IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-00512-PAB-MJW

JEFFREY T. MAEHR,

Plaintiff,

v.

JOHN KOSKINEN, Commissioner of Internal Revenue;
JOHN VENCATO, Revenue Agent;
GINGER WRAY, Revenue Agent;
GARY MURPHY, Revenue Agent; and
WELLS FARGO BANK, NA;

Defendants.

RECOMMENDATION ON
(1) MOTION TO DISMISS CLAIMS AGAINST DEFENDANT WELLS FARGO BANK, N.A. (Docket No. 45)
and
(2) UNITED STATES' MOTION TO DISMISS AMENDED COMPLAINT (Docket No. 46)

MICHAEL J. WATANABE
United States Magistrate Judge

This case is before this Court pursuant to an Order Referring Case (Docket No. 33) entered by Judge Philip A. Brimmer on March 1, 2017. Now before the Court for a report and recommendation are (1) the Motion to Dismiss Claims Against Defendant Wells Fargo Bank, N.A. (Docket No. 45) and (2) the United States' Motion to Dismiss Amended Complaint (Docket No. 46). The United States' motion was filed on behalf of Defendants Koskinen, Vencato, Wray, and Murphy.[1] The Court has carefully considered

[1] The Court refers to these Defendants collectively as the "IRS Defendants."

the subject motions (Docket Nos. 45 & 46), pro se[2] Plaintiff Maehr's responses (Docket Nos. 56 & 57), and Defendants' replies (Docket Nos. 60 & 61). In addition, the Court has taken judicial notice of the Court's file, and has considered the applicable Federal Rules of Civil Procedure and case law. The Court now being fully informed makes the following findings of fact, conclusions of law, and recommendations.

Jurisdiction

The Court has jurisdiction pursuant to 28 U.S.C. § 1331.

Summary of the Case

Plaintiff filed his Prisoner Complaint (Docket No. 1) on March 1, 2016. On May 5, 2016, Judge Babcock dismissed this action and judgment was entered in Defendants' favor (Docket Nos. 12 & 13). Plaintiff appealed the dismissal. On October 20, 2016, the Tenth Circuit Court of Appeals affirmed the dismissal of most of Plaintiff's claims, but reversed and remanded with the following instruction regarding the levy placed on certain funds: "We reverse and remand for the district court to consider Appellant's non-frivolous legal claim that the IRS has improperly levied exempt VA disability benefits by placing a levy on all funds in the bank account where Appellant's disability benefits are deposited." (Docket No. 20 at 6). This case was reopened and Plaintiff was ordered to file a Second Amended Complaint (Docket Nos. 22 & 23). A Second Amended

[2] The Court must construe the filings of pro se litigants liberally. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not be the pro se litigant's advocate, nor should the Court "supply additional factual allegations to round out [the pro se litigant's] complaint or construct a legal theory on [his] behalf." *Whitney v. New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997) (citing *Hall*, 935 F.2d at 1110). In addition, pro se litigants must follow the same procedural rules that govern other litigants. *Nielson v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994).

Complaint (Docket No. 26) was filed on January 17, 2017, and is the operative complaint. In short, Plaintiff asserts that the Internal Revenue Service ("IRS") has improperly placed a levy on his disability benefits. (Docket No. 26 at 4). Plaintiff alleges that Wells Fargo Bank, N.A. ("Wells Fargo") is "an accomplice to the illegal levy action . . . ." (*Id*. at 7). Plaintiff asks the Court to enjoin the IRS from levying his veteran's disability benefits; to order the IRS to create an administrative policy notice that is sent to all IRS departments regarding veteran's disability funds; to sanction the IRS for violating laws and regulations; to order Wells Fargo to create a standard policy to review levies for lawfulness; and for compensatory and punitive damages against both Defendants. (*Id*. at 10-11). Defendant Wells Fargo moves to dismiss under Fed. R. Civ. P. 12(b)(6). (Docket No. 45). The IRS Defendants move to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). (Docket No. 46).

Standard of Review

Defendants move to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) is appropriate if the Court lacks subject matter jurisdiction over claims for relief asserted in the complaint. Rule 12(b)(1) challenges are generally presented in one of two forms: "[t]he moving party may (1) facially attack the complaint's allegations as to the existence of subject matter jurisdiction, or (2) go beyond allegations contained in the complaint by presenting evidence to challenge the factual basis upon which subject matter jurisdiction rests." *Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell*, 363 F.3d 1072, 1074 (10th Cir. 2004) (quoting *Maestas v. Lujan*, 351 F.3d 1001, 1013 (10th Cir. 2003)). When reviewing the factual basis on which subject matter jurisdiction rests, the district

court does not presume the truthfulness of the complaint and "has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995) (citations omitted). Consideration of evidence outside the pleadings does not convert the motion to a Rule 56 motion. *Id*.

"The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's Complaint alone is legally sufficient to state a claim for which relief may be granted." *Dubbs v. Head Start, Inc*., 336 F.3d 1194, 1201 (10th Cir. 2003) (citations omitted). In doing so, the Court "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Alvarado v. KOB–TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007) (quotation marks and citation omitted). At the same time, however, a court need not accept conclusory allegations. *Moffett v. Halliburton Energy Servs., Inc*., 291 F.3d 1227, 1232 (10th Cir. 2002).

Generally, "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (omission marks, internal quotation marks, and citation omitted). The "plausibility" standard requires that relief must plausibly follow from the facts alleged, not that the facts themselves be plausible. *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008).

However, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not

shown—that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (internal quotation marks and alteration marks omitted). Thus, even though modern rules of pleading are somewhat forgiving, "a complaint still must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Bryson*, 534 F.3d at 1286 (quotation marks and citation omitted).

Analysis

A. Defendant Wells Fargo

In its October 20, 2016 Order and Judgment, the Tenth Circuit held: "The allegations in Appellant's complaint are [ ] insufficient to establish a meritorious legal claim for relief against Wells Fargo based on its role in the levies placed on Appellant's accounts." (Docket No. 20 at 3). The same is true for Plaintiff's allegations against Wells Fargo in his Second Amended Complaint. Plaintiff's allegations have not changed. His general allegation that Wells Fargo is "an accomplice to the illegal levy action . . . ." simply does not state a civil cause of action. (Docket No. 26 at 7). Accordingly, the Court recommends that the Motion to Dismiss Claims Against Defendants Wells Fargo Bank, N.A. (Docket No. 45) be granted for the reasons stated by the Tenth Circuit (Docket No. 20) and in Judge Babcock's May 5, 2016 Order (Docket No. 12).

B. IRS Defendants

As an initial matter, and as the IRS Defendants note, because they are federal employees sued in their official capacities, the proper Defendant is the United States. *Atkinson v. O'Neill*, 867 F.2d 589, 590 (10th Cir. 1989) (where action named various

IRS employees as defendants "[p]laintiff was essentially suing the United States, even though the United States was not actually named as a party").

1. Requests for Injunctive and Declaratory Relief

Because the Court must consider whether it has jurisdiction before it can adjudicate the merits of any case, the Court next turns to the IRS Defendants' argument that this Court lacks jurisdiction over Plaintiff's claims. The IRS Defendants argue that the Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421(a), and the Declaratory Judgment Act ("DJA"), 28 U.S.C. § 2201(a) bar this suit. (Docket No. 46 at 6-7). As the Tenth Circuit has explained,

> Under the Anti-Injunction Act, subject to certain exceptions, individuals may not maintain any suit for the purpose of restraining the collection of any tax. Likewise, the tax exception provision of the Declaratory Judgment Act prohibits declaratory judgments in matters relating to an individual's federal taxes. In practical effect, these two statutes are coextensive, with the Declaratory Judgment Act "reaffirming the restrictions set out in the Anti-Injunction Act." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 732 n. 7, 94 S.Ct. 2038, 40 L.Ed.2d 496 (1974).

Ambort v. U.S., 392 F.3d 1138, 1140 (10th Cir. 2004). On its face, it appears that the vast majority of the relief sought by Plaintiff is barred by these two statutes. However, as the Tenth Circuit noted in its order remanding this case to the district court, there remains the question of whether this Plaintiff "can satisfy the demanding *Williams Packing* exception" to the AIA. (Docket No. 20 at 5). This exception to the AIA provides that the AIA does not apply "if it is clear that under no circumstances could the Government ultimately prevail" and "if equity jurisdiction otherwise exists." *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962). The IRS Defendants argue that the government can ultimately prevail—meaning that the levy on Plaintiff's bank account

was proper because federal law allows the IRS to levy the veterans' benefits in question. (Docket No. 46 at 8-12. The IRS Defendants further argue that the second prong of the test is not met because Plaintiff cannot state any other claim for relief. (*Id*. at 13-14).

With regard to the first element of the *Williams Packing* exception to the AIA, 38 U.S.C. § 5301(a)(1) does protect veterans' benefits from "attachment, levy, or seizure" in most circumstances. However, it explicitly states that "[t]he preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments." In addition, Section 5301(d) makes clear that veterans' benefits are not exempt from levy by the IRS ("Notwithstanding subsection (a) of this section, payments of benefits under laws administered by the Secretary shall not be exempt from levy under subchapter D of chapter 64 of the Internal Revenue Code of 1986 (26 U.S.C. 6331 *et seq*.)."). In addition, 26 U.S.C. § 6331 grants the IRS the power to levy property and rights to property except property that is exempt under 26 U.S.C. § 6634. This is where the IRS Defendants' arguments and the Tenth Circuit's order remanding this case collide. To the extent that Plaintiff's veteran's benefits qualify under 26 U.S.C § 6334(a)(10) as "service-connected disability payments," the question of whether the IRS levy was lawful becomes tricky because "any amount payable to an individual as a service-connected . . . disability benefit" is exempt from levy. Pursuant to 38 U.S.C. § 101(16), "[t]he term "service-connected" means, with respect to disability or death, that such disability was incurred or aggravated . . . in line of duty in the active military, naval, or air service." The IRS Defendants argue that the language "payable to" is the key to

unraveling this question and indeed it is.

As the IRS Defendants note, other exempt property listed in Section 6334 includes broader language such as "payable to *or received by*." 26 U.S.C. § 6334(a)(9) (emphasis added). However, the relevant subsection only states that "any amount *payable to* an individual as a service-connected . . . disability benefit" is except from levy. 26 U.S.C. § 6334(a)(10) (emphasis added). In this case, the levy was placed on Plaintiff's bank account held at Wells Fargo. This, obviously, contained money that had already been received by Plaintiff. Therefore the levy in question in the instant lawsuit, which may be governed by subsection 10, was placed on benefits that had already been paid to Plaintiff ("received by"), not on benefits that would be paid to Plaintiff on a future date ("payable to"). And, as noted above, subsection 10's exclusion of amounts from levy by the IRS does not include funds "received by" an individual, but funds that are "payable to" him.

There is not a robust body of case law on this issue, but the District Court for the Western District of Washington directly addressed this question in 2016. *U.S. v. Poff*, 2016 WL 3079001 (W.D. Wash. June 1, 2016). In that case, the court found that the language "payable to an individual" meant that a levy could be placed on money already in an account. *Id*. at *5. As the court explained:

> Section 6334(a)(10)'s exemption for service-connected disability payments is expressly incorporated by 18 U.S.C. § 3613(a)(1) and applies to restitution collection. This exemption, however, only protects amounts "payable to an individual," not amounts already paid and deposited in the recipient's account. 26 U.S.C. § 6334(a)(10). In *Hughes v. IRS*, 62 F. Supp. 2d 796 (E.D.N.Y. 1999), the court held "after an examination of the plain language of the statute, that . . . § 6334(a)(10) . . . exempt[s] from levy only amounts that are payable—that is, amounts that are not yet paid." *Id*. at 800-01. The court explained that "the funds in plaintiffs' bank

> account, which were levied upon by the defendants, were no longer capable of being paid" and therefore dismissed the plaintiffs' claims that the levied funds were exempt from seizure. *Id*. at 801; *see also United States v. Coker*, 9 F. Supp. 3d 1300, 1302 (S.D. Ala. 2014). The *Hughes* court reasoned that amounts "payable" must be distinguished from amounts already paid because, elsewhere in Section 6334(a), Congress exempts "any amounts payable to or received by" an individual. *Hughes*, 62 F. Supp. 2d at 800 (citing 26 U.S.C. § 6334(a)(9)).
>
> This court also notes that the term "payable" in Section 6334(a)(10) cannot be construed to include amounts already paid without rendering the clause "or received by" in Section 6334(a)(9) to be mere surplusage. The court is disinclined to interpret a statutory provision in a manner that would render a portion of it to be surplusage. *See Romero-Ruiz v. Mukasey*, 538 F.3d 1057, 1062-63 (9th Cir. 2008) (citing *Am. Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1098 (9th Cir. 2002)). Because Mr. Poff has already received the funds in his inmate trust account, those funds are no longer "payable" to him and therefore are not exempt from collection by the Government under 18 U.S.C. § 3613(a)(1).

Id. The District Court for the District of New Hampshire reached the same conclusion when considering a different exception—the workmen's compensation exception found in subsection 6334(a)(7), which provides that "any amount payable to an individual as workmen's compensation" is exempt from levy by the IRS. In that case, as in the instant case, the IRS placed a levy on the individual's bank account. The court considered whether the words "payable to" included money that had already been paid to an individual. That court concluded:

> The plain meaning of the word "payable" is an amount to be paid or capable of being paid. Thus, payable does not include money that has already been paid. In several similar provisions Congress has referred to funds payable and paid, supporting the notion that when Congress used the word "payable" it intended to exclude funds already paid. Indeed, the Internal Revenue Code's minimum wage exemption refers to "any amount payable to or received by an individual as wages . . . ." 26 U.S.C. § 6334(a)(10). Given the straightforward meaning of the language used, the court is not at liberty to rewrite the statute by holding that Congress must have intended something other than what it said. *See One Nat'l Bank v. Antonellis*, 80 F.3d 606, 615 (1st Cir. 1996) ("It is a basic tenet of statutory

> interpretation that where the plain language of a statute is clear, it governs.").

Fredyma v. U.S. Dep't of Treasury, 1998 WL 77993, at *4 (D.N.H. Jan. 9, 1998).

This case is no different. To the extent that Plaintiff's veteran's benefits qualify under 26 U.S.C § 6334(a)(10) as "service-connected disability payments," "any amount *payable to* [Plaintiff] as a service-connected . . . disability benefit" is exempt from levy. However, any amount *already paid to* Plaintiff is not exempt under this exception. Further, the other statutes discussed above make clear that the IRS has broad authority to levy property and rights to property that is not explicitly exempt. As a result, this Court agrees with the IRS Defendants that Plaintiff does not meet the first element of the *Williams Packing* exception to the AIA. *See Williams Packing & Nav. Co.*, 370 U.S. at 7 (holding that the AIA does not apply "if it is clear that under no circumstances could the Government ultimately prevail" and "if equity jurisdiction otherwise exists."). To the contrary, it appears under this analysis that the government will ultimately prevail. As a result, the Court agrees with the IRS Defendants that it does not have jurisdiction to hear this case to the extent Plaintiff seeks injunctive relief or declaratory relief and all such claims should be dismissed under Fed. R. Civ. P. 12(b)(1).

2. General Request for Compensatory and Punitive Damages

The Court notes that although the vast majority of the relief requested by Plaintiff is declaratory or injunctive in nature (Docket No. 26 at 10-11), Plaintiff includes a general request for compensatory and punitive damages. (*Id*. at 10). Plaintiff notes that this request relates to "being forced to defend against fraudulent actions for a year [and] the considerable time and effort in researching, and drafting of documents against this

fraud costing him money and irreversible stress, pain and suffering he could ill afford, and the subsequent exacerbation of Plaintiff's existing disabilities." (*Id*. at 10-11). The above analysis, however, leads the Court to conclude that Plaintiff's claims against the IRS Defendants that they have improperly levied the money in his bank account are baseless and fail as a matter of law under Fed. R. Civ. P. 12(b)(6) because the levy is allowed under the relevant statutes. Therefore, to the extent Plaintiff seeks compensatory and punitive damages, the Court concludes that those claims should be dismissed under Fed. R. Civ. P. 12(b)(6).

Recommendation

WHEREFORE, for the foregoing reasons,

It is hereby **RECOMMENDED** that the Motion to Dismiss Claims Against Defendants Wells Fargo Bank, N.A. (Docket No. 45) be **GRANTED**, and

It is further **RECOMMENDED** that the United States' Motion to Dismiss Amended Complaint (Docket No. 46) be **GRANTED** under Fed. R. Civ. P. 12(b)(1) to the extent Plaintiff seeks declaratory and injunctive relief, and under Fed. R. Civ. P. 12(b)(6) to the extent Plaintiff seeks compensatory and punitive damages.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b)(2), the parties have fourteen (14) days after service of this recommendation to serve and file specific written objections to the above recommendation with the District Judge assigned to the case. A party may respond to another party's objections within fourteen (14) days after being served with a copy. The District Judge need not consider frivolous, conclusive, or general objections. A party's failure to file

and serve such written, specific objections waives de novo review of the recommendation by the District Judge, Thomas v. Arn, 474 U.S. 140, 148-53 (1985), and also waives appellate review of both factual and legal questions. Makin v. Colo. Dep't of Corr., 183 F.3d 1205, 1210 (10th Cir. 1999); Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Date: February 20, 2018
Denver, Colorado

s/ Michael J. Watanabe
Michael J. Watanabe
United States Magistrate Judge