IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CHERYL MYERS,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 12-4005-KHV**
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM AND ORDER

Cheryl Myers brings suit pro se against the United States of America for violations of the Internal Revenue Code, specifically 26 U.S.C. §§ 7433, 6304 and 7432. Plaintiff alleges that the Internal Revenue Service ("IRS") engaged in unauthorized collection actions against her in connection with certain income tax returns, including wrongful failure to release a lien on her property. This matter is before the Court on United States' Motion To Dismiss Plaintiff's Complaint (Doc. #12) filed August 8, 2012.[1] Defendant moves to dismiss plaintiff's complaint because (1) plaintiff has not established that this Court has subject matter jurisdiction over her claims, (2) defendant has not waived its sovereign immunity for any claims that accrued before January 9, 2010, (3) plaintiff's allegations concern the assessment of her taxes, rather than collection thereof, and thus plaintiff has not stated a claim upon which relief may be granted under 26 U.S.C. § 7433 and (4) plaintiff failed to exhaust administrative remedies. For the following reasons, the Court sustains defendant's motion to dismiss.

Legal Standards

Defendant seeks to dismiss plaintiff's claims under Rules 12(b)(1) and (b)(6), Fed. R. Civ. P.,

[1] This case was originally assigned to the Honorable Eric F. Melgren. Judge Melgren recused and the case was reassigned to the undersigned on March 1, 2013. Doc. #26.

for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Rule 12(b)(1) motions generally take the form of facial attacks on the complaint or factual attacks on the accuracy of its allegations. Holt v. United States, 46 F.3d 1000, 1002-03 (10th Cir. 1995) (citing Ohio Nat'l Life Ins. Co. v. United States, 922 F.2d 320, 325 (6th Cir. 1990)). Defendant challenges the face of the complaint, so the Court presumes the accuracy of plaintiff's factual allegations and does not consider evidence outside the complaint. Id. Courts may exercise jurisdiction only when specifically authorized to do so, see Castaneda v. INS, 23 F.3d 1576, 1580 (10th Cir. 1994), and must "dismiss the cause at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking." Scheideman v. Shawnee County Bd. of County Comm'rs, 895 F. Supp. 279, 280 (D. Kan. 1995) (citing Basso v. Utah Power & Light Co., 495 F.2d 906, 909 (10th Cir. 1974)); Fed. R. Civ. P. 12(h)(3). Because federal courts are courts of limited jurisdiction, the law imposes a presumption against jurisdiction. Marcus v. Kan. Dep't of Revenue, 170 F.3d 1305, 1309 (10th Cir. 1999). Plaintiff bears the burden of showing that jurisdiction is proper, see id., and must demonstrate that the case should not be dismissed, see Jensen v. Johnson County Youth Baseball League, 838 F. Supp. 1437, 1439-40 (D. Kan. 1993). Conclusory allegations of jurisdiction are not enough. Id.

In ruling on a motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P., the Court assumes as true all well-pleaded factual allegations and determines whether they plausibly give rise to an entitlement of relief. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). To survive a motion to dismiss, a complaint must contain sufficient factual matter to state a claim which is plausible – and not merely conceivable – on its face. Id. at 679-80; Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In determining whether a complaint states a plausible claim for relief, the Court draws on its judicial experience and common sense. Iqbal, 556 U.S. at 679.

The Court need not accept as true those allegations which state only legal conclusions. See id.; Hall v. Bellmon, 935 F.3d 1106, 1110 (10th Cir. 1991). Plaintiff bears the burden of framing her complaint with enough factual matter to suggest that she is entitled to relief; it is not enough to make threadbare recitals of a cause of action accompanied by conclusory statements. Twombly, 550 U.S. at 556. Plaintiff makes a facially plausible claim when she pleads factual content from which the Court can reasonably infer that defendant is liable for the misconduct alleged. Iqbal, 556 U.S. at 678. Plaintiff must show more than a sheer possibility that defendant has acted unlawfully – it is not enough to plead facts that are "merely consistent with" defendant's liability. Id. (quoting Twombly, 550 U.S. at 557). A pleading which offers labels and conclusions, a formulaic recitation of the elements of a cause of action, or naked assertions devoid of further factual enhancement will not stand. Iqbal, 556 U.S. at 678. Similarly, where the well-pleaded facts do not permit the Court to infer more than the mere possibility of misconduct, the complaint has alleged – but has not "shown" – that the pleader is entitled to relief. Id. at 1950. The degree of specificity necessary to establish plausibility and fair notice depends on context, because what constitutes fair notice under Rule 8(a)(2), Fed. R. Civ. P., depends on the type of case. Robbins v. Oklahoma, 519 F.3d 1242, 1248 (10th Cir. 2008) (quoting Phillips v. County of Allegheny, 515 F.3d 224, 232-33 (3d Cir. 2008)).

Factual Background

The 14-page complaint incorporates the 51-page administrative claim which plaintiff mailed two days before she filed her complaint. In each document, plaintiff recounts in largely chronological order her inability to obtain credit from the IRS for estimated tax payments she allegedly made for tax years 1997 and 1998. Plaintiff summarizes her facts and claims as follows:

> Plaintiff claims violations as a result of . . . IRS reckless and intentional collection tactics perpetrated in illegal disregard of the Internal Revenue Code, ("IRC"), and regulations

> promulgated by the IRC.
>
> Plaintiff also claims violations as a result of the United States' use of IRS as an instrumentality to perpetuate the on-going, invidious collusion between the United States, ("US"), and Michael Barton Myers, ("Myers"), and the use of IRS as an instrumentality to perpetuate the plans, secret pacts, and secret settlements the US and Myers' [sic] collusively devised to implement overt acts employing the threat and/or use of violence and/or use of other criminal means intended to harm and which continue to harm Plaintiff's physical person, reputation and property.
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> All of the claims, events, and damages set forth herein, taken individually and together, evidence a decade of illegal pattern and practice of reckless and intentional violation of § 7433 and illegal pattern and practice of harassment and abuse as defined in § 6304(b).

Complaint (Doc. #1) filed Jan. 9, 2012 at ¶¶ 11-13. The complaint thereafter alleges the following facts:

Plaintiff was married to Michael Myers ("Myers"). Both are lawyers. Myers' law firm terminated his employment in September of 1992 and forced plaintiff, who was under duress as a result of Myers' verbal and physical abuse, to take him on as a partner in her solo practice.[2] When Myers went to plaintiff's practice, he took a client named Douglas Ruedlinger, whom Myers represented in individual and business bankruptcy matters. About four months after Myers went to plaintiff's law firm, Ruedlinger petitioned the bankruptcy court to let him hire Myers, the law firm and another lawyer to represent Doug Ruedlinger, Inc. and First Benefits, Inc. In connection with the petition, Myers completed an affidavit that lacked candor and/or was perjured, which drew plaintiff and the firm into matters over which plaintiff had no control or knowledge. The IRS ultimately conducted audits of all attorneys who had represented Ruedlinger, including plaintiff and her partnership, and the joint tax returns for plaintiff and Myers for tax years 1992, 1993 and 1994. In response to the audit, in May of 1997, plaintiff and Myers filed a petition for determination of deficiency. At the time, plaintiff had access to all law firm and personal tax records to prove the elements of the petition.

[2] After Myers joined the practice, the firm was known as "Myers and Myers."

In September of 2000, plaintiff filed for divorce. The following month she filed for dissolution of the law partnership. She then discovered that, in the pages of thousands of books and magazines in their home, Myers had hidden tax documents and receipts relevant to tax years 1992 through 1994 and 1997 through 2000. After plaintiff found, collected and categorized the tax records, Myers was under court order to leave the records at his attorney's office.[3] Instead, in March of 2001, Myers stole the records and took them to California. Plaintiff has had no access to the records since then.

On May 15, 2001, Myers filed a Chapter 11 personal bankruptcy proceeding. Plaintiff alleges that (1) the United States and the IRS knew that Myers had acted in bad faith in connection with a bankruptcy case in which he was attorney of record; (2) the IRS knew but ignored the fact that Myers had omitted from his bankruptcy schedules property of his deceased mother which may have been valued at more than $2.0 million; (3) the United States and the IRS endorsed fraudulent draft tax returns that Myers had prepared in connection with his bankruptcy and ignored plaintiff's evidence of the fraud; (4) knowing that plaintiff and Myers had made joint estimated tax payments for 1997 and 1998, the IRS allowed Myers to file a tax return for 1997 that sought a refund of 1997 estimated tax payments even though it was outside the permissible three-year window; (5) despite plaintiff's claim for $34,250 (the amount of the joint estimated tax payments for 1997 and 1998) the IRS did not post such payment on plaintiff's account and ignored her claims; and (6) in 2001, when plaintiff discovered the indicia of Myers's tax fraud, she refused to file joint returns with him for the tax years 1997 through 2000. Instead, in 2002 plaintiff filed her tax returns for those four years as a married person filing individually, hindered in her ability to document her returns because Myers had stolen the records.

[3] Except to state that the order came from the District Court of Shawnee County, Kansas, plaintiff does not explain anything about the order or the case in which it was entered.

The estimated tax payments are central to plaintiff's claims. Plaintiff and Myers made these payments from their joint personal checking account for tax years 1997 and 1998. In her 2002 filings, plaintiff noted the estimated tax payments on her returns for 1997, 1998, 1999 and 2000.[4] As a result, plaintiff's returns for each of those years show a tax-due balance of zero. On March 25, 2002, the IRS sent plaintiff a notice of underpayment of 2000 taxes – her first notice that the IRS had not credited the 1997 and 1998 joint estimated tax payments to plaintiff's returns. In April and June of 2002, the IRS sent plaintiff deficiency notices for all four tax years – 1997 through 2000 – even though plaintiff's returns indicated a zero tax balance due. Following up, in June and July of 2002, the IRS sent plaintiff notices of intent to levy on her state tax refunds for those four years. In April of 2003, the IRS sent plaintiff notice of its final intent to levy. It then filed a tax lien in Shawnee County, Kansas, in the amount of $5,891.10. When plaintiff called the IRS to protest the lien and intent to levy, she asked for and received copies of her accounts for tax years 1997 through 2000. Those accounts showed no evidence that the IRS had received estimated tax payments for 1997 or 1998.

On May 15, 2003, plaintiff filed with the IRS a "Consolidated Request for Withdrawal of Notice of Federal Tax Lien and Request for a Collection Due Process Hearing." In the request, she wrote of physical and mental abuse by Myers, her lack of access to joint funds during their marriage, his secreting money and spending extravagantly on other women and himself, Myers' fraud and tax crimes and her consequential physical and mental impairments and fear for her life – all of which formed the basis of her request for equitable relief and status as an innocent spouse. Plaintiff also stated that her consolidated request served as proof of the reasons that the notice of lien and levy were illegal. Four

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[4] Plaintiff states that Myers never claimed the 1997 and 1998 estimated tax payments on his filed returns. She also states that Myers sought a refund of the 1997 estimated tax payments on his 1997 return.

days later, when plaintiff telephoned the IRS, an IRS agent verbally threatened her and demanded that plaintiff make no more reports about Myers.

On May 24, 2004, plaintiff filed her own Chapter 11 bankruptcy. The IRS entered an adverse appeals decision regarding her tax returns for 1997 through 2000, ignored plaintiff's request for a due process hearing and filed a proof of claim.[5] According to plaintiff, the United States, IRS and Myers were then engaged in secret pacts to dupe and greatly harm her and to defile the bankruptcy and tax courts.

In December of 2009, the IRS sent a final notice before levy on plaintiff's Social Security benefits regarding tax years 1997, 1998, 1999, 2000 and 2002. On January 5, 2010, the IRS sent a notice of levy to plaintiff's employer, the Topeka USD 501 School District. That same day, plaintiff telephoned the IRS to complain about the levy on her Social Security benefits. As a result of this phone call, the IRS sent plaintiff account transcripts for Myers 1997 and 1998 tax years. Plaintiff received these account transcripts around January 9, 2010. They showed that the estimated tax payments for 1997 and 1998, in the amount of $34,250.00, had been credited to Myers account.[6] Over the next six weeks, plaintiff compared the account transcripts with dockets and documents from her bankruptcy case and discovered that the United States and the IRS had concealed secret unilateral deals with Myers with

[5] Plaintiff states that the IRS violated the bankruptcy mandatory stay by issuing an adverse appeals decision while the bankruptcy case was ongoing, but she acknowledges that the IRS rescinded the decision and held her request for hearing in abeyance pending the outcome of her bankruptcy case.

[6] Three estimated tax payments appear on Myers' account transcripts: (1) a payment on January 21, 1998 for tax year 1997 in the amount of $2,320.00; (2) another payment that same date and also for tax year 1997 in the amount of $21,180.00; and (3) a payment on April 15, 1999 for tax year 1998 in the amount of $10,750.00. Thus, the payments were actually made in 1998 and 1999 but were credited to the 1997 and 1998 tax years.

respect to the estimated tax payments. These deals allowed him to amend his 1997 and 1998 tax returns to receive credit for the estimated tax payments. Plaintiff has received no such credit.

In 2005, the IRS moved to dismiss plaintiff's bankruptcy because she had failed to file a disclosure statement and reorganization plan. On March 23, 2005, plaintiff filed an objection and set out a list of allegations which she claimed should be the subject of an evidentiary hearing. Her list included tax fraud and theft of tax records by Myers; the relationship between the U.S. Attorney for the District of Kansas and Myers; the U.S. Attorney's affiliation with a law firm that was representing a creditor in plaintiff's bankruptcy case; plaintiff's discovery of evidence of more than $100,000.00 worth of her own property that her creditors had concealed, converted, stolen and dissipated; and the IRS unjustly holding plaintiff's estimated tax payments. Plaintiff accused the IRS of seeking to dismiss her bankruptcy to hide conflicts of interest, help conceal IRS failures and violations and allow the IRS to unjustly pursue her property outside of federal bankruptcy protection. Ultimately, plaintiff alleged that the IRS had prevented her from establishing her federal and state tax liabilities and Myers' tax fraud and crimes.

On May 27, 2005, plaintiff filed a motion asking the bankruptcy court to determine her tax liability for 1997 and 1998, including allocation of the estimated tax payments, and to determine Myers' tax liability for those years.[7] Plaintiff also sought to convert her Chapter 11 proceeding to Chapter 13. The IRS objected to the conversion, and Myers objected to plaintiff's request that the bankruptcy court determine his tax liability. On July 26, 2005, the bankruptcy court conducted a hearing on the IRS' motion to dismiss and plaintiff's motion to convert. IRS counsel did not appear. Plaintiff was able to

[7] As indicated, Myers and plaintiff filed separate tax returns for 1997 and 1998, so it is not clear how the bankruptcy court could determine Myers' tax liability in plaintiff's bankruptcy case.

discern that Myers was lying during the hearing and thus obtained a transcript. During the hearing, Myers said that he was not waiving his right to get credit for the estimated tax payments but that he had filed nothing with the IRS. Six days later, however, the IRS changed Myers' tax assessment for 1997 to zero.

In sum, plaintiff states that with the help of Myers' IRS account transcripts and her own bankruptcy case records and transcript, she has been able to piece together the existence of a pact between the United States, the IRS and Myers to cover up their conversion of plaintiff's property which resulted in Myers obtaining secret refunds and other illegal monetary benefits.

As noted above, in 2002 plaintiff filed her tax returns for 1997 through 2000. In April and June of 2002 the IRS issued deficiency notices for those years. Plaintiff did not challenge the proposed deficiencies in Tax Court or within the IRS administrative process. Consequently, the IRS assessed the taxes and issued notices to plaintiff that it intended to use collection methods to collect on the assessment. On May 15, 2003, plaintiff filed a consolidated request for withdrawal of notice of federal tax lien and a request for a collection due process hearing. On November 4, 2005, in Tax Court plaintiff filed a "petition for redetermination of IRS collection actions" for her tax assessments for 1997 through 2000.[8] On March 27, 2007, the Tax Court entered summary judgment against plaintiff.

Plaintiff seeks damages in excess of $1.0 million in connection with her allegations of wrongdoing with respect to her federal income tax liability for 1997, 1998, 1990, 2000 and 2002.

Analysis

[8] The information concerning plaintiff's Tax Court filings comes from public records (court docket sheets) of which this Court takes judicial notice without converting defendant's motion to dismiss to a motion for summary judgment. See JP Morgan Trust Co., Nat'l Ass'n v. Mid-America Pipeline Co., 413 F. Supp. 2d 1244, 1258 (D. Kan. 2006).

Defendant asserts that plaintiff's complaint must be dismissed because she has not established that this Court has subject matter jurisdiction. The United States, including its agencies and employees, is immune from suit unless and only to the extent it consents to be sued by waiving sovereign immunity. United States v. Testan, 424 U.S. 392, 399 (1976). A plaintiff who seeks to bring suit against the United States may not rely on the general federal question jurisdiction of 28 U.S.C. § 1331, but must identify a specific statutory provision that waives the government's sovereign immunity. The waiver must be unequivocally expressed and will be strictly construed in the government's favor. United States v. Nordic Village, Inc., 503 U.S. 30, 33-34 (1992). The burden to show waiver is on the party bringing the cause of action. Sydnes v. United States, 523 F.3d 1179, 1183 (10th Cir. 2008).

I. Subject Matter Jurisdiction

Plaintiff invokes 28 U.S.C. § 1357, 26 U.S.C. § 7433 and 26 C.F.R. § 301.7433 as the basis for subject matter jurisdiction. Only a statute may confer jurisdiction; a regulation is ineffective because it does not reflect congressional authority. See Kontrick v. Ryan, 540 U.S. 443, 452-53 (2004). Plaintiff therefore cannot successfully invoke the cited regulation. The relevant text of 28 U.S.C. § 1357 reads as follows:

> The district courts shall have original jurisdiction of any civil action *commenced by any person to recover damages for any injury to his person or property on account of any act done by him*, under any Act of Congress, for the protection or collection of any of the revenues.

28 U.S.C. § 1357 (emphasis added). Plaintiff is not suing for damages that she sustained as a result of her own actions in protecting or collecting revenue. Accordingly, Section 1357 does not confer subject matter jurisdiction.

Finally, 26 U.S.C. § 7433 waives sovereign immunity, but its waiver is limited to actions seeking damages in connection with any collection of tax that involves the reckless, intentional or negligent disregard of any provision or regulation under the Internal Revenue Code. 26 U.S.C. § 7433(a). In other words, for sovereign immunity to be waived, plaintiff must allege a violation of another statutory or regulatory provision in combination with Section 7433. Although she does not refer to it in her allegations of jurisdiction, plaintiff's complaint does allege that defendant engaged in reckless and intentional violation of Section 7433 by harassing and abusing plaintiff in violation of I.R.C. § 6304(b), which reads as follows:

> (b) Prohibition of harassment and abuse. – The Secretary may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of any unpaid tax. Without limiting the general application of the foregoing, the following conduct is a violation of this subsection:
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> (1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.
>
> (2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.
>
> (3) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.
>
> (4) Except as provided under rules similar to the rules in section 804 of the Fair Debt Collection Practices Act (15 U.S.C. 1692b), the placement of telephone calls without meaningful disclosure of the caller's identity.

26 U.S.C. § 6304(b). The complaint thus adequately cites a statutory provision which is a basis for subject matter jurisdiction.[9]

Defendant further alleges that even if the complaint cites a jurisdictional statute, constraints exist.

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[9] Although the first paragraph of the complaint mentions 26 U.S.C. § 7432, plaintiff never explains its relevance or connects factual allegations to it. Section 7432 allows a taxpayer to bring a civil action against the United States in federal district court "[i]f any officer or employee of the [IRS] knowingly, or by reason of negligence, fails to release a lien under section 6325 on property of the taxpayer." 26 U.S.C. § 7432(a). Section 6325 directs the IRS to release a lien within 30 days of the day on which the lien has been fully satisfied or has become legally unenforceable.

The first such constraint is a two-year statute of limitations. See 26 U.S.C. §§ 7432(d)(3); 7433(d)(3) (identical language in both). A civil action under those sections may be brought "only within 2 years after the date the right of action accrues." Id. A cause of action accrues when the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action. 26 C.F.R. §§ 301.7432-1(i)(2); 301.7433-1(g)(2). Thus, if plaintiff has stated a claim upon which relief may be granted, it must be for a cause of action which accrued within two years of January 9, 2012, the filing date of her complaint.[10]

Second, plaintiff must exhaust administrative remedies. A judgment for damages under Sections 7432 or 7433 may not be awarded unless "the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service." 26 U.S.C. §§ 7432(d)(1), 7433(d)(1). The IRS has issued the following regulations which spell out the exhaustion requirement:

> (1) Except as provided in paragraph (e)(2) of this section, no action under paragraph (a) of this section shall be maintained in any federal district court before the earlier of the following dates:
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> > (i) The date a decision is rendered on a claim filed in accordance with paragraph (f) of this section; or
> >
> > (ii) The date 30 days after the date an administrative claim is filed in accordance with paragraph (f) of this section.
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> (2) If an administrative claim is filed in accordance with paragraph (f) of this section during the last 30 days of the period of limitations described in paragraph (i) of this section, the taxpayer may file an action in federal district court anytime after the

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[10] Plaintiff urges the Court to adopt a continuing violation theory, in which the statute of limitations would be extended by IRS collection activities that continued after plaintiff first had notice. The law of this circuit does not support her argument. See Wallace v. United States, 372 F. App'x 826, 829-30 (10th Cir. 2010) (statute of limitations in taxpayer action is two years from accrual and continuing wrong doctrine does not apply).

administrative claim is filed and before the expiration of the period of limitations, without waiting for 30 days to expire or for a decision to be rendered on the claim.

26 C.F.R. §§ 301.7432-1(e); 301.7433-1(e). Although courts disagree whether this exhaustion requirement is jurisdictional[11] and the Tenth Circuit Court of Appeals has not considered that issue, the exhaustion requirement at the least deserves deference and is valid. Pragovich v. United States, 602 F. Supp. 2d 194, 196 (D.D.C. 2009). Exhaustion serves several valid purposes, including exhibiting respect for a coordinate branch of the federal government by giving the agency an opportunity to fix its own errors, allowing the agency and the potential plaintiff an opportunity to work out their differences without litigation and narrowing the issues if litigation does follow. See Gray v. United States, 723 F.3d 795, 800-01 (7th Cir. 2013).

With this statutory framework in mind, the Court analyzes plaintiff's complaint to determine if it has subject matter jurisdiction. The Court already has concluded that the complaint adequately cites a statutory provision which is a basis for federal court subject matter jurisdiction; in other words, Sections 7432 and 7433 are limited waivers of sovereign immunity. The next question is whether plaintiff's claim accrued within two years of January 9, 2012, the day she filed her complaint. Accrual occurs when plaintiff has had a reasonable opportunity to discover all essential elements of a possible cause of action. 26 C.F.R. §§ 301.7432-1(i)(2); 301.7433-1(g)(2). Defendant argues that all of plaintiff's claims regarding collection activities that occurred before January 9, 2010 must be dismissed

[11] Compare Gray v. United States, 723 F.3d 795 (7th Cir. 2013) (Section 7433 exhaustion requirement not jurisdictional) with Gaines v. United States, 424 F. Supp. 2d 219 (D.D.C. 2006) (Section 7433 exhaustion requirement jurisdictional). In Moline v. United States, No. 09-4145-RDR, 2010 WL 5600996 (D. Kan. Feb. 16, 2010), this Court held that Section 7433 is jurisdictional but as support, cited a Tenth Circuit Court of Appeals case which addressed a different statute and did not hold that the exhaustion requirement in that statute is jurisdictional. Id. at *1. This Court is not bound to follow the statement in Moline.

for lack of subject matter jurisdiction, leaving (1) plaintiff's claim of ongoing collusion between the United States, the IRS and Myers to prevent plaintiff from receiving credit for the estimated tax payments for 1997 and 1998; (2) the allegedly illegal wage levy issued to the School District; and (3) the allegedly illegal lien filed against plaintiff in Shawnee County. Plaintiff argues that the statute of limitations for her entire action accrued in the spring of 2011 when she received a copy of the IRS levy dated January 5, 2010, which the School District honored.[12]

II. Statute Of Limitations Interplay With Rule 12(b)(6) Analysis

Deciding when plaintiff's claims accrued requires the Court to determine when she had a reasonable opportunity to discover all essential elements of a possible cause of action. That, in turn, requires the Court to determine what are the essential elements for plaintiff's possible cause of action. The essential elements of a Section 7433 cause of action are (1) a collection of federal tax with respect to plaintiff (2) which injures plaintiff and (3) results from an IRS officer or employee's reckless, intentional or negligent disregard for a provision of the Internal Revenue Code or a related regulation. Slutter v. United States, No. 11-1161, 2012 WL 5960837, at *4 (E.D. Pa. Nov. 29, 2012). Defendant contends that plaintiff's allegations do not challenge the collection of taxes but instead relate to the IRS determination of plaintiff's tax liability, and that the complaint does no more than recite in formulaic language the words of 26 U.S.C. § 6304 (the I.R.C. provision at issue in the third element) and does not allege facts which state a claim upon which relief may be granted.[13]

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[12] In the administrative complaint, plaintiff alleges as follows: "The relevant two year time period could not begin to run until on and after USD 501 honored the January 5, 2010 levy upon Taxpayer's wages and USD 501 gave Taxpayer a copy of the January 5, 2010 wage levy, all on and after approximately 16 months later in 2011, making the expiration of the two year time period sometime in 2013." Administrative Complaint (Doc. #1-2) at 5.

[13] The line between dismissal under Fed. R. Civ. P. 12(b)(1) and (6) blurs in this analysis.
(continued...)

The Court first turns to the third element to consider the interplay between Sections 7344 and 6304. Plaintiff must frame her complaint with enough factual matter to suggest that she is entitled to relief, meaning that she must state facts which show how defendant engaged in "conduct the natural consequence of which is to harass, oppress, or abuse" plaintiff in connection with the collection of her unpaid tax. 26 U.S.C. § 6304(b). The statute provides examples of conduct which falls within the statutory prohibition: the use or threat of use of violence to harm a person's body, reputation or property; the use of obscene or profane language as a means of abuse; causing a telephone to ring repeatedly with intent to annoy or harass; or making phone calls without disclosing the caller's identity. Id. The complaint contains no facts which describe how IRS personnel engaged in conduct which would violate the statute.[14] Indeed, the complaint does no more than recite the language of Section 6304(b) that is quoted in this paragraph. Simply parroting the statute does not state a claim upon which relief may be granted and does not survive a motion to dismiss. Morrow v. United States, 723 F. Supp. 2d 71, 81 (D.D.C. 2010); Guthery v. United States, 562 F. Supp. 2d 136, 140 (D.D.C. 2008); Spahr v. United States, 501 F. Supp. 2d 92, 97 (D.D.C. 2007). Stated another way, allegations which are legal conclusions and not factual contentions do not state a cause of action. Buaiz v. United States, 417 F. Supp. 2d 129, 137 (D.D.C. 2007). Because plaintiff has not satisfied the pleading requirements of Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) with respect to Section 6304, she cannot state a claim under Section 7433.

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[13](...continued)
Although Section 7433 is a jurisdictional statute, it cannot be considered alone because it requires reckless, intentional or negligent disregard of another I.R.C. section or regulation.

[14] Plaintiff does allege that in a telephone call in 2003, an IRS agent became verbally threatening and demanded that plaintiff make no further reports about Myers, insisted that plaintiff read a particular book and accused plaintiff of failing to report wages. These allegations are outside the two-year statute of limitations.

Even if the complaint alleged sufficient facts to state a claim under Section 6304, plaintiff faces another statutory obstacle to suit. A claim for relief under Section 7433 must be "in connection with any collection of Federal tax." 26 U.S.C. § 7433(a). Congress enacted Section 7433 in 1988, as part of the "Taxpayers' Bill of Rights;" until then, taxpayers had no specific right to sue the government for damages sustained on account of unreasonable conduct by an IRS employee. The bill originally granted taxpayers the right to sue for damages in connection with the determination or collection of federal taxes, but Congress removed from the final version the provision relating to the determination of taxes. Arnett v. United States, 889 F. Supp. 1424, 1430 (D. Kan. 1995).

Defendant asserts that plaintiff's complaint does not address any collection activities by the IRS but instead alleges a faulty basis for her underlying tax assessment and the amount of tax due. The Court agrees. Plaintiff's complaint centers entirely on the estimated tax payments for 1997 and 1998, and the IRS refusal to credit her account with those payments. Such allegations clearly go to tax assessment rather than tax collection. Plaintiff's "Administrative Claim for IRC § 7433 Violations and Damages" illustrates this point.[15] It alleges that "[d]espite the fact that Taxpayer *has never owed any taxes . . . , IRS' calculation of taxes, interest and penalties* continues to burgeon with Taxpayer."

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[15] As the title suggests, plaintiff's administrative claim asserts violations of Section 7433. It makes no mention of Section 7432 as a basis for damages and does not allege conduct which violates Section 7432. Plaintiff has therefore failed to exhaust administrative remedies with respect to any Section 7432 claim that her complaint may be construed to contain. The Court considers and rejects the viability of a Section 7432 claim infra, but for this additional reason any claim that the complaint may make under that section must be dismissed.

The Court's ruling obviates the need to address the exhaustion issue in full. The Court notes, however, that plaintiff's mailing of her administrative claim two days before she filed her complaint does not satisfy the requirements of 26 C.F.R. §§ 301.7432-1(e) or 301.7433-1(e). See Tenpenny v. United States, 490 F. Supp. 2d 852, 857-58 (N.D. Ohio 2007); Evans v. United States, 433 F. Supp. 2d 17, 22-23 (D.D.C. 2006). As an alternative ruling, the Court finds that plaintiff has not exhausted administrative remedies and her complaint is subject to dismissal on that ground.

Administrative Claim, Doc. #1-3 at 33 n.6 (emphasis added). Plaintiff's objection with respect to tax liens and levies does not arise out of IRS conduct which by its nature operates to harass, oppress or abuse plaintiff. See Behr v. United States, Civ. No. 09-502, 2010 WL 1131383, at *14-15 (D. Minn. Feb. 8, 2010) (Section 6304 intended to regulate manner in which IRS employees communicate with taxpayers; no Section 7433 violation where IRS collection activities procedurally correct but based on erroneous assessment). Plaintiff's claim does not arise out of collection activity, but out of a tax assessment which plaintiff disputes. While the distinction may not be intuitively clear, it becomes easier to categorize collection and assessment activities by recognizing that a violation of each involves proving distinctive facts. "[T]o prove a claim for improper assessment, a taxpayer must demonstrate why no taxes are owed, but to prove a claim for improper collection practices, the taxpayer must demonstrate that the IRS did not follow the prescribed methods of acquiring assets." Shaw v. United States, 20 F.3d 182, 184 (5th Cir. 1994). Plaintiff's complaint addresses only the former.

Plaintiff's allegation that the United States, the IRS and Myers conspired to prevent her from receiving credit for estimated tax payments and to destroy all documents that might support her claims are likewise not related to collection activities. Section 7433 creates a private right of action only for tax collection activity that violates some provision of the Revenue Code or the regulations promulgated thereunder. Shwarz v. United States, 234 F.3d 428, 433 (9th Cir. 2000). Moreover, in plaintiff's bankruptcy case in 2005, plaintiff filed an objection which revealed her knowledge of a conflict of interest, concealment and Myers' tax fraud and crimes. Administrative Claim (Doc. #1-3) ¶¶ 125, 136, 141. Any Section 7433 violation which might arise out of this conduct would therefore be precluded by the statute of limitations which reaches back to early 2010. Finally, the complaint is wholly devoid of facts alleging a conspiracy and contains nothing more than speculation.[16]

Insofar as it attempts to state a claim under Section 7433, plaintiff's complaint must be dismissed.

III. Section 7432

Plaintiff also alleges that she has been damaged by the IRS imposition of a lien in Shawnee County. Giving plaintiff the benefit of the doubt, the Court considers whether an alternative cause of action exists under Section 7432 with respect to that conduct. Section 7432 provides a means for a taxpayer to seek damages for the knowing or negligent failure to release a lien under 26 U.S.C. § 6325. Section 6325 requires the IRS to release any lien within 30 days of the lien being satisfied or becoming legally unenforceable. 26 U.S.C. § 6325(a). As the Court has explained above, plaintiff's complaint seeks damages for improper tax assessment, not improper tax collection, and her argument with respect to the liens is that they are improper because she does not owe the IRS any money. This too is a challenge to plaintiff's assessment and cannot be heard under Section 7432. Behr v. United States, Civ. No. 09-502, 2010 WL 1131383, at *17 (D. Minn. Feb. 8, 2010). Insofar as the complaint attempts to state a cause of action under Section 7432, plaintiff's complaint must be dismissed.

IV. Motion To Amend

In response to defendant's motion, plaintiff asks for leave to amend her complaint if the Court determines that it is deficient. Plaintiff does not attach the proposed amended complaint required by D. Kan. R. 15.1. Nor does she describe how she would amend her complaint. Rule 15.1 requires that a party seeking to amend attach to a motion the proposed amended pleading. Compliance with this

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[16] Plaintiff filed her administrative claim and complaint pro se. Typically, as a result, the Court would liberally construe her allegations. Plaintiff, however, is an attorney with 20 years of bankruptcy practice in cases with the IRS. A pro se attorney does not receive the same liberal construction of pleadings that generally is afforded an unrepresented party. Mann v. Boatright, 477 F.3d 1140, 1148 n.4 (10th Cir. 2007).

requirement is critical for the Court to assess the factors relevant in deciding a motion to amend, and to give the opponent an opportunity to review, evaluate and perhaps oppose the proposed amendments. Hammond v. City of Junction City, Kan., Nos. 00-2146, 01-2602, 01-2603, 2002 WL 31545354, at *1 (D. Kan. Nov. 18, 2002). Because plaintiff has not complied with the rule, the Court is unable to adequately assess whether to grant leave to amend. The Court notes, however, that because its ruling is based primarily on jurisdictional grounds, an amended complaint might also be subject to dismissal. Anderson v. Suiters, 499 F.3d 1228, 1238 (10th Cir. 2007). Accordingly, the Court denies plaintiff's request.

V. Motion To Strike

Plaintiff seeks to strike defendant's motion to dismiss on the ground that it perpetuates fraud on the court. Plaintiff's Consolidated Motion To Strike The United States' Motion To Dismiss For Fraud On The Court And Response And Objection To The United States' Motion To Dismiss Plaintiff's Complaint (Doc. #15) filed September 28, 2012. Plaintiff asserts that the "IRS seeks to perpetuate its fraud and seeks to dispute the effectiveness of its fraud against Taxpayer by filing its motion to dismiss." Id. at 21. Plaintiff provides no further argument and the Court cannot find as a matter of law that defendant's motion to dismiss is a perpetuation of fraud.

Plaintiff also asserts that Judge Eric F. Melgren, the United States District Judge to whom this case was originally assigned, participated in the fraud by presiding over this case after serving as United States Attorney when that office represented the IRS in plaintiff's bankruptcy. This issue is moot because the case has been reassigned.

IT IS THEREFORE ORDERED that United States' Motion To Dismiss Plaintiff's Complaint (Doc. #12) filed August 8, 2012, be and hereby is **SUSTAINED**.

IT IS FURTHER ORDERED that plaintiff's request to amend her complaint be and hereby is **OVERRULED**.

IT IS FURTHER ORDERED that Plaintiff's Consolidated Motion To Strike The United States' Motion To Dismiss For Fraud On The Court And Response And Objection To The United States' Motion To Dismiss Plaintiff's Complaint (Doc. #15) filed September 28, 2012, be and hereby is **OVERRULED**.

Dated this 11th day of October, 2013 at Kansas City, Kansas.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge