute, also known as the Hobbs Act, 18 U.S.C. § 1951, by employees of a government agency in their efforts to obtain an easement over landowner's property for the exclusive benefit of the federal government did not qualify as a predicate offense for a RICO action. Wilkie v. Robbins, 551 U.S. 537, 563–567 (2007). The Court held that the "Hobbs Act does not apply when the National Government is the intended beneficiary of the allegedly extortionate acts." Id. at 563. The Court drew a line between private and public beneficiaries which "prevents suits (not just recoveries) against public officers whose jobs are to obtain property owed to the

Government." Id. at 566. "It is not reasonable to assume that the Hobbs Act (let alone RICO) was intended to expose all federal employees, whether in the Bureau of Land Management, the Internal Revenue Service, the Office of the Comptroller of the Currency (OCC), or any other agency, to extortion charges whenever they stretch in trying to enforce Government property claims." Id. at 566.

Here, the First Amended Complaint alleges predicate acts of RICO under the Hobbs Act, 18 U.S.C. § 1951; mail fraud, 18 U.S.C. § 1341; wire fraud, 18 U.S.C. § 1343; bank fraud, 18 U.S.C. § 1344; racketeering, 18 U.S.C. § 1952; and witness tampering, 18 U.S.C. § 1512. These acts were allegedly violated while the IRS Defendants were acting as employees of the IRS and attempting to obtain tax revenues owed to the federal government.

Therefore, pursuant to the ruling in Wilkie, the Court concludes that Plaintiffs may not allege a predicate act of extortion against individual Defendants under RICO. See Wilkie, 551 U.S. at 563-566. The Court GRANTS IRS Defendants' motion to dismiss the RICO claim as it relates to the predicate act of extortion under the Hobbs Act, 19 U.S.C. § 1951.

IRS Defendants also ask the Court to expand the holding in Wilkie and conclude that a RICO suit does not lie against the IRS Defendants under any "predicate acts" alleged by Plaintiffs. However, Defendants have not presented any legal authority for the Court to make such a holding. Wilkie

concerned solely the predicate act under the Hobbs Act for a RICO claim. Accordingly, the Court declines to expand the holding of Wilkie.

B. RICO Claims as to IRS Defendants

Plaintiffs allege a RICO claim against IRS Defendant under 28 U.S.C. § 1962(c) and conspiracy to commit RICO under § 1962(d). The Court first looks to whether there is a valid RICO claim pursuant to 18 U.S.C. § 1962(c) before addressing whether there is a conspiracy to commit RICO under 18 U.S.C. § 1962(d). See Odom v. Microsoft Corp., 486 F.3d 541, 547 (9th Cir. 2007).

18 U.S.C. § 1962(c) provides that "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). A prima facie case for RICO under § 1962(c) requires "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Sedima, S.P. R.L. v. Imrex Co., Inc., 473 U.S. 479, 496 (1985). A plaintiff must also show harm of a specific business or property interest by the racketeering conduct. Id.; Diaz v. Gates, 420 F.3d 897, 900 (9th Cir. 2005).

"Racketeering activity" is any act indictable under the several provisions of Title 18 of the United States Code, including the predicate acts

alleged by Plaintiffs in this case: mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343)[29], bank fraud (18 U.S.C. § 1344), federal extortion (18 U.S.C. § 1951), witness tampering (18 U.S.C. § 1952) and federal racketeering (18 U.S.C. § 1952). See 18 U.S.C. § 1961(1).

C. Allegations of Fraud Pursuant to Federal Rule of Civil Procedure 9(b)

For mail and wire fraud, a plaintiff must allege (1) formation of a scheme to defraud, (2) use of the United States mail or wire in furtherance of the scheme to defraud, and (3) specific intent to deceive or defraud. Schreiber Distrib. Co. v Serv-Well Furniture Co., Inc., 806 F.2d 1393, 1399- 1400 (9th Cir. 1986). For predicate acts involving fraud, a plaintiff must plead the facts with the particularity required by Federal Rule of Civil Procedure 9(b). Edwards v. Marin Park. Inc., 356 F.3d 1058, 1065-66 (9th Cir. 2004). Federal Rule of Civil Procedure 9(b) requires that "a party must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). Rule 9(b) applies to civil RICO claims. Edwards, 356 F.3d at 1065-66. "Allegations of mail fraud under section 1962(a)-1962(c) 'must identify the time, place, and manner of each fraud plus the role of each defendant in each scheme.'" Schreiber Distrib. Co., 806 F.2d at 1401 (quoting

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[29] In construing the complaint in light most favorable to Plaintiffs, it appears that Plaintiffs are alleging mail and wire fraud as the predicate acts as he uses the words "mail" and "wire" in the First Amended Complaint.

Lewis v. Sporck, 612 F. Supp. 1316, 1325 (N.D. Cal. 1985)).

While Plaintiffs reference specific dates and certain letters concerning the fraud allegations, Plaintiffs lump the IRS Defendants Kelly, Plasky, Pittner, Alito, and Crawford together and do not provide the role of each defendant in each scheme. See Screibner Distrib. Co., 806 F.2d at 1401. For example, Plaintiffs state that these IRS Defendants either "directly or indirectly took part in the conduct of the IRS . . ." but provides no specific facts as to each IRS Defendants' involvement in the conduct. Plaintiffs also has not presented any facts as to the place of each fraud. Accordingly, the Court DISMISSES the RICO claims based on the predicate acts of mail, wire and bank fraud for failure to comply with Federal Rules of Civil Procedure 9(b).

D. Pattern of Racketeering

A "pattern of racketeering" requires "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5). The United States Supreme Court in H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239 (1989), defined the term "pattern" as "showing of a relationship between the predicates" and of "the threat of continuing activity." 492 U.S. 229, 239 (1989) (citing to Legislative History, S. Rep. No. 91-617 at 158 (1969)). "It is this factor of *continuity plus*

relationship which combines to produce a pattern." Id. (citation omitted). As to continuity, a plaintiff . . . must prove continuity of racketeering activity, or its threat." Id. at 241. Continuity applies to "a closed period of repeated conduct or to past conduct that by its nature projects into the future with a threat of repetition." Id. at 241. A plaintiff may show continuity over a closed period by "proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement." Id. at 242.

IRS Defendants argue that Plaintiffs have failed to plead "through a pattern" element of RICO because the alleged predicate acts do not form a pattern as the period in which the alleged acts occurred has closed and there is no threat of continuing activity. The alleged predicate acts occurred over a period of a year from July 2009 to August 2010. (FAC ¶¶ 16(c), 60.) Defendants argue that there is no threat of continuing activity because Plaintiffs' remaining federal tax liability has been determined to be uncollectible. (IRS Defendants' Opp. at 15.) In opposition, Plaintiffs argue they have properly alleged a pattern of racketeering through facts that establish that the IRS Defendants engaged in four separate criminal episodes seeking three separate lawsuit settlements. Plaintiffs argue that once they have assets again, the IRS will be pursuing its illegal acts.

The Court concludes that Plaintiffs have not alleged a pattern of racketeering activity. According to the First Amended Complaint, the alleged RICO acts occurred for a period of one year and Plaintiffs have not alleged that there is a threat of continuing, future criminal conduct. Accordingly, the Court concludes that Plaintiffs have failed to properly allege a "pattern of racketeering." Accordingly, the Court GRANTS IRS Defendants' motion to dismiss for failure to state a RICO claim under 28 U.S.C. § 1962(c).

In addition, Plaintiffs' RICO conspiracy claim against the IRS Defendants relies on the underlying RICO claim. See Odom, 486 F.3d at 547 (survival of claim under § 1962(c) (RICO claim) will ensure the survival of claim under 1962(d) (RICO conspiracy claim)); Howard v. Am. Online Inc., 208 F.3d 741, 751 (9th Cir. 2000) ("Plaintiffs cannot claim that a conspiracy to violate RICO existed if they do not adequately plead a substantive violation of RICO). Since the Court has dismissed the RICO claim for failure to state a claim, the Court also GRANTS IRS Defendants' motion to dismiss for failure to state a claim as to the conspiracy to commit RICO under 28 U.S.C. § 1962(d).

E. Exclusive Remedy for Damages under 26 U.S.C. § 7433(a).

Defendants argue that Plaintiffs have failed to state a claim because 26 U.S.C. § 7433 provides the exclusive remedy for Plaintiffs' allegations of IRS Defendants' fraudulent attempt to collect federal

taxes. Plaintiffs argue that section 7433 only applies to violations of Title 26, the Internal Revenue Code, and since he has alleged RICO claims, they fall outside of 26 U.S.C. § 7433. (Pls' Opp. at 9.)

Under 26 U.S.C. § 7433(a), "in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence disregards any provision of this title or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States . . . ." 26 U.S.C. § 7433(a). This provision "shall be the exclusive remedy for recovering damages resulting from such actions." Id. In order to make out a claim under section 7433(a), a claimant must demonstrate that an employee of the IRS violated a specific section of the Internal Revenue Code or Treasury Regulations in collecting taxes from the claimant. See id.; see also Miller v. United States, 66 F.3d 220, 222 (9th Cir. 1995). Plaintiffs must also exhaust all administrative remedies before filing in district court. 26 U.S.C. § 7433(d)(1).

The claims in the First Amended Complaint concern allegedly fraudulent actions taken by IRS Defendants in the collection of federal taxes. Specifically, they allege that IRS Defendants fraudulently obtained settlement funds from a prior lawsuit pending an Offer in Compromise. Even though Plaintiffs claim they are not making allegations for violation of Title 26, in their opposition, they contend that they are entitled to

the settlement funds under Title 26. In addition, Plaintiffs cite to numerous violations of the Internal Revenue Code committed by IRS Defendants regarding the Offer in Compromise. (Pls' Opp. at 12.)

In addition, in an order filed on November 18, 2010, the Court noted that 26 U.S.C. § 7433(a) provides the exclusive remedy for recovering damages by a taxpayer against an officer or employee of the Internal Revenue Service for recklessly, intentionally or negligently disregarding any provision or regulation. (Dkt. No. 10.) The Court stated that Plaintiffs may not circumvent this statutory scheme by asserting RICO claims against the IRS or its employees. (Id.)

Plaintiffs' allegations fall within 26 U.S.C. § 7433. Plaintiffs contend that IRS Defendants unlawfully obtained settlement funds from another prior lawsuit against their tax professionals while an Offer in Compromise was pending. (FAC ¶ 12.) They also allege that certain IRS Defendants fraudulently returned the Offer in Compromise in order to gain access to the settlement funds. (Id. 30.) Plaintiffs contend that IRS Defendants made a second attempt to fraudulently return Plaintiffs' Offer in Compromise in order to gain access to lawsuit settlement funds. (Id. ¶ 44.) Lastly, Plaintiffs complain that in response to Freedom of Information Act requests in December 2009 and summer of 2010, certain IRS Defendants altered the administrative complaint Plaintiffs filed against the IRS by using ICS-HISTORY to conceal their dishonest activities regarding receipt of the

OIC from Plaintiffs. (Id. ¶¶ 55-58.) These are allegations against employees of the IRS for their allegedly fraudulent role in collecting federal taxes from Plaintiffs.

The Court concludes that 26 U.S.C. § 7433 is Plaintiffs' exclusive remedy. See Mayben v. Bargnes, 290 F. Supp. 2d 1169 (E.D. Cal. 2003) (holding that 26 U.S.C. § 7433(a) is the exclusive remedy for the improper collection of taxes and precludes Plaintiff from bringing a *Bivens* action). Accordingly, the Court GRANTS IRS Defendants' motion to dismiss for failure to state a claim based on 26 U.S.C. § 7433(a).

Because the Court GRANTS IRS Defendants' motion to dismiss the First Amended Complaint for lack of subject matter jurisdiction and for failure to state a claim, the Court need not address whether IRS Defendants are entitled to qualified immunity or whether the Court lacks personal jurisdiction over Defendants Alito and Plasky and whether Plaintiffs failed to properly serve Defendants Meigs, Crawford, Alito and Plasky.

F. Conspiracy to Commit RICO as to Defendants Dunn and LD&D

Defendants Dunn and LD&D move to dismiss the First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and 9(b). The First Amended Complaint alleges one claim of conspiracy

to commit RICO[30] against Dunn and LD&D. (FAC at 37.) In their opposition, Plaintiffs state that their only claim against the Dunn Defendants is conspiracy to commit RICO.

Plaintiffs' RICO conspiracy claim relies on the underlying RICO claim. Since the Court has determined that Plaintiffs have failed to allege a RICO cause of action, the RICO conspiracy claim necessarily fails. See Odom v. Microsoft Corp., 486 F.3d 541, 547 (9th Cir. 2007) (survival of claim under § 1962(c) (RICO claim) will ensure the survival of claim under 1962(d) (RICO conspiracy claim)); Howard v. Am. Online Inc., 208 F.3d 741, 751 (9th Cir. 2000) ("Plaintiffs cannot claim that a conspiracy to violate RICO existed if they do not adequately plead a substantive violation of RICO"). Accordingly, the Court GRANTS Dunn Defendants' motion to dismiss the complaint for failure to state a claim as to the RICO conspiracy claim.

The Court also notes that the order dismissing the original complaint filed on November 18, 2010 dismissed the complaint as to the Dunn Defendants because "Plaintiffs have not alleged facts establishing a plausible RICO claim against them." (Dkt. No. 10.) The First Amended Complaint presents the same allegations against the Dunn Defendants as the original complaint. For that

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[30] Section 1962(d) of RICO provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C. § 1962(d).

reason, the Court also GRANTS Dunn Defendants' motion to dismiss the First Amended Complaint.[31]

(III.) DUNN DEFENDANTS' MOTION FOR SANCTIONS

Dunn Defendants have filed a motion for sanctions pursuant to Federal Rule of Civil Procedure 11. Plaintiffs oppose arguing their claims are not frivolous and they have presented a facially plausible claim.

Rule 11 states, in pertinent part, that when an attorney or an unrepresented party presents a signed paper to a court, that person is certifying that to the best of his or her "knowledge information, and belief, formed after an inquiry reasonable under the circumstances. . . (2) the claims, defenses, and other legal contentions therein are warranted by existing law; [and] (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery . . . ." Fed. R. Civ. P. 11(b).

The Ninth Circuit has provided a standard to determine the kind of conduct or neglect that may trigger sanctions under Rule 11. Zaldivar v. City of Los Angeles, 780 F.2d 823, 831 (9th Cir.1986),

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[31] Since the Court has granted the Dunn Defendants' motion to dismiss, the Court need not address whether the Noerr-Pennington doctrine applies to this case.

abrogated on other grounds by, Cooter & Gell v. Hartmarx, Corp., 496 U.S. 384 (1990). Rule 11 requires the imposition of sanctions where an attorney or unrepresented party has signed pleadings that are frivolous or without merit or has filed a pleading for an improper purpose. Id. At 830-32. Rule 11 is governed by an objective standard of reasonableness. Id. at 830. "Our cases have established that sanctions [under Rule 11] must be imposed on the signer of a paper if either a) the paper is filed for an improper purpose, or b) the paper is 'frivolous.'" Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir. 1990) (en banc).

Rule 11 sanctions must be assessed if the papers filed with the court is "frivolous, legally unreasonable, or without factual foundation, even though the paper was not filed in subjective bad faith." Zaldivar, 780 F.2d at 831. The second factor of "improper purpose" requires a determination whether the pleading was filed to "harass or to cause unnecessary delay or needless increase in the cost of litigation." Id.

Pro se litigants, like represented parties and attorneys are subject to Rule 11 sanctions. Fed. R. Civ. P. 11(b). Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 892 F.2d 802, 811 (9th Cir. 1989). However, the Court must take into account a plaintiff's *pro se* status when determining whether to impose sanctions because what is objectively reasonable for a *pro se* litigant and for an attorney may not be the same. Warren v. Guelker, 29 F.3d 1386, 1390 (9th Cir. 1994). A court can consider

Plaintiff's ability to pay monetary sanctions as one factor in assessing sanctions. Id. At 1390. A court's "discretion acknowledges that (1) what is objectively reasonable for a *pro se* litigant and for an attorney may not be the same, and (2) the *pro se* status of a violator may be relevant to the court's discretionary choice of the appropriate sanction in a given case." Bus. Guides, Inc., 892 F.2d at 811.

A *pro se* plaintiff may be sanctioned if he or she successively "seeks to press a wholly frivolous claim." Ricketts v. Midwest Nat.'l Bank, 874 F.2d 1177, 1182 n. 4 (7th Cir. 1989) (citing Fed. R. Civ. P. 11 advisory committee note (1983 amendments)); see also GC & KB Investments, Inc. v. Wilson, 2001 WL 34125618 (C.D. Cal. 2001).

Here, Plaintiffs' original complaint was dismissed as to the Dunn Defendants by Judge Moskowitz for failing to "allege facts establishing a plausible RICO claim against them." (Dkt. No. 10.) The First Amended Complaint mirrors the original complaint as to the Dunn Defendants. Despite the Court's order, no changes were made to add facts or allegations of RICO against Dunn Defendants. Plaintiffs continue to assert that their claim is not frivolous, and is otherwise in good faith.

Although the allegations in Plaintiffs' First Amended Complaint are ultimately unavailing, the Court does not believe they are sufficiently frivolous to warrant Rule 11 sanctions. In addition, Plaintiffs have only amended the complaint one time and one revision is not considered to be a successive filing of a frivolous claim. See Ricketts,

874 F.2d at 1182 n. 4. The Court exercises its discretion to not award sanctions. Accordingly, the Court DENIES Dunn Defendants' motion for sanctions.

(IV.) DUNN DEFENDANTS' REQUEST FOR JUDICIAL NOTICE

Dunn Defendants filed a request for judicial notice in support of their motion to dismiss and their motion for sanctions. Since the Court did not reference any of the documents in the request for judicial notice, the Court DENIES Defendants' request for judicial notice in support of their motion to dismiss and in support of their motion for sanctions.

(V.) LEAVE TO AMEND

Before dismissing a *pro se* complaint, a district court must provide the litigant notice "of the deficiencies in his complaint in order to ensure that the litigant uses the opportunity to amend effectively." Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992). However, a district court may dismiss a complaint without leave to amend if it is absolutely clear that amendment would be futile. Nunes v. Ashcroft, 375 F.3d 805, 808 (9th Cir. 2004); Mayben, 290 F. Supp. 2d at 1174 (dismissing *Bivens* complaint against IRS employee for the improper collection of taxes with prejudice because no amendment to the complaint could cure the defects in the complaint).

Here, Plaintiffs' original complaint was dismissed for failure to state a claim against IRS Defendants based on sovereign immunity and against the Dunn Defendants for failure to state a claim. The Court provided reasons to support its dismissal. Plaintiffs disregarded the ruling of the Court and filed a First Amended Complaint alleging the same facts and causes of action as the original complaint with the exception that Plaintiffs allege they are now suing the IRS Defendants in their individual capacities. The underlying facts alleging RICO against the IRS Defendants as employees of the federal government are barred under the doctrine of sovereign immunity. As such, the conspiracy claims against the Dunn Defendants also fail. No set of facts can cure the complaint to avoid dismissal. The Court concludes that any amendment to the First Amended Complaint would be futile.[32] Accordingly,

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[32] In their opposition to Dunn Defendants' motion to dismiss and to IRS Defendants' motion to dismiss, Plaintiffs attach a two separate "proposed" Second Amended Complaints. Each of the Second Amended Complaints are different from each other. It appears Plaintiffs have attempted to amend their First Amended Complaint based on IRS and Dunn Defendants' arguments in their motions to dismiss. Plaintiffs have not requested leave to file a second amended complaint and the Court did not review the Second Amended Complaints in deciding the pending motions before the Court. However, the Court reviewed the "proposed" Second Amended Complaints to confirm that any leave to file an amended complaint would be futile. The Second Amended Complaints present additional facts to support their claims but the four "criminal episodes" and causes of action are the same.

the Court DISMISSES the First Amended Complaint with prejudice.

Conclusion

Based on the above reasoning, the Court:

1) GRANTS IRS Defendants' motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim with prejudice. (Dkt. No. 59.)
2) GRANTS Dunn Defendants' motion to dismiss for failure to state a claim with prejudice. (Dkt. No. 17.)
3) DENIES Dunn Defendants' motion for sanctions. (Dkt. No. 25.)

IT IS SO ORDERED.

DATED: May 27, 2011

s/
Hon. Anthony J. Battaglia
U.S. District Judge

Although one of the Second Amended Complaints add Fireman's Fund Insurance Company as a defendant, the allegations are based on the IRS Defendants' fraudulent attempt to satisfy a federal tax lien by confiscating settlement funds from a prior lawsuit outside the OIC process. These claims have been dismissed as discussed above. Therefore, any leave to file a second amended complaint would be futile.

XIV. APPENDIX D - 26 USC § 7433

26 USC § 7433 - *Civil damages for certain unauthorized collection actions*

(a) In general

If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

(b) Damages

In any action brought under subsection (a) or petition filed under subsection (e), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the lesser of $1,000,000 ($100,000, in the case of negligence) or the sum of—

(1) actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional or

negligent actions of the officer or employee, and

(2) the costs of the action.

(c) Payment authority

Claims pursuant to this section shall be payable out of funds appropriated under section 1304 of title 31, United States Code.

(d) Limitations

(1) Requirement that administrative remedies be exhausted

A judgment for damages shall not be awarded under subsection (b) unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service.

(2) Mitigation of damages

The amount of damages awarded under subsection (b)(1) shall be reduced by the amount of such damages which could have reasonably been mitigated by the plaintiff.

(3) Period for bringing action

Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought without regard to the amount in controversy and may be brought only

within 2 years after the date the right of action accrues.

(e) Actions for violations of certain bankruptcy procedures

(1) In general

If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service willfully violates any provision of section 362 (relating to automatic stay) or 524 (relating to effect of discharge) of title 11, United States Code (or any successor provision), or any regulation promulgated under such provision, such taxpayer may petition the bankruptcy court to recover damages against the United States.

(2) Remedy to be exclusive

(A) In general

Except as provided in subparagraph (B), notwithstanding section 105 of such title 11, such petition shall be the exclusive remedy for recovering damages resulting from such actions.

(B) Certain other actions permitted

Subparagraph (A) shall not apply to an action under section 362(h) of such title 11 for a violation of a stay

provided by section 362 of such title; except that—

(i) administrative and litigation costs in connection with such an action may only be awarded under section 7430; and

(ii) administrative costs may be awarded only if incurred on or after the date that the bankruptcy petition is filed.