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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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

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

1 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion
2 thereof if the Court determines that an allegation of poverty is
3 untrue or that the action is 1) frivolous or malicious, 2) fails
4 to state a claim upon which relief may be granted, or 3) seeks
5 monetary relief from a defendant who is immune from such relief.
6 28 U.S.C. §§ 1915A(b), 1915(e)(2).

7 "Rule 8(a)'s simplified pleading standard applies to all
8 civil actions, with limited exceptions," none of which applies to
9 section 1983 actions. Swierkiewicz v. Sorema N. A., 534 U.S. 506,
10 512 (2002); Fed. R. Civ. P. 8(a). Pursuant to Rule 8(a), a
11 complaint must contain "a short and plain statement of the claim
12 showing that the pleader is entitled to relief" Fed. R.
13 Civ. P. 8(a). "Such a statement must simply give the defendant
14 fair notice of what the plaintiff's claim is and the grounds upon
15 which it rests." Swierkiewicz, 534 U.S. at 512. However, "the
16 liberal pleading standard... applies only to a plaintiff's
17 factual allegations." Neitze v. Williams, 490 U.S. 319, 330 n.9
18 (1989).

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

1 reveal evidence of the required element. Bell, 127 S.Ct. at 1965.

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

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

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

1 Id.

2 The test for malice is a subjective one that requires the
3 Court to determine whether the applicant is proceeding in good
4 faith. Kinney v. Plymouth Rock Squab. Co., 236 U.S. 43, 46
5 (1915); see Wright v. Newsome, 795 F.2d 964, 968 n. 1 (11th Cir.
6 1986). A lack of good faith is most commonly found in repetitive
7 suits filed by plaintiffs who have used the advantage of cost-
8 free filing to file a multiplicity of suits. A complaint may be
9 inferred to be malicious if it suggests an intent to vex the
10 defendants or abuse the judicial process by relitigating claims
11 decided in prior cases, Crisafi v. Holland, 655 F.2d 1305, 1309
12 (D.C.Cir. 1981); if it threatens violence or contains
13 disrespectful references to the Court, id.; or if it contains
14 untrue material allegations of fact or false statements made with
15 knowledge and an intent to deceive the Court, Horsev v. Asher,
16 741 F.2d 209, 212 (8th Cir. 1984).

17 B. Plaintiff's Complaint

18 Plaintiff alleges that he was denied refunds on his income
19 tax for tax years 2001 (\$4008.00), 2002 (\$85.00), and 2004
20 (\$128.45). He alleges that he was entitled to the earned income
21 tax credit. He states generally that he filed claims, pertinent
22 documents are attached to the complaint, he appealed the decision
23 within the Internal Revenue Service (IRS), and his claim was
24 denied.¹ At this point in the proceeding, and in the context of

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26 ¹A plaintiff may attach a copy of a document to the complaint and
27 incorporate it by reference; such a document become a part of the pleading for
28 all purposes.. Fed. R. Civ. P. 10(c). Attaching a defendant's document as an
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

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
29 law at the time the act complained of was committed and that 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 defendants deprived the plaintiff of rights, privileges, or
2 immunities secured by the Constitution or laws of the United
3 States. Gibson v. United States, 781 F.2d 1334, 1338 (9th Cir.
4 1986).

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

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

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

15 Accordingly, it will be recommended that the allegations be
16 dismissed without leave to amend.

17 D. Sovereign Immunity

18 1. The United States

19 The United States, as a sovereign entity, is immune from
20 suit except when it consents to be sued; the terms of its consent
21 to be sued in a court define that court's jurisdiction to
22 entertain the suit. United States v. Dalm, 494 U.S. 596, 608
23 (1990). It is the plaintiff's burden to establish the
24 jurisdiction of the court, and thus to show a waiver of sovereign
25 immunity. See McNutt v. General Motors Acceptance Corp., 298 U.S.
26 178, 188 (1936).

27 Title 26 U.S.C. § 7422(a) grants a waiver of sovereign
28

1 immunity to permit jurisdiction under 28 U.S.C. § 1346² for tax
2 refund actions. Section 7422(a) provides:

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

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

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

21 Accordingly, it appears that Plaintiff has stated a claim
22 against the United States for a refund with respect to taxes paid
23 for tax year 2001. Although it is unclear whether his claim
24 extends to the tax years 2002 and 2004, the Court concludes that
25 Plaintiff has stated a claim at least with respect to tax year
26 2001, and thus service against the United States is appropriate

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 as is further discussed below.

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4 2. IRS Employees

5 Plaintiff has sued employees of the IRS.³ Generally,
6 sovereign immunity does not bar damage actions against federal
7 officials in their individual capacity for violation of an
8 individual's constitutional rights. Bivens v. Six Unknown Nmed
9 Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971).
10 However, the Ninth Circuit has not recognized a constitutional
11 violation from the collection of taxes. Wages v. Internal Revenue
12 Service, 915 F.2d 1230, 1235 (9th Cir. 1990) (holding that a suit
13 based on a complaint of allegedly fraudulent and intimidating
14 conduct of individual IRS employees was foreclosed by Congress's
15 having provided the remedy of suing the government for a refund
16 of improperly collected taxes). Indeed, it has been held that
17 allegations of negligent misapplication of federal law and
18 regulations and wilful disregard of law and regulations do not
19 state a claim because the remedy provided by § 7433 for damages
20 for unauthorized collection is the exclusive remedy for relief.
21 Mayben v. Barnes, 290 F.Supp.2d 1169, 1173 (E.D.CA 2003).

22 Further, it is established that a Bivens claim cannot be
23 asserted against the United States or an agency thereof. F.D.I.C.
24 v. Meyer, 510 U.S. 471, 484-86 (1994); Cato v. United States, 70
25 F.3d 1103, 1110-11 (9th Cir. 1995).

27 ³ Plaintiff sues Nancy Jones, Operations Manager; Jon Schwartz, Operations Manager; Kathleen M.
28 Woekel, Department Manager; Virginia Araiza, employee and Appeals Officer; Rosalind C. Kochmanski, Field
Director and Accounts Manager; Jeff Stetina, Director of Field Compliance Services; and Dorothy M. Baylis,
Operations Manager. (Cmplt. pp. 2-3.)

1 Because there is no recognized constitutional claim against
2 federal employees or officers for a wrongful failure to refund
3 taxes, Plaintiff has not alleged sufficient facts to show a
4 waiver of sovereign immunity with respect to the named employees
5 or officials. Likewise, because one cannot assert a Bivens claim
6 against the United States or an agency thereof, Plaintiff has not
7 established a waiver of sovereign immunity with respect to the
8 United States or the Internal Revenue Service, an agency thereof.

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

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

15 E. Qualified Immunity of Officers

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

25 F. Amendment of the Complaint to Name the United
26 as a Defendant

27 Title 26 U.S.C. § 7422(a) and (f) provide that a suit or
28 proceeding in court for recovery of any internal revenue tax
alleged to have been erroneously or illegally assessed or

1 collected is permitted, but it may only be maintained against the
2 United States and not against any officer or employee of the
3 United States. Section 7422(f)(2) provides in pertinent part:

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

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

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

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

22 Landis v. North American Co., 299 U.S. 248, 254-255 (1936);
23 Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992). The Court
24 has broad discretion to interpret and apply its local rules.

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

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

1 II. Service of the Complaint

2 Because Plaintiff has stated a cognizable claim against
3 Defendant United States of America, it will be recommended that
4 service of the complaint on Defendant United States of America be
5 directed, including the sending of service documents to
6 Plaintiff, Plaintiff's completing the service documents and
7 returning them to the Clerk of the Court, the Clerk's sending the
8 completed service documents to the Marshal for service, the
9 Marshal's service of the summons, complaint, and any related
10 documents on Defendant United States of America, and the
11 Marshal's filing a return of service.

12 III. Recommendation

13 Accordingly, it IS RECOMMENDED that

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

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

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

28 4) Plaintiff's complaint BE SERVED on Defendant United

1 States of America; and

2 5) Service be effected by Plaintiff, the Clerk, and the
3 Marshal as follows:

4 a) The Clerk of the Court shall send Plaintiff one USM-
5 285 form, one summons, a Notice of Submission of Documents form,
6 an instruction sheet, and a copy of the complaint filed on
7 February 20, 2009;

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

12 1. One completed summons;

13 2. One completed USM-285 form for the Defendant
14 listed above; and

15 3. Two copies of the endorsed complaint filed on
16 February 20, 2009;

17 c) Plaintiff need not attempt service on defendants and
18 need not request waiver of service; and

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

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

25 1) Serve process and a copy of this order upon the
26 defendant pursuant to Rule 4 of the Federal Rules of Civil
27 Procedure; and

28 2) Within ten days after service is effected, the

1 United States Marshal shall file the return of service for the
2 defendant, along with evidence of any attempts to secure a waiver
3 of service of process and of the costs subsequently incurred in
4 effecting service on said defendant. Said costs shall be
5 enumerated on the USM-285 form and shall include the costs
6 incurred by the Marshal's office for photocopying additional
7 copies of the summons and complaint and for preparing new USM-285
8 forms, if required.

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

12 This report and recommendation is submitted to the United
13 States District Court Judge assigned to the case, pursuant to the
14 provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 72-304 of the
15 Local Rules of Practice for the United States District Court,
16 Eastern District of California. Within thirty (30) days after
17 being served with a copy, any party may file written objections
18 with the court and serve a copy on all parties. Such a document
19 should be captioned "Objections to Magistrate Judge's Findings
20 and Recommendations." Replies to the objections shall be served
21 and filed within ten (10) court days (plus three days if served
22 by mail) after service of the objections. The Court will then
23 review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636
24 (b) (1) (C). The parties are advised that failure to file
25 objections within the specified time may waive the right to
26 appeal the District Court's order. Martinez v. Ylst, 951 F.2d
27 1153 (9th Cir. 1991).

28 Plaintiff is admonished not to attempt to file an amended

1 complaint as Plaintiff's recourse is to object to these findings
2 and recommendations. Plaintiff is further admonished that this
3 Court will strike any amended complaint filed without the Court's
4 specific grant of permission to file an amended complaint.

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6 IT IS SO ORDERED.

7 **Dated:** April 14, 2009

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE

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