In the United States Court of Federal Claims

NOT FOR PUBLICATION
Nos. 09-283T, 09-333T & 10-157T
(Filed May 26, 2010)

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LOUIS J. BALESTRA JR. and PHYLLIS M. BALESTRA,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

WILLIAM KOOPMANN, et al.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

PETER SOFMAN, et al.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

* *

ORDER

The three above-captioned cases have not been formally consolidated, but for purposes of efficiency and due to the related nature of the claims all three have been assigned to the

undersigned. After reviewing the pending matters, the Court has concluded, for reasons that will become apparent, that one order filed in all three is the best manner in which to proceed.

The three cases involve claims for tax refunds sought by retirees formerly employed by United Airlines, from whom Federal Insurance Contributions Act (FICA) hospital insurance (HI) taxes were withheld and paid based on the present value of deferred benefits they ultimately failed to receive. The cases have unfortunately been complicated by the fact that the retirees have attempted to join their claims together and to represent themselves. The Court understands, from some of the submissions, that plaintiffs had attempted to find suitable counsel and failed, possibly due to the relatively small size of the claims and limited resources the plaintiffs could accordingly invest in the litigation.

These cases, however, present difficult questions concerning the applicable statute of limitations and applicable tax years; the procedures to be followed in seeking refunds of such HI tax overpayments; and whether these procedures (or their absence) may result in an illegal exaction, among other issues. The resolution of such difficult and important questions would be facilitated by the participation of tax lawyers on both sides of the cases. In the past, our Clerk's Office has contacted noted Washington-based attorneys with national tax practices to see if they or attorneys in their practice group would be willing to volunteer to represent, on a *pro bono* (no fees) basis, plaintiffs who filed complicated tax claims *pro se*. These three cases seem suited for similar treatment, and the Court would like to offer this opportunity to the plaintiffs. To this end, the Court requests that any plaintiffs who would ***not*** want their claims to be handled by a *pro bono* counsel to call Chambers at 202-357-6668 and so inform the law clerk handling the case, **on or by June 7, 2010**. The Court will assume that all plaintiffs who do not call are willing to be represented by a tax lawyer. If a tax counsel volunteers for this representation, the Clerk's Office will ask the counsel to contact Mr. Balestra, who brought his own case, and Messrs. Koopmann and Sofman, who appear to be the main points of contact in the other two cases, to coordinate representation in these matters.

The difficulties posed by the lack of plaintiffs' counsel have already been seen in these proceedings. It is not often that our Court receives complaints in which several unrelated *pro se* plaintiffs have joined their claims. Perhaps this explains the apparent miscommunication between the Clerk's Office and plaintiffs which resulted in the *Koopmann v. United States* complaint being prepared with just the signature of Mr. Koopmann and no other parties. Since the other 169 named plaintiffs did not sign the complaint, it was assumed by the government, and ultimately this Court, that Mr. Koopmann -- who is not an attorney admitted to practice before our Court -- was improperly attempting to represent them. But the failure of any plaintiff but Mr. Koopmann to effectively appear by signing the complaint also presented an obstacle to rectifying the matter.

An amended complaint containing the signatures of all plaintiffs was needed, and the Court's rules *entitle* a plaintiff to one amendment within twenty-one days (plus three) of service of a motion to dismiss a complaint. *See* Rule 15(a)(1)(B) of the Rules of the United States Court of Federal Claims ("RCFC"); RCFC 6(d) (adding three days when service was by mail). The

government's Motion to Strike and for Partial Dismissal filed in *Koopmann* was mailed on July 27, 2009 -- but was served solely on Mr. Koopmann, the only party to sign the complaint and the only one for whom the address appeared certain (addresses for Messrs. Balestra, Bleyle, Mitchell, Rayfield, and Arthur Jackson were included in attachments to the complaint). Thus, if the other 169 named plaintiffs were considered parties to the suit, on that date the clock did not begin to run on the right each had to amend the complaint. On the other hand, since our rules require that every unrepresented party must sign each paper to be filed with the Court, *see* RCFC 11, the failure of the other 169 to sign the complaint suggests they were not yet parties.

In any event, Mr. Koopmann responded to the motion to strike by gathering together separate forms containing the addresses, refund amounts claimed, and signatures of 165 of the 170 named plaintiffs,[1] which he submitted to the Court in separate batches (and, for many individuals, more than once). This had the unfortunate consequence of reinforcing the mistaken impression that Mr. Koopmann was trying to represent the others. Batches of signature pages were received by the Clerk's office on August 12, August 24, September 3, and September 11, 2009. The first and last of these batches were accompanied by one page documents from Mr. Koopmann in which he "petitioned" the Court "to accept the attached Addendum of Plaintiff [i]nformation." The third had a cover sheet with just the case number, Mr. Koopmann's name, address, and signature, and a description of the attachments. As is often the case when *pro se* parties submit documents, each submission suffered from technical defects which prevented them from being filed, such as the failure to provide proof of service and to present the request in the right form. Such technicalities are usually excused, and formalities relaxed, to accommodate *pro se* plaintiffs, *see Young v. United States*, 60 Fed. Cl. 418, 426 (2004), but here the confusion over whether Mr. Koopmann was attempting to represent the others seems to have trumped the normal considerations. Only the second submission, which was styled as a response to the government's motions, was filed in the case (on August 28, 2009), with signature pages for 17 of the purported plaintiffs.

To be sure, Mr. Koopmann cannot be faulted for failing to clearly identify his submissions as motions to amend the complaint, as our rules were not designed with these specific circumstances in mind. The rules provide that papers that are not signed by unrepresented parties are to be stricken "unless the omission is promptly corrected after being called to the . . . party's attention." RCFC 11(a). It is not clear whether this rule applies when the document lacking a signature is the complaint -- the one that would make the signatory a "party." But the motion to strike the other named plaintiffs was granted, *see* Opinion and Order (Nov. 18, 2009), and the efforts of some two dozen of these named plaintiffs to have this ruling reconsidered were treated as appeals to the Federal Circuit because of the mistaken use of the word "appeal" by each purported plaintiff. Once these appeals were pending, no additional documents from these plaintiffs were filed in *Koopmann*, as the Clerk's Office considered the

[1] No signature page appears to have been submitted for Messrs. Cobb, Horne, Magdaleno, Moore, or Saeger.

matters to have been removed from our jurisdiction.[2] Now that the mandate has issued after the Federal Circuit dismissed these mistakenly-filed appeals, our Court is in a position to reconsider matters.

It now appears obvious that plaintiffs in August and September of last year were trying to amend the complaint to supply the missing individual allegations and signatures. These various submissions, in light of the *pro se* status of plaintiffs, should have been treated as motions to amend. The first batch of signature pages, received August 12, 2009, concerned 120 of the named plaintiffs (including Mr. Koopmann). As was noted above, the second batch of 17 signature pages was filed on August 28, 2009. On September 3, 2009, the Court received signature pages for ten individuals (two of which, Messrs. Jones and Schultz, had already been among the August 12 submissions). And on September 11, 2009, signature pages for 162 plaintiffs were received, although only 20 had not previously been received. All told, 165 plaintiffs had sought to add their individual allegations and signatures to the complaint in *Koopmann*. These plaintiffs promptly sought to correct the omission of their signatures from the complaint, and the government's motion and the resulting decision of our Court to strike their names was premised on a misunderstanding of the nature of the *Koopmann* complaint.

The Court is inclined to restore the stricken names to the *Koopmann* complaint; to allow the four above-referenced submissions to be treated as motions to amend; to have the three unfiled batches filed as of the date they were received; and to grant these motions to amend the complaint. There are a few complications, however. A party may not split a claim by filing it in more than one lawsuit before the same court. *See Young*, 60 Fed. Cl. at 423-24. The complaint in *Balestra v. United States* was filed in our Court before the one in *Koopmann*, which would preclude the participation of Mr. Balestra in the latter. And 42 of the named plaintiffs in *Koopmann* were named parties in the subsequently-filed *Sofman v. United States* complaint, including Mr. Sofman himself. The attachments to the *Sofman* complaint are more complete than those submitted for *Koopmann*, however, including copies of portions of disallowance letters.

The government has moved to sever the claims in *Sofman*, and would presumably so move in *Koopmann* were the complaint amended to add the 164 additional signatures. At this time, the Court is not convinced that severance is necessary or advisable, but the presence of numerous *pro se* parties severely complicates matters. Much that was discussed in this order, for instance, could have been orally relayed in a status conference, were one feasible. But a teleconference with scores of parties is not practical, and the alternative is to select smaller

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[2] These unfiled documents have been located by the Court and will be maintained in the Chambers' files. The purpose of these documents was to clarify that no appeal to the Federal Circuit was sought by the respective plaintiffs. Now that the appeals have been dismissed, the subject of these documents is moot and thus there appears to be no need to file them in *Koopmann*.

subsets of plaintiffs for conferences limited to only their claims -- which may not be easily workable. This, again, is another reason why the Court hopes that tax counsel can be found who will volunteer their services, and that plaintiffs will accept such *pro bono* representation. Otherwise, even if the claims may be joined or the cases consolidated, the Court may have no choice but to sever the claims into separate cases for purposes of administration.

But for the time being, and in anticipation that *pro bono* counsel may be found, the Court concludes that the best course of action is to restore the stricken parties to the *Koopmann* proceeding. Given the lenity extended to *pro se* pleadings, it is reasonable under the circumstances to recognize that 170 individual plaintiffs were attempting to join 170 separate causes of action for the refund of FICA HI taxes that were either overpaid or illegally exacted. While one of these already has a claim in *Balestra*, and 42 attempted to assert these claims also in *Sofman*, it is premature for the Court to decide which matter contains which parties -- particularly since *pro bono* counsel may wish to file amended complaints clarifying the claims and providing the information sought in the government's motions for more definite statements.

The Court recognizes the frustration felt by the plaintiffs, whose earnest efforts at litigating this matter were misunderstood at many junctures. But such misunderstandings are often unavoidable when individuals attempt to try complicated matters without assistance of counsel. To rectify the consequences of the Court's previous failure to comprehend the nature of the documents submitted by the plaintiffs, the Court orders the following:

1. The document and attachments received from Mr. Koopmann on August 12, 2009 shall be considered a motion to amend the complaint in *Koopmann v. United States*, and shall be **FILED UNDER SEAL** by the Clerk's Office, with a filing date of August 12, 2009;[3]

2. the document (Docket entry No. 9) from Mr. Koopmann that was filed on August 28, 2009, and which contains 17 signature pages, shall be placed **UNDER SEAL** and is considered a motion to amend the complaint in *Koopmann v. United States*;

3. the document and attachments received from Mr. Koopmann on September 3, 2009 shall be considered a motion to amend the complaint in *Koopmann v. United States*, and shall be **FILED UNDER SEAL** by the Clerk's Office, with a filing date of September 3, 2009; and

4. the document and attachments received from Mr. Koopmann on September 11, 2009 shall be considered a motion to amend the complaint in *Koopmann v. United States*, and shall be **FILED UNDER SEAL** by the Clerk's Office, with a filing date of September 11, 2009.

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[3] Several of the signature forms include social security numbers, and thus these entire filings will be placed under seal until this personal information is redacted.

The four above-described motions to amend the complaint in *Koopmann* are **GRANTED**. The attachments to each shall be treated as attachments to the complaint. The Clerk's Office **SHALL ADD** as *pro se* parties to *Koopmann* all other plaintiffs named in the complaint, except Messrs. Cobb, Horne, Magdaleno, Moore, and Saeger, from whom no signature pages or individual claim allegations have yet been received (any of these five may still be restored to the complaint, if the requisite signature is received in a timely fashion). The September 11, 2009 motion to amend the complaint contains signature pages for 162 of the purported plaintiffs and was served upon government counsel. Of these, 142 also have signature pages submitted with one or more of the earlier motions to amend. It is not clear to the Court whether the documents received on August 12 and September 3 were served on defendant. The Clerk's Office is thus requested to **MAIL TO DEFENDANT'S COUNSEL** a copy of these two documents, with their attachments, in case any of the information on these attachments was not repeated in the September 11, 2009 submission. Between the September 11, 2009 submission and the September 3, 2009 submission (which contains signatures and information for Messrs. Jones, Mark Lund and Southworth), the individual allegations and addresses of 165 of the named plaintiffs in *Koopmann* may be found.

As a consequence of the amendments to the *Koopmann* complaint, the portions of the November 18, 2009 Opinion and Order striking the names of plaintiffs and dismissing portions of the complaint relating to their tax refund or illegal exaction claims are **VACATED**. To accommodate the process of locating *pro bono* counsel, for plaintiffs who are willing to accept such representation, consideration of the following motions is **STAYED**: the government's motion to dismiss in *Koopmann*; the government's motion to sever in *Sofman*; and the government's motion for a more definite statement in *Sofman*. Any plaintiffs who would ***not*** want their claims to be handled by a *pro bono* counsel must call Chambers at 202-357-6668 and so inform the law clerk handling the case, **on or by June 7, 2010**.

IT IS SO ORDERED.

VICTOR J. WOLSKI
Judge