



1 Presently before the court is plaintiff's motion for partial summary judgment, filed  
2 November 22, 2013, which seeks to reduce to judgment federal tax liabilities assessed against  
3 defendants.<sup>3</sup> (ECF No. 148.) On December 5, 2013, defendants filed a written opposition to  
4 plaintiff's motion arguing, among other things, that the court should dismiss the motion for being  
5 untimely filed. (ECF No. 155.) On December 12, 2013, the court ordered plaintiff to show cause  
6 why the court should deem plaintiff's motion timely filed and ordered defendant to file a  
7 declaration stating whether he was prejudiced by plaintiff's delay in filing its motion. (ECF No.  
8 156.) Plaintiff filed a response to the court's December 12, 2013 order and defendants filed a  
9 declaration of prejudice. (ECF Nos. 157, 158.) On January 27, 2014, the court discharged its  
10 order to show cause, deemed plaintiff's motion timely filed, and ordered defendants to file an  
11 amended opposition that complied with the requirements of Rule 56 of the Federal Rules of Civil  
12 Procedure and Local Rule 260(b), including but not limited to the filing of a separate Statement of  
13 Disputed Facts. (ECF No. 159.) Defendants filed an amended opposition on February 25, 2014,  
14 which primarily consists of arguments recycled from defendants' previous declaration of  
15 prejudice and fails to include a Statement of Disputed Facts. (ECF No. 161.) Plaintiff filed a  
16 reply on March 4, 2014. (ECF No. 163.)

17 The court heard this matter on its May 8, 2014 law and motion calendar. Attorney Guy  
18 Patrick Jennings appeared on behalf of plaintiff. James Molen, who is proceeding without an  
19 attorney, failed to appear at the hearing.<sup>4</sup>

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20 Orbin Molen Limited Partnership.

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22 <sup>2</sup> This action was referred to the undersigned pursuant to Eastern District Local Rule 302(c)(21).  
(ECF No. 11.)

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24 <sup>3</sup> Plaintiff only seeks summary judgment with respect to the issue of whether the tax assessments  
25 made against defendants should be reduced to judgment and recognizes that the following two  
26 disputed issues remain for trial: "(1) whether James Molen obtained a refund in the first quarter of  
27 2000 by fraud, and (2) whether the federal tax liens may be enforced against the Molen residence,  
28 held in the name of Black Hole Adventures Trust, as the nominee, alter ego, or fraudulent  
transferee of the Molens." (ECF No. 148-1 at 3.)

<sup>4</sup> Defendants' recent filings reflect that Sandra Molen is deceased. (See ECF Nos. 134, 158, 161,  
164 (all noting that Sandra Molen is "deceased" in the party caption).) The effect of her alleged

1 The undersigned has fully considered the parties' briefs, the parties' oral arguments, and  
2 appropriate portions of the record. For the reasons that follow, the undersigned recommends that  
3 plaintiff's motion for partial summary judgment be granted in full.

4 I. Plaintiff's Motion for Partial Summary Judgment

5 Plaintiff requests entry of summary judgment against defendants for tax liabilities that  
6 have accrued against them because of their failure to pay employment taxes due on the wages  
7 paid to employees in their flower shop and filing of frivolous tax returns that reported no income.  
8 Specifically, plaintiff "requests entry of judgment against James O. Molen in the amount of  
9 \$194,025.86 for unpaid federal employment tax and \$5,843.85 for frivolous return penalties, plus  
10 additional interest and other statutory additions that have accrued since November 30, 2013" for  
11 the tax periods including all quarters of 2000, 2001, 2002, 2003, the first and fourth quarters of  
12 2004, as well as for frivolous return penalties assessed for 1997 through 2004.<sup>5</sup> (ECF No. 148-1  
13 at 2, 11.) It further "requests entry of judgment against Sandra Molen in the amount of  
14 \$3,867.27, for frivolous return penalties [assessed against her from 1998 through 2004], plus  
15 additional interest and other statutory additions that have accrued since November 30, 2013."  
16 (Id.) Finally, it "requests that judgment be entered against the James Orbin Molen Limited  
17 Partnership in the amount of \$19,092.67 plus additional interest and other statutory additions that  
18 have accrued since November 30, 2013" for non-payment of employment taxes for the second  
19 and fourth quarters of 2005, all quarters of 2006, and non-payment of federal unemployment tax  
20 ("FUTA tax") for 2005 and 2006.<sup>6</sup> (Id.)

21 recent death on plaintiff's request for judgment against her is addressed in further detail below.

22 <sup>5</sup> This calculation includes a fraud penalty assessed against James O. Molen for the first quarter of  
23 2000. One of the remaining issues for which plaintiff is not seeking summary judgment in the  
24 present motion is whether James O. Molen obtained a refund in the first quarter of 2000 by fraud.  
25 Plaintiff states in its motion that "if James Molen is found after trial not to have acted with a  
26 fraudulent intent in seeking the refund he obtained," then the court should make an adjustment to  
27 the final judgment reflecting the absence of such a penalty. (ECF No. 148-1 at 11.)

28 <sup>6</sup> By minute order issued on May 8, 2014, the court directed plaintiff to file a supplemental brief  
that included, among other things, an updated statement of the full judgment amount it requests  
against each defendant as of May 8, 2014, including any interest and other statutory additions that  
had accrued up until that date. (ECF No. 170.) In compliance with this order, plaintiff filed a

1 II. Legal Standards Governing Motions for Summary Judgment

2 Federal Rule of Civil Procedure 56(a) provides that “[a] party may move for summary  
3 judgment, identifying each claim or defense--or the part of each claim or defense--on which  
4 summary judgment is sought.” It further provides that “[t]he court shall grant summary judgment  
5 if the movant shows that there is no genuine dispute as to any material fact and the movant is  
6 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).<sup>7</sup> A shifting burden of proof  
7 governs motions for summary judgment under Rule 56. Nursing Home Pension Fund, Local 144  
8 v. Oracle Corp. (In re Oracle Corp. Sec. Litig.), 627 F.3d 376, 387 (9th Cir. 2010). Under  
9 summary judgment practice, the moving party always bears the initial responsibility of informing  
10 the district court of the basis for its motion, and identifying those portions of “the pleadings,  
11 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if  
12 any,” which it believes demonstrate the absence of a genuine issue of material fact.

13 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting then-numbered Fed. R. Civ. P.  
14 56(c)). “Where the non-moving party bears the burden of proof at trial, the moving party need

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16 supplemental brief on May 15, 2014 stating that the totals sought against each defendant,  
17 including additional interest and other statutory additions, as of May 8, 2014, were as follows:

18 James O. Molen Form 941: \$196,948.69  
19 James Orbin Molen Ltd. Partnership: \$19,389.05  
20 James O. Molen § 6702: \$5,920.67  
21 Sandra L. Molen § 6702: \$3,918.11

22 (ECF No. 171 at 2.) Plaintiff includes a declaration of Michael Norris, an Advisory Insolvency  
23 Advisor for the IRS, to support these totals. (ECF No. 171-1.) Within his declaration, Norris  
24 describes the method he utilized to compute the total balances owed by each defendant up  
25 through May 8, 2014. (Id. at ¶¶ 6-10.) This declaration also includes a table listing the unpaid  
26 balance each defendant owes as of May 8, 2014, with respect to each tax period at issue in this  
27 case. (Id. at 3-5.) In addition, plaintiff attaches includes as exhibits reports reflecting the total  
28 amounts assessed against each defendant for each tax period at issue broken down by the amounts  
of interest and penalties assessed. (ECF No. 171-2.) Based on this evidence, plaintiff’s  
representations appear to accurately reflect the outstanding balances against each defendant as of  
May 8, 2014.

<sup>7</sup> Federal Rule of Civil Procedure 56 was revised and rearranged effective December 10, 2010.  
However, as stated in the Advisory Committee Notes to the 2010 Amendments to Rule 56, “[t]he  
standard for granting summary judgment remains unchanged.”

1 only prove that there is an absence of evidence to support the non-moving party's case." In re  
2 Oracle Corp. Sec. Litig., 627 F.3d at 387 (citing Celotex Corp., 477 U.S. at 325); see also Fed. R.  
3 Civ. P. 56 advisory committee's notes to 2010 amendments (recognizing that "a party who does  
4 not have the trial burden of production may rely on a showing that a party who does have the trial  
5 burden cannot produce admissible evidence to carry its burden as to the fact").

6 If the moving party meets its initial responsibility, the opposing party must establish that a  
7 genuine dispute as to any material fact actually exists. See Matsushita Elec. Indus. Co. v. Zenith  
8 Radio Corp., 475 U.S. 574, 585-86 (1986). To overcome summary judgment, the opposing party  
9 must demonstrate the existence of a factual dispute that is both material, i.e., it affects the  
10 outcome of the claim under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S.  
11 242, 248 (1986); Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc., 618 F.3d  
12 1025, 1031 (9th Cir. 2010), and genuine, i.e., "the evidence is such that a reasonable jury could  
13 return a verdict for the nonmoving party," FreecycleSunnyvale v. Freecycle Network, 626 F.3d  
14 509, 514 (9th Cir. 2010) (quoting Anderson, 477 U.S. at 248). A party opposing summary  
15 judgment must support the assertion that a genuine dispute of material fact exists by: "(A) citing  
16 to particular parts of materials in the record, including depositions, documents, electronically  
17 stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers,  
18 or other materials; or (B) showing that the materials cited do not establish the absence or presence  
19 of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the  
20 fact." Fed. R. Civ. P. 56(c)(1)(A)-(B). However, the opposing party "must show more than the  
21 mere existence of a scintilla of evidence." In re Oracle Corp. Sec. Litig., 627 F.3d at 387 (citing  
22 Anderson, 477 U.S. at 252).

23 In resolving a motion for summary judgment, the evidence of the opposing party is to be  
24 believed. See Anderson, 477 U.S. at 255. Moreover, all reasonable inferences that may be drawn  
25 from the facts placed before the court must be viewed in a light most favorable to the opposing  
26 party. See Matsushita, 475 U.S. at 587; Walls v. Cent. Contra Costa Transit Auth., 653 F.3d 963,  
27 966 (9th Cir. 2011). However, to demonstrate a genuine factual dispute, the opposing party  
28 "must do more than simply show that there is some metaphysical doubt as to the material facts . .

1 . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-  
2 moving party, there is no ‘genuine issue for trial.’” Matsushita, 475 U.S. at 586-87 (citation  
3 omitted).

### 4 III. Undisputed Facts

5 In accordance with Local Rule 260(a), plaintiff filed a Statement of Undisputed Facts  
6 (“SUF”) in support of its motion for partial summary judgment. (ECF No.148-2.) Defendants  
7 failed to directly respond to plaintiff’s SUF beyond generalized arguments that the documentary  
8 evidence plaintiff’s SUF is based on is all impermissible hearsay evidence that was obtained “by  
9 threat and duress of contempt of court.”<sup>8</sup> (ECF No. 161 at 4.) Moreover, defendants did not file a  
10 statement of disputed facts, which violates Local Rule 260(b) and the court’s order requiring  
11 defendants to file an opposition and supporting materials that comply with Rule 56 of the Federal  
12 Rules of Civil Procedure and Local Rule 260. The procedure prescribed in Local Rule 260  
13 contemplates identification of the facts that the parties assert are material, disputed or undisputed.  
14 “If the nonmovant does not ‘specifically . . . [controvert duly supported] facts identified in the  
15 [movant]’s statement of undisputed facts,’ the nonmovant ‘is deemed to have admitted the  
16 validity of the facts contained in the [movant]’s statement.’” United States v. Burrell, 2013 WL  
17 4710498 at \*1 (E.D. Cal. Aug. 30, 2013) (quoting Beard v. Banks, 548 U.S. 521, 527 (2006)).  
18 Accordingly, for purposes of the motion for partial summary judgment, the court accepts  
19 plaintiff’s evidence and proposed undisputed facts, outlined below, as the truth.

20 Defendants James O. Molen and Sandra Molen, doing business as Touch of Class Florist,  
21 had employees and paid wages and other compensation to those employees. (SUF ¶ 2.)  
22 Beginning in the second quarter of 2005, defendants operated their business in a similar fashion  
23 under the name “James Orbin Molen Limited Partnership” (“Partnership”). (Id. at ¶¶ 2, 18.)  
24 Defendants’ workers were treated the same prior to and after the business was converted to the  
25 Partnership. (Id. at ¶ 20; James Molen Depo. (ECF No. 140-1) 120:22-25, 121:1-5.) Defendants’  
26 workers were paid by check at first and later by money order. (SUF ¶ 21.) As employers,  
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28 <sup>8</sup> The court addresses these arguments in detail below and finds them unpersuasive.

1 defendants were required to file quarterly IRS Form 941 federal employment tax returns reporting  
2 employee wages and their employment tax liability, file yearly IRS Form 940 federal  
3 unemployment tax returns reporting Federal Unemployment Tax Act (“FUTA”) tax liability, and  
4 withhold income and taxes from employees’ wages pursuant to the Federal Income Contribution  
5 Act (“FICA”) and pay those taxes to the Internal Revenue Service (“IRS”). (Id. at ¶ 3.) James O.  
6 Molen was a general partner under the Partnership and, therefore, is liable for the Partnership’s  
7 tax liabilities. (Id. at ¶ 22; Cal. Corp. Code § 16306(a).)

8 For the first quarter of 2000, James O. Molen submitted a refund claim under a Form  
9 941C that requested a refund for the taxes paid on wages reported for 1997, 1998, and 1999. (Id.  
10 at ¶ 5; Stacy Decl. (ECF No. 148-5) ¶ 9.) On November 20, 2000, the IRS erroneously refunded  
11 \$30,005.29 to James O. Molen after he engaged in what was determined to be a fraudulent  
12 scheme. (SUF ¶ 5; Stacy Decl. ¶ 9.) On March 29, 2004, the liability relating to the erroneous  
13 refund was assessed against James O. Molen along with a fraud penalty. (SUF ¶ 5.)

14 IRS Revenue Agent Patricia Stacy prepared the assessments in the defendants’ case for  
15 the 2000 tax year. (SUF ¶ 6; Stacy Decl. ¶ 5.) She estimated the wages paid by defendants for  
16 2000 by looking back at the defendants’ accounts for 1999 and assuming the same wage amount  
17 was paid for 2000. (Stacy Decl. ¶ 5.) It was on this basis that she calculated the employment tax  
18 defendants owed. (SUF ¶ 6; Stacy Decl. ¶ 5.)

19 After Stacy made her assessments, defendants filed numerous Forms 941 for many  
20 periods in a single large batch in 2004. (SUF ¶ 7.) These tax returns were signed by Sandra  
21 Molen and a Certified Public Accountant. (Id.) Stacy adjusted the 2000 year assessments to  
22 reflect the amounts defendants reported on the tax returns they signed and filed in 2004 with the  
23 exception of the return filed for the first quarter of 2000 due to the fraud penalty assessed against  
24 James O. Molen during that period. (Id.; Stacy Decl. ¶¶ 7, 9.) Defendants’ tax returns filed in  
25 2004 were forwarded to the Service Center for processing. (SUF ¶ 8.) The assessments for 2001,  
26 2002, and 2003 match the returns filed by the Molens. (Id.) However, defendants submitted false  
27 amended Forms 941 for all four quarters of 2004 and 2005, inaccurately reporting that they paid  
28 no wages subject to Social Security or Medicare taxes. (Id. at ¶ 9; Order of Permanent Injunction,

1 Exhibit 1 (ECF No. 140) at ¶ 4.)

2 Defendants did not submit their required IRS Forms 940 and 941 by the mandated  
3 deadlines, nor did they make timely Form 941 tax deposits. (SUF ¶ 10; Exhibit 1 at ¶ 5.)  
4 Furthermore, defendants provided their employees false IRS Forms W-2 and failed to report  
5 Social Security and Medicare wages and taxes. (SUF ¶ 11; Exhibit 1 at ¶ 6.) Defendants  
6 attempted to justify their refusal to meet these legal obligations by making the patently frivolous  
7 arguments that the compensation they pay employees did not constitute wages and that the federal  
8 courts cannot enforce federal tax laws outside of the District of Columbia. (SUF ¶ 12; Exhibit 1  
9 at ¶ 7.) As a result, defendants have accrued Form 941 employment tax liabilities, including  
10 interest and penalties, for the periods ending March 31, 2000, through June 30, 2006, and Form  
11 940 liabilities for tax years 2000 through 2005. (SUF ¶ 13; Exhibit 1 at ¶ 8, n.1.) This total  
12 liability includes the \$30,698.03 erroneous refund the IRS issued in 2000 after the Molens filed  
13 false amended IRS Forms 941 for the years 1997 through 1999. (SUF ¶ 14; Exhibit 1 at ¶ 8, n.1.)  
14 For the taxable years ending December 31, 1997, through December 31, 2004, defendants James  
15 O. Molen and Sandra Molen jointly filed frivolous returns reporting zero income, which resulted  
16 in the IRS assessing frivolous return penalties against them pursuant to 26 U.S.C. § 6702. (SUF  
17 ¶¶ 23-24; Exhibits 35-58.)

18 In July 2005, defendants submitted an “International Bill of Exchange” to the IRS in a  
19 supposed attempt to pay their tax liabilities, but this did not decrease defendants’ tax liability  
20 because it was not valid legal tender. (SUF ¶ 15.) On October 11, 2006, a permanent injunction  
21 was issued against defendants, which, *inter alia*, enjoined defendants from failing to file accurate  
22 and timely IRS Forms 941 and 940 returns and from failing to timely withhold and pay over to  
23 the IRS all FICA and FUTA taxes required by law. (Exhibit 1 at 3-4.) After the Order of  
24 Permanent Injunction issued, defendants filed Forms 941 prepared by a CPA but did not pay the  
25 amounts shown due; defendants’ accounts were mostly adjusted to match these returns. (SUF ¶  
26 16.)

27 In the amounts, and for the tax periods set forth below, a duly authorized delegate of the  
28 Secretary of Treasury made assessments against defendants for unpaid federal employment and



1 FUTA taxes, frivolous return penalties, interest, and other statutory additions as follows:

<b>Tax Period</b>	<b>Tax Type</b>	<b>Taxpayer</b>	<b>Unpaid Balance As of 11/30/2013</b>
1st Q. 2000	941	James O. Molen	\$115,481.08
2[nd] Q. 2000	941	James O. Molen	14,169.87
3[rd] Q. 2000	941	James O. Molen	1,263.02
4[th] Q. 2000	941	James O. Molen	4,707.63
1st Q. 2001	941	James O. Molen	5,753.37
2[nd] Q. 2001	941	James O. Molen	4,937.48
3[rd] Q. 2001	941	James O. Molen	3,320.26
4[th] Q. 2001	941	James O. Molen	3,866.76
1st Q. 2002	941	James O. Molen	5,747.05
2[nd] Q. 2002	941	James O. Molen	4,702.88
3[rd] Q. 2002	941	James O. Molen	3,331.45
4[th] Q. 2002	941	James O. Molen	3,730.86
1st Q. 2003	941	James O. Molen	6,934.24
2[nd] Q. 2003	941	James O. Molen	4,826.07
3[rd] Q. 2003	941	James O. Molen	2,157.46
4[th] Q. 2003	941	James O. Molen	\$3,409.34
1st Q. 2004	941	James O. Molen	419.19
4th Q. 2004	941	James O. Molen	484.59
2001	940	James O. Molen	621.13
2001	940	James O. Molen	695.90
2001	940	James O. Molen	2,054.54
2001	940	James O. Molen	1,411.69
2nd Q. 2005	941	JOM Ltd Ptrship.	3,449.08
4th Q. 2005	941	JOM Ltd Ptrship.	3,884.75

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1st Q. 2006	941	JOM Ltd Ptrship.	3,094.92
2nd Q. 2006	941	JOM Ltd Ptrship.	2,611.30
3rd Q. 2006	941	JOM Ltd Ptrship.	497.07
4th Q. 2006	941	JOM Ltd Ptrship.	987.76
2005	940	JOM Ltd Ptrship.	4,494.69
2006	940	JOM Ltd Ptrship.	73.10
1997	§ 6702	James O. Molen	767.85
1998	§ 6702	James O. Molen	730.26
1999	§ 6702	James O. Molen	730.26
2000	§ 6702	James O. Molen	730.26
2001	§ 6702	James O. Molen	730.26
2002	§ 6702	James O. Molen	730.26
2003	§ 6702	James O. Molen	730.26
2004	§ 6702	James O. Molen	694.44
1998	§ 6702	Sandra L. Molen	0.00
1999	§ 6702	Sandra L. Molen	251.79
2000	§ 6702	Sandra L. Molen	730.26
2001	§ 6702	Sandra L. Molen	730.26
2002	§ 6702	Sandra L. Molen	730.26
2003	§ 6702	Sandra L. Molen	730.26
2004	§ 6702	Sandra L. Molen	694.44

(Decl. of Paul Enjalran, ECF No. 148-6, at 5-6.)<sup>9</sup>

Proper notice has been given and demand made for payment of the assessments set forth above against defendants. Despite timely notice and demand for payment of the assessments,

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<sup>9</sup> As part of its supplemental brief, plaintiff includes a declaration by Michael Norris that includes an updated table reflecting the unpaid balance for each of these tax periods through May 8, 2014, which includes the amounts of interest and other additions that have accrued since November 30, 2013. (ECF No. 171-1 at 3-5.)

1 defendants have neglected, failed or refused to fully pay these assessments, which remain due and  
2 owing, plus statutory interest and other additions allowed by law from November 30, 2013.

3 IV. Discussion

4 The United States bears the initial burden of proof in an action to collect taxes. United  
5 States v. Stonehill, 702 F.2d 1288, 1293 (9th Cir. 1983). The government's burden can be met by  
6 the presentation of federal tax assessments. Id.; Rocovich v. United States, 933 F.2d 991, 994  
7 (Fed. Cir. 1991) ("A Certificate of Assessments and Payments is routinely used to prove that a tax  
8 assessment has in fact been made."). "Normally, a presumption of correctness attaches to the  
9 assessment, and its introduction establishes a prima facie case." Stonehill, 702 F.2d at 1293  
10 (citing Welch v. Helvering, 290 U.S. 111, 115 (1933)); Cracchiola v. Comm'r of Internal  
11 Revenue, 643 F.2d 1383, 1386 (9th Cir. 1981) ("[The Government's] method of calculating . . .  
12 income is presumptively correct and will be affirmed as long as it is rationally based."); United  
13 States v. Molitor, 337 F.2d 917, 922 (9th Cir. 1964)).

14 However, "[t]he presumption does not arise unless it is supported by a minimal  
15 evidentiary foundation." Id. (citing Weimerskirch v. Comm'r, 596 F.2d 358, 360 (9th Cir.  
16 1979)). A tax payer may rebut the presumption of correctness by demonstrating that the  
17 assessments are "arbitrary and capricious," meaning that the assessments contain errors as to the  
18 amounts assessed. Stonehill, 702 F.2d at 1294 (citing Helvering v. Taylor, 293 U.S. 507, 515  
19 (1935)). If an assessment is based upon multiple items, then the presumption of correctness  
20 attaches to every item. Id. Proof of error as to one item destroys its individual presumption, but  
21 the presumption of correctness that attached to the other items remains. Id.

22 "[I]n the absence of contrary evidence, [a Certificate of Assessment is] sufficient to  
23 establish that notices and assessments were properly made." Hansen v. United States, 7 F.3d 137,  
24 138 (9th Cir. 1993). "A certificate of Assessments and Payments, or Form 4340, is admissible,  
25 highly probative evidence demonstrating that notices and assessments were properly made."  
26 United States v. Cowan, 535 F. Supp. 2d 1135, 1143 (D. Haw. 2008) (citing Hughes v. United  
27 States, 953 F.2d 531, 539-40 (9th Cir. 1992). Forms 4340 are admissible as self-authenticating  
28 official government records. Hughes, 953 F.2d at 540; Fed. R. Evid. 902(1). Furthermore, they

1 “qualify as ‘[r]ecords, reports, . . . or data compilations, in any form, of public offices or agencies,  
2 setting forth . . . matters observed pursuant to duty imposed by law as to which matters there was  
3 a duty to report,’ thus meeting one of the definitions of public records set forth in Fed. R. Evid.  
4 803(8).” Hughes, 953 F.2d at 540.

5 Plaintiff has met its initial burden, meeting the applicable standard by submitting  
6 affidavits consisting of the Form 4340 Certificates of Assessments and Payments generated under  
7 seal and signed by an authorized delegate of the Secretary of the Treasury.<sup>10</sup> The submission of  
8 these documents by the United States adequately evidences defendants’ tax liability. Specifically,  
9 this evidence shows that James O. Molen is liable in the amount of \$194,025.86 for unpaid  
10 federal employment tax plus additional interest and other statutory additions that have accrued  
11 since November 30, 2013, for the tax periods including all quarters of 2000, 2001, 2002, 2003,  
12 and the first and fourth quarters of 2004, in addition to \$5,843.85 plus additional interest and  
13 other statutory additions that have accrued since November 30, 2013, for frivolous return  
14 penalties assessed for 1997 through 2004. (See Exhibits 3-24, 34-42.) The evidence further  
15 shows that Sandra Molen is liable in the amount of \$3,867.27 for frivolous return penalties  
16 assessed against her from 1998 through 2004, plus additional interest and other statutory  
17 additions that have accrued since November 30, 2013. (See Exhibits, 43-48, 50.) Finally, it  
18 shows that James Orbin Molen Limited Partnership is liable in the amount of \$19,092.67 plus  
19 additional interest and other statutory additions that have accrued since November 30, 2013, for  
20 non-payment of employment taxes for the second and fourth quarters of 2005, all quarters of  
21 2006, and non-payment of FUTA taxes for 2005 and 2006. (See Exhibits, 27-34.) Because the  
22 United States’ showing exceeds the minimal factual foundation necessary, the assessments  
23 receive a presumption of correctness and the burden of proof shifts to defendants to demonstrate  
24 any error.

25 Defendants appear to argue in their opposition that the documentary evidence plaintiff  
26 relies on in support of its motion, i.e. the Form 4340 Certificates of Assessments and Payments

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27 <sup>10</sup> Plaintiff has also included tax returns prepared by defendants for the relevant tax return  
28 periods. (See Exhibits 51-96.)

1 and defendants' signed tax returns, constitutes impermissible hearsay. However, this argument is  
2 without merit. The Certificates of Assessments and Payments fall within Fed. R. Evid. 803(8)'s  
3 public records exception to the hearsay rule. Hughes, 953 F.2d at 540. Furthermore, defendants'  
4 signed tax returns are not hearsay because they are statements made by defendants being offered  
5 as evidence against defendants. Fed. R. Evid. 801(d)(2) (Opposing Party's Statement); Robson v.  
6 C.I.R., 79 T.C.M. (CCH) 2225 (T.C. 2000) ("Statements on a Federal tax return are admissions  
7 under rule 801(d)(2) of the Federal Rules of Evidence and will not be overcome without cogent  
8 evidence that they are wrong."); Lare v. Commissioner, 62 T.C. 739, 750 (1974) ("Statements  
9 made in a tax return signed by a taxpayer may be treated as admissions.").

10 Defendants further argue that plaintiff cannot use their tax returns as evidence against  
11 them because they "were acquired by threat and duress of contempt of [a] court order." (ECF No.  
12 161 at 4.) However, "it is not duress for the IRS to use or to notify the taxpayer that it intends to  
13 use all lawful means either to assess or collect a tax." United States v. Toyota of Visalia, 772 F.  
14 Supp. 481, 487 (E.D. Cal. 1991) aff'd sub nom. United States v. Toyota of Visalia, Inc., 988 F.2d  
15 126 (9th Cir. 1993); see also George v. Commissioner, 139 T.C. 508, 515 (2012) (holding that the  
16 threat of judicial contempt for not complying with a court order to sign Form 8332 does not  
17 constitute duress); Ballard v. Commissioner, 54 T.C.M. (CCH) 580, 582 (1987). Accordingly,  
18 defendants' duress argument is not credible due to the absence of any showing that plaintiff  
19 obtained or threatened to obtain these records via unlawful means.

20 For the reasons stated above, plaintiff provides evidence sufficient to meet its initial  
21 burden of proof in this action and defendants have not come forward with any admissible  
22 evidence or made any arguments sufficient to rebut this record. There is no genuine dispute of  
23 material fact as to the issue of whether defendants are liable for the taxes in the amounts assessed  
24 above. Accordingly, plaintiff's motion for partial summary judgment should be granted in full.

#### 25 V. Effect of Sandra Molen's Apparent Death on the Judgment Against Her

26 It appears from defendants' recent filings that defendant Sandra Molen has recently died  
27 and has yet to be either dismissed from this case or replaced with an appropriate party. (See ECF  
28 Nos. 134, 158, 161, 164 (all noting that Sandra Molen is "deceased" in the party caption).) The

1 court discussed this apparent fact with plaintiff's counsel during the hearing on the present  
2 motion for partial summary judgment and ordered plaintiff to file a supplemental brief discussing  
3 the impact of this ostensible event on the judgment sought against Sandra Molen. (ECF No. 170.)  
4 Plaintiff filed its supplemental brief in compliance with this order on May 15, 2014. (ECF No.  
5 171.)

6 Rule 25(a)(1) provides that if "a party dies and the claim is not thereby extinguished, the  
7 court may order substitution of the proper parties." Fed.R.Civ.P. 25(a)(1). Therefore, before a  
8 party can substitute a new party pursuant to Rule 25(a)(1), the court must establish that the  
9 substantive law controlling the suit permits survival of the cause of action. If the cause of action  
10 does not survive the death of a party, no substitution may be made.

11 Plaintiff's claims against Sandra Molen are for frivolous tax return penalties assessed  
12 pursuant to 26 U.S.C. § 6702. Accordingly, federal substantive law determines whether these  
13 claims survive Sandra Molen's death. Generally, to determine whether a federal cause of action  
14 survives the death of a defendant, the court must first determine whether the claim asserted  
15 against that defendant is civil or penal in nature. Reiserer v. United States, 479 F.3d 1160, 1162  
16 (9th Cir. 2007) (citing United States v. \$84,740.00 Currency, 981 F.2d 1110, 1113 (9th Cir.  
17 1992)). "It is 'a well-settled rule that actions upon penal statutes do not survive the death' of a  
18 party." Id. (quoting United States v. Oberlin, 718 F.2d 894, 896 (9th Cir. 1983)).

19 Some statutes expressly state that an action survives upon the death of a party; however,  
20 many statutes, such as the one at issue here, do not include such express language. Accordingly,  
21 courts must determine whether the statute in question is civil or penal in nature by resorting to the  
22 two-part test articulated by the United States Supreme Court in Hudson v. United States, 552 U.S.  
23 93 (1997). This test requires the court to first inquire into whether "the legislature has indicated  
24 an intention to establish a civil penalty." Reiserer, 479 F.3d at 1163 (quoting Hudson, 552 U.S. at  
25 99). Second, the court must determine "whether the statutory scheme [is] so punitive either in  
26 purpose or effect, as to transform what was clearly intended as a civil remedy into a criminal  
27 penalty." Id.

28 ////

1 Plaintiff cites to no case law in its supplemental brief directly addressing the issue of  
2 whether a penalty assessed under 26 U.S.C. § 6702 is a civil remedy or a criminal penalty, and  
3 the court is aware of none. This appears to be an issue of first impression.

4 Plaintiff cites to the Ninth Circuit Court of Appeals' decision in Reiserer in support of its  
5 assertion that an action pursuant to 26 U.S.C. § 6702 is civil in nature, therefore surviving the  
6 death of a defendant. In Reiserer, the Ninth Circuit Court of Appeals addressed the issue of  
7 whether an action for civil tax shelter promoter penalties under 26 U.S.C. §§ 6700, 6701 survived  
8 the death of the defendant and held that the penalties under these statutes were sufficiently civil in  
9 nature that the action survived the defendant's death. Reiserer, 479 F.3d at 1164. Notably, in  
10 coming to the conclusion that the penalties under these statutes were not punitive in nature, the  
11 court reasoned that the fact that "[t]he statutes are found in Internal Revenue Code Chapter 68,  
12 titled 'Additions to the Tax, Additional Amounts, and Assessable Penalties,' rather than Chapter  
13 75, titled 'Crimes, Other Offenses, and Forfeitures,' were a clear indication "that the legislature  
14 intended the penalties in question to be civil." Id. at 1663. Title 26 U.S.C. § 6702, the statute at  
15 issue in this case, also appears in Chapter 68 of the Internal Revenue Code, thus indicating that  
16 the legislature intended for the penalties assessed pursuant to it to be civil in nature.

17 However, the fact that the legislature intended the statute to be civil in nature is only the  
18 first step in the inquiry because a statute may be "so punitive either in purpose or effect, as to  
19 transform what was clearly intended as a civil remedy into a criminal penalty." Reiserer, 479  
20 F.3d at 1163. Plaintiff argues that the penalty assessed under 26 U.S.C. § 6702 is not so onerous  
21 as to raise it to the level of a criminal sanction. In support of this argument, plaintiff cites to  
22 Estate of Rau v. Commissioner, 301 F.2d 51 (9th Cir. 1962), where the Ninth Circuit Court of  
23 Appeals "held that a fifty percent addition to tax for fraud did not abate at the [defendant]  
24 taxpayer's death." Reiserer, 479 F.3d at 1164 (citing Estate of Rau, 301 F.2d at 56-57.) While  
25 Estate of Rau predates the United States Supreme Court's holding in Hudson and, therefore, did  
26 not analyze the issue of whether the cause of action was extinguished upon the defendant  
27 taxpayer's death under Hudson's two-part test, the Ninth Circuit Court of Appeals determined in  
28 Reiserer that the holding and reasoning Estate of Rau was in line with subsequent Supreme Court

1 precedent because “its reasoning rests in part on the same precedent as that relied on in Hudson.”  
2 Reiserer, 479 F.3d at 1164 (citing Estate of Rau, 301 F.2d at 55); see also Louis v. Comm’r, 170  
3 F.3d 1232, 1235 (9th Cir. 1999).

4 Plaintiff asserts that the penalty assessed against Sandra Molen under 26 U.S.C. § 6702,  
5 which was \$500 for each violation,<sup>11</sup> is far less onerous than the penalty assessing a fifty-percent  
6 addition to tax for fraud that was held to be civil in nature in Estate of Rau, or the tax shelter  
7 promoter penalty that was held to survive the death of the defendant taxpayer in Reiserer. The  
8 court agrees. A flat \$500 penalty for each frivolous return appears to be far less onerous in the  
9 typical case than the penalties deemed to be civil in nature in both Estate of Rau and Reiserer.  
10 Accordingly, the court finds that the frivolous return penalties assessed against Sandra Molen  
11 under 26 U.S.C. § 6702 survive her death.

12 Because plaintiff’s claims against Sandra Molen under 26 U.S.C. § 6702 are not  
13 extinguished by her death, the court may order pursuant to Rule 25(a)(1) that she be substituted  
14 by a proper party. Furthermore, any party or Sandra Molen’s successor or representative may  
15 make a motion for her substitution. Fed. R. Civ. P. 25(a)(1). However, if such a motion is not  
16 made within 90 days after service of a “statement noting [Sandra Molen’s] death, the action . . .  
17 against [her] must be dismissed.” Id.

18 Defendants have listed Sandra Molen as “deceased” within the party caption in their  
19 recent filings in this case, starting with the filing made on July 11, 2013. (See ECF Nos. 134,  
20 158, 161, 164.) If these filings were to constitute a statement of death for purposes of Rule 25,  
21 then plaintiffs’ claims Sandra Molen would have to be dismissed from this action because more  
22 than 90 days has passed without the filing of a motion for substitution. See Fed. R. Civ. P.

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23 <sup>11</sup> For the years the assessments under Section 6702 were made against Sandra Molen, 1998  
24 through 2004, the penalty for a frivolous return was \$500 for each violation. This statute has  
25 since been amended and now imposes a \$5,000 penalty on a person for filing a frivolous return.  
26 See 26 U.S.C. § 6702(a). The above analysis as to the issue of whether the civil penalty imposed  
27 by this statute is so onerous as to be criminal in effect is only with respect to the version of the  
28 statute under which the penalties at issue in this case were assessed against Sandra Molen.  
Accordingly, the court provides no opinion on whether the larger \$5,000 penalty under the  
current version of this statute is so onerous that it is considered a criminal penalty under the  
Hudson test.



1 25(a)(1). However, in order for the 90 day period to commence, the statement of death must be  
2 more than a mere reference to the deceased party's death in a pleading or other filing and must  
3 conform to certain presentation requirements. E.E.O.C. v. Timeless Investments, Inc., 734 F.  
4 Supp. 2d 1035, 1056 (E.D. Cal. 2010) (quoting Grandbouche v. Lovell, 913 F.2d 835, 836 (10th  
5 Cir. 1990) ("The 90 day time period is not triggered 'unless a formal suggestion of death is made  
6 on the record, regardless of whether the parties have knowledge of a party's death,' and the 'mere  
7 reference to a party's death in court proceedings or pleadings is not sufficient.'"); Barlow v.  
8 Ground, 39 F.3d 231, 233 (9th Cir. 1994) (party must serve the nonparty successors or  
9 representatives of the deceased with a suggestion of death in compliance with the requirements  
10 set out in Rule 4 of the Federal Rules of Civil Procedure); Colon v. Home Depot, U.S.A., Inc.,  
11 22009 WL 4158783 (E.D. Cal. Nov. 18, 2009) (finding that the mere reference to plaintiff's death  
12 in a joint status report filed with the court was insufficient to trigger the 90 day period under Rule  
13 25(a)(1)); Fed. R. Civ. P. 25(a)(3) (requiring a statement noting death to be served on parties a  
14 provided in Rule 5 of the Federal Rules of Civil Procedure). Accordingly, defendants' mentions  
15 of Sandra Molen's alleged death up until the present have been insufficient to trigger the 90 day  
16 period under Rule 25(a)(1).<sup>12</sup>

17 As noted above, no party has filed a motion requesting the substitution of Sandra Molen  
18 with a proper party. Under Rule 25(a)(1), the court *may* order a such a substitution. However,  
19 the court is not required to do so and may proceed to judgment with the original named parties  
20 when no party has moved for substitution. See 6 Moore's Fed. Practice 3d § 25.12(5) (citing  
21 Ciccone v. Secretary of Dept of Health & Human Servs. of U.S., 861 F.2d 14, 15 (2d Cir. 1988),  
22 Fariss v. Lynchburg Foundry, 769 F.2d 958, 962-63 (4th Cir. 1985), and Copier By & Through  
23 Lindsey v. Smith & Wesson Corp., 138 F.3d 833, 835 (10th Cir. 1998)). Plaintiff requests that  
24 the court enter judgment in this case against the currently-named defendants, including Sandra

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25  
26 <sup>12</sup> Plaintiff, in its supplemental brief, requests that the court grant it an extension of time to file a  
27 motion to substitute parties up until the date of trial in the event that defendants do file a formal  
28 statement of death that meets the requirements of Rule 25. (ECF No. 171 at 5-6.) While it is  
premature to grant such a request, the court informs plaintiff that it is amenable to such a future  
request in the event that defendants do file a formal statement of death.

1 Molen, because plaintiff is presently unable to ascertain who the successor in interest or executor  
2 of her estate may be, or whether Sandra Molen has an estate beyond the property already before  
3 the court. (ECF No. 171 at 6.) Furthermore, plaintiff believes that defendant James O. Molen  
4 may be the successor in interest or executor of Sandra Molen's estate, thus negating the need for a  
5 substitution of an outside party. Finally, plaintiff asserts that facts clarifying the above issues can  
6 be ascertained during trial and a proper substitution, if necessary, can then be made at that time.  
7 The court agrees. Therefore, Sandra Molen should not be substituted at this time and judgment  
8 should be entered against her to the extent requested in plaintiff's motion for partial summary  
9 judgment.

10 VI. Conclusion

11 Based on the foregoing, IT IS HEREBY RECOMMENDED that:

12 1. Plaintiff's Motion for Partial Summary Judgment (ECF No. 148) be GRANTED.

13 2. Judgment be entered against James O. Molen in the amount of \$194,025.86 for unpaid  
14 federal employment tax and \$5,843.85 for frivolous return penalties, plus additional interest and  
15 other statutory additions that have accrued since November 30, 2013.<sup>13</sup>

16 3. Judgment be entered against Sandra Molen in the amount of \$3,867.27 for frivolous  
17 return penalties, plus additional interest and other statutory additions that have accrued since  
18 November 30, 2013.<sup>14</sup>

19 4. Judgment be entered against the James Orbin Molen Limited Partnership in the amount  
20 of \$19,092.67 plus additional interest and other statutory additions that have accrued since  
21 November 30, 2013.<sup>15</sup>

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23 \_\_\_\_\_  
24 <sup>13</sup> As of May 8, 2014, when additional interest and other statutory additions are taken into  
25 account, this judgment amount is \$196,948.69 for unpaid federal employment tax and \$5,920.67  
for frivolous return penalties.

26 <sup>14</sup> As of May 8, 2014, when additional interest and other statutory additions are taken into  
27 account, this judgment amount is \$3,918.11 for frivolous return penalties.

28 <sup>15</sup> As of May 8, 2014, when additional interest and other statutory additions are taken into  
account, this judgment amount is \$19,389.05.

