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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

FILED March 27, 2019

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

1)	
2)	
3)	
4	In re)	Case No. 17-10236-B-13
5	PAUL DAYTON LANGSTON and)	
6	KATHLEEN LOUISE LANGSTON,)	
7	Debtors.)	
8	_____	)	Adv. Proceeding No. 17-1044-B
9	PAUL DAYTON LANGSTON and	)	DCN: US-1
10	KATHLEEN LOUISE LANGSTON,)	
11	Plaintiffs,	)	Date: March 20, 2019
12		)	Time: 1:30 p.m.
13	v.	)	Place: U.S. Courthouse
14	INTERNAL REVENUE SERVICE,	)	2500 Tulare St.,
15	Defendant.	)	Fresno, California,
16		)	Dept. B, Courtroom 13,
17		)	5th Floor
18		)	Judge: Hon. René Lastreto II
19)	
20)	
21)	
22)	
23)	
24)	
25)	
26)	
27)	
28)	

MEMORANDUM DECISION

INTRODUCTION

Even the Internal Revenue Service ("IRS" or "Defendant") must obey the bankruptcy code's automatic stay. If the IRS willfully violates the stay, it is liable for an individual debtor's actual damages including costs and attorney's fees. The IRS, here, admittedly violated the automatic stay by offsetting

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1 taxes owed pre-petition with the debtors' annuity payments to be
2 received post-petition. Before filing an administrative claim
3 for relief with the IRS, the debtors filed an adversary
4 proceeding. After a trial on the severed issue of actual
5 damages, this court ruled the debtors could not prove the actual
6 damage claim.
7

8 The debtors' attorney's fees are a different story. Two
9 provisions of the Internal Revenue Code (26 U.S.C. §§ 7430;
10 7433) and related regulations (26 C.F.R. 301.7430-1(a) and (e);
11 301.7433-2) require the debtors to exhaust administrative
12 remedies before filing an adversary proceeding to recover their
13 attorney's fees for the automatic stay violation. The necessary
14 administrative claim must first be filed with the "Chief, Local
15 Insolvency Unit, for the judicial district in which the
16 bankruptcy petition" was filed. 26 C.F.R. 301.7433-2(e). But
17 there is a problem: there is no "Chief, Local Insolvency Unit,
18 for the judicial district." The IRS now concedes after nearly
19 two years of litigation that after filing the adversary
20 proceeding the debtors did properly file an administrative claim
21 - they just needed to file it before the adversary proceeding
22 was filed.
23
24
25
26

27 While the current application of this exhaustion
28 requirement appears to be regulatory legerdemain, our circuit

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1 requires exhaustion. The broad waiver under 11 U.S.C. § 106 must
2 be tempered by the relevant provisions of the Internal Revenue
3 code that require exhaustion of administrative remedies before
4 the IRS can be found to have waived their sovereign immunity.
5 For that reason and because the IRS now concedes the debtors
6 here have satisfied the requirements, the court is constrained
7 to dismiss the attorney's fees claim without prejudice for lack
8 of subject matter jurisdiction.
9

FACTS

10
11
12 Paul Langston ("Paul") once worked for the Federal
13 Government. While he worked there, Paul earned a defined benefit
14 annuity payment which was administered by The Office of
15 Personnel Management ("OPM") who distributed those payments to
16 Paul. He also owed nearly \$88,000.00 to the IRS.
17
18

19 Paul and his wife, Kathleen, (collectively "Langston,"
20 "Langstons," of "Plaintiffs") filed this Chapter 13 case in
21 January 2017. About two weeks later, the IRS learned of the
22 Langstons' bankruptcy case. In less than a week, the IRS filed a
23 claim in the bankruptcy case. About two months after this case
24 was filed, and while the automatic stay (11 U.S.C. § 362(a))¹ was
25
26

27 ¹ Unless specified otherwise, all chapter and section references are to the
28 Bankruptcy Code, 11 U.S.C. §§ 101-1532. All "Rule" references are to the
Federal Rules of Bankruptcy Procedure and all "Civil Rule" references are to
the Federal Rules of Civil Procedure.

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1 in effect, Paul received a letter from OPM telling him the IRS
2 would be withholding \$339.17 of his April 3, 2017 annuity
3 payment "because [Paul] owe[s] the Government." The IRS withheld
4 Paul's post-petition annuity payments for the months of April
5 through July 2017.
6

7 After the failure of informal attempts by the Langstons'
8 counsel to convince the IRS to return the payments, the
9 Langstons filed this adversary proceeding on May 3, 2017. The
10 Langstons did not pursue any administrative remedies until after
11 this suit was filed. But, the IRS returned the April and May
12 annuity payments within two weeks after the adversary proceeding
13 was filed and the June and July payments shortly thereafter. The
14 IRS released the OPM levy on June 23, 2017 and notified
15 Langstons' counsel.
16
17

18 The IRS answered the complaint. Then, Langstons' counsel
19 tried without success to find the right "Chief, Local Insolvency
20 Unit" to receive an administrative claim. Many web searches and
21 even formal discovery was met with no identified "Chief, Local
22 Insolvency Unit." Exasperated, Langstons' counsel sent the
23 administrative claim addressed to "Chief, Local Insolvency Unit"
24 to every IRS office located within this district. The IRS
25 admitted in discovery that to their knowledge no employee
26 retains the title of "Chief Local Insolvency Unit" after the IRS
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1 reorganized in 2010. The IRS instead referred debtors' counsel
2 to a listing of "Collection Advisory Groups." The IRS did
3 respond after receiving debtor's administrative claim noting
4 they were referring it to the "Local Insolvency Unit." But the
5 IRS did not name a "Chief" of that unit. And so, it goes.²
6

7 At the Pretrial Conference in this matter, the court and
8 the parties agreed the "actual damages" portion of the debtors'
9 claim should be tried first. It was. The court issued an oral
10 ruling finding the Plaintiffs did not meet their burden of proof
11 for being "actually" damaged.³
12

13 The IRS then filed this motion to dismiss the attorney's
14 fees claim for lack of subject matter jurisdiction under Civil
15 Rules 12(b)(1), (h)(3) and (i) (made applicable to bankruptcy
16 adversary proceedings by Rule 7012).⁴ The IRS argues that this
17 court does not yet have subject matter jurisdiction to decide
18 the attorney's fees issue because the debtors filed this
19 adversary proceeding before filing an administrative claim with
20 the IRS. They reason that their waiver of sovereign immunity
21
22
23

24 _____
25 ² Counsel for the United States has repeatedly assured the court and debtors'
26 counsel that no action has been taken on the administrative claim because
27 this adversary proceeding is now pending.

28 ³ The Plaintiffs' only damage claim was for alleged interest which had accrued
on a Domestic Support Obligation Paul owed. The court did not find
Plaintiffs' proof on the issue adequate to meet their burden of proof.

⁴ Plaintiffs filed a motion for summary judgment/summary adjudication which
the court has continued since this jurisdictional issue must be decided
first.

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1 under § 106(a)(1) for attorney's fees claims stemming from
2 automatic stay violations is conditioned upon a debtor's
3 compliance with 26 U.S.C. §§ 7430 and 7433 and the applicable
4 regulations before filing suit. Counsel for the United States
5 noted in oral argument that the Plaintiffs have now complied
6 with the exhaustion requirement because they filed the
7 administrative claim, albeit at the wrong time and that more
8 than six months have passed with no action by the IRS. 26 C.F.R.
9 301-7433-2(d)(ii).⁵
10
11

12 Plaintiffs argue that complying with the administrative
13 remedy in this case is impossible because there is indisputably
14 no "Chief, Local Insolvency Unit" identified to accept the claim
15 even if it was filed before the adversary proceeding. Since the
16 law does not require pursuit of an administrative remedy that is
17 impossible to achieve, Plaintiffs argue, even if they dismissed
18 the suit and filed another administrative claim they could not
19 comply.⁶
20
21

22 In reply the IRS argues the Plaintiffs have successfully
23 submitted an administrative claim. So, they contend, the lack of
24

25 ⁵ Plaintiffs' counsel is understandably dubious given the issues in this case.
26 At oral argument, Plaintiffs' counsel analogized the IRS' application of the
27 regulations here to Lucy Van Pelt's penchant for moving the football as
28 Charlie Brown was about to kick it in Charles M. Schulz' beloved "Peanuts"
comic strip. The court notes that Lucy, after all, also dispensed psychiatric
advice for a nickel.

⁶ Of course, now, counsel for the United States has stated the debtors have
complied.

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1 an individual who is the "Chief, Local Insolvency Unit" does not
2 mitigate the conditional waiver of sovereign immunity for
3 attorney's fees claims for automatic stay violations: first
4 exhaust administrative remedies before filing this adversary
5 proceeding.
6

JURISDICTION

7
8
9 The United States District Court for the Eastern District
10 of California has jurisdiction of this bankruptcy case and
11 adversary proceeding under 28 U.S.C. § 1334(b) as this is a
12 proceeding arising under Title 11 of the United States Code and
13 arising in a case under Title 11. The District Court has
14 referred this case to this court under 28 U.S.C. § 157(a). This
15 is a "core" proceeding under 28 U.S.C. § 157(b)(2)(A), (C) and
16 (O). If the proceeding is not deemed "core" the parties have
17 agreed to have this court enter a final judgment in the matter.
18
19 Jurisdiction to determine issues arising about the application
20 of the automatic stay to the IRS is also conferred by
21 § 106(a)(2).
22
23

DECISIONAL STANDARDS

24
25 The existence of sovereign immunity is a question of law.
26 Arizona v. Bliemeister (In re Bliemeister), 296 F.3d 858, 861
27 (9th Cir. 2002); Montana v. Goldin (In re Pegasus Gold Corp.),
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1 394 F.3d 1189, 1193 (9th Cir. 2005). So too are questions
2 whether a plaintiff has exhausted administrative remedies,
3 Williams v. Paramo, 775 F.3d 1182, 1191 (9th Cir. 2014) or
4 whether a plaintiff must, Chang v. United States, 327 F.3d 911,
5 919 (9th Cir. 2003).
6

7 A federal court is compelled to dismiss an action if at any
8 time it determines it lacks subject matter jurisdiction. Civil
9 Rule 12(h)(3).
10

ANALYSIS

11
12
13 The IRS asks the court to dismiss this adversary proceeding
14 because this court lacks jurisdiction over the Langstons' claim
15 for attorney's fees. Doc. #57. The IRS asserts that this court
16 does not have subject matter jurisdiction because the IRS has
17 not waived its sovereign immunity; that exhaustion of
18 administrative remedies is a prerequisite for waiver of
19 sovereign immunity and the Langstons have not exhausted the
20 requisite administrative remedies. Id.
21
22

23 The Langstons, on the other hand, argue that they did in
24 fact exhaust all available administrative remedies "in that the
25 only remedy outlined in federal regulations is actually
26 impossible to comply with, and cannot be 'available' to
27 Plaintiff." Doc. #102. They cite Ninth Circuit case law holding
28

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1 that § 106 “plainly waives sovereign immunity for court-ordered
2 monetary damages under the waiver’s enumerated provisions . . .”
3 (Hunsaker v. United States, 902 F.3d 963, 968 (9th Cir. 2018))
4 and that “one need not exhaust administrative remedies that
5 would be futile or impossible to exhaust.” Singh v. Ashcroft,
6 362 F.3d 1164, 1169 (9th Cir. 2004) (citing Taniguchi v.
7 Schultz, 303 F.3d 950, 957 (9th Cir. 2002) (plaintiffs need not
8 exhaust administrative remedies when doing so would be futile
9 (citing Aleknagik Natives Ltd. V. Andrus, 648 F.2d 496, 499 (9th
10 Cir. 1981))).
11
12

13 The IRS maintains, though: first, “all that is required to
14 satisfy the plain language of the regulation is that a writing
15 be sent to ‘Chief, Local Insolvency Unit’,” the actual existence
16 of an individual with that title being immaterial for
17 compliance, and; second, Plaintiffs’ reliance on Hunsaker is
18 misplaced because Hunsaker does not address a situation where
19 the only issue remaining is Plaintiffs’ claim for attorney’s
20 fees nor does it specifically address waivers of sovereign
21 immunity for claims for attorney’s fees in tax cases. Doc. #112.
22 Granting this motion and dismissing the case would not prejudice
23 Plaintiffs, the IRS contends, because “Plaintiffs could
24 immediately re-engage the administrative process with the IRS or
25 bring a procedurally sound suit with the Court.” Id.
26
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1 This court must first find if it has subject matter
2 jurisdiction over this action. To do so, the court must find
3 whether Defendant has waived sovereign immunity. If the
4 Defendant has not, then the motion must be granted, and the
5 action dismissed for lack of subject matter jurisdiction
6 pursuant to Civil Rule 12(b)(1).
7

8 If the court finds that Defendant has waived sovereign
9 immunity, the court must then determine whether exhaustion of
10 administrative remedies is a jurisdictional pre-requisite. If
11 the court finds administrative remedy exhaustion is a
12 jurisdictional pre-requisite, then the court must determine if
13 Plaintiffs have exhausted the required administrative remedies.
14 If Plaintiffs have not, the motion must be granted, and the
15 action dismissed for lack of subject matter jurisdiction. If not
16 a jurisdictional pre-requisite, then the motion may be granted
17 for failure of the Langstons to state a claim for which relief
18 can be granted under Civil Rule 12(c) or 12(i). But, in that
19 case, the Langston's may be given leave to amend.
20
21
22

23 **I. Has the United States waived sovereign immunity?**
24

25 Under Civil Rule 12(b)(1), a court must dismiss a case if
26 it lacks subject matter jurisdiction. A federal court is
27 presumed to lack subject matter jurisdiction until the party
28 asserting it establishes otherwise. Kokkonen v. Guardian Life

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1 Ins. Co. of Am., 511 U.S. 375, 377 (1994). The "United States,
2 as sovereign, 'is immune from suit . . .'" unless it consents to
3 be sued. United States v. Dalm, 494 U.S. 596, 608 (1990)
4 (citations omitted). A waiver of sovereign immunity must be
5 unequivocally expressed. United States v. Mitchell, 445 U.S.
6 535, 538 (1980). Section 106(a) states "[N]otwithstanding an
7 assertion of sovereign immunity, sovereign immunity is abrogated
8 as to a governmental unit to the extent set forth in this
9 section with respect to . . . [S]ection 362 of [the Bankruptcy
10 Code]." 11 U.S.C. § 106(a)(3) gives this court the authority to
11 issue an order, process, or judgment for an order or judgment
12 awarding a money recovery, which this adversary proceeding
13 seeks. Section 106(a)(3) states "[S]uch order or judgment for .
14 . . fees . . . shall be consistent with the provisions and
15 limitations of [28 U.S.C. § 2412(d)(2)(A)]" ("[26 U.S.C. §]7430
16 has supplanted [28 U.S.C. § 2412(d)(2)(A)] for the award of
17 attorney's fees and costs in proceedings to which § 7430 is
18 applicable." IRS v. Brickell Inv. Corp. (In re Brickell Inv.
19 Corp.), 922 F.2d 696, 700 (11th Cir. 1991) (citing 28 U.S.C. §
20 2412(e)) (superseded by statute on other grounds).
21
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25
26 Section 106(a)(4) states that the enforcement of such order
27 or judgment against any governmental unit "shall be consistent
28 with appropriate nonbankruptcy law applicable to such

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1 governmental unit" The "applicable nonbankruptcy law"
2 applicable to Defendant would be Title 26 of the United States
3 Code.

4
5 Courts throughout the country are not united on this issue.
6 This court however, is persuaded that under § 106, the United
7 States has waived sovereign immunity for this action. See
8 Hunsaker v. United States, 902 F.3d 963, 968 (9th Cir. 2018);
9 see also In re Lowthorp, 332 B.R. 656, 660 (Bankr. M.D. Fla.
10 2005) (finding that § 106 applied and "Congress has specifically
11 waived sovereign immunity" for an action for sanctions for
12 contempt) and Szanto v. IRS (In re Szanto), 574 B.R. 862 (Bankr.
13 D. Or. 2017).

14
15
16 Defendant's position that Hunsaker is not applicable is
17 unpersuasive. The Ninth Circuit stated "[11 U.S.C. § 106(a)]'s
18 text plainly waives sovereign immunity for court-ordered
19 monetary damages under the waiver's enumerated provisions,
20 although the damages may not be punitive." Hunsaker, 902 F.3d at
21 968. Additionally, "the statute's text unambiguously waives
22 sovereign immunity for nonpunitive monetary damages" Id.
23 Remedies available to individual debtor's under § 362(k)
24 includes attorney's fees. Section 106(a)(3) allows for a "money
25 recovery" except for "punitive damages." Notably, Hunsaker also
26 expressly rejected a claimed limitation that the immunity waiver
27
28

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1 only applies to sums of money unlawfully in the possession of
2 governmental entities. Id. at 969. This court is persuaded that
3 “money recovery” may be broad enough to encompass attorney’s
4 fees. See id. at 968 (the clause “including . . . a money
5 recovery expressly broadens the waiver’s scope to encompass
6 monetary damages.”).

8 On the other hand, Hunsaker does not go as far as the
9 Langstons suggest. The plaintiff in Hunsaker did file an
10 adversary proceeding without exhausting administrative remedies,
11 but at trial the plaintiff only sought damages for emotional
12 distress. Id. at 965. The court in Hunsaker did hold that the
13 waiver of sovereign immunity in § 106(a) extends “unambiguously
14 to such monetary claims.” Id. at 968 (citing Daniel v. Nat’l
15 Park Serv., 891 F.3d 762, 768 (9th Cir. 2018) (citing Lane v.
16 Pena, 518 U.S. 187, 192 (1996)). But the court did not have an
17 attorney’s fees claim before it so there was no analysis of
18 U.S.C. §§ 7430 and 7433. Nor did the Hunsaker court overrule or
19 discuss earlier Ninth Circuit precedent, Conforte v. United
20 States, 979 F.2d 1375, 1377 (9th Cir. 1992).

24 The Florida Middle District Court held that “[26 U.S.C. §
25 7430(b)] constitutes a waiver of the government’s sovereign
26 immunity and as a result, strict compliance with its provisions
27 is required.” Klauer v. United States (In re Klauer), 23 Fla. L.
28

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1 Weekly Fed. D. 153, at *8 (U.S. M.D. Fla. 2007) (citing United
2 States v. Nordic Village, Inc., 503 U.S. 30, 34 (1992) and
3 Ardestani v. United States, 502 U.S. 129, 137 (1991)). See also
4 In re Lowthorp, 332 B.R. 656, 660 (Bankr. M.D. Fla. 2005)
5 (finding that § 106 applied and "Congress has specifically
6 waived sovereign immunity" for an action for sanctions for
7 contempt). A waiver of sovereign immunity cannot be implied, but
8 must be unequivocally expressed. Gilbert v. DaGrossa, 756 F.2d
9 1455, 1458 (9th Cir. 1985). The taxpayer bears the burden of
10 showing an unequivocal waiver of immunity. Baker v. United
11 States, 817 F.2d 560, 562 (9th Cir. 1987).

14 The court is also persuaded that Defendant is deemed to
15 have waived sovereign immunity pursuant to § 106(b). That
16 section states that the governmental unit

18 that has filed a proof of claim in the case is deemed
19 to have waived sovereign immunity with respect to a
20 claim against such governmental unit that is property
21 of the estate and that arose out of the same
22 transaction or occurrence out of which the claim of
23 such governmental unit arose.

24 Defendant filed a claim in this case. Claim #3. The claim
25 is in the amount of \$97,634.87, \$43,988.57 of which is priority
26
27
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1 as "taxes or penalties owed to governmental units" pursuant to
2 § 507(a)(8). Id. The Langstons' claim is property of the
3 bankruptcy estate and this adversary proceeding arose from the
4 IRS garnishing payments owed Paul post-petition without stay
5 relief.
6

7 The court thus finds that the IRS has waived sovereign
8 immunity provided the Langstons complied with the requirements
9 of law. The difficulty here is this is not now a case where
10 "actual damages" are at issue. That issue has been tried and the
11 Langstons did not prevail. Instead the issue is recovery of
12 Langstons' litigation costs including attorney's fees for the
13 IRS' admitted violation of the automatic stay.⁷ The court must
14 now determine whether exhausting administrative remedies is
15 jurisdictional.
16
17

18 **II. Is exhaustion of administrative remedies a**
19 **jurisdictional pre-requisite in the 9th Circuit?**
20

21 26 U.S.C. § 7430(b) prevents a court from issuing a
22 judgment for reasonable litigation costs "unless the court
23 determines that the prevailing party has exhausted the
24 administrative remedies available to such party within the
25

26 ⁷ To be sure, one could logically argue that § 362(k) uses the term
27 "including" before "costs and attorneys' fees" when describing "actual
28 damages" relief afforded those injured by willful violations of the stay. As
we see below, that probably makes no difference in the analysis given the
specificity of the statutes conditioning attorney's fees recovery from the
IRS for improper collection activity on exhausting administrative remedies.

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1 Internal Revenue Service." 26 C.F.R. 301.7433-2(e)(1) outlines
2 the process for administrative remedies, requiring, inter alia,
3 that the administrative claim "be sent in writing to the Chief,
4 Local Insolvency Unit, for the judicial district in which the
5 taxpayer filed the underlying bankruptcy case giving rise to the
6 alleged violation." At least one federal court of appeals finds
7 the burden imposed by the exhaustion requirement as *de minimis*:
8 "[T]he burden imposed by 26 C.F.R. § 301.7430-1 is exacting and
9 non-intuitive, but taxpayers must comply with the letter of the
10 government's narrow waiver of sovereign immunity in order to get
11 to Federal Court." Kuhl v. United States, 467 F.3d 145, 148 (2d
12 Cir. 2006) (citation omitted).⁸

13
14
15
16 Many courts have painstakingly considered this issue and
17 have arrived at various conclusions. In support of its argument,
18 the IRS cites 10 cases. All of them are materially
19 distinguishable from the facts of this case - most importantly,
20 in this case Plaintiffs, after the adversary proceeding was
21 filed, attempted to exhaust administrative remedies.⁹

22
23
24 Some courts have ruled that the plaintiff's failure to
25 exhaust administrative remedies does not deprive the court of

26 ⁸ Similar sentiments have been expressed elsewhere: Gray v. U.S., 723 F.3d 795
27 (7th Cir. 2013) cert. den., 572 U.S. 1137 (2014); Evans v. U.S., 433 F. Supp.
28 2d 17 (D.D.C. 2006).

⁹ At the hearing on this motion on March 20, 2019, Defendant reported that
Plaintiffs had in fact complied and at that moment in time, would be able to
proceed in court to sue for attorneys' fees.

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1 jurisdiction. The court in In re Graham, No. 99-26549-DHA, 2003
2 WL 21224773 (Bankr. E.D. Va. Apr. 11, 2003) found that it had
3 jurisdiction under 28 U.S.C. §§ 157(b)(2) and 1334(b). This
4 case, being one of the earliest decided cases the court found,
5 held that "26 U.S.C. § 7433(e)(2)(A) states that the exclusive
6 remedy for recovering damages for violations of the Bankruptcy
7 Code is to petition the bankruptcy court" and within that
8 section "[T]here is no mention . . . of the need to exhaust
9 administrative remedies." Id. at *2. 26 U.S.C. § 7433(e) was
10 "quite clear" that the "bankruptcy court is the *exclusive* remedy
11 for the violation of Bankruptcy Code provisions." Id.¹⁰

14
15 The court in In re Lowthorp held that "[c]ongress has
16 specifically waived sovereign immunity for this type of contempt
17 sanctions. 11 U.S.C. § 106." In re Lowthorp, 332 B.R. 656, 660
18 (Bankr. M.D. Fla. 2005). That court found jurisdiction but held
19 that it could not grant the relief because "[D]ebtors were
20 required to first exhaust their administrative remedies"

21
22 Id.

23
24 The Georgia Northern District Court found that failure to
25 exhaust administrative remedies did not limit the court's

26
27
28 ¹⁰ Of course, 26 U.S.C. § 7433(e)(2)(B) specifically references the recovery of administrative and litigation costs can only be awarded under 26 U.S.C. § 7430.

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1 subject matter jurisdiction. Music v. United States, 17 F. Supp.
2 3d 1327, 1332 n.1 (N.D. Ga. 2014).

3 The court in Pointer v. United States, Dep't of Treasury
4 (In re Pointer), 510 B.R. 433, 435-36 (Bankr. M.D. Ga. 2014)
5
6 cited two cases in the 6th and 11th Circuit which both held that
7 the exhaustion of remedies under 26 U.S.C. § 7433 was not
8 jurisdictional. See Hoogerheide v. IRS, 637 F.3d 634 (6th Cir.
9 2011); Galvez v. IRS, 448 F. App'x. 880 (11th Cir. 2011). In
10 Galvez, the court held that the debtors' claim should be
11 dismissed because they failed to state a claim on which relief
12 could be granted because they failed to exhaust their
13 administrative remedies. Galvez, 448 F. App'x. at 888.
14 Hoogerheide similarly dismissed the action for "failure to
15 exhaust," not jurisdictional grounds. See generally Hoogerheide,
16 637 F.3d at 636-39.
17
18

19
20 The Virgin Islands District Court held that after examining
21 the "Supreme Court's instructions in [Arbaugh v. Y & H Corp.,
22 546 U.S. 500, 516 (2006)], [26 U.S.C. § 7433]'s statutory
23 language, and the caselaw examining Section 7433 after Arbaugh
24 was decided . . . the greater, and more persuasive, weight of
25 authority supports the conclusion that failure to exhaust
26 administrative remedies . . . does not raise a jurisdictional
27 bar to relief." Hassen v. Gov't of the V.I., No. 15-38, 2017
28

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1 U.S. Dist. LEXIS 47758, at *16 119 A.F.T.R.2d (RIA) 1344 (D.V.I.
2 Mar. 30, 2017). Arbaugh held that “when Congress does not rank a
3 statutory limitation on coverage as jurisdictional, courts
4 should treat the restriction as nonjurisdictional in character.”
5 Arbaugh, 546 U.S. at 516. “It is grounds for dismissal on a Rule
6 12(b)(6) motion, provided that the defendant has met the burden
7 of pleading . . . that the plaintiff has failed to exhaust
8 administrative remedies.” Hassen, 2017 U.S. Dist. LEXIS 74458,
9 at *18 (citing Jones v. Bock, 549 U.S. 199, 216 (2007)).¹¹
10
11

12 The court in In re Cooper, No. 10-11701C-13G, 2011 Bankr.
13 LEXIS 160, at *5, 107 A.F.T.R.2d (RIA) 580 (Bankr. M.D.N.C. Jan.
14 19, 2011) found that it was undisputed that the Debtor did not
15 exhaust the available administrative remedies and therefore
16 could not “[seek] to recover damages from the IRS in the
17 bankruptcy court for a violation of the automatic stay. . . .”
18 Id. The court did not specifically rule on jurisdiction but did
19 dismiss the sanctions motion at issue there without prejudice
20 for the debtor’s failure to exhaust administrative remedies.
21
22
23
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25

26
27 ¹¹ The statutes here 26 U.S.C. §§ 7430(b) and 7433 state no judgment shall be
28 awarded unless the prevailing party has exhausted administrative remedies.
This specificity suggests Congress did “rank a statutory limitation on
coverage as jurisdictional.” Arbaugh, 546 U.S. at 515. As we have seen, the
lower courts are not uniformly convinced.

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1 Perhaps the court's dicta in In re Consolidated Health
2 Services, Inc., No. 08-00103-8-SWH, 2013 WL 4409695, at *4
3 (Bankr. E.D.N.C.) is most enlightening:

4 The court's holding notwithstanding, is it true
5 that § 743 3(e) [sic] could be clearer in highlighting
6 the "prior exhaustion of administrative remedies"
7 requirement? Absolutely. Would it be appropriate for
8 the IRS itself to highlight this requirement, and
9 provide sufficient information for taxpayers to take
10 note of, and then comply with, the IRS's own
11 regulatory procedure? Absolutely. Did the trustee take
12 reasonable steps in responding, repeatedly, to the IRS
13 notices at the addresses specified in the notices by
14 the IRS itself? Again, absolutely. And is it
15 frustrating for the trustee, for the next hapless
16 taxpayer, and for this court to see the IRS seemingly
17 get a "pass" for its blatant disregard of the
18 automatic stay, now that this matter finally has
19 attracted the IRS's attention, by virtue of its
20 ability to now point to 26 C.F.R. 301.7433-2(e)(1) as
21 if all concerned should have simply availed themselves
22 of that "opportunity" all along? Absolutely.

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1 Is the "Appeals Office" serving this district the same
2 thing as the "Local Insolvency Unit" for this
3 district? The court does not know.² Nor does the IRS
4 appear to think that recipients of the notice need to
5 know, because according to the IRS, it is the
6 "coordinator" who transfers that information, *not a*
7 *taxpayer seeking to pursue "administrative*
8 *remedies."* Suffice to say, the court understands the
9 trustee's frustration with the current situation, and
10 is itself frustrated with the fact that this situation
11 is bound to repeat itself so long as the IRS continues
12 to play this decidedly one-sided game of "hide the
13 exhaust administrative remedies ball" with taxpayers
14 and debtors.

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18 Some courts have found that administrative remedy
19 exhaustion is a jurisdictional prerequisite. See Jacoway v.
20 Dep't of Treasury (In re Graycarr, Inc.), 330 B.R. 741, 747
21 (Bankr. W.D. Ark. 2005) (failure to exhaust administrative
22 remedies jurisdictional prerequisite); Kuhl v. United States,
23 467 F.3d 145, 147 (2d Cir. 2006) (failure to exhaust
24 administrative remedies deprives the court of jurisdiction
25 (citing Venen v. United States, 38 F.3d 100, 103 (3d Cir.
26 1994)); McIver v. United States, 650 F. Supp. 2d 587, 593 (N.D.

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1 Tex. 2009) (failure to exhaust administrative remedies grounds
2 for dismissal without prejudice for lack of subject matter
3 jurisdiction); In re Rae v. United States, 436 B.R. 266, 275
4 (Bankr. D. Conn. 2010) (“[M]any bankruptcy courts have
5 consistently recognized that waivers of immunity in §§ 7430 and
6 7433 will deprive them of jurisdiction if the plaintiff did not
7 comport with the requirements set forth in the statutes” (citing
8 Kovacs v. United States, 391 B.R. 820, 824 (E.D. Wis. 2008));
9 Swensen v. United States (In re Swensen), 438 B.R. 195, 198
10 (Bankr. N.D. Iowa 2010) (failure to ‘pursue’ the administrative
11 remedy is grounds for dismissal for lack of subject matter
12 jurisdiction); Kight v. Dep’t of Treasury/IRS (In re Kight), 460
13 B.R. 555, 566 (Bankr. M.D. Fla. 2011) (filing an administrative
14 claim with the IRS prior to filing the adversary proceeding is a
15 jurisdictional prerequisite); Barcelos v. United States (In re
16 Barcelos), 576 B.R. 854 (Bankr. E.D. Cal. 2017) (sovereign
17 immunity was not waived because debtor did not exhaust the
18 administrative remedies).

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23 The Ninth Circuit in Conforte v. United States, 979 F.2d
24 1375, 1377 (9th Cir. 1992), without much analysis, held that
25 “[C]onforte may not bring this action against the United States
26 under 26 U.S.C. § 7433 without exhausting her administrative
27 remedies” and therefore the court lacked jurisdiction. This is
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1 apparently still the law in the Ninth Circuit. See Manant v.
2 United States, No. 10-00566 JMS/KSC, 2011 Dist. LEXIS 70365, 108
3 A.F.T.R.2d (RIA) 5066, at *10 (D. Haw. June 30, 2011) (“[I]t
4 thus appears that Ninth Circuit precedent (Conforte) is no
5 longer valid to the extent it requires exhaustion to be pled and
6 deems a failure to exhaust under § 7433(d) to be a
7 jurisdictional defect”), vacated and remanded, Manant v. United
8 States, 498 F. App’x. 752 (9th Cir. 2012) (citing Conforte,
9 “[D]ismissal of the Manants’ action without prejudice was proper
10 because the district court lacked jurisdiction in light of the
11 Manants’ failure to pursue an administrative claim before filing
12 their action.”). See also, Barcelos, 576 BR at 857.

13
14
15
16 Despite the apparent confusion among courts in the various
17 circuits, this court is bound by the precedent set by higher
18 courts in this Circuit. The Ninth Circuit has held that
19 administrative remedy exhaustion is a jurisdictional
20 prerequisite.

21
22 **III. Did Plaintiffs exhaust the administrative remedies?**

23
24 The court must now determine if Plaintiffs exhausted the
25 necessary administrative remedy.

26
27 Exhausting the applicable administrative remedy requires
28 the tax-payer to send certain documents to the “Chief, Local

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1 Insolventcy Unit, for the judicial district in which the taxpayer
2 filed the underlying bankruptcy case giving rise to the alleged
3 violation," inter alia. 26 C.F.R. 301.7433-2. The IRS' admission
4 (doc. #104, exh. C, p.6, ¶¶1-3) and Attorney Peter Sauer's
5 declaration (doc. #103), state such a person does not exist.
6 But, that person's existence is immaterial to compliance
7 contends the IRS. They say simply addressing the administrative
8 claim to the "Chief, Local Insolventcy Unit" is compliance
9 enough. Doc. #112.
10
11

12 At the hearing on March 20, 2019, Defendant stated that the
13 IRS went through an internal reorganization that eliminated
14 numerous titles and positions, one of which was "Chief, Local
15 Insolventcy Unit." Despite that however, Defendant stated that
16 the claims still get processed, primarily by insolventcy
17 personnel assigned to the case. Defendant also confirmed that as
18 of March 20, 2019, Plaintiffs have complied with the
19 administrative remedy and have the right to seek attorney's fees
20 in the bankruptcy court. Defendant further explained that the
21 exhaustion of administrative remedies is a "gatekeeping
22 function" of the IRS that helps to avoid excessive litigation.
23
24
25

26 In none of the cases previously discussed have the courts
27 examined this issue raised by Plaintiffs - that complying with
28 the statute is impossible. The courts either found that the

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1 taxpayer made no attempt (see Swensen v. United States (In re
2 Swensen), 438 B.R. 195, 198 (Bankr. N.D. Iowa 2010); In re Rae
3 v. United States, 436 B.R. 266, 275 (Bankr. D. Conn. 2010);
4 Kight v. Dep't of Treasury/IRS (In re Kight), 460 B.R. 555, 566
5 (Bankr. M.D. Fla. 2011)), or found that the taxpayer's attempt
6 was deficient for a number of reasons (see Klauer v. United
7 States (In re Klauer), 23 Fla. L. Weekly Fed. D 153, at *11-14
8 (M.D. Fla. 2007); Don Johnson Motors, Inc. v. United States, 532
9 F. Supp. 2d 844, 883 (S.D. Tex. 2007); McIver v. United States,
10 650 F. Supp. 2d 587, 593 (N.D. Tex. 2009); Barcelos v. United
11 States (In re Barcelos), 576 B.R. 854, 857-58 (Bankr. E.D. Cal.
12 2017); Galvez v. IRS, 448 F. App'x 880, 886 (11th Cir. 2011);
13 Kuhl v. United States, 467 F.3d 145, 148 (2d Cir. 2006); In re
14 Lowthorp, 332 B.R. 656, 659-61 (Bankr. M.D. Fla. 2005)), but no
15 court addressed whether compliance was possible because the tax-
16 payer was required to send the documents to a person that did
17 not exist, nor was that argument ever raised.

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21
22 Because of the Ninth Circuit's ruling in Conforte, and
23 under Civil Rule 12(b)(1), (b)(6), and (c), this court must
24 dismiss the action. Administrative remedy exhaustion is a
25 jurisdictional prerequisite. The IRS has shown that neither the
26 Langstons' adversary complaint nor the amended complaint alleged
27 that they exhausted their administrative remedies before suing
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1 for attorneys' fees. See doc. #1, 17. So the Langstons did not
2 comply with 26 U.S.C. §§ 7430 and 7433. The court does note
3 however the great lengths Plaintiffs went to comply after the
4 fact.¹² Plaintiffs mailed an administrative claim addressed to
5 "Chief, Local Insolvency Unit" to nine separate IRS offices on
6 or around September 25, 2017. Doc. #104, exh. A. All offices
7 listed appear to be within the boundaries of the Eastern
8 District of California. The Langstons even propounded
9 interrogatories to the IRS to learn how IRS notified the public
10 of the identity of the Chief, Local Insolvency Unit. The IRS
11 responded: "IRS Publication 4325 has a listing of all local
12 Collection Advisory Groups," though no explanation was provided
13 if "Collection Advisory Group" is identical to "Local Insolvency
14 Unit." See doc. #103, 104, exh. C, p. 6, ¶¶ 4-14. The court must
15 wonder what issues might be raised if Plaintiffs did timely file
16 the administrative claim to "Chief, Collection Advisory Group."
17
18
19
20

21 The Langstons also contend that compliance with the
22 requirements of 26 U.S.C. §§ 7430 and 7433 and accompanying
23 regulations would be futile and therefore unnecessary. See
24 Taniguchi v. Schultz, 303 F.3d 950, 957 (9th Cir. 2002). First,
25

26 ¹² At the hearing on March 20, 2019, Plaintiffs' counsel reiterated, he was
27 told to send the Langston's notice to a "Collection Group" for tax liens in
28 Oakland, CA, which is not in the Eastern District of California. The court
notes that the regulation requires that the administrative remedy be sent to
the Insolvency Office in the "judicial district in which the taxpayer filed
the underlying bankruptcy case giving rise to the alleged violation," which
is the Eastern District of California.

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1 the facts of this case do not support the argument. The IRS,
2 through counsel, has conceded that the Langstons have exhausted
3 their administrative remedies and they can proceed with another
4 lawsuit to seek their attorney's fees. So, compliance with the
5 administrative remedy here was neither impossible nor futile.¹³
6

7 Second, neither Singh nor Taniguchi help the Langstons
8 here. Those cases did not deal with a pre-requisite to damage
9 recovery or an apparent failure of the relevant law or
10 regulations to have a designated person to whom an
11 administrative claim could be sent. In Singh, the plaintiff did
12 not receive the necessary transcript to challenge an immigration
13 judge's credibility determination in an asylum proceeding. Singh
14 v. Ashcroft, 362 F.3d 1164, 1169-70 (9th Cir. 2004). It was thus
15 futile to require the timely exhaustion requirement. In
16 Taniguchi it was futile to require exhaustion because the basis
17 for the plaintiff's equal protection claim - arbitrary waiver of
18 deportation by the Attorney General - was not supported since
19 plaintiff's status as a legal permanent resident did not legally
20 permit the Attorney General to waive a deportation requirement.
21 Taniguchi v. Schultz, 303 F.3d 950, 957-58 (9th Cir. 2002).
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28 ¹³ The court will leave for another day the question of who is responsible for the length of this litigation given the regulatory quagmire the Langston's have endured.

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1 Plaintiffs here filed the adversary proceeding to stop
2 Defendant from garnishing the annuity payments. Plaintiffs could
3 have simultaneously filed the administrative claim and then
4 filed another adversary proceeding for attorney's fees, if need
5 be. In fact, in this case, the IRS stopped garnishing wages and
6 returned the funds shortly after learning of the pending
7 adversary proceeding. This demonstrates the effectiveness of the
8 Langstons' approach. This scenario is substantially different
9 from those at issue in Taniguchi or Singh.
10
11

12 Plaintiffs' defense that the administrative remedy is not
13 available falls short. Strict compliance, as argued by the IRS
14 in reply, requires that the administrative claim "be sent in
15 writing to the Chief, Local Insolvency Unit, for the judicial
16 district in which the taxpayer filed the underlying bankruptcy
17 case giving rise to the alleged violation." 26 C.F.R. 301.7433-
18 2. Plaintiff actually did send such a notice but after the
19 lawsuit was filed. The IRS now admits Plaintiffs have complied
20 and could proceed with another action for attorney's fees.
21
22

CONCLUSION

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25 Therefore, pursuant to Civil Rules 12(b)(1), (b)(6) and
26 (c), this motion is GRANTED without prejudice. Since there is no
27 other issue to be tried in this adversary proceeding, the court
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1 will issue separate orders dismissing the attorney's fees claim,
2 denying the Langtons' motion for summary judgment without
3 prejudice as moot, and enter a judgment accordingly.

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**Instructions to Clerk of Court
Service List - Not Part of Order/Judgment**

The Clerk of Court is instructed to send the Order/Judgment or other court generated document transmitted herewith to the parties below. The Clerk of Court will send the Order via the BNC or, if checked X , via the U.S. mail.

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