

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
BRIDGEPORT DIVISION

EMERGING MONEY CORP.,)	
EMERGING ADMINISTRATIVE)	
SERVICES, LLC, and EMERGING)	
ACTUARIAL DESIGNS, LLC,)	Case No. 3:09-CV-01502-CSH
)	
Plaintiffs,)	
)	
v.)	
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	
_____)	

STATEMENT TO THE COURT PURSUANT TO DOCKET 48

COMES NOW Plaintiffs Emerging Money Corporation, Emerging Administrative Services, LLC, and Emerging Actuarial Designs, LLC (collectively, "Plaintiffs") and files this statement with the Court regarding their intent to pursue to trial the claim with respect to the "Ponzi scheme" assertion, and an explanation of the damages sought pursuant to the Court's order at Docket 48.

STATEMENT

Plaintiffs intend to try the claim with respect to the "Ponzi scheme" wrongful disclosure, and provide an explanation of damages that are available to the Plaintiffs in this case. In the Court's order, denying in part,

the United States motion for summary judgment, the Court found that the “Ponzi scheme” disclosure in the IRS’s notices to taxpayers as a wrongful disclosure of the Plaintiffs’ tax return information.

Because of these wrongful disclosures, Section 7431 permits the taxpayer to seek damages in an amount equal to the greater of: (1) \$1,000 for each act of unauthorized disclosure of a return or return information with respect to which such defendant is found liable, or (2) the sum of the actual damages sustained by the plaintiff as a result of the unauthorized disclosure, plus, in the case of a willful or grossly negligent disclosure, punitive damages, and costs and reasonable attorneys fees. I.R.C. §7431(c)(1)-(3). As such, the statute specifically permits an aggrieved plaintiff to elect the higher of the two damage computations determined by the Court.

Plaintiffs plan to establish and pursue the sum of statutory and actual damages sustained as the result of the IRS’ unauthorized disclosure and elect the greater of the two.

I. Statutory Damages.

Section 7431 permits a taxpayer to collect the greater of statutory damages in the amount of \$1,000.00 per unauthorized disclosure for which the government is found liable. Because the Court has found that “Ponzi

scheme” statement was a wrongful disclosure, the statutory damages provides a floor of recovery. I.R.C. §7431(c)(1)(A). The declaration of Judith Steiner, attached to the United States’ motion for summary judgment, states that 23 letters containing the “Ponzi scheme” language were delivered to taxpayers. (Decl. of J. Steiner, Docket 28-3, p.7 ¶22.)¹ As such, each Plaintiff is entitled to \$1,000 for each of the 23 letters. The total statutory damage for all three Plaintiffs is \$69,000 at his time. Plaintiffs sought additional discovery to confirm that 23 is the total number, but the IRS has refused to provide the information.

II. Actual Damages.

In the alternative, the statute provides for the sum of actual damages sustained as a result of the disclosure, plus punitive damages. I.R.C. §7431(c)(1)(B). Again, additional discovery is needed to determine exactly how many letters containing the Ponzi scheme language may have been issued, and to whom the letters were issued to. This information will be used to create an analysis of actual economic damages sustained by the Plaintiffs, including loss of clients, goodwill and reputation and, in the

¹ Judith Steiner’s first declaration filed with this Court stated that a total of 26 letters were sent to taxpayers, with 23 of them containing “Ponzi scheme” language. The United States later filed a second declaration which states that only 24 letters were sent out in total. (Docket 42-1.) These numbers have not been confirmed as the United States continues to withhold the actual letters from the Plaintiffs.

alternative, establish the total number of disclosures for an award of statutory penalties. Determining who received the letters is the first step to establish the effect that the Ponzi scheme criminal assertion had on their business relationships with the Plaintiffs.

The Plaintiffs' accountant will analyze the income and revenue stream before and after the issuance of the Preliminary Notice. Indeed, allegations that the Plaintiffs were engaged in criminal activity coming from the IRS caused severe damage, eventually forcing the Plaintiffs to shut down their business. At this time, Plaintiffs believe their actual economic damages resulting from the allegations that they were involved in a criminal Ponzi scheme are substantially greater than the permitted statutory relief.

III. Punitive Damages.

If Plaintiffs are successful in establishing the actual economic damages which resulted from the unauthorized disclosures, they are also entitled to punitive damages if the disclosure is determined to be grossly negligent or willful. I.R.C. §7431(c)(1)(B)(ii). Willful conduct is "that which was done without ground for believing that it was lawful or conduct marked by a careless disregard of whether one has a right to act in such a manner." Barrett v. U.S., 100 F.3d 35, 40 (5th Cir. 2006) (citing Smith

v. U.S., 730 F. Supp. 948, 955 (C.D. Ill. 1990), rev'd on other grounds, Smith v. U.S., 964 F.2d 630 (7th Cir. 1992). Conduct that is grossly negligent is that which is either willful or marked by “wanton or reckless disregard of the rights of another.” Id. (citing Smith, 730 F. Supp. at 955); see also Marré v. U.S., 38 F.3d 823, 826 (5th Cir. 1994). While the IRS has discretion to disclose return information to the extent the disclosure is necessary to obtain information not otherwise reasonably available, the making of the criminal “Ponzi scheme” assertion admittedly does not accomplish this objective.

Plaintiffs believe it is clear from Agent Steiner’s declaration that the use of the “Ponzi scheme” language was completely reckless. As the Court pointed out, Steiner attested that the criminal fraud assertion was included in the letters (but not in later letters on the same subject) to deter taxpayer resistance to the IRS’s finding. (Docket 48, p.8.) Simply put, it was a strong-arm, scare tactic to coerce taxpayers at the expense of accusing the Plaintiffs of being associated with a criminal activity. It is even more outrageous that a civil IRS agent would use terminology that is only associated with criminal activity. Indeed, the Court held that the government has provided no explanation or justification for the use of the criminal Ponzi scheme allegation. (Docket 48, p.8.)

More recent events make IRS's grossly negligent conduct all the more apparent. As previously discussed in the briefing, the IRS was conducting a Section 6700 investigation of Emerging Money Corporation. Section 6700 is an assessable tax/penalty against those that engage in the promotion of "tax shelters." After a multi-year investigation, Emerging Money Corporation was cleared of any civil liability as a promoter of the transaction by the IRS. (Ex. 1.) Thus, to implicate Mr. Strauss' companies (the Plaintiffs) in criminal activity when no civil liability was ultimately determined by the IRS is from the Plaintiffs' perspective grossly negligent at the very least. Plaintiffs assert that this behavior defines "a willful or grossly negligent disclosure" for the purpose of establishing a basis for punitive damages.

III. Costs & Reasonable Attorneys' Fees.

Section 7431(c)(2) and (3) permits Plaintiffs to collect the costs of the action, plus reasonable attorneys' fees if the Plaintiffs are deemed the prevailing party. Plaintiffs may not be deemed the prevailing party if the United States establishes that the position of the government in the proceeding was "substantially justified." I.R.C. §7430(c)(4)(B)(ii). The statutory phrase "substantially justified" means "'justified in substance or in the main' – that is, justified to a degree that could satisfy a reasonable

person.” Pierce v. Underwood, 487 U.S. 552, 565 (1988). For the reasons set forth above, and contained in the Court’s summary judgment order, the IRS was not substantially justified in arguing the “Ponzi scheme” disclosure was not wrongful.

The Court’s order points out the fact that the government has failed to offer any reason for disclosing this information. (“In fact, Defendant, explaining in its Memorandum in Support why the IRS needed to disclose this information, said nothing about the Ponzi-scheme allegation.” (Docket 48, p.8).) The only reason the Defendant has offered as to why such language was included in the notices was to deter taxpayer resistance to the IRS’s findings. (Docket 48, p.8 (citing Steiner Decl. ¶¶26-27.)) It is not reasonable or justifiable for the IRS to accuse an individual or a business of criminal, fraudulent conduct in order to force taxpayers into agreeing to a tax assessment. Indeed, it raises legitimate questions into the tactics of the IRS in enforcing compliance with the tax code. Under these circumstances, the IRS was not substantially justified in arguing in this proceeding that the disclosure of “Ponzi scheme” was not wrongful.

CONCLUSION

Plaintiffs plan to move forward with its case against the United States on its remaining claim, and will be seeking actual and punitive

damages, or in the alternative, the statutory award, plus its costs and reasonable attorneys' fees. Plaintiffs will be filing a motion to lift the discovery stay and set a new discovery deadline and will then renew their motions to compel.

Respectfully submitted,

/s/ Lindsey W. Cooper Jr.

LINDSEY W. COOPER JR. (phv03751)
The Law Offices of L.W. Cooper Jr., LLC
36 Broad Street
Charleston, SC 29401
Telephone: 843.723.5152
Facsimile: 843.577.4570

DAVID J. FABRIZI
Attorney at Law
79 S. Benson Road #5
Fairfield, CT 06824
Telephone: 203.256.8379
Facsimile: 203.256.1169

Counsel for Plaintiffs

Dated: July 3, 2012
Charleston, South Carolina

CERTIFICATE OF SERVICE

It is hereby certified that on July 3, 2012, I caused to be served the foregoing STATEMENT TO THE COURT to counsel of record via ECF.

/s/ Lindsey W. Cooper Jr.