IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES, Plaintiff, v. NANCY ZAK, CLAUD CLARK III, ECOVEST CAPITAL, INC., ALAN N. SOLON, ROBERT M. MCCULLOUGH, RALPH R. TEAL JR., Defendants.	))))))))))))))))	Case No. 1:18-cv-05774-AT

UNITED STATES' OPPOSITION TO DEFENDANT CLARK'S MOTION TO DISMISS COUNTS I, III, IV, AND V WITH RESPECT TO CLARK

On December 18, 2018, the United States filed its Complaint seeking to enjoin Defendants, including Claud Clark, under 26 U.S.C. §§ 7402, 7407, and 7408, for their roles in the organization, promotion, and sale of the "conservation easement syndication scheme." As alleged in the Complaint, the "conservation easement syndication scheme" involves Defendants selling interests in tracts of land to taxpayers looking for large tax deductions. In the arrangement, Defendants use an appraiser, like Clark, to prepare inflated appraisals of those tracts of land in

conjunction with the granting of conservation easements on the land. The resulting inflated charitable deductions are then split among the taxpayers. For the scheme to work, the promoters rely upon the use of pass-through entities and inflated appraisals of the conservation easements.

The Complaint contains 164 paragraphs of factual averments as to each Defendant's role in the conservation easement syndication scheme, how each Defendant's conduct violates the internal revenue laws, and claim for relief with respect to Defendants' conduct. As alleged in the Complaint, Clark is one of the appraisers who prepares these inflated appraisals. The Complaint sets forth the "who, what, where, when, and how" of Defendant Clark's conduct and otherwise satisfies the pleading requirements of the Federal Rules of Civil Procedure, as set forth below. Accordingly, the United State requests that this Court deny Clark's motion to dismiss.

The United States' Claims and Clark's Motion to Dismiss

In its Complaint, the United States seeks relief based on five separate counts: (I) injunction against all defendants under 26 U.S.C. § 7408 for engaging in

conduct subject to penalty under 26 U.S.C. § 6700;[1] (II) injunction against Defendants Zak and Clark under 26 U.S.C. § 7402 for engaging in conduct subject to penalty under 26 U.S.C. § 6695A;[2] (III) injunction against Defendant Clark

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[1] Section 7408 grants the United States the authority to bring actions to enjoin "specified conduct." Specified conduct is defined to include conduct subject to penalty under § 6700.

The relevant portion of 26 U.S.C. § 6700 states that "any person who (1)(A) organizes (or assists in the organization of) (i) a partnership or other entity, (ii) any investment plan or arrangement, or (iii) any other plan or arrangement, or (B) participates (directly or indirectly) in the sale of any interest in an entity or plan or arrangement referred to in subparagraph (A), and (2) make or furnishes or causes another person to make or furnish (in connection with such organization or sale) (A) a statement with respect to the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which the person knows or has reason to know is false or fraudulent as to any material matter, or (B) a gross valuation overstatement as to any material matter."

[2] Section 7402 grants the district courts "jurisdiction to make and issue in civil actions, writs and orders of injunction, and of ne exeat republica, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary **<u>or</u>** appropriate for the enforcement of the internal revenue laws." (Emphasis added).

Section 6695A(a) imposes a penalty if "(1) a person prepares an appraisal of the value of property and such person knows, or reasonably should have known, that the appraisal would be used in connection with a return or claim for refund, and (2) the claimed value of the property on a return or claim for refund which is based on such appraisal results in a substantial valuation misstatement under chapter 1 (within the meaning of § 6662(e)), …, or a gross valuation misstatement (within the meaning of § 6662(h)), with respect to such property."

under 26 U.S.C. § 7407 for engaging in conduct subject to penalty under 26 U.S.C. § 6694; (IV) injunction against all defendants under 26 U.S.C. § 7402 for unlawful interference with the administration and enforcement of the internal revenue laws, and (V) disgorgement against all Defendants as necessary or appropriate to enforce the internal revenue laws. (ECF No. 1, at 63-73).

Thus, to prevail on its claims for an injunction, the United States will need to prove: (1) that an injunction is necessary or appropriate to enforce the internal revenue laws under § 7402 (Counts II and IV); (2) that Defendant Cark engaged in specific conduct under § 7408, such as conduct subject to penalty under § 6700, and an injunction is appropriate to prevent the recurrence of such conduct (Count I); or (3) that Defendant Clark, as a tax return preparer, has engaged in specified conduct, such as conduct subject to penalty under § 6694, and an injunction is appropriate to prevent the recurrence of such conduct (Count III). To prevail on disgorgement, the United States will need to prove that disgorgement is necessary or appropriate to enforce the internal revenue laws. (Count V).

In its Complaint, the United States alleges Defendants, including Clark, engaged in conduct spanning from 2009 to present in relation to at least 96 conservation easement syndicates. (Compl. ¶¶ 11-174). This includes a description of all six Defendants and their roles in the conservation easement syndication

scheme (*id.* ¶¶ 12-53); extensive details of how the scheme works and the steps involved in organization, promotion, and sale of each syndicate (*id.* ¶¶ 61-62); detailed examples of three different syndicates (*id.* ¶¶ 69-111); specific statements by the Defendants (*id.* ¶¶ 117-129); an identification of why certain statements were false or fraudulent and what facts Defendants knew that would have provided "reason to know" that such statements were false or fraudulent (*id.* ¶¶ 131-163).

On March 26, 2019, Clark filed a motion to dismiss Counts I, III, IV, and V with respect to him under Fed. R. Civ. P. 12(b)(6). (ECF Nos. 41, 41-1).[3] With respect to Counts I, IV, and V, Clark "joins" in Zak's motion to dismiss with respect to the arguments made in her motion "under Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure and the five-year statute of limitations prescribed by 28 U.S.C. § 2462." (*Id.*). Clark asserts that "those portions of [Zak's] argument…apply with equal force to him." (*Id.*). Clark however, does not provide any further basis for this bald proposition.

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[3] Clark has not moved to dismiss Count II of the Complaint seeking an injunction under 26 U.S.C. § 7402 for engaging in conduct subject to penalty under 26 U.S.C. § 6695A. (ECF No. 41-1, at 3). As Clark has not moved to dismiss Count II of the Complaint, Defendant Clark will continue as a party to this case even if the Court grants his motion. Because Clark has not moved to dismiss Count II, the United States will not discuss the sufficiency of Count II in its opposition.

Clark also moves to dismiss Count III under Fed. R. Civ. P. 12(b)(6) for failure to state a claim because, he argues: (1) appraisers do not fit the definition of a "tax return preparer" under 26 U.S.C. § 7701(a)(36), and (2) there are separate statutory schemes governing tax return preparers and appraisers.

Clark's motions however, ignores the lengthy and detailed factual averments contained in the United States' Complaint, especially as they relate to Clark. For example, the United States has alleged that Defendant Clark is self-employed as a real property appraiser based out of Magnolia Springs, Alabama who claims to specialize in conservation easement and historical preservation appraisals, (Compl. ¶¶ 19-20) who has, since 2009, appraised at least 58 conservation easements for syndicates and provided a statement of value with respect to those appraisals. (Compl. ¶¶ 5, 22-23).

The United States alleges that those statements of value are used by the syndicates to solicit prospective customers and demonstrate the return on investment from investing in the syndicates – shown as the anticipated tax savings from investing. (Compl. ¶ 22). The Complaint alleges that Clark's statements of value, documented in appraisal reports, also serve as support for the tax deduction reported by the syndicates and ultimately, the investors. (Compl. ¶ 23). Taken as a whole, the 164 paragraphs of factual allegations describe Clark's conduct and why

that conduct is enjoinable under Sections 7402, 7407, and 7408 of the Internal Revenue Code. Because the United States' Complaint has met the pleading requirements of the Federal Rules of Civil Procedure and has stated a plausible claim for relief with respect to Clark's conduct, the United States requests that the Court deny Clark's motion.

DISCUSSION

I. The Complaint satisfies the pleading requirements of the Federal Rules of Civil Procedure with respect to Defendant Clark.

Clark argues that Counts I, IV, and V should be dismissed for the same reasons that Defendant Zak set forth in her motion to dismiss. (ECF No. 41-1, at 3 (citing Zak's Memorandum of Law in Support of her Motion to Dismiss, ECF No. 31-1, at 10-35). However, Clark does not articulate the how the standards in Rule 12(b)(6) and Rule 9(b) apply specifically to the allegations against him.

A. The Complaint must state a plausible claim for relief and pleaded fraud with particularity to satisfy Rules 12(b)(6) and 9(b).

As set forth in the United States' opposition to Zak's motion to dismiss, the bar for succeeding on a Rule 12(b)(6) motion is exceptionally high. (ECF NO. 47, at 11-12). The purpose of a Rule 12(b)(6) motion is to test the formal sufficiency of a statement of the claim for relief; the motion is not a procedure for resolving a contest between the parties about facts or the substantive merits of the plaintiff's

case. *Tri-State Consumer Ins. Co., Inc. v. LexisNexis Risk Solutions, Inc.*, 823 F.Supp.2d 1306, 1316 (N.D. Ga. 2011). To avoid dismissal under Rule 12(b)(6), a complaint must include "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Speaker v. U.S. Dept' of Health Human Servs. Centers for Disease Control & Prevention*, 623 F.3d 1371, 1380-81 (11th Cir. 2010) (internal quotation and citation omitted).

Fed. R. Civ. P. 9(b) requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Rules 9(b) is satisfied by identifying the specific statements, representations, or omissions; the time and place of such statement and the person responsible; the content of the statement and the person responsible; the content of the statement and how it misled; and what the defendant obtained as a result of the fraud. *Lucky Cap. Mgmt., LLC v. Miller & Martin PLLC*, 2019 WL 855322, at *6 (11th Cir. Feb. 21, 2019) (citing *Brooks v. Blue Cross and Blue Shield of Florida*, 116 F.3d 1364, 1371 (11th Cir. 1997)).

The application of Rule 9(b)'s "particularity" requirement must not abrogate the concept of notice pleading. *Ziemba v. Cascade Intern., Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001). A court should "take account of the general simplicity and flexibility contemplated by the rules" in applying the standards of Rule 9(b). *Sevilla Industry Mach. Corp. v. Southmost Mach. Corp.*, 742 F.3d 786, 791 (3d Cir. 1984). The Eleventh Circuit has championed a "nuanced, case-by-case approach" for examining whether the requisite indicia of reliability to satisfy Rule 9(b) are present. *U.S. v. Crumb*, 2016 WL 4480690, at *7 (S.D. Ala. 2016) (citing *U.S. ex rel. Mastej v. Health Mgmt. Assoc., Inc.*, 591 Fed. Appx. 693, 703-04 (11th Cir. 2014)).

This flexible case-by-case analysis allows a court to take into consideration the purposes of Rule 9(b) which include alerting defendants "to the precise misconduct with which they are charged and protecting defendants against spurious charges of immoral and fraudulent behavior." *Durham v. Business Mgmt. Assoc.*, 847 F.2d 1505, 1511 (11th Cir. 1998). Rule 9(b)'s "particularity" standard may be relaxed in cases where the fraud alleged is widespread, occurs over a period of time, is complex, or when factual information about the fraud is peculiarly within the defendant's knowledge or control. *See, Hill v. Morehouse Medical Associates, Inc.*, 2003 WL 22019936, at *3, (11th Cir. 2003); *U.S. ex rel.*

Clausen v. Laboratory Corp. of America, Inc., 290 F.3d 1301, 1314 (11th Cir. 2002); *U.S. ex rel. Butler v. Magellan Health Services, Inc.*, 101 F.Supp.2d 1365, 1368-69 (M.D. Fla. 2000). When Rule 9(b) is relaxed, the plaintiff can plead the overall nature of the fraud and then allege with particularity one or more illustrative instances of fraud. *Clausen*, 290 F.3d at 1310; *U.S. CFTC v. Giddens*, 2012 WL 603592, at *4 (N.D. Ga. 2012). But, even if the standard is not relaxed, Rule 9(b) does not require the United States to *prove* its case at the pleadings stage. *Crumb*, at *11; *Clausen*, 390 F.3d at 1313; *see also, U.S. v. Prewett*, 2008 WL 840540, at *3 (M.D. Fla. 2008) ("The Complaint is not required to specify each allegedly fraudulent tax return prepared over multiple years in order to meet the requirements of Rule 9.).

Clark, in adopting Zak's motion to dismiss, argues for a standard that exceeds what Rule 9(b) requires. The Government has plead the circumstances of Clark's alleged fraud with particularity, and, as discussed below, the Complaint meets even the most stringent interpretation of Rule 9(b)'s pleading requirements.

B. The United States' Complaint pleads the circumstances of fraud with particularity.[4]

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[4] As laid out in Footnote 7 of the United States' opposition to Zak's motion to dismiss, the United States assumes *arguendo* that the requirements of Rule 9(b) apply to certain allegations in this case. (ECF No. 47, at 12, n.7).

In its 164 paragraphs of factual averments, the United States describes the abusive conservation easement syndication scheme that has been ongoing for more than a decade. The United States describes the general pattern of the scheme and provides illustrative examples of the scheme along with specific statements made by the different Defendants. In short, the Government's complaint articulates the *who, what, when, where and how* of Defendant Clark's false or fraudulent conduct.

1. Who

The Complaint makes it clear that Defendant Clark, and the other five Defendants, are the "who" under Rule 9(b). The Complaint includes details about Claud Clark, his related entity, and his role in the conservation easement syndication scheme as an appraiser of real property. (Compl. ¶¶ 19-25). The Complaint also includes details of Clark's role in two specific conservation easement syndicates, Partnership Y, promoted and sold in 2012, (Compl. ¶¶ 78-94) and Partnerships W and X, promoted and sold in 2015. (Compl. ¶¶ 95-111). In these two illustrative examples, the United States alleges that Clark provided a preliminary opinion of value that was used by the syndicates in their marketing and sales, (Compl. ¶¶ 86, 94, 101, 103-104, 111) and then subsequently provided a final opinion of value that was used by the syndicates and the ultimate investors to

support the federal tax deduction relating to the conservation easement. (Compl. ¶¶ 90-93, 107-110).

2. What and How

The Complaint describes in considerable detail the mechanics of the conservation easement syndication scheme by outlining eleven distinct steps. (Compl. ¶¶ 61, 62). Then, the Complaint contains specific details of three conservation easement syndicates, including the property at issue, how the syndicates were offered, the number of units offered and the price of those units, the valuation obtained and then used to support the federal tax deductions claimed. (Compl. ¶¶ 69-111). The Complaint articulates three categories of statements that the United States contends were false or fraudulent, but the United States alleges that Clark only made statements in one of these categories – statements pertaining to value. (Compl. ¶ 115-116, 133). The United States also alleges that Clark not only made or furnished the statements, but he caused others – including the other Defendants – to make or furnish those statements to others, including the ultimate investors. (Compl. ¶¶ 86, 90, 93, 103, 104, 107, 110).

The United States alleges that the statements of value are gross valuation overstatements as defined in 26 U.S.C. § 6700(b)(1) but are also false or fraudulent statements that Defendants knew or had reason to know were false or fraudulent.

(*Id.*). The Complaint also includes details as to why the statements of value were false or fraudulent, and why Defendants knew or had reason to know they were false or fraudulent. (Compl. ¶¶ 91, 92, 108, 109, 142-163). For example, in appraising the conservation easement for Partnership W, Clark employed a discounted cash flow analysis to value the property – stating that the property's highest and best use was a multi-family resort-like development. (Compl. ¶ 108). In doing so, Clark relied upon the development plan as provided to him, and ignored relevant historical sales data. (*Id.*). As alleged by the United States, these errors by Clark – including the use of inappropriate methodology and exclusion of pertinent facts – resulted in Clark's valuation exceeding by 200 percent or more, the correct value of the conservation easement. (Compl. ¶ 109). The Complaint then alleges that Clark engaged in this conduct continually and repeatedly and explained in more detail how Clark's conduct led to gross valuation overstatements that were also false or fraudulent statements. (Compl. ¶¶ 142-163).

3. When

The Complaint provides particularity of when Defendant Clark's conduct occurred. The Complaint alleges that Defendant Clark's conduct started no later than 2009 ***and has continued to date***. (Compl. ¶¶ 5, 19-25, 65, 86-94, 101-111, 115-116, 174). For Partnership Y, the complaint alleges specific acts occurred

2012-2013. (Compl. ¶¶ 78-94). For Partnerships X and W, the complaint alleges specific acts by Defendants occurring between May 18, 2015, and December 22, 2015. (Compl. ¶¶ 95-111). The Complaint also contains an estimate of the number of conservation easement appraisals Clark prepared between 2009 and 2016. (Compl. ¶ 147).

4. Where

The complaint meets the "where" requirement for pleading fraud. The complaint contains an allegation of where Defendant Clark resides and does business (Compl. ¶¶ 19-25), where the real property subject to the conservation easements is located (Compl. ¶¶ 64, 70, 79, 97, 112), where certain of the syndicates were organized (Compl. ¶¶ 69, 78, 95, 97), and where investors were located (Compl. ¶ 113).

C. Defendant Clark cannot credibly maintain that he has an inability to understand the allegations or prepare a response.

By essentially incorporating Zak's motion to dismiss into his motion, Clark also asks this Court to accept the premise that he cannot understand the allegations or prepare a response. However, the initial four paragraphs of his memorandum evidences that he understands the allegations and is ready with a defense to the United States' Complaint. (ECF No. 41-1, at 1-2). But Clark's attempt to argue the merits and inject new facts into this case, should be disregarded in considering

Clark's Rule 12(b)(6) motion. *See, Stewart v. Quality Recovery Services, Inc.*, 2018 WL 6725553, at *5 (N.D. Ga. 2018).

Specifically, Clark argues that "he does not intentionally undervalue or overvalue," that he "cooperated fully" with the IRS administrative investigation into Clark's conduct, and that his business has slowed to a halt.[5] But these matters have no bearing on whether the United States has stated a plausible claim for relief or has pleaded the circumstances of fraud with particularity. Clark's four paragraphs of introduction demonstrate he knows exactly what the United States is complaining about – Clark's conduct in appraising conservation easements – and the relief it seeks.

Because the United States has stated a plausible claim for relief on Counts I, IV, and V, and plead the circumstances of fraud with particularity, the Court should deny Clark's motion with respect to those Counts.

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[5] Clark's attempt to insert facts outside the pleadings is even more obvious than Zak's given that he has attached an exhibit to his motion to support his claim. The Court should disregard matters or purported facts that are outside the Complaint. The United States objects to Clark's attempt to cite to matters outside the Complaint, and would in either way, disagree with his characterization of such matters. The statements and arguments of Clark's counsel in his motion to dismiss are not evidence. Further, Clark's "offer" of how the IRS *should* conduct its investigation is irrelevant. The IRS has the authority to investigate the matter as it deems fit and is not required to "take [Clark] up on his offer."

II. Defendant Clark's motion with respect to Count V fails because disgorgement is available under 7402 and does not violate the Excessive Fines Clause of the Eighth Amendment

Rather than restate the entirety of the United States' arguments in opposition to Zak's motion to dismiss with respect to Count V, the United States incorporates the argument by reference and summarizes why Clark's motion with respect to Count V should also be denied. (ECF No. 47, at 23-31).

Section 7402 of the Internal Revenue Code grants districts courts authority to issues "writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other ordered and processes, and to render such judgments and decrees as may be **necessary or appropriate** for the enforcement of the internal revenue laws." 26 U.S.C. § 7402 (emphasis added). The language of § 7402(a) encompasses a broad range of powers necessary to compel compliance with the tax laws. *See, e.g., Brody v. U.S.*, 243 F.2d 378, 384 (1st Cir. 1957) ("It would be difficult to find language more clearly manifesting a congressional intention to provide the district court with a full arsenal of powers to compel compliance with the internal revenue laws."). This broad arsenal includes the power to issues orders of disgorgement. *See, e.g., U.S. v. Stinson*, 239 F.Supp.3d 1299 (M.D.Fla. 2017), *aff'd*, 729 Fed.Appx. 891 (11th Cir. 2018); *U.S. v. RaPower-3, LLC*, 343 F.Supp.3d 1115, 1194 (D.Utah 2018), *appeal pending*, Nos.

18-4119, 18-4150 (10th Cir.). The remedies available under Section 7402, including disgorgement, are "in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws." 26 U.S.C. § 7402. By its literal terms, Section 7402 permits a Court to order disgorgement regardless of whether the IRS assesses penalties – either before or after an action is initiated pursuant to Section 7402.

Clark adopts Zak's arguments with respect to *Kokesh* and 28 U.S.C. § 2462, but as discussed in the United States' opposition to Zak's motion to dismiss, *Kokesh* is inapposite. *Kokesh v. S.E.C.*, 137 S.C.t 1635 (2017); *see also*, ECF No. 47, at 24-27. The issue in *Kokesh* was whether 28 U.S.C. § 2462 applies to disgorgement in the SEC context. But Zak and Clark ask this Court to extend the holding of *Kokesh*, without providing any basis for doing so. And at least one court to consider the issue after *Kokesh* declined to extend the *Kokesh* holding. *See, U.S. v. RaPower-3, LLC*, 294 F.Supp.3d 1238, 1240-41 ("*Kokesh v. SEC* decided whether disgorgement is a penalty for the purpose of applying a statute of limitation. *Kokesh* is a statutory analysis of terms. The Supreme Court does not state in *Kokesh* that its ruling determines that disgorgement is a penalty in all contexts. And, *Kokesh* certainly did not discuss or overrule the long standing

precedent of categorizing disgorgement as an equitable remedy."), *appeal pending*, Nos. 18-4119, 18-4150 (10th Cir.).

Additionally, the characteristics of the disgorgement sought in this case are much different than the characteristics of the disgorgement at issue in *Kokesh*. Here, the disgorgement (1) redresses a wrong committed against the United States; (2) is paid to the victim – the United State Treasury; and (3) is remedial in nature because it restores the parties to the status quo by putting funds back into the Treasury – and does so in a manner consistent with the law of restitution. *Cf. Kokesh*, 137 S.Ct. at 1643-45.

To succeed in a challenge to disgorgement under the Excessive Fines Clause of the Eighth Amendment, Clark would need to establish that the disgorgement is: (1) a fine, and (2) excessive. *See*, *U.S. v. 817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F.3d 1304, 1309 (11th Cir. 1999); *U.S. v. Bajakajian*, 524 U.S. 321 (1998). Courts to consider the issue have generally deferred on deciding whether disgorgement constitutes a "fine" and instead focus on the fact that the disgorgement is not excessive as it is tied to a defendant's wrongful gain. *See, e.g., S.E.C. v. Metter*, 2017 WL 3708084, at *2 (2d Cir. 2017); *S.E.C. v. Jammin Java Corp.*, 2017 WL 4286180, at *5 (C.D. Cal.); *In re Bilzerian*, 153 F.3d 1278, 1283 (11th Cir. 1998). Here, disgorgement lacks punitive characteristics, as discussed

above, and also will be tied to Clark's receipts from his conduct in inflating conservation easement appraisals. As such, it is not a violation of the Eighth Amendment. Accordingly, the United States requests this Court deny Clark's motion with respect to Count V.

III. The United States' Complaint states a claim for relief against Clark for an injunction under 26 U.S.C. § 7407 for conduct subject to penalty under 26 U.S.C. § 6694 in Count III.

To succeed on Count III, the United States will need to prove that Clark engaged in conduct subject to penalty under § 6694 and that an injunction is appropriate to prevent the recurrence of such conduct. 26 U.S.C. § 7407. Section 6694 of the Internal Revenue Code penalizes "tax return preparers" who cause an understatement of a taxpayer's liability due to unreasonable positions taken on a tax return and/or as a result of willful or reckless conduct. 26 U.S.C. § 6694(a), (b). A "tax return preparer" for purposes of § 6694 is defined as "any person who prepares for compensation, any return of tax imposed by this title or any claim for refund of tax imposed by this title." 26 U.S.C. §§ 6694(f), 7701(a)(36). The preparation of a substantial portion of a return or claim for refund shall be treated as if it were the preparation of such return or claim for refund. 26 U.S.C. § 7701(a)(36). Thus, to succeed, the United States would need to prove that Clark

is a "tax return preparer" who caused an understatement of a taxpayer's liability due to an unreasonable position or as a result of willful or reckless conduct.

In deciding Clark's Rule 12(b)(6) motion, the issue is whether the United States has pleaded factual content that allows this Court to draw the reasonable inference that Clark is liable for the misconduct alleged. *See*, *Speaker v. U.S. Dep't of Health Human Servs. Centers for Disease Control & Prevention*, 623 F.3d 1371, 1380-81 (11th Cir. 2010) (internal quotations and citation omitted). Here, the United States has alleged that Clark prepared appraisal reports that were attached to tax returns to support the "position" claimed, the charitable contribution resulting from the conservation easement. (Compl. ¶¶ 22, 23, 86, 90-94, 101, 107-111, 147-148). The United States also alleged that Clark prepared and signed Forms 8283 which accompanied the tax returns to support that "position." (Compl. ¶ 156). The United States also alleged that Clark received compensation for his role in the conservation easement syndication scheme, preparing appraisal reports and Forms 8283. (Compl. ¶¶ 24, 149). The United States has alleged facts that permit this Court to draw the inference that Clark is liable for the misconduct alleged. The United States has pleaded this claim in accordance with the pleading standards and asks the Court to deny Clark's motion with respect to Count III.

Clark's argument is premised on the notion that "[a]ppraisers receive compensation for providing valuation services, not for preparing tax returns or substantial portions of tax returns." However, this premise – even if true – is a matter outside the Complaint that should not be considered at this juncture. The United States has alleged facts that state a claim for relief. Clark's motion attempts to argue the merits of the United States' claim – inappropriately asking this court to essential weight evidence that it may present at trial to determine whether Clark, in this instance, should be considered a tax return preparer for his conduct. This is not the court's role in deciding a Rule 12(b)(6) motion. *Adinolfe v. United Technologies Corp.*, 768 F.3d 1161, 1168 (11th Cir. 2014) (citation omitted).

The United States has alleged that by providing the appraisal reports and preparing Forms 8283, Clark has prepared a "substantial portion" of a tax return for compensation and meets the definition of a "tax return preparer." Clark also knew that his returns were being used to support a federal tax deduction and would be attached to the returns as required by statute. *See*, I.R.C. § 170(f)(11). Accepting the United States' allegations as true, as is required in considering a Rule 12(b)(6) motion, the United States has stated a plausible claim for relief on Count III.

Clark then pivots to a lengthy discussion of the penalty provisions of I.R.C. § 6695A relating to conduct of appraisers and § 6694 relating to conduct of tax

return preparers. (ECF No. 41-1, at 4-10). Once again, Clark asks this Court to assume that an individual cannot be both an appraiser and a tax return preparer – that conduct should be subject to penalty under only one of the two statutes discussed and not both. But, the Court need not engage in a lengthy analysis of legislative history. The explicit language of §§ 6694 and 6695A do not require the conclusion for which Clark advocates.

Clark seems to recognize that flaw in his analysis though – citing to the Treasury Department's preamble to final regulations implementing amendments to § 6694 issued in December 2008. 73 FR 78430-01, 2008 WL 5271944, at *78436 (F.R.); ECF No. 41-4, at 8-9. In discussing the comments received to the proposed regulations issued under § 6694, the IRS and Treasury Department considered comments that appraisers should not be subject to penalties under § 6694 because of the new standards of conduct articulated in § 6695A and concluded that the "Treasury Department and the IRS continue to include appraisers in the definition of both signing and non-signing preparers." *Id.* In support of their conclusion in the final regulations, the Treasury Department and IRS cited to the Treasury regulations in place since 1977 whereby "an appraiser might be subject to penalties under section 6694 as a non[-]signing tax return preparer if the appraisal is a substantial portion of the return or claim for refund and the applicable standards of

care under section 6694 are not met." *Id.* Nothing in Clark's analysis of the separate statutory provisions changes the conclusion that the United States alleged sufficient facts for this Court to conclude that he has engaged in conduct subject to penalty under § 6694 and § 6695A. Clark's implicitly argues that he is not directly filling out the tax return because all he is doing is prepare an appraisal and certify their appraisal on the Form 8283, but this misses the objective of §6694 – to penalize the person who is responsible as a substantive matter for the way in which a return is prepared. *See, Goulding v. U.S.*, 957 F.2d 1420, 1426-27 (7th Cir. 1992). Clark, is directly responsible for the ultimate valuation claimed as a charitable deduction on the tax return (the substantive matter) and is thus responsible for "substantial portion" of the return and subject to penalty under § 6694.

Clark's reference to *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014) is also fruitless. The issue in *Loving* was whether the IRS's authority to "regulate the practice of representatives of persons before the Department of Treasury" encompassed the authority to regulate tax-return preparers. *Loving*, 742 F.3d at 1016. In deciding that the IRS did not have the authority to regulate tax-return preparers, the D.C. Circuit considered the statute's text, history, structure, and context to determine that the IRS had incorrectly interpreted the phrase

"representatives of persons before the Department of Treasury" contained in 31 U.S.C. § 330. Here, however, *Loving* is inapposite because the allegation is that Clark engaged in conduct explicitly delineated in § 6694 thus making him a "tax return preparer" for purposes of this case. This is not a case where the Court is being asked to make a bright-line determination that all appraisers will be subject to penalty under § 6694. The United States' Complaint has facial plausibility – the United States has included 164 paragraphs of factual allegations in its Complaint that outline Clark's conduct and how it is enjoinable under § 7407 because it is specified conduct, a.k.a. conduct subject to penalty under § 6694. At this juncture, nothing more is required. As such, the Court should deny Clark's motion with respect to Count III.

IV. If the Court determines that Complaint is not plead with particularity, the United States requests leave to amend.

Where it appears a more carefully drafted complaint might state a claim upon which relief can be granted, a district court should give a plaintiff an opportunity to amend his complaint instead of dismissing it. *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991); *see also*, Fed. R. Civ. P. 15. Although the United States has included detailed factual averments about Defendant Clark's conduct and how his conduct violates and interferes with the internal revenue laws, if the

Court finds that such allegations should be alleged with even more specificity and particularity, the United States requests leave to amend.

CONCLUSION

Because the United States' Complaint states a claim for relief with respect to Clark on Counts I, III, IV, and V and meets the pleading requirements set forth in the Federal Rules of Civil Procedure, including Rule 9(b), the United States requests that the court deny Defendant Clark's motion.

Dated: April 9, 2019

Respectfully submitted,

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*I certify that this motion has been prepared with one of the font and point selections approved by the court in LR 5.1C.

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2019, the foregoing document was electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to all counsel of record.

/s Erin R. Hines
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