

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

WILMA SHORE,

Plaintiff,

v.

KEVIN M. BROWN, ACTING
COMMISSIONER OF INTERNAL
REVENUE SERVICE OF UNITED
STATES OF AMERICA, and DOES 1
through 10 inclusive

Defendant.

1:07-CV-01160 OWW SMS

MEMORANDUM DECISION RE
DEFENDANT UNITED STATES OF
AMERICA'S MOTION FOR SUMMARY
JUDGMENT AGAINST ADDITIONAL
COUNTERCLAIM DEFENDANTS
GREGORY SHORE AND BRENDA
REYNOLDS (Doc. 52.)

UNITED STATES OF AMERICA,

Counterclaimant,

v.

WILMA SHORE,

Counterclaim Defendant.

AND

GREGORY SHORE and BRENDA O.
REYNOLDS

Additional Counterclaim
Defendants.

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1 **I. INTRODUCTION.**

2 Before the court for decision is the United States' Motion For
3 Summary Judgment to reduce to judgment the outstanding federal
4 income tax liabilities assessed against Counterclaim-Defendants
5 Gregory Shore and Brenda Reynolds. (Doc. 52.) The motion is
6 unopposed.¹

7
8 **II. FACTUAL BACKGROUND.**

9 This case arises out of tax liabilities assessed by the
10 Internal Revenue Service ("IRS") against Gregory Shore and Brenda
11 Reynolds because it deemed them to be responsible persons for three
12 separate corporations, Dean's Materials, Inc., Dean R. Shore, Inc.,
13 and Cybergate, Inc. The government seeks to collect unpaid payroll
14 taxes from Dean's Materials, Inc. and Dean R. Shore, Inc., for
15 eleven tax periods from April 1, 1997 through December 31, 1999.
16 The government seeks recovery of payroll taxes from Cybergate.com,
17 Inc., for seven tax periods from March 31, 1998 through September
18 30, 1999.

19 CMS and INCON evolved out of a small acoustical tile business
20 started by Dean R. Shore, Gregory Shore's deceased father, in 1960.
21 (Defendant United States' Statement of Disputed Facts ("DSUF") 1.)
22 Dean's Materials, Inc. sold building supplies in Central California
23 under the trade name Construction Materials Suppliers ("CMS").
24 (DSUF 3.) Dean R. Shore, Inc. was a large commercial acoustical

25
26 ¹ The United States requested the Clerk to enter default
27 against Gregory Shore and Brenda Reynolds on June 23, 2008. (Docs.
28 20 & 21.) The Clerk entered default against both parties on June
24, 2008. (Docs. 24 & 25.) To date, neither Gregory Shore nor
Brenda Reynolds have moved to set aside the default.

1 tile, plaster and commercial drywall subcontractor that did
2 business under the name Interior Contractors ("INCON"). (DSUF 4.)
3 Throughout the relevant tax periods at issue in this case, CMS was
4 the parent company and sole shareholder of INCON.² (DSUF 7.)

5 During the relevant tax periods at issue in this litigation,
6 Gregory Shore and Brenda Reynolds were employees of CMS and INCON.
7 (DSUF 14, 56.) Gregory shore managed the daily operations of CMS
8 and INCON, as well as serving as a director and officer for each
9 company. (DSUF 9, 14, 56, 69, 72-74.) Brenda Reynolds was the
10 controller for both companies, managing financial operations and
11 the accounts payable. (DSUF 56-58.) It is undisputed that both
12 Shore and Reynolds signed checks, controlled employees (i.e.,
13 ability to hire and fire), knew of CMS and INCON's poor financial
14 condition as early as 1997, and paid other creditors with full
15 knowledge of the federal tax indebtedness.³ (DSUF 14, 56-82.) It
16 was on this basis that the IRS assessed penalties against Gregory
17 Shore and Brenda Reynolds. (DSUF 117-19.)

18 Gregory Shore acquired Cybergate in the mid-1990's and, during
19 the relevant tax periods, was its majority owner, President, and
20

21 ² Other than the interests of Gregory Shore and Brenda
22 Reynolds, Cybergate was not directly affiliated to either CMS or
23 INCON.

24 ³ There is also evidence that Mrs. Reynolds deposited \$30,000
25 of her personal funds into INCON's payroll accounts to cover
26 payroll checks. (DSUF 68.) In her January 22, 2009 deposition,
27 Mrs. Reynolds admitted making the deposits because "[a]ll I know is
28 one day I went to the bank and there was like 18 guys waiting for
their paychecks, and there was no money in the payroll account."
(Dep. Reynolds, 70:21-70:24.) According to Mrs. Reynolds, Mr.
Shore knew that she deposited personal funds into company accounts
(Dep. Reynolds, 71:4-71:6.)

1 Director. (DSUF 74.) Mrs. Reynolds was Cybergate's Secretary and
2 Treasurer, as well as serving on its Board of Directors. (DSUF
3 69.) Pursuant to their corporate positions, Shore and Reynolds had
4 significant control over Cybergate's financial operations,
5 including signing checks, hiring and firing employees, and
6 negotiating contracts. (DSUF 69-71, 75.) It is undisputed that
7 Shore and Reynolds knew Cybergate was in poor financial condition
8 as early as 1997, yet continued paying creditors other than the IRS
9 during the relevant time period in this case. (Id.)

10 Following an investigation into the delinquent taxes, the IRS
11 assessed trust fund recovery penalties against Gregory Shore and
12 Brenda Reynolds relating to CMS, INCON, and Cybergate's outstanding
13 payroll liabilities. (DSUF 117-19.)

14
15 A. Assessments Against Gregory Shore

16 The IRS assessed penalties against Gregory Shore as to CMS and
17 INCON's unpaid tax liabilities for eleven tax periods from April 1,
18 1997 through December 31, 1999. (DSUF 117-18.) The IRS assessed
19 penalties against Gregory Shore as to Cybergate.com's unpaid tax
20 liabilities for seven tax periods from March 31, 1998 through
21 September 30, 1999. (Id.)

22 The IRS assessed penalties against Gregory Shore concerning
23 CMS' unpaid tax liabilities in the amount of \$38,867.58 for the
24 second quarter of 1997, \$36,346.66 for the third quarter of 1997,
25 \$39,647.46 for the fourth quarter of 1997, \$25,287.07 for the first
26 quarter of 1998, \$25,665.25 for the second quarter of 1998,
27 \$26,193.58 for the third quarter of 1998, \$23,540.84 for the fourth
28 quarter of 1998, \$17,642.23 for the first quarter of 1999,

1 \$18,670.89 for the second quarter of 1999, \$18,519.88 for the third
2 quarter of 1999, and \$19,336.95 for the fourth quarter of 1999.⁴
3 (DSUF 118.)

4 Concerning INCON, the IRS assessed penalties against Gregory
5 Shore in the amount of \$106,345.58 for the second quarter of 1997,
6 \$155,671.18 for the third quarter of 1997, \$124,821.18 for the
7 fourth quarter of 1997, \$218,437.67 for the first quarter of 1998,
8 \$144,667.76 for the second quarter of 1998, \$91,513.87 for the
9 third quarter of 1998, \$183,554.25 for the fourth quarter of 1998,
10 \$171,853.43 for the first quarter of 1999, \$217,007.41 for the
11 second quarter of 1999, \$143,344.31 for the third quarter of 1999,
12 and \$122,304.55 for the fourth quarter of 1999. (DSUF 118.)

13 The IRS assessed trust fund recovery penalties against Gregory
14 Shore relating to Cybergate's outstanding payroll liabilities for
15 seven tax periods running from April 1, 1997 through December 31,
16 1999. (DSUF 118.) The IRS assessed penalties against Mr. Shore in
17 the amount of \$4,861.38 for the first quarter of 1998, \$5,178.26
18 for the second quarter of 1998, \$4,619.19 for the third quarter of
19 1998, \$4,523.20 for the fourth quarter of 1998, \$4,625.13 for the
20 first quarter of 1998, \$5,723.50 for the second quarter of 1998,
21 and \$5,836.08 for the third quarter of 1998. (DSUF 118.)

22 As of July 19, 2009, the total assessed penalties against
23 Brenda Reynolds for CMS, INCON, and Cybergate's federal tax
24 liabilities for all tax periods at issue, including interest, is

25
26 ⁴ The assessed penalties against Mrs. Reynolds concerning CMS
27 and INCON span only eight tax periods, from March 31, 1998 through
28 December 31, 1999. The assessed penalties against Gregory Shore
concerning CMS and INCON for eleven tax periods from April 1, 1997
through December 31, 1999.

1 \$3,160,230.95. (DSUF 118.)

2
3 B. Assessments Against Brenda Reynolds

4 The IRS assessed penalties against Brenda Reynolds as to CMS
5 and INCON's unpaid tax liabilities for eight tax periods, from
6 March 31, 1998 through December 31, 1999. (DSUF 119.) The IRS
7 assessed penalties against Brenda Reynolds as to Cybergate.com's
8 unpaid tax liabilities for seven tax periods from March 31, 1998
9 through September 30, 1999. (Id.)

10 The IRS assessed penalties against Brenda Reynolds concerning
11 CMS' unpaid tax liabilities in the amount of \$25,287.07 for the
12 first quarter of 1998, \$25,665.25 for the second quarter of 1998,
13 \$26,193.58 for the third quarter of 1998, \$23,540.84 for the fourth
14 quarter of 1998, \$17,642.23 for the first quarter of 1999,
15 \$18,670.89 for the second quarter of 1999, \$18,519.88 for the third
16 quarter of 1999, and \$19,336.95 for the fourth quarter of 1999.⁵
17 (DSUF 119.)

18 Concerning INCON, the IRS assessed penalties against Brenda
19 Reynolds in the amount of \$218,437.67 for the first quarter of
20 1998, \$144,667.76 for the second quarter of 1998, \$91,513.87 for
21 the third quarter of 1998, \$183,554.25 for the fourth quarter of
22 1998, \$171,853.43 for the first quarter of 1999, \$217,007.41 for
23 the second quarter of 1999, \$143,344.31 for the third quarter of
24 1999, and \$122,304.55 for the fourth quarter of 1999. (DSUF 119.)

25
26 ⁵ The assessed penalties against Mrs. Reynolds concerning CMS
27 and INCON span only eight tax periods, from March 31, 1998 through
28 December 31, 1999. The assessed penalties against Gregory Shore
concerning CMS and INCON for eleven tax periods from April 1, 1997
through December 31, 1999.

1 The IRS assessed trust fund recovery penalties against Brenda
2 Reynolds relating to Cybergate's outstanding payroll liabilities
3 for seven tax periods running from April 1, 1997 through December
4 31, 1999. The IRS assessed penalties against Mr. Shore in the
5 amount of \$4,861.38 for the first quarter of 1998, \$5,178.26 for
6 the second quarter of 1998, \$4,619.19 for the third quarter of
7 1998, \$4,523.20 for the fourth quarter of 1998, \$4,625.13 for the
8 first quarter of 1998, \$5,723.50 for the second quarter of 1998,
9 and \$5,836.08 for the third quarter of 1998. (DSUF 119.)

10 As of July 19, 2009, the total assessed penalties against
11 Brenda Reynolds for CMS, INCON, and Cybergate's federal tax
12 liabilities for all tax periods at issue, including interest, is
13 2,290,843.92. (DSUF 119.)

14 15 **III. PROCEDURAL BACKGROUND.**

16 On August 8, 2008, Mrs. Wilma Shore, Gregory Shore's mother
17 and an officer, director, and majority shareholder of CMS and
18 INCON, brought suit against the United States pursuant to 28 U.S.C.
19 § 1346, seeking a refund of trust fund liabilities assessed
20 personally against her by the IRS.

21 On December 17, 2007, the United States filed its Answer to
22 Shore's Complaint and asserted a counterclaim against Plaintiff
23 Wilma Shore seeking to collect the balance of the assessed
24 penalties. (Doc. 8.) The United States also raised counterclaims
25 against Gregory Shore and Brenda Reynolds, seeking to reduce to
26 judgment certain trust fund recovery penalties assessed against
27 them pursuant to 26 U.S.C. § 6672.

28 On June 23, 2008, the United States requested the Clerk of

1 Court to enter default against Gregory Shore and Brenda Reynolds.
2 (Docs. 20 & 21.) The Clerk entered default against both parties on
3 June 24, 2008. (Docs. 24 & 25.)

4 On July 20, 2009, the United States filed a Motion For Summary
5 Judgment to reduce to judgment the outstanding federal income tax
6 liabilities assessed against Plaintiff and Counterclaim-Defendant
7 Wilma Shore and Additional Counterclaim-Defendants Gregory Shore
8 and Brenda Reynolds. (Doc. 52.) As to Counterclaim-Defendants
9 Gregory Shore and Brenda Reynolds, the United States seeks to
10 reduce trust fund penalties to judgment because they are
11 responsible persons under 26 U.S.C. § 6672 for the unpaid tax
12 liabilities of Dean's Materials, Inc. and Dean R. Shore, Inc., and
13 Cybergate, Inc.

14 To date, neither Gregory Shore nor Brenda Reynolds have moved
15 to set aside the default or opposed the government's summary
16 judgment motion.

17
18 **IV. LEGAL STANDARD.**

19 Summary judgment is appropriate when "the pleadings, the
20 discovery and disclosure materials on file, and any affidavits show
21 that there is no genuine issue as to any material fact and that the
22 movant is entitled to judgment as a matter of law." Fed. R. Civ. P.
23 56(c). The movant "always bears the initial responsibility of
24 informing the district court of the basis for its motion, and
25 identifying those portions of the pleadings, depositions, answers
26 to interrogatories, and admissions on file, together with the
27 affidavits, if any, which it believes demonstrate the absence of a
28 genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S.

1 317, 323 (1986) (internal quotation marks omitted).

2 Where the movant will have the burden of proof on an issue at
3 trial, it must "affirmatively demonstrate that no reasonable trier
4 of fact could find other than for the moving party." *Soremekun v.*
5 *Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). With
6 respect to an issue as to which the non-moving party will have the
7 burden of proof, the movant "can prevail merely by pointing out
8 that there is an absence of evidence to support the nonmoving
9 party's case." *Soremekun*, 509 F.3d at 984.

10 When a motion for summary judgment is properly made and
11 supported, the non-movant cannot defeat the motion by resting upon
12 the allegations or denials of its own pleading, rather the
13 "non-moving party must set forth, by affidavit or as otherwise
14 provided in Rule 56, 'specific facts showing that there is a
15 genuine issue for trial.'" *Soremekun*, 509 F.3d at 984. (quoting
16 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). "A
17 non-movant's bald assertions or a mere scintilla of evidence in his
18 favor are both insufficient to withstand summary judgment." *FTC v.*
19 *Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009). "[A] non-movant
20 must show a genuine issue of material fact by presenting
21 affirmative evidence from which a jury could find in his favor."
22 *Id.* (emphasis in original). "[S]ummary judgment will not lie if
23 [a] dispute about a material fact is 'genuine,' that is, if the
24 evidence is such that a reasonable jury could return a verdict for
25 the nonmoving party." *Anderson*, 477 U.S. at 248. In determining
26 whether a genuine dispute exists, a district court does not make
27 credibility determinations; rather, the "evidence of the non-movant
28 is to be believed, and all justifiable inferences are to be drawn

1 in his favor." *Id.* at 255.

2
3 **V. DISCUSSION.**
4

5 A. Trust Fund Recovery Penalties Under 26 U.S.C. § 6672

6 The Internal Revenue Code requires employers to withhold
7 federal social security and individual income taxes from the wages
8 of their employees. See 26 U.S.C. §§ 3102(a), 3402(a). Although
9 an employer collects this money each salary period, payment to the
10 federal government takes place on a quarterly basis. In the
11 interim, the employer holds the collected taxes in "a special fund
12 in trust for the United States." 26 U.S.C. § 7501(a). These taxes
13 are known as "trust fund taxes." *Slodov v. United States*, 436 U.S.
14 238, 243 (1978).

15 If an employer fails to pay over collected trust fund taxes,
16 "the officers or employees of the employer responsible for
17 effectuating the collection and payment of trust fund taxes who
18 willfully fail to do so are made personally liable to a 'penalty'
19 equal to the amount of the delinquent taxes" under 26 U.S.C. §
20 6672. *Slodov*, 436 U.S. at 244-45. Section 6672 provides, in
21 relevant part:

22 Any person required to collect, truthfully account
23 for, and pay over any tax imposed by this title who
24 willfully fails to collect such tax, or truthfully
25 account for and pay over such tax ... shall ... be
liable to a penalty equal to the total amount of the
tax ... not collected, or not accounted for and paid
over.

