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

BRIAN KENNER and KATHLEEN
KENNER,

Plaintiffs,

v.

ERIN KELLY et al.,

Defendants.

Case No. 11-cv-1538 DMS (WVG)

**ORDER GRANTING
DEFENDANT’S MOTION TO
DISMISS**

Pending before the Court is Defendant United States of America’s motion to dismiss Plaintiffs Brian and Kathleen Kenner’s Second Amended Complaint (“SAC”) pursuant to Federal Rule of Civil Procedure 12(b)(1) & (6). Plaintiffs filed an opposition, and Defendant filed a reply. For the following reasons, the Court grants Defendant’s motion to dismiss.

**I.
BACKGROUND**

A. Procedural History

On October 8, 2010, Plaintiffs filed their first lawsuit against individual Internal Revenue Service employees (“IRS Defendants”), as well as Barbara Dunn and Lacey, Dunn & Do (“Dunn Defendants”). (*See Kenner v. Kelly*, 10-cv-2105

1 AJB (WVG).) Barbara Dunn is an attorney who formerly represented several
2 defendants in another prior lawsuit where Plaintiffs sued their tax professionals, and
3 Lacey, Dunn & Do is the law firm where Dunn is employed. The underlying facts
4 of that case arose out of collection activities undertaken by the IRS to satisfy unpaid
5 federal taxes. The Complaint alleged Defendants engaged in four distinct “criminal
6 episodes” encompassing six different predicate acts under the Racketeer Influenced
7 and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1961 et seq. Specifically,
8 Plaintiffs alleged the IRS Defendants engaged in unauthorized collection actions,
9 and the Dunn Defendants conspired with the IRS Defendants, in violation of RICO.
10 On May 27, 2011, Judge Anthony J. Battaglia granted Defendants’ motions to
11 dismiss with prejudice. On June 21, 2011, Plaintiffs filed a notice of appeal,
12 challenging the order granting the motions to dismiss.

13 On July 12, 2011, Plaintiffs filed the present action against the same IRS
14 Defendants and the Dunn Defendants, alleging essentially identical claims for
15 relief.¹ The underlying facts of this case arose from the same events as the first
16 action. The Complaint alleged Defendants engaged in four distinct “criminal
17 episodes” encompassing 59 different predicate acts under RICO. Because the claims
18 in this action were nearly identical to those in the first action, Judge Battaglia stayed
19 the case pending resolution of appeal in the first action.²

20 On October 14, 2011, while the appeal was pending in the first action,
21 Plaintiffs filed a third action in the San Diego County Superior Court against the
22 same IRS Defendants, Capital One, and Judge Battaglia and Judge Barry Ted
23 Moskowitz (“judicial Defendants”). (*See Kenner v. Kelly*, 11-cv-2520 BEN (BGS).)
24 In the Complaint, Plaintiffs alleged the judicial Defendants “acted with [other]
25

26 ¹ The Complaint also alleged a conspiracy to commit RICO claim against Fireman’s
27 Fund Insurance Company.

28 ² On October 11, 2012, Judge Battaglia recused from this case, which was then
transferred to this Court.

1 defendant parties as conspirators to defeat the RICO lawsuits. [They] have used
2 threats, intimidation, and coercion to force [Plaintiffs] to abandon their rights.” (*Id.*,
3 ECF. No. 1.) The United States and the IRS Defendants removed the action on
4 October 31, 2011. On January 13, 2012, Judge Roger T. Benitez granted the United
5 States’ motion to substitute party, dismissing the IRS Defendants and substituting
6 the United States as a proper party defendant. Subsequently, Judge Benitez granted
7 the United States’ motion to dismiss for lack of subject matter jurisdiction and failure
8 to state a claim. Plaintiff filed a notice of appeal on July 20, 2012.

9 On April 25, 2012, Plaintiffs filed a fourth lawsuit against the United States,
10 Eric Holder, and Tim Geithner. (*See Kenner v. Holder*, 12-cv-1011 MMA (WVG).)
11 The underlying facts of that case also arose from the same events as the other
12 lawsuits. The Complaint alleged “Defendants’ agents engaged in a ‘pattern of
13 racketeering’ (RICO) to confiscate our property during an ‘offer in compromise’
14 negotiation with the IRS.” (*Id.*, ECF No. 1.) On December 19, 2012, Judge Michael
15 M. Anello granted Defendants’ motion to dismiss for lack of subject matter
16 jurisdiction. Plaintiffs subsequently filed a notice of appeal on December 28, 2012.

17 On October 17, 2013, the Ninth Circuit affirmed the dismissal of the first
18 action. This Court then issued an order further staying this action pending appeal in
19 the third and fourth actions. The Ninth Circuit subsequently affirmed the dismissals
20 on June 16, 2017 and June 16, 2015, respectively. Because the appeal proceedings
21 that gave rise to the stay of the instant action have concluded, the Court vacated the
22 stay. On February 14, 2018, Plaintiffs filed a FAC substituting the United States as
23 a defendant in lieu of the IRS Defendants and removing Fireman’s Fund Insurance
24 Company as a defendant. The United States and Dunn Defendants both filed
25 motions to dismiss the FAC. On April 10, 2018, the Court granted the Dunn
26 Defendants’ motion to dismiss with prejudice and the United States’ motion to
27 dismiss without prejudice. Thereafter, Plaintiffs filed a SAC against the United
28 States (hereafter “Defendant”), arguing they are entitled to damages under § 7433

1 because Defendant violated the following statutes and/or regulations: (1) 26 U.S.C.
2 § 6331(k)(1), (2) 26 U.S.C. § 7214(a), (3) 26 U.S.C. § 301.7122(b)(3), and (4) 26
3 U.S.C. § 7435. Defendant filed the present motion to dismiss the SAC for lack of
4 subject matter jurisdiction and failure to state a claim.

5 **B. Factual Background**

6 On July 7, 2009, the IRS filed a Notice of Tax Lien against Plaintiffs. (SAC
7 ¶ 11.) The allegations in the SAC arise from the IRS’s collection efforts regarding
8 Plaintiffs’ federal tax liabilities. In July 2009, Plaintiffs settled a lawsuit with their
9 prior tax professionals and expected to receive settlement funds of approximately
10 \$250,000. (SAC ¶ 9.) Rick Edson represented them in this prior lawsuit. (*Id.* ¶ 30.)
11 Plaintiffs allege Defendant unlawfully obtained a portion of the settlement funds in
12 the amount of \$137,069.98 while an Offer in Compromise (“OIC”) was pending.
13 (*Id.* ¶¶ 21, 59c.) Specifically, Plaintiffs claim Defendant influenced Mr. Edson and
14 opposing counsel in the prior lawsuit to disburse the settlement check to Defendant
15 when it should have been delivered to them. (*Id.* ¶¶ 22, 30, 34, 41, 59a & b.)

16 **II.**

17 **LEGAL STANDARD**

18 Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, a party may
19 move to dismiss based on the court’s lack of subject matter jurisdiction. *See* Fed. R.
20 Civ. P. 12(b)(1). A plaintiff has the burden to establish that subject matter
21 jurisdiction is proper. *Kokkonen v. Guardian Life Ins., Co.*, 511 U.S. 375, 377
22 (1994). Under Rule 12(b)(1), a jurisdictional attack may either be “facial” or
23 “factual.” *White v. Lee*, 227 F.3d 1213, 1242 (9th Cir. 2000). When a defendant
24 challenges jurisdiction “facially,” as they do here, all material allegations in the
25 complaint are assumed to be true, and the question for the court is whether the lack
26 of federal jurisdiction appears from the face of the pleading itself. *Thornhill Publ’g*
27 *Co. v. Gen. Tel. Elec.*, 594 F.2d 730, 733 (9th Cir. 1979); *Mortensen v. First Fed.*
28 *Sav. & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977). In a factual attack, the

1 “defendant disputes the truth of the allegations that, by themselves, would otherwise
2 invoke federal jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039
3 (9th Cir. 2004). A challenge for lack of subject matter jurisdiction may be raised at
4 any time by either party or sua sponte by the court. *Fleming v. Gordon & Wong Law*
5 *Group, P.C.*, 723 F. Supp. 2d 1219, 1222 (N.D. Cal. 2010) (citing *Olson Farms, Inc.*
6 *v. Barbosa*, 134 F.3d 933, 937 (9th Cir. 1998)).

7 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil
8 Procedure tests the legal sufficiency of the claims asserted in the complaint. *See*
9 *Fed. R. Civ. P. 12(b)(6)*; *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). In
10 deciding a motion to dismiss, all material factual allegations of the complaint are
11 accepted as true, as well as all reasonable inferences to be drawn from them. *Cahill*
12 *v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996). A court, however, need
13 not accept all conclusory allegations as true. Rather, it must “examine whether
14 conclusory allegations follow from the description of facts as alleged by the
15 plaintiff.” *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th Cir. 1992) (citation
16 omitted); *see Benson v. Ariz. State Bd. of Dental Exam’rs*, 673 F.2d 272, 275–76
17 (9th Cir. 1982) (court need not accept conclusory legal assertions). A motion to
18 dismiss should be granted if a plaintiff’s complaint fails to contain “enough facts to
19 state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550
20 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads
21 factual content that allows the court to draw the reasonable inference that the
22 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
23 (2009) (citing *Twombly*, 550 U.S. at 556).

24 III.

25 DISCUSSION

26 Defendant moves to dismiss Plaintiff’s § 7433 claim for failure to state a claim
27 pursuant to Rule 12(b)(6) and for lack of subject matter jurisdiction pursuant to Rule
28 12(b)(1). A taxpayer may bring suit against the United States for civil damages in

1 relation to collection efforts of federal tax liabilities. 26 U.S.C. § 7433(a). “Section
2 7433 creates a private right of action only for tax collection activity that violates
3 some provision of the Revenue Code or the regulations promulgated thereunder.”
4 *Shwarz v. United States*, 234 F.3d 428, 433–34 (9th Cir. 2000) (citing 26 U.S.C. §
5 7433(a)). Accordingly, to state a claim under § 7433, “a plaintiff must allege that
6 the IRS violated an Internal Revenue Code provision or a Treasury Regulations.”
7 *Scharringhausen v. United States*, 686 F. Supp. 2d 1069, 1073 (S.D. Cal. 2009)
8 (citing *Shwarz*, 234 F.3d at 433–34). Here, Plaintiffs seek damages under § 7433,
9 arguing Defendant violated § 6331(k)(1), § 7214(a), § 301.7122(b)(3), and § 7435.

10 **A. § 6331(k)(1)**

11 Plaintiffs allege Defendant violated § 6331(k)(1) when it “unlawfully
12 obtained settlement funds in the amount of \$137,069.98, ..., while a proper
13 KENNER/IRS Offer In Compromise was pending[.]” (SAC ¶ 59c.) Section
14 6331(k)(1) provides “No levy may be made under subsection (a) on the property or
15 rights to property of any person with respect to any unpaid tax—(A) during the
16 period that an offer-in-compromise by such person under section 7122 of such
17 unpaid tax is pending with the Secretary; and (B) if such offer is rejected by the
18 Secretary, during the 30 days thereafter (and, if an appeal of such rejection is filed
19 within such 30 days, during the period that such appeal is pending).” 26 U.S.C. §
20 6331(k)(1). Defendant argues the SAC does not allege “the existence of a levy. Nor
21 do they allege that a Notice of Levy was ever issued by the IRS to their tax
22 professionals.” (Mem. of P. & A. in Opp’n to Mot. at 6–7.) Indeed, the SAC
23 expressly states, “The USA, by and through its Employees, received the Kenner-
24 Shaff settlement funds without issuing a levy, and while an OIC was pending.”
25 (SAC ¶ 59d.) Because the SAC fails to allege Defendant made a levy on his
26 settlement check while the OIC was pending, Defendant’s motion to dismiss
27 Plaintiff’s § 7433 claim premised on a violation of § 6331(k)(1) is granted.

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1 **B. § 7214(a)**

2 Next, Plaintiffs allege Defendant violated § 7214(a), which makes criminal
3 certain acts by IRS employees and authorizes a court to render judgment against a
4 convicted “employee for the amount of damages sustained in favor of the party
5 injured[.]” 26 U.S.C. § 7214(a). As Defendant correctly argues, § 7214(a) is a
6 “criminal statute[] that do[es] not provide for a private right of action and thus not
7 enforceable through a civil action. *Andrews v. Heaton*, 483 F.3d 1070, 1076 (10th
8 Cir. 2007); *see Hanna v. Home Ins. Co.*, 281 F.2d 298, 303 (5th Cir. 1960) (federal
9 criminal statutes do not provide a basis for civil liability). Thus, the Court does not
10 have jurisdiction over this claim, and therefore, Defendant’s motion to dismiss
11 Plaintiff’s § 7433 claim premised on a violation of § 7214(a) is granted.

12 **C. § 301.7122(b)(3)**

13 Plaintiffs allege Defendant violated § 301.7122(b)(3) by rejecting their OIC
14 after determining “it was submitted only to ‘Hinder and Delay’ the collection of
15 taxes,” even though “the OIC was valid and not submitted to ‘Hinder and Delay[.]’”³
16 (SAC ¶ 62.) Plaintiffs argue Defendant “intentionally avoided the potentially valid
17 OIC in order to collect funds outside of the OIC.” (Mem. of P. & A. in Opp’n to
18 Mot. at 7.) The “IRS decisions and actions pertaining to offers in compromise are
19 not considered to be collection activity under Section 7433.” *Sawyers v. United*
20 *States*, No. 3:15-CV-00873-GNS-DW, 2016 WL 7223430, at *2 (W.D. Ky. Dec. 13,
21 2016) (citations omitted); *see also United States v. Ullman*, No. CIV.A. 01-0272,
22 2002 WL 987998, at *6 (E.D. Pa. May 8, 2002) (“Compromising tax liabilities is a
23 purely discretionary activity and will not give rise to a claim for intentional, reckless
24 or negligent violation of the Internal Revenue Code.”) (citation omitted). Therefore,
25 Defendant’s motion to dismiss Plaintiff’s § 7433 claim premised on a violation of §

26 _____
27 ³ It is uncertain how these allegations show a violation of § 301.7122(b)(3), which
28 forth guidelines for evaluating offers to compromise that “[p]romote effective tax
administration.”

1 301.7122(b)(3) is granted.

2 **D. § 7435**

3 Lastly, Plaintiff claims Defendant violated § 7435 by “contact[ing] attorney
4 Richard Edson and attorney Barbara Dunn regarding the Kenner-Shaff settlement
5 funds.” (SAC ¶ 66.) Section 7435 prohibits the IRS employees from “intentionally
6 compromis[ing] the determination or collection of any tax due from an attorney,
7 certified public accountant, or enrolled agent representing a taxpayer in exchange
8 for information conveyed by the taxpayer to the attorney, certified public accountant,
9 or enrolled agent for purposes of obtaining advice concerning the taxpayer’s tax
10 liability[.]” 26 U.S.C. § 7435(a).⁴ The SAC does not contain any allegations that
11 Plaintiffs’ attorney had any tax due to the IRS or that IRS compromised the
12 determination or collection of that tax. *See Ramirez v. United States*, No. SACV 14-
13 1299-JLS ANX, 2015 WL 3606218, at *5 (C.D. Cal. Mar. 11, 2015). Therefore,
14 Defendant’s motion to dismiss Plaintiff’s § 7433 claim premised on a violation of §
15 7435 is granted. Accordingly, the Court declines to address Defendant’s remaining
16 arguments.

17 **III.**

18 **CONCLUSION**

19 The Court has previously cautioned Plaintiffs that their failure to cure
20 pleading deficiencies would result in a dismissal of their claims with prejudice and
21 without leave to amend. Plaintiffs have failed to state a claim despite having had
22 multiple opportunities in which to do so. Accordingly, Defendant’s motion to
23 dismiss is granted with prejudice.

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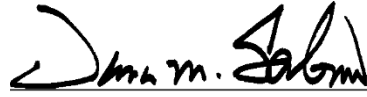
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27 ⁴ Plaintiff appears to contend the “tax due” refers to Plaintiffs’ tax liability. The
28 statute, however, expressly states to “tax due from an attorney, certified public
accountant, or enrolled agent representing a tax payer[.]” 26 U.S.C. § 7435.

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IT IS SO ORDERED.

Dated: July 2, 2018



Hon. Dana M. Sabraw
United States District Judge