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2  
3 UNITED STATES DISTRICT COURT  
4 EASTERN DISTRICT OF CALIFORNIA  
5

6 UNITED STATES OF AMERICA,

7 Plaintiff,

8 v.

9 FRANK A. VACANTE, *et al.*,

10 Defendants.  
11  
12

1:08-CV-01349-OWW-DLB

MEMORANDUM DECISION RE  
DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT (Doc. 105) AND MOTION  
TO DISMISS (DOC. 124);  
PLAINTIFF UNITED STATES OF  
AMERICA'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT (Doc. 119)

13  
14 I. INTRODUCTION.

15 Plaintiff United States filed this action to reduce federal  
16 tax assessments to judgment and foreclose federal tax liens on real  
17 property on June 10, 2008. The tax assessments at issue are  
18 against husband and wife Frank and Ute Vacante and their alleged  
19 alter egos, Central Valley Insurance Services, Inc. ("CVIS"), and  
20 Instant Services, Inc.

21 Before the Court for decision are several motions. The United  
22 States moves for summary judgment against Defendants Frank Vacante  
23 and Ute Vacante, proceeding pro se, seeking to reduce to judgment  
24 individual tax liabilities for tax years 2000 and 2004. In  
25 addition to reducing to judgment the individual tax liabilities  
26 assessed against Frank and Ute Vacante, Plaintiff moves to reduce  
27 to judgment Frank Vacante's Form 941 Employment Tax Liabilities for  
28 the tax periods ending June 30, 1993, September 30, 1993, December

1 31, 1993, March 31, 1994, June 30, 1994, September 30, 1994, and  
2 December 31, 1994; Plaintiff also seeks to reduce to judgment  
3 Frank Vacante's Form 940 Federal Unemployment Tax ("FUTA")  
4 liabilities for the tax periods ending December 31, 1993 and  
5 December 31, 1994.

6 Pro se Defendants' first motion, filed on November 30, 2009,  
7 seeks entry of summary judgment on each cause of action contained  
8 in the Second Amended Complaint ("SAC"). Defendants argue that  
9 summary judgment is appropriate because they did not have the  
10 ability to pay CVIS's taxes, did not have knowledge of the past due  
11 amounts, and did not take part in the financial decisions of CVIS.

12 Defendants' second motion, filed on December 16, 2009, also  
13 seeks to dismiss the entire SAC on grounds that: (1) Defendants  
14 were denied their due process rights during an unidentified appeals  
15 proceeding; (2) Defendants have a binding pre-nuptial agreement;  
16 (3) Revenue Officers Randy Reese and John Certini made material  
17 misrepresentations and false statements during their  
18 investigations; and (4) IRS manager Martha Rodriguez failed to  
19 properly supervise Revenue Officers Reese and Certini.

20 Oral argument on these motions was held on February 26, 2010,  
21 during which Mr. Vacante requested an extension of time to file a  
22 supplemental opposition to the United States' motion. Mr.  
23 Vacante's request was granted and the Court set a supplemental  
24 briefing schedule on the United States' summary judgment motion  
25 only.<sup>1</sup> Although the parties' arguments in the original and

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26  
27 <sup>1</sup> Plaintiff's supplemental briefing was filed on March 12,  
28 2010 and the United States responded on March 22, 2010. (Docs. 145  
through 153.)

1 supplemental briefing are largely the same, there is one important  
2 distinction: Based on the employment tax figures provided by Mr.  
3 Vacante in his supplemental opposition, the United States reduced  
4 his Form 941 tax liabilities for the seven tax quarters in 1993 and  
5 1994. The government also recalculated Mr. Vacante's Form 940 tax  
6 liabilities for the 1993 and 1994 tax years. However, the tax  
7 adjustments were limited to Mr. Vacante's employment tax  
8 liabilities, i.e., the figures did not impact or reduce the  
9 Vacantes' individual income tax liabilities for tax years 2000 and  
10 2004.

## 11 12 II. FACTUAL BACKGROUND.<sup>2</sup>

13 This case arises out of the government's attempt to reduce to  
14 judgment certain federal tax assessments made against Frank  
15 Vacante, Ute Vacante, CVIS and Instant Services, Inc., and to  
16 foreclose federal tax liens arising from federal tax liabilities  
17 against five parcels of property owned by the Vacantes.

### 18 19 A. The Vacante's Insurance Businesses

20 Frank and Ute Vacante ("the Vacantes"), husband and wife  
21 have, since 1987, owned and operated a number of insurance  
22 businesses beginning in the 1980's. (F. Vacante Dep. at 26:20-  
23 30:9, 34:5-35:24.) In 1993 and 1994, Frank Vacante's insurance

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24  
25 <sup>2</sup> Defendants did not file their own separate statement of  
26 disputed facts, or admit or deny the facts set forth by the United  
27 States as undisputed. See Local Rule 56-260(b) ("Any party  
28 opposing a motion for summary judgment or summary adjudication  
shall reproduce the itemized facts in the Statement of Undisputed  
Facts and admit those facts that are undisputed and deny those that  
are disputed [....]").

1 business operated as a sole proprietorship - VIF Insurance - and  
2 employed several individuals, including Ute Vacante, Cynthia Burris  
3 and Dan Belew III. (PSUF 15, 29-33; Doc. 145, 11:2-11:3.) In  
4 1995, the Vacante's incorporated the insurance business as Central  
5 Valley Insurance Services, Inc. (F. Vacante Dep. at 68:5-68:10.)  
6 The California Department of Insurance closed Central Valley  
7 Insurance Services, Inc. in 2001, at which time it was absorbed by  
8 Instant Services, Inc., an existing real estate company owned by  
9 the Vacantes. (Id. at 70:5-70:12, 255:3-257:12.) The Vacantes  
10 operated Instant Services, Inc. from 2001 through 2005, issuing a  
11 number of insurance policies and engaging in other financially-  
12 related transactions.<sup>3</sup>

13 Following an investigation into the Vacantes' delinquent  
14 taxes, the IRS assessed employment tax liabilities and penalties  
15 against Frank Vacante relating to VIF Insurance's outstanding  
16 payroll liabilities for seven tax periods from June 30, 1993  
17 through December 31, 1994. The IRS determined that Frank Vacante  
18 failed to properly assess and pay his federal employment taxes -  
19 Form 940 and 941 - based on his 1992 Form 1040 tax return, Ute  
20 Vacante's 1994 W-2 and Form 1040 tax return, the business records  
21 of CPA Daniel Burke, and the deposition testimony of Cynthia Burris  
22 and Dan Belew III. The IRS's investigation also determined that  
23 the Vacantes failed to properly pay their individual income taxes  
24 for the 2000 and 2004 tax years.

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26 <sup>3</sup> The government asserts that the Vacantes operated several  
27 additional unincorporated insurance businesses out of Instant  
28 Service's location, utilizing the same personnel and sharing the  
same insurance broker's license to initiate and close deals.

1 At oral argument on February 26, 2010, Mr. Vacante disputed  
2 these "estimated" amounts, and requested an extension of time to  
3 oppose the United States' motion. On March 12, 2010, as part of  
4 his supplemental briefing, Mr. Vacante provided figures for wages  
5 paid to workers Dan Belew and Cynthia Burris by VIF Insurance in  
6 1993 and 1994. He described the payments as "commissions."  
7 According to Mr. Vacante, Mr. Belew and Ms. Burris were paid  
8 \$26,095 - \$16,495 and \$9,600 - in 1993. As to the 1994 tax year,  
9 Mr. Vacante contends that the two employees were paid commissions  
10 of \$17,479 (Mr. Belew) and \$9,600 (Ms. Burris), for a total of  
11 \$27,079.

12 The United States accepts Mr. Vacante's tax figures for 1993  
13 and 1994, however, it contends that Mr. Vacante omits \$75,000 in  
14 wages paid to Mrs. Vacante in 1994. The United States contends  
15 that Mrs. Vacante signed, under penalty of perjury, a bank loan  
16 document stating that she "received \$75,000 in wages from VIF  
17 insurance in 1994." The United States also submitted VIF  
18 Insurance's W-2 for 1994, which stated that Ute Vacante received  
19 \$75,000 in wages from VIF insurance in 1994. According to the  
20 United States, the operative wage figures for the 1993 and 1994 tax  
21 years are \$26,095 and \$102,079. The \$26,095 and \$102,079 paid in  
22 wages are the foundation for Mr. Vacante's 1993 and 1994 employment  
23 tax liabilities (Form 940 and 941).

24  
25 B. Form 1040 Tax Liabilities For Tax Years 2000 & 2004

26 1. 2000 Tax Year

27 In late 2006, the IRS, pursuant to 26 U.S.C. § 6020(b),  
28 assessed income tax liabilities and penalties against Frank Vacante

1 and Ute Vacante for the 2000 tax year. (Doc. 120, Reece Dec. ¶ 4.)  
2 The assessments were based on Frank and Ute Vacante's failure to  
3 file Form 1040 Individual Tax Returns for the tax year ending  
4 December 31, 2000. (Id.)

5 On April 7, 2008, the IRS received the Vacantes' Joint Form  
6 1040 Individual Tax Return for the tax year ending December 31,  
7 2000. (PSUF 1.) The IRS accepted the Vacantes' untimely return  
8 and abated the earlier assessments to the extent they conflicted  
9 with the joint return. (Reece Dec. ¶ 4.) The only offset to the  
10 Vacantes' 2000 tax liability was a \$1.07 overpayment applied by the  
11 IRS on March 28, 2007. (Doc. 120, Reece Dec. ¶ 6.)

12 On November 16, 2009, the IRS determined that Frank and Ute  
13 Vacante failed to make estimated income tax payments for the 2000  
14 tax year and issued a "Form 4340, Certificate of Assessments,  
15 Payments and Other Specified Matters for Frank A & Ute G. Vacante  
16 for U.S. Individual Income Tax Return (Form 1040), for the tax  
17 period ending December 31, 2000." (Reece Dec. ¶ 6; Doc. 120-3.)  
18 The Certificates of Assessments (known as "Form 4340s") detail the  
19 amount in taxes the IRS believes the Vacantes owe for the 2000 tax  
20 year, as well as any penalties, costs, and interest assessed to the  
21 Vacantes due to their failure to make timely payments. (Id.) As  
22 of December 1, 2009, the total outstanding balance of the federal  
23 income tax liabilities due from Frank and Ute Vacante for the 2000  
24 tax year, including interest, is \$7,102.58.<sup>4</sup> (Reece Dec. ¶ 26;  
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26 <sup>4</sup> According to the Form 4340, Defendants owe \$6,336.38 in  
27 income tax liabilities, penalties, and interest assessments for the  
28 2000 tax year. (Doc. 120-3.) The remaining \$766.20 represents  
accrued, but unassessed, interest. (Reece Dec. ¶ 26.)

1 Doc. 121-3.)

2 Defendants dispute the accuracy of the IRS assessments,  
3 arguing that their individual income tax issues were summarily  
4 resolved pursuant to a \$52,064.67 check they sent to the IRS on  
5 October 29, 2004. According to the United States, however, the  
6 \$52,064.67 was used to satisfy the Vacantes' outstanding tax  
7 liabilities for the 1993-1999 and 2001 years. It contends that the  
8 Vacantes' 2000 and 2004 tax liabilities were not satisfied by the  
9 October 29, 2004 payment.

10  
11 2. 2004 Tax Year

12 On June 5, 2007, the IRS received the Vacantes' Joint Form  
13 1040 Individual Tax Return for the tax year ending December 31,  
14 2004. (PSUF 9.) After reviewing the joint return, the IRS  
15 determined that Frank and Ute Vacante failed to make sufficient  
16 income tax payments for the 2004 tax year; the only payments made  
17 toward Frank and Ute Vacante's individual income tax liabilities  
18 for the 2004 tax year were \$1,134.00 in withholdings. (PSUF 10-  
19 11.)

20 On March 11, 2008, the IRS issued a "Form 4340, Certificate of  
21 Assessments, Payments and Other Specified Matters for Frank A & Ute  
22 G. Vacante for U.S. Individual Income Tax Return (Form 1040), for  
23 the tax period ending December 31, 2004." (Doc. 120-5.) The Form  
24 4340s detail the amount in taxes the IRS asserts the Vacantes owe  
25 in taxes for the 2004 tax year, as well as any penalties, costs,  
26 and interest assessed to the Vacantes due to their failure to make  
27 timely payments. (Id.) The assessments were based on Frank and  
28 Ute Vacante's failure to timely pay their individual income tax

1 liabilities and for late-filing their Form 1040 tax Return. (PSUF  
2 12-13.) As of December 1, 2009, the total outstanding balance of  
3 the federal income tax liabilities due from Frank and Ute Vacante  
4 for the 2004 tax year, including interest, is \$4,258.17.<sup>5</sup> (Reece  
5 Dec. ¶ 27; Doc. 121-4.)

6 Defendants acknowledge a \$2,115.00 federal tax liability for  
7 the 2004 tax year. Nevertheless, they dispute the accuracy of  
8 their liability on grounds that the IRS "levied the Vacante's bank  
9 accounts and applied the money to items not owed by the Vacante's."  
10 (Doc. 145, 10:21-10-:22.) The allocation and distribution of levy  
11 payments is discussed in § V(A) (3), *infra*.

12  
13 C. Form 941 Tax Liabilities - Frank Vacante

14 IRS records indicate that Frank Vacante did not file Form 941  
15 Employment Tax Returns for his sole proprietorship for the tax  
16 periods ending June 30, 1993, September 30, 1993, December 31,  
17 1993, March 31, 1994, June 30, 1994, September 30, 1994, and  
18 December 31, 1994. According to the United States, Frank Vacante  
19 employed several individuals during this time, yet failed to make  
20 federal tax deposits of withheld income and FICA tax. Mr. Vacante,  
21 however, maintains he was not required to withhold or pay Form 941  
22 taxes because his employees paid their own self-employment taxes  
23 during the 1993 and 1994 tax years. He claims the employees in  
24 question were treated as "independent contractors" and paid

25  
26 \_\_\_\_\_  
27 <sup>5</sup> According to the Form 4340, Defendants owe \$3,528.44 in  
28 income tax liabilities, penalties, and interest assessments for the  
2004 tax year. (Doc. 121-4.) The remaining \$729.73 represents  
accrued, but unassessed, interest. (Reece Dec. ¶ 27.)



1 "commissions."

2 Because Frank Vacante did not file Form 941 Employment Tax  
3 Returns for his sole proprietorship for the 1993 and 1994 tax  
4 years, the IRS calculated the employment taxes based on wages paid  
5 by Frank Vacante in 1992 and other third party information.  
6 However, the United States recalculated Mr. Vacante's Form 941  
7 employment tax liabilities for tax year 1993 based on the  
8 documentation produced by Mr. Vacante on March 12, 2010. According  
9 to the United States, the operative wage figures for the 1993 and  
10 1994 tax years are \$26,095 and \$102,079.

11  
12 1. 1993

13 On December 13, 2007, the IRS issued a "Form 4340, Certificate  
14 of Assessments, Payments and Other Specified Matters for Frank  
15 Vacante, Frank Vacante Insurance for Employer's Quarterly Federal  
16 Tax Return (Form 941)," for the tax periods ending June 30, 1993,  
17 September 30, 1993, and December 31, 1993. (Docs. 120-8 to 120-  
18 10.) Because Frank Vacante failed to file Form 941 Employment Tax  
19 Returns or to pay withholding taxes for his sole proprietorship for  
20 the 1993 tax year, the IRS calculated the employment taxes based on  
21 the wages paid by Frank Vacante in 1992. (PSUF 17.) However, the  
22 United States recalculated Mr. Vacante's Form 941 employment tax  
23 liabilities for tax year 1993 pursuant to the documentation  
24 produced on March 12, 2010 (i.e., wages of \$26,095).

25 As of December 1, 2009, the total outstanding balance of the  
26 Form 941 tax liabilities due from Frank Vacante for the June 30,  
27 1993, September 30, 1993, and December 31, 1993 tax periods,  
28

1 including interest, is \$24,241.28.<sup>6</sup> (Doc. 153-2, ¶¶ 10-13.)

2  
3 **2. 1994**

4 On December 13, 2007, the IRS issued a "Form 4340, Certificate  
5 of Assessments, Payments and Other Specified Matters for Frank  
6 Vacante, Frank Vacante Insurance for Employer's Quarterly Federal  
7 Tax Return (Form 941)," for the tax periods ending March 31, 1994,  
8 June 30, 1994, September 30, 1994, and December 31, 1994. (Docs.  
9 120-11 to 120-14.) Initially, because Frank Vacante failed to file  
10 Form 941 Employment Tax Returns or to pay withholding taxes for his  
11 sole proprietorship for the 1994 tax year, the IRS calculated the  
12 Vacante's employment tax liability based on third party  
13 information, including the deposition testimony of Cynthia Burris  
14 and Dan Belew III. (PSUF 30-31.) The IRS also reconstructed  
15 Vacante's Form 941 liability using Ute Vacante's 1994 W-2 filing,  
16 which stated she was paid \$75,000 by Frank Vacante's sole  
17 proprietorship. (PSUF 29.) However, the United States  
18 recalculated Mr. Vacante's Form 941 employment tax liabilities for  
19 tax year 1994 pursuant to the documentation produced on March 12,  
20 2010 (i.e., wages of \$102,079).

21 As of December 1, 2009, the total outstanding balance of the  
22 Form 941 tax liabilities due from Frank Vacante for the March 31,  
23 1994, June 30, 1994, September 30, 1994, and December 31, 1994 tax  
24  
25

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26 <sup>6</sup> Specifically, Mr. Vacante owes \$7,259.84 in Form 941  
27 employment taxes for the tax period ending June 30, 1993; \$8,549.15  
28 for the tax period ending September 30, 1993; and \$8,432.29 for the  
tax period ending December 31, 1993. (Doc. 153-2. ¶¶ 10-13.)

1 periods, including interest, is \$123,443.49.<sup>7</sup> (Doc. 153-2. ¶¶ 14-  
2 18.)

3  
4 D. Form 940 FUTA Tax Liabilities - Frank Vacante

5 1. 1993 & 1994 Tax Years

6 IRS records indicate that Frank Vacante did not file a Form  
7 940, Employer's Annual Federal Unemployment Tax Return, for the tax  
8 periods ending December 31, 1993 and December 31, 1994. (PSUF 24,  
9 42.) According to the United States, Frank Vacante employed  
10 several individuals during 1993 and 1994, yet failed to make  
11 federal tax deposits of withheld FUTA taxes. (PSUF 43.) Mr.  
12 Vacante maintains that his employees paid their own self-employment  
13 taxes during the 1993 and 1994 tax years, therefore he did not owe  
14 Form 940 or 941 taxes.

15 On December 13, 2007, the IRS issued a "Form 4340, Certificate  
16 of Assessments, Payments and Other Specified Matters for Frank  
17 Vacante, Frank Vacante Insurance, for Employer's Annual Federal  
18 Unemployment Tax Return (Form 940)," for the tax periods ending  
19 December 31, 1993 and December 31, 1994. (Docs. 121 to 121-2.)  
20 Because Frank Vacante failed to file Form 940 FUTA Returns for  
21 either 1993 or 1994, the IRS based its FUTA calculations on two  
22 sources: (1) payments to workers by Mr. Vacante in 1992, to  
23 establish Mr. Vacante's 1993 FUTA liability; and (2) payments of  
24 \$111,912 paid to workers by Mr. Vacante in the tax year 1994 -

25 \_\_\_\_\_  
26 <sup>7</sup> Specifically, Mr. Vacante owes \$28,615.09 in Form 941  
27 employment taxes for the tax period ending March 31, 1994;  
28 \$32,079.29 for the tax period ending June 30, 1994; \$31,729.16 for  
the tax period ending September 30, 1993; and \$31,019.95 for the  
tax period ending December 31, 1994. (Doc. 153-2, ¶¶ 14-18.)

1 \$27,987/quarter - to establish Mr. Vacante's 1994 FUTA liability.  
 2 (PSUF 25, 44.) However, the United States recalculated Mr.  
 3 Vacante's Form 940 tax liabilities for the 1993 and 1994 tax years  
 4 pursuant to the documentation produced on March 12, 2010 (i.e.,  
 5 wages of \$26,095 and \$102,079).

6 As of December 1, 2009, the total outstanding balance of the  
 7 Form 940 FUTA tax liability due from Frank Vacante for the December  
 8 31, 1993 tax period, including interest, is \$832.71. (Doc. 153-2.  
 9 ¶ 20.) Mr. Vacante owes \$3,063.85 in Form 940 FUTA taxes for the  
 10 tax period ending December 31, 1994. (Doc. 153-2. ¶ 22.)

11  
 12 E. Summary of Tax Liability - Government Figures

13 1. Frank Vacante

Type of Tax	Tax Period	Unpaid Balance of Assessments	Balance Due w/ Interest
Form 1040	2000	\$6,336.38	\$7,102.58
Form 1040	2004	\$3,528.44	\$4,258.17
Form 941	6/30/93	\$4,914.47	\$7,259.84
Form 941	9/30/93	\$5,809.83	\$8,549.15
Form 941	12/31/93	\$5,730.41	\$8,432.29
Form 941	3/31/94	\$19,446.22	\$28,615.09
Form 941	6/30/94	\$21,800.42	\$32,079.29
Form 941	9/30/94	\$21,450.29	\$31,729.16
Form 941	12/31/94	\$21,080.49	\$31,019.95
Form 940	12/31/93	\$565.88	\$832.71
Form 940	12/31/94	\$2,082.11	\$3,063.85

26 TOTAL DUE:<sup>8</sup> 151,581.30

27  
 28 <sup>8</sup> The interest and other statutory accruals were calculated on December 1, 2009 and may now be higher. Mr. Vacante's federal

2. Ute Vacante

Type of Tax	Tax Period	Assessment Date	Unpaid Balance of Assessments	Balance Due w/ Interest
Form 1040	2000	11/16/09	\$6,336.38	\$7,102.58
Form 1040	2004	3/11/08	\$3,528.44	\$4,258.17

TOTAL DUE:<sup>9</sup> \$11,360.75

F. Prior Federal Court Judgment Against Frank Vacante

On May 15, 2002, the United States filed an action against Frank Vacante in U.S. District Court for the Eastern District of California, Fresno Division, entitled *United States v. Frank Vacante*, No. 02-CV-5565-OWW-DLB. The United States initiated litigation to reduce to judgment certain outstanding Form 940 and 941 tax assessments against Defendant Frank Vacante - operating his sole proprietorship as VIF Insurance - for the 1989 and 1990 tax years. (Doc. 1.<sup>10</sup>) Defendant Vacante was properly served with copies of the summons and complaint, but did not respond to the complaint or otherwise appear in the action. Mr. Vacante's default was taken on September 10, 2002. (Doc. 9.)

On November 14, 2002, the United States moved for default judgment against Frank Vacante in the amount of his outstanding tax

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employment tax liability - stemming from unpaid Form 940 and 941 taxes - was reduced on March 22, 2010. (See Doc. 153-1 through 153-5.)

<sup>9</sup> The interest and other statutory accruals were calculated on December 1, 2009 and may now be higher.

<sup>10</sup> All citations in § II(F) refer to *United States v. Frank Vacante*, No. 02-CV-5565-OWW-DLB.

1 liabilities. (Doc. 10.) Mr. Vacante did not oppose the motion,  
2 nor did he move to set aside the entry of default. The United  
3 States' motion for default judgment against Frank Vacante was  
4 granted on March 7, 2003. (Doc. 14.) The default judgment was  
5 entered in the amount of \$21,087.91, plus interest, penalties, and  
6 other statutory additions. (Doc. 128-2.<sup>11</sup>) The judgment remains  
7 unpaid. (Id.)

8  
9 III. PROCEDURAL BACKGROUND.

10 The United States filed a complaint on June 10, 2008 to reduce  
11 to judgment outstanding federal tax assessments against Frank  
12 Vacante, Ute Vacante, CVIS, and Instant Services, Inc., to  
13 foreclose federal tax liens arising from federal tax liabilities  
14 against property owned by the Vacantes, to adjudicate that Frank  
15 and Ute Vacante are alter egos of CVIS, and to establish successor-  
16 in-interest liability regarding the Vacante's various insurance  
17 entities.<sup>12</sup> (Doc. 1.)

18 On July 21, 2008, Defendants filed their Answer to Plaintiff's  
19 Complaint.

20 On September 14, 2009, Plaintiff filed the operative SAC,  
21

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22 <sup>11</sup> Citation refers to 1:08-CV-01349-OWW-DLB.

23 <sup>12</sup> The United States also named Pacific Bell Directory,  
24 Stanislaus County Tax Collector, Everett J. & Willie Jean  
25 Rodrigues, Washington Mutual Bank, Beneficial California, Inc., New  
26 Century Mortgage Corporation, Franchise Tax Board, Union Bank of  
27 California, Northern California Collection Services, Inc., Turlock  
28 Irrigation District, Merced County Tax Collector, Terry L. Blake  
dba Blake Electric, and Deutsche Bank National Trust Company as  
Defendants. According to the United States, each party "is named  
in this action because it may claim an interest in real property  
that is subject to this action." (Doc. 90, ¶¶ 8-20.)

1 advancing fifteen causes of action: (1) To Reduce to Judgement  
2 Federal Tax Assessments Relating to the Vacantes' Unincorporated  
3 Business Against Frank Vacante; (2) To Reduce to Judgement Federal  
4 Income Tax Assessments and Tax Assessments (Relating to CVIS) Made  
5 Pursuant to 26 U.S.C. § 6672 Against Frank Vacante; (3) To Reduce  
6 to Judgement Federal Tax Assessments (Relating to CVIS) Made  
7 Pursuant to 26 U.S.C. § 6672 Against Ute Vacante; (4) To Reduce to  
8 Judgement Federal Tax Assessments Against CVIS; (5) To Reduce to  
9 Judgement Federal Tax Assessments Against Instant Services, Inc. ;  
10 (6) To Determine that CVIS is a Successor in Interest to the  
11 Vacantes' Unincorporated Business; (7) To Determine that Instant  
12 Services, Inc. is a Successor in Interest to CVIS; (8) To  
13 Determine that Ute Vacante is an Alter Ego of CVIS; (9) To  
14 Determine that Ute Vacante is an Alter Ego of Instant Services,  
15 Inc. ; (10) To Determine that Frank Vacante is an Alter Ego of CVIS;  
16 (11) To Determine that Frank Vacante is an Alter Ego of Instant  
17 Services, Inc. ; (12) To Foreclose Federal Tax Liens Against Ute  
18 Vacante on the Lander Avenue Property; (13) To Foreclose Federal  
19 Tax Liens Against Ute Vacante on the Minaret Avenue Property; (14)  
20 To Foreclose Federal Tax Liens Against Frank Vacante on the Lupin  
21 Lane Property; (15) To Foreclose Federal Tax Liens Against Frank  
22 and Ute Vacante on the Snedigar Road Property; and (16) To  
23 Foreclose Federal Tax Liens Against Frank and Ute Vacante on the  
24 August Avenue Property. (Doc. 90, ¶¶ 148-201.)

25 On November 30, 2009, Defendants moved for summary judgment on  
26 each cause of action contained in the SAC. (Doc. 105) Defendants  
27 argue that summary judgment is appropriate because they did not  
28 have the ability to pay CVIS's taxes, did not have knowledge of the

1 past due amounts, and did not take part in the financial decisions  
2 of CVIS. Defendants, however, did not file a "Statement of  
3 Undisputed Facts," as required by Rule 56-260, Local Rules of  
4 Practice.

5 On December 14, 2009, the United States moved for summary  
6 judgment against Defendants Frank Vacante and Ute Vacante, seeking  
7 to reduce to judgment certain tax liabilities against Frank Vacante  
8 and Ute Vacante. (Doc. 119.) In particular, the United States  
9 seeks to: (1) reduce to judgment Frank and Ute Vacante's individual  
10 tax liabilities for tax years 2000 and 2004; (2) reduce to  
11 judgment Frank Vacante's Form 941 Employment Tax Liabilities for  
12 the tax periods ending June 30, 1993, September 30, 1993, December  
13 31, 1993, March 31, 1994, June 30, 1994, September 30, 1994, and  
14 December 31, 1994; (3) reduce to judgment Frank Vacante's Form  
15 940 Federal Unemployment Tax liabilities for the tax periods ending  
16 December 31, 1993 and December 31, 1994.

17 On December 16, 2009, Defendants moved to dismiss the entire  
18 SAC on grounds that: (1) Frank Vacante never signed a lease for  
19 office space in Turlock on May 23, 1994; (2) Defendants were  
20 denied their due process rights during an unidentified appeals  
21 proceeding; (3) Defendants have a binding pre-nuptial agreement;  
22 (4) Revenue Officers Randy Reese and John Certini made material  
23 misrepresentations and false statements during their  
24 investigations; and (5) IRS manager Martha Rodriguez failed to  
25 properly supervise Revenue Officers Reese and Certini. (Doc. 124.)

26 The United States filed its opposition to Defendants' summary  
27 judgment motion on January 25, 2010. (Doc. 128.) In support of  
28 its opposition, Plaintiff submitted: (1) a Memorandum opposing the



1 motion ("Memorandum"); (2) a Statement of Facts in Support of its  
2 Opposition; (3) the Declaration of G. Patrick Jennings; and (4)  
3 Certificates of Assessments for the relevant tax periods at issue  
4 in this case. (Docs. 128-129.)

5 The United States opposes summary judgment on grounds that  
6 there remains a genuine issue of material fact concerning whether  
7 the Vacantes are "responsible parties" or "acted willfully" under  
8 26 U.S.C. § 6672. (Doc. 128.) The United States also maintains  
9 that Defendants' "claim for damages should be denied because they  
10 have not counterclaim[ed] for such a remedy, and so their claim is  
11 not part of this suit." (Id. at 2:11-2:13.)

12 On February 4, 2010, Plaintiff United States filed its "Reply  
13 and Motion to Strike Vacantes' Memorandum of Points Against Partial  
14 Summary Judgment." (Doc. 132.) Attached to the United States'  
15 reply was Defendants' "Memorandum of Points Against Partial Summary  
16 Judgment." The United States explains:

17 Frank Vacante sent a memorandum in opposition to the  
18 United States' Motion for Partial Summary Judgment to  
19 counsel for the United States. This document has not  
20 appeared on ECF and does not appear to have been filed  
21 with the Court. The mailroom at counsel's building  
22 received this document on the afternoon of Friday  
23 January 29, 2010, and counsel received this document  
24 on the morning of February 1, 2010.

25 (Doc. 132, 2:1-2:6.)

26 The United States moves to strike Defendants' "Memorandum of  
27 Points Against Partial Summary Judgment," i.e., Defendants'  
28 opposition to Plaintiff's summary judgment motion, on grounds that  
it does not comply with the Rule 78-230(c), Local Rules of  
Practice. The issue of timeliness under Local Rule 78-230(c) is  
discussed in § V(A)(1), *infra*.

1 Defendants' "Memorandum of Points Against Partial Summary  
2 Judgment," includes over 180-pages of exhibits: (1) photocopies of  
3 more than 75 cancelled checks from payor "VIF Insurance Services"  
4 to payee "West America Bank;" (2) federal tax deposit slips; (3)  
5 taxpayer account statements; (4) confidential IRS correspondence  
6 re: overpayments and levy notices; (5) photocopies of Form 941  
7 Employment Tax Returns for the tax periods ending June 30, 2001,  
8 September 30, 2001, December 31, 2001, March 31, 2002, June 30,  
9 2002, September 30, 2002, December 31, 2002, March 31, 2003, March  
10 31, 2004, June 30, 2005, September 30, 2006; (6) photocopies of  
11 Form 940 FUTA taxes for the tax periods ending December 31, 2001  
12 and December 31, 2002; and (7) photocopies of Form 1040 tax  
13 liabilities for the 1993, 1994, and 2000 tax periods. (Doc. 136,  
14 pgs. 1-99, to 136-2, pgs. 1-81.) Defendants' exhibits were not  
15 independently tabbed or otherwise identified.<sup>13</sup>

16 On February 12, 2010, the United States filed its "Opposition  
17 to Frank Vacante's Motion to Dismiss," arguing that "Vacante's  
18 Motion to Dismiss is a series of allegations that two IRS Officers  
19 [made material misrepresentations] denying them due process."  
20 (Doc. 141, 2:5-2:8.) According to the government, because "Vacante  
21 has not raised these claims in a prior proceeding [...] it is  
22

---

23 <sup>13</sup> Defendants included a document entitled "Defendants  
24 Memorandum of Points in Opposition to Summary Judgment Against  
25 Central Valley Insurance Inc. and Instant Service Inc." as part of  
26 Defendants' lengthy filing. According to Defendants, "summary  
27 judgment against Central Valley Insurance Inc. and (or) Instant  
28 Service Inc. would prejudice the proceedings against Defendants Ute  
Vacante and Frank Vacante [...] they would be done in repairable  
[sic] harm." Here, the United States has not moved for summary  
judgment against either Central Valley Insurance Inc. or Instant  
Service Inc. The document is irrelevant to the present motions.

1 improper to raise them now after discovery is closed." (Id. at  
2 2:13-2:15.) The government also asserts that such claims can only  
3 be raised pursuant to 26 U.S.C. § 7433, which Mr. Vacante has  
4 failed to do.

5 The parties appeared before the Court on February 26, 2010 for  
6 argument on the motions filed by the Vacantes and the United  
7 States. During the hearing, Mr. Vacante requested an extension of  
8 time to oppose the United States' motion. The Court granted the  
9 request and continued the hearing to April 19, 2010.<sup>14</sup>

10 Defendants filed four documents on March 12, 2010: (1) an  
11 opposition to the United States' motion for summary judgment; (2)  
12 a "Points and Memorandum in Support of Summary Judgment Motion;"  
13 (3) a "Points and Memorandum in Support of Motion to Dismiss [for]  
14 Failure of Due Process;" and (4) a "Points and Memorandum in  
15 Support of Jury Trial Motion."<sup>15</sup> In their opposition, Defendants  
16 acknowledged that VIF Insurance had payrolls of \$42,245 in 1993 and  
17 \$49,248.64 in 1994.

18 The United States filed its supplemental briefing on March 22,  
19 2010.<sup>16</sup> The substance of the United States' supplemental briefing  
20 mirrors its original filings: Defendants' unauthenticated and  
21 inadmissible evidence is insufficient to generate a genuine dispute  
22

---

23 <sup>14</sup> The court also set a supplemental briefing schedule: Mr.  
24 Vacante's opposition was due on or before March 12, 2010 and any  
25 response was due on or before March 22, 2010. (Doc. 142.)

26 <sup>15</sup> Defendants filed a "Motion for Jury Trial" on December 2,  
27 2009. (Doc. 106.) Defendants' March 12, 2010 filing is  
28 interpreted as a supplement to their original motion.

<sup>16</sup> Two of the documents were filed prior to March 22, 2010.  
(Docs. 150 & 151.)

1 of material fact on the issue of tax liability. The United States  
2 also recalculated Mr. Vacante's Form 940 and 941 employment tax  
3 liabilities for the 1993 and 1994 tax years pursuant to the  
4 documentation produced on March 12, 2010. According to the United  
5 States, there is substantial documentary evidence demonstrating the  
6 Vacantes' tax liabilities for the relevant tax periods.

#### 8 IV. LEGAL STANDARDS.

##### 9 A. Motion For Summary Judgment/Adjudication

10 Summary judgment/adjudication is appropriate when "the  
11 pleadings, the discovery and disclosure materials on file, and any  
12 affidavits show that there is no genuine issue as to any material  
13 fact and that the movant is entitled to judgment as a matter of  
14 law." Fed. R. Civ. P. 56(c). The movant "always bears the initial  
15 responsibility of informing the district court of the basis for its  
16 motion, and identifying those portions of the pleadings,  
17 depositions, answers to interrogatories, and admissions on file,  
18 together with the affidavits, if any, which it believes demonstrate  
19 the absence of a genuine issue of material fact." *Celotex Corp. v.*  
20 *Catrett*, 477 U.S. 317, 323 (1986) (internal quotation marks  
21 omitted).

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

1 party's case." *Soremekun*, 509 F.3d at 984.

2       When a motion for summary judgment is properly made and  
3 supported, the non-movant cannot defeat the motion by resting upon  
4 the allegations or denials of its own pleading, rather the  
5 "non-moving party must set forth, by affidavit or as otherwise  
6 provided in Rule 56, 'specific facts showing that there is a  
7 genuine issue for trial.'" *Soremekun*, 509 F.3d at 984. (quoting  
8 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). "A  
9 non-movant's bald assertions or a mere scintilla of evidence in his  
10 favor are both insufficient to withstand summary judgment." *FTC v.*  
11 *Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009). "[A] non-movant  
12 must show a genuine issue of material fact by presenting  
13 affirmative evidence from which a jury could find in his favor."  
14 *Id.* (emphasis in original). "[S]ummary judgment will not lie if [a]  
15 dispute about a material fact is 'genuine,' that is, if the  
16 evidence is such that a reasonable jury could return a verdict for  
17 the nonmoving party." *Anderson*, 477 U.S. at 248. In determining  
18 whether a genuine dispute exists, a district court does not make  
19 credibility determinations; rather, the "evidence of the non-movant  
20 is to be believed, and all justifiable inferences are to be drawn  
21 in his favor." *Id.* at 255.

22  
23       B.    Motion to Dismiss

24       Under Federal Rule of Civil Procedure 12(b)(6), a motion to  
25 dismiss can be made and granted when the complaint fails "to state  
26 a claim upon which relief can be granted." Dismissal under Rule  
27 12(b)(6) is appropriate where the complaint lacks a cognizable  
28 legal theory or sufficient facts to support a cognizable legal

1 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699  
2 (9th Cir. 1990).

3 To sufficiently state a claim for relief and survive a  
4 12(b)(6) motion, a complaint "does not need detailed factual  
5 allegations" but the "[f]actual allegations must be enough to raise  
6 a right to relief above the speculative level." *Bell Atl. Corp. v.*  
7 *Twombly*, 550 U.S. 544, 555 (2007). Mere "labels and conclusions"  
8 or a "formulaic recitation of the elements of a cause of action  
9 will not do." *Id.* Rather, there must be "enough facts to state a  
10 claim to relief that is plausible on its face." *Id.* at 570. In  
11 other words, "[t]o survive a motion to dismiss, a complaint must  
12 contain sufficient factual matter, accepted as true, to state a  
13 claim to relief that is plausible on its face." *Ashcroft v. Iqbal*,  
14 --- U.S. ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009)  
15 (internal quotation marks omitted). "The plausibility standard is  
16 not akin to a probability requirement, but it asks for more than a  
17 sheer possibility that a defendant has acted unlawfully. Where a  
18 complaint pleads facts that are merely consistent with a  
19 defendant's liability, it stops short of the line between  
20 possibility and plausibility of entitlement to relief." *Id.*  
21 (internal citation and quotation marks omitted).

22 In deciding whether to grant a motion to dismiss, the court  
23 must accept as true all "well-pleaded factual allegations." *Iqbal*,  
24 129 S.Ct. at 1950. A court is not, however, "required to accept as  
25 true allegations that are merely conclusory, unwarranted deductions  
26 of fact, or unreasonable inferences." *Sprewell v. Golden State*  
27 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); see, e.g., *Doe I v.*  
28 *Wal-Mart Stores, Inc.*, --- F.3d ----, 2009 WL 1978730, at \*3 (9th

1 Cir. July 10, 2009) ("Plaintiffs' general statement that Wal-Mart  
2 exercised control over their day-to-day employment is a conclusion,  
3 not a factual allegation stated with any specificity. We need not  
4 accept Plaintiffs' unwarranted conclusion in reviewing a motion to  
5 dismiss.").

6  
7 V. DISCUSSION.

8 A. The United States' Motion

9 The United States moves for summary judgment against Frank  
10 Vacante and Ute Vacante for the assessments of unpaid income taxes  
11 and penalties for the 2000 and 2004 tax years. (Doc. 119, 2:21-  
12 23.) The United States also moves for summary judgment against  
13 Frank Vacante as to: (1) his liabilities for Form 941 Employment  
14 Taxes for the periods ending June 30, 1993, September 30, 1993,  
15 December 31, 1993, March 31, 1994, June 30, 1994, September 30,  
16 1994, and December 31, 1994; and (2) his liabilities for Form 940  
17 FUTA taxes for the periods ending December 31, 1993 and December  
18 31, 1994. (Id. at 2:23-3:2.)

19 "In an action to collect federal taxes, the government bears  
20 the initial burden of proof." *In re Olshan*, 356 F.3d 1078, 1084  
21 (9th Cir. 2004) (quoting *Palmer v. I.R.S.*, 116 F.3d 1309, 1312 (9th  
22 Cir. 1997)). The government's burden can be met by presenting  
23 federal tax assessments. *United States v. Stonehill*, 702 F.2d  
24 1288, 1293 (9th Cir. 1983). Certificates of Assessments and  
25 Payments ("Form 4340s") are highly probative and in the absence of  
26 contrary evidence, are sufficient to establish a tax assessment was  
27 properly made and notice and demand for payment were sent. See  
28 *Huff v. United States*, 10 F.3d 1440, 1445 (9th Cir. 1993)

1 ("Generally, courts have held that IRS Form 4340 provides at least  
2 presumptive evidence that a tax has been validly assessed ....");  
3 *Hughes v. United States*, 953 F.2d 531, 535 (9th Cir. 1992)  
4 ("Official certificates, such as Form 4340, can constitute proof of  
5 the fact that the [tax] assessments were actually made.").

6 When supported by a minimal factual foundation, the IRS'  
7 assessments for taxes and related penalties are entitled to a  
8 presumption of correctness and the burden shifts to the taxpayer to  
9 show the assessment is incorrect. See *In re Olshan*, 356 F.3d at  
10 1084; *Palmer*, 116 F.3d at 1312. If the taxpayer fails to rebut  
11 the presumption, the government is entitled to judgment as a matter  
12 of law. See *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir.  
13 1993) (finding taxpayers' declaration that they did not receive  
14 notice of the tax assessment was insufficient to show a genuine  
15 issue of fact for trial where IRS presented Form 4340s.

16 The United States has submitted Form 4340s calculating the  
17 Vacante's tax liabilities and the related penalties for 2000 and  
18 2004, (Docs. 120-3 & 120-5), and Frank Vacante's employer tax  
19 liabilities and related penalties for 1993 and 1994, (Docs. 120-8  
20 to 121-2), along with Revenue Officer Randy Reece's Declaration  
21 supporting those assessments. (Dec. of R. Reece ¶¶ 4-25; Doc. 153-  
22 2, ¶¶ 10-22.) In further support of the assessments, the United  
23 States has submitted bank account records, the income tax returns  
24 for Ute and Frank Vacante (W-2 and 1040's), associated tax  
25 documents, and the deposition testimony of Frank Vacante and  
26 Cynthia Burris. (Docs. 120-2, 120-4, 120-6, 120-7, 122-2 to 122-  
27 4.) As to the subsequent adjustments, the United States submitted  
28 the declaration of IRS Agent Randy Reece and several corresponding



1 account transcripts. (Doc. 133-1 to 133-7.) Because the United  
2 States' showing exceeds the minimal factual foundation necessary,  
3 the assessments receive a presumption of correctness and the burden  
4 of proof shifts to Frank and Ute Vacante to demonstrate any error.

5  
6 1. Defendants' Opposition<sup>17</sup>

7 Defendants advance three arguments questioning the accuracy of  
8 the United States' Form 4340s. First, as to their Form 1040 tax  
9 liabilities, Defendants assert that "[a] check was issued by  
10 Fidelity National Title Co. in favor of the IRS in the amount of  
11 \$52,064.67 [...] [t]his amount paid 1040 taxes for 1997, 1998,  
12 1999, 2000, and 2001, including all interest and penalties." (Doc.  
13 136, 1:20-1:22.) Second, Defendants argue that their outstanding  
14 individual income tax liabilities were satisfied pursuant to a levy  
15 on their social security benefits. Third, Defendants contend that  
16 "[a]ll 941 and 940 taxes for 6/30/93, 9/30/93, 12/31/93, 3/31/94,  
17 6/30/94, 9/30/94, 12/31/94 were paid. Three people worked at VIF

18  
19  
20 <sup>17</sup> On February 4, 2010, the United States objected to  
21 Defendant's opposition brief as untimely. According to the United  
22 States, "[a]ny opposition to the [government's motion] had to be  
23 filed with the Court by January 29, 2010 [...] as the Vacantes  
24 failed to file a timely opposition, they are not entitled to be  
25 heard [...] at oral argument." (Doc. 132, 2:8-2:11.)

26 Defendants' "Memorandum of Points Against Partial Summary  
27 Judgment," i.e., its opposition to the government's motion, was  
28 filed with this Court on January 29, 2010, within the time-frame  
provided by Rule 78-230(c). (Doc. 136.) Although the document did  
not appear on the docket until February 8, 2010, the face of the  
document reveals two information stamps - "Received" and "Filed"  
stamps - both indicating the document was received/filed on January  
29, 2010. (Id.) Defendants' opposition was timely and the  
government's motion to strike is DENIED. It is also MOOT as the  
parties were permitted to file supplemental briefing.

1 Insurance in 1993 and 1994 [...] all three paid there [sic] taxes  
2 on Form 1040, including self-employment tax, Medicare, and federal  
3 and state tax." (Doc. 136, 2:1-2:4.) These arguments were the  
4 focus of Defendants' original and supplemental briefing.

5  
6 **2. Form 1040 Liabilities**

7 Defendants' first argument is based on their belief that all  
8 outstanding 1040 tax liabilities were resolved pursuant to an  
9 October 29, 2004 check from Fidelity National Title to the IRS.  
10 According to Defendants, the \$52,064.67 check satisfied all 1040  
11 liabilities and left a surplus of \$6000.00, which was not returned  
12 or otherwise explained.<sup>18</sup>

13 While the United States does not dispute that it received the  
14 \$52,064.67 check in 2004, it argues that check was credited to the  
15 Vacantes' Form 1040 tax liabilities for 1993-1999 and 2001, not the  
16 2000 or 2004 tax periods. According to the United States, the  
17 check satisfied the liabilities for those years "in full,"  
18 however, "[n]o part of the proceeds received on October 29, 2004,  
19 was [sic] posted to the year at issue in this suit." (Doc. 132,  
20 2:18-2:22.)

21 To support its position, the government submitted the  
22 Vacantes' Account Transcripts for Form 1040 income tax liabilities  
23 for the relevant tax years. The Account Transcripts indicate that  
24 the \$52,064.67 check was credited to the outstanding Form 1040 tax  
25 liabilities for the 1993, 1994, 1995, 1996, 1997, 1998, 1999, and  
26

---

27 <sup>18</sup> Defendants do not dispute that they owed and failed to pay  
28 \$2,115 in federal tax income for the 2004 tax year. (See Doc. 145,  
at 10:21 ("The \$2115 due for year 2004's 1040 is correct."))

1 2001 tax periods, not against the 2000 and 2004 Form 1040 tax  
2 liabilities:<sup>19</sup>

Tax Year	Liability on 10/29/04	Amount Posted	Fully Satisfied?	Record (Doc., Pg.)
1993	\$6,897.38	\$6,897.38	Yes	133-2, 2-3
1994	\$8,879.65	\$8,879.65	Yes	133-2, 4-5
1995	\$6,076.52	\$6,076.52	Yes	133-2, 6-7
1996	\$7,549.93	\$7,549.93	Yes	133-2, 8-9
1997	\$10,720.41	\$10,720.41	Yes	133-2, 10-1
1998	\$5,950.55	\$5,950.55	Yes	133-2, 12-3
1999	\$3,129.30	\$3,129.30	Yes	133-2, 14-5
2001	\$2,860.93	\$2,860.93	Yes	133-2, 16-7

12 TOTALS:        \$52,064.67        \$52,064.67

14  
15 Here, despite Defendants' argument that the \$52,064.67 payment  
16 satisfied their individual income tax liabilities from 1993-1999  
17 and 2001 - \$52,064.67 - as well as their individual income tax  
18 liabilities from 2000 and 2004 - \$11,360.75 -, no documentary  
19 evidence was offered to support such a claim. For example,  
20 Defendants do not produce a single document memorializing a "below  
21 market" global settlement or provide any other explanation for the  
22 disparity. Defendants' claims are merely conclusory allegations,  
23 which are insufficient to defeat the government's request for  
24 summary judgment. See, e.g., *Hanson v. United States*, 7 F.3d 137,

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25 <sup>19</sup> The government's proffer of the Form 4340s, establishing a  
26 presumption of tax liability, and the subsequent production of the  
27 Vacante's Form 1040 Account Transcripts for the relevant tax years,  
28 constitute substantial evidence that the \$52,064.67 payment did not  
reduce the Vacantes' Form 1040 income tax liabilities for the 2000  
and 2004 tax periods.

1 138 (9th Cir. 1993) (“[nonmoving party] cannot rely on conclusory  
2 allegations unsupported by factual data to create an issue of  
3 material fact.”). Defendants also do not contest that their 1993-  
4 1999 and 2001 individual income tax liabilities totaled \$52,064.67,  
5 which matches identically with their November 29, 2004 payment.  
6 Absent evidence that Defendants’ \$52,064.67 payment satisfied more  
7 than \$52,064.67 of tax liability or that the tax assessments were  
8 incorrect, Defendants have not met their burden for defeating the  
9 government’s summary judgment motion.

10 At oral argument on February 26, 2010, Defendants emphasized  
11 that they “paid year 2000 taxes including interest and penalties in  
12 full on October 29, 2004.” In its supplemental briefing, the  
13 United States asserted that was impossible for the proceeds to  
14 offset the Vacantes’ 2000 individual tax liabilities because “no  
15 assessments existed for tax year 2000 at the time of payment  
16 [October 29, 2004].” The evidence supports the United States’  
17 position. In particular, the relevant Form 4340 shows that the  
18 first assessment against the Vacantes for tax year 2000 was made on  
19 December 25, 2006. (Doc. 120-3.) Here, because the tax liability  
20 did not exist in 2004, it was not “satisfied” pursuant to the  
21 Vacantes’ October 29, 2004 check. Setting aside Defendants’ own  
22 declarations/submissions, there is no evidence that the October 29,  
23 2004 payment resolved the Vacantes’ 2000 individual income tax  
24 liabilities.

25 That is not the end of the analysis, however. During oral  
26 argument on April 19, 2010, Defendants claimed that their  
27 supplemental briefing erased all uncertainty concerning when they  
28 filed their Form 1040 taxes for the 2000 tax year. In particular,

1 the Vacantes referred to several certified mail receipts which were  
2 attached to their supplemental opposition. (Doc. 145, pgs. 37-39.)  
3 The receipts allegedly relate to their Form 1040 taxes for the 2000  
4 tax year. According to the Vacantes, these receipts demonstrate  
5 that they mailed - and paid - their 2000 Form 1040 taxes in May of  
6 2002. This argument is a nonstarter. First, Mr. Vacante fails to  
7 identify the receipts or establish their origin - by declaration or  
8 otherwise; there is no way to validate his claims concerning the  
9 certified receipts. In this regard, the documents are not properly  
10 authenticated and are stricken from the summary judgment record.  
11 *See Conkey v. United States*, 545 F. Supp. 2d 1013, 1016-17 (N.D.  
12 Cal. 2008) (striking two certified mail envelopes because they were  
13 not properly authenticated); *see also Harris v. Freedom of Info.*  
14 *Unit Drug Enforcement Admin.*, No.06-CV-0176-R, 2006 WL 3342598 at  
15 \*1 (N.D. Tex. Nov. 17, 2006) (striking certified mail receipts on  
16 grounds that they "[we]re not properly authenticated.").

17 Even assuming the unauthenticated receipts are admissible as  
18 evidence, the record contradicts the Vacantes' unsupported  
19 assertion that these receipts are proof that they mailed their Form  
20 1040 tax returns in May 2002. As the undisputed evidence submitted  
21 by the Government demonstrates, the Vacantes neither filed nor paid  
22 their 2000 Form 1040 taxes in 2002; rather, they did not submit  
23 their tax return until April 7, 2008. (See Doc. 120-2 (Vacantes'  
24 Form 1040 for tax year 2000, filed in April 2008); Doc. 120, ¶ 4.)  
25 The Vacantes have come forward with no admissible evidence to rebut  
26 this record. There is no genuine dispute of material fact.

27 ///

28 ///

1                   3.    Social Security Levy Payments

2           Defendants next argue that their outstanding individual income  
3 tax liabilities were satisfied pursuant to a levy on their social  
4 security benefits. Specifically, Defendants contend that "Mrs.  
5 Vacante's Social Security was levied in the amount of \$398.00  
6 [monthly] starting in May of 2006 for period of 24 months," and  
7 "Mr. Vacante's Social Security was levied in the amount of \$127.00  
8 a month for 23 months." (Doc. 136, 1:23-1:25.)

9           The United States does not dispute that it levied Defendants'  
10 social security benefits, however, it asserts that "most of the  
11 levy payments were posted to tax periods not at issue in this  
12 suit." (Doc. 132. 3:16-3:17.) According to the declaration of IRS  
13 Agent Randy Reece, attached to the United States' February 4, 2010  
14 reply, the IRS identified several levy payments made from the  
15 Vacantes' social security stipends in 2006 and 2007. These levy  
16 payments, however, did not offset the tax obligations forming the  
17 substance of this litigation:<sup>20</sup>

18                   The IRS received levy payments in the amount of \$398  
19 a month, beginning in March of 2006 and ending in  
20 December of 2006 [...]

21                   On March 6, 2006, a levy payment in the amount of \$398

22                   <sup>20</sup> The government also contends that Defendants' considerable  
23 tax issues make it nearly impossible to substantiate their  
24 assertions:

25                   [I]t is difficult to find where particular payments  
26 were posted, as the Vacantes have at different points  
27 in time had outstanding federal tax liabilities for  
28 ten different years, outstanding trust fund recovery  
penalties for multiple years, and outstanding Form 941  
employment tax liabilities for numerous quarters.

(Doc. 132, 3:1-3:5.)

1 was posted to the Form 941 employment tax liabilities  
2 of VIF Insurance for the quarter ending March 31, 1995  
3 [...]

4 On April 25, 2006, and May 24, 2006, levy payments in  
5 the amount of \$398 were posted to the Form 941  
6 employment tax liabilities of VIF Insurance for the  
7 quarter ending March 31, 1993 [...]

8 On June 23, 2006, a levy payment in the amount of \$398  
9 was posted to the Form 1040 individual federal income  
10 tax liabilities for Ute Vacante for 1994. When the  
11 Vacantes late-filed a Joint Income Tax Return for  
12 1994, the IRS abated the individual assessments  
13 against Ute Vacante, and assessed federal income tax  
14 liabilities against the Vacantes jointly for 1994, per  
15 their late-filed return. Part of the \$398 levy  
16 payment covered lien fees incurred by the IRS related  
17 to Ute Vacante's 1994 federal tax liabilities. The  
18 remainder was transferred as a credit toward the trust  
19 fund recovery penalties assessed against Ute Vacante  
20 for the tax period ending December 31, 1998 [...]

21 On August 3, 2006, September 3, 2006, October 3, 2006,  
22 November 3, 2006, and December 3, 2006, levy payments  
23 in the amount of \$398 were posted to the Form 941  
24 employment tax liabilities of VIF Insurance for the  
25 quarter ending March 31, 1993 [...]

26 The IRS received levy payments in the amount of \$409  
27 each month beginning in January of 2007 and ending in  
28 May of 2007 [...]

On January 3, 2007, January 25, 2007, February 21,  
2007, March 26, 2007, and April 25, 2007, levy  
payments in the amount of \$409 were posted to the Form  
941 employment tax liabilities of VIF Insurance for  
the quarter ending March 31, 1993 [...]

On May 23, 2007, a levy payment in the amount of \$409  
was posted to the Form 941 employment tax liabilities  
of VIF Insurance for the quarter ending June 30, 1993  
[...]

On December 26, 2007, the IRS received a levy payment  
in the amount of \$1309.05. On January 24, 2007, and  
on February 28, 2007, the IRS received levy payments  
in the amount of \$134.40. On March 28, 2007, the IRS  
received a levy payment in the amount of \$120.30 [...]  
the[se] levy payments were posted to the trust fund  
recovery penalties assessed against Frank Vacante for  
the tax period ending December 31, 1998 [...]

(Dec. of R. Reese, Doc. 133, ¶¶ 6-15.)

A graphical representation of Defendants' levy payments shows that the payments did not offset the tax obligations forming the substance of the government's motion:<sup>21</sup>

<u>Levy Date</u>	<u>Amount</u>	<u>Posted Acct</u>	<u>Record</u>
3/6/06	\$398	Form 941 - Qtr End 3/31/95	Doc. 133, Ex. 2
4/25/06	\$398	Form 941 - Qtr End 3/31/93	Doc. 133, Ex. 3
5/24/06	\$398	Form 941 - Qtr End 3/31/93	Doc. 133, Ex. 3
6/23/06	\$398	Form 1040 - U. Vacante ('94) & Trust Fund Penalty	Doc. 133, Ex. 4
8/3/06	\$398	Form 941 - Qtr End 3/31/93	Doc. 133, Ex. 3
9/3/06	\$398	Form 941 - Qtr End 3/31/93	Doc. 133, Ex. 3
10/3/06	\$398	Form 941 - Qtr End 3/31/93	Doc. 133, Ex. 3
11/3/06	\$398	Form 941 - Qtr End 3/31/93	Doc. 133, Ex. 3
12/3/06	\$398	Form 941 - Qtr End 3/31/93	Doc. 133, Ex. 3
1/3/07	\$409	Form 941 - Qtr End 3/31/93	Doc. 133, Ex. 3
1/25/07	\$409	Form 941 - Qtr End 3/31/93	Doc. 133, Ex. 3
2/21/07	\$409	Form 941 - Qtr End 3/31/93	Doc. 133, Ex. 3
3/26/07	\$409	Form 941 - Qtr End 3/31/93	Doc. 133, Ex. 3
4/25/07	\$409	Form 941 - Qtr End 3/31/93	Doc. 133, Ex. 3
5/23/07	\$409	Form 941 - Qtr End 6/30/93	Doc. 133, Ex. 5
12/27/06	\$130	Trust Fund Penalty - F. Vacante (Qtr End 12/31/98)	Doc. 133, Ex. 6
1/24/07	\$134	Trust Fund Penalty - F. Vacante (Qtr End 12/31/98)	Doc. 133, Ex. 6
2/28/07	\$134	Trust Fund Penalty - F.	Doc. 133, Ex. 6

<sup>21</sup> Chart produced from data contained in Docs. 133-2 to 133-7.



		Vacante (Qtr End 12/31/98)	
3/28/07	\$120	Trust Fund Penalty - F.	Doc. 133, Ex. 6
		Vacante (Qtr End 12/31/98)	

Similar to § V(A) (1), the United States provides substantial evidence establishing that the levy payments were used to offset *other* federal tax liabilities of the Defendants, not the liabilities at issue in this litigation. Defendants, in contrast, provide only two documents supporting their litigation position: (1) an October 11, 2004 letter from the IRS to "Instant Services, Inc." describing a \$52.84 Form 940 tax liability stemming from 2003 tax year, (Doc. 136, pgs. 82-83); and (2) a June 13, 2005 letter from the IRS to "Instant Services, Inc." outlining a \$17,092.11 Form 941 tax arrearage stemming from the quarter ending December 31, 2001. (Doc. 136-2, pgs. 61-63.)

Neither document is relevant to the issues presented by the government's motion. The two letters relate to Form 940 and 941 employment taxes levied against Instant Services, Inc. for the 2001 and 2003 tax periods. In this regard, the letters bear little relation to the issues raised in the United States' motion - i.e., Form 940 and Form 941 employment taxes levied against Frank Vacante's sole proprietorship for the 1993 and 1994 tax periods. Defendants continue to conflate and confuse the issues raised in the Second Amended Complaint with those raised by the government's motion for summary judgment. They are not identical. Defendants' evidence is insufficient to rebut the presumption of correctness

1 arising from the Form 4340s submitted by the government.<sup>22</sup>

2  
3 **4. Form 940 and 941 Employment Taxes**

4 Mr. Vacante argues that the government unfairly and without  
5 proper documentation assessed employment taxes against VIF  
6 Insurance for the 1993 and 1994 tax years. He asserts that he owes  
7 no employment tax for the years at issue because the monies Ute  
8 Vacante, Dan Belew, and Cynthia Burris received from VIF Insurance  
9 during those years did not constitute wages or income. Instead,  
10 the employees in question were treated as "independent contractors"  
11 and paid "commissions." The government responds to this argument  
12 by observing that the taxpayer bears the burden of persuasion in  
13 this litigation. It also contends that, despite Mr. Vacante's  
14 self-serving declaration, there exists adequate competent evidence  
15 to support the assessments in question.

16 To determine whether a factual dispute exists as to Mr.  
17 Vacante's employment tax liabilities, it is necessary to harmonize  
18 the arguments advanced - and evidence presented - by the parties  
19 during the two stages of briefing. In his original opposition, Mr.  
20 Vacante did not submit a signed declaration, relying instead on  
21 unsigned tax returns and various bank records. Mr. Vacante  
22

---

23  
24 <sup>22</sup> The same reasoning applies to the documents submitted by  
25 Defendants on March 11, 2010. To oppose the government's motion,  
26 Defendants submit: (1) photocopies of Form 1040 tax liabilities for  
27 the 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000 and 2001 tax  
28 periods; (2) Frank and Ute Vacante's 1987 pre-marital agreement;  
and (3) a "Notice a Federal Tax Lien." It is unclear how these  
documents demonstrate that Defendants' outstanding tax liabilities  
were satisfied pursuant to a levy on their social security  
benefits.

1 asserted VIF Insurance employees paid their own federal employment  
2 taxes during these two tax years, therefore any assessments against  
3 Defendants for this period were meritless:

4 All 941 and 940 taxes for 6/30/93, 9/30/93, 12/31/93,  
5 3/31/94, 6/30/94, 9/30/94, 12/31/94 were paid. Three  
6 people worked at VIF Insurance in 1993 and 1994. Dan  
7 Belew III, Ute Vacante, and Cynthia (Nunes) Burris.  
8 All three paid there (sic) taxes on Form 1040,  
9 including self employment tax, Medicare, and federal  
and state tax. The total payroll for VIF Insurance  
for 1993 was \$42,245.00 and 1994 was \$49,248.64. The  
figures used by the Plaintiff are completely without  
foundation. After 10 years the United States has only  
produced three people who worked at VIF.

10 (Doc. 136, 2:1-2:4.)

11 The government responded with a number of evidentiary  
12 objections. According to the government, Mr. Vacante did not  
13 produce evidence or the possibility that he can produce evidence  
14 sufficient to overcome the presumption that the tax assessments  
15 levied by the IRS are correct. Specifically, as to Cynthia Burris,  
16 the government contended that "[t]he Vacantes did not include any  
17 evidence that Cynthia (Nunes) Burris paid self-employment taxes."

18 (Doc. 132, 4:14-4:15.) The government correctly cited *Rivera v.*  
19 *National R.R. Passenger Corp.*, 331 F.3d 1074, 1078 (9th Cir. 2003)  
20 for the proposition that an unsupported assertion of self-payment  
21 does not create a genuine dispute of fact.

22 As to Dan Belew III, the government argued that  
23 unauthenticated and unsigned tax returns do not demonstrate that  
24 the assessment was incorrect:

25 The Vacantes included with their memorandum copies of  
26 Form 1040 Tax Returns that they claim are the tax  
27 returns of Dan Belew, III. However, these returns are  
28 not signed, and the Vacantes have no evidence that  
they are authentic or filed with the IRS. Furthermore  
the Vacantes have submitted no evidence that Dan

1           Belew, III ever paid any self-employment tax.

2  
3           (Doc. 132, 4:15-4:19.)

4           The government similarly objects to the use of Frank and Ute  
5 Vacante's Form 1040 tax returns to rebut the presumption of  
6 correctness:

7                   The Vacantes included purported Form 1040 Tax Returns  
8                   for Frank and Ute Vacante for 1993 and 1994, but these  
9                   returns are unsigned and the Vacantes have submitted  
10                   no evidence that they are authentic.

11           (Doc. 132, 4:20-4:22.)

12           The government's evidentiary objections are well-taken. In  
13 this Circuit, unauthenticated and unsigned tax returns are  
14 insufficient to place any material fact in controversy. See *Bias*  
15 *v. Moynihan*, 508 F.3d 1212, 1224 (9th Cir. 2007) ("Rule 56(e) of  
16 the Federal Rules of Civil Procedure requires that a proper  
17 foundation be laid for evidence considered on summary judgment.  
18 The documents must be authenticated [...]"); see also *Nat'l Steel*  
19 *Corp. v. Golden Eagle Ins. Co.*, 121 F.3d 496, 502 (9th Cir. 1997)  
20 ("Conclusory allegations [...] without factual support, are  
21 insufficient to defeat summary judgment."); *Cristobal v. Siegel*,  
22 26 F.3d 1488, 1494 (9th Cir. 1994) ("We have repeatedly held that  
23 unauthenticated documents cannot be considered in a motion for  
24 summary judgment."). Courts require the party claiming error to  
25 affirmatively produce evidence demonstrating that the assessment  
26 was incorrect, which Mr. Vacante did not do in his original  
27 opposition.

28           However, during oral argument on February 26, 2010, the Court  
instructed Mr. Vacante on the relevant legal standards, namely

1 Federal Rule of Civil Procedure 56(e). Mr. Vacante requested an  
2 extension of time to file supplemental briefing, which was granted.  
3 As part of his supplemental briefing, Mr. Vacante did not submit a  
4 formal declaration, but his supplemental opposition to the motion  
5 for summary judgment, construed with the leniency typically  
6 afforded pro se parties in complying with procedural requirements,  
7 see *Lucas v. Miles*, 84 F.3d 532, 535 (2d Cir. 1996), satisfies the  
8 requirements. In his declaration, which was signed under penalty  
9 of perjury, Mr. Vacante denies that VIF Insurance had the financial  
10 capacity to "employ" three individuals during the relevant tax  
11 years - and that the individuals were "independent contractors."  
12 He also asserts that the IRS' employment tax figures were  
13 incorrectly based on Central Valley Insurance Services, not VIF  
14 Insurance:

- 15 1. Frank Vacante owned and operated VIF Insurance  
16 services as his sole proprietorship and sole  
property from 1983-1994.
- 17 2. Frank Vacante notified the IRS on January 3, 1993  
18 that he no longer had employees.
- 19 3. No payroll tax was due from Frank Vacante or VIF  
20 Insurance during the periods 3/31/93, 6/30/93,  
9/30/93, 12/31/93, 3/31/94, 6/30/94, 9/30/94 or  
21 12/31/94.
- 22 4. VIF's business was 95% high risk auto insurance.
- 23 5. In November 1989, the people of California passed  
24 Prop 103, the California Insurance Initiative.
- 25 6. Prop 103 limited how insurance companies rated  
26 policies, restricted profit and dictated rate  
27 reductions of 10%.
- 28 7. Many of the insurance companies VIF represented were  
working with a 10-15% margin at the time. It was  
not feasible to comply with the new laws so a  
majority of the companies withdrew from the  
California market. Many of the remaining companies  
placed a moratorium on new business. VIF insurance

1 went from representing greater than 100 insurance  
2 companies to fewer than 10 in a matter of months.

3 8. VIF Insurance Services went from selling  
4 approximately 90-100 new policies per month in 1989,  
5 to less than 15-25 per month by 1993.

6 9. Due to changes in billing practices by the insurance  
7 companies, VIF's residual income fell sharply from  
8 1990-1994. These billing practices were designed to  
9 cancel policies.

10 10. Due to the reduction of business and clientele, VIF  
11 Insurance did not need an office staff.

12 11. All day to day business was handled by Mr. & Mrs.  
13 Vacante after January 1993.

14 12. All direct sales were handled by Dan Belew and  
15 Cynthia Nunes. Both were licensed agents and  
16 appointed by the insurance companies being  
17 represented. This is mandated by the California  
18 Department of Insurance and is an industry standard  
19 practice for direct sales.

20 13. The total payroll for VIF Insurance Services in 1993  
21 was \$42,245.

22 A. Frank Vacante and Ute Vacante received \$16,150  
23 and paid all taxes due, including federal  
24 income tax, social security tax, self  
25 employment tax and Medicare on Form 1040.

26 B. Dan Belew III received \$16,495 as commission  
27 reported on form 1099 to the IRS. Mr. Belew  
28 III paid all the tax due including federal  
income tax, social security tax, self  
employment tax and Medicare on his Form 1040.

C. Cynthia Nunes received \$9,600 as commission  
reported on form 1099 to the IRS. Ms. Nunes  
(Burris) has testified under oath during  
deposition in this matter that she paid all  
federal income tax, social security tax, self  
employment tax and Medicare tax due on her Form  
1040.

14. The total payroll for VIF Insurance Services in 1994  
was \$49,248.

A. Frank Vacante and Ute Vacante received \$22,170  
and paid all taxes due, including federal  
income tax, social security tax, self  
employment tax and Medicare on Form 1040 for  
the year 1994.

1 B. Dan Belew III received \$17,478.64 as commission  
2 reported on form 1099 to the IRS. Mr. Belew  
3 III paid all the tax due including federal  
4 income tax, social security tax, self  
5 employment tax and Medicare on his Form 1040.

6 C. Cynthia Nunes received \$9,600 as commission  
7 reported on form 1099 to the IRS. Ms. Nunes  
8 (Burris) has testified under oath during  
9 deposition in this matter that she paid all  
10 federal income tax, social security tax, self  
11 employment tax and Medicare tax due on her Form  
12 1040 [...]

13 2[.]. Forms 940 and 941 filed by the IRS are not based on  
14 interview or investigation for the tax periods  
15 3/31/94, 6/30/94, 9/30/94 or 12/31/94. Assessments  
16 for these periods are incorrectly based on Forms 940  
17 and 941 filed by the IRS on a different business.  
18 Central Valley Insurance Services was the sole  
19 proprietorship of Dan Belew III [...]

20 (Doc. 145, 11:2-12:26, 14:1-14:6.)

21 The government responds that Mr. Vacante has still offered  
22 nothing to counter the evidence provided by the government, i.e.,  
23 the Form 4340s are sufficient to establish that the tax assessments  
24 were correctly made. The government also objects to Mr. Vacante's  
25 evidence on grounds that it is unauthenticated, contains hearsay,  
26 and was not made on the basis of his personal knowledge. The  
27 government is correct; unauthenticated and unsigned tax returns  
28 are inadmissible to establish a genuine issue of material fact.  
See *Bias*, 508 F.3d at 1224. The same is true as to documents  
containing hearsay and statements lacking personal knowledge.

Despite these evidentiary objections, Mr. Vacante has  
submitted sufficient evidence to make out a triable issue as to  
whether, in 1993 and 1994, Ute Vacante, Dan Belew and Cynthia  
Burris were treated as independent contractors. Here, there are  
two conflicting interpretations on whether the workers at issue  
were "independent contractors" or "employees." Mr. Vacante

1 declares that the individuals were paid "commissions," did not have  
2 specific job responsibilities or work functions, and operated  
3 largely outside a manager or "boss." (Doc. 145 at 11:2-14:6.)  
4 Additionally, it is undisputed that Mr. Vacante paid self-  
5 employment tax on his VIF Insurance income in 1993 and 1994, and  
6 that Ms. Burris reported \$764.00 in self-employment tax in 1994.  
7 (Doc. 153, 4:22-4:25, 9:3-9:4.) Mr. Vacante also communicated to  
8 the IRS in 1993 that he did not have any "employees" and, according  
9 to his declaration, reconfigured his office structure based on  
10 dialogue with an IRS Agent. (Doc. 145, pg. 43; Doc. 145, 12:15-  
11 13:5.) All of these facts weigh in favor of independent contractor  
12 status.

13 This is contrary to the government's characterization of  
14 individuals working at VIF Insurance during the relevant time  
15 periods. Initially, the government assessed employment tax  
16 liabilities against Mr. Vacante based on wages paid by him in 1992,  
17 the deposition testimony of Cynthia Burris, and Ute Vacante's 1994  
18 W-2 filing, which stated she was paid \$75,000 by VIF insurance.  
19 However, the United States reduced Mr. Vacante's Form 940 and 941  
20 tax liabilities for 1993 and 1994 based on figures he provided on  
21 March 12, 2010, where he describes the payments as "commissions."<sup>23</sup>  
22 Because Mr. Vacante's wage figures - the "commissions" - were  
23 accepted by the government, it is unclear if the original  
24 assessments still provide the foundation for the government's  
25  
26

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27 <sup>23</sup> Doc. 145 at 12:6-12:7 ("Dan Belew III received \$16,495 as  
28 commission []." ) (emphasis added).



1 argument.<sup>24</sup>

2 Even assuming the original assessments provide the basis for  
3 the government's characterization, there is a triable issue as to  
4 whether Mr. Vacante treated Ute Vacante, Dan Belew, and Cynthia  
5 Burris as employees for tax purposes in 1993 in 1994. With respect  
6 to Ms. Burris' deposition testimony, it is an insufficient basis to  
7 resolve the issue of employee vs. independent contractor status.  
8 In her deposition, Ms. Burris does not clearly describe her duties,  
9 whether she invested in the insurance business or the generation of  
10 insurance leads, the level of professionalism required, or any  
11 number of circumstances relevant to whether an individual is an  
12 "employee" or an "independent contractor" for federal tax purposes.  
13 See *United States v. Porter*, 569 F. Supp. 2d 862 (S.D. Iowa 2008)  
14 (analyzing the twenty factors to consider when examining whether  
15 sufficient control existed to establish an employer-employee  
16 relationship). There is also record evidence that Ms. Burris  
17 considered herself to be an independent contractor, not an  
18 employee. (Doc. 153, 9:3-9:4 ("Th[e] [tax] return filed by Ms.  
19 Burris [in 1994] reported \$764 in self-employment tax [....]".))

20 The same reasoning applies to the government's reliance on the  
21 wages paid by VIF Insurance in 1992 and the \$75,000 in wages  
22 allegedly paid to Ute Vacante in 1994. First, the government's  
23

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24 <sup>24</sup> As to the nature of the employees' employment relationship,  
25 the government's motion lacks a fully developed factual record.  
26 See, e.g., *Porter*, 569 F. Supp. 2d at 872-74; see also *Greco v.*  
27 *United States*, 380 F. Supp. 2d 598, 608-16 (M.D. Pa. 2005). The  
28 facts submitted by the government concerning the Vacantes' § 6672  
liability do not provide a complete picture of the employment  
relationship.

1 reliance on 1992 figures is contradicted by Mr. Vacante's  
2 declaration, in which he explains how the insurance business  
3 contracted following intense regulation. This added cost and  
4 regulatory oversight resulted in a severe reduction in VIF's  
5 workforce in 1993. Second, Mr. Vacante explained during February  
6 26th's oral argument that he forged his wife's signature to obtain  
7 a bank loan. According to Mr. Vacante, he misrepresented to the  
8 bank that Ute Vacante made \$75,000 in 1994 in order to invest in  
9 his insurance business and "get back on his feet." Contrary to the  
10 government's assertions, forging a signature is not dispositive of  
11 the independent contractor vs. employee issue, which is "factually  
12 intensive." See *Peno Trucking, Inc. v. C.I.R.*, 296 F. App'x 449 at  
13 \*6 (6th Cir. 2008) ("It is settled that each [independent  
14 contractor vs. employee] case must stand on its own facts, in light  
15 of all the existing circumstances, and that no one facet of the  
16 relationship is generally determinative.") (citation omitted).  
17 Moreover, the credibility of a witness is an issue for the jury.  
18 See, e.g., *Bourns, Inc. v. Raychem Corp.*, 331 F.3d 704, 714 (9th  
19 Cir. 2003). Whether Mrs. Vacante did not have \$75,000 in income is  
20 a disputed fact issue based on Mr. Vacante's assertion that he  
21 fabricated this amount to obtain a bank loan to save his business.

22 In an abundance of caution and in light of Mr. Vacante's pro  
23 se status, viewing the evidence in a light most favorable to him,  
24 there is a question of fact concerning whether Mr. Vacante treated  
25 his employees as independent contractors during the relevant tax  
26 periods. According to Mr. Vacante, the employees in question were  
27  
28

1 treated as independent contractors and paid commissions.<sup>25</sup> If  
2 believed, a dispute exists whether Mr. Vacante's workers were  
3 independent contractors during the relevant tax periods. Trial is  
4 necessary to resolve factual issues surrounding the nature of the  
5 employees' working relationship and the level of investments made  
6 by these individuals.<sup>26</sup> The government's summary judgment motion  
7 is DENIED on this issue.

8 A factual dispute exists whether and to what extent Mr.  
9 Vacante treated Ute Vacante, Dan Belew and/or Cynthia Burris as  
10 employees or independent contractors. Defendants are pro se and  
11 appear to be unfamiliar with the Federal Rules of Evidence, and  
12 what constitutes admissible evidence under those rules. In  
13 preparing for trial, Defendants must become familiar with the  
14

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15 <sup>25</sup> There is record evidence to support Mr. Vacante's  
16 declaration. See § V(A)(4), *infra*.

17 <sup>26</sup> The Court notes the responsive burden for a party in a tax  
18 case, see, e.g., *Greco v. United States*, 380 F. Supp. 2d 598 (M.D.  
19 Pa. 2005), and that an employer's self-serving characterization of  
20 a worker does not dictate the status of the worker. See generally  
21 *Seattle Opera v. N.L.R.B.*, 292 F.3d 757, 764 n. 8 (D.C. Cir. 2002)  
22 (noting that "if an employer could confer independent contractor  
23 [i.e., non-employee] status through the absence of payroll  
24 deductions there would be few employees falling under the  
25 protection of the Act."); see also *State Farm Fire & Cas. Co. v.*  
26 *Luciano's Landscaping Service, Inc.*, No. 97-2132, 1998 WL 103376 at  
27 \* 3 (E.D. Pa. Feb. 24, 1998) ("It would be both illogical, and quite  
28 possibly against public policy, to allow an employer's self-serving  
characterization of a worker to dictate the status of that worker  
[...]. [i]f such were the case, all an employer would have to do is  
label his workers 'casuals' or 'independent contractors' or some  
other handy euphemism, and by that simple act the employer could  
escape expenses for [all employer taxes]."). Although a close  
call, taking the evidence in Mr. Vacante's favor, there is a  
question of fact concerning whether Mr. Vacante treated his  
employees as independent contractors.

1 Federal Rules of Evidence, the Federal Rules of Civil Procedure,  
2 and the Rules of the United States District Court for the Eastern  
3 District of California ("Local Rules").<sup>27</sup>  
4

5 **5. Conclusion on the United States' Motion**

6 After viewing the entirety of the evidence in the Vacantes'  
7 favor, drawing all inferences in their favor, the Vacantes'  
8 evidence does not raise a genuine issue of fact on the issue of  
9 Form 1040 income tax liabilities for the 2000 and 2004 tax years.  
10 Summary judgment is GRANTED in favor of the United States on this  
11 issue.<sup>28</sup>

12 However, as to employment tax, Mr. Vacante has created a  
13 genuine dispute as to whether he treated his employees as  
14 independent contractors during the relevant tax periods. This  
15 issue must be determined by the trier of fact. The United States'  
16 motion is DENIED as to Mr. Vacante's employment tax liabilities -  
17

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18 <sup>27</sup> The Federal Rules of Civil Procedure are available at:  
19 <http://www.law.cornell.edu/rules/frcp/>. The Federal Rules of  
20 Evidence are available at: <http://www.law.cornell.edu/rules/fre/>.  
21 A copy of the Court's Local Rules may be obtained from the Clerk's  
22 Office.

23 <sup>28</sup> Pursuant to 26 U.S.C. §§ 6601(a) and (e)(2)(A), 6621, and  
24 6622, the United States is entitled to statutory interest on income  
25 taxes and associated penalties imposed as of the date of notice and  
26 demand, which accrues daily until paid in full. See *Purcell v.*  
27 *United States*, 1 F.3d 932, 943 (9th Cir. 1993). Once a court  
28 validates a tax assessment, awarding statutory interest is  
mandatory. See *id.* (noting that § 6601(e)(2)(A) is a "binding  
statutory directive" to award interest). Thus, the Court GRANTS  
summary judgment with respect to the statutory interest on the tax  
assessments and penalties described above and ORDERS that judgment  
be entered against Frank Vacante and Ute Vacante for those income  
tax liabilities and associated penalties plus statutory interest.

1 Forms 940 and 941 - for the 1993 and 1994 tax years.

2  
3 **B. Defendants' Motion for Summary Judgment**

4 Defendants move for summary judgment, arguing that they did  
5 not have the requisite control over CVIS's finances and employees  
6 to hold them liable. According to Defendants, the deposition  
7 transcripts of Mariela Perez, Dan Belew III, and Ira White  
8 demonstrate that they did not have the ability to pay CVIS's taxes,  
9 did not have knowledge of the past due amounts, and did not take  
10 part in the financial decisions of CVIS.<sup>29</sup> Defendants, however, do  
11 not attach the deposition transcripts of Mrs. Perez, Mr. Belew, or  
12 Mr. White; they also do not attach a separate statement of  
13 undisputed facts as required by Local Rule 56-260.<sup>30</sup>

14 The government primarily opposes Defendants' motion on grounds  
15 that it is unintelligible and does not comply with Local Rule 56-

16  
17  
18  
19 <sup>29</sup> Defendants also allege that the "Revenue Officer John  
20 Certini made with malice false and misleading statements," leading  
21 "Defendants [to] los[e] over one million dollars [...] and seven  
22 hundred thousand dollars in income." (Doc. 105, 4:3-4:14.)  
23 Defendants also include a prayer for "attorney's fees [and]  
24 damages." (Id. at 4:21.) The United States maintains that the  
25 "claim for damages should be denied because [Defendants] have not  
26 counterclaim[ed] for such a remedy, and so their claim is not part  
27 of this suit." (Doc. 128, 2:11-2:13.) The government is correct.  
28 Here, Defendants have yet to raise an affirmative cause of action  
against the United States. To the extent Defendants' motion raises  
affirmative claims, the motion is DENIED.

<sup>30</sup> Defendants' filing consists of a single four-page document,  
which, as best understood, challenges the government's attempt to  
collect employment taxes from Central Valley Insurance Services,  
Inc., one of the entities owned by Defendants.

1 260.<sup>31</sup> The government also maintains that there remains genuine  
2 issues of material fact concerning whether Defendants are  
3 "responsible parties" or "acted willfully" under 26 U.S.C. § 6672,  
4 the likely subjects of Defendants' motion.

5 Local Rule of Civil Procedure 56-260(a) provides, in part,  
6 that summary judgment motions shall be accompanied by "a statement  
7 of undisputed facts that shall enumerate discretely each of the  
8 specific material facts relied upon in support of the motion."  
9 E.D. Cal. R. 56-260(a). That rule also provides that the movant  
10 shall "cite the particular portions of any pleading, affidavit,  
11 deposition, interrogatory answer, admission, or other document  
12 relied upon to establish that fact." *Id.* Defendants' motion  
13 neither includes nor is accompanied by a separate statement of  
14 material facts. Since Defendants carry the burden of setting forth  
15 facts that establish a genuine issue of material fact, their  
16 failure to present those facts is fatal to their motion for summary  
17 judgment. The motion fails to comply with the requirements of  
18 Local Rule 56-260(a) and is DENIED.

19 Assuming, *arguendo*, that Defendants' motion was properly  
20 supported, there remains a genuine issue of material fact  
21 concerning whether the Vacantes are "responsible parties" or "acted  
22 willfully" under 26 U.S.C. § 6672. In their motion, Defendants  
23 argue that the "deposition testimony [of several former employees]  
24

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25 <sup>31</sup> Defendants' moving papers are severely lacking. Defendants  
26 fail to identify a subject(s) - or claim(s) - targeted by their  
27 motion and do not include a memorandum of points and authorities,  
28 a separate statement of undisputed facts, or supporting exhibits.  
In this regard the motion does not comply with Rule of Civil  
Procedure 7(b).

1 clearly shows that Defendants did not have the ability to pay over  
2 taxes of Central Valley Insurance, Inc." (Doc. 105, 1:17-1:19.)  
3 As best understood, this argument corresponds to the government's  
4 tax assessments against the Vacantes pursuant to 26 U.S.C. § 6672  
5 and, to a lesser degree, to the claim that the Vacantes are  
6 directly liable for the taxes of CVIS based on an alter ego theory.

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 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.

27 26 U.S.C. § 6672.  
28

1 For the purposes of § 6672, a "person" includes "an officer or  
2 employee of a corporation ... who ... is under a duty to perform  
3 the act in respect of which the violation occurs." 26 U.S.C. §  
4 6671(b). Thus, an individual is liable for a penalty under Section  
5 6672 if (1) he is a "responsible person"; and (2) if he acts  
6 willfully in failing to collect or pay over the withheld taxes.  
7 *Davis v. United States*, 961 F.2d 867, 869-70 (9th Cir. 1992).<sup>32</sup>

8  
9 1. Responsible Person

10 The Ninth Circuit has consistently identified persons who have  
11 "the final word as to what bills should or should not be paid, and  
12 when" as "responsible" persons under § 6672. *Purcell v. United*  
13 *States*, 1 F.3d 932, 936 (9th Cir. 1993). A person has the final  
14 word if that person had "the authority required to exercise  
15 significant control over the corporation's financial affairs,  
16 regardless of whether he exercised such control in fact." *Purcell*,  
17 1 F.3d at 937. In other words, responsibility is a matter of  
18 status, duty, and authority, not knowledge. *Davis*, 961 F.2d at 873  
19 (upholding the trial court's finding of "responsible person" based  
20 on the plaintiff's position as the president, member of the board,  
21 and major shareholder, even though the plaintiff had no knowledge  
22 of the tax default). "Authority turns on the scope and nature of  
23 an individual's power to determine how the corporation conducts its  
24 financial affairs; the duty to ensure that withheld employment

25  
26 <sup>32</sup> Defendants appear to argue that they cannot be held liable  
27 pursuant to § 6672 because they were not responsible persons and  
28 did not willfully fail to pay the delinquent trust fund taxes.  
(Doc. 105, 1:17-4:2.) The government disagrees, arguing there are  
factual disputes as to the Vacantes' culpability under § 6672.



1 taxes are paid over flows from the authority that enables one to do  
2 so." *Purcell*, 1 F.3d at 936.

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

15 The United States has submitted evidence that Defendants were  
16 owners of CVIS during the relevant tax periods, had sizeable  
17 entrepreneurial interests in the company, had check signing  
18 authority, controlled the financial affairs of the company, and  
19 were CVIS's only corporate officers. (United States' Statement of  
20 Facts in Support of Opposition to Motion for Summary Judgment, Doc.  
21 128-2, No. 4, 9.) There is also evidence in the record that Frank  
22 Vacante had the authority to hire and fire employees, which he  
23 exercised on a number of occasions. (*Id.* at 7, 10.) Ute Vacante  
24 also had explicit signature authority over CVIS's bank accounts.  
25 (*Id.*)

26 Significantly, Defendants do not offer any evidence that they  
27 lacked the authority to pay CVIS's taxes. See *Alsheskie v. United*  
28 *States*, 31 F.3d 837, 839 (9th Cir. 1994) (distinguishing the

1 district court's finding that the plaintiff was not a responsible  
2 party from a case where "the record contained no evidence that ...  
3 the responsible party was without authority to pay the taxes.").  
4 Defendants' arguments regarding their responsibility focus almost  
5 entirely on the delegation of responsibility to Ute Vacante's son,  
6 Dan Belew III. This argument is not well-taken. It is well-  
7 established that the duty to ensure that withholding taxes are  
8 collected and paid over to the government is nondelegable. See  
9 *Purcell*, 1 F.3d at 936 (responsibility to pay taxes cannot be  
10 delegated); *Keller v. United States*, 46 F.3d 851, 854 (8th Cir.  
11 1995) ("an otherwise responsible person does not avoid liability  
12 under section 6672 by delegating his authority to another.");  
13 *Thomsen v. United States*, 887 F.2d 12, 17 (1st Cir. 1989)  
14 ("delegation will not relieve one of responsibility; liability  
15 attaches to all those under the duty set forth in the statute").

16 The evidence introduced by the parties on the question of  
17 responsibility is conflicting and susceptible of at least two  
18 reasonable interpretations for the tax periods at issue.  
19 Defendants' motion is DENIED as to this issue.

## 20 21 2. Willfulness

22 In the Ninth Circuit, willfulness under § 6672 is defined as  
23 a "voluntary, conscious and intentional act to prefer other  
24 creditors over the United States." *Phillips v. United States*, 73  
25 F.3d 939, 942 (9th Cir. 1996) (quoting *Klotz v. United States*, 602  
26 F.2d 920, 923 (9th Cir. 1979)). The Ninth Circuit holds that "[i]f  
27 a responsible person knows that withholding taxes are delinquent,  
28 and uses corporate funds to pay other expenses..., our precedents

1 require that the failure to pay withholding taxes be deemed  
2 'willful.'" *Buffalow v. United States*, 109 F.3d 570, 573 (9th Cir.  
3 1997) (quoting *Phillips*, 73 F.3d at 942). The Ninth Circuit  
4 recognizes two ways by which the government can establish  
5 willfulness. First, the government may show that the responsible  
6 person had actual knowledge that payroll taxes were not being  
7 collected or paid over, and thereafter made payment to a non-IRS  
8 creditor. Second, a responsible person may be deemed "willful" if  
9 he or she acted in "reckless disregard of whether the taxes [were]  
10 being paid over." *Phillips*, 73 F.3d at 942 (stating that a  
11 "responsible person" is liable under the reckless disregard  
12 standard if he (1) clearly ought to have known that (2) there was  
13 a grave risk that withholding taxes were not being paid and if (3)  
14 he was in a position to find out for certain very easily.).

15 A review of the summary judgment evidence reveals a genuine  
16 and heated dispute on the ultimate issue of whether Defendants  
17 clearly ought to have known that there was a grave risk that  
18 withholding taxes were not being paid and if she was in a position  
19 to find out for certain very easily. The government contends that  
20 Frank Vacante acted with "reckless disregard" by failing to ensure  
21 that CVIS's taxes were paid after learning about its tax  
22 delinquency. (Doc. 128-2, No. 2.) To support its contention, the  
23 government relies on the fact an IRS Revenue Officer contacted Mr.  
24 Vacante over a dozen times to inform him of the delinquency. (Id.)  
25 In addition, Judgment was entered against Mr. Vacante in 2003  
26 concerning failure to pay trust fund recovery penalties for his  
27 business in 1989 and 1990. (Id.) According to the government, Mr.  
28 Vacante avoided paying the judgment against him, "chang[ing] the

1 name of the business to Central Valley and set[ting] up a  
2 figurehead to conceal his interest in the business." (Doc. 128,  
3 13:21-13:22.)

4 As to Ute Vacante, the government emphasizes that she was the  
5 chief financial officer of CVIS, had express signing authority, and  
6 certainly knew that the business had bounced a number of checks and  
7 was in financial distress. The government additionally points to  
8 the IRS Revenue Officer's dozen calls to the Vacantes, alerting  
9 them to the tax delinquency, and her marriage to Frank Vacante -  
10 who had previously been held liable under § 6672. These  
11 circumstances, the government argues, created a risk that CVIS was  
12 delinquent and made it incumbent upon Ute Vacante to ensure that  
13 the government was being paid before making payments to non-IRS  
14 creditors.

15 The government contends that this evidence creates a genuine  
16 issue of material fact as to willfulness and supports a denial of  
17 Defendants' summary judgment motion. The government is correct.  
18 A reasonable jury, considering all the evidence, could find that  
19 Frank and Ute Vacante were responsible persons and/or acted  
20 willfully as those terms are defined by § 6672. Defendants' motion  
21 for summary judgment is DENIED.

22  
23 C. Defendants' Motion to Dismiss

24 Defendants filed their motion to dismiss on December 16, 2009,  
25 two days after the December 14, 2009 deadline for the filing of  
26  
27  
28

1 dispositive motions set by the Amended Scheduling Order.<sup>33</sup> The  
2 Original Scheduling Order in this case set the deadline for filing  
3 dispositive motions on November 2, 2009. (Doc. 66.) On September  
4 11, 2009, the United States moved to extend discovery and modify  
5 the scheduling order. (Doc. 75.) Defendants opposed the motion,  
6 arguing that the United States already "had over eighteen thousand  
7 pages of documents [and] all credit card information Defendants  
8 have or can acquire." (Doc. 88.) The United States' motion was  
9 granted on September 11, 2009 and the dispositive motion deadline  
10 was continued to December 14, 2009. (Doc. 89.)

11 "Federal Rule of Civil Procedure 16 vests the district court  
12 with early control over cases 'toward a process of judicial  
13 management that embraces the entire pretrial phase, especially  
14 motions and discovery.'" *In re Arizona*, 528 F.3d 652, 657 (9th  
15 Cir. 2009) (quoting Fed. R. Civ. P. 16 advisory committee's note,

16  
17 <sup>33</sup> Attached to Defendants' Motion to Dismiss are the affidavits  
18 of Alice Nicastro, Dan W. Belew III, Michele Harvery, and Ira  
19 White. (Doc. 124, Exhs. 1, A-D.) Each affidavit is signed under  
20 penalty of perjury and challenges the statements attributed to them  
21 by Revenue Officer John Certini. For example, Mr. Belew states  
22 that "the statements attributed to me in [Certini's] report to  
23 appeal page 13 line 38d are not true [...] I have never been  
24 involved in an appeals hearing of any kind either in person or by  
25 phone." An unidentified excerpt, apparently page 12 of Mr.  
26 Certini's report (Bates Stamp US01035), is attached to Mr. Belew's  
27 affidavit:

28 He (Dan) further stated that the real owners are Frank  
and Ute Vacante (his mother and stepfather) and that  
he was nothing but a figurehead.

(Doc. 124, Exh. B.)

The affidavits of Alive Nicastro, Michele Harvery, and Ira  
White also challenge statements attributed to them by Mr. Certini,  
attaching the relevant excerpt to their signed affidavit. No other  
supporting evidence is provided.

1 1983 Amendment). Courts have "broad discretion in supervising the  
2 pretrial phase of litigation," including the authority to determine  
3 "the preclusive effect of a pretrial order." *Johnson v. Mammoth*  
4 *Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992) (quoting  
5 *Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 369 (9th Cir.  
6 1985)). It is not an abuse of discretion for a court to deny or  
7 strike a motion on the basis that it is untimely filed according to  
8 the timetable set by the scheduling order. *Id.* at 610.  
9 Nevertheless, before the final pretrial conference the scheduling  
10 order may be modified upon a showing of "good cause and with the  
11 judge's consent." Fed. R. Civ. P. 16(b)(4); see *Johnson*, 975 F.2d  
12 at 608 (noting that the deadlines set by the scheduling order  
13 govern the action "unless modified by the court"). The Rule 16  
14 "good cause" inquiry "primarily considers the diligence of the  
15 party seeking the [modification of the order]." *Johnson*, 975 F.2d  
16 at 609.

17 Defendants have not attempted to show that the pretrial  
18 schedule could not reasonably have been met despite their  
19 diligence. See *id.* (quoting advisory committee notes to Rule 16).  
20 In particular, Defendants do not provide a single reason for  
21 failing to comply with the Rule 16 Scheduling Order in this case.  
22 More problematic is that Defendants did not request an extension of  
23 the December 14, 2009 deadline despite previously objecting to  
24 Plaintiff's motion for an extension; they also filed the motion  
25 without seeking leave of Court. Defendants do not establish that  
26 their failure to follow the deadlines under the Modified Scheduling  
27 Order and Federal Rules of Civil Procedure was anything more than  
28 inadvertence - or something more flagrant. Plaintiff does not

1 provide a sufficient basis on which the Court may permit a late  
2 filing under Rule 16.

3       Allowing Defendants' motion to dismiss, without a showing of  
4 diligence or good cause, prejudices the United States and imposes  
5 on the management of the Court's docket. See *Wong*, 410 F.3d at  
6 1060 ("In these days of heavy caseloads, trial courts ... set  
7 schedules and establish deadlines to foster the efficient treatment  
8 and resolution of cases."); *Mammoth Recreations, Inc.*, 975 F.2d at  
9 610 ("Disregard[ing] the [scheduling] order would undermine the  
10 court's ability to control its docket, disrupt the agreed-upon  
11 course of the litigation, and reward the indolent and the  
12 cavalier.")

13       Defendants' motion to dismiss is also deficient under Rule  
14 7(b) of the Federal Rules of Civil Procedure. Rule 7(b) requires  
15 that all motions filed with the court detail with sufficient  
16 "particularity the grounds therefor." The specificity requirement  
17 of Rule 7(b) has generally been interpreted liberally. See *Intera*  
18 *Corp. v. Henderson*, 428 F.3d 605, 613 (6th Cir. 2005); see also *Roy*  
19 *v. Volkswagenwerk Aktiengesellschaft*, 781 F.2d 670, 670-71 (9th  
20 Cir. 1985). However, at a minimum, it must be applied so as to  
21 provide the opposing party with sufficient information to respond,  
22 and the Court with sufficient information to rule on the motion.  
23 *Registration Control Sys., Inc. v. Compusystems, Inc.*, 922 F.2d  
24 805, 808 (Fed. Cir. 1990). Defendants' motion does not satisfy  
25 this standard. At this time, it is not possible to reconcile  
26 Defendants' unintelligible arguments with the corresponding actions  
27 filed by the government.

28       In addition, as the government's opposition to Defendants'

1 motion to dismiss recognizes, Defendants have failed to show that  
2 they have exhausted the administrative remedies required by 26  
3 U.S.C. § 7433(d) and 26 C.F.R. § 301.7433-1(d)-(e). See 26 U.S.C.  
4 § 7433(d)(1) ("A judgment for damages shall not be awarded under  
5 subsection (b) unless the court determines that the plaintiff has  
6 exhausted the administrative remedies available to such plaintiff  
7 within the Internal Revenue Service."); see also 26 C.F.R. §  
8 301.7433-1(d)-(e) (detailing the procedures for a taxpayer to  
9 exhaust administrative remedies). While Defendants appear to argue  
10 that they exhausted their administrative remedies by corresponding  
11 with various IRS officials, a large volume of correspondence does  
12 not equate to exhaustion of remedies. See *id.* ("An administrative  
13 claim [...] shall be sent in writing to the Area Director, Attn:  
14 Compliance Technical Support Manager of the area in which the  
15 taxpayer currently resides."). Here, there is no evidence that  
16 Defendants filed any administrative claim(s) under 26 U.S.C. §  
17 7433(d) or Treasury Regulation § 301.7433-1(e).

18 Defendants' motion to dismiss is untimely and does not comply  
19 with Rule 7(b) of the Federal Rules of Civil Procedure. Defendants  
20 also fail to exhaust administrative remedies required by 26 U.S.C.  
21 § 7433(d). The motion is DENIED and the merits are not considered.

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///



1 V. CONCLUSION.

2 For the foregoing reasons:

3 (1) The government's motion for summary judgment is GRANTED  
4 in part and DENIED in part. Defendants fail to identify any facts  
5 rebutting the legitimacy of the government's Form 4340s as to the  
6 2000 and 2004 tax assessments. However, as to employment tax, a  
7 factual dispute exists whether and to what extent Mr. Vacante  
8 treated Ute Vacante, Dan Belew and/or Cynthia Burris as employees  
9 or independent contractors.

10  
11 (a) Defendant Frank Vacante is indebted to the United  
12 States for unpaid federal income tax liabilities for the tax year  
13 2000 and 2004 in the amount of \$11,360.75 as of December 1, 2009,  
14 plus further interest and statutory additions as allowed by law;

15  
16 (b) Defendant Ute Vacante is indebted to the United  
17 States for unpaid federal income tax liabilities for the tax year  
18 2000 and 2004 in the amount of \$11,360.75 as of December 1, 2009,  
19 plus further interest and statutory additions as allowed by law;

20  
21 (c) Mr. Vacante has created a genuine dispute as to  
22 whether he treated his employees as independent contractors during  
23 the relevant tax periods. This issue must be determined by the  
24 trier of fact. The United States' motion is DENIED on this issue.

25  
26 (2) Defendants' motion for summary judgment is DENIED as it  
27 fails to comply with the requirements of Local Rule 56-260(a).  
28 Additionally, a reasonable jury, considering all the evidence,

1 could find that Frank and Ute Vacante were responsible persons and  
2 acted willfully as those terms are defined by § 6672; and

3  
4 (3) Defendants' motion to dismiss is untimely and does not  
5 comply with Rule 7(b) of the Federal Rules of Civil Procedure. The  
6 motion is DENIED.

7  
8 The United States shall submit a form of order consistent  
9 with, and within five (5) days following electronic service of,  
10 this memorandum decision.

11  
12 IT IS SO ORDERED.

13 Dated: May 20, 2010

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE