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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOAQUIN SERRANO REYES,)	1:09-cv-00319-LJO-SMS
)	
Plaintiff,)	FINDINGS AND RECOMMENDATIONS TO
)	DISMISS SOME CLAIMS WITHOUT LEAVE
v.)	TO AMEND, TO DEEM THE COMPLAINT
)	AMENDED TO REFLECT SUBSTITUTION
)	OF THE UNITED STATES AS THE
DEPARTMENT OF THE TREASURY,)	DEFENDANT, AND TO DIRECT SERVICE
INTERNAL REVENUE SERVICE,)	ON DEFENDANT UNITED STATES OF
)	AMERICA
Defendants.)	
)	
)	

Plaintiff is a prisoner who is proceeding pro se and in forma pauperis with an action for damages and other relief concerning alleged civil rights violations and tax refunds. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b) and Local Rules 72-302 and 72-304. Pending before the Court is Plaintiff's complaint, filed on February 20, 2009.

I. Screening the Complaint

A. Legal Standards

The Court must screen complaints brought by prisoners seeking relief against a governmental entity or officer. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion

1 thereof if the Court determines that an allegation of poverty is
2 untrue or that the action is 1) frivolous or malicious, 2) fails
3 to state a claim upon which relief may be granted, or 3) seeks
4 monetary relief from a defendant who is immune from such relief.
5 28 U.S.C. §§ 1915A(b), 1915(e)(2).

6 "Rule 8(a)'s simplified pleading standard applies to all
7 civil actions, with limited exceptions," none of which applies to
8 section 1983 actions. Swierkiewicz v. Sorema N. A., 534 U.S. 506,
9 512 (2002); Fed. R. Civ. P. 8(a). Pursuant to Rule 8(a), a
10 complaint must contain "a short and plain statement of the claim
11 showing that the pleader is entitled to relief" Fed. R.
12 Civ. P. 8(a). "Such a statement must simply give the defendant
13 fair notice of what the plaintiff's claim is and the grounds upon
14 which it rests." Swierkiewicz, 534 U.S. at 512. However, "the
15 liberal pleading standard... applies only to a plaintiff's
16 factual allegations." Neitze v. Williams, 490 U.S. 319, 330 n.9
17 (1989).

18 Although a complaint attacked by a Rule 12(b)(6) motion to
19 dismiss does not need detailed factual allegations, a plaintiff
20 does not meet his or her obligation to provide the grounds of
21 entitlement to relief by supplying only conclusions, labels, or a
22 formulaic recitation of the elements of a claim. Bell Atlantic
23 Corp. v. Twombly, 127 S.Ct. 1955, 1964-65 (2007). Factual
24 allegations must be sufficient, when viewed in light of common
25 experience, to raise a right to relief above the speculative
26 level and to provide plausible grounds to suggest and infer the
27 element, or to raise a reasonable expectation that discovery will
28 reveal evidence of the required element. Bell, 127 S.Ct. at 1965.

1 In reviewing a complaint under this standard, the Court
2 must accept as true the allegations of the complaint in question,
3 Hospital Bldg. Co. v. Trustees of Rex Hospital, 425 U.S. 738, 740
4 (1976), construe the pro se pleadings liberally in the light most
5 favorable to the Plaintiff, Resnick v. Hayes, 213 F.3d 443, 447
6 (9th Cir. 2000), and resolve all doubts in the Plaintiff's favor,
7 Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). Once a claim has
8 been stated adequately, it may be supported by showing any set of
9 facts consistent with the allegations of the complaint, and it
10 may not be dismissed based on a court's assessment that the
11 plaintiff will fail to find evidence to support the allegations
12 or prove the claim to the satisfaction of the finder of fact.
13 Bell, 127 S.Ct. at 1969.

14 If the Court determines that the complaint fails to state a
15 claim, leave to amend should be granted to the extent that the
16 deficiencies of the complaint can be cured by amendment. Lopez v.
17 Smith, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc). Dismissal
18 of a pro se complaint for failure to state a claim is proper only
19 where it is obvious that the Plaintiff cannot prevail on the
20 facts that he has alleged and that an opportunity to amend would
21 be futile. Lopez v. Smith, 203 F.3d at 1128.

22 A claim is frivolous if it lacks an arguable basis either in
23 law or fact. Neitzke v. Williams, 490 U.S. 319, 324 (1989). A
24 frivolous claim is based on an inarguable legal conclusion or a
25 fanciful factual allegation. Id. A federal court may dismiss a
26 claim as frivolous if it is based on an indisputably meritless
27 legal theory or if the factual contentions are clearly baseless.
28 Id.

1 The test for malice is a subjective one that requires the
2 Court to determine whether the applicant is proceeding in good
3 faith. Kinney v. Plymouth Rock Squab. Co., 236 U.S. 43, 46
4 (1915); see Wright v. Newsome, 795 F.2d 964, 968 n. 1 (11th Cir.
5 1986). A lack of good faith is most commonly found in repetitive
6 suits filed by plaintiffs who have used the advantage of cost-
7 free filing to file a multiplicity of suits. A complaint may be
8 inferred to be malicious if it suggests an intent to vex the
9 defendants or abuse the judicial process by relitigating claims
10 decided in prior cases, Crisafi v. Holland, 655 F.2d 1305, 1309
11 (D.C.Cir. 1981); if it threatens violence or contains
12 disrespectful references to the Court, id.; or if it contains
13 untrue material allegations of fact or false statements made with
14 knowledge and an intent to deceive the Court, Horsev v. Asher,
15 741 F.2d 209, 212 (8th Cir. 1984).

16 B. Plaintiff's Complaint

17 Plaintiff alleges that he was denied refunds on his income
18 tax for tax years 2001 (\$4008.00), 2002 (\$85.00), and 2004
19 (\$128.45). He alleges that he was entitled to the earned income
20 tax credit. He states generally that he filed claims, pertinent
21 documents are attached to the complaint, he appealed the decision
22 within the Internal Revenue Service (IRS), and his claim was
23 denied.¹ At this point in the proceeding, and in the context of
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25 ¹A plaintiff may attach a copy of a document to the complaint and
26 incorporate it by reference; such a document become a part of the pleading for
27 all purposes.. Fed. R. Civ. P. 10(c). Attaching a defendant's document as an
28 exhibit to the complaint does not necessarily establish the truth of the
defendant's unilateral statements; rather, it is necessary to consider why a
plaintiff attached the documents, who authored the documents, and the
reliability of the documents. Northern Indiana Gun & Outdoor Shows, Inc. v.
City of South Bend, 163 F.3d 449, 455 (7th Cir. 1998). Further, when the
document in question is not the very subject of the claim, a plaintiff is not
required to adopt the entire exhibit as true. Id.

1 construing this pro se plaintiff's complaint, the Court considers
2 the attachments for the purpose of establishing Plaintiff's
3 filing of a claim and the denial of the claim for a refund.

4 The attached documents reflect that a claim with respect to
5 the 2001 tax refund was made and was disallowed (Cmplt. p. 6); on
6 June 11, 2008, Plaintiff was informed by the appeals officer that
7 review of his claim had been completed; there was no basis to
8 allow the claim; and Plaintiff could pursue the matter by filing
9 suit in the United States District Court within two years of
10 August 31, 2007. (Cmplt. p. 20.)

11 C. Civil Rights Action pursuant to 42 U.S.C. § 1983

12 Plaintiff's complaint is stated on a civil rights complaint
13 form. Further, Plaintiff alleges that the defendants in the suit
14 include not only the Internal Revenue Service, but also numerous
15 named employees of the IRS who work as operations managers,
16 appeals officers, field compliance service workers, etc. (Cmplt.
17 pp. 2-3.)

18 The Civil Rights Act under which this action was filed
19 provides:

20 Every person who, under color of [state law]...
21 subjects, or causes to be subjected, any citizen of the
22 United States... to the deprivation of any rights,
23 privileges, or immunities secured by the
24 Constitution... shall be liable to the party injured in
25 an action at law, suit in equity, or other proper
26 proceeding for redress.

27 42 U.S.C. § 1983. To state a claim pursuant to § 1983, a
28 plaintiff must plead that defendants acted under color of state
law at the time the act complained of was committed and that the
defendants deprived the plaintiff of rights, privileges, or
immunities secured by the Constitution or laws of the United

1 States. Gibson v. United States, 781 F.2d 1334, 1338 (9th Cir.
2 1986).

3 There is no allegation in the complaint before the Court
4 that any Defendant was acting under color of state law. Further,
5 there are no facts that would support an inference of action
6 under color of state law.

7 It is established that § 1983 provides no claim against
8 federal officers acting under color of federal law. Billings v.
9 United States, 57 F.3d 797, 801 (9th Cir. 1995).

10 Thus, any claim pursuant to § 1983 must be dismissed.
11 Further, because the named defendants are federal officers, any
12 opportunity to amend with respect to them would be futile.

13 Accordingly, it will be recommended that the allegations be
14 dismissed without leave to amend.

15 D. Sovereign Immunity

16 1. The United States

17 The United States, as a sovereign entity, is immune from
18 suit except when it consents to be sued; the terms of its consent
19 to be sued in a court define that court's jurisdiction to
20 entertain the suit. United States v. Dalm, 494 U.S. 596, 608
21 (1990). It is the plaintiff's burden to establish the
22 jurisdiction of the court, and thus to show a waiver of sovereign
23 immunity. See McNutt v. General Motors Acceptance Corp., 298 U.S.
24 178, 188 (1936).

25 Title 26 U.S.C. § 7422(a) grants a waiver of sovereign
26 immunity to permit jurisdiction under 28 U.S.C. § 1346² for tax

27
28 ² Section 1346(a)(1) provides that district courts shall have original jurisdiction of civil actions against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected.

1 refund actions. Section 7422(a) provides:

2 (a) No suit prior to filing claim for refund.--No
3 suit or proceeding shall be maintained in any court for
4 the recovery of any internal revenue tax alleged to
5 have been erroneously or illegally assessed or
6 collected, or of any penalty claimed to have been
7 collected without authority, or of any sum alleged to
8 have been excessive or in any manner wrongfully
9 collected, until a claim for refund or credit has been
10 duly filed with the Secretary, according to the
11 provisions of law in that regard, and the regulations
12 of the Secretary established in pursuance thereof.

13 A refund claim is a prerequisite to jurisdiction; a United States
14 District Court does not have jurisdiction over a tax refund suit
15 unless the taxpayer has not only paid all assessments in full,
16 but has also filed a claim for a refund with the IRS. Thomas v.
17 United States, 755 F.2d 728, 729 (9th Cir. 1985); Yuen v. United
18 States, 825 F.2d 244, 245 (9th Cir. 1987).

19 Here, the allegations in the complaint and the documents
20 attached to the complaint support an inference that Plaintiff
21 filed a refund claim (Cmplt. p. 6), that his claim was
22 disallowed, and that he had two years to sue after August 31,
23 2007 (Cmplt. pp. 20). It may further be inferred that Plaintiff
24 paid the tax. (Cmplt. p. 13.)

25 Accordingly, it appears that Plaintiff has stated a claim
26 against the United States for a refund with respect to taxes paid
27 for tax year 2001. Although it is unclear whether his claim
28 extends to the tax years 2002 and 2004, the Court concludes that
29 Plaintiff has stated a claim at least with respect to tax year
30 2001, and thus service against the United States is appropriate
31 as is further discussed below.

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1 waiver of sovereign immunity with respect to the named employees
2 or officials. Likewise, because one cannot assert a Bivens claim
3 against the United States or an agency thereof, Plaintiff has not
4 established a waiver of sovereign immunity with respect to the
5 United States or the Internal Revenue Service, an agency thereof.

6 The Court concludes that an opportunity to amend would be
7 futile because of the lack of a viable legal theory to support
8 the alleged claim against any defendant.

9 Accordingly, it will be recommended that any Bivens action
10 against the named employees, the United States, or the IRS be
11 dismissed without leave to amend.

12 E. Qualified Immunity of Officers

13 The Court also concludes that there would also be qualified
14 immunity for any individual officers because any officers'
15 conduct would not violate a clearly established statutory or
16 constitutional right which a reasonable person would know; this
17 would be the case even if the agents had violated IRS
18 administrative or statutory provisions. See Wages v. United
19 States, 915 F.2d 1230, 1235 (9th Cr. 1990); Mayben v. Barnes, 290
20 F.Supp.2d 1169, 1173; Short v. Richardson, 1995 WL 810023, *4-5
21 (E.D. WA, Nov. 21, 1995).

22 F. Amendment of the Complaint to Name the United
23 as a Defendant

24 Title 26 U.S.C. § 7422(a) and (f) provide that a suit or
25 proceeding in court for recovery of any internal revenue tax
26 alleged to have been erroneously or illegally assessed or
27 collected is permitted, but it may only be maintained against the
28 United States and not against any officer or employee of the
United States. Section 7422(f)(2) provides in pertinent part:

1 If a suit or proceeding brought in a United States
2 district court against an officer or employee of the
3 United States (or former officer or employee) or his
4 personal representative is improperly brought
5 solely by virtue of paragraph (1), the court shall
6 order, upon such terms as are just, that the pleadings
7 be amended to substitute the United States as a
8 party for such officer or employee as of the time such
9 action commenced, upon proper service of process on
10 the United States.

11 The Court concludes that pursuant to the statute, the complaint
12 must be amended to substitute the United States as a party.

13 Normally an amendment to a complaint must be accomplished by
14 filing an entirely new complaint that is complete in itself.

15 Local Rule 15-220. However, the Court may grant a plaintiff
16 approval to the contrary. Id. Further, a court has inherent power
17 to control its docket and the disposition of its cases with
18 economy of time and effort for both the court and the parties.

19 Landis v. North American Co., 299 U.S. 248, 254-255 (1936);

20 Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992). The Court
21 has broad discretion to interpret and apply its local rules.

22 Dulange v. Dutro Construction, Inc., 183 F.3d 916, 919 n. 2 (9th
23 Cir. 1999).

24 Here, the statute expressly directs the Court to order
25 amendment of the pleadings to effectuate substitution of the
26 correct party. Pursuant to the statute, the local rule, and the
27 Court's inherent power to control its docket, it will be
28 recommended that the complaint BE DEEMED AMENDED to reflect
substitution of the United States as the Defendant in this
action.

29 II. Service of the Complaint

30 Because Plaintiff has stated a cognizable claim against
31 Defendant United States of America, it will be recommended that

1 service of the complaint on Defendant United States of America be
2 directed, including the sending of service documents to
3 Plaintiff, Plaintiff's completing the service documents and
4 returning them to the Clerk of the Court, the Clerk's sending the
5 completed service documents to the Marshal for service, the
6 Marshal's service of the summons, complaint, and any related
7 documents on Defendant United States of America, and the
8 Marshal's filing a return of service.

9 III. Recommendation

10 Accordingly, it IS RECOMMENDED that

11 1) Plaintiff's claim pursuant to 42 U.S.C. § 1983 against
12 all defendants BE DISMISSED WITHOUT LEAVE TO AMEND; and

13 2) Plaintiff's claim pursuant to Bivens v. Six Unknown Nmed
14 Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971)
15 against the United States, the Internal Revenue Service, or any
16 IRS employees, including but not limited to Jon Schwartz,
17 Operations Manager; Kathleen M. Woekel, Department Manager;
18 Virginia Araiza, employee and Appeals Officer; Rosalind C.
19 Kochmanski, Field Director and Accounts Manager; Jeff Stetina,
20 Director of Field Compliance Services; and Dorothy M. Baylis,
21 Operations Manager, BE DISMISSED WITHOUT LEAVE TO AMEND; and

22 3) The complaint BE DEEMED AMENDED to reflect substitution
23 of the United States as the Defendant in this action upon proper
24 service of process upon the United States; and

25 4) Plaintiff's complaint BE SERVED on Defendant United
26 States of America; and

27 5) Service be effected by Plaintiff, the Clerk, and the
28 Marshal as follows:

1 a) The Clerk of the Court shall send Plaintiff one USM-
2 285 form, one summons, a Notice of Submission of Documents form,
3 an instruction sheet, and a copy of the complaint filed on
4 February 20, 2009;

5 b) Within THIRTY (30) DAYS from the date of this order,
6 Plaintiff shall complete the attached Notice of Submission of
7 Documents and submit the completed Notice to the Court with the
8 following documents:

9 1. One completed summons;

10 2. One completed USM-285 form for the Defendant
11 listed above; and

12 3. Two copies of the endorsed complaint filed on
13 February 20, 2009;

14 c) Plaintiff need not attempt service on defendants and
15 need not request waiver of service; and

16 d) Upon receipt of the documents described above, the
17 Clerk of the Court SHALL FORWARD them to the United States
18 Marshal to serve the above-named defendant pursuant to Federal
19 Rule of Civil Procedure 4 without payment of costs; and

20 e) Upon receipt of the documents from the Clerk of the
21 Court, the United States Marshal shall:

22 1) Serve process and a copy of this order upon the
23 defendant pursuant to Rule 4 of the Federal Rules of Civil
24 Procedure; and

25 2) Within ten days after service is effected, the
26 United States Marshal shall file the return of service for the
27 defendant, along with evidence of any attempts to secure a waiver
28 of service of process and of the costs subsequently incurred in

1 effecting service on said defendant. Said costs shall be
2 enumerated on the USM-285 form and shall include the costs
3 incurred by the Marshal's office for photocopying additional
4 copies of the summons and complaint and for preparing new USM-285
5 forms, if required.

6 **Plaintiff's failure to comply with this order will**
7 **result in a recommendation to dismiss this action for**
8 **failure to obey this Court's order. Local Rule 11-110.**

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10 IT IS SO ORDERED.

11 **Dated: April 9, 2009**

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE

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