26 26 U.S.C. § 6672.

27 For the purposes of Section 6672, a "person" includes "an
28

1 officer or employee of a corporation ... who ... is under a duty to
2 perform the act in respect of which the violation occurs." 26
3 U.S.C. § 6671(b). Thus, an individual is liable for a penalty
4 under Section 6672 if (1) he is a "responsible person"; and (2) if
5 he acts willfully in failing to collect or pay over the withheld
6 taxes. *Davis v. United States*, 961 F.2d 867, 869-70 (9th Cir.
7 1992).

8
9 1. Gregory Shore

10 a. *Responsible Person*

11 For purposes of assessing a § 6672 penalty, a "responsible
12 party" is one who has the "final word as to what bills should or
13 should not be paid, and when." *Alsheskie v. United States*, 31 F.3d
14 837, 838 (9th Cir. 1994). A person is deemed to have the final
15 word when he possessed "the authority required to exercise
16 significant control over the corporation's financial affairs,
17 regardless of whether he exercised such control in fact." *Purcell*
18 *v. United States*, 1 F.3d 932, 937 (9th Cir. 1993). More than one
19 person can be found responsible with respect to any tax quarter at
20 issue, and liability can be imposed on each. *See, e.g., Turner v.*
21 *United States*, 423 F.2d 448, 449 (9th Cir. 1970). Responsibility
22 turns on the "scope and nature of an individual's power to
23 determine how the corporation conducts its financial affairs; the
24 duty to ensure that withheld employment taxes are paid over flows
25 from the authority that enables one to do so." *United States v.*
26 *Jones*, 33 F.3d 1137, 1139 (9th Cir. 1994) (citation omitted).

27 Mr. Shore admitted during his January 2009 deposition that he
28 was "responsible" for CMS, INCON, and Cybergate's tax liabilities

1 for the relevant periods at issue. (DSUF 72-82.) Despite this
2 admission and the unopposed status of the government's motion, Mr.
3 Shore's liability under 26 U.S.C. 6672 is evaluated under the
4 factors set forth in *Hochstein v. United States*, 900 F.2d 543, 547
5 (2nd Cir. 1990). These factors include "the individual's duties as
6 outlined in the corporate bylaws, his ability to sign checks, his
7 status as an officer or director, and whether he could hire and
8 fire employees." *Id.* at 547; *See Jones*, 33 F.3d at 1140 (approving
9 use of the Hochstein factors).

10 There is substantial record evidence that Mr. Shore
11 "exercise[d] significant control over the corporation's financial
12 affairs," making him a responsible person under 26 U.S.C. 6672.
13 The United States has submitted evidence that Shore was an officer
14 and director of the corporations, ran the daily operations, had
15 check signing authority, and both hired and fired employees. (DSUF
16 72-82.) All of this evidence indicates that Mr. Shore had
17 significant control over the finances of CMS, INCON, and
18 Cybergate.com.

19 Mr. Shore conceded during his April 27, 1998 "IRS Form 4180"
20 interview, that he was "running all operations" at both CMS and
21 INCON. (DSUF 76.) Shore admitted that he hired and fired
22 employees, managed employees, paid bills, and negotiated contracts.
23 (Doc. 59, Exh. 45.) During his January 2009 deposition, Mr. Shore
24 confirmed his April 27, 1998 statements and reiterated his
25 substantial control over CMS and INCON's finances from 1997-1999.
26 (G. Shore Dep. 200:15-201:7.)

27 The undisputed facts are that Plaintiff was vice-president,
28 secretary, and treasurer of CMS and INCON, actively managed both

1 corporations, had check signing authority, hired and fired
2 employees, and on at least one occasion attempted to negotiate a
3 settlement with the IRS concerning outstanding tax liabilities.
4 (DSUF 72-82, 122.) Plaintiff had equal powers at Cybergate, in
5 addition to his majority ownership. (DSUF 74-75.) These facts
6 indicate that Plaintiff had significant control of all three
7 corporation's finances.

8 As a matter of law, Mr. Shore is a "responsible person" under
9 26 U.S.C. 6672. The undisputed facts establish Mr. Shore's
10 "responsibility" under the Hochstein factors.

11
12 b. *Willfulness*

13 Having determined that Mr. Shore is a "responsible person" for
14 the relevant tax assessment periods, the remaining question is
15 whether Mr. Shore willfully refused to pay CMS, INCON, and
16 Cybergate's taxes for those periods. In this context willfulness
17 is "a voluntary, conscious and intentional act to prefer other
18 creditors over the United States." *Davis v. U.S.*, 961 F.2d 867,
19 871 (9th Cir. 1992); *Klotz v. United States*, 602 F.2d 920, 923 (9th
20 Cir. 1979). Willfulness does not require an intent to defraud the
21 government or any other bad motive. *Davis*, 961 F.2d at 871;
22 *Klotz*, 602 F.2d at 923. Conduct motivated by a reasonable cause,
23 such as a desire to meet payroll, may nonetheless be willful. See,
24 e.g., *Phillips v. United States*, 73 F.3d 939, 942 (9th Cir. 1996).
25 The standard is further explicated as follows:

26 If a responsible person knows that withholding taxes are
27 delinquent, and uses corporate funds to pay other
28 expenses, even to meet the payroll out of personal funds
he lends the corporation, our precedents require that the
failure to pay withholding taxes be deemed "willful."

1 *Id.* (citations omitted).

2 Once a responsible person gains knowledge of a payroll tax
3 deficiency, he is liable for all periods during which he was a
4 responsible party, regardless of whether those periods precede or
5 follow the date he gained that knowledge. *See, e.g., Davis*, 961,
6 F.2d at 873.

7 Mr. Shore acknowledges that he was aware of financial problems
8 at CMS and INCON as early as 1996. (DSUF 77.) During his January
9 26, 2009 deposition, Mr. Shore testified that he knew about CMS and
10 INCON's perilous financial condition and, specifically, the
11 outstanding federal tax liabilities. (DSUF 77, 80.) Nevertheless,
12 Mr. Shore manipulated CMS and INCON's accounts so that CMS and
13 INCON appeared solvent. (DSUF 80.) This included paying creditors
14 other than the IRS as early as 1997:

15 Q. Basically by the beginning of calendar year 1997,
16 you were aware that payroll taxes were delinquent to
17 the federal government, is that correct?

18 A. Yeah. Actually before that, but yeah.

19 Q. Okay ... at the time when there were outstanding
20 delinquent payroll taxes, were you authorizing
obligations other than payroll taxes to be paid out of
corporate funds?

21 A. Yes.

22 Q. And what were you authorizing to be paid?

23 A. Uh ... the payroll ... loan payment, suppliers,
24 vendors, utility bills.

25 Q. In fact, as needed if money was in CMS, and you
26 needed it to cover something else, you just
transferred it, notwithstanding the delinquent payroll
taxes, is that correct?

27 A. Correct. Directed it to wherever I felt it was
28 appropriate for it to go, yes.

1 Q. So I mean you take responsibility for paying
2 vendors when payroll taxes were overdue, is that
correct?

3 A. Yes.

4 Q. And that would go for all of the tax quarters at
5 issue in this case?

6 A. Yes. Every single one.

7 (Exh. 3, 198:17-199:18.)

8 The evidence supporting § 6672 liability against Mr. Shore is
9 substantial and undisputed. Mr. Shore acknowledges becoming aware
10 of the tax deficiencies of CMS and INCON in early 1997 and of
11 Cybergate in 1998. Once Mr. Shore became aware of the deficiency,
12 he failed to ensure payment in full of that deficiency before any
13 other creditors were paid. Instead, Mr. Shore continued writing
14 checks to trade creditors and meeting payroll obligations. The law
15 is clear that such a failure is willful and subjects the
16 responsible person to § 6672 penalties. See *Buffalow v. United*
17 *States*, 109 F.3d 570, 573 (9th Cir. 1997) ("If a responsible person
18 knows that withholding taxes are delinquent, and uses corporate
19 funds to pay other expenses ... our precedents require that the
20 failure to pay withholding taxes be deemed willful.")

21 After viewing the entirety of the evidence in Mr. Shore's
22 favor, drawing all inferences in his favor, there is insufficient
23 evidence to create a genuine issue of material fact concerning Mr.
24 Gregory Shore's liability under 26 U.S.C. § 6672.

25 Summary judgment is GRANTED in favor of the United States.

26
27 ///

28 ///

1 2. Brenda Reynolds

2 a. *Responsible Person*

3 As an employee of CMS and INCON, and not an officer or
4 director, it would appear that the analysis of Mrs. Reynolds'
5 "responsibility" under 26 U.S.C. differs substantially from that of
6 Gregory Shore. However, the Ninth Circuit has consistently held
7 that the control necessary to support liability under section 6672
8 is simply the ability to direct or control the payment of corporate
9 funds. *Purcell*, 1 F.3d at 936 (quoting *Wilson v. United States*,
10 250 F.2d 312, 316 (9th Cir. 1958)). A person is "responsible" if
11 he or she has a significant voice in determining what bills should
12 be paid or not paid, and when. *Turner*, 423 F.2d at 449.

13 The evidence is undisputed that in September 1996, Reynolds
14 was hired as the controller of CMS and INCON. (DSUF 56.)
15 Reynolds' first assignment as controller was to review CMS and
16 INCON's liabilities, prioritize the amounts due, and negotiate
17 payment plans with creditors. (Id.) Specifically, Reynolds would
18 formulate a plan for payments, discuss the plan with Greg Shore,
19 and then manipulate the timing of these payments to avoid penalties
20 and the appearance of inability to pay. (DSUF 58.) Reynolds often
21 "held" checks to various creditors because CMS did not have
22 sufficient funds to cover the checks. (DSUF 57.)

23 From 1997 forward, Reynolds exercised significant authority
24 over corporate finances and accounts payable operations at CMS and
25 INCON. By early 1997, all of the bookkeepers at CMS and INCON
26 reported to Reynolds concerning accounting matters. (DSUF 59.) In
27 the third and fourth quarters of 1997, as well as in 1998 and 1999,
28 Reynolds signed hundreds of checks on behalf of CMS and INCON and,

1 along with Greg Shore, decided what creditors to pay first. (DSUF
2 60 & 66.)

3 Signing as Controller for CMS and INCON, Reynolds reviewed and
4 signed "Employer's Quarterly Federal Tax Returns" for eleven
5 quarters: the quarter ending June 30, 1997 through the quarter
6 ending December 31, 1999. (DSUF 62.) It is undisputed that no
7 payments were made by INCON or CMS against employment tax
8 liabilities during this period.⁶ (Id.) Reynolds, as Controller
9 for CMS and INCON, also signed "representative" letters to the CMS
10 and INCON's accountant, Hills Renaut, in order to obtain financial
11 statements for 1997 and 1998. (DSUF 67.) In these letters,
12 Reynolds represented that there were no "irregularities" or
13 "violations of law" concerning the accounting practices of CMS and
14 INCON. (Doc. 59, Exh. 26.)

15 The facts in this case show that Brenda Reynolds had a status
16 and position at CMS, INCON, and Cybergate to impose on her a legal
17 duty to collect, truthfully account for and pay over to the IRS
18 payroll taxes withheld from the salaries and wages of the company's
19 employees. The law is clear that such a status and position
20 establish that the individual is a "responsible party" under §
21 6672. See *Davis*, 961 F.2d at 877 (holding that a responsible
22 person is anyone who had the authority to direct payment,
23 regardless of his or her lack of knowledge); *United States v.*

24
25 ⁶ Two partial payments were made during the first four months
26 of 1998. These payments were credited to the first and second
27 quarters of 1997. INCON also wrote four \$25,000 checks each
28 intended to be partial payments for INCON's tax liability for the
second quarter of 1997. All four checks bounced in January 1998.
(DSUF 62.)

1 *Chapman*, 7 F. App'x 804, 807 (9th Cir. 2001) ([an individual] may
2 be held responsible as long as he had the ability to exercise
3 significant, not total, control over the company's financial
4 affairs.).

5 As a matter of law, Mrs. Reynolds is a "responsible person"
6 under 26 U.S.C. 6672.

7
8 b. *Willfulness*

9 The Ninth Circuit defines "willfulness" as a "voluntary,
10 conscious, and intentional act to prefer other creditors over the
11 United States." *Purcell*, 1 F.3d at 938 (quoting *Davis*, 961 F.2d at
12 871); see also *Teel v. United States*, 529 F.2d 903, 905 (9th Cir.
13 1976). "An intent to defraud the government or other bad motive
14 need not be proven." *Davis*, 961 F.2d at 871; *Klotz v. United*
15 *States*, 602 F.2d 920, 923 (9th Cir. 1979). A "responsible person"
16 is considered to have acted willfully if he or she acted with a
17 reckless disregard of a known or obvious risk that withholding
18 taxes may not be remitted to the government. *Teel*, 529 F.2d 903;
19 *Kappas v. United States*, 578 F.Supp. 1435, 1440 (C.D.Cal. 1983).
20 Willfulness can be proven by showing a preference of other
21 creditors over the United States either before or after the due
22 date for the corporation to remit the withheld taxes. *Kappas v.*
23 *United States* at 1440.

24 It is undisputed that Mrs. Reynolds had knowledge of CMS,
25 INCON, and Cybergate's unpaid taxes. (Reynolds Dep. 82:1-107:187.)
26 Relevant to the "willfulness analysis," is that although Mrs.
27 Reynolds knew in 1997 that CMS, INCON, and Cybergate, in 1998, were
28 not paying federal payroll taxes, she continued to write checks to

1 vendors and to employees for net wages. (DSUF 61 & 66.) Mrs.
2 Reynolds continued this practice in 1998 and 1999. (Id.) Still
3 facing federal tax delinquencies, Reynolds continued writing checks
4 to creditors other than the IRS through the end of 1999:

5 Q: Now did there come a time, though, that when you
6 were holding checks that had been cut to the IRS?

7 A. Yes.

8 Q. - or the government?

9 A. Yes...

10 Q. During the time you knew there was a serious
11 employment tax problem, were you still writing
12 checks for payroll accounts to individuals for
13 their wages or to other vendors?

14 A. Yes.

15 Q. You were doing that for both CMS and INCON, is
16 that correct?

17 A. Yes, that's correct.

18 Q. But yet you know the balances weren't paid in
19 full?

20 A. Yes, I knew that. Eventually I came to know
21 that, yes.

22 Q. And you came to know it roughly six months after
23 you started working there?

24 A. Approximately...

25 Q. And that occurred all the way through 1999?

26 A. Yes.

27 (Doc. 59, "Reynolds Dep." Exh. 36, 183:7-183:22, 193:4-193:9.)

28 Mrs. Reynolds admitted at her deposition that she made no
efforts to use available funds to pay the IRS rather than to meet
payroll or other needs. Because of her duty to pay employee taxes
over to IRS, Mrs. Reynolds is liable under 26 U.S.C. 6672. During

1 the periods in question, Mrs. Reynolds failed to see that these and
2 any other available funds were remitted to the IRS and not to other
3 creditors. See *Schlicht v. United States*, No. 03-1606-PHX-RCB,
4 2005 WL 2083103 (D. Ariz. Aug. 25, 2005) (“Once a responsible
5 person gains knowledge of a payroll tax deficiency, [he or she] is
6 liable for all periods during which [he or she] was a responsible
7 party.”). Mrs. Reynolds’ failure to pay over the payroll taxes
8 was, as a matter of law, willful under Section 6672 during the tax
9 periods at issue in this case.

10 After viewing the entirety of the evidence in Mrs. Reynold’s
11 favor, drawing all inferences in her favor, there is insufficient
12 evidence to create a genuine issue of material fact concerning Mrs.
13 Brenda Reynolds’ liability under 26 U.S.C. § 6672. Summary
14 judgment is GRANTED in favor of the United States.

15
16 IV. CONCLUSION.

17 For the reasons discussed above:

18 1. Summary judgment is GRANTED in favor of the United States
19 on its counterclaim against Gregory Shore under 26 U.S.C. § 6672.

20 2. Summary judgment is GRANTED in favor of the United States
21 on its counterclaim against Brenda Reynolds under 26 U.S.C. § 6672.

22 The United States shall submit a form of final judgment
23 consistent with this decision within five (5) days of electronic
24 service.

25
26 IT IS SO ORDERED.

27 **Dated: October 9, 2009**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE