

1 \*\*E-Filed 1/5/08\*\*

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8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN JOSE DIVISION**

11  
12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 THOMAS E. SEIDEL,

16 Defendant.

Case Number C 07-4128 JF (RS)

ORDER<sup>1</sup> DENYING DEFENDANT'S  
MOTION IN LIMINE TO EXCLUDE  
FORM 2751

[re: docket no. 48]

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19 Defendant Thomas Seidel ("Seidel") moves to exclude the Form 2751 that he signed on  
20 October 30, 1996, asserting that revenue officer Stephen Penrod ("Penrod") violated the  
21 Bankruptcy automatic stay by soliciting Seidel's signature on the Form 2751 after Seidel and his  
22 wife had filed a Chapter 7 petition on October 25, 1996.

23 In general, the filing of a petition in bankruptcy operates as a stay of, *inter alia*:

24 (1) the commencement or continuation, including the issuance or employment of  
25 process, of a judicial, administrative, or other action or proceeding against the  
26 debtor that was or could have been commenced before the commencement of the  
case under this title, or to recover a claim against the debtor that arose before the  
commencement of the case under this title.

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1 This disposition is not designated for publication in the official reports.

1 11 U.S.C. § 362(a)(1). However, the filing of a petition does not operate as a stay of, *inter alia*:

2 (D) the making of an assessment for any tax and issuance of a notice and demand  
3 for payment of such an assessment (but any tax lien that would otherwise attach to  
4 property of the estate by reason of such an assessment shall not take effect unless  
5 such tax is a debt of the debtor that will not be discharged in the case and such  
6 property or its proceeds are transferred out of the estate to, or otherwise revested  
7 in, the debtor).

8 11 U.S.C. § 362(b)(9)(D).

9 Seidel argues that although the making of an assessment and issuance of notice and  
10 demand are excepted from the automatic stay provision, the *signing of a waiver document* is not.  
11 Seidel argues that Penrod’s solicitation of the Form 2751 thus falls within the general stay  
12 provision and accordingly is void. *See In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992)  
13 (holding that actions in violation of the automatic stay provision are void).

14 The United States does not squarely address Seidel’s argument, but rather attacks as  
15 misplaced Seidel’s reliance upon *Ellison v. C.I.R.*, 385 B.R. 158 (S.D.W.Va. 2008). *Ellison* is  
16 factually similar to the instant case in that the Internal Revenue Service (“IRS”) solicited the  
17 plaintiff’s signature on a Form 2751 after the plaintiff had filed a bankruptcy petition. The court  
18 held that the solicitation violated the automatic stay. However, the court noted expressly that  
19 “[w]hile the IRS is able to make a tax assessment under the current version of the code, it was  
20 precluded from doing so [at the time of the subject events].” *Id.* at 162 n.7. The court’s holding  
21 thus provides no support for Seidel’s position; in fact, the court’s comment on the change in the  
22 code implies that the court would have reached a different result had the amendment applied.

23 Seidel nonetheless relies upon the following language from the decision: “[t]he language  
24 of 11 U.S.C. § 362 does not create any such exception [to the automatic stay] for a waiver and its  
25 legislative history does not support that result.” *Id.* at 167. The *Ellison* court was addressing the  
26 IRS’s argument that the signing of the Form 2751 operated to waive the violation of the  
27 automatic stay. The court concluded that the IRS’s argument was circular. However, the court’s  
28 discussion must be viewed against the backdrop of the court’s prior conclusion that the  
Bankruptcy Code amendments excepting tax assessments did not apply in the case before it.  
Whereas the *Ellison* court had to decide the effect of a post-petition Form 2751 absent any

1 arguably applicable statutory exception to the automatic stay provision, this Court is confronted  
2 with the very different question of whether the statutory exception set forth at § 362(b)(9)(D)  
3 applies here.

4 The parties have not cited, and the Court has not discovered, any cases expressly  
5 addressing whether § 362(b)(9)(D), excepting from the automatic stay “the making of an  
6 assessment for any tax and issuance of a notice and demand for payment of such an assessment,”  
7 should be construed to include the solicitation of a Form 2751. This Court concludes that it  
8 should be so construed. Although the bankruptcy stay is broad, *see Eskanos & Adler, P.C. v.*  
9 *Leetien*, 303 F.3d 1210, 1214 (9th Cir. 2002) (noting that “[t]he scope of protections embodied in  
10 the automatic stay is quite broad, and serves as one of the most important protections in  
11 bankruptcy law.”), soliciting a signature on a Form 2751 would seem to be part and parcel of the  
12 process of making an assessment and issuing a notice and demand.

13 Accordingly, Seidel’s motion to exclude the Form 2751 is DENIED.

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16 DATED: 1/5/08

17   
18 JEREMY FOGEL  
19 United States District Judge  
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1 This Order has been served upon the following persons:

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