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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

PUONGPUN SANANIKONE,  
Plaintiff,

No. 2:07-cv-01434-MCE-EFB

v.

MEMORANDUM AND ORDER

UNITED STATES OF AMERICA,  
Defendant.

AND RELATED COUNTERCLAIMS

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Plaintiff Puongpun Sananikone ("Sananikone"), a former official of American Steel Frame, Inc. ("ASFI") has sued the government for (1) a refund of taxes that were assessed against and collected from him; and (2) the abatement of the Trust Fund Recovery Penalty under 26 U.S.C. § 6672 ("TFRP") that was imposed upon him. (ECF No. 1.)

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1 In its Answer (ECF No. 9), Defendant/Counterclaimant United  
2 States ("United States" or "government") counterclaimed against  
3 Counterclaim Defendant Jacob Intveld ("Intveld"), another ASFI  
4 executive, to reduce to judgment an outstanding tax assessment  
5 made against him pursuant to the TFRP for ASFI's withholding  
6 income and social security taxes ("trust fund taxes"). Intveld  
7 answered the United States' Counterclaim and counterclaimed for a  
8 refund of an overpayment of employment taxes and the abatement of  
9 the TFRP for the taxable periods ending June 30, 2000, September  
10 30, 2000, December 31, 2000, and June 30, 2001. (ECF No. 21.)

11 Presently before the Court is a Motion for Summary Judgment  
12 brought by the United States against Intveld pursuant to Federal  
13 Rule of Civil Procedure Rule 56.<sup>1</sup> (ECF No. 85.) For the reasons  
14 set forth below, the United States' Motion will be denied.<sup>2</sup>

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### BACKGROUND<sup>3</sup>

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18 ASFI was a commercial and residential light-gauge steel-  
19 truss manufacturing and installation company based in Stockton,  
20 California.

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24 <sup>1</sup> Unless otherwise noted, all future references to Rule or  
Rules are to the Federal Rules of Civil Procedure.

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26 <sup>2</sup> Because oral argument will not be of material assistance,  
the Court orders this matter submitted on the briefs. E.D. Cal.  
Local Rule 230(g).

27

28 <sup>3</sup> The factual assertions in this section are found in the  
non-moving party's Mem. P. & A. Opp'n Mot. Summ. J. (ECF No. 87)  
unless otherwise specified.

1 In February, 2000, ASFI hired Intveld as its Vice President of  
2 Manufacturing and Operations ("Operations VP"). Intveld's duties  
3 and responsibilities were solely in the production area, relating  
4 to the operations of the manufacturing processes. He did not  
5 hire or fire any employees. He reported to Paul Ta ("Ta"),  
6 Executive Vice President and Chief Executive Officer of ASFI.

7 On February 17, 2000, the ASFI Board of Directors ("Board")  
8 authorized Intveld as a signatory on ASFI's checking account.  
9 Intveld did not learn of this authorization, nor act upon it,  
10 until June, 2000, when Ta asked him to sign some checks. Also  
11 during February of 2000, the Board gave Intveld specific  
12 authority to negotiate a sale of ASFI's stock to Dietrich  
13 Industries. No sale, however, transpired from those  
14 negotiations. Intveld's specific authority in that regard  
15 terminated after sixty days.

16 On May 31, 2000, Intveld became President of ASFI, with the  
17 understanding that he would be President in name only and his  
18 duties at ASFI would not change.<sup>4</sup> Following his appointment as  
19 President, Intveld reported to both Ta and [Board Chairman]  
20 Sananikone. Because ASFI's anti-fraud policy required two  
21 signatures on all business checks written, Intveld, as an  
22 authorized signatory, often signed checks presented to him.

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26 <sup>4</sup> After several attempts by Sananikone to persuade Intveld  
27 to accept the position of President, Intveld agreed on the  
28 condition that he would be named President "only for marketing  
and client relationship reasons," so ASFI could capitalize on  
Intveld's prior industry-wide relationships.

1 However, in all instances Intveld claims he neither prepared the  
2 checks nor exercised any authority over which checks were later  
3 released for payment. Intveld did not have any knowledge of what  
4 happened to the checks after he signed them. In November, 2000,  
5 Intveld was appointed as a member of ASFI's Board. He attended  
6 four board meetings while employed by ASFI and gave a  
7 "President's Report" at each of them.

8 In January, 2001, ASFI's bookkeeper, Charlene Amarante  
9 ("Amarante") informed Intveld for the first time that payroll tax  
10 returns had not been filed for the second, third, and fourth  
11 quarters of 2000 and asked him to sign them. Intveld told  
12 Amarante that "preparing and signing payroll tax returns were  
13 outside his authority" and immediately contacted Sananikone to  
14 apprise him of the delinquent returns. Mem. P. & A. Opp'n Mot.  
15 Summ. J. 7. Sananikone told Intveld that he would "speak to Ta  
16 and take care of it." Id.

17 According to Intveld, Ta occasionally showed him a list of  
18 suppliers and asked that he identify those suppliers that had to  
19 be paid in order to avoid halting production. Intveld indicated  
20 which suppliers met that criteria and gave the list back to Ta.  
21 Intveld never made any decisions about which creditors to pay.  
22 The list did not include any creditors other than production  
23 suppliers. In February, 2001, Intveld used his personal credit  
24 card to cover payroll when Amarante informed him that Ta failed  
25 to deposit funds needed to cover payroll checks.

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1           During the second quarter of 2001, Ta and Amarante attempted  
2 to negotiate a settlement of past due trust fund taxes by meeting  
3 with J.K. Harris. They were told that ASFI had to pay the trust  
4 fund taxes for the next two quarters as they became due and J.K.  
5 Harris would attempt to negotiate a settlement with the Internal  
6 Revenue Service ("IRS") for the remaining delinquent periods.  
7 Intveld never met with anyone regarding the delinquent trust fund  
8 taxes or negotiated with anyone to settle the debt. When Ta  
9 refused to pay the taxes for the first quarter of 2001, Amarante  
10 informed Intveld. Dr. Nguyen Vo ("Vo"), a shareholder and  
11 director of ASFI, met with Intveld and Ta and instructed Ta to  
12 sign the tax return and accompanying check for payment. Intveld  
13 witnessed Ta's signature on both.

14           On July 10, 2001, prior to a Board meeting, Intveld  
15 attempted to resign from ASFI because he anticipated that Ta  
16 would again refuse to pay the delinquent second quarter's trust  
17 fund taxes. During the meeting, Ta indeed refused to pay them.  
18 "Sananikone and Vo assured Intveld that they would take care of  
19 [T]a and the payroll tax issue." Mem. P. & A. Opp'n Mot. Summ.  
20 J. 8. Intveld resigned in August, 2001, citing the company's  
21 ongoing delinquent taxes as the reason. Intveld was asked to  
22 continue working at ASFI until a new president was transitioned.  
23 He agreed to do so. Intveld left ASFI in September of 2001.

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1 Genuine factual issues must exist that "can be resolved only by a  
2 finder of fact, because they may reasonably be resolved in favor  
3 of either party." Id. at 250. In judging evidence at the  
4 summary judgment stage, the court does not make credibility  
5 determinations or weigh conflicting evidence. See T.W. Elec. v.  
6 Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630-631 (9th Cir.  
7 1987), citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio  
8 Corp., 475 U.S. 574, 587 (1986).

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10 **ANALYSIS**

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12 On February 25, 2004, the United States, through its agent,  
13 the Secretary of the Treasury, made an assessment against Intveld  
14 pursuant to the TFRP for the tax periods ended June 30, 2000,  
15 September 30, 2000, December 31, 2000, and June 30, 2001. The  
16 assessment was made due to Intveld's "willful failure to collect,  
17 truthfully account for, and pay over the withheld Trust Fund  
18 taxes of [ASFI]." On April 14, 2004, Intveld filed a Formal  
19 Written Appeal and Protest. He filed an IRS Form 843 Claim for  
20 Refund and Request for Abatement for the abovementioned periods  
21 on January 10, 2008. The government alleges that Intveld is  
22 liable for the tax assessment because as President of ASFI from  
23 May 2000 until at least August 2001, he bore the responsibility  
24 to ensure the corporation paid its required trust fund taxes.  
25 Intveld asserts twelve affirmative defenses in his Answer. (ECF  
26 No. 21.) Intveld acknowledges that he was an officer of ASFI  
27 during the abovementioned periods, but denies being responsible  
28 for the corporation's unpaid trust fund taxes.

1 In his Answer, Intveld counterclaims against the United States  
2 for (1) the refund of taxes collected from him and (2) the  
3 abatement of the TFRP imposed upon him under 26 U.S.C. § 6672.  
4

5 **A. Responsible Person Under 26 U.S.C. § 6672**  
6

7 Employers are required to withhold federal income and social  
8 security taxes from employees' wages for each pay period and  
9 remit those withheld taxes to the IRS. See 26 U.S.C. §§ 3102(a),  
10 3402(a); see also Davis v. United States, 961 F.2d 867, 869  
11 (9<sup>th</sup> Cir. 1992). Employers hold the withheld amounts in trust  
12 for the government between the time the taxes are withheld from  
13 the employees and the time the employer remits them to the IRS.  
14 26 U.S.C. § 7501. Employers may not use withheld funds to pay  
15 other business expenses. See 26 U.S.C. §§ 3102(b), 3403,  
16 7501(a). Regardless of whether or not the employer actually  
17 remits the withheld taxes to the IRS, employees are credited with  
18 the amounts for income tax and social security purposes. See  
19 Slodov v. United States, 436 U.S. 238, 243 (1978); Davis,  
20 961 F.2d at 869. To prevent the government's loss of withheld  
21 amounts not paid by the employer but credited to the employee,  
22 26 U.S.C. § 6672 provides that:

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, or willfully  
27 attempts in any manner to evade or defeat any such tax  
or payment thereof, shall, in addition to other  
penalties provided by law, be liable for a penalty  
equal to the total amount of the tax evaded, or not  
collected, or not accounted for and paid over.

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1 26 U.S.C. § 6672(a). It is well-settled law that a person liable  
2 under this section need not be a person who performs all three  
3 functions (collecting, accounting for, and paying over), but  
4 rather need only be a person responsible for the collection of  
5 third-party taxes. Slodov, 436 U.S. at 250.

6 There is a two-step inquiry when determining liability under  
7 Section 6672. First, a court must determine whether the assessed  
8 person meets the "responsible person" test. If that test is met,  
9 a court must then determine whether the responsible person  
10 "willfully fail[ed] to collect, ...account for, and pay over the  
11 tax[es]." § 6672(a). The government bears the initial burden of  
12 proof when it brings suit to collect taxes. Palmer v. United  
13 States, 116 F.3d 1309, 1312 (9th Cir. 1997). However, there is a  
14 presumption of correctness applied to tax assessments, so long as  
15 such assessments are supported by a "minimal fact foundation."  
16 Id. Here, the United States has established its prima facie case  
17 through its production of IRS Form 4340, Certificates of  
18 Assessments and Payments. See Koff v. United States, 3 F.3d  
19 1297, 1298 (9th Cir. 1993); Hughes v. United States, 953 F.2d  
20 531, 535 (9th Cir. 1992). The burden of persuasion accordingly  
21 shifts to Intveld to prove that either (1) he is not a  
22 responsible person under the statute; or (2) he did not willfully  
23 fail to collect, account for, or pay over the trust fund taxes.

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1 To prove Intveld was a responsible person under the statute,  
2 the government relies on Purcell v. United States, 1 F.3d 932  
3 (9th Cir. 1993). There, the United States Court of Appeals for  
4 the Ninth Circuit held that if a person "had the authority  
5 required to exercise significant control over the corporation's  
6 financial affairs, regardless of whether he exercised such  
7 control in fact," then that person was "responsible" under the  
8 statute. Id. at 937. The government also cites a long line of  
9 cases establishing the factors courts use when determining  
10 whether a particular person had "significant control," including:

- 11 1. The ability to sign checks on behalf of the  
12 corporation or to prevent a check's issuance;
- 13 2. The authority to control distributions of payroll;
- 14 3. The authority to control payroll accounts;
- 15 4. The authority and control to pay the payroll  
16 taxes;
- 17 5. The authority to sign and prepare corporate tax  
18 returns;
- 19 6. The authority to hire and fire employees;
- 20 7. The authority to control the financial affairs of  
21 the corporation;
- 22 8. An individual's status as an officer, shareholder,  
23 or director of the corporation; and
- 24 9. An individual's entrepreneurial stake in the  
25 corporation.

26 See Mem. of P. & A. Supp. Mot. Summ. J. 21 (internal citations  
27 omitted).

28 The government offers numerous facts to prove Intveld  
exercised significant control over ASFI for the tax periods in  
question. However, in assessing the propriety of summary  
judgment, the court must credit all inferences supported by [the  
non-moving party's] evidence. Blackhorn v. City of Orange,  
485 F.3d 463, 470 (9th Cir. 2007), (quoting Anderson v. Liberty  
Lobby, Inc., 477 U.S. at 255).

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1 There is no dispute that from May 31, 2000 until August 2001,  
2 Intveld held the title of President of ASFI. It is also  
3 undisputed that the Board gave Intveld check-signing authority on  
4 February 17, 2000. While the Board's action and the date are not  
5 in dispute, Intveld argues that this does not prove significant  
6 control because he did not even learn of his authority to sign  
7 checks until June 2000. More importantly, all checks Intveld  
8 signed were returned to Ta, who decided which ones to release for  
9 payment. Intveld argues that while he physically signed the  
10 checks to fulfill ASFI's anti-fraud policy requiring two  
11 signatures on every check, he did not have the authority to  
12 determine which checks would actually be released for payment.

13 Although the government claims that Intveld had the  
14 authority to hire and fire employees and supervised approximately  
15 twenty-five manufacturing employees, Intveld denies hiring or  
16 firing anyone at ASFI. The government nonetheless argues that  
17 Intveld possessed the authority to control the financial affairs  
18 of ASFI because he held the title of President and performed  
19 duties relating to that title, such as giving "President's  
20 Reports" to the Board during quarterly meetings. The government  
21 cites a document titled "Job Duties of President of ASFI," in  
22 which the following duties are listed: "[e]valuate techniques and  
23 strategies to minimize the company's tax liabilities,...[r]eview  
24 monthly financial statements for all department activities,...and  
25 [c]oordinate and review an overall compensation plan." Intveld  
26 challenges the document's authenticity and claims it lacks  
27 evidentiary foundation and therefore should not be considered by  
28 the Court.

1 He claims he held the title of President only for marketing,  
2 client relationship and industry name recognition purposes, and  
3 contends his role as President conferred no greater authority  
4 beyond what he possessed previously as Operations VP of ASFI.

5 The United States, on the other hand, maintains that Intveld  
6 regularly met with Schuler Homes, ASFI's largest customer,  
7 proving he exercised significant authority over ASFI. Intveld  
8 explains that before being appointed President he was asked to  
9 meet with Schuler Homes because he had a positive relationship  
10 with Schuler from past business dealings with them. The  
11 government also points to Intveld's involvement with ASFI's  
12 financing when Intveld signed a promissory note with a creditor  
13 for \$15,000 and later wrote that same creditor asking for an  
14 extension of the note's terms. Intveld claims, in response, that  
15 he was not involved in ASFI's financing in any way. The only  
16 document he signed regarding financing was an extension of an  
17 instrument previously negotiated by others at ASFI. Ta told him  
18 to sign the documents, and he did as he was told. Additionally,  
19 and as a fundamental matter, the United States claims that the  
20 office of President of ASFI had inherent financial control, as  
21 stated in the document titled "Job Duties of President of ASFI."  
22 See supra. Intveld claims his duties at ASFI did not change when  
23 he went from being Operations VP to President.

24 As further evidence of Intveld's inherent financial control,  
25 the government contends that Amarante regularly prepared a list  
26 of ASFI's suppliers for Intveld, who would select which creditors  
27 would be paid. For a period of time, Intveld and Amarante would  
28 sign checks "For Disbursement Approval."

1 Intveld disputes this and says he was asked by Ta to indicate the  
2 suppliers on a list whose product was necessary to avoid a halt  
3 in the plant's production. The list was returned to Ta, as were  
4 the signed checks. Only Amarante wrote "For Disbursement  
5 Approval" on the checks, and she did so at Ta's direction.

6 Finally, the United States argues that while Intveld may not  
7 have obtained possession of stock in ASFI, he was promised stock  
8 as part of an anticipated sale of ASFI to another company. In  
9 response, Intveld simply points to the undisputed fact that he  
10 was never an investor in ASFI and never owned stock in the  
11 corporation.

12 Taking the evidence in the light most favorable to Intveld,  
13 the trier of fact may conclude that he was not a "responsible  
14 person" who exercised "significant control" over the corporation  
15 under Section 6672. As the starkly contrasting arguments  
16 outlined above illuminate, any number of disputed facts on the  
17 issue of Intveld's true authority prevent the government's motion  
18 from being granted.

19  
20 **B. Willful Failure to Truthfully Collect, Account for, or**  
21 **Pay Over Trust Fund Taxes Under 26 U.S.C. § 6672**

22 The Ninth Circuit has "construed the term 'willfulness' for  
23 purposes of failing to pay over withholding taxes as a  
24 'voluntary, conscious and intentional act to prefer other  
25 creditors over the United States.'" Phillips v. United States,  
26 73 F.3d 939, 942 (9th Cir. 1996) (quoting Klotz v. United States,  
27 602 F.2d 920, 923 (9th Cir. 1979); Davis v. United States,  
28 961 F.2d 867, 871 (9th Cir. 1992)).

1 It distinguishes "reckless disregard" from actual knowledge of  
2 whether the trust fund taxes are being paid, saying reckless  
3 disregard may sufficiently establish willfulness. Id. (citing  
4 Sorenson v. United States, 521 F.2d 325, 329 (9th Cir. 1975);  
5 Teel v. United States, 529 F.2d 903, 905 (9th Cir. 1976).  
6 Recklessness will be found if a responsible person "fails to  
7 investigate or correct mismanagement after being notified of a  
8 default in the payment of withholding tax." Phillips, 73 F.3d at  
9 943. However, the government must prove more than mere  
10 negligence. Klotz v. United States, 602 F.2d at 924.

11 The government contends that "Intveld knew that ASFI owed  
12 federal payroll taxes at least as early as January 2001." Mem.  
13 P. & A. Supp. Mot. Summ. J. 25. In order to allege liability for  
14 taxes owed before that date, it relies on Davis, 961 F.2d at 876,  
15 which held that a responsible person's willful actions can make  
16 him responsible for taxes that accrued earlier than when he  
17 became aware of the delinquency. In Davis, the court held that  
18 use of after-acquired funds to pay a corporate taxpayer's  
19 commercial debts by the same persons who were responsible for the  
20 corporation's failure to collect and pay withholding taxes in the  
21 first instance, as opposed to new management, gives rise to  
22 liability for the "responsible person" penalty of Section 6672.  
23 Here, Intveld neither decided the application of after-acquired  
24 receipts towards existing commercial debts, nor directed which  
25 creditors were to be paid. Therefore, Davis is not analogous.

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1           The United States also argues that Intveld's failure to  
2 investigate and correct ASFI's failure to pay its payroll taxes  
3 and failure to use funds received by ASFI during 2001 to pay the  
4 delinquent trust fund taxes constitutes reckless disregard. That  
5 reckless disregard, in turn, establishes willfulness under the  
6 statute with respect to all of the tax periods in dispute. See  
7 Phillips, 73 F.3d at 942; see also Greenberg v. United States,  
8 46 F.3d 239, 244. This case, however, is clearly distinguishable  
9 on the facts from both Phillips and Greenberg. In both those  
10 cases, the person in question had unrestricted access to  
11 corporate funds with which to pay the delinquent taxes. Both  
12 persons were either aware or should have been aware of the trust  
13 fund tax delinquency, based upon their respective roles and  
14 direct authority in their respective organizations. Intveld, on  
15 the other hand, is not in the same situation. He neither  
16 controlled the bank account funds (either incoming or outgoing),  
17 nor directed who should be paid and when. Since the Court must  
18 credit all inferences supported by the non-moving party's  
19 evidence when deciding a motion for summary judgment, see supra,  
20 it finds that the government has not established the requisite  
21 reckless disregard in failing Intveld's alleged failure to pay  
22 the delinquent trust fund taxes.

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