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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

GEORGETTE SAID,	)	Case No. EDCV 11-01033 VAP
	)	(SPx)
Plaintiff,	)	
	)	<b>ORDER GRANTING MOTION TO</b>
v.	)	<b>DISMISS AND DISMISSING</b>
	)	<b>COMPLAINT WITH PREJUDICE</b>
ENCORE SENIOR LIVING	)	
LLC; DOES 1-60	)	<b>[Motion filed on August 26,</b>
INCLUSIVE,	)	<b>2011]</b>
	)	
Defendants.	)	

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Before the Court is a Motion to Dismiss ("Motion") filed by Defendant Encore Senior Living, LLC ("Defendant"). After considering the papers in support of, and opposition to, the Motion, the Court GRANTS Defendant's Motion.

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**I. BACKGROUND**

Plaintiff Georgette<sup>1</sup> Said was an employee of Defendant. (Not. of Removal, Ex. A (Compl.) at 1.) While she was working for Defendant, the Internal Revenue Service ("IRS") sent Defendant a wage garnishment letter, dated October 25, 2010, and a Notice of Levy (collectively, "the WGL"). (Id.)<sup>2</sup> The cover page of the WGL stated that the levy against Plaintiff "attache[d] the taxpayer's take-home pay," but that Plaintiff was "not entitled to the exemptions under section 6334(a)(9) of the Internal Revenue Code." (WGL at 2.) The Notice of Levy stated that the "excemptions [sic] referred to by Internal Revenue Code section 6334 are not allowed because of other income that is received by [Plaintiff and her husband]. What ever [sic] is normally paid to [Plaintiff] should be remitted to the Internal Revenue Service." (WGL at 1.) After listing the amount owed, the Notice of Levy states further,

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<sup>1</sup> The precise spelling of Plaintiff's first name is unclear. In the caption of her complaint, Plaintiff spells her name "Georgett," whereas she spells it "Georgette" in the body of the complaint. (See Compl. at 1.) For consistency, the Court uses the spelling "Georgette."

<sup>2</sup> Plaintiff objects to the Court's reliance on the WGL, as it was not attached to the pleadings, but was instead included as an exhibit to the Declaration of Monica Hamblet ("Hamblet Decl.") in support of this Motion. (Doc. No. 11.) For the reasons set forth infra in Section III.A., the Court overrules Plaintiff's objection, and relies on the WGL to resolve the Motion.

1 This levy requires you to turn over to us: (1)  
2 this taxpayer's wages and salary that have been  
3 earned but not paid, as well as wages and salary  
4 earned in the future until this levy is released,  
5 and (2) this taxpayer's other income that you have  
6 now or for which you are obligated.

7 (WGL at 1.)

8 After Defendant received the WGL, it garnished  
9 Plaintiff's entire "take home pay," vacation time, and  
10 "money allocated for healthcare." (Compl. at 1.) In so  
11 doing, Plaintiff contends, Defendant ignored the IRS's  
12 schedule for wage garnishment. (Id.) As a result,  
13 Plaintiff contends she received no compensation for the  
14 work she performed in violation of state and federal law.  
15 (See Compl. at 2.)

16 Accordingly, on March 16, 2011, Plaintiff filed a  
17 complaint against Defendant in the California Superior  
18 Court for the County of Riverside, alleging the following  
19 claims:

- 20 1. Violation of federal minimum wage law, 29 U.S.C.  
21 § 206;
- 22 2. Breach of Contract;
- 23 3. Violation of 29 U.S.C. § 215(a)(2);
- 24 4. Violation of Cal. Labor Code § 203;
- 25 5. Violation of Cal. Minimum Wage Law.

26 Defendant removed the complaint to this Court on July 5,  
27 2011.

1 On August 26, 2011, Defendant filed this Motion, the  
2 Hamblet Declaration, and an Appendix of Non-Local  
3 Authorities. (Doc. No. 10.) On October 11, 2011,  
4 Plaintiff filed her Opposition, and on October 18, 2011,  
5 Defendant filed its Reply. (Doc. Nos. 22, 24.)

## 6 7 **II. LEGAL STANDARD**

8 Federal Rule of Civil Procedure 12(c) provides that  
9 "[a]fter the pleadings are closed – but early enough not  
10 to delay trial – a party may move for judgment on the  
11 pleadings." A motion for judgment on the pleadings is a  
12 vehicle for summary adjudication, but the standard is  
13 like that of a motion to dismiss. Hishon v. King &  
14 Spalding, 467 U.S. 69, 73 (1984); Dworkin v. Hustler  
15 Magazine, Inc., 867 F.2d 1188, 1192 (9th Cir. 1989). The  
16 only significant difference is that a 12(c) motion is  
17 properly brought "after the pleadings are closed -- but  
18 early enough not to delay trial." Fed. R. Civ. P. 12(c);  
19 Dworkin, 867 F.2d at 1192; see William W. Schwarzer, A.  
20 Wallace Tashima & James M. Wagstaffe, Federal Civil  
21 Procedure Before Trial § 9:319-323.

22  
23 As a general matter, the Federal Rules of Civil  
24 Procedure require only that a plaintiff provide "'a short  
25 and plain statement of the claim' that will give the  
26 defendant fair notice of what the plaintiff's claim is  
27 and the grounds upon which it rests." Conley v. Gibson,

1 355 U.S. 41, 47 (1957) (quoting Fed. R. Civ. P. 8(a)(2));  
2 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).  
3 Under the Rule 12(b)(6) pleading standard, a plaintiff  
4 must set forth allegations that create a "plausible"  
5 entitlement to relief. Twombly, 550 U.S. at 557, 570.  
6 "A pleading that offers 'labels and conclusions' or 'a  
7 formulaic recitation of the elements of a cause of  
8 action' does not satisfy [Rule] 8 and is subject to  
9 dismissal." Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct.  
10 1937, 1949 (2009) ("The plausibility standard is not akin  
11 to a 'probability requirement,' but it asks for more than  
12 a sheer possibility that a defendant has acted  
13 unlawfully. Where a complaint pleads facts that are  
14 'merely consistent with' a defendant's liability, it  
15 stops short of the line between possibility and  
16 plausibility of 'entitlement to relief.'") (citing  
17 Twombly, 550 U.S. at 557, 570).

18  
19 Judgment on the pleadings is proper only when there  
20 is no unresolved issue of fact and no question remains  
21 that the moving party is entitled to a judgment as a  
22 matter of law. Torbet v. United Airlines, Inc., 298 F.3d  
23 1087, 1089 (9th Cir. 2002). The court must assume the  
24 truthfulness of all material facts alleged and construe  
25 all inferences reasonably to be drawn from the facts in  
26 favor of the responding party. Hal Roach Studios, Inc.  
27 v. Richard Feiner & Co., 896 F.2d 1542, 1550 (9th Cir.

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1 1990). Although the scope of review is limited to the  
2 contents of the complaint, the court may also consider  
3 exhibits submitted with the complaint, id. at 1555 n.19,  
4 and "take judicial notice of matters of public record  
5 outside the pleadings," Mir v. Little Co. of Mary Hosp.,  
6 844 F.2d 646, 649 (9th Cir. 1988).

7  
8 If a court concludes dismissal is appropriate, leave  
9 to amend shall be freely given when justice so requires.  
10 Fed. R. Civ. P. 15(a). "This policy is to be applied  
11 with extreme liberality." Eminence Capital, LLC v.  
12 Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003)  
13 (internal quotation marks and citation omitted). In the  
14 absence of any apparent or declared reason - such as  
15 undue delay, bad faith, or dilatory motive on the part of  
16 the movant, repeated failure to cure deficiencies by  
17 amendments previously allowed, undue prejudice to the  
18 opposing party by virtue of allowance of the amendment,  
19 or futility of amendment - leave sought should be "freely  
20 given." Foman v. Davis, 371 U.S. 178, 182 (1962).  
21 Dismissal without leave to amend is not appropriate  
22 unless it is clear that the complaint could not be saved  
23 by amendment. Id.

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1 III. DISCUSSION

2 A. Reliance on Documents Outside the Pleadings

3 The parties dispute whether the Court may consider  
4 the WGL, as it is a document not contained in the  
5 parties' pleadings, but was instead introduced as an  
6 exhibit to Ms. Hamblet's Declaration. "Certain written  
7 instruments attached to pleadings may be considered part  
8 of the pleading." United States v. Ritchie, 342 F.3d  
9 903, 908 (9th Cir. 2003) (citing Fed. R. Civ. P. 10(c)).  
10 "Even if a document is not attached to a complaint, it  
11 may be incorporated by reference into a complaint if the  
12 plaintiff refers extensively to the document or the  
13 document forms the basis of the plaintiff's claim." Id.  
14 (citations omitted); see also Tellabs, Inc. v. Makor  
15 Issues & Rights, Ltd., 551 U.S. 308, 323 (2007) (noting  
16 that "courts must consider the complaint in its entirety,  
17 as well as other sources courts ordinarily examine when  
18 ruling on Rule 12(b)(6) motions to dismiss, in  
19 particular, documents incorporated into the complaint by  
20 reference . . ."); Branch v. Tunnell, 14 F.3d 449, 454  
21 (9th Cir. 1994) (overruled on other grounds in Galbraith  
22 v. Cnty. of Santa Clara, 307 F.3d 1119, 1127 (9th Cir.  
23 2002)) ("We have said that a document is not 'outside'  
24 the complaint if the complaint specifically refers to the  
25 document and if its authenticity is not questioned.").

1 Further, the Ninth Circuit has "extended the doctrine  
2 of incorporation by reference to consider documents in  
3 situations where the complaint necessarily relies upon a  
4 document or the contents of the document are alleged in a  
5 complaint, the document's authenticity is not in question  
6 and there are no disputed issues as to the document's  
7 relevance." Coto Settlement v. Eisenberg, 593 F.3d 1031,  
8 1038 (9th Cir. 2010) (citing, inter alia, Knieval v.  
9 ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005)). Numerous  
10 district courts in this circuit have applied the  
11 "incorporation by reference" doctrine to motions under  
12 Rule 12(c). See, e.g., In re Novatel Wireless Sec.  
13 Litig., \_\_ F. Supp. 2d \_\_, 2011 WL 5873113, \*8 (S.D. Cal.  
14 2011); Delgado v. United Facilities, Inc., No.  
15 2:11-cv-00485-MCE-DAD, 2011 WL 1586475, \*1 n.4 (E.D. Cal.  
16 Apr. 22, 2011); Shepard v. Miler, No. CIV. 2:10-1863 WBS  
17 JFM, 2010 WL 5205108, \*2 (E.D. Cal. Dec. 15, 2010); Rice  
18 v. Ralphs Foods, No. C 09-02650 SBA, 2010 WL 5017118, \*3  
19 (N.D. Cal. Dec. 3, 2010); Tumlinson Grp., Inc. v.  
20 Johannessen, No. 2:09-cv-1089 JFM, 2010 WL 4366284, \*3  
21 (E.D.Cal. Oct. 27, 2010).

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The Court finds that Plaintiff's Complaint  
incorporates the WGL by reference, and that the Court may  
therefore rely upon it in resolving this Motion. Here,  
Plaintiff's Complaint states:



1 The IRS sent a wage garnishment to [Defendant]  
2 which [sic] at the time was the employer of  
3 [Plaintiff]. The IRS requested that [Defendant]  
4 give them all of [Plaintiff's] "take home pay."  
5 [Defendant] took it one step further gave [sic]  
6 the IRS all her "take home pay," vacation time  
7 which [sic] was not due at the time and was not  
8 requested, and money allocated for health care,  
9 which is not part of her take home pay. IRS has  
10 a pay schedule for garnishments which [sic]  
11 [Defendant] ignored.

12 (Compl. at 1:22-27.) Plaintiff therefore alleges the  
13 contents of the WGL in her Complaint, and necessarily  
14 relies upon the WGL in asserting Defendant failed to  
15 follow the WGL's instructions when garnishing her wages.  
16 Moreover, neither party disputes the WGL's authenticity,  
17 or that it is relevant to this case. Accordingly, the  
18 Court may rely upon the WGL in resolving Defendant's  
19 Motion under Rule 12(c). Coto Settlement, 593 F.3d at  
20 1038; Novatel, 2011 WL 5873113, at \*8; see also McDowell  
21 v. Norfolk S. Corp., No. 2:06-CV-00038D, 2007 WL 2815743,  
22 \*3 (E.D.N.C. Jan. 24, 2007) (considering a Notice of Levy  
23 introduced in the defendants' motion to dismiss where the  
24 plaintiff's "entire claim [was] based on the Notice").

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**B. "Immunity" Under 26 U.S.C. § 6332(e) and "Wages"**  
**Under § 6334**

Defendant moves to dismiss Plaintiff's Complaint  
because it contends: (1) Plaintiff's vacation time and  
"money allocated for healthcare" are "wages" that may be  
garnished; (2) if the vacation time and healthcare funds  
are not wages, the Notice of Levy required Defendant

1 garnish more than Plaintiff's "wages;" and (3) 26 U.S.C.  
2 § 6332(e) immunizes Defendant from any liability arising  
3 out of its compliance with an IRS notice of levy.

4  
5 **a. Funds Garnished**

6 Defendant contends that Plaintiff's vacation time and  
7 healthcare funds are "wages" that may be garnished under  
8 the Notice of Levy. Plaintiff asserts that Defendant  
9 garnished her pay improperly because these funds do not  
10 constitute "wages."

11  
12 "[I]n the application of a federal revenue act, state  
13 law controls in determining the nature of the legal  
14 interest which the taxpayer had in the property. This  
15 follows from the fact that the federal statute creates no  
16 property rights but merely attaches consequences,  
17 federally defined, to rights created under state law."  
18 United States v. Nat'l Bank of Commerce, 472 U.S. 713,  
19 723 (1985) (internal quotations and citations omitted);  
20 accord Aquilino v. United States, 363 U.S. 509, 513  
21 (1960) ("[I]n the application of a federal revenue act,  
22 state law controls in determining the nature of the legal  
23 interest which the taxpayer had in the property.").  
24 Accordingly, the Court must determine whether Plaintiff's  
25 "vacation time" and "money allocated for healthcare" are  
26 wages under California law.

1 In Suastez v. Plastic Dress-Up Co., 31 Cal. 3d 774  
2 (1982), the California Supreme Court held that "vacation  
3 pay is simply a form of deferred compensation," and is "in  
4 effect, additional wages for services performed." 31 Cal.  
5 3d at 779-80. More recently, the court reaffirmed its  
6 holding in Suastez, stating that California law construes

7  
8 the term "wages" broadly to include not only the  
9 periodic monetary earnings of the employee but  
10 also the other benefits to which he is entitled as  
11 a part of his compensation. [Citation] Courts have  
12 recognized that "wages" also include those  
13 benefits to which an employee is entitled as a  
14 part of his or her compensation, including money,  
15 . . . vacation pay, and sick pay.

16 Schachter v. Citigroup, Inc., 47 Cal. 4th 610, 618 (2009)  
17 (internal citation and quotations omitted) (emphasis  
18 added). Hence, under California law, Plaintiff's  
19 vacation time constitutes "wages." Schachter, 47 Cal.  
20 4th at 618.

21 Further, under California law, "wages" include  
22 compensation for health benefits. See People v. Alves,  
23 155 Cal. App. 2d Supp. 870, 872 (1957) ("There is no  
24 doubt that payments to a health or welfare fund made as  
25 part of the compensation for services rendered by  
26 employees are wages as that word is used in the foregoing  
27 [California Supreme Court case]."); Road Sprinkler  
28 Fitters Local Union No. 669 v. G & G Fire Sprinklers,  
Inc., 102 Cal. App.4th 765, 781 (2002) (citing Alves and  
holding "'[w]ages' include health benefits"); see also

1 Sturgeon v. Cnty. of L.A., 167 Cal. App. 4th 630, 647  
2 (2008) (noting the continuing validity of Alves).  
3 Accordingly, as both Plaintiff's vacation time and  
4 healthcare funds are "wages" under California law,  
5 Defendant did not garnish Plaintiff's wages improperly by  
6 including those funds.

7  
8 Plaintiff argues, however, that under the Internal  
9 Revenue Code, 26 U.S.C. § 3401, the term "wages" does not  
10 include vacation time or pre-tax benefits such as  
11 Plaintiff's healthcare funds. (Opp'n at 2.) Plaintiff's  
12 argument lacks merit. By its own language, § 3401  
13 defines wages "[f]or purposes of this chapter" only,  
14 i.e., Chapter 24 of Title 26. 26 U.S.C. § 3401(a).  
15 Chapter 24 includes §§ 3401 through 3406. It does not,  
16 however, include the provisions at issue here, which are  
17 contained in Chapters 63 (Assessment) and 64  
18 (Collection). Accordingly, the definition provided in  
19 § 3401 does not apply here.

20  
21 The Court finds, therefore, that the funds Defendant  
22 garnished were "wages." As the Court finds that  
23 Plaintiff's vacation time and healthcare funds are  
24 "wages" under California law, it need not reach  
25 Defendant's second argument; i.e., that garnishing those  
26 funds was proper because the Notice of Levy required  
27 Defendant garnish more than Plaintiff's "wages."

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1           **b. Immunity Under 26 U.S.C. § 6332(e)**

2           With certain exceptions inapplicable here, under the  
3 Internal Revenue Code, any person who is "in possession  
4 of (or obligated with respect to) property or rights to  
5 property subject to levy upon which a levy has been made  
6 shall, upon demand of the Secretary, surrender such  
7 property or rights (or discharge such obligation) to the  
8 Secretary . . . ." 26 U.S.C. § 6332(a). A person who  
9 fails to surrender the property subject to levy is  
10 "liable in his own person and estate to the United States  
11 in a sum equal to the value of the property or rights not  
12 so surrendered, . . . together with costs and interest on  
13 such sum . . . ," and is also liable for a penalty equal  
14 to 50 percent of that amount. 26 U.S.C. § 6332(d). "[A]  
15 refusal to honor the levy [is] at the third person's own  
16 risk." Farr v. United States, 990 F.2d 451, 456 (9th  
17 Cir. 1993).

18  
19           "Of course, a third person put in that position might  
20 well complain that he is being forced to negotiate  
21 between the Scylla of IRS fury and the Charybdis of  
22 taxpayer vengeance every time a levy is made. Congress in  
23 its wisdom has made some provision for that difficulty."  
24 Id. Accordingly, under 26 U.S.C. § 6332(e), a person who  
25 "surrenders such property or rights to property . . . to  
26 the Secretary" is "discharged from any obligation or  
27 liability to the delinquent taxpayer and any other person  
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1 with respect to such property or rights to property  
2 arising from such surrender or payment." Id. (quoting 26  
3 U.S.C. § 6332(e)).

4  
5 Courts have interpreted the statutory immunity in  
6 § 6332(e) to provide that if a third party honors a levy,  
7 that party is "discharged from any obligation or  
8 liability to the delinquent taxpayer with respect to such  
9 property." Nat'l Bank of Comm., 472 U.S. at 721. Hence,  
10 for third parties that comply with a Notice of Levy,  
11 "§ 6332(e) provides the third party an absolute defense  
12 against any subsequent claim by a delinquent taxpayer or  
13 any other person." United States v. Hemmen, 51 F.3d 883,  
14 887-88 & n.3 (9th Cir. 1995) (emphasis added).

15  
16 Here, Defendant complied with the Notice of Levy, and  
17 garnished Plaintiff's pay in accordance with the notice.  
18 Defendant is therefore statutorily immune from "any  
19 subsequent claim" arising out of its actions. Thus,  
20 Plaintiff cannot maintain her claims against Defendant.

21  
22 Plaintiff nevertheless contends that Defendant had a  
23 duty as Plaintiff's employer to "inquire as to the  
24 validity of the IRS request," including the provision in  
25 the notice stating Plaintiff did not qualify for any  
26 exemptions under § 6334. (Opp'n at 2; WGL at 1.)  
27 Defendant had no such obligation.

28

1           Once the IRS served a Notice of Levy on Defendant, it  
2 "had a legal obligation under § 6332(a) to turn over to  
3 the IRS [Plaintiff's] [income]; [Defendant] could not  
4 challenge the validity of the levy." Moore v. Gen.  
5 Motors Pension Plans, 91 F.3d 848, 851 (7th Cir. 1996);  
6 Farr, 990 F.2d at 456 (noting that § 6332(e) saves a  
7 third person served with a levy from being "forced to  
8 negotiate between the Scylla of IRS fury and the  
9 Charybdis of taxpayer vengeance"); see also Schiff v.  
10 Simon & Schuster, Inc., 780 F.2d 210, 212 (2d Cir. 1985)  
11 (holding that a dispute relating to the underlying tax  
12 assessment does not alter the obligation to honor the  
13 levy and noting that "arguments challenging tax levy are  
14 more appropriately brought in an action against the  
15 government"); accord Nat'l Bank of Commerce, 472 U.S. at  
16 727 ("a bank served with a notice of levy has two, and  
17 only two, possible defenses for failure to comply with  
18 the demand: that it is not in possession of the property  
19 of the taxpayer, or that the property is subject to a  
20 prior judicial attachment or execution."). Accordingly,  
21 as Defendant had no obligation to "inquire as to the  
22 validity of the IRS request," Plaintiff's contention  
23 lacks merit. (Opp'n at 2.)

24

25           Additionally, Plaintiff contends that Defendant  
26 should have inquired about the validity of the Notice of  
27 Levy because the notice stated Plaintiff did not qualify  
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1 for an exemption under § 6334. In addition to the  
2 reasons set forth above, this contention lacks merit as  
3 it contravenes the governing federal regulations. Under  
4 those regulations, where, as here, the Notice of Levy  
5 states that "no amount of the taxpayer's wages, salary,  
6 or other income is exempt from levy," the employer "may  
7 rely on such notification in paying over amounts pursuant  
8 to the levy." 26 C.F.R. § 301-6334-2. Hence, Defendant  
9 was entitled to rely on the IRS's determination that  
10 Plaintiff did not qualify for an exemption under § 6334.  
11

12 Accordingly, as Defendant is immune under § 6332(e),  
13 and as Plaintiff's arguments to the contrary all fail,  
14 the Court GRANTS Defendant's Motion.  
15

#### 16 IV. CONCLUSION

17 As Defendant complied with the Notice of Levy, it is  
18 statutorily immune from suit under § 6332(e). Further,  
19 as Plaintiff's complaint is based entirely on Defendant's  
20 compliance with the Notice of Levy, and as Defendant  
21 enjoys immunity for complying with the notice, the Court  
22 finds that it is "absolutely clear" amendment would be  
23 futile here. See Sands v. Lewis, 886 F.2d 1166, 1168  
24 (9th Cir. 1989) (dismissal of a pro se complaint without  
25 leave to amend is proper where it is "absolutely clear  
26 that the deficiencies of the complaint could not be cured  
27 by amendment"). The Court therefore GRANTS Defendant's  
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1 Motion and DISMISSES Plaintiff's Complaint WITH  
2 PREJUDICE.

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Dated: February 24, 2012

*Virginia A. Phillips*  
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VIRGINIA A. PHILLIPS  
United States District Judge