

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

WILMA SHORE,

1:07-CV-01160 OWW SMS

Plaintiff,

MEMORANDUM DECISION RE  
DEFENDANT UNITED STATES OF  
AMERICA'S MOTION FOR SUMMARY  
JUDGMENT AGAINST PLAINTIFF AND  
COUNTERCLAIM DEFENDANT WILMA  
SHORE (Doc. 52.)

v.

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

Defendant.

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 Plaintiff Wilma Shore filed suit against the United States  
3 seeking a refund and abatement of tax penalties assessed and/or  
4 collected against her as the person responsible for Dean's  
5 Materials, Inc. and Dean R. Shore, Inc.'s failure to pay its  
6 payroll taxes. The government responded with a counterclaim  
7 against Plaintiff to reduce to judgment certain trust fund recovery  
8 penalties assessed against Plaintiff. The government contends that  
9 Plaintiff, as an officer, director and largest shareholder of  
10 Dean's Materials, Inc. and Dean R. Shore, Inc., is responsible for  
11 payment of these taxes and acted with reckless disregard to the  
12 payment of the federal taxes.

13 The government now moves, pursuant to Federal Rule of Civil  
14 Procedure Rule 56, for summary judgment on its counterclaim against  
15 Wilma Shore and for judgment in its favor as to the claims made in  
16 Plaintiff's Complaint.<sup>1</sup> Plaintiff has filed opposition, to which  
17 the United States has replied.

18  
19 **II. FACTUAL BACKGROUND.**

20 This case arises out of the government's attempt to recover  
21 unpaid payroll taxes that were required to but were not withheld  
22 from the wages of Dean's Materials, Inc. and Dean R. Shore, Inc.  
23 employees for eleven tax periods from April 1, 1997 through  
24 December 31, 1999. The facts are largely undisputed.

25 \_\_\_\_\_  
26 <sup>1</sup> The United States also moved, pursuant to Rule 56, to reduce  
27 trust fund recovery penalties to judgment against Gregory Shore and  
28 Brenda Reynolds. The motion for summary judgment filed by the  
United States against Gregory Shore and Brenda Reynolds is resolved  
by separate Memorandum Decision.

1 Dean's Materials, Inc. and Dean R. Shore, Inc. evolved out of  
2 a small acoustical tile business started in 1960 by Dean R. Shore,  
3 Plaintiff's deceased husband. ((Defendant United States' Statement  
4 of Disputed Facts ("DSUF") 1).<sup>2</sup>). Dean's Materials, Inc. sold  
5 building supplies in Central California under the trade name  
6 Construction Materials Suppliers ("CMS"). (DSUF 3.) Dean R.  
7 Shore, Inc. was a large commercial acoustical tile, plaster and  
8 commercial drywall subcontractor that did business under the name  
9 Interior Contractors ("INCON"). (DSUF 4.) Throughout the relevant  
10 tax periods at issue in this case, CMS was the parent company and  
11 sole shareholder of INCON. (DSUF 7.)

12 Following Dean R. Shore's death in 1991, Plaintiff became the  
13 largest shareholder of CMS and INCON.<sup>3</sup> (DSUF 9.) Plaintiff held  
14 in excess of 40% of the outstanding shares of CMS and served as co-  
15 trustee of two trusts that collectively owned another 40% stake in  
16 CMS. (DSUF 17.) Plaintiff was also a director of both CMS and  
17 INCON from 1991 until her resignation in 1999.<sup>4</sup> (DSUF 11, 20.)  
18 During the eleven tax periods at issue, there were two members of  
19 the Board of Directors: Plaintiff and her son Gregory Shore.

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20  
21 <sup>2</sup> Plaintiff does not dispute the bulk of Defendant's  
22 undisputed facts. To the extent she does, her objections are  
overruled or immaterial to the ultimate facts of the case.

23 <sup>3</sup> At the time of Dean R. Shore's death, and throughout the tax  
24 periods at issue in this case, parent company CMS also owned  
25 commercial real estate located in Redding, California. In  
26 September 1991, this property had a value of \$2.7 million. (DSUF  
27 8.) CMS was also the recipient of a sizeable damages award in 1991  
of nearly \$5 million, obtained as a result of a lawsuit against a  
telecommunications company. (Id.)

28 <sup>4</sup> On September 30, 1996, Jim Shore and Deanna K. Covey  
resigned as officers and directors of CMS and INCON. (Exh. 4.)

1 From 1991 until her resignation in 1999, Plaintiff was the  
2 President of CMS and INCON. (DSUF 11, 20.) Under CMS and INCON's  
3 bylaws, Wilma Shore, as President of each company, had "general  
4 supervision, direction and control of the business and officers of  
5 the corporation." (DSUF 13, 22.) The bylaws also authorized  
6 Plaintiff, as President of each company, to call special meetings  
7 of the Board of Directors and to inspect all books, records, and  
8 documents of every kind. (DSUF 15-16, 24-25.)

9 From 1991 forward, Plaintiff drew a regular salary and  
10 retained the right to sign checks on CMS and INCON's bank  
11 accounts.<sup>5</sup> (DSUF 26, 28.) Although Plaintiff's son, Gregory  
12 Shore, ran the daily operations of the business, Wilma Shore  
13 reconciled CMS and INCON's bank statements and dealt with outside  
14 accounting professionals regarding the preparation of financial  
15 statements and corporate disclosure forms. (DSUF 14, 29.)  
16 Plaintiff came into the CMS and INCON offices on a regular basis,  
17 up to five times per week. (DSUF 27.) Plaintiff also provided  
18 substantial funding to the companies, including the 1993 purchase  
19 of a \$656,907.00 loan obligation that CMS owed to Bank of America.  
20 (DSUF 32-33.) In 2000, CMS defaulted on the loan and Plaintiff  
21 foreclosed on the real estate collateral, consisting of substantial  
22 real property in Redding, California.<sup>6</sup>

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24 <sup>5</sup> Specifically, on at least four occasions from March 1999 to  
25 July 1999, Plaintiff signed large payroll checks issued to  
employees. (Doc. 59, Exh. 57(a)-(d).)

26 <sup>6</sup> Although the loan was over \$150,000 in arrears by 1996,  
27 Plaintiff agreed to subordinate her security interest in the  
28 collateral property in order to obtain an additional \$600,000 in  
financing to CMS. (DSUF 34.)

1 During the second half of her eight-year tenure as president  
2 of INCON and CMS, the companies encountered severe financial  
3 difficulties and cash shortages. (DSUF 47-55.) It is undisputed  
4 that checks bounced, payments were held back, and CMS and INCON  
5 failed to timely remit payroll taxes to the Government.<sup>7</sup> (Id.)  
6 According to the government, Plaintiff knew, or should have known,  
7 that CMS and INCON were not withholding taxes in 1997 and early  
8 1998 because four checks payable to the IRS, each in the amount of  
9 \$25,000, were returned for insufficient funds.<sup>8</sup> (DSUF 103.) In  
10 1997 and 1998, there were additional checks, ranging from \$10,000  
11 to \$140,000, made payable to the IRS that "bounced" for  
12 insufficient funds. (Doc. 59, Exhs. 54 & 55.) In April 1998, CMS  
13 and INCON ceased all payments, periodic or otherwise, to the IRS  
14 for delinquent employee taxes.<sup>9</sup> (DSUF 107, 110.)

15 INCON and CMS retained the accounting firm Hills Renault to  
16 prepare annual financial reports for the 1993, 1994, 1995, 1996,  
17 1997, 1998, and 1999 fiscal years. (DSUF 37.) Each year,  
18 Plaintiff signed the accountants' engagement and representation  
19 letters in connection with the preparation of these financial  
20 statements, which were given to CMS and INCON's lenders. (DSUF  
21

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22 <sup>7</sup> As early as 1995, Plaintiff made personal loans to INCON to  
23 "help cover payroll." (DSUF 36.)

24 <sup>8</sup> The reconciled bank records contain Plaintiff's handwritten  
25 notes next to each "bounced" check. (Doc. 59, Exh. 53.) The  
26 records reflect the date the check bounced, the amount (\$10,000),  
the bank code "Return Item Enclosure," and Plaintiff's handwritten  
check number, i.e., "#9373" and "#9495." (Id.)

27 <sup>9</sup> It appears that CMS and INCON made several payments to the  
28 IRS to reduce its federal tax liability, however, these efforts  
ceased in April 1998.

1 37.) In 1996, Hills Renault became concerned about CMS and INCON's  
2 financial viability. During an audit in August 1996, Plaintiff was  
3 made personally aware of Hills Renault's concerns by Leslie Kos, an  
4 accountant at Hills Renault. (DSUF 88.) Kos personally warned  
5 Plaintiff that Hills Renault was adding a "going concern" note to  
6 the financial statements of CMS and INCON. (Id.) A "going  
7 concern" footnote questions the financial viability of the  
8 businesses over the ensuing fiscal year. (Id.)

9 From 1996 forward, CMS and INCON's financial statements  
10 contained express references to unpaid payroll taxes, penalties,  
11 and interest. (DSUF 53, 112.) For example, the March 31, 1997  
12 financial statement for CMS states: "At March 31, 1997 and 1996,  
13 accounts payable and accrued expenses include \$122,400 and  
14 \$139,000, respectively, representing delinquent payroll taxes,  
15 penalties, and interest." (DSUF 53; Doc. 59, Exh. 29.) INCON's  
16 March 31, 1997 financial statement contained a similar statement:  
17 "At March 31, 1997 and 1996, accounts payable and accrued expenses  
18 include \$311,700 and \$550,400, respectively, representing  
19 delinquent payroll taxes, penalties, and interest." (DSUF 53.)

20 CMS and INCON's financial condition continued to decline in  
21 1998. (DSUF 107-114.) According to the financial statements  
22 prepared By Hills Renault for the 1998 fiscal year, INCON's  
23 delinquent payroll taxes, penalties, and interest totaled  
24 \$1,192,241. (DSUF 112.) CMS's delinquent payroll taxes,  
25 penalties, and interest totaled \$243,971. (Id.) Plaintiff's  
26 personal financial statement for the 1998 fiscal year, also  
27 prepared by Hills Renault, reflected large losses, negative working  
28 capital, and the elimination of Plaintiff's book equity in CMS and

1 INCON. (DSUF 113.)

2 In April 1999, Plaintiff received a copy of a letter from  
3 Richard Howard to Ms. Audrey Chan of the Department of Labor in San  
4 Francisco. Mr. Howard alleged that the assets of CMS and INCON's  
5 profit sharing plan might be at risk, since there "appears to be a  
6 serious disregard for compliance with basic ERISA laws by the  
7 plan's trustee." (DSUF 111; Doc. 59, Exh. 56.) Mr. Howard also  
8 stated that "the trustee does not return my phone calls ... [and]  
9 the 1997 benefit statements have not been provided." (Id.) The  
10 letter was sent to "Mrs. Wilma Shore, Shore Corp. President" via  
11 certified mail. (Id.)

12 In March, June, and July 1999, Plaintiff signed large numbers  
13 of payroll checks issued to employees. (DSUF 114; Doc. 59, Exh.  
14 57A, 57B, 57C, 57D.) The payroll checks drawn on July 26, 2009 and  
15 signed by Wilma Shore, were the last checks drawn on CMS and INCON  
16 accounts. CMS and INCON stopped doing business in 2000.<sup>10</sup> (DSUF  
17 115.)

18 Following an investigation into the delinquent taxes, the IRS  
19 assessed trust fund recovery penalties against Wilma Shore relating  
20 to CMS and INCON's outstanding payroll liabilities for eleven tax  
21 periods from April 1, 1997 through December 31, 1999.<sup>11</sup> (DSUF 117.)

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23 <sup>10</sup> In late 2000, Plaintiff foreclosed her "loan" and acquired  
24 the Redding properties. (DSUF 116.)

25 <sup>11</sup> On January 26, 2000 the IRS sent Plaintiff notification that  
26 it was planning to assess trust fund penalties against her for the  
27 second quarter of 1997, third quarter of 1997, fourth quarter of  
28 1997. Shortly thereafter, the IRS sent Plaintiff notification that  
it was planning to assess trust fund penalties against her for the  
first quarter of 1998, second quarter of 1998, third quarter of  
1998, fourth quarter of 1998, first quarter of 1999, second quarter

1 The IRS assessed penalties against Plaintiff concerning CMS'  
2 unpaid tax liabilities in the amount of \$38,867.58 for the second  
3 quarter of 1997, \$36,346.66 for the third quarter of 1997,  
4 \$39,647.46 for the fourth quarter of 1997, \$25,287.07 for the first  
5 quarter of 1998, \$25,665.25 for the second quarter of 1998,  
6 \$26,193.58 for the third quarter of 1998, \$23,540.84 for the fourth  
7 quarter of 1998, \$17,642.23 for the first quarter of 1999,  
8 \$18,670.89 for the second quarter of 1999, \$18,519.88 for the third  
9 quarter of 1999, and \$19,336.95 for the fourth quarter of 1999.  
10 (DSUF 120.)

11 Concerning INCON, the IRS assessed penalties against Plaintiff  
12 in the amount of \$106,345.58 for the second quarter of 1997,  
13 \$155,671.18 for the third quarter of 1997, \$124,821.18 for the  
14 fourth quarter of 1997, \$218,437.67 for the first quarter of 1998,  
15 \$144,667.76 for the second quarter of 1998, \$91,513.87 for the  
16 third quarter of 1998, \$183,554.25 for the fourth quarter of 1998,  
17 \$171,853.43 for the first quarter of 1999, \$217,007.41 for the  
18 second quarter of 1999, \$143,344.31 for the third quarter of 1999,  
19 and \$122,304.55 for the fourth quarter of 1999.<sup>12</sup> (DSUF 120.)

20 As of July 19, 2009, the total outstanding balance of the  
21 federal tax liabilities due from Wilma Shore with respect to CMS  
22 and INCON for all tax periods at issue, including interest, is  
23 \$2,983,797.66. (DSUF 120.)

24 \_\_\_\_\_  
25 of 1999, third quarter of 1999, fourth quarter of 1999.

26 <sup>12</sup> On January 26, 2000, the IRS sent Wilma Shore formal  
27 notification that it was planning to assess a trust fund penalty  
28 against her for the quarters ending June 30, 1997, September 30,  
1997, and December 31, 1997 for the delinquent employment taxes of  
CMS and INCON. A short time later,

1  
2 **III. PROCEDURAL BACKGROUND.**

3 On August 8, 2008, Wilma Shore brought suit against the United  
4 States pursuant to 28 U.S.C. § 1346, seeking a refund or abatement  
5 of trust fund liabilities assessed personally against her by the  
6 IRS. (Doc. 1.) Plaintiff's first cause of action seeks to recover  
7 or abate the allegedly erroneously withheld sums, stating that she is  
8 neither a "responsible party" nor "acted willfully" as described in  
9 26 U.S.C. § 6672. Plaintiff's second cause of action is brought  
10 pursuant to an estoppel theory.

11 On December 17, 2007, the United States filed its Answer to  
12 Plaintiff's Complaint and also asserted a counterclaim against  
13 Shore. (Doc. 8.) In its counterclaim, the United States sought to  
14 reduce to judgment the contested trust fund liabilities assessed  
15 against Shore pursuant to 26 U.S.C. § 6672. The United States also  
16 raised counterclaims against Gregory Shore and Brenda Reynolds,  
17 seeking to recover certain trust fund recovery penalties assessed  
18 against them.

19 On July 20, 2009, the United States filed a Motion For Summary  
20 Judgment to reduce to judgment the outstanding federal income tax  
21 liabilities assessed against Plaintiff and Counterclaim-Defendant  
22 Wilma Shore and Additional Counterclaim-Defendants Gregory Shore  
23 and Brenda Reynolds. (Doc. 52.) As to Plaintiff and Counterclaim-  
24 Defendant Wilma Shore, the United States seeks to reduce trust fund  
25 recovery penalties to judgment and for judgment in its favor as to  
26 the claims made in Ms. Shore's Complaint.

27 The Government seeks to recover \$2,983,797.66 from Wilma Shore  
28 in unpaid FICA and income taxes for her involvement in the non-

1 payment of payroll tax liabilities for Dean's Materials, Inc. and  
2 Dean R. Shore, Inc. The Government contends that Plaintiff, as an  
3 officer, director and largest shareholder of CMS and INCON, is  
4 responsible for payment of these taxes and acted with reckless  
5 disregard in failing to pay federal taxes.

6 Wilma Shore filed her opposition to the United States' summary  
7 judgment motion on August 14, 2009. (Doc. 74.) In support of her  
8 opposition, Plaintiff submitted: (1) a Memorandum opposing the  
9 motion ("Memorandum"); (2) the declaration of Art Myatt; (3) the  
10 declaration of Dennis Bean, PhD; (4) the declaration of Deanna  
11 Covey; and (5) a single Statement of Disputed Facts ("PSDF").  
12 (Docs. 72-74.)

13 Wilma Shore opposes summary judgment on grounds that there  
14 remains a genuine issue of material fact concerning whether she is  
15 a "responsible party" or "acted willfully" under 26 U.S.C. § 6672.  
16 Plaintiff contends that a genuine issue of material fact exists  
17 because she was President of CMS and INCON "in name only," and was  
18 not involved in the day-to-day operations of either company.

19  
20 **IV. LEGAL STANDARD.**

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

1 affidavits, if any, which it believes demonstrate the absence of a  
2 genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S.  
3 317, 323 (1986) (internal quotation marks omitted).

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

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

1 credibility determinations; rather, the "evidence of the non-movant  
2 is to be believed, and all justifiable inferences are to be drawn  
3 in his favor." *Id.* at 255.

4  
5 **V. DISCUSSION.**

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

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

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

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

26 U.S.C. § 6672.

1 For the purposes of Section 6672, a "person" includes "an  
2 officer or employee of a corporation ... who ... is under a duty to  
3 perform the act in respect of which the violation occurs." 26  
4 U.S.C. § 6671(b). Thus, an individual is liable for a penalty  
5 under Section 6672 if (1) he is a "responsible person"; and (2) if  
6 he acts willfully in failing to collect or pay over the withheld  
7 taxes. *Davis v. United States*, 961 F.2d 867, 869-70 (9th Cir.  
8 1992).

9 Plaintiff argues that the § 6672 penalty cannot be assessed  
10 against her because she was not a responsible person and because  
11 she did not willfully fail to pay the delinquent trust fund taxes.  
12 (Doc. 74, 2:6-2:23.) The United States submitted Certificates of  
13 Assessment (Forms 4340) for the § 6672 penalty for each quarter.  
14 (Doc. 56, Exhs. 1-28.<sup>13</sup>) These forms establish a prima facie case  
15 for the United States. *United States v. Jones*, 33 F.3d 1137, 1139  
16 (9th Cir. 1994). Plaintiff cannot prevail unless she can  
17 demonstrate by a preponderance of the evidence that either the  
18 element of responsibility or the element of willfulness is not met.  
19 *See id.*

20  
21 1. Responsible Person

22 The Ninth Circuit has consistently identified persons who have  
23 "the final word as to what bills should or should not be paid, and  
24 when" as "responsible" persons under § 6672. *Purcell v. United*  
25 *States*, 1 F.3d 932, 936 (9th Cir. 1993). A person has the final  
26 word if that person had "the authority required to exercise  
27

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28 <sup>13</sup> (Doc. 56, Exhs. 6, 9, 12, 15, 18, 21, 24, and 28.)

1 significant control over the corporation's financial affairs,  
2 regardless of whether he exercised such control in fact." *Purcell*,  
3 1 F.3d at 937. In other words, responsibility is a matter of  
4 status, duty, and authority, not knowledge. *Davis*, 961 F.2d at 873  
5 (upholding the trial court's finding of "responsible person" based  
6 on the plaintiff's position as the president, member of the board,  
7 and major shareholder, even though the plaintiff had no knowledge  
8 of the tax default). "Authority turns on the scope and nature of  
9 an individual's power to determine how the corporation conducts its  
10 financial affairs; the duty to ensure that withheld employment  
11 taxes are paid over flows from the authority that enables one to do  
12 so." *Purcell*, 1 F.3d at 936.

13 In the absence of an admission of responsibility, there are  
14 various factors which are indicative of significant control. These  
15 factors include "the individual's duties as outlined in the  
16 corporate bylaws, his ability to sign checks, his status as an  
17 officer or director, and whether he could hire and fire employees."  
18 *Hochstein v. United States*, 900 F.2d 543, 547 (2nd Cir. 1990); see  
19 *Jones*, 33 F.3d at 1140 (approving use of the Hochstein factors).  
20 Other courts have identified additional factors, such as whether  
21 the individual held stock in the corporation and whether the  
22 individual's signature is on the employer's federal quarterly and  
23 other tax returns. *Greenberg v. United States*, 46 F.3d 239, 243  
24 (3rd Cir. 1994).

25 The United States has submitted evidence that Plaintiff was  
26 the president of the corporations, the corporate bylaws charged  
27 Plaintiff with "general supervision, direction and control" of the  
28 corporations, Plaintiff reconciled bank accounts, had check signing

1 authority, and was a director and majority shareholder of CMS and  
2 INCON. All of this evidence indicates that Plaintiff had  
3 significant control over the corporation's finances. There is also  
4 evidence in the record that Plaintiff was involved in the  
5 preparation of financial statements for CMS and INCON, as her  
6 signature appears on the representation letters to Hills Renault  
7 concerning the financial statements for the 1993 to 1999 fiscal  
8 years.

9 Plaintiff acknowledges that she was president of CMS and INCON  
10 and the bylaws gave her general supervision and control of the  
11 companies. She also does not dispute that she was the majority  
12 shareholder, signed checks on behalf of the companies, reconciled  
13 bank accounts, or received a salary. However, Plaintiff contests  
14 any characterization of herself as a "responsible person" during  
15 the relevant time frame, and rather casts herself as a passive  
16 owner who allowed her son to manage the companies.<sup>14</sup> (Doc. 74,  
17 4:22-4:27.) Plaintiff contends that she had only "technical  
18 authority and a titular designation" and that Greg Shore "rebuffed  
19 her inquiries, screened her telephone calls, and instructed other  
20 employees to not answer her questions regarding certain checks and  
21 payments." (Doc. 74, 7:2-7:10.)

22 Significantly, Plaintiff does not offer any evidence that she  
23 lacked the authority to pay CMS or INCON's taxes. See *Alsheskie v.*  
24 *United States*, 31 F.3d 837, 839 (9th Cir. 1994) (distinguishing the  
25 district court's finding that the plaintiff was not a responsible  
26

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27 <sup>14</sup> Plaintiff also contends that a "family culture" of allowing  
28 men to control the business undercuts any explicit finding of  
"responsibility" under § 6672.

1 party from a case where "the record contained no evidence that ...  
2 the responsible party was without authority to pay the taxes.").  
3 Plaintiff's arguments regarding her responsibility focus almost  
4 entirely on her inability to exercise her authority because her son  
5 controlled the daily operations of both CMS and INCON. This  
6 argument is unavailing. The "responsibility" prong of the  
7 liability analysis addresses only the existence of authority; the  
8 "willfulness" prong considers the ability of the individual to act  
9 upon his or her authority. See e.g., *Phillips v. IRS*, 73 F.3d 939,  
10 943 (9th Cir. 1995).

11 Plaintiff spends much of her opposition brief arguing that she  
12 delegated the day-to-day operations to her son beginning in 1991,  
13 and that this designation continued unimpeded through her  
14 resignation in October 1999. Plaintiff contends that Gregory  
15 Shore's control over the daily operations of CMS and INCON  
16 precludes her from any liability under § 6672. Although it appears  
17 that Greg Shore conducted CMS and INCON's daily operations, it is  
18 well-established that the duty to ensure that withholding taxes are  
19 collected and paid over to the government, which Plaintiff  
20 possessed, is nondelegable. See *Purcell*, 1 F.3d at 936  
21 (responsibility to pay taxes cannot be delegated); *Keller v. United*  
22 *States*, 46 F.3d 851, 854 (8th Cir. 1995) ("an otherwise responsible  
23 person does not avoid liability under section 6672 by delegating  
24 his authority to another."); *Thomsen v. United States*, 887 F.2d  
25 12, 17 (1st Cir. 1989) ("delegation will not relieve one of  
26 responsibility; liability attaches to all those under the duty set  
27 forth in the statute.").

28 In *Purcell*, the Ninth Circuit held that the delegation of

1 responsibility for all financial matters from the "responsible  
2 person" to a third person does not shelter the "responsible person"  
3 from liability for failing to pay the taxes. Even where a party  
4 does not control the daily operations of the company and does not  
5 participate in many decisions affecting the companies, she is still  
6 liable for the unpaid taxes. *Id.* at 937. It is not a question of  
7 what the responsible person does, rather, the inquiry centers on  
8 what she could have done, i.e., the extent of her authority.  
9 Despite Greg Shore's control over CMS and INCON's daily operations,  
10 Plaintiff retained the ostensible authority to pay the taxes. She  
11 was the President, a Director, the largest shareholder, and, via  
12 her loans and financial involvement, largely controlled the  
13 company's finances. This authority supports finding her a  
14 "responsible person" under the law. See *Barnett v. I.R.S.*, 988  
15 F.2d 1449, 1454 (5th Cir. 1993) ("The crucial inquiry is whether a  
16 party ... by virtue of his position in ... the company, could have  
17 had substantial input into such decisions, had he wished to exert  
18 his authority.").

19 Plaintiff also argues that because Greg Shore admitted  
20 "responsibility" for the tax deficiency, she cannot be held liable.  
21 Plaintiff fails to recognize that under § 6672 liability may extend  
22 to more than one corporate officer. See *United States v. Chapman*,  
23 7 F. App'x 804, 807 (9th Cir. 2001) ("Section 6672 applies to all  
24 responsible persons, not just the most responsible."); *USLIFE Title*  
25 *Ins. Co. of Dallas v. Harbison*, 784 F.2d 1238, 1243 (5th Cir. 1986)  
26 ("The fact that more than one person is responsible for a  
27 particular delinquency does not relieve another responsible person  
28 of his or her personal liability, nor can a responsible person

1 avoid collection against himself on the ground that the Government  
2 should first collect the tax from someone else."). The IRS's  
3 determination that Gregory Shore and Brenda Reynolds are also  
4 responsible for CMS and INCON's failure to pay its withholding  
5 taxes for eleven tax periods at issue in this case does not  
6 foreclose whether Wilma Shore is also liable under § 6672.

7 Plaintiff contends that the "IRS has offered no evidence  
8 establishing Wilma Shore has the responsibility to pay the  
9 withholding taxes ... the evidence will show that Wilma Shore has  
10 only 'technical authority and a titular designation.'" (Doc. 74,  
11 7:1-7:3.) Plaintiff cites *Vinick v. United States*, 205 F.3d 1 (5th  
12 Cir. 2000), in support of her arguments. However, *Vinick* is  
13 factually distinguishable.

14 In *Vinick*, a corporation's treasurer filed a claim for a  
15 refund of taxes paid pursuant to a penalty assessed for the failure  
16 to pay payroll taxes.<sup>15</sup> However, the similarities to this case end  
17 there. *Vinick* was formally the treasurer of a small company in  
18 which he was an investor; but - unlike Wilma Shore - he was neither  
19 paid by the company nor engaged in financing its business affairs,  
20 had no office at the company, and did not sign checks in the  
21 relevant time frame. Throughout the period in question, *Vinick* was  
22 a CPA with his own private practice elsewhere. Plaintiff's  
23 engagement and relationship with CMS and INCON bears little, if  
24 any, resemblance to the Plaintiff in *Vinick*. There is undisputed  
25 evidence that Plaintiff signed payroll checks for CMS and INCON,

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26  
27 <sup>15</sup> Following a bench trial, the District Court entered judgment  
28 for government. On appeal, the First Circuit held that a treasurer  
was not a "responsible person" who was liable for failure to pay  
taxes. *Vinick*, 205 F.3d at 14.

1 maintained an office at the business, received a salary, reconciled  
2 corporate bank accounts, and participated in corporate meetings.  
3 The facts and ruling in *Vinick* are not helpful or persuasive in  
4 this case.

5 Despite her arguments to the contrary, Plaintiff's authority  
6 was more than nominal. The undisputed facts are that Plaintiff was  
7 president of the corporations; charged with "general active  
8 management" of the corporations; was a Director of the  
9 corporations; had check signing authority; visited her office at  
10 company headquarters a few days a week; and was majority  
11 shareholder. These facts establish that Plaintiff was a  
12 "responsible person" under § 6672 for all eleven quarters. See  
13 *Schlicht v. United States*, No. 03-1606, 2005 WL 2083103, at \*3 (D.  
14 Ariz. Aug. 25, 2005) (holding that a corporation's president, who  
15 "was charged with 'general active management' ..., had check  
16 signing authority, hired and fired employees, and on at least one  
17 occasion ... paid trust fund taxes" was a responsible party even  
18 though he did not exercise his authority over finances on a regular  
19 basis.). No reasonable jury could conclude otherwise.

20 *United States v. Chapman*, 7 F. App'x 804, 806, is instructive.  
21 In *Chapman*, the Ninth Circuit held that the district court applied  
22 an incorrect legal standard to conclude that the taxpayer was not  
23 a "responsible person" within the meaning of § 6672:

24 After careful examination of the district court's oral  
25 decision, we conclude that the district court's  
26 finding that [the taxpayer] was not a "responsible  
27 person" derives from the use of improper legal  
28 standards. First, the district court focused its  
inquiry on whether [the taxpayer] had knowledge that  
the taxes went unpaid. This was error under *Davis*,  
where we stated that "[r]esponsibility is a matter of  
status, duty, and authority, not knowledge." Second,

1 the district court erred by basing its conclusion, in  
2 part, on the fact that paying taxes was not part of  
3 [the taxpayer's] "functional responsibility." The  
4 court specifically emphasized that [the taxpayer] had  
5 "nothing to do with taxes, ever, nothing." Our case  
6 law teaches the contrary. An individual may be held  
7 responsible if he had the authority required to  
8 exercise significant control over the corporation's  
9 financial affairs, regardless of whether he exercised  
10 such control in fact.

11 *Id.* (citations omitted).

12 Even if Gregory Shore controlled the daily operations of CMS  
13 and INCON, Plaintiff was still responsible, as President, for  
14 ensuring that the corporation paid its trust fund taxes. See  
15 *Purcell*, 1 F.3d at 937 ("That an individual's day-to-day function  
16 in a given enterprise is unconnected to financial decision making  
17 or tax matters is irrelevant where that individual has the  
18 authority to pay or to order the payment of delinquent taxes.");  
19 *Chapman*, 7 F. App'x at 806. Plaintiff, under corporate law,  
20 possessed the legal authority to exercise control over the  
21 corporation's financial affairs throughout the periods at issue in  
22 this case, even if she delegated this responsibility to another  
23 financial officer. Plaintiff was a "responsible person" under §  
24 6672 for CMS and INCON for all eleven quarters.

25 As a matter of law, Plaintiff is a "responsible person" under  
26 26 U.S.C. 6672. The United States' motion for summary judgment on  
27 this issue is GRANTED.

## 28 2. Willfulness

That Plaintiff is a "responsible person" for the relevant tax  
assessment periods at issue does not resolve whether Plaintiff  
willfully refused to pay CMS and INCON's taxes for those periods.

1 In the Ninth Circuit, willfulness under section 6672 is defined as  
2 a "voluntary, conscious and intentional act to prefer other  
3 creditors over the United States." *Phillips v. United States*, 73  
4 F.3d 939, 942 (9th Cir. 1996) (quoting *Klotz v. United States*, 602  
5 F.2d 920, 923 (9th Cir. 1979)). The Ninth Circuit holds that "[i]f  
6 a responsible person knows that withholding taxes are delinquent,  
7 and uses corporate funds to pay other expenses..., our precedents  
8 require that the failure to pay withholding taxes be deemed  
9 'willful.'" *Buffalow v. United States*, 109 F.3d 570, 573 (9th Cir.  
10 1997) (quoting *Phillips*, 73 F.3d at 942). The question of  
11 willfulness is a factual one and if sufficiently controverted,  
12 would preclude the granting of summary judgment on penalty  
13 liability." *Teel v. United States*, 529 F.2d 903, 905 (9th Cir.  
14 1976).

15 The Ninth Circuit recognizes two ways by which the government  
16 can establish willfulness. First, the government may show that the  
17 responsible person had actual knowledge that payroll taxes were not  
18 being collected or paid over, and thereafter made payment to a  
19 non-IRS creditor. Second, a responsible person may be deemed  
20 "willful" if he or she acted in "reckless disregard of whether the  
21 taxes [were] being paid over." *Phillips*, 73 F.3d at 942 (stating  
22 that "a responsible person is liable under the reckless disregard  
23 standard if he (1) clearly ought to have known that (2) there was  
24 a grave risk that withholding taxes were not being paid and if (3)  
25 he was in a position to find out for certain very easily.")  
26 (citation and quotation omitted).

27 A review of the record evidence reveals a genuine dispute on  
28 the ultimate issue of whether Plaintiff *clearly* ought to have known

1 that there was a grave risk that withholding taxes were not being  
2 paid and if she was in a position to find out for certain very  
3 easily. The government contends that Plaintiff acted with  
4 "reckless disregard" by failing to ensure that CMS and INCON's  
5 taxes were paid after learning about CMS and INCON's poor financial  
6 condition and that past payroll taxes were not paid. To support  
7 its latter contention, the government relies on the fact that  
8 several checks payable to the IRS were returned for insufficient  
9 funds in early 1997, prior to the periods at issue in this case.<sup>16</sup>  
10 This, the government argues, created a risk that IRS and INCON were  
11 delinquent and made it incumbent upon Plaintiff to ensure that the  
12 government was being paid before making payments to non-IRS  
13 creditors.<sup>17</sup>

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14  
15 <sup>16</sup> A review of the checks, one of which was returned twice,  
16 show Plaintiff's handwritten notations on each check. However, the  
17 record reveals that a substantial number of these checks eventually  
18 cleared CMS and/or INCON's accounts.

19 <sup>17</sup> At oral argument, Plaintiff argued that only Plaintiff's  
20 conduct in the relevant quarters in which liability was assessed  
21 can be used to determine § 6672 liability. Plaintiff averred that  
22 Plaintiff's conduct outside of the eleven tax periods at issue -  
23 i.e., prior to 1997 - is irrelevant and inadmissible. Here,  
24 evidence of Plaintiff's loans in 2003 (which remained outstanding  
25 until 2000), as well as the warnings by Mr. Howard in 2004 and Ms.  
26 Koz in 2006 are relevant to demonstrate Plaintiff's awareness of  
27 CMS and/or INCON's dire financial condition in early 1997 and  
28 whether her reliance on Greg Shore was reasonable. See *Purcell*, 1  
F.3d at 938 (liability under Section 6672 for person who paid out  
corporate funds to other creditors after the period in question  
rather than remitting taxes to the government); *Turner v. United  
States*, No. C04-2080Z, 2005 WL 3747959 at \*8 (W.D. Wash. Dec. 30,  
2005) (outside tax period evidence was relevant because it showed  
taxpayer's authority to influence who got paid from corporate  
funds); *Jefferson v. United States*, 546 F.3d 477, 481 n.1 (7th Cir.  
2008) (reviewing outside tax period evidence "made sense" because  
Jefferson was "involved with the day care for over twenty years

1 Plaintiff's primary argument in rebuttal is that a material  
2 issue of fact exists because Greg Shore, who she trusted, misled  
3 her by asserting that he had taken care of the matter or would take  
4 care of the matter. Specifically, Plaintiff argues that she never  
5 clearly ought to have known about CMS and INCON's tax deficiencies  
6 because, "Greg Shore controlled the check book and decisions as to  
7 what creditor was being paid ... Greg repeatedly assured  
8 [Plaintiff] that finances of the corporation were being taken care  
9 of." Drawing factual inferences in her favor, Plaintiff maintains  
10 it was reasonable for her to trust her son despite her fiduciary  
11 obligations, as a responsible party, to care properly for the funds  
12 temporarily entrusted to the corporation for the ultimate use of  
13 the United States.<sup>18</sup>

14 The critical inquiry in this case is whether Plaintiff showed  
15 such reckless disregard for a known or obvious risk by failing to  
16 ascertain whether monies withheld from employees wages were  
17 remitted to the government after CMS and INCON began to flounder.  
18 The United States argues that applying *Phillips* to the facts of  
19 this case, there is no genuine dispute of material fact that  
20

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21 [and] there is no evidence that Jefferson's involvement with  
22 managing the day care's finances ceased at any time before or  
23 during the relevant fiscal period.").

24 <sup>18</sup> Plaintiff also attempts to defeat any notion that she  
25 recklessly disregarded a risk by pointing out that a number of the  
26 "bounced" IRS checks eventually cleared CMS and/or INCON accounts,  
27 and she only signed a few checks to creditors and did not sign or  
28 prepare tax returns. As to the financial statements, there is  
deposition testimony by Plaintiff that CMS and INCON's financial  
statements were given to, and maintained by, Greg Shore. Plaintiff  
testified that she never reviewed CMS and INCON's financial  
statements.

1 Plaintiff met the Ninth Circuit's standard for reckless disregard.  
2 However, in *Phillips*, the taxpayer was aware that the employee he  
3 entrusted with the responsibility to remit the withholding taxes  
4 had previously failed to pay them. Specifically, the taxpayer  
5 previously paid an IRS assessment for failure to pay federal  
6 withholding taxes and told the employee to "not let it happen  
7 again." Subsequently, the same employee neglected to pay federal  
8 withholding taxes and the IRS assessed the penalty against the  
9 taxpayer.<sup>19</sup> The facts supporting a finding of willfulness, in  
10 *Phillips*, i.e., the taxpayer's actual knowledge of the previous  
11 failure to remit withholding taxes, are not present in this case.

12 The United States cites other authority to support its  
13 argument that there is no genuine dispute of fact as to Plaintiff's  
14 reckless disregard of a grave risk. *Wright v. United States*, 809  
15 F.2d 425, 427 (7th Cir. 1987); *Thomsen v. United States*, 887 F.2d  
16 12, 18 (1st Cir. 1989). However, in *Wright*, the court held Wright  
17 was liable for the penalty because he had actual knowledge of the  
18 prior delinquency. Like *Phillips*, the same individual responsible  
19 for the prior delinquency of the company continued to be a  
20 principal of the company, and the company's financial picture  
21 worsened, leading to a second delinquency. *Wright*, 809 F.2d at  
22 426-27. Similarly in *Thomsen*, the taxpayer had actual notice of an  
23 employee's failure to remit taxes, yet continued to delegate that  
24 responsibility to the failing party without taking steps to insure

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25  
26 <sup>19</sup> The Ninth Circuit found the taxpayer to be "willful" under  
27 26 U.S.C. 6672 because he was aware that the employee he entrusted  
28 with the responsibility to remit the withholding taxes had failed  
once before to pay them, yet he never inquired whether taxes were  
being paid. *Phillips*, 73 F.3d at 943-44.

1 payment. *Thomsen*, 887 F.2d at 17-18. The key difference between  
2 *Wright* and *Thomsen* and this case, and the reason summary judgment  
3 is precluded, is that a factual dispute exists whether and to what  
4 extent Plaintiff was on notice that Greg Shore had mismanaged the  
5 corporation and whether he could be trusted to pay either CMS or  
6 INCON's payroll taxes. Even applying *Wright* and *Thomsen*, the  
7 factual dispute remains.

8 In this case, in addition to not having day-to-day control  
9 over the finances, Plaintiff signed only a few checks to creditors  
10 and did not sign or prepare tax returns. These differences are  
11 important because the greater control and responsibility one has  
12 over the taxes and finances of a company, and over the payment of  
13 creditors, the sooner one "clearly ought to have known" of the risk  
14 that withholding taxes were not paid. In some situations where the  
15 taxpayer had greater immediate control over and responsibility for  
16 a company's finances or check writing, such as *Phillips*,<sup>20</sup> knowledge  
17 that the company has financial difficulties could be sufficient to  
18 establish recklessness with respect to nonpayment of taxes, but  
19 that is not true in this case.<sup>21</sup>

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20  
21 <sup>20</sup> In *Phillips*, the taxpayer maintained check writing authority  
22 and conceded that he made the final decision on what creditors to  
pay. *Phillips*, 73 F.3d at 943.

23 <sup>21</sup> Plaintiff's lack of immediate responsibility for finances  
24 and taxes and her lack of knowledge of past or present tax  
25 deficiencies--if believed, distinguish this case from those in  
26 which responsible parties without knowledge that withholding taxes  
27 were not paid, are nonetheless found "willful" under § 6672. In  
28 *Jefferson v. United States*, 546 F.3d 477 (7th Cir. 2008), for  
example, the evidence suggested that Jefferson, the President of  
the board of directors, was not only aware of the company's history  
of tax payment problems--he sent two checks on company's behalf to  
the IRS for past taxes--, but he was also aware of its continued

1 Viewing the evidence in a light most favorable to Plaintiff,  
2 drawing all inferences in her favor, there remains a genuine issue  
3 of material fact as to whether she acted with reckless disregard.  
4 On her account, Greg Shore, who she trusted, misled her by  
5 asserting that he had taken care of the matter or would take care  
6 of the matter. If believed, a dispute exists whether Plaintiff,  
7 once aware of the liability to the government, reasonably  
8 discharged her duty to ensure that the taxes were paid before any  
9 payments were made to other creditors. The extent and nature of  
10 her knowledge after the first 1997 check to the IRS was returned,  
11 raises the question of whether Plaintiff could continue to  
12 reasonably rely on Greg's statements that "everything was taken  
13 care of." A factual dispute exists whether and to what extent  
14 Plaintiff was on notice and knew that Greg Shore had mismanaged the  
15 corporation and whether he could be trusted to pay either CMS or  
16 INCON's payroll taxes. Whether Plaintiff acted recklessly by  
17 continuing to rely on the assurances of a person she may have known  
18 failed to file federal withholdings in 1997, must be weighed and  
19 given effect by the trier of fact.

20 Ninth Circuit cases suggest that once a responsible party  
21 knows a delegatee failed to pay over withheld taxes, continuing to  
22 rely blindly on that delegatee can amount to reckless disregard  
23 under the totality of the circumstances. See *Phillips*, 73 F.3d at  
24

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25 poor financial state. Although Jefferson reviewed monthly reports  
26 showing a steadily increasing tax liability, he did not investigate  
27 whether subsequent tax obligations were met. The Seventh Circuit  
28 affirmed summary judgment against Jefferson, holding he acted  
"willfully" because he ignored signs that the taxes were unpaid and  
was aware of the center's financial difficulties.

1 943; *Purcell*, 1 F.3d at 937-38. Whether Plaintiff recklessly  
2 disregarded a known, palpable risk that withholdings would not be  
3 paid by continuing to rely on Greg Shore's mismanagement of CMS and  
4 INCON is in dispute. A rational trier of fact could infer that  
5 Plaintiff did not know of any tax deficiencies, had little  
6 immediate involvement in the company's finances and taxes, and  
7 reasonably relied on Gregory Shore to manage CMS and INCON. See  
8 *Teel*, 529 F.2d at 905 ("The question of willfulness is a factual  
9 one and if sufficiently controverted, would preclude the granting  
10 of a summary judgment on penalty liability.").

11 At oral argument, Plaintiff reiterated that she did not act  
12 with reckless disregard because Greg Shore controlled the financial  
13 affairs of CMS and INCON, and she trusted his word that they were  
14 financially viable and was in effect misled. The government  
15 pointed out that Plaintiff "had to be aware" of the unpaid  
16 employment taxes when four checks payable to the IRS, each for  
17 \$25,000, bounced in early 1997.<sup>22</sup> Plaintiff responded that "a  
18 number of these checks that we're talking about in those prior  
19 quarters, went through a second time and cleared." This evidence  
20 bears directly on Plaintiff knowledge of a past delinquency - and  
21 Greg Shore's management of CMS and INCON - and must be weighed by  
22 the trier of fact.

23 There is a genuine dispute whether Plaintiff *clearly* ought to  
24 have known that there was a grave risk that withholding taxes were  
25

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26 <sup>22</sup> Plaintiff does not identify the checks or their time  
27 periods, but Plaintiff is likely referring to the checks made out  
28 to the IRS in early 1997 for \$140,519.50 (January 1997), \$30,000  
(January 1997), \$10,000 (February 1997), and three checks for  
\$10,000 in March 1997. (Doc. 59, Exhs. 54 & 55.)

1 not being paid from 1997 onward, which would cover the eleven tax  
2 periods at issue. Although a close call, the dispute over  
3 Plaintiff's willfulness continues to be genuine through the second,  
4 third, and fourth quarters of 1999. In her April 14, 2009  
5 deposition, Plaintiff admitted that she signed payroll checks on  
6 March 5, March 26, June 11, and July 30, 1999 without checking to  
7 see if payroll taxes had been paid. On April 9, 1999, Mr. Howard  
8 sent Plaintiff a letter concerning CMS and INCON's profit sharing  
9 plan. However, Plaintiff testified that the checks were "rushed,"  
10 she signed only because "Greg and Brenda were not in the office,"  
11 and she does not recall receiving the letter or whether Ms. Kos  
12 discussed the companies' financial status prior to this time.  
13 (Shore Dep. 186:23-187:25.) At this time, according to her  
14 testimony, Plaintiff continued to be misled concerning CMS and  
15 INCON's payroll deficiencies. Although less persuasive, these  
16 circumstances bear on whether Plaintiff willfully, voluntarily, or  
17 intentionally ignored her duty to pay CMS and/or INCON's taxes. A  
18 factual dispute remains whether Plaintiff acted willfully  
19 throughout the eleven relevant quarters, including the last three  
20 quarters of 1999.

21 The evidence introduced by the parties on the question of  
22 willfulness is conflicting and susceptible of at least two  
23 reasonable interpretations for the eleven tax periods at issue. A  
24 jury must decide whether Plaintiff acted recklessly by relying on  
25 the assurances of a person she may have known failed to file  
26 federal withholdings in 1997. See *Thomsen*, 887 F.2d at 19 ("A jury  
27 question would, of course, arise if there were a genuinely disputed  
28 issue of fact as to whether [the taxpayer] was actually on notice

1 that the person to whom he delegated responsibility for collecting,  
2 accounting for, and paying over the taxes had failed to fulfill  
3 that responsibility in the past.”).

4 Plaintiff created a disputed issue of material fact as to the  
5 issue of willfulness. The government’s motion for summary judgment  
6 is DENIED on this issue.

7  
8 3. Conclusion

9 After viewing the entirety of the evidence in Plaintiff’s  
10 favor, drawing all inferences in her favor, Plaintiff’s evidence  
11 does not raise a genuine issue of fact as to her “responsibility”  
12 under § 6672. Summary judgment is GRANTED in favor of the United  
13 States as to Plaintiff’s status as a responsible person.

14 However, Plaintiff has created a genuine dispute as to  
15 “willfulness.” Whether Plaintiff acted willfully under § 6672 must  
16 be determined by the trier of fact. The United States’ motion is  
17 DENIED as to whether Plaintiff acted “willfully” as that term is  
18 defined by § 6672.

19  
20 B. Plaintiff’s Estoppel Claim

21 The United States moves for summary judgment on Plaintiff’s  
22 equitable estoppel claim. Plaintiff argues that the government’s  
23 actions, specifically, IRS Advisor Carol Johnson’s purported  
24 representations -- reasonably led her to believe that her 2006  
25 settlement offer was accepted. Plaintiff also alleges that the IRS  
26 did not properly inform her of collection efforts against her.  
27 Plaintiff maintains that these two grounds support the doctrine of  
28 equitable estoppel, preventing the IRS from enforcing trust fund

1 penalties against her.

2 "A party seeking to raise estoppel against the government must  
3 establish affirmative misconduct going beyond mere negligence; even  
4 then, estoppel will only apply where the government's wrongful act  
5 will cause a serious injustice, and the public's interest will not  
6 suffer undue damage by imposition of the liability." *Watkins v.*  
7 *U.S. Army*, 875 F.2d 699, 707 (9th Cir. 1989). When estoppel is  
8 available, the court then considers its traditional elements, which  
9 include that "(1) the party to be estopped must know the facts; (2)  
10 he must intend that his conduct shall be acted on or must so act  
11 that the party asserting the estoppel has a right to believe it is  
12 so intended; (3) the latter must be ignorant of the true facts; and  
13 (4) he must rely on the former's conduct to his injury." *Watkins*,  
14 875 F.2d at 709.

15 To establish estoppel, Plaintiff's primary argument is that  
16 she reasonably relied on IRS Advisor Carol Johnson's  
17 representations that the IRS accepted the 2006 settlement offer.  
18 According to Plaintiff, Agent Johnson notified Mr. Satterburg,  
19 Plaintiff's representative, that Plaintiff's Offer and Compromise  
20 was accepted by all the necessary people and "based upon this  
21 communication, Plaintiff felt relieved and did not pursue any other  
22 actions to resolve this problem." (Doc. 74, 11:15-11:19.) To  
23 invoke estoppel against the government, Plaintiff must show  
24 "affirmative misconduct going beyond mere negligence." The Ninth  
25 Circuit has explained that this type of conduct does not rise to  
26 the level of "affirmative misconduct" necessary to invoke estoppel  
27 against the government. *See Buffalow v. United States*, 109 F.3d  
28 570 (9th Cir. 1997).

1 In *Buffalow*, the President and sole shareholder of a  
2 corporation sought a refund of corporation's trust fund taxes which  
3 Buffalow paid as person responsible for taxes. The government  
4 counterclaimed for unpaid trust fund taxes. Plaintiff moved for  
5 summary judgment, arguing that the government was estopped from  
6 collecting the penalties because an IRS officer encouraged Buffalow  
7 to keep the business going and behaved in a manner that led  
8 Buffalow to believe that the IRS would not seek to hold him  
9 personally responsible for the taxes. The Ninth Circuit held that  
10 Plaintiff did not establish "affirmative misconduct":

11 [i]t takes much more than that to bind the government.  
12 Buffalow's letter to the revenue officer could not  
13 have been a true settlement with the government  
14 because it was not accepted in writing. If Buffalow  
15 made a mistake in that regard, his mistake cannot save  
16 him. Beyond that, what we said in *Purcell* applies  
17 here: 'We are sympathetic to [his] plight.' However,  
18 at most the revenue officer 'encouraged' him to keep  
19 the business going, and behaved in a manner that led  
20 him to believe that the IRS would not seek to hold him  
21 personally responsible for the ... taxes. This  
22 testimony at best established a mere omission or  
23 negligent failure on [the revenue officer's] part.  
24 That will not suffice to estop the government.

19 *Buffalow*, 109 F.3d at 573-574 (citations omitted).

20 Whether or not Agent Johnson orally approved of Plaintiff's  
21 settlement offer, it is clear that Agent Johnson's conduct did not  
22 rise to the level of "affirmative misconduct" as defined by the  
23 Ninth Circuit. Like *Buffalo* and *Landel Corp. v. United States*, No.  
24 C04-0452RSM, 2005 WL 1155709 (W.D.Wash. Feb.16, 2005),<sup>23</sup> neither the

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26 <sup>23</sup> Under facts similar to *Buffalow* and this case, Plaintiff in  
27 *Landel* argued that the government was estopped from assessing  
28 federal withholding penalties against it because Plaintiff  
understood that it reached settlement agreement, and the IRS did  
not repudiate that understanding by responding to Plaintiff's

1 Revenue Agent nor the IRS explicitly approved, in writing, of  
2 Plaintiff's settlement proposal. At best, there were oral  
3 affirmations.<sup>24</sup> This is not a settlement or affirmative misconduct.  
4 Under *Buffalow* and its progeny, such conduct is a "mere omission or  
5 negligent failure on the revenue officer's part ... [t]hat will not  
6 suffice to estop the government." *Id.* at 573-574.

7 In this case, Plaintiff suffered no prejudice. A settlement  
8 with the government must be reduced to writing. Plaintiff alleges  
9 no detrimental reliance or prejudice that resulted. Plaintiff's  
10 contentions of being "kept out of the loop" are not relevant to the  
11 key elements of estoppel. "Failing to inform" Plaintiff of the  
12 collection efforts against her does not rise to the level of  
13 "affirmative misconduct" necessary to invoke estoppel against the  
14 government.<sup>25</sup>

15 Also fatal to Plaintiff's estoppel claim is that she does not  
16 \_\_\_\_\_  
17 letter. *Landel* determined that Plaintiff's argument was meritless,  
18 noting that there was no written settlement agreement and "the  
19 Ninth Circuit Court of Appeals has held that testimony such as  
20 [Plaintiff's representative's] 'will not suffice to estop the  
21 government.'" *Landel*, 2005 WL 1155709 at \*5.

21 <sup>24</sup> During oral argument, Plaintiff argued that there was  
22 written evidence of the settlement agreement, but "[w]e've never  
23 been able to obtain it through freedom of information, but we were  
24 told that it existed." To date, neither Plaintiff nor Defendant  
25 has produced a copy of the purported written settlement agreement.  
26 It is not part of the record.

27 <sup>25</sup> According to the United States, Plaintiff confuses IRS  
28 collection efforts with its penalty investigation. As part of its  
collection efforts, the IRS contacted Gregory Shore, who attempted  
to settle the outstanding obligations. There was no need to  
contact Plaintiff at that time. Subsequently, the IRS initiated an  
investigation into possible TFRP assessment. Based on the record,  
the IRS attempted to contact Plaintiff as part of this penalty  
investigation.

1 establish that Revenue Agent Johnson had authority to bind the  
2 government. It is well-established that a "purported agreement  
3 with United States is not binding unless the party can show that  
4 official with whom agreement was made had authority to bind United  
5 States." *Grosinsky v. United States*, 947 F.2d 417, 419 (9th Cir.  
6 1991); see *D & N Bank v. United States*, 331 F.3d 1374, 1378 (Fed  
7 Ct. 1997) ("[a] contract with the United States also requires that  
8 the Government representative who entered or ratified the agreement  
9 had actual authority to bind the United States.") (citation  
10 omitted). There is no evidence, and Plaintiff points to none, that  
11 Agent Johnson had actual authority to bind the United States.

12 After viewing the entirety of the evidence in Plaintiff's  
13 favor, drawing all inferences in her favor, Plaintiff has failed to  
14 offer any evidence or allege specific facts that would create a  
15 genuine issue of material fact concerning equitable estoppel.  
16 Summary judgment is GRANTED in favor of the United States regarding  
17 Wilma Shore's second cause of action for estoppel.

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1 IV. CONCLUSION.

2 For the reasons discussed above:

3 1. Summary judgment is GRANTED in favor of the United States  
4 as to Plaintiff's status as a responsible person as that term is  
5 defined under § 6672. Summary Judgment is DENIED as to whether  
6 Plaintiff acted "willfully" under § 6672.

7 2. Summary judgment is GRANTED in favor of the United States  
8 as to the estoppel cause of action contained in Wilma Shore's  
9 complaint, filed August 8, 2008.

10  
11 The United States shall submit an order consistent with this  
12 decision within five (5) days of electronic service.

13  
14 IT IS SO ORDERED.

15 Dated: October 9, 2009

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE