UNITED STATES TAX COURT
WASHINGTON, DC 20217 **CLC**

JOSEPH A. INSINGA,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 9011-13W.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

This is an action pursuant to section 7623(b)(4)[1] to review the denial by the Internal Revenue Service ("IRS") of petitioner Joseph A. Insinga's claim for a whistleblower award. This matter is before the Court on: (1) Mr. Insinga's motion to compel respondent, the Commissioner of the IRS, to produce supplemental and unredacted documents; (2) his motion to compel respondent to fully respond to interrogatories; (3) his motion to compel non-consensual depositions of Robert Gardner, Robert Piatka and Steven Mitzel; (4) the Commissioner's motion for partial summary judgment; and (5) Mr. Insinga's motion for partial summary judgment.

We will defer ruling on both parties' motions for partial summary judgment, pending the further discovery that we will allow here. We will deny without prejudice Mr. Insinga's motion to compel non-consensual depositions. We will grant in part and deny in part Mr. Insinga's motion to compel respondent to produce supplemental and unredacted documents and his motion to compel respondent to fully respond to interrogatories.

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[1]Unless otherwise indicated, all section references are to the Internal Revenue Code (26 U.S.C.; "Code"), and all Rule references are to the Tax Court Rules of Practice and Procedure. Dollar amounts are rounded to the nearest dollar.

SERVED Jul 27 2016

Background

The facts set forth below are based on the pleadings and other pertinent materials in the record. Rule 121(b). We will refer to the target taxpayers, transactions, and amounts by the fictitious or generic terms as used by the Commissioner or the petitioner in their respective reference lists of redacted information filed contemporaneously with their motions for partial summary judgment. We do so to protect the identity of taxpayers who are not parties to this suit. See generally Whistleblower One 10683-13W v. Commissioner, 145 T.C. __,__ (slip op. at 8) (September 16, 2015) (describing the importance of the confidentiality and disclosure restrictions of section 6103).

Mr. Insinga's petition alleges an address in New Jersey.

Mr. Insinga's employment

Mr. Insinga was employed as a senior executive in Dutch Bank during the years 1994-2003. In that capacity, he became aware that, during the years 1998-2005, Dutch Bank had promoted and entered into complex tax avoidance transactions with other U.S. corporate taxpayers.

Mr. Insinga's whistleblower claim

On April 2, 2007, Mr. Insinga submitted to the IRS Whistleblower Office ("Whistleblower Office") Form 211, Application for an Award for Original Information. On May 29, 2007, Mr. Insinga filed an amended submission by sending a copy to agent Robert Gardner, then Senior Programs Analyst of the Whistleblower Office. Mr. Insinga's submissions reported information about his employer, as well as eight[2] other corporate taxpayers and 94 alleged Midco

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[2]Mr. Insinga reported information on ten different entities, these included: Dutch Bank; a U.S. subsidiary of Dutch Bank; seven corporations; and a group of 94 unnamed companies that participated in Midco transactions allegedly promoted by Dutch Bank. The award claim pertaining to the Dutch Bank subsidiary was not included in the denial letter issued to Mr. Insinga and so we do not discuss that entity. At times during the administrative proceedings the parties treated Mr. Insinga's claim as to Dutch Bank and his claim as to the 94 Midco transactions in the aggregate as one claim, while in this litigation they have treated his claims against Dutch Bank and the 94 Midco transactions as two distinct claims. We will also treat these as two distinct claims. Therefore there are nine claims before us,

transactions[3] with unidentified additional taxpayers. Mr. Insinga's submissions enclosed as an exhibit an Internal Audit Report conducted by Dutch Bank's internal auditors who viewed the transactions as being inappropriately tax driven.

(Presumably unbeknownst to Mr. Insinga, the IRS also received information regarding the same transactions from sources other than himself. These other sources are described below.)

On May 10, 2007, agent Gardner contacted Mr. Insinga's counsel and acknowledged receipt of Mr. Insinga's submission and indicated that IRS personnel in New York City wished to meet with Mr. Insinga and his counsel. Mr. Insinga and his counsel met with IRS personnel on June 25, 2007. At that meeting Mr. Insinga provided the IRS with several Dutch Bank Internal Credit Applications and Reviews that explained the tax-driven nature of the transactions. Mr. Insinga also detailed the subject transactions to the IRS personnel. At the conclusion of the meeting an IRS agent advised Mr. Insinga's counsel that he would likely be contacted by several IRS agents as investigations were initiated. Shortly after his initial meeting with the IRS personnel, on June 29, 2007, the Whistleblower Office subject matter expert (SME) sent Mr. Insinga's information to the audit teams assigned to each of the target taxpayers.

Subsequently, Mr. Insinga and his counsel spoke with two IRS audit teams who were investigating transactions entered into by two of the eight taxpayers. Mr. Insinga's counsel and agent Gardner frequently communicated regarding Mr. Insinga's submissions and the status of his claim from the time of the submissions through his later receipt of the denial letter.

In late 2010 Mr. Insinga and his counsel became aware that some of the target taxpayers had settled disputes with the IRS. Mr. Insinga's counsel advised agent Gardner that they were aware of several settlements, but agent Gardner

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consisting of eight distinct claims for eight corporate taxpayers, and a ninth claim for the group of 94 unnamed companies that allegedly participated in Midco transactions.

[3]For a detailed discussion about Midco transactions see Notice 2001-16, 2001-1 C.B. 730, clarified by Notice 2008-111, 2008-51 I.R.B. 1299; Diebold Found., Inc. v. Commissioner, 736 F.3d 172, 175-176 (2d Cir. 2013), vacating and remanding Salus Mundi Found. v. Commissioner, T.C. Memo. 2012-61.

denied that there was a nexus between Mr. Insinga's submissions and the settlements. In November 2011, agent Gardner advised Mr. Insinga's counsel that he had learned that there were other sources of the information Mr. Insinga had provided in his submissions and that Mr. Insinga's whistleblower claim was in jeopardy. (Additional information about the IRS's other information is set out below in the discussion of the discovery requests and responses.)

On April 15, 2013, the Whistleblower Office issued Mr. Insinga a denial letter advising him that he did not qualify for an award because his information "did not result in the collection of any proceeds from any of the taxpayers covered by this letter" and designated the claim as "closed". Petitioner timely petitioned this Court pursuant to section 7623(b)(4).

Mr. Insinga's discovery motions

Mr. Insinga filed a motion to compel the Commissioner to produce supplemental and unredacted documents. The Commissioner filed his response to Mr. Insinga's motion and an accompanying motion to file exhibits under seal attaching several hundred pages of documents that are part of the underlying administrative record. (It is unclear to the Court whether these documents filed under seal are what the Commissioner contends is the entirety of the administrative record or just a portion of it.)

Mr. Insinga also filed a motion to compel the Commissioner to fully respond to interrogatories and a motion to compel non-consensual depositions of Robert Gardner, Robert Piatka, and Steven Mitzel. All three motions to compel have been fully briefed.

The Commissioner's motion for partial summary judgment

The Commissioner filed a motion for partial summary judgment. The motion sets out facts that are the background of the parties' discovery disputes, so we will discuss the motion for partial summary judgment to provide that context.

The Commissioner's motion seeks summary judgment as to six of the target taxpayers and all of the 94 Midco transactions. It alleges specific facts for each of the six target taxpayers and, collectively, the 94 Midco transactions:

1. Dutch Bank

Mr. Insinga's submissions identified transactions that Dutch Bank promoted or facilitated for other taxpayers through the use of special purpose vehicles ("SPVs"). The principal point of Mr. Insinga's submissions regarding Dutch Bank was that it promoted tax avoidance transactions and structures that lacked economic substance. Mr. Insinga's submissions however, do not assert income tax underpayments or deficiencies that were or could have been asserted against Dutch Bank by the IRS. It appears that Mr. Insinga's submissions instead would relate to any promoter investigation of Dutch Bank or promoter penalties that could have been assessed against it.[4]

The Form 11369 states that Mr. Insinga's information primarily related to tax years 1999 through 2003 but the income tax examination for Dutch Bank's tax year 2003 was already completed before receipt of his information. The tax year 2003 was in the IRS Office of Appeals ("Appeals") awaiting a final determination on an income tax issue unrelated to Mr. Insinga's submissions. The Form 11369 also states that "The information provided by the informant was not tax-related information and was irrelevant to the income tax audit."

The Commissioner produced several internal IRS emails to support the conclusion on the Form 11369 and to demonstrate that the IRS did not initiate a promoter examination on Dutch Bank or assess any promoter penalties against it. In an email dated April 3, 2013, Kimberlee Loren, a Tax Shelter Promoter Compliance Specialist of the IRS's Large Business and International Division ("LB&I"), confirmed to Robert Gardner that Dutch Bank was not examined by LB&I for promoter penalties. The Commissioner also attached an email dated April 3, 2013, from Alexander J. Perkins, Program Evaluation and Risk Analyst, LB&I, Office of Tax Shelter Analysis ("OTSA"), to Loren confirming Dutch Bank was never referred to OTSA for a promoter examination.

However, the Integrated Data Retrieval System ("IDRS") results for Dutch Bank show that the IRS made two examination tax assessments after Mr. Insinga's information was transferred by the SME to the field agents on June 29, 2007. On

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[4]We do note that Mr. Insinga submitted information regarding underpayment of income taxes of Dutch Bank's U.S. subsidiary. However, Mr. Insinga's claim regarding Dutch Bank's U.S. subsidiary was not addressed in the denial letter and is not before us in this case.

November 19, 2007, Dutch Bank was assessed $R dollars and on May 2, 2011, Dutch Bank was assessed $S dollars.

2. A Inc.

Mr. Insinga's submissions identified a transaction that A Inc. initiated in 2000 and restructured in 2003. The transaction, facilitated by Dutch Bank, enabled A Inc. to move certain income-generating assets into an offshore SPV, so that tax savings would result from the offshore earnings being taxed at a lower rate than if they had been earned in the U.S.

However, on February 13, 2007--i.e., two months before Mr. Insinga's initial submission--the IRS and A Inc. had entered into a closing agreement for the years 2000 through 2004. The closing agreement covered the transaction reported by Mr. Insinga. On the Commissioner's Form 11369, "Confidential Evaluation Report on Claim for Reward", the team manager stated: "audit adjustments proposed by examination team was totally due to audit process and not by information provided by informant. Issue raised by examination team prior to informants alerting Internal Revenue Service". The team manager recommended an award of zero percent.

3. C LLC

Mr. Insinga's submissions identified a transaction that C LLC initiated in 2002. The transaction involved the use of a C LLC SPV, to which C LLC contributed certain strategic assets, so that the accrued earnings of the assets remained in the SPV until they were lent back to C LLC as inter-company loans. This structure enabled the SPV to make inter-company loans to C LLC totaling $1.1 billion.

On June 15, 2007 (i.e., 2-1/2 months after Mr. Insinga's initial submission), the Commissioner issued a 30-Day Letter and Summary Report to C LLC for years 2002 and 2003, which included the transaction in Mr. Insinga's submissions. It was not until later, on June 29, 2007, that the SME first sent Mr. Insinga's information to the examination team. Consequently, on the Form 11369, the revenue agent stated:

> I have already issued the 30 day letter for the [C LLC] corporate examination and have issued a summary report for the [C LLC] partnership examination. All issues that would have possibly come to light as a result of

> the documents and information provided by the informant were raised in my RAR's prior to receiving that information. While there are significant unagreed issues relating to the [Dutch Bank] transactions with [the SPV], the informant's information did not in any way assist in raising or developing these issues and it would be my recommendation that no reward be given to the informant unless he/she provides additional significant information that has not yet been provided that would be pertinent to the case.

On this basis of his review the revenue agent recommended an award of zero percent.

4. French Bank

Mr. Insinga's amended submission to the Whistleblower Office identified a five year (2002 through 2007) $L dollars financial asset securitization investment trust ("FASIT") transaction that was facilitated by Dutch Bank for French Bank. On June 29, 2007, the SME sent Mr. Insinga's information to the audit team. The attachment to the unsigned and incomplete Form 11369[5] states: "This same issue was audited as part of the [French Bank] IRS corporate audit. The issue was determined by the national Office Chief Counsel's office to be in the taxpayer's favor and not abusive. * * * Therefore, the Service determined that the information was not of value."

However, the IRS did make two assessments of additional tax against French Bank--one for tax year 2003 and a second for tax year 2006. The Commissioner produced a Business Master File On Line Transcript ("BMFOLT") which shows that on December 8, 2009, the IRS made an assessment of $T dollars for tax year 2003. The taxpayer challenged the proposed deficiency but eventually settled with Appeals. The Commissioner produced this settlement letter and the accompanying Form 5278, "Statement - Income Tax Change". The Commissioner points to Form 5278 lines 16 and 20 to demonstrate that the $T dollars assessment concerned an adjustment to the taxpayer's alternative minimum tax.

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[5]Mr. Insinga's response to the motion for partial summary judgment notes that another Form 11369 was filed by a second whistleblower regarding a "swap loss" transaction. Mr. Insinga asserts that both his and the second whistleblower's Forms 11369 relate to the same claim.

On September 7, 2009, the IRS made a second assessment of $U dollars for tax year 2006. The Commissioner produced a Form 4549, "Income Tax Examination Changes", and a Form 4549-B, "Income Tax Examination Changes", for the years 2004 through 2006. The Forms 4549 (lines 6 and 7) and 4549-B show an increase in French Bank's alternative minimum tax.

5. B Corp.

a. *The Monetization Transactions*

Mr. Insinga's amended submission to the Whistleblower Office identified two "monetization transactions" in which Dutch Bank, through an SPV, provided B Corp. with debt and structured equity. The purpose of the transactions was to provide B Corp. with an off-balance-sheet debt structure and tax deferrals on the sale of securitized installment notes. The first transaction was initiated in 1999 and restructured in 2000, and the second transaction was initiated in 2001. At the June 25, 2007 meeting, Mr. Insinga also provided the IRS with a credit application dated February 6, 2001, that was purportedly used to facilitate one or more of these monetization transactions.

On June 29, 2007, the SME sent Mr. Insinga's information to the audit team. Two weeks later, on July 12, 2007, a revenue agent on B Corp.'s audit team informed the SME that the issue was previously reviewed in the 1999-2001 audit cycles and the information was already known and of no value. The Form 11369 dated May 29, 2008, states that Mr. Insinga's information was previously known and the transaction was reviewed in the 1999-2001 audit cycle.

The Commissioner has produced several documents to support the conclusion on the Form 11369. The Commissioner has produced the January 3, 2005, RAR that described the audit findings and proposed deficiency against B Corp. for the 1999-2001 audit cycle. The Commissioner has also produced the 30-Day letter that was also issued on January 3, 2005, notifying B Corp. of the proposed audit adjustments.

b. *The Financing Transactions*

The February 6, 2001, credit application that Mr. Insinga provided to the IRS appears to be related to the financing component of one or more of the monetization transactions. Mr. Insinga asserts that this credit application forms the basis for the IRS's adjustments for the Q financing transaction in tax years 2006

and 2007. As reflected in the produced Forms 4549-B for tax years 2004 through 2007, the IRS did make adjustments related to a Q financing transaction in tax years 2006 and 2007.

However, the Commissioner has produced several documents that suggest that the adjustments in the 2006 and 2007 tax years for the Q financing transaction were not on the basis of Mr. Insinga's information. The Commissioner has produced some audit team correspondence from July-August 2004 and Financial Product Specialists' Workpapers from the 1999-2001 examination cycle to show that the adjustments in those years related to the Q financing transaction were the result of the IRS's investigation prior to Mr. Insinga's submissions. One document in the audit team correspondence is an August 26, 2004, memo from the B Corp. team manager to the audit director overseeing B Corp. The August 2004 memo states that the Q financing transaction "will not be further pursued at this time for the 1999-2001 audit cycle. Such will be subject to examination during the 2002-2003 audit cycle, and/or in the event that claims are filed relative to years currently open."

Additionally, internal audit team emails from July 2004 state that they would postpone examination of the issue until the 2002-2003 audit cycle because the Financial Product Specialist did not have enough time "to develop a strong argument for disallowance." Finally, the Financial Product Specialists' Workpapers contain approximately 17 pages of hand-written notes about the Q financing transaction including specifics about the parties involved and its structure. The top of each page of the hand-written notes states a date on which the notes appear to have been written. The dates of the notes range from March 2 to July 6, 2004. The Financial Product Specialists' Workpapers also include a memo summary of the transaction and a list of items requested and received from the taxpayer in response to information document requests ("IDRs"). The header to this document states that it was created on November 19, 2003, and relates to the 1999-2001 audit cycle. The memo also contains documents that appear to have been received from the taxpayer in response to some of the IDRs. These documents include powerpoint slides and organizational charts that explain some aspects of the Q financing transaction.

Although it is unclear from the parties' submissions, it appears possible that the IRS's adjustments for the 1999-2001 audit cycle and the subsequent adjustments for the 2004-2007 audit cycle both may have arisen from the same underlying monetization transactions. The Commissioner asserts that Mr. Insinga's submission related only to the underlying monetization transaction

and that the IRS already knew about the monetization transaction; however, upon inspection of Mr. Insinga's submission, the internal audit report and the credit application do include the structure for the Q financing transaction that the IRS was investigating after the 1999-2001 adjustments. The Commissioner seems to allege that the two sets of adjustments were the result of two unrelated transactions. But Mr. Insinga's briefing suggests that the adjustments arise from separate legs of the same transaction and that the common link between them is the credit application, and without prejudging the case we cannot dismiss that possibility.

6. D Co.

Mr. Insinga's amended submissions identified two monetization transactions that D Co. entered into in 2002 and 2003. The purpose of both transactions was to achieve gain deferrals under section 453 on low-basis assets. On June 29, 2007, the SME sent Mr. Insinga's information to the audit team. The IRS's team manager for the D Co. audit completed the undated Form 11369 and checked the boxes that Mr. Insinga's information was of no value, that it was already known, and that an audit was already in process for tax years 2001, 2002, and 2003. In section 15 of the Form 11369 she stated: "No taxes, interest or penalties were assessed or collected based on the information provided by the informant."

The Commissioner produced internal IRS emails and a memorandum that reflect the agency's decision not to challenge the transactions Mr. Insinga identified through audit, but rather to pursue a legislative solution. These documents show that notwithstanding the SME's referral of Mr. Insinga's information, the audit team was instructed by the IRS National Office not to pursue the monetization issue. In an email dated August 28, 2007, an Associate Area Counsel emailed members of the audit team and explained the IRS National Office's reasoning for not challenging the transaction through audit. The email explains that the industry counsel and division counsel concluded that the transaction should not be challenged by applying judicial doctrines because the IRS wanted to preserve the favorable case law it had developed applying judicial doctrines to tax shelter cases.

The Commissioner also produced several documents to demonstrate that the 2001-2002 monetization transactions that Mr. Insinga reported were not challenged because of the IRS National Office directive, and that in a subsequent audit the monetization transactions were not challenged under alternative theories for similar reasons. The Commissioner has produced November 2010 emails by which a

subsequent D Co. audit team, which was examining, and sought to challenge, a similar transaction on a different basis, inquired why the 2001-2002 monetization transaction was not pursued. The produced emails also include a November 2012 email from the subsequent D Co. audit team manager to Steven Mitzel which states that the audit team followed the IRS National Office's directive and did not challenge any of the monetization transactions. Finally, the Commissioner produced a November 2012 memo to file by Steven Mitzel that documents several phone conversations with the subsequent D Co. team manager regarding the 2001-2002 audit cycle and a subsequent audit cycle. The memo states that, on the basis of the IRS National Office directive, the 2001-2002 audit cycle team did not pursue the issue, and that the subsequent audit team's attempt to challenge the transaction by challenging the partnership formations as loans and not partnerships "was not supported either". The memo further states that the subsequent audit team's RAR "treated the partnerships as valid and made some small 267(a) adjustments."

Through discovery in this case Mr. Insinga obtained a Letter 950(DO) (referencing D Co.'s Form 1120 and attaching its Form 4549-A) from the IRS to D Co., which shows that capital gain income was increased for tax years 2001-2003 by more than $1 billion. Mr. Insinga asserts that no explanation for these adjustments appears in the record and that the adjustments appear to have reduced the NOLs carried by D Co. Mr. Insinga asserts that the $1 billion adjustment was the result of the information in his submissions.

7. 94 Midco Transactions

Mr. Insinga's submissions alleged that Dutch Bank facilitated at least 94 other Midco transactions. However, Mr. Insinga's submissions failed to provide the IRS with specific names of the customers involved in those transactions or any specific details about the transactions. The appendix of the Dutch Bank audit report attached to Mr. Insinga's amended submission included a diagram and explanation of the internal auditor's understanding of the typical structure of a Midco transaction. The internal audit report also explains how many Midco transactions Dutch Bank executed each year from 1998 through 2004 but does not provide any specific information about the transactions or the parties involved.

The Commissioner has produced a document created by the SME that details when Mr. Insinga's information regarding each taxpayer was sent to the separate audit teams. The SME's document does not list Mr. Insinga's information about

the 94 Midco transactions as ever being sent to a separate audit team for additional investigation.

However, in a memo dated December 12, 2011, from Gardner to Stephen Whitlock, the director of the Whistleblower Office, Garder notes that: "While information was sent from the Industry Office to five taxpayers on potential tax issues arising from a tax scheme referred to as 'MIDCO', the team did not pursue this issue any further and no other leads were developed or provided to other teams. This information was confirmed by this analyst with the National Technical Advisor on 'MIDCO.'" The confirmation referenced in the final sentence of the Gardner memo refers to the April 3, 2013, Loren and Perkins emails by which both individuals confirmed that Dutch Bank was not examined for promoter penalties and that Dutch Bank was not referred to OTSA for a promoter examination.

Mr. Insinga's motion for partial summary judgment

Mr. Insinga's motion for partial summary judgment addresses the issue of liability (but not damages) for an award regarding V Inc. a taxpayer corporation not addressed in the Commissioner's motion for summary judgment.

Like the Commissioner's motion for partial summary judgment, Mr. Insinga's motion for partial summary judgment provides additional context to the parties' discovery disputes. Mr. Insinga's submissions identified a transaction that V Inc., initiated in 2001. The transaction was facilitated by Dutch Bank and enabled V Inc., to move income-generating accounts receivable assets into a newly created offshore SPV, called W SPV, and to partially shield them from U.S. taxation. The submissions stated that Dutch Bank invested equity in W SPV and that W SPV then purchased V Inc.'s accounts receivables at a discount. W SPV collected the accounts receivables and lent the proceeds back to V Inc., as an intercompany loan.[6] Mr. Insinga's submission also included a transaction structure chart.

The Form 11369 states that Mr. Insinga's information "identified a tax non-compliance issue of a type previously unknown or not well understood." It also

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[6]The difference between the discount in which W SPV purchased the accounts receivables and the loss rate of the accounts receivables was accumulated in W SPV, and lent back to V Inc. as an intercompany loan. The result of this structure was that the accumulated W SPV proceeds were not taxed in the United States.

confirms that the IRS used his information to develop document requests or other inquiries to V Inc., and that he provided information that would not have been obtained through general audit or investigative techniques. Finally, the Form 11369 states that Mr. Insinga provided continuing assistance during the audit or investigation and that he helped identify other taxpayers or entities involved in the same or similar transactions by providing specific identifying information.

However, on the attachment to the Form 11369, the revenue agent stated that the IRS was already examining V Inc.'s 2003 and 2004 tax returns and, specifically, the accounts receivable transaction that Mr. Insinga reported. No changes were proposed for the 2003 and 2004 exam cycle but the issue was included in the 2005 tax year examination plan. The revenue agent stated that Mr. Insinga submitted a credit application regarding a second structured transaction between V Inc., and Dutch Bank, but the credit application also included additional information relating to the accounts receivable transaction the IRS was previously examining. That document confirmed that Dutch Bank viewed the transaction as a loan to V Inc., rather than an equity investment in its subsidiary. The credit application caused the IRS to issue additional IDRs to V Inc., and a summons to Dutch Bank. The revenue agent stated: "the information received from the whistleblower and the subsequent summons, was helpful" but that it did not impact the exam plan because the information was not received until after the exam plans were completed. He further stated that the issues related to the transaction Mr. Insinga identified were included in the RAR as adjustments for 2005 and 2006 but that they were also within the planned scope of the audit prior to receipt of Mr. Insinga's information.

V Inc., appealed the adjustments to Appeals, and in the Appeals Case Memorandum the Appeals Officer conceded the debt-versus-equity issue. However, in September 2010, V Inc., and Appeals entered into a closing agreement that resulted in substantial adjustments for tax years 2005 and 2006 arising from the accounts receivable transactions.

Additional target not addressed in the motions for partial summary judgment

There is one additional target taxpayer that was not addressed in either motion for partial summary judgment but that is involved in the motions to compel. Mr. Insinga's submissions identified a second accounts receivable structure initiated by X Inc. that was nearly identical to the accounts receivable transaction initiated by V Inc. We will not repeat the X Inc. transaction structure and purpose here because it is identical to V Inc. Mr. Insinga's information was

sent to the audit team on June 29, 2007, and the audit team had a conference call with him in August 2007.

The IRS's senior team coordinator for the X Inc. audit completed the Form 11369 and stated that the information provided by Mr. Insinga did not cause the investigation, nor was it a direct factor in the recovery of taxes, penalties, and fines. On the second page of the Form 11369, the senior team coordinator stated that the transaction Mr. Insinga reported "was already under examination and had been for many months. The issue had been classified as a Tier One issue and it was actively being managed by the IMT as we developed the information more fully. We received the informant's report after we had substantially developed the issue." He further stated that Mr. Insinga's information assisted the audit team in the following ways: (1) he confirmed the audit team's understanding of the transaction; (2) he brought to their attention the premium paid by X Inc. to Dutch Bank; and (3) he gave the audit team the names of certain types of documents they should seek from Dutch Bank. Id. Dutch Bank denied the existence of documents with those names in response to subsequent IRS summonses. Id. The Form 11369 was dated June 26, 2008 and the senior team coordinator left the recommended award box blank.

In the Commissioner's motion to file exhibits under seal, he attached email correspondence between the X Inc. team manager to the Whistleblower Office management analyst attaching a powerpoint presentation describing the X Inc. transaction. The team manager stated in the email that the powerpoint presentation was made on March 20, 2007, however the powerpoint slides do not appear to bear a date. The attached emails also contain correspondence between the team manager and the audit team stating that on October 27, 2006, the team manager drafted the issue audit plan for this issue. We note that the issue audit plan does not appear to be in our record. The Commissioner also produced the Appeals Case Memorandum that describes the IRS's position on the proposed adjustments for the 2001 and 2002 tax years and notes that subsequent discussions with X Inc. resulted in X Inc. conceding fifty-seven percent of the issue, which was within the recommended settlement range. However, the Commissioner has not produced a closing agreement reflecting the ultimate resolution of the transaction.

Discussion

I. The motions to compel

Mr. Insinga has filed three motions to compel. We will deny without prejudice his motion to compel non-consensual depositions of Robert Gardner, Robert Piatka, and Steven Mitzel but will grant in part his motion to compel respondent to produce supplemental and unredacted documents and his motion to compel respondent to fully respond to interrogatories.

A. Motion to compel nonconsensual depositions

Mr. Insinga seeks non-consensual depositions of nonparty witnesses, who are current or former IRS employees. He states that the depositions of these individuals are necessary because "the IRS has been unwilling to provide information necessary to allow Mr. Insinga to prosecute this claim." He further states that he "seeks the mental impressions of all three deponents, including their knowledge of facts prior to Petitioner's submission, their motivations for taking certain actions, their knowledge of facts not appearing in the IRS' files produced pursuant to discovery requests and informal discovery, and their intent and motivation in both acting upon Petitioner's information and later denying Petitioner's claims." Mr. Insinga asserts that these three individuals can provide information that is not contained in the documents or other discovery the Commissioner has produced.

The Tax Court's discovery rules are broadly similar to those in the Federal Rules of Civil Procedure, but one of the longstanding significant differences is our relatively restrictive allowance of depositions. Tax Court Rule 74 authorizes a party, under certain limited circumstances, to obtain discovery by taking depositions. Discovery depositions can either be depositions upon consent of the parties under Rule 74(b) or depositions without consent of the parties under Rule 74(c). The Commissioner does not consent to the proposed depositions; and consequently, whether the depositions may proceed is governed by Rule 74(c). Rule 74(c)(1)(B) provides in pertinent part (emphasis added):

> The taking of a deposition of a party, a nonparty witness, or an expert witness under this paragraph is an extraordinary method of discovery and may be used only where a party, a nonparty witness, or an expert witness can give testimony or possesses documents, electronically stored information, or things which are discoverable within the meaning of Rule

> 70(b) and where such testimony, documents, electronically stored information, or things practicably cannot be obtained through informal consultation or communication (Rule 70(a)(1)), interrogatories (Rule 71), a request for production of documents, electronically stored information, or things (Rule 72), or by a deposition taken with consent of the parties (Rule 74(b)).

Rule 74(c)(1)(B) further provides that if the requirements described above are met, then a deposition under Rule 74 may be taken subject to the other requirements set forth in the Court's Rules.

The rule makes clear that a non-consensual deposition "is an extraordinary method of discovery" that is only available where the witness can give testimony that could not be obtained through document discovery. It is true that whistleblower cases, unlike the deficiency cases that form the great majority of our docket, are brought by a petitioner who is likely not to know many of the operative facts relevant to his case--a circumstance that should, in some instances, condition the application of our rule. However, when Congress granted exclusive jurisdiction over whistleblower cases to the Tax Court, it committed these cases to a court one of whose distinctive features is very limited depositions. If Congress had intended whistleblowers to be permitted to conduct depositions liberally, it could have granted jurisdiction over whistleblower claims to the United States District Courts, which are governed by the Federal Rules of Civil Procedure, or to the United States Court of Federal Claims, which has similarly permissive discovery rules. Instead, Congress chose a forum where nonconsensual depositions are "extraordinary". A whistleblower's desire for additional information about the rejection of his claim is not an extraordinary circumstance that, without more, would justify nonconsensual depositions in this Court.

However, this feature of our rules can, and in this case does, warrant granting latitude to a party's use of the other tools of discovery, particularly interrogatories. The document discovery that Mr. Insinga seeks will show whether the IRS collected proceeds on the basis of Mr. Insinga's information. This is particularly true in light of the extent of the Court's granting, in part, the motion to compel document discovery, as discussed below. It will be the IRS's documents, not the testimony of IRS employees, that most reliably shows whether the IRS collected any proceeds on the basis of Mr. Insinga's information.

When a party believes that document requests have not been fully responded to, one remedy under the Federal Rules is to depose the producing party; and under

our rules the remedy can include requiring sworn responses to interrogatories, which we address below. Unless the document production and sworn interrogatory responses prove to be inadequate means of discovery, non-consensual depositions should be denied.

B. Motion to compel documents

1. Redacted documents. From the documents he produced, the Commissioner made redactions on the basis of claims of privilege. Mr. Insinga disputes the privilege claims and moves to compel the production of unredacted documents. For the reasons stated in the Commissioner's response, we will deny Mr. Insinga's motion to this extent.

2. Documents outside the "administrative record"

Mr. Insinga argues that the Commissioner's document production is deficient because most of the documents produced consist of the same documents that Mr. Insinga submitted to the IRS, and the document production lacks documents from the underlying audit or Appeals process of the target taxpayer that would reveal the extent to which the IRS used Mr. Insinga's information to collect proceeds from the target taxpayers. Mr. Insinga seeks the production of virtually all documents that were produced by the third-party taxpayers or were generated by the IRS with respect to their examinations. He also seeks production of unredacted copies of all redacted documents that the Commissioner has produced in this case.

The Commissioner responds that he has provided Mr. Insinga with the entirety of the record of the non-privileged information relating to the Whistleblower Office's consideration and evaluation of Mr. Insinga's claim and the basis of its determination to deny the award. The Commissioner asserts that the documents provided to