

Fed. R. Civ. P. 12(b)(1)
Fed. R. Civ. P. 12(b)(6)
11 U.S.C. § 105
11 U.S.C. § 106
11 U.S.C. § 505
26 U.S.C. §§ 7121-22
26 U.S.C. § 7433
Federal Tort Claims Act
Anti-Injunction Act

Szanto v. Internal Revenue Service, et al.,
Adversary No. 16-3141-pcm
In re Szanto, Case No. 16-33185-pcm11

06/13/2017

PCM

Unpublished

In this action by a chapter 11 debtor against the Internal Revenue Service ("IRS") and alleged current and former employees of the IRS, the court entered a Memorandum Opinion on defendants' motion to substitute the United States as defendant, dismiss individual defendants and dismiss debtor's Amended Complaint.

Debtor alleged a number of claims against the IRS focusing on taxes assessed for tax year 2007 and whether the IRS had agreed in 2012 to settle plaintiff's 2007 tax liability for a lesser amount than it now claims in its proof of claim. The complaint also asserts tort claims based on the IRS's alleged conduct in assessing taxes for 2007, and its filing of an amended pleading in tax court for the tax year 2009.

The court granted defendants' motion to substitute the United States for the IRS and dismissed the individual defendants, leaving a claim for breach of contract and tort claims against the United States.

The court dismissed plaintiff's breach of contract claim pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted because the document alleged to form the basis of an agreement with the IRS did not meet the requirements for a legally binding contract with the IRS. Further, plaintiff did not argue that he could allege that he complied with the statutorily mandated procedures for establishing such an agreement. Accordingly, plaintiff's breach of contract claim was dismissed with prejudice because amendment of the complaint would be futile.

Plaintiff indicated in his briefing that he intended to withdraw his claim for emotional distress. Accordingly, that claim was dismissed.

Plaintiff's claims for fraud and malicious prosecution were dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. However, the court found that, by filing a proof of claim in plaintiff's bankruptcy case, the United States waived sovereign immunity up to the amount of an offset of its proof of claim. Because it is not clear that repleading would be futile, plaintiff's tort claims were dismissed with leave to replead.

Plaintiff's claim for a refund of taxes paid was dismissed because plaintiff failed to allege facts sufficient to meet the requirements of § 505 of the Bankruptcy Code and establish jurisdiction for his refund claim. Because amendment of the complaint would be futile, plaintiff's claim for a refund was dismissed with prejudice.

Finally, plaintiff's claim for injunctive relief was dismissed for failure to meet the requirements of the Anti-Injunction Act and its exceptions to bring a claim for injunctive relief against the United States. Because amendment of the complaint would be futile, plaintiff's claim for injunctive relief was dismissed with prejudice.

Below is an Opinion of the Court.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26



PETER C. MCKITTRICK
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re: Peter Szanto, Debtor.	Bankruptcy Case No. 16-33185-pcm11
Peter Szanto, Plaintiff, v. Internal Revenue Service, Tammy Hedstrand, Vicky Hazley, Chris Wagner, Unknown Agents 1-10, Defendants.	Adv. Proc. No. 16-3141-pcm MEMORANDUM OPINION

This matter came before the Court on April 28, 2017, on the United States' Motion to Dismiss filed on behalf of the Internal Revenue Service (IRS). In his Amended Complaint, plaintiff-debtor Peter Szanto seeks relief against the IRS for allegedly improperly assessed taxes, damages resulting from that assessment, a refund of taxes already paid, and injunctive relief.

1 Plaintiff has a long history of litigating against the IRS for the
2 assessment of taxes in multiple tax years. This particular adversary
3 proceeding focuses on the tax year 2007 and whether the IRS had agreed
4 in 2012 to settle plaintiff's 2007 tax liability for a lesser amount
5 than it now claims in its proof of claim. The complaint also asserts
6 tort claims based on the IRS's conduct in assessing taxes for 2007, and
7 its filing of an amended pleading in tax court for the tax year 2009.

8 This case raises interesting and complex legal issues, including
9 the intersection of the Federal Tort Claims Act (FTCA), § 106 of the
10 Bankruptcy Code, and 26 U.S.C. § 7433 of the Internal Revenue Code.

11 For the reasons stated below, the IRS's motion will be granted as
12 to all the individual defendants and as to the United States as to all
13 affirmative claims. Plaintiff will be granted leave to replead his
14 claims for fraud and malicious prosecution consistent with this
15 Memorandum Opinion. All other claims will be dismissed with prejudice.

16 17 FACTS

18 Plaintiff filed a chapter 11¹ case on August 16, 2016. The IRS
19 filed a proof of claim, asserting that it is owed taxes, interest, and
20 penalties totaling \$72,406.54. The amounts claimed are as follows:

21
22
23
24
25
26

¹ Unless otherwise indicated, all statutory references are to Title
11 of the United States Code.

Tax Year	Date Assessed	Tax Due	Interest as of Petition Date
2007	9/21/2009	\$0	\$3,136.33
2007	1/7/2013	\$5,557.34	\$2,765.28
2009	8/13/2012	\$1,497.00	\$342.14
2009	11/28/2016	\$2,409.00	\$551.17
2010	Pending examination	\$25,278.00	\$4,639.42

In addition, the proof of claim asserts that plaintiff owes \$26,230.47 in penalties.

In response to the IRS's proof of claim, plaintiff filed this adversary proceeding, asserting three claims against the IRS as the single defendant: breach of contract, fraud, and intentional or negligent infliction of emotional distress. When the IRS filed a motion to dismiss, plaintiff obtained leave to file this amended complaint. In it, he added individual defendants who he claims are employees of the IRS, and asserted four claims: breach of contract, fraud, malicious prosecution, and intentional or negligent infliction of emotional distress. His complaint also sought an injunction against defendants and a refund of taxes paid. Although not separately stated as a claim for relief, the complaint also says that it is an objection to the IRS's proof of claim.

Plaintiff asserts that in 2013, the IRS wrongfully assessed additional taxes for the 2007 tax year after he had completely settled his 2007 tax liability earlier in 2012. He also claims that the IRS attempted to amend an answer in a tax court proceeding involving his 2009 tax liability by asserting an additional \$380,161 of income for

1 that tax year. Plaintiff argues that these acts by the IRS support
2 claims for breach of contract, fraud, and malicious prosecution.
3 Plaintiff also alleges that he has made payments to the IRS, which have
4 been credited to his 2007 disputed tax liability, so he also seeks a
5 refund of those amounts paid based on the theory that the 2007
6 assessment beyond the amount agreed upon in 2012 was wrongful.

7 The IRS on its own behalf and on behalf of defendant Hedstand,
8 filed a motion to dismiss the amended complaint on the basis that: (1)
9 plaintiff named the wrong party; (2) the claims against the individual
10 defendants should be dismissed because the activities complained of were
11 allegedly taken by IRS employees in their official capacities; (3)
12 plaintiff's breach of contract claim should be dismissed for lack of
13 subject matter jurisdiction; (4) alternatively, the contract claim
14 should be dismissed for failure to state a claim; (5) plaintiff's tort
15 claims should be dismissed for lack of subject matter jurisdiction; (6)
16 alternatively, plaintiff's tort claims should be dismissed for failure
17 to state a claim; (7) plaintiff's assertion that he is entitled to a
18 refund of taxes paid is barred by statute; and (7) plaintiff's claim for
19 injunctive relief is barred by the anti-injunction statute.

20 DISCUSSION

21 A party may move to dismiss a claim under Fed. R. Bankr. P.
22 7012(b), which makes Fed. R. Civ. P. 12(b)(1) and (6) applicable to
23 adversary proceedings.

24 Pursuant to Fed. R. Civ. P. 12(b)(1), a court must dismiss a case
25 if it lacks subject matter jurisdiction. A federal court is presumed to
26 lack subject matter jurisdiction until the party asserting it

1 establishes otherwise. Kokkonen v. Guardian Life Ins. Co. of America,
2 511 U.S. 375, 377 (1994). Accordingly, plaintiff bears the burden of
3 establishing jurisdiction.

4 Pursuant to Fed. R. Civ. P. 12(b)(6), a complaint will be dismissed
5 for "failure to state a claim upon which relief can be granted." The
6 complaint must contain "a short and plain statement of the claim showing
7 that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2).
8 "To survive a motion to dismiss, a complaint must contain sufficient
9 factual matter, accepted as true, to 'state a claim to relief that is
10 plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).
11 Although detailed allegations of fact are not necessary, the complaint
12 must contain "more than an unadorned, the-defendant-unlawfully-harmed-me
13 accusation." Id. Simply reciting the elements of a cause of action is
14 insufficient. Id.

15 1. Improper Defendants

16 a. IRS is the incorrect party

17 The United States correctly states that the IRS is not subject to
18 suit in a United States District Court. See, e.g., Blackmar v. Guerre,
19 342 U.S. 512, 514-15 (1952) ("When Congress authorizes one of its
20 agencies to be sued eo nomine, it does so in explicit language . . .
21 ."). An action against an agency of the United States is deemed to be
22 an action against the United States. Dugan v. Rank, 372 U.S. 609, 613
23 (1962).

24 Plaintiff argues that the IRS is the correct party, because the
25 proof of claim filed in this case was filed by the Department of
26 Treasury, Internal Revenue Service. Although plaintiff refers in the

1 complaint to the proof of claim and says that the complaint is acting as
2 an objection to the proof of claim, the adversary complaint goes well
3 beyond defeating the proof of claim. It asserts numerous affirmative
4 claims for relief and seeks monetary damages and injunctive relief.
5 Consequently, the identification of the creditor on the proof of claim
6 does not override the well-established authority that a suit against the
7 IRS is deemed to be a suit against the United States.

8 The court shall substitute the United States as the defendant.

9 b. Dismissal of claims against individual defendants

10 In addition to naming the IRS as a defendant, in his amended
11 complaint plaintiff also named several individuals whom plaintiff
12 asserts are or were employees of the IRS. Where a suit is against IRS
13 employees in their official capacity, it is essentially a suit against
14 the United States. Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir.
15 1985). Moreover, "[a] suit or proceeding [for the recovery of tax
16 erroneously or illegally assessed or collected] may be maintained only
17 against the United States and not against any officer or employee of the
18 United States (or former officer or employee) or his personal
19 representative." 26 U.S.C. § 7422(f)(1).

20 Plaintiff argues that, under Bivens v. Six Unknown Named Agents of
21 the Fed. Bureau of Narcotics, 403 U.S. 388 (1971), governmental actors
22 may be held personally liable for "violations, committed under the guise
23 and pretext of government authority to deprive citizens of
24 constitutional rights." Plaintiff's Response at p.15. However, "the
25 right to sue as established by Bivens is qualified and is not absolute."
26 Adams v. Johnson, 355 F.3d 1179, 1183 (9th Cir. 2004). "Because the

1 Internal Revenue Code gives taxpayers meaningful protections against
2 government transgressions in tax assessment and collection," Bivens
3 relief is not available in actions against IRS auditors and officials
4 acting in their official capacity. Id. at 1186. Plaintiff does not
5 allege that the individual defendants took any action outside their
6 official capacity.

7 Plaintiff also argues that 26 U.S.C. § 7433(a) authorizes suit
8 against individual IRS employees. However, that statute provides that a
9 "taxpayer may bring a civil action for damages against the United States
10" (emphasis supplied). It does not authorize suit against
11 individual agents of the IRS.

12 Accordingly, all claims against the individual defendants will be
13 dismissed.² Reference to "defendant" hereafter shall refer to the
14 United States.

15 2. Contract Claim

16 Defendant concedes that "there is no dispute that this Court has
17 jurisdiction to adjudicate an objection to the IRS Claim filed in this
18 case," but argues that this court lacks jurisdiction to hear any

19
20 ² The only individual defendant to appear in this action is defendant
21 Hedstrand. Based on the arguments of the parties during the April 26,
22 2017, hearing on the United States' Motion to Dismiss, it appears the
23 remaining defendants may not have been properly served and may not be
24 aware of this action. However, pursuant to Fed. R. Civ. P. 12(b)(6) and
25 21 made applicable in adversary proceedings by Fed. R. Bankr. P. 7012
26 and 7021, this court may dismiss a party sua sponte "when it is clear
that the plaintiff has not stated a claim upon which relief may be
granted." Hunt v. County of Orange, 672 F.3d 606, 617 (9th Cir. 2012)
(quoting Trujillo v. Crescent Jewelers, 243 F.3d 550 (9th Cir. 2000)
(unpublished)). "Such a dismissal may be made without notice where the
claimant cannot possibly win relief." Trujillo, 243 F.3d at *1.

1 complaint for relief beyond the adjudication of plaintiff's claim
2 objection. Defendant further argues that plaintiff's contract claim
3 fails to state a claim for relief. For the reasons discussed below, I
4 conclude that, by filing a proof of claim in this case, the United
5 States waived sovereign immunity, but that plaintiff failed to state a
6 claim for relief. Accordingly, plaintiff's contract claim will be
7 dismissed with prejudice.

8 11 U.S.C. § 106 governs sovereign immunity as it applies in
9 bankruptcy. Section 106 addresses three distinct types of claims: (1)
10 claims that arise under the Bankruptcy Code; (2) claims that are in the
11 nature of compulsory counterclaims when the IRS has filed a proof of
12 claim; and (3) claims that are in the nature of permissive
13 counterclaims, which may be used only as an offset to the amounts
14 claimed under the proof of claim. See § 106(a)-(c); McGuire v. United
15 States, 550 F.3d 903, 912-13 (9th Cir. 2008) ("Section 106 of the
16 Bankruptcy Code waives the federal government's sovereign immunity in
17 three circumstances: (1) where the substantive authority for the cause
18 of action arises from the Bankruptcy Code itself; (2) for compulsory
19 counterclaims against government claims; and (3) for permissive
20 counterclaims capped by a set-off limitation."). Said differently, for
21 compulsory counterclaims, sovereign immunity is waived with regard to
22 the bankruptcy estate's claims that arose out of the same transaction or
23 occurrence as the government's claim. In re Pinkstaff, 974 F.2d 113,
24 115 (9th Cir. 1992).

25 A claim is a compulsory counterclaim when it bears a "logical
26 relationship" to the claim.

1 A logical relationship exists when the counterclaim arises
2 from the same aggregate set of operative facts as the
3 initial claim, in that the same operative facts serve as
4 the basis of both claims or the aggregate core of facts
upon which the claim rests activates additional legal
rights otherwise dormant in the defendant.

5 In re Pinkstaff, 974 F.2d at 115 (quoting United States v. Bulson (In re
6 Bulson), 117 B.R. 537, 541 (9th Cir. BAP 1990), aff'd by memorandum, 974
7 F.2d 1341 (9th Cir. 1992)) (citations omitted).

8 Defendant argues that McGuire stands for the proposition that
9 "bankruptcy courts lack[] subject matter jurisdiction to hear Tucker Act
10 claims against the Federal government." United States Reply at p.10.
11 The Tucker Act addresses claims brought against the United States in
12 civil actions for damages not sounding in tort which exceed \$10,000.
13 McGuire, 550 F.3d at 910. Plaintiff's contract claim accordingly falls
14 within the ambit of the Tucker Act: it sounds in contract, not in tort,
15 and seeks damages in excess of \$10,000. Nevertheless, defendant's
16 reading of McGuire is far too broad.

17 Defendant is correct that "[t]he express, specific waivers in § 106
18 suggest that Congress did not intend to broadly consent to suit in
19 bankruptcy court for any claim that falls under the Tucker Act."
20 McGuire, 550 F.3d at 913. And, "[t]he Tucker Act's sovereign immunity
21 waiver is limited to suits filed in the United States Court of Federal
22 Claims." Id. at 906. However, the facts of McGuire are distinguishable
23 from this case. In McGuire, the plaintiff brought a takings claim
24 against a party that had not filed a proof of claim in his bankruptcy.
25 Under that set of facts, that plaintiff's claim did not arise from the
26 bankruptcy, was not a compulsory counterclaim, and was not subject to

1 offset by a claim filed in the case. By contrast, here defendant did
2 file a proof of claim in debtor's bankruptcy case. The filing of a
3 proof of claim opens the door for a compulsory or permissive
4 counterclaim.

5 Plaintiff alleges that the 2007 tax liability asserted in the IRS's
6 proof of claim exceeds the amount agreed upon by the parties under the
7 alleged settlement agreement. Plaintiff asserts that defendants'
8 efforts to collect amounts outside that alleged agreement constitute a
9 breach of the settlement agreement for which plaintiff is entitled to
10 damages. Because the IRS's proof of claim and plaintiff's contract
11 claim both address plaintiff's 2007 tax liability, plaintiff's claim
12 "arises from the same aggregate set of operative facts as the initial
13 claim," In re Pinkstaff, 974 F.2d at 115, and is therefore a compulsory
14 counterclaim.

15 Because plaintiff's claim is a compulsory counterclaim, § 106(b)
16 applies and sovereign immunity is waived as to plaintiff's contract
17 claim.

18 However, defendant also moves to dismiss the contract claim under
19 Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

20 As discussed above, "[t]o survive a motion to dismiss, a complaint
21 must contain sufficient factual matter, accepted as true, to 'state a
22 claim to relief that is plausible on its face.'" Iqbal, 556 U.S. at
23 678. Leave to amend must be granted unless it is clear that the
24 complaint's deficiencies cannot be cured by amendment. Lucas v. Dep't
25 of Corrections, 66 F.3d 245, 248 (9th Cir. 1995). When amendment would
26

1 be futile, dismissal may be ordered with prejudice. Dumas v. Kipp, 90
2 F.3d 386, 393 (9th Cir. 1996).

3 Plaintiff's complaint alleges that he entered into a valid contract
4 with the IRS settling the amount owed for the 2007 tax year and the IRS
5 breached the agreement when the agency attempted to collect amounts
6 related to the 2007 tax year beyond the amount set out in the agreement.
7 As proof of the agreement, plaintiff attached as Exhibit A to his
8 amended complaint a Form 870-AD, Offer to Waive Restrictions on
9 Assessment and Collection of Deficiency and to Accept Overassessment.
10 The form is signed by plaintiff, plaintiff's wife and the Appeals Team
11 Manager for the IRS.

12 Defendant argues that this form is legally insufficient to
13 constitute the contract plaintiff alleges he entered into with the IRS.
14 Defendant is correct.

15 The settlement of disputed tax liabilities is governed by
16 [26 U.S.C. §§] 7121 and 7122, which authorize the Secretary
17 or an authorized delegate to settle any tax disputes and
18 compromise any civil or criminal case arising under the
19 internal revenue laws. The procedures under these
20 provisions and the applicable regulations are the exclusive
21 means by which a compromise or settlement will be binding
22 on both the taxpayer and the Government. Accordingly, no
23 theory founded upon general concepts of accord and
24 satisfaction can be used to impute a compromise settlement.

22 Regulations under [26 U.S.C. §] 7122 clarify the procedures
23 required with respect to an offer-in-compromise and how an
24 offer may be accepted. Section 301.71221(d)(1), *Proced. &*
25 *Admin. Regs.*, requires that offers-in-compromise be
26 submitted in the form and manner prescribed by the Internal
Revenue Service (IRS). The prescribed form for an offer-
in-compromise is Form 656, *Offer in Compromise*. Section
301.7122-1(d)(1), *Proced. & Admin. Regs.*, also provides

1 that "[a]n offer to compromise a tax liability must be made
2 in writing, must be signed by the taxpayer under penalty of
perjury, and must contain all of the information prescribed
or requested by the Secretary."

3 Prussin v. C.I.R., 2014 WL 6888460, at *3 (T.C. Dec. 8, 2014)

4 (quotations and citations omitted).

5 There are no allegations in the amended complaint that the parties
6 complied with the procedures specified under 26 U.S.C. §§ 7121 or 7122
7 for either a closing agreement or an offer-in-compromise. Indeed, the
8 amended complaint is express that the contract allegedly entered is the
9 document attached as Exhibit A.³ Moreover, plaintiff's Response to
10 Motion to Dismiss, at p.13:16-17 and 23-26, alleges that no additional
11 document indicating any agreement between the parties exists, and that
12 Exhibit A is the one and only relevant document.

13 Exhibit A does not meet the requirements for a legally binding
14 contract with the IRS. Accordingly, even assuming all facts as alleged
15 are true and construing them in the light most favorable to plaintiff,
16 his claim for breach of contract does not state a claim for relief.
17 Moreover, because plaintiff does not argue that he could allege that he
18 complied with the procedures outlined in 26 U.S.C. §§ 7121 and 7122
19 required to establish a contract with the IRS, any amendment to the
20 complaint would be futile. Accordingly, plaintiff's breach of contract
21 claim will be dismissed with prejudice.

22
23 ³ Plaintiff also argues that the IRS claim for additional funds
24 associated with the 2007 tax year could not be assessed because the year
25 was "closed" by the Form 870-AD. However, because this document did not
26 constitute a settlement of disputed tax liability, I need not reach the
question of whether the additional tax was first assessed in 2009, as
the IRS asserts, or 2013, as debtor asserts, and whether the Form 870-AD
impacted such assessment.

1 3. Tort Claims

2 Plaintiff's remaining claims are for fraud, malicious prosecution
3 and intentional or negligent infliction of emotional distress. In his
4 response to the motion to dismiss, plaintiff indicated his intent to
5 withdraw his emotional distress claim. Plaintiff's Response at p.18.
6 Accordingly, that claim will be dismissed. The remaining claims for
7 fraud and malicious prosecution are tort claims ("Tort Claims").

8 The United States argues that, despite the waiver of sovereign
9 immunity contained in §§ 106(b) and (c), both the FTCA and 26 U.S.C. §
10 7433 of the Internal Revenue Code provide jurisdictional limitations
11 barring plaintiff's claims.

12 The FTCA serves as a general waiver of the United States' sovereign
13 immunity with respect to tort claims filed against it and provides for
14 recovery against the United States

15 for injury or loss of property, or personal injury or death
16 arising or resulting from the negligent or wrongful act or
17 omission of any employee of the Government while acting
18 within the scope of his office or employment Any
19 other civil action or proceeding for money damages arising
20 out of or relating to the same subject matter against the
employee or the employee's estate is precluded without
regard to when the act or omission occurred.

21 28 U.S.C. § 2679(b)(1). However, several exceptions apply to this
22 waiver. 28 U.S.C. § 2680. If a claim falls within one of the listed
23 exceptions, federal courts lack subject matter jurisdiction. McQuade v.
24 U.S., 839 F.2d 640, 642 (9th Cir. 1988).

25 Section 2680(c) precludes "[a]ny claim arising in respect of the
26 assessment or collection of any tax" This includes activity

1 that goes "beyond the normal scope of authority and amount[s] to
2 tortious conduct" Morris v. U.S., 521 F.2d 872, 874 (9th Cir.
3 1975).

4 Plaintiff's fraud and malicious prosecution claims fit squarely
5 within this exception. For his fraud claim, plaintiff alleges:

6 The facts and acts of defendants' multiple false and
7 fraudulent actions towards plaintiff are these:

- 8 i) Attempt to collect more tax than is due for 2007
9 ii) Attempt to collect taxes for other tax years which are
10 likewise not due
11 iii) Despicable unwarranted and unjustified collection
12 efforts. This was fraud, because defendant IRS and
13 its agents' statements were lies - which defendants
knew to be lies when made, because debtor does not owe
14 more taxes than he has already paid.
15 iv) Amending tax liability based on \$380,161 [EXHIBIT D]
16 in knowing disregard of the fact that no such amount
was justifiably (nor conceivably) due from plaintiff

17 Complaint, ¶ 50. For his malicious prosecution claim, plaintiff alleges
18 "there was no probable cause for any attempted addition of that
19 \$380,161."⁴ Complaint, ¶ 58. These claims "aris[e] in respect of the
20 assessment or collection" of tax, making § 2680(c) applicable.

21 Additionally, 28 U.S.C. § 2680(h) precludes any claim arising out
22 of malicious prosecution, misrepresentation or deceit, among other
23 causes of action. Accordingly, plaintiff's malicious prosecution and
24

25 ⁴ This amount referenced an additional amount of income that
26 defendants asserted that plaintiff received. The amount of tax,
interest, and penalties asserted by defendants is outlined above.

1 fraud claims fall also within this exception to the sovereign immunity
2 waiver contained in the FTCA.

3 Plaintiff's response that his malicious prosecution claims are
4 unrelated to the collection of any tax is facially incorrect and without
5 merit, based on the allegations of the amended complaint. Further,
6 plaintiff's argument regarding these claims is replete with references
7 to audits and assessment attempts by the IRS.

8 Plaintiff also argues that, because no investigative or law
9 enforcement officers were involved, § 2680(h) does not apply. Plaintiff
10 misreads the exception. No such involvement is required for the
11 exception to apply. The exception applies to "any claim." The proviso
12 related to investigative or law enforcement officers is inapplicable in
13 this case and does not otherwise limit the exception.

14 Because together these two exceptions apply to deprive this court
15 of subject matter jurisdiction to hear plaintiff's claims for fraud and
16 malicious prosecution under the FTCA, unless the § 106 waiver of
17 sovereign immunity overrides the FTCA's exceptions to waiver of
18 sovereign immunity, plaintiff's claims are barred under the FTCA.

19 The Tenth Circuit court of appeals' decision in Franklin Sav. Corp.
20 v. United States (In re Franklin Sav. Corp.), 385 F.3d 1279 (10th Cir.
21 2004) is instructive on the question of whether the sovereign immunity
22 waivers contained in Bankruptcy Code §§ 106(b) or 106(c) override §§
23 2680(c) and 2680(h) of the FTCA.

24 In Franklin, the debtor sought to bring tort claims against the
25 FDIC under the FTCA. Id. at 1287. However, its claims failed to meet
26 the statute of limitations requirements under FTCA. Id. The debtor

1 argued that § 106 of the Bankruptcy Code abrogated the jurisdictional
2 statute of limitations contained in the FTCA. Id. at 1289.

3 The Franklin court reasoned that the waiver of sovereign immunity
4 in § 106 could not overcome the defects in the debtor's claim under the
5 FTCA. Id. at 1290 ("Neither the language nor the legislative history of
6 Bankruptcy Code § 106 unequivocally express a Congressional intent to
7 abrogate, eliminate, or avoid any applicable statute of limitations that
8 is integral to the cause of action asserted pursuant to § 106's
9 waiver.") Rather, the court reasoned, "Congress intended § 106 to
10 provide a limited waiver of sovereign immunity to enable a debtor to
11 recover damages only to the same extent that the debtor's claims would
12 be cognizable outside of bankruptcy." Id. Quoting Lehman v. Nakshian,
13 453 U.S. 156, 160-61 (1981), the court further explained that, "[l]ike a
14 waiver of immunity itself, which must be unequivocally expressed, the
15 Supreme Court has long decided that limitations and conditions upon
16 which the Government consents to be sued must be strictly observed and
17 exceptions thereto are not to be implied." Id. at 1289-90.

18 Noting that other cases have indicated that certain provisions of
19 the FTCA, such as exhaustion of remedies, are superseded by § 106's
20 waiver of sovereign immunity, the Franklin court reasoned that failure
21 to meet statute of limitations requirements under FTCA is distinct from
22 failure to exhaust administrative remedies. Without ruling on the
23 question of whether § 106 waives the administrative exhaustion
24 requirement, the court held that "[i]t would be extraordinarily unfair
25 to the United States if the mere filing of a proof of claim in a
26 bankruptcy proceeding subjected it to liability for untimely claims,

1 leaving it without recourse to the usual protections from stale claims
2 available to it in any other, non-bankruptcy proceeding." Id. at 1291.

3 Plaintiff's fraud and malicious prosecution claims in this case
4 suffer similar defects as those presented by the Franklin debtor:
5 Plaintiff's claims do not meet the statutory requirements under the FTCA
6 for cognizable claims. This bar is not a mere procedural requirement,
7 but a clear and express substantive provision that makes the FTCA
8 inapplicable to cases involving the assessment or collection of tax. To
9 allow plaintiff to assert the Tort Claims under the FTCA when such
10 claims would clearly exceed the scope of the government's liability
11 outside of bankruptcy stretches the boundaries of § 106 beyond its
12 terms.

13 Plaintiff also asserts that this court has jurisdiction to consider
14 the Tort Claims under 26 U.S.C. § 7433. The United States argues that
15 26 U.S.C. § 7433 does not provide subject matter jurisdiction, because
16 plaintiff did not exhaust his administrative remedies as required under
17 § 7433. 26 U.S.C. § 7433 states, in relevant part, "Judgment for
18 damages shall not be awarded . . . unless the court determines that the
19 plaintiff has exhausted the administrative remedies available to such
20 plaintiff within the Internal Revenue Service." 26 § U.S.C. 7433(d)(1).
21 The United States also cites the applicable regulations promulgated by
22 the Secretary of the Treasury, which outline the administrative claim
23 process. 26 C.F.R. § 301.7433-(1)(e)(1). The United States argues that
24 plaintiff's failure to exhaust his administrative remedies is
25 jurisdictional and is fatal to his claims.

1 I disagree. By filing a proof of claim, the IRS invoked the
2 provisions of §§ 106(b) and 106(c). The exhaustion of remedies
3 provisions in 26 U.S.C. § 7433 are similar to the exhaustion of remedies
4 provisions found in the FTCA. These provisions are not a substantive
5 bar to the assertion of the claims, but rather a requirement that
6 encourages efficient administration of claims against the IRS. Allowing
7 those same claims to proceed in bankruptcy court rather than through the
8 administration process does not bequeath rights to plaintiff that do not
9 exist outside of bankruptcy; rather, it shifts the forum for hearing the
10 dispute. This conclusion is supported by In re Ashbrook, 917 F.2d 918
11 (6th Cir. 1990), and In re Anderson, 918 F.2d 1139 (4th Cir. 1990) in
12 which the courts held that the FTCA's requirement that administrative
13 remedies be exhausted was abrogated by § 106.

14 Having concluded that § 106 abrogates the exhaustion of remedies
15 requirement under 26 U.S.C. § 7433, the next issue is whether
16 plaintiff's Tort Claims fit within the waiver contained in § 106(b), and
17 may therefore be used as a mechanism of recover damages, or fit within
18 the more limited terms of § 106(c), in which case the claims may only be
19 used as an offset to the IRS's proof of claim. In order for the Tort
20 Claims to be asserted affirmatively to recover damages, plaintiff must
21 show that the claims asserted are in the nature of compulsory
22 counterclaims as required under § 106(b).

23 Cases that address whether a counterclaim may be asserted under the
24 FTCA when the United States asserts an affirmative claim against a party
25 are helpful in analyzing the breadth of the waiver contained in
26 § 106(b). Indeed, the language in § 106(b) adopts the same test,

1 requiring the court to determine first whether a claim is a compulsory
2 counterclaim.

3 Once the United States brings a suit, it waives sovereign immunity
4 to the extent that defendants have a claim for recoupment or a
5 compulsory counterclaim. F.D.I.C. v. F.S.S.S., 829 F.Supp. 317, 321-22
6 (D. Alaska 1993). Counterclaims against the United States under the
7 FTCA are compulsory - and, therefore, permitted - "only when the
8 principal action by the United States was in tort and the counterclaim
9 was compulsory in nature."⁵ Spawr v. U.S., 796 F.2d 279, 281 (9th Cir.
10 1986) (holding that, because the United States initiated proceedings
11 against the defendants that did not sound in tort, when the defendants
12 initiated suit in a different forum and sought money damages, their
13 claim was "of a different nature" and, therefore, not permitted under
14 the FTCA). See also Perez v. Blue Mountain Farms, 2015 WL 4723630, *2
15 (E.D. Wash. Aug. 10, 2015) (holding that Spawr's requirement that the
16 principal action sound in tort is controlling precedent, not dicta, in
17 the Ninth Circuit); but see U.S. v. Iron Mountain Mines, Inc., 812
18 F.Supp. 1528, 1551 (E.D. Cal. 1992) (rejecting Spawr's requirement that
19 relief sought in counterclaim be identical in nature to that sought by
20 the government).

21 Although the case law interpreting the applicability of Spawr is
22 not uniform, Spawr is controlling in this case and bars plaintiff from

23 ⁵ The requirement that the principal action sound in tort appears to be unique to
24 the Ninth Circuit. Several other circuits have reached the opposite conclusion. See,
25 e.g., F.D.I.C. v. Hulsey, 22 F.3d 1472, 1487 (10th Cir. 1994) ("The fact that the
26 FDIC's suit is based on contract and the counterclaims are based on tort is not
significant.").

1 asserting the Tort Claims affirmatively against the United States. The
2 IRS's claim is based in statutory requirements that plaintiff pay taxes.
3 Plaintiff's counterclaims sound in tort. Accordingly, plaintiff's Tort
4 Claims do not constitute compulsory counterclaims. Because § 106(b)
5 contains the same compulsory counterclaim test discussed in Spawr, in
6 order to assert claims for damages exceeding offset of the United
7 States' claim, plaintiff has the burden to demonstrate that his Tort
8 Claims are compulsory counterclaims. He has failed to do so.

9 However, given the broad language in § 106(c), which provides that
10 ANY claim may be used as an offset, plaintiff can still proceed with his
11 Tort Claims as permissive counterclaims under § 106(c) in an amount
12 capped by the set-off limitation.

13 As with his claims under the FTCA, in order to proceed on claims
14 under § 7433, and notwithstanding the waiver of sovereign immunity under
15 § 106(c), plaintiff must show that he has a cognizable claim for relief.
16 As pleaded, plaintiff's amended complaint fails to do so.

17 26 U.S.C. § 7433 allows a plaintiff to recover "[i]f, in connection
18 with any collection of Federal tax with respect to a taxpayer, any
19 officer or employee of the Internal Revenue Service recklessly or
20 intentionally, or by reason of negligence, disregards any provision of
21 [Title 26], or any regulation promulgated under [Title 26]." 26 U.S.C.
22 § 7433 (emphasis supplied). Although the complaint is not a beacon of
23 clarity, plaintiff's amended complaint, even read in the light most
24 favorable to plaintiff, addresses only liability relating to assessment
25 of tax, not to its collection. Moreover, plaintiff's amended complaint
26 does not cite any specific violations of Title 26 or the regulations

1 promulgated under Title 26. Accordingly, plaintiff's Tort Claims will
2 be dismissed for failure to state a claim upon which relief can be
3 granted. Because it is not clear that repleading would be futile,
4 plaintiff will be given leave to replead these claims.

5 4. Request for Refund

6 Without alleging a specific claim for relief or additional facts
7 related to his request for a refund, plaintiff states in his amended
8 complaint that he "seeks return of money paid to the IRS based on
9 payments for non-existent taxes," Amended Complaint, ¶ 41, and "to
10 recover money and property belonging to the debtor Peter Szanto's
11 Bankruptcy estate. (ie.[sic] money which Szanto has already paid in
12 excess of the [EXHIBIT A] settlement)." Amended Complaint, ¶ 14. To
13 the extent the amended complaint is an attempt to set out a claim for
14 refund, for the following reasons the claim will be dismissed.

15 Section 505 of the Bankruptcy Code establishes bankruptcy court
16 jurisdiction for adjudicating tax claims. Plaintiff argues that § 505's
17 jurisdictional grant applies in his case. However, plaintiff's argument
18 overlooks § 505(a)(2)(B), which excepts from this jurisdictional grant
19 the authority to determine:

20 Any right of the estate to a tax refund, before the earlier of
21 - (i) 120 days after the trustee properly requests such refund
22 from the governmental unit from which such refund is claimed;
23 or (ii) a determination by such governmental unit of such
24 request.

24 The jurisdictional requirement of properly requesting a refund is
25 also well established elsewhere in statute and case law. Although 26
26 U.S.C. § 1346(a) provides the district court with jurisdiction to hear

1 claims against the United States for recovery of taxes alleged to have
2 been erroneously or illegally assessed or collected, under 26 U.S.C. §
3 7422:

4 No suit or proceeding shall be maintained in any court for the
5 recovery of any internal revenue tax alleged to have been
6 erroneously or illegally assessed or collected, or of any
7 penalty claimed to have been collected without authority, or
8 of any sum alleged to have been excessive or in any manner
9 wrongfully collected, until a claim for refund or credit has
been duly filed with the Secretary, according to the
provisions of law in that regard, and the regulations of the
Secretary established in pursuance thereof.

10
11 26 U.S.C. § 7422(a).

12 The Supreme Court has held that, unless a claim for refund has been
13 properly filed within the applicable time period, a suit for refund "may
14 not be maintained in any court." United States v. Dalm, 494 U.S. 596,
15 602 (1990). See also Martinez v. United States, 595 F.2d 1147, 1148
16 (9th Cir. 1979) ("Compliance with 26 U.S.C. § 7422(a) and Treas. Reg.
17 301.6402-2(b)(1), by specifying in detail all grounds and supporting
18 facts upon which a claim for refund is based, is a jurisdictional
19 prerequisite to a suit for refund of taxes, and unless waived by the
20 government, the taxpayer cannot proceed with his suit for refund"
21 (internal citations omitted)); Mutual Assurance, Inc. v. United States,
22 56 F.3d 1353, 1355-56 (11th Cir. 1995) ("[A] taxpayer's filing of an
23 administrative refund claim with the IRS in accordance with the relevant
24 provisions of the Internal Revenue Code is a jurisdictional prerequisite
25 to the maintenance of a tax refund suit.").

1 Plaintiff argues in his response that he has "made many
2 administrative claims." Plaintiff's Response at p.9. He also argued at
3 the hearing on the motion to dismiss that he had made a substantial
4 effort to pursue his refund and performed what he termed the "functional
5 equivalent" of exhausting his claims. However, the statute does not
6 provide for "functional equivalency." Plaintiff has failed to allege
7 facts sufficient to meet the requirements of § 505 of the Bankruptcy
8 Code and establish jurisdiction for his refund claim. Accordingly,
9 plaintiff's claim for a refund will be dismissed.

10 5. Request for Injunctive Relief

11 As with his claim for a refund, plaintiff does not specifically set
12 out a claim for an injunction, but rather simply requests injunctive
13 relief. Amended Complaint, ¶ 24. To the extent plaintiff is making a
14 claim for injunctive relief, the claim for relief will be dismissed for
15 the following reasons.

16 Injunctions against the assessment or collection of any tax are
17 governed by the Anti-Injunction Act, 26 U.S.C. § 7421(a), which
18 provides:

19 Except as provided in [26 U.S.C. §§] 6015(e), 6212(a) and (c),
20 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c),
21 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, no suit for
22 the purpose of restraining the assessment or collection of any
23 tax shall be maintained in any court by any person, whether or
24 not such person is the person against whom such tax was
25 assessed.

24 The Anti-Injunction Act is strictly enforced. If the action
25 does not fall within any of the exceptions to the Anti-
26 Injunction Act, the bankruptcy court must dismiss the
action for lack of subject matter jurisdiction. Even if the
taxpayer satisfies one of the exceptions under the Anti-

1 Injunction Act, he or she still must allege sufficient
grounds to warrant equitable relief.

2 In re Carey, 2010 WL 5600987, at *5 (9th Cir. BAP Nov. 30, 2010)
3 (citations omitted), aff'd, 481 F. Appx. 422 (9th Cir. 2012).

4 None of the statutory exceptions set out above apply in this case.
5 There are two judicially created exceptions: "(1) where the taxpayer
6 lacks alternative means to contest the legality of a particular tax or
7 (2) if it is clear that under no circumstances could the Government
8 ultimately prevail, and the taxpayer will suffer irreparable injury
9 without injunctive relief." Id. (citations omitted).

10 Plaintiff has not alleged that he lacks alternative means to
11 contest the legality of a particular tax. In fact, his allegations
12 suggest the opposite, since he has appealed to the Tax Court in the
13 past. Amended Complaint, Exh. E. Nor do the allegations of the amended
14 complaint show that it is clear that the taxpayer will ultimately
15 prevail or that he will suffer irreparable injury without injunctive
16 relief.

17 Accordingly, even assuming all facts as alleged are true and
18 construing them in the light most favorable to plaintiff, his claim for
19 injunctive relief does not state a claim for relief. Moreover, any
20 amendment to the complaint would be futile. Accordingly, plaintiff's
21 claim for injunctive relief will be dismissed with prejudice.

22 6. Section 105 Jurisdiction

23 In addition to the specific statutory provisions discussed above,
24 plaintiff alleges that this court has general jurisdiction to hear his
25 claims pursuant to its "inherent jurisdiction to facilitate debtor's
26

1 recovery of debtor's estate assets" and its equitable power under § 105.
2 Complaint, ¶¶ 25, 39-40. However, "§ 105(a) is not a roving commission
3 to do equity. A bankruptcy court's equitable powers must and can only
4 be exercised within the confines of the Bankruptcy Code." Willms v.
5 Sanderson, 723 F.3d 1094, 1103 (9th Cir. 2013)(quotations and citations
6 omitted). Accordingly, § 105 does not grant this court jurisdiction
7 beyond the bounds provided for in the Bankruptcy Code or in
8 contravention of any other state or federal statute. 2 Collier on
9 Bankruptcy ¶ 105.1[2], p. 105-7 (16th Ed. 2017).

10 CONCLUSION

11 The court will substitute the United States as the defendant in
12 this case.

13 Plaintiff's claims against the individual defendants will be
14 dismissed with prejudice. Plaintiff's claims against the United States
15 for breach of contract, refund and injunctive relief will be dismissed
16 with prejudice. Plaintiff's claims for fraud and malicious prosecution
17 will be dismissed without prejudice and with leave to replead. However,
18 any such claims will be limited in their recovery to the amounts
19 asserted in the IRS proof of claim pursuant to § 106(c).

20 Plaintiff may file a Second Amended Complaint against the United
21 States curing the deficiencies discussed herein, which he must do within
22 14 days of the date of entry of the order dismissing the claims.

23 Failure to meet the 14-day deadline to file an amended complaint or
24 failure to cure the deficiencies identified in this Memorandum Opinion
25 will result in a dismissal of all claims with prejudice. Plaintiff may
26

1 not add new causes of action or parties without leave of the court or
2 stipulation of the United States pursuant to Fed. R. Civ. P. 15.

3 Counsel for the United States should submit the order.
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26