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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

United States of America,  
Plaintiff,  
v.  
Kennith J. Malinowski, et  
al.,  
Defendants.

No. 2:11-cv-01187-JAM-JFM

**ORDER DENYING DEFENDANT'S MOTION  
FOR RECONSIDERATION**

Presently before the Court is Defendant Kenneth J. Malinowski's ("Defendant") Motion for Reconsideration (Doc. # 76) of the Court's September 20, 2012 order granting summary judgment in favor of Plaintiff United States of America ("Plaintiff") (Doc. # 74). Plaintiff's motion for summary judgment was unopposed by Defendant. Plaintiff opposes the current motion for reconsideration (Doc. # 81).

There are four bases for reconsideration presented by Defendant: 1) Plaintiff failed to properly notice its lien on Defendant's property, 2) Plaintiff's counsel is not authorized to represent the United States and the Court improperly considered

1 evidence submitted in support of Plaintiff's motion, 3) Defendant  
2 was unable to oppose the motion due to pending discovery  
3 requests, and 4) the Court abused its power by entering judgment  
4 in favor of Plaintiff without a sufficient explanation of its  
5 reasoning.

6 A motion for reconsideration of a grant of summary judgment  
7 can be brought pursuant to Federal Rules of Civil Procedure 59(e)  
8 or 60(b). Hinton v. Pac. Enters., 5 F.3d 391, 395 (9th Cir.  
9 1993). In this case, Defendant proceeds under rule 59(e).

10 Rule 59(e) permits a district court to reconsider and  
11 amend a previous order, [but] the rule offers an  
12 extraordinary remedy, to be used sparingly in the  
13 interests of finality and conservation of judicial  
14 resources. Indeed, a motion for reconsideration  
15 should not be granted, absent highly unusual  
16 circumstances, unless the district court is [1]  
17 presented with newly discovered evidence, [2]  
committed clear error, or [3] if there is an  
intervening change in the controlling law. A Rule  
59(e) motion may *not* be used to raise arguments or  
present evidence for the first time when they could  
reasonably have been raised earlier in the litigation

18 Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th  
19 Cir. 2000) (internal quotations omitted) (emphasis in original).

20 At the outset, the Court notes that Defendant merely raises  
21 arguments that could have been reasonably raised in opposition to  
22 the original motion for summary judgment, making the present Rule  
23 59(e) motion improper. For instance, when pending discovery  
24 disputes limit a defendant's ability to respond to a motion for  
25 summary judgment, an opposition based upon Rule 56(d) allows a  
26 court to defer consideration of the motion until more facts are  
27 known. The same reasoning applies to Defendant's remaining  
28 arguments. Accordingly, Defendant's motion may be properly

1 denied solely because it raises arguments that should have been  
2 raised in opposition to Plaintiff's motion for summary judgment.  
3 Id. Defendant proceeds pro se, however, and pro se pleadings are  
4 entitled to some deference. See Erickson v. Pardus, 551 U.S. 89,  
5 94 (2007). Accordingly, the Court will address the Defendant's  
6 other arguments to ensure that the Plaintiff was entitled to  
7 summary judgment.

#### 8 1. Proper Notice of Lien

9 Defendant argues that Plaintiff's liens cannot be reduced to  
10 judgment because Plaintiff failed to produce a certified copy of  
11 a valid claim of lien. Plaintiff responds that a valid lien  
12 automatically arose pursuant to 26 U.S.C. §§ 6321 and 6322 when  
13 Defendant failed to pay taxes. Plaintiff's argument is  
14 persuasive. Sections 6321 and 6322, by their plain terms, give  
15 rise to a valid lien when a taxpayer fails to pay taxes upon the  
16 government's demand. See McGinley v. United States, 942 F. Supp.  
17 1239, 1243 (D. Neb. 1996). Evidence of Defendant's liability,  
18 Forms 4340, were submitted by Plaintiff. Hughes v. United  
19 States, 953 F.2d 531, 535 (9th Cir. 1992) (holding that forms  
20 4340 are sufficient evidence of tax assessments); see also  
21 McGinley, 942 F. Supp. at 1243 (holding that the government is  
22 not required to file a notice of lien with state authorities in  
23 order to enforce a federal tax lien). Accordingly, summary  
24 judgment was properly entered in Plaintiff's favor based on the  
25 submitted evidence.

#### 26 2. Plaintiff's Counsel's Authority to Bring Action

27 Next Defendant argues that Plaintiff's counsel lacks  
28 authority under the 11th Amendment to the U.S. Constitution to

1 prosecute this action on behalf of the United States. Defendant  
2 also argues that Plaintiff's counsel did not submit admissible  
3 evidence in support of the motion for summary judgment.  
4 Plaintiff responds that Defendant's arguments are not grounded in  
5 any authority, and are therefore frivolous and should not be  
6 considered.

7 Defendant's argument concerning admissible evidence is  
8 incorrect. Under Federal Rule of Civil Procedure 56, a motion  
9 for summary judgment can be supported with affidavits, admissible  
10 evidence, and declarations. An attorney declaration is a proper  
11 vehicle for submitting admissible evidence. Clark v. Cnty. of  
12 Tulare, 755 F. Supp. 2d 1075, 1084 (E.D. Cal. 2010) (holding that  
13 an attorney may certify the authenticity of documents if he has  
14 personal knowledge of their authenticity). Plaintiff's counsel's  
15 declaration only concerns documents that were created during the  
16 course of litigation and he declares that he has personal  
17 knowledge of their authenticity. As a result, the materials  
18 submitted by Plaintiff's counsel were properly considered.

19 Defendant's argument that the 11th Amendment bars this suit  
20 is also incorrect. The 11th Amendment bars suits against states,  
21 but the present action is against Kenneth and Patricia  
22 Malinowski, neither of whom are sovereign entities. Ex parte  
23 Young, 209 U.S. 123, 149 (1908). Accordingly, the 11th Amendment  
24 does not bar entry of judgment in Plaintiff's favor.

### 25 3. Discovery Responses

26 Finally, Defendant claims that he was not able to oppose  
27 Plaintiff's motion for summary judgment because was waiting for a  
28 "verified complaint" and production of discovery. The Court's

1 docket indicates that Defendant was served with and acknowledged  
2 receiving the complaint in this action (Doc. # 5). Additionally,  
3 some of the discovery requests made by Defendant were actually  
4 Freedom of Information Act requests, and are therefore beyond the  
5 purview of this litigation. With regard to the remaining  
6 requests, Plaintiff points out that it responded to timely  
7 requests for admissions, but the last set were served by  
8 Defendant after the discovery cutoff date. Accordingly, the  
9 Court finds that Defendant's motion cannot be maintained on the  
10 basis of deficient discovery requests.

11 4. Conclusion

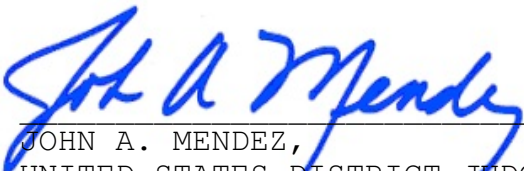
12 For the reasons discussed above, Defendant has not raised  
13 any ground upon which his motion for reconsideration may be  
14 granted. Defendant does argue that the Court's order granting  
15 judgment in Plaintiff's favor is deficient because it is not a  
16 reasoned decision grounded in law and fact. Such an order,  
17 however, is not required when granting an unopposed motion for  
18 summary judgment. Fed. R. Civ. P. 52(a)(3). In any event,  
19 Defendant's last argument is mooted by the present order because  
20 it contains the Court's reasoning with regard to the entry of  
21 summary judgment in Plaintiff's favor.

22  
23 III. ORDER

24 Defendant's Motion for Reconsideration is DENIED.

25  
26 IT IS SO ORDERED.

27 Dated: October 11, 2012

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JOHN A. MENDEZ,  
UNITED STATES DISTRICT JUDGE