UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHN SCHLABACH,

Plaintiff,

v.

UNITED STATES OF AMERICA, and its agents,

Defendant.

No. 2:18-cv-00053-SMJ

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL RELIEF FROM ORDER, PURSUANT TO RULE 60

Before the Court, without oral argument,[1] is *pro se* Plaintiff John Schlabach's Motion for Partial Relief from Order, Pursuant to Rule 60, ECF No. 15. Schlabach asks the Court to reconsider its October 24, 2018 order granting Defendant the United States of America's motion to dismiss his complaint, ECF No. 14. Having reviewed the file and relevant legal authorities, the Court grants in part and denies in part Schlabach's motion for partial relief, vacates the prior order granting the United States' motion to dismiss, construes the United States' motion to dismiss as a summary judgment motion, and directs the parties to respond to the material facts

[1] Because oral argument is unnecessary, the Court decides Schlabach's motion without it. *See* LCivR 7(i)(3)(B)(iii).

the Court has identified may not be genuinely in dispute.

BACKGROUND

On February 13, 2018, Schlabach sued the Internal Revenue Service ("IRS"), seeking an order invalidating the civil monetary penalties the IRS charged him for filing frivolous income tax returns regarding tax years 2009, 2010, 2012, and 2013, and refunding the money he paid or the IRS applied toward those penalties. ECF No. 1. The United States moved to dismiss Schlabach's complaint, arguing the Court lacked subject matter jurisdiction over Schlabach's refund claims for tax years 2009, 2010, and 2012, and Schlabach failed to state a facially plausible refund claim for tax year 2013. ECF No. 9. In connection with the motion, both the United States and Schlabach presented numerous documents outside the complaint. ECF No. 9-1; ECF No. 10 at 7–31. The Court did not exclude these documents and proceeded to grant the United States' motion to dismiss Schlabach's complaint. ECF No. 14.

LEGAL STANDARD

"Rule 60(b) 'provides for reconsideration only upon a showing of (1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) extraordinary circumstances which would justify relief.'" *Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (quoting *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1442 (9th Cir. 1991)). "Rule 60(b) is 'remedial' and 'must be liberally applied.'" *United States v.*

Aguilar, 782 F.3d 1101, 1106 (9th Cir. 2015) (quoting *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984)).

DISCUSSION

Schlabach asks the Court to "reconsider the ruling on the penalties for reasons of surprise, new information not presentable before and fraud on the court." ECF No. 15 at 8. Schlabach expresses concern that the Court relied on material outside his complaint. *Id. passim*. The Court's original approach is defensible. But in hindsight, the Court recognizes it should have converted the United States' motion to dismiss into a summary judgment motion after considering documents the parties submitted. Therefore, the Court will take that course of action by vacating the prior order and directing additional briefing. Liberally applying Rule 60(b)'s remedial provisions, the Court concludes Schlabach is entitled to partial relief from the prior order on grounds of mistake or extraordinary circumstances.[2] The following

[2] By its terms, Rule 60(b) applies only to "a final judgment, order, or proceeding." Fed. R. Civ. P. 60(b). An order is generally considered final for Rule 60(b) purposes if it is appealable. *United States v. Martin*, 226 F.3d 1042, 1048 n.8 (9th Cir. 2000). And ordinarily, an order is not appealable if it dismisses a complaint but fails to dismiss the underlying action and enter final judgment. *See Lopez v. City of Needles*, 95 F.3d 20, 22 (9th Cir. 1996). While the Court subjectively intended the prior order to be final and appealable, the Court omitted some key objective manifestations of such intent. *See* ECF No. 14 at 15–16 (dismissing all claims—three without prejudice and one with prejudice—but failing to dismiss the underlying action and enter final judgment). Therefore, to the extent the prior order was not final for Rule 60(b) purposes, the Court exercises its "inherent jurisdiction to modify, alter, or revoke [the order]." *Martin*, 226 F.3d at 1049.

paragraphs explain the Court's decision.

A. The United States' motion to dismiss under Federal Rule of Civil Procedure 12(b)(1)

Under Rule 12(b)(1), the Court must dismiss a claim over which it lacks subject matter jurisdiction. Federal courts have limited subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A federal court presumes a civil action lies outside its limited jurisdiction and the burden to prove otherwise rests on the party asserting jurisdiction exists. *Id.*

An attack on subject matter jurisdiction may be either facial or factual. *Edison v. United States*, 822 F.3d 510, 517 (9th Cir. 2016). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.* (quoting *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)). Here, the United States mounts a factual attack by filing certificates and exhibits challenging Schlabach's allegations. *See* ECF No. 9-1; *see also Edison*, 822 F.3d at 517; *see also Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004) (stating a moving party converts a Rule 12(b)(1) motion into a factual motion "by presenting affidavits or other evidence properly brought before the court" (quoting *Safe Air*, 373 F.3d at 1039)).

In response to a factual attack, the plaintiff "must present 'affidavits or any other evidence necessary to satisfy [his or her] burden of establishing that the court, in fact, possesses subject matter jurisdiction.'" *Edison*, 822 F.3d at 517 (quoting *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1121 (9th Cir. 2009)). Thus, in resolving a factual attack, the Court may look beyond the complaint to the parties' evidence without converting a Rule 12(b)(1) motion into a summary judgment motion. *Id.* And in evaluating the evidence, the Court need not presume the truthfulness of the plaintiff's allegations but must resolve any factual disputes in his or her favor. *Id.*

However, the Court must treat a Rule 12(b)(1) motion as a summary judgment motion if "the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits of an action." *Safe Air*, 373 F.3d at 1039 (quoting *Sun Valley Gas., Inc. v. Ernst Enters.*, 711 F.2d 138, 139 (9th Cir. 1983)); *see also id.* at 1040; *Bolton v. Lynch*, 200 F. Supp. 3d 1179, 1183 n.1 (E.D. Wash. 2016). "The question of jurisdiction and the merits of an action are intertwined where 'a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief.'" *Safe Air*, 373 F.3d at 1039 (quoting *Sun Valley*, 711 F.2d at 139).

Here, the jurisdictional issue and substantive issues are intertwined because

28 U.S.C. § 1346(a)(1) and I.R.C. §§ 7422(a) and 6532(a) arguably provide the basis for both the Court's subject matter jurisdiction and Schlabach's substantive claim for relief. Therefore, the Court treats the United States' Rule 12(b)(1) motion as a summary judgment motion. Accordingly, the Court hereby notifies the parties it has identified several material facts that may not be genuinely in dispute. *See* Fed. R. Civ. P. 56(f)(3). Those facts are as follows:

1. On November 28, 2016, the IRS notified Schlabach that it charged him $10,000 in frivolous filing penalties, plus $324.69 in interest, for tax year 2013.
2. On May 1, 2017, the IRS notified Schlabach that it applied his 2015 income tax overpayment of $1730.87 to the frivolous filing penalty for tax year 2013.
3. On May 15, 2017, the IRS notified Schlabach that it applied his 2016 income tax overpayment of $8724.68 to the frivolous filing penalty for tax year 2013.
4. Through these credits, Schlabach paid the full amount of the frivolous filing penalty for tax year 2013.
5. On June 10, 2017, Schlabach filed a claim with the IRS seeking a refund of the money it applied to the frivolous filing penalty for tax year 2013.
6. On November 13, 2017, the IRS rejected Schlabach's refund claim for tax year 2013.
7. On December 4, 2017, the IRS notified Schlabach that it charged him $15,000 in frivolous filing penalties for tax years 2009, 2010, and 2012.
8. Sometime between December 26, 2017 and January 2, 2018, Schlabach paid the U.S. Department of the Treasury $2250, or fifteen percent of the frivolous filing penalties for tax years 2009, 2010, and 2012.
9. Schlabach did not pay the full amount of the frivolous filing penalties for those tax years.
10. On January 16, 2018, Schlabach filed claims with the IRS seeking a refund of the money he paid toward the frivolous filing penalties for tax years 2009, 2010, and 2012.
11. Schlabach filed this lawsuit on February 13, 2018.

12. As of February 13, 2018, the IRS had not yet rejected Schlabach's refund claims for tax years 2009, 2010, and 2012, and less than a month had expired since he submitted them.

The parties will have a reasonable time to respond with all the material pertinent to the motion, as it relates to the specific facts outlined above. *See* Fed. R. Civ. P. 56(f). The briefing schedule is set forth at the end of this Order.

B. The United States' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Under Rule 12(b)(6), the Court must dismiss the complaint if it "fail[s] to state a claim upon which relief can be granted." A complaint is subject to dismissal under Rule 12(b)(6) if it either fails to allege a cognizable legal theory or fails to allege sufficient facts to support a cognizable legal theory. *Kwan v. SanMedica Int'l*, 854 F.3d 1088, 1093 (9th Cir. 2017).

To survive a Rule 12(b)(6) motion, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Facial plausibility exists where a complaint pleads facts permitting a reasonable inference that the defendant is liable to the plaintiff for the misconduct alleged. *Id.* Plausibility does not require probability but

demands more than a mere possibility of liability. *Id.* While a complaint need not contain detailed factual allegations, unadorned accusations of unlawful harm, naked assertions of wrongdoing, labels and conclusions, and formulaic or threadbare recitals of a cause of action's elements, supported only by mere conclusory statements, are not enough. *Id.* Whether a complaint states a facially plausible claim for relief is a context-specific inquiry requiring the Court to draw from its judicial experience and common sense. *Id.* at 679.

In deciding a Rule 12(b)(6) motion, the Court construes a complaint in the light most favorable to the plaintiff and draws all reasonable inferences in his or her favor. *Ass'n for L.A. Deputy Sheriffs v. County of Los Angeles*, 648 F.3d 986, 991 (9th Cir. 2011). Thus, the Court must accept as true all factual allegations contained in a complaint. *Iqbal,* 556 U.S. at 678. But the Court may disregard legal conclusions couched as factual allegations. *See id.*

Additionally, in deciding a Rule 12(b)(6) motion, the Court construes a *pro se* complaint liberally and may dismiss it if only if it appears beyond doubt that the plaintiff can prove no set of facts entitling him or her to relief. *Nordstrom v. Ryan,* 762 F.3d 903, 908 (9th Cir. 2014). But a liberal interpretation of a *pro se* complaint may not supply essential elements of a claim that the plaintiff did not initially plead. *Litmon v. Harris,* 768 F.3d 1237, 1241 (9th Cir. 2014).

Generally, the Court "may not consider material outside the pleadings when

assessing the sufficiency of a complaint under Rule 12(b)(6)." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018). Instead, the Court must convert a Rule 12(b)(6) motion into a summary judgment motion if "matters outside the pleadings are presented to and not excluded by the court."[3] Fed. R. Civ. P. 12(d).

Here, both parties presented documents outside the pleadings but the Court did not exclude them. ECF No. 9-1; ECF No. 10 at 7–31; ECF No. 14. Therefore, the Court treats the United States' Rule 12(b)(6) motion as a summary judgment motion. Accordingly, the Court hereby notifies the parties it has identified several material facts that may not be genuinely in dispute. *See* Fed. R. Civ. P. 56(f)(3). Those facts are as follows:

1. Schlabach claims he "has converted all his received paychecks into lawful money of the United States ("U.S. Notes"), pursuant to the provisions of 12 U.S.C. § 411." ECF No. 1 at 1.
2. "Schlabach's process is to stamp '*Redeemed in Lawful Money pursuant to 12 U.S.C. § 411*' on the endorsement line of each of his paychecks to assert his demand made to the Federal Reserve Bank where his checks are cashed and/or deposited." *Id.*
3. Schlabach claims federal reserve notes are obligations of the United States that may be redeemed in U.S. notes, which the Supreme Court has ruled are not subject to taxation.
4. Schlabach believes the law "provides access to . . . lawful money '**upon demand**'" and "assures '**full discharge**' of all obligations upon assignment or transfer of payments to the United States." *Id.* at 5.
5. Schlabach communicated these views to the IRS.

[3] While it is debatable whether an exception to this rule applies here, the Court exercises caution and follows the letter of Rule 12(d). *See generally Khoja*, 899 F.3d at 998–99, 1002–03 (discussing judicial notice and incorporation by reference at the Rule 12(b)(6) stage).

6. As a result, the IRS imposed civil penalties, plus interest, on Schlabach for allegedly filing a frivolous tax return regarding tax year 2013.
7. The IRS determined the position Schlabach took in his tax returns fit "argument code 30," which means "Non-negotiable Chargeback." *Id.* at 4–5, 12–14.
8. One IRS record contains the phrase "redeemed in lawful [indecipherable]" in explaining Schlabach's frivolous filing penalty for tax year 2009. *Id.* at 12.

The parties will have a reasonable time to respond with all the material pertinent to the motion, as it relates to the specific facts outlined above. *See* Fed. R. Civ. P. 12(d), 56(f). The briefing schedule is set forth at the end of this Order.

C. The United States' converted summary judgment motion under Federal Rule of Civil Procedure 56

In responding to this Order, the parties shall apply the following legal standard in conjunction with the Notice to *Pro Se* Litigants of the Summary-Judgment Rule Requirements, which the Clerk's Office will issue in due course.

Under Rule 56, a party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Summary judgment is appropriate if the record establishes "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

The moving party has the initial burden of showing no reasonable trier of fact could find other than for the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party meets its burden, the nonmoving party must point to specific facts establishing a genuine dispute of material fact for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986).

"[A] mere 'scintilla' of evidence will be insufficient to defeat a properly supported motion for summary judgment; instead, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Fazio v. City & County of San Francisco*, 125 F.3d 1328, 1331 (9th Cir. 1997) (quoting *Anderson*, 477 U.S. at 249, 252). If the nonmoving party fails to make such a showing for any of the elements essential to its case as to which it would have the burden of proof at trial, the trial court should grant the summary judgment motion. *Celotex*, 477 U.S. at 322.

The Court must view the facts and draw inferences in the manner most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255; *Chaffin v. United States*, 176 F.3d 1208, 1213 (9th Cir. 1999). And, the Court "must not grant summary judgment based on [its] determination that one set of facts is more believable than another." *Nelson v. City of Davis*, 571 F.3d 924, 929 (9th Cir. 2009).

D. Schlabach's remaining arguments

Because the Court vacates the prior order granting the United States' motion

to dismiss, the Court denies as moot the remainder of Schlabach's motion for partial relief.

Accordingly, **IT IS HEREBY ORDERED**:

1. Plaintiff's Motion for Partial Relief from Order, Pursuant to Rule 60, **ECF No. 15**, is **GRANTED IN PART** and **DENIED IN PART**.

2. The Clerk's Office is directed to:

A. **VACATE** the Court's October 24, 2018 Order Granting United States' Motion to Dismiss, **ECF No. 14**.

B. **CONSTRUE** the United States' Motion to Dismiss, **ECF No. 9**, as a summary judgment motion and **RE-NOTE** it for hearing without oral argument on **March 22, 2019** at **6:30 PM**.

C. **PROVIDE** *pro se* Plaintiff and Defendant's counsel a copy of the Notice to *Pro Se* Litigants of the Summary-Judgment Rule Requirements.

3. The parties shall answer this Order as follows:

A. No later than **February 22, 2019**, Plaintiff shall file a **response brief** not exceeding **twenty pages**. Attached to his response brief, Plaintiff shall submit all evidence pertinent to the summary judgment motion, as it relates to the specific facts outlined above that the Court has identified may not be

genuinely in dispute.

B. No later than **March 8, 2019**, Defendant shall file a **reply brief** not exceeding **ten pages**. Attached to its reply brief, Defendant shall submit all evidence pertinent to the summary judgment motion, as it relates to the specific facts outlined above that the Court has identified may not be genuinely in dispute.

C. No other documents may be filed in connection with the summary judgment motion without the Court's approval.

IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to *pro se* Plaintiff and Defendant's counsel.

DATED this 18th day of January 2019.

SALVADOR MENDOZA, JR.
United States District Judge