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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	1:08cv1349 OWW DLB
)	
	)	FINDINGS AND RECOMMENDATIONS
	)	REGARDING PLAINTIFF'S
	)	MOTION FOR DEFAULT JUDGMENT
	)	AGAINST CENTRAL VALLEY INSURANCE
Plaintiff,	)	SERVICES, INC., INSTANT SERVICES, INC.,
	)	WASHINGTON MUTUAL BANK, AS
v.	)	ASSIGNEE OF AMERICAN SAVINGS BANK,
	)	BENEFICIAL CALIFORNIA, INC.,
FRANK A. VACANTE, et al.,	)	NORTHERN CALIFORNIA COLLECTION
	)	SERVICE, INC., TURLOCK IRRIGATION
	)	DISTRICT, AND DEUTSCHE BANK
	)	NATIONAL BANK TRUST COMPANY FKA
	)	BANKERS TRUST
)	
Defendants.	)	(Document 109)
)	

On December 10, 2009, Plaintiff United States of America ("Plaintiff" or "United States") filed the instant motion for default judgment against Defendants Central Valley Insurance Services, Inc., Instant Services, Inc., Washington Mutual Bank, Beneficial California, Inc., Northern California Collection Service, Inc., Turlock Irrigation District and Deutsche Bank National Bank Trust Company. The matter was heard on February 5, 2010, before the Honorable Dennis L. Beck, United States Magistrate Judge. Adair F. Boroughs appeared telephonically on behalf of Plaintiff United States. Defendant Frank A. Vacante, proceeding pro se, appeared telephonically. No other Defendants appeared.

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1 **BACKGROUND**

2 On June 10, 2008, the United States filed this action (1) to reduce to judgment federal tax
3 assessments against Frank Vacante, Ute Vacante, Central Valley Insurance Services, Inc.
4 (“CVIS”) and Instant Services, Inc. (“Instant Services”), (2) to adjudicate that Frank Vacante and
5 Ute Vacante are alter egos of CVIS and Instant Services, (3) to adjudicate that CVIS is a
6 successor-in-interest to the sole proprietorship run by Frank and Ute Vacante and that Instant
7 Services is a successor-in-interest to CVIS, and (4) to foreclose federal tax liens against five
8 parcels of real property: the Lander Avenue Property, the Minaret Property, the Snedigar
9 Property, the Lupin Property and the August Property. See Second Amended Complaint
10 (“SAC”).

11 A. Factual Background

12 1. Insurance Businesses

13 According to the operative complaint, Frank and Ute Vacante are husband and wife. In
14 December 1984, Frank Vacante purchased 5 Bar-Bee Insurance Company from Ute’s former
15 husband, Dan Belew II. Since 1987, the Vacantes have operated an insurance business together.
16 By November 1992, the Vacantes’ unincorporated business had unpaid federal employment tax
17 liabilities. Mr. Vacante filed a tax return on November 3, 1992, indicating that the unincorporated
18 business no longer had employees.

19 To avoid paying the federal tax liabilities, the Vacantes incorporated CVIS on August 20,
20 1993, and transferred the assets of the Vacantes’ unincorporated business to CVIS. The
21 Vacantes were the owners of CVIS. Ute’s son, Dan Belew III, was named as the initial President
22 and CEO of CVIS. Ute was named as the initial Vice President and CFO. Cynthia Nunes, Dan’s
23 then live-in girlfriend, was named Secretary.

24 On or around April 17, 1997, the State of California suspended the corporate charter of
25 CVIS. Despite the suspension, the Vacantes continued to operate CVIS until at least 2001. In
26 March 2001, the California Department of Insurance closed CVIS.

27 On March 23, 2001, Instant Services was incorporated in Nevada. The initial officers
28 were President Frank Vacante, Secretary Ute Vacante and Treasurer Dan Belew. Instant Services

1 did not register as a foreign corporation in California. From 2001 through 2005, the Vacantes
2 filed Form 941 (employment) tax returns through Instant Services, but were operating their
3 insurance business under names used by them when they were operating the business as an
4 unincorporated entity.

5 The Vacantes' unincorporated business, CVIS and Instant Services were all operated out
6 of the same business location, employed the same staff, sold the same product and utilized the
7 same phone numbers. They also were all operated under Frank Vacante's insurance broker's
8 license.

9 The United States alleges that CVIS is a successor-in-interest to the Vacantes'
10 unincorporated business and Instant Services is a successor-in-interest to CVIS. The United
11 States further alleges that the Vacantes were alter egos of CVIS and Instant Services.

12 2. Federal Tax Liabilities

13 a. CVIS

14 The United States contends that CVIS failed to file Form 941 returns for the eleven tax
15 periods ending March 31, 1995, June 30, 1995, September 30, 1995, December 31, 1995, March
16 31, 1996, June 30, 1996, September 30, 1996, December 31, 1996, March 31, 1997, June 30,
17 1997, and March 31, 1999. SAC ¶ 104; Declaration of IRS Revenue Officer Randy Reece
18 ("Reece Dec.") ¶ 4. Because CVIS failed to file tax returns, the IRS made assessments against
19 CVIS for these periods. SAC ¶ 106; Reece Dec. ¶ 4.

20 CVIS did file Form 941 returns for the eight tax periods ending December 31, 1998,
21 September 30, 1999, December 31, 1999, March 31, 2000, June 30, 2000, September 30, 2000,
22 December 31, 2000, and March 31, 2001. Reece Dec. ¶¶ 24, 26-28, 33-37. However, CVIS
23 failed to pay the full amount of the employment taxes shown due and owing and failed to make
24 timely federal tax deposits. SAC ¶ 105; Reece Dec. ¶¶ 5, 50, 52-58. The IRS assessed penalties
25 for failure to timely pay the taxes and assessed penalties for failure to make federal tax deposits.
26 SAC ¶ 106; Exhibits A-17, A-23, A-24, A-26, A-28, A-30, A-32 and A-34 to Reece Dec.

1 CVIS filed a Federal Unemployment Tax Act (“FUTA”) Form 940 for tax year 2000, but
2 failed to pay the FUTA taxes shown due and owing on the return. SAC ¶ 164. The IRS assessed
3 penalties for failure to timely pay these taxes. SAC ¶ 106.

4 CVIS failed to file any Form W-2s, which employers are required to file annually with the
5 IRS for each employee, for tax year 1998. SAC ¶ 165; Reece Dec. ¶ 39. The IRS assessed a
6 penalty for this failure. SAC ¶ 106; Exhibit A-37 to Reece Dec.

7 Despite notice and demand for payment, CVIS has failed to pay all of the identified
8 assessments. SAC ¶¶ 166-67; Reece Dec. ¶¶ 40-60 and Exhibits A-38 through A-51. As of
9 December 1, 2009, CVIS’ tax liabilities total **\$858,794.86**, which includes accrued interest,
10 penalties and other statutory additions.¹ Reece Dec. ¶¶ 40-60.

11 b. Instant Services

12 Instant Services failed to file Form 941 returns for the three tax periods ending September
13 30, 2001, December 31, 2001, and September 30, 2004. SAC ¶¶ 107; Reece Dec. ¶ 61. Because
14 Instant Services failed to file tax returns, the IRS made employment tax assessments against
15 Instant Services for these periods. SAC ¶ 108; Reece Dec. ¶ 61.

16 Instant Services did file Form 941 returns for the eight tax periods ending March 31,
17 2002, December 31, 2002, March 31, 2003, September 30, 2003, June 30, 2004, December 31,
18 2004, March 31, 2005, and September 30, 2005. Reece Dec. ¶¶ 67-71, 74-76. However, Instant
19 Services failed to pay the full amount owing and failed to make timely federal tax deposits. SAC
20 ¶ 169; Reece Dec. ¶ 62. The IRS assessed penalties for failure to timely pay these taxes and for
21 failure to make federal tax deposits. SAC ¶ 108; Exhibits A-57, A-59, A-61, A-63, A-65, A-69,
22 A-71 and A-73 to Reece Dec.

23 Instant Services failed to file a Form 940 return for tax year 2001. Reece Dec. ¶ 77. The
24 IRS assessed a penalty for this failure. SAC ¶ 108; Reece Dec. ¶ 77.

27 ¹There is a one cent discrepancy between the amount identified by the United States and the amount
28 supported by the exhibits. However, there has been no challenge to the asserted amounts and the difference is
inconsequential.

1 Despite notice and demand for payment, Instant Services has failed to pay the identified
2 assessments. SAC ¶¶ 171-72; Reece Dec. ¶¶ 79-90. As of December 1, 2009, Instant Services’
3 tax liabilities total **\$85,007.68**, which includes accrued interest, penalties and other statutory
4 additions. Reece Dec. ¶¶ 79-90 and Exhibits A-75 through A-86.

5 3. Defendant Lienholders and the Subject Properties

6 In this action, the United States is seeking to foreclose its federal tax liens and enforce its
7 prior judgment against the subject properties. The United States explains that the foreclosure
8 count will be determined after either summary judgment or trial. However, as part of the
9 foreclosure count, the Court must “finally determine the merits of all claims to and liens upon the
10 property.” 26 U.S.C. § 7403(c). The United States believes that Washington Mutual Bank
11 (“Washington Mutual”), Beneficial California, Inc. (“Beneficial”), Northern California Collection
12 Service, Inc. (“NCCS”), Turlock Irrigation District (“TID”) and Deutsche Bank National Bank
13 Trust Company (“Deutsche”) may claim an interest in one or more of the subject properties and,
14 therefore, the Court must make a determination as to their claims.

15 B. Procedural Background

16 On June 25, 2008, CVIS was served with a copy of the Summons and Complaint by
17 personal service on Ute Vacante, an officer. (Doc. 9). Instant Services was served on the same
18 day and in the same manner. (Doc. 10). TID also was served that day by personal service on
19 Tami Wallenberg, clerk of the Board of Directors. (Doc. 13).

20 Beneficial was served on August 15, 2008, by personal service on its agent for service of
21 process. (Doc. 27) Washington Mutual was served on August 19, 2008, by substituted service.
22 (Doc. 28). NCCS also was served on August 19, 2008, by personal service on the President of
23 NCCS. (Doc. 33). In addition, these three defendants were served by mail with copies of the
24 First Amended Complaint on October 24, 2008. (Doc. 44-2).

25 On December 10, 2008, pursuant to the United States’ request, the Clerk of the Court
26 entered default against Washington Mutual, Beneficial and NCCS.

27 On February 24, 2009, pursuant to the United States’ request, the Clerk of the Court
28 entered default against CVIS and Instant Services.

1 On September 14, 2009, TID also was served with a copy of the SAC. (Doc. 90-2). On
2 November 3, 2009, pursuant to the United States' request, the Clerk of the Court entered default
3 against TID.

4 On September 30, 2009, Deutsche was served with a copy of the Summons and SAC by
5 personal service on its registered agent. (Doc. 95). On November 19, 2009, pursuant to the
6 United States' request, the Clerk of the Court entered default against Deutsche.

7 On December 10, 2009, the United States filed the instant motion for default judgment
8 against CVIS, Instant Services, Washington Mutual, Beneficial California, NCCS, TID and
9 Deutsche.

10 No oppositions have been filed. However, on February 2, 2010, the United States filed a
11 reply and motion to strike Mr. Vacante's attempted appearance on behalf of CVIS and Instant
12 Services. According to the reply, Mr. Vacante sent an opposition to the United States, but it has
13 not been filed with the Court. The United States submits the untimely opposition with its reply
14 and seeks to strike Mr. Vacante's efforts to represent CVIS and Instant Services in defense of the
15 motion.

16 DISCUSSION

17 By the instant default judgment motion, the United States seeks (1) to reduce federal tax
18 assessments to judgment against CVIS and Instant Services; and (2) to extinguish any interest
19 held by Washington Mutual, Beneficial, NCCS, TID and Deutsche in the subject properties.

20 A. Legal Standard

21 The United States moves for entry of default judgment pursuant to [Federal Rule of Civil](#)
22 [Procedure 55\(b\)\(2\)](#), which provides:

- 23 (2) By the Court. In all other cases, the party must apply to the court for a
24 default judgment. A default judgment may be entered against a minor
25 or incompetent person only if represented by a general guardian,
26 conservator, or other like fiduciary who has appeared. If the party
27 against whom a default judgment is sought has appeared personally or
28 by a representative, that party or its representative must be served with
written notice of the application at least 3 days before the hearing. The
court may conduct hearings or make referrals—preserving any federal
statutory right to a jury trial—when to enter or effectuate judgment, it
needs to: (A) conduct an accounting; (B) determine the amount of

1 damages; (C) establish the truth of any allegation by evidence; or (D)
2 investigate any other matter.

3 “Upon default, the well-pleaded allegations of a complaint relating to liability are taken as
4 true.” [Dundee Cement Co. v. Howard Pipe & Concrete Products, Inc., 722 F.2d 1319, 1323 \(7th](#)
5 [Cir. 1983\)](#); [TeleVideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917-18 \(9th Cir. 1987\)](#). Thus,
6 “[a]t the time of entry of default, the facts alleged by the plaintiff in the complaint are deemed
7 admitted.” 10 J. Moore, [Moore's Federal Practice](#) § 55.11 (3d ed. 2000).

8 Factors which may be considered by courts in exercising discretion as to the entry of a
9 default judgment include: (1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff's
10 substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action;
11 (5) the possibility of a dispute concerning material facts; (6) whether the default was due to
12 excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure
13 favoring decisions on the merits. [Eitel v. McCool, 782 F.2d 1470, 1471-1472 \(9th Cir. 1986\)](#).

14 B. Eitel Factors

15 1. Prejudice

16 CVIS owes over \$850,000 in federal tax liabilities, and Instant Services owes over
17 \$85,000. According to the United States, neither of these companies still operates and both are
18 essentially judgment proof. Reece Dec. ¶ 91. In order to collect on these liabilities, the United
19 States argues that they must be reduced to judgment so that the United States can pursue
20 enforcement against other individuals and entities. The United States is claiming that the
21 Vacantes are liable for the debts of CVIS and Instant Services under alter ego and successor-in-
22 interest theories. Therefore, to collect the tax liabilities, the United States must be successful on
23 one or more of its alter ego/successor-in-interest claims, the subject properties must be sold, the
24 interests of Washington Mutual, Beneficial, NCCS, TID and Deutsche must be extinguished and
25 the sale proceeds distributed.

26 As CVIS and Instant Services have not answered the complaint, the United States will
27 suffer prejudice if default judgment is not entered. Further, absent a default judgment against
28 Washington Mutual, Beneficial, NCCS, TID and Deutsche, the sale of the subject property likely

1 would be negatively affected as it would remain encumbered by any liens or interests of
2 Washington Mutual, Beneficial, NCCS, TID and Deutsche. This could prejudice the United
3 States' efforts to satisfy the tax liabilities in the event that it is successful on its alter ego or
4 successor-in-interest theories.

5 2. Merits of Claims and Sufficiency of Complaint

6 CVIS and Instant Services

7 Pursuant to 26 U.S.C. § 7402(a), the United States can bring an action to obtain a
8 judgment to enforce the internal revenue laws. In the SAC, the United States has identified the
9 tax assessments at issue and has alleged that CVIS and Instant Services have neglected, refused or
10 failed to pay the assessments despite proper notice. SAC ¶¶ 105-06, 108, 164-67, 169-72.

11 Additionally, the assessments made against CVIS and Instant Services are supported by
12 Certificates of Assessments and Payment (Form 4340) submitted by the United States in support
13 of its motion. Form 4340s are an appropriate means of establishing that assessments were
14 properly made and that notices and demand for payment were sent. Koff v. United States, 3 F.3d
15 1297, 1298 (9th Cir. 1993). The United States also has submitted evidence showing the
16 calculation of accrued statutory interest and showing that CVIS' federal tax liabilities calculated
17 through December 1, 2009, total \$858,794.86, and that Instant Services' federal tax liabilities
18 calculated through December 1, 2009, total \$85,007.68. Reece Dec. ¶¶ 40-60, 79-90 and
19 Exhibits A-38 through A-51; A-75 through A-86. Neither CVIS nor Instant Services have
20 appeared through counsel to challenge the assessments or calculations.

21 Washington Mutual, Beneficial, NCCS, TID and Deutsche

22 The Internal Revenue Code provides that after parties have been notified of the United
23 States' action, a court shall "finally determine the merits of all claims to and liens upon the
24 property." 26 U.S.C. § 7403(c). According to the United States, it identified Washington
25 Mutual, Beneficial, NCCS, TID and Deutsche as potential lien holders via a public records search
26 and seeks a determination of their purported claims to the subject properties by naming them as
27 defendants.

1 By this motion, the United States asks that the Court extinguish any interest that these
2 defendants may have in the subject properties. Washington Mutual, Beneficial, NCCS, TID and
3 Deutsche have not responded to the complaint or the instant motion for default judgment.

4 3. Money at Stake

5 The United States it seeks to reduce the federal tax assessments against CVIS and Instant
6 Services to judgment.

7 The United States does not seek any monetary damages from Washington Mutual,
8 Beneficial, NCCS, TID and Deutsche; rather, the United States seeks to extinguish their interest-if
9 any-against the Vacantes only to the extent that they relate to the real property at issue in this
10 case.

11 4. Dispute concerning material facts

12 Based on the entry of default, the Court accepts the allegations in the complaint as true
13 and the six defendants have not appeared to suggest a dispute. See, e.g., Elektra Entm't Group,
14 Inc. v. Crawford, 226 F.R.D. 388, 393 (C.D.Cal. 2005) (“Because all allegations in a
15 well-pleaded complaint are taken as true after the court clerk enters default judgment, there is no
16 likelihood that any genuine issue of material fact exists.”).

17 The United States asserts that as Washington Mutual, Beneficial, NCCS, TID and
18 Deutsche failed to answer, they have effectively disclaimed interest in the property.

19 The United States further asserts that there is no practical dispute regarding the tax
20 assessments against CVIS and Instant Services because (1) most of them were the result of self-
21 assessments by the corporations reported on filed tax returns; and (2) the remainder were based
22 on wages the corporations reported on either a tax return or to the California EDD.

23 As noted, Frank Vacante sent the United States an opposition to “summary judgment”
24 against CVIS and Instant Services. This opposition was not filed with the Court, but the United
25 States attached it to its reply in support of default judgment. Exhibit A to Reply. The United
26 States seeks to strike the opposition because Mr. Vacante, appearing pro se, is not an attorney
27 and he cannot represent the corporations. See C.E. Pope Equity Trust v. United States, 818 F.2d
28 696, 697 (9th Cir. 1987) (a non-attorney may appear in pro per on his own behalf, but he has no

1 authority to appear as an attorney for others); see also Tal v. Hogan, 453 F.3d 1244, 1254-55
2 (10th Cir. 2006) (pro se party had no right to represent corporations in federal court).

3 In the opposition, Mr. Vacante appears to contend that the Vacantes are not responsible
4 persons for CVIS. Mr. Vacante also claims that judgment against either CVIS or Instant Services
5 “would be a Judgement [sic] against Mr. and Mrs. Vacante denying them there [sic]
6 Constitutional Right to a jury trial Under the 7th Amendment.” Opposition, p. 4. Per the United
7 States, only if Mr. Vacante admits that he is the controlling person and alter ego of the
8 corporations should the Court then consider allowing him to represent those interests.

9 The United States also attempts to refute Mr. Vacante’s claim that Instant Services paid
10 all of the taxes due. Mr. Vacante reportedly sent counsel for the United States copies of tax
11 returns and checks partially paying some of Instant Services’ liabilities. Counsel for the United
12 States indicates that it sat down with Mr. Vacante and showed him where those checks were
13 posted to Instant Services’ accounts. The United States reports that it seeks entry of default
14 judgment for the remaining balance, after all credits, of the unpaid taxes.

15 The Court finds it unnecessary to strike Mr. Vacante’s papers as they have not been filed
16 with the Court. However, the Court disregards the arguments forwarded by Mr. Vacante on
17 behalf of Instant Services and/or CVIS as he cannot represent the corporations pro se in this
18 action and the United States has responded to his assertions.

19 5. Excusable neglect

20 The possibility of excusable neglect is remote where a defendant receives notice of the
21 complaint and default judgment motion and an extended period of time has passed since the clerk
22 entered default. Elektra, 226 F.R.D. at 393. Here, the relevant defendants received notice of
23 both the complaint and the motion for default judgment. Defendants failed to answer the
24 complaint and have not opposed the motion. Additionally, more than a year has passed since the
25 Clerk entered default against Washington Mutual, Beneficial and NCCS, more than 11 months
26 have passed since the Clerk entered default against CVIS and Instant Services, and more than 2
27 months have passed since the Clerk entered default against TID and Deutsche.

1 and Ute Vacante and/or is successful one or more of its alter ego or successor-
2 in-interest claims; and

- 3 5. Default Judgment be entered in favor of the United States and against
4 Defendants Washington Mutual Bank, Beneficial California, Inc., Northern
5 California Collection Service, Inc., Turlock Irrigation District and Deutsche
6 Bank National Bank Trust Company.

7 These Findings and Recommendations are submitted to the Honorable Oliver W. Wanger,
8 United States District Court Judge, pursuant to the provisions of [28 U.S.C. § 631](#)(b)(1)(B) and
9 Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of
10 California. Within thirty days after being served with a copy, any party may serve on opposing
11 counsel and file with the court written objections to such proposed findings and
12 recommendations. Such a document should be captioned "Objections to Magistrate Judge's
13 Findings and Recommendations." Replies to the objections shall be served and filed within
14 fourteen (14) days after service of the objections. The Court will then review the Magistrate
15 Judge's ruling pursuant to [28 U.S.C. § 636](#) (b)(1).

16
17 IT IS SO ORDERED.

18 **Dated: February 8, 2010**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE