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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA

8 CHARLES WAYNE UPTERGROVE, MARTHA
9 GENE UPTERGROVE,

10 Plaintiffs,

11 v.

12 UNITED STATES OF AMERICA, UNITED
13 STATES ATTORNEY MCGREGOR W. SCOTT,
14 TRIAL ATTORNEY G. PATRICK
JENNINGS, U.S. MARSHALS OFFICE,
MARILYN COLLINS, DOES 1-100,

15 Defendants.

1:08-CV-01800-OWW-SMS

MEMORANDUM DECISION
GRANTING DEFENDANTS' MOTION
TO DISMISS (DOC. 10-2)

16
17 I. INTRODUCTION

18 Plaintiffs Charles Wayne Uptergrove and Martha Gene
19 Uptergrove (collectively "Plaintiffs"), appearing pro se, filed
20 suit against the United States of America ("United States"),
21 United States Attorney McGregor Scott ("Scott"), Trial Attorney
22 G. Patrick Jennings with the Tax Division of the United States
23 Department of Justice ("Jennings"), the United States Marshals
24 Office ("U.S. Marshals"), Internal Revenue Service ("IRS")
25 employee Marilyn Collins ("Collins"), and Does 1-100
26 (collectively "Defendants"). The complaint brought under 42
27 U.S.C. § 1983 alleges that Defendants violated Plaintiffs'
28 Seventh Amendment rights. Plaintiffs seek no damages, but

1 request "equitable relief and injunctive relief against
2 defendants permanently restraining them from seizing and selling"
3 their home. (Doc. 1, Compl. at p. 13.)

4 Before the court for decision is Defendants' motion to
5 dismiss for lack of subject matter jurisdiction pursuant to
6 Federal Rule of Civil Procedure 12(b)(1) and for failure to state
7 a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).
8 The United States asserts that each defendant is entitled to
9 immunity from suit. Plaintiffs have not filed an opposition with
10 the court. Instead, Plaintiffs mailed a copy of their opposition
11 to the Fresno IRS office, which forwarded the opposition to
12 Defendants. Defendants attached Plaintiffs' opposition to their
13 reply brief, filed April 3, 2009, as Exhibit "A." (Doc. 12.)
14 Oral argument was heard on April 13, 2009; Plaintiffs did not
15 appear.

16 17 II. BACKGROUND

18 Plaintiffs' claim arises from facts relating to two prior
19 lawsuits. (Compl. ¶ 1.) The first lawsuit, *In re Charles*
20 *Uptergrove, DBA Urc Trucking*, No. LA 88-14691-NRR, involving
21 Plaintiff Charles Wayne Uptergrove ("Charles"), began as a
22 Chapter 7 bankruptcy proceeding, but was later converted to a
23 Chapter 11 bankruptcy proceeding. (*Id.*) In the second lawsuit,
24 *United States v. Uptergrove*, No. 1:06-CV-01630-AWI-LJO (E.D. Cal.
25 Sept. 24, 2008) ("*Uptergrove I*"), the United States sought to
26 reduce Plaintiffs' federal tax liabilities to judgment and
27 foreclose on real property owned by them. (Doc. 10-2 at 2.) Due
28 to Plaintiffs' refusal to cooperate during discovery, the

1 district court ordered sanctions and warned Plaintiffs that
2 failure to comply with the order could result in a default
3 judgment. (*Id.*) Plaintiffs did not comply with the order and a
4 default judgment was subsequently entered, ordering the sale of
5 real property to satisfy unpaid federal tax liabilities and
6 unpaid sanctions. (*Id.*) *Uptergrove I* is currently on appeal to
7 the Ninth Circuit. (*Id.*)

8 Plaintiffs allege here that in bringing *Uptergrove I*, Scott
9 and Jennings "intentionally, knowingly, willfully, falsified
10 factual allegations against [Plaintiff] Martha Uptergrove in
11 which they falsely alleged that she was owner, operator, or
12 employee, of a business called Ikon Roofing, and owed taxes from
13 income relating to said business" (Compl. ¶ 2.)

14 Plaintiffs allege that Martha Gene Uptergrove ("Martha") was not
15 involved with Ikon Roofing, rather, she was employed by the
16 Madera Water District. (Compl. ¶ 3.) Martha alleges that she
17 was terminated from the Madera Water District due to the alleged
18 unlawful levying from her paycheck by the IRS. (*Id.*) Martha
19 does not seek damages for the alleged termination.

20 Plaintiffs further allege that IRS Agent Collins falsely
21 represented that Martha was an owner of Ikon Roofing. (Compl. ¶¶
22 4, 5.) Plaintiffs allege that Collins' false statement prompted
23 the IRS to issue a wage levy order to Martha's employer, and the
24 seizing of Charles's property. (Compl. ¶ 5.) Plaintiffs also
25 allege that Defendant United States "intentionally omitted [and]
26 excluded . . . evidence . . ." in *Uptergrove I*. (Compl. ¶ 10.)

1 III. STANDARD OF DECISION

2 A. Subject Matter Jurisdiction - Fed. R. Civ. Proc.
3 12(b)(1)

4 A court may only exercise subject matter jurisdiction in an
5 action against the Federal Government where (1) a statutory
6 authority vests the district court with subject matter
7 jurisdiction; and (2) the United States has waived its sovereign
8 immunity. See *Alvarado v. Table Mountain Rancheria*, 509 F.3d
9 1008, 1016 (9th Cir. 2007). "Absent consent to sue, dismissal of
10 the action is required." *Hutchinson v. United States*, 677 F.2d
11 1322, 1327 (9th Cir. 1982).

12 B. Failure to State a Claim - Fed. R. Civ. Proc. 12(b)(6)

13 Federal Rule of Civil Procedure 12(b)(6) provides that a
14 motion to dismiss may be made if the plaintiff fails "to state a
15 claim upon which relief can be granted." In deciding whether to
16 grant a motion to dismiss, the court must "accept all factual
17 allegations of the complaint as true and draw all reasonable
18 inferences" in the light most favorable to the nonmoving party.
19 *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999); see also
20 *Rodriguez v. Panayiotou*, 314 F.3d 979, 983 (9th Cir. 2002). "To
21 avoid a Rule 12(b)(6) dismissal, a complaint need not contain
22 detailed factual allegations; rather, it must plead 'enough facts
23 to state a claim to relief that is plausible on its face.'" *Weber v. Dep't of Veterans Affairs*, 521 F.3d 1061 (9th Cir. 2008)
24 (citing *Bell Atl. v. Twombly*, 550 U.S. 544; 127 S. Ct. 1955
25 (2007) (rejecting interpretation of Rule 8 that permits dismissal
26 only when the plaintiff can prove "no set of facts" in support of
27 his claim). A court is not "required to accept as true
28

1 allegations that are merely conclusory, unwarranted deductions of
2 fact, or unreasonable inferences." *Sprewell v. Golden State*
3 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Something "more
4 than labels and conclusions" is needed to provide the grounds for
5 relief. *Bell Atl.*, 127 S. Ct. at 1965 (citing *Papasan v. Allain*,
6 478 U.S. 265, 286 (1986)).

7 The court need not accept as true allegations that
8 contradict facts which may be judicially noticed. See *Mullis v.*
9 *United States Bankr. Ct.*, 828 F.2d 1385, 1388 (9th Cir. 1987).
10 Matters of public record may be considered, including pleadings,
11 orders, and other papers filed with the court of records of
12 administrative bodies. See *Mack v. South Bay Beer Distrib.,*
13 *Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Allegations in the
14 complaint may be disregarded if contradicted by facts established
15 by exhibits attached to the complaint. *Sprewell*, 266 F.3d at
16 988. When ruling on a motion to dismiss, the court may consider
17 facts alleged in the complaint, documents attached to the
18 complaint when authenticity is not contested, and matters of
19 which the court may take judicial notice. *Parrino v. FHP, Inc.*,
20 146 F.3d 699, 705-06 (9th Cir. 1988).

21 Pro se complaints are held to less stringent standards than
22 formal pleadings by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520
23 (1972). A court must construe a pro se plaintiff's "inartful
24 pleading" liberally in determining whether a claim has been
25 stated, including pro se motions as well as complaints. *Zichko*
26 *v. Idaho*, 247 F.3d 1015, 1020 (9th Cir. 2001); *Eldridge v. Block*,
27 832 F.2d 1132, 1137 (9th Cir. 1987). This is especially true
28 when a plaintiff appears pro se in a civil rights case. *Ferdik*

1 v. *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). "Dismissal of
2 a *pro se* complaint without leave to amend is proper only if it is
3 absolutely clear that the deficiencies of the complaint could not
4 be cured by amendment." *Schucker v. Rockwood*, 846 F.2d 1202,
5 1203-04 (9th Cir. 1988).

6
7 IV. DISCUSSION

8 A. Collateral Attack / Anti-Injunction Act

9 Defendants argue that "Plaintiffs' Complaint is an attempt
10 to collaterally [attack] the judgment entered against them in
11 [*Uptergrove I*]." (Doc. 10-2 at 2.) In *Uptergrove I*, the United
12 States sought to reduce Plaintiffs' federal tax liabilities to
13 judgment and foreclose on real property owned by Plaintiffs.
14 (*Id.*) Due to Plaintiffs' refusal to cooperate during discovery,
15 the district court ordered sanctions and warned Plaintiffs that
16 failure to comply with the order could result in a default
17 judgment. (*Id.*) Plaintiffs did not comply with the order and a
18 default judgment was subsequently entered, ordering the sale of
19 real property to satisfy unpaid federal tax liabilities and
20 unpaid sanctions. (*Id.*) *Uptergrove I* is currently on appeal to
21 the Ninth Circuit. (*Id.*)

22 "The collateral attack doctrine precludes litigants from
23 collaterally attacking the judgments of other courts." *Rein v.*
24 *Providian Fin. Corp.*, 270 F.3d 895, 902 (9th Cir. 2001) (citing
25 *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995)). The United
26 States Supreme Court made clear:

27 [I]t is for the court of first instance to determine
28 the question of the validity of the law, and until its
decision is reversed for error by orderly review,

1 either by itself or by a higher court, its orders based
2 on its discretion are to be respected.

3 *Celotex*, 514 U.S. at 313 (quoting *Walker v. Birmingham*, 388 U.S.
4 307, 314 (1967) (quotations omitted).

5 This case is a collateral attack upon *Uptergrove I* because
6 the only relief sought here by Plaintiffs is equitable and
7 injunctive relief to restrain Defendants from "seizing and
8 selling the property" at issue in *Uptergrove I*. (Doc. 10-2 at
9 3.)

10 Plaintiffs argue that a judicially created exception to the
11 Anti-Injunction Act permits them to collaterally attack the prior
12 judgment. (Doc. 12-2 at 7.)¹ The Anti-Injunction Act, 26 U.S.C.
13 § 7421(a), bars lawsuits aimed at restraining the assessment or
14 collection of taxes.² Plaintiffs contend that an exception to
15 the Anti-Injunction Act, as provided in *Enochs v. Williams*
16 *Packing & Navigation Co., Inc.*, 370 U.S. 1, 7 (1962), allows them
17 to collaterally attack the judgment in *Uptergrove I*. (Doc. 12-2
18 at 14, 17.)

19 *Enochs* permits a lawsuit to enjoin collection of taxes if:
20 (1) "under no circumstances could the Government ultimately
21 prevail;" and (2) the taxpayer will suffer irreparable injury
22 without injunctive relief. *Enochs*, 370 U.S. at 7; see also *Bob*

23 ¹ Plaintiffs' arguments are derived from their opposition
24 submitted to the court via Defendants' reply brief. (See Doc.
25 12, Exhibit "A".)

26 ² The Anti-Injunction Act reads in pertinent part: "Except
27 as provided . . . no suit for the purpose of restraining the
28 assessment or collection of any tax shall be maintained in any
 court by any person, whether or not such person is the person
 against whom such tax was assessed." 26 U.S.C. § 7421(a).

1 *Jones Univ. v. Simon*, 416 U.S. 725, 742-46 (1974); *Elias v.*
2 *Connett*, 908 F.2d 521, 525 (9th Cir. 1990). A plaintiff has the
3 burden of pleading and proving facts to show that the government
4 cannot ultimately prevail. *Comm'r v. Shapiro*, 424 U.S. 614, 628-
5 29 (1976). The *Enochs* exception, however, is only applicable
6 during the pendency of the original tax collection action, i.e.,
7 *Uptergrove I*, and is only triggered when the government cannot
8 ultimately prevail. See *Enochs*, 370 U.S. at 7 (discussing the
9 exception in terms of the underlying tax collection action, i.e.,
10 the original proceeding). Plaintiffs cannot assert the *Enochs*
11 exception here because the government did prevail in *Uptergrove I*
12 (the original tax collection action), making it impossible for
13 them to establish that the government could not prevail in that
14 case.

15 Plaintiffs cannot use this lawsuit to collaterally attack
16 the judgment in *Uptergrove I*. While an appeal is pending, the
17 district court's judgment is the law of the case unless and until
18 reversal by the Court of Appeals. See *Celotex*, 514 U.S. at 313.
19 Accordingly, the relief Plaintiffs seek, an injunction against
20 foreclosure of their home, is barred. As to this form of relief,
21 Defendants' motion to dismiss is GRANTED WITH PREJUDICE.

22 Even if Plaintiffs sought damages or other forms of relief,
23 the analysis below reveals that any such claims are also barred.

24
25 B. Section 1983 Claim

26 Plaintiffs' complaint alleges a "Title 42 § 1983" claim
27 against the United States, Scott, Jennings, the U.S. Marshals
28 Office, and Collins. Each of these defendants is either a

1 federal entity or an employee of a federal agency.

2 Section 1983 provides:

3 Every person who, under color of any statute,
4 ordinance, regulation, custom or usage, of any State or
5 Territory or the District of Columbia, subjects, or
6 causes to be subjected, any citizen of the United
7 States or other person within the jurisdiction thereof
8 to the deprivation of any rights, privileges, or
9 immunities secured by the Constitution and laws, shall
10 be liable to the party injured in an action at law,
11 suit in equity, or other proper proceeding for redress
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13 42 U.S.C. § 1983 (emphasis added). Section 1983 "deals only with
14 those deprivations of rights that are accomplished under the
15 color of 'any State or Territory.'" *Dist. of Columbia v. Carter*,
16 409 U.S. 418, 424 (1973). Section 1983 does not apply to
17 "actions of the Federal Government and its officers[, they] are
18 at least facially exempt from its proscriptions." *Id.* at 424-25;
19 see also *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1200 (9th
20 Cir. 1975) (finding a § 1983 action against federal officials
21 improper). Federal officials may be subject to suit for
22 deprivations of civil rights under *Bivens v. Six Unknown Named*
23 *Agents*, 403 U.S. 388, 397 (1971). Here, however, all of the
24 named defendants are, for the reasons set forth below, immune
25 from suit.

26 C. Defendants' Immunities

27 The United States argues that each defendant is immune from
28 suit. (Doc. 10-2.)

1. United States

Defendant United States contends that, as a sovereign, it is
immune from suit. (Doc. 10-2 at 5.) A court may exercise

1 subject matter jurisdiction in an action against the United
2 States where (1) a statutory authority vests the district court
3 with subject matter jurisdiction; and (2) the United States has
4 waived its sovereign immunity. See *Alvarado v. Table Mountain*
5 *Rancheria*, 509 F.3d 1008, 1016 (9th Cir. 2007).

6 "The United States is a sovereign and, as such, is immune
7 from suit without its prior consent." *Hutchinson*, 677 F.2d at
8 1327 (citing *United States v. Shaw*, 309 U.S. 495, 500-01 (1940)).
9 Here, Plaintiffs identify no statutory authority waiving the
10 United States' sovereign immunity, nor does the record indicate
11 that the United States has otherwise waived its immunity.

12 As to defendant United States, Defendants' motion to dismiss
13 for lack of subject matter jurisdiction is GRANTED WITH
14 PREJUDICE.

15 2. U.S. Marshals Office

16 Defendants argue that the "U.S. Marshals," as an agency of
17 the sovereign, is also immune from suit. "[S]overeign immunity
18 shields the Federal Government and its agencies from suit." *Fed.*
19 *Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994) (emphasis
20 added). As an agency of the United States, the U.S. Marshals
21 Service, is entitled to sovereign immunity. *Delgado v. Detention*
22 *Center*, 839 F. Supp. 345, 346 (E.D. Pa. 1993); see also *Komongnan*
23 *v. U.S. Marshals Service*, 471 F. Supp. 2d 1, 4 (D. D.C. 2006)
24 (dismissing action against U.S. Marshals Service in a *Bivens*
25 action because, as an agency of the United States, the U.S.
26 Marshals are immune from suit). Plaintiffs have not alleged, and
27 the record does not indicate, that the U.S. Marshals have
28 consented to suit, which leaves the U.S. Marshals' immunity

1 intact.

2 Defendants' motion to dismiss for lack of subject matter
3 jurisdiction, as to the U.S. Marshals, is GRANTED WITH PREJUDICE.

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5 3. U.S. Attorney McGregor Scott, Trial Attorney G.
6 Patrick Jennings, and IRS Official Marilyn Collins
- Official Capacity Claims

7 Claims against government officials acting in their official
8 capacity are essentially suits against the United States. See
9 *Consejo de Desarrollo Economico de Mexicali, A.C. v. United*
10 *States of America* ("Consejo"), 482 F.3d 1157, 1173 (9th Cir.
11 2007). In *Consejo*, the Ninth Circuit provided:

12 [A] Bivens action can be maintained against a defendant
13 in her or her individual capacity only, and not in his
14 or her official capacity This is because a
15 Bivens suit against a defendant in his or her official
16 capacity would merely be another way of pleading an
17 action against the United States, which would be barred
18 by the doctrine of sovereign immunity

19 (internal citations and quotations omitted). Moreover, "[t]he
20 bar of sovereign immunity cannot be avoided merely by naming
21 officers and employees of the United States as defendants."
22 *Hutchinson*, 677 F.2d at 1327.

23 Here, Scott, Jennings, and Collins are employees of the
24 United States: Scott is a U.S. Attorney, Jennings is a Trial
25 Attorney with the Tax Division of the U.S. Department of Justice,
26 and Collins is an IRS Agent. Any official capacity claims
27 against these individuals are claims against the sovereign and
28 are barred.

29 Defendants' motion to dismiss for lack of subject matter
30 jurisdiction, as to Scott, Jennings, and Collins acting in their
31 official capacities, is GRANTED WITH PREJUDICE.

1 4. U.S. Attorney McGregor Scott and Trial Attorney G.
2 Patrick Jennings - Individual Capacity Claims

3 Scott and Jennings, as government prosecutors, are entitled
4 to absolute immunity from suit. See *Fry v. Melaragno*, 939 F.2d
5 832, 837 (9th Cir. 1991). *Fry* provides: "If the government
6 attorney is performing acts 'intimately associated with the
7 judicial phase' of the litigation, that attorney is entitled to
8 absolute immunity from damage liability." *Id.* "Absolute
9 immunity is thus necessary to assure that judges, advocates, and
10 witnesses can perform their respective functions without
11 harassment or intimidation." *Butz v. Economou*, 438 U.S. 478, 512
12 (1978). The judicial process contains safeguards to ensure that
13 advocates are restrained, that is, they are restrained by their
14 professional obligations and by the judicial adjudicative process
15 itself. *Id.* Accordingly, "federal prosecutors are absolutely
16 immune from claims of malicious prosecution." *Flood v.*
17 *Harrington*, 532 F.2d 1248, 1250-51 (9th Cir. 1976).

18 Here, Plaintiffs allege that Scott and Jennings made
19 fraudulent statements in the complaint and pleadings in
20 *Uptergrove I*. Specifically, Plaintiffs contend that Scott and
21 Jennings knowingly misrepresented the fact that Martha was not an
22 owner of Ikon Roofing, and as such, was not liable for federal
23 income taxes arising from that business. This alleged misconduct
24 engaged in by Scott and Jennings arises from the natural course
25 of litigation, i.e., filing the initial complaint, which involves
26 alleging facts in the pleadings, and subsequent pleadings.
27 Accordingly, both Scott and Jennings, as government prosecutors
28 are entitled to absolute immunity.

1 Defendants' motion to dismiss for failure to state a claim
2 as to Scott and Jennings, as they are entitled to absolute
3 immunity, is GRANTED WITH PREJUDICE.

4 5. IRS Agent Marilyn Collins- Individual Capacity
5 Claim

6 Defendants argue that insofar as Collins is sued in her
7 individual capacity, she is not subject to suit. (Doc. 10-2 at
8 9.) *Bivens* relief is not available for "allegedly
9 unconstitutional actions of IRS officials engaged in tax
10 assessment and collection." *Adams v. Johnson*, 355 F.3d 1179,
11 1188 (9th Cir. 2004). In *Wages v. I.R.S.*, 915 F.2d 1230, 1235
12 (9th Cir. 1990), the plaintiff alleged that IRS agents engaged in
13 fraudulent and intimidating conduct. The court stated that it
14 has "never recognized a constitutional violation arising from the
15 collection of taxes." *Id.*

16 Here, Plaintiffs allege that Collins made false statements
17 in her assessments of Plaintiffs' tax liability, as the plaintiff
18 attempted to do in *Wages*. Allegations of fraudulent conduct will
19 not overcome the settled rule that a *Bivens* action cannot be
20 brought for the assessment and collection of taxes, as the
21 Internal Revenue Code provides adequate alternative remedies for
22 alleged misconduct.

23 Defendants' motion to dismiss for failure to state a claim
24 is GRANTED WITH PREJUDICE.

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1 V. CONCLUSION

2 For these reasons, Defendants' motion to dismiss for lack of
3 subject matter jurisdiction is GRANTED, as to the United States,
4 the U.S. Marshals, and Scott, Jennings, and Collins as federal
5 officials acting in their official capacity. Defendants' motion
6 to dismiss for failure to state a claim is GRANTED, as to Scott,
7 Jennings, and Collins, acting in their individual capacity. As
8 to Does 1-100, Plaintiffs have failed to identify any additional
9 defendants. Defendants' motion to dismiss as to Does 1-100 is
10 GRANTED WITHOUT PREJUDICE.

11 Defendants shall lodge a form of order confirming these
12 findings with five (5) days following electronic service of this
13 memorandum decision.

14
15 SO ORDERED

16 Dated: April 17, 2009

17
18 /s/ Oliver W. Wanger
19 Oliver W. Wanger
20 United States District Judge
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