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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

BRIAN KENNER, AN INDIVIDUAL, AND
KATHLEEN KENNER, AN INDIVIDUAL,

Plaintiffs,

v.

E. KELLY, et al.,

Defendants

Case No. 10cv2105 BTM(WVG)

**ORDER DENYING APPLICATION
FOR AN ORDER REQUIRING THE
DISTRICT ATTORNEY TO SERVE
IRS PARTIES AND DISMISSING
THE COMPLAINT FOR FAILURE TO
STATE A CLAIM**

Plaintiffs have filed an ex parte application requesting that the Court require the District Attorney to serve the IRS defendants with Plaintiffs' Complaint. The Court assumes that Plaintiffs actually mean the U.S. Attorney. At any rate, Plaintiffs' application is **DENIED** for the reasons discussed below.

On October 8, 2010, Plaintiffs commenced this action. Plaintiffs sue various IRS employees and agents in addition to Barbara Dunn, an attorney for a defendant in a prior lawsuit brought by Defendants, and her firm, Lacy, Dunn, & Do. Plaintiffs bring RICO claims against Defendants based on the IRS's "illegal confiscation" of settlement funds from the prior lawsuit, pending an Offer In Compromise.

Plaintiffs Complaint fails to state a claim. Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit. Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475 (1993). As provided in 26 U.S.C. § 7433(a), "If, in connection with any

1 collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal
2 Revenue Service recklessly or intentionally, or by reason of negligence disregards any
3 provision of this title, or any regulation promulgated under this title, such taxpayer may bring
4 a civil action for damages against the United States in a district court of the United States.
5 Except as provided in section 7432, *such civil action shall be the exclusive remedy for*
6 *recovering damages resulting from such actions.*" (Emphasis added.) Administrative
7 remedies must be exhausted before filing suit under 26 U.S.C. § 7433(a).

8 Taxpayers may not circumvent the comprehensive statutory scheme established by
9 § 7433(a) by asserting RICO claims against the IRS or its agents. See Duran v. IRS, 2009
10 WL 772802 (E.D. Cal. March 18, 2009). Moreover, there can be no RICO claim against the
11 federal government. Berger v. Pierce, 933 F.2d 393, 397 (6th Cir. 1991).

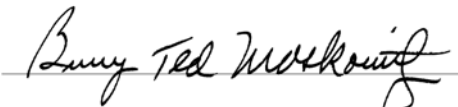
12 Plaintiffs' Complaint clearly pertains to allegedly improper actions taken by the IRS
13 defendants in the collection of Federal tax. Therefore, Plaintiffs' exclusive remedy against
14 the IRS and its agents is under 26 U.S.C. § 7433(a). Accordingly, Plaintiffs' Complaint is
15 dismissed as to the IRS defendants for failure to state a claim.

16 Plaintiffs' Complaint is also dismissed as to Dunn and her law firm because Plaintiffs
17 have not alleged facts establishing a plausible RICO claim against them.

18 In conclusion, Plaintiffs' Complaint is **DISMISSED** for failure to state a claim.
19 However, the Court grants Plaintiffs leave to file an amended complaint within 20 days of the
20 entry of this order. Failure to do so will result in the entry of judgment dismissing this case.
21 Plaintiffs' application for an order requiring the U.S. Attorney to serve the IRS defendants
22 with the Complaint is **DENIED** as moot.

23 **IT IS SO ORDERED.**

24 DATED: November 18, 2010

25 
26 Honorable Barry Ted Moskowitz
27 United States District Judge
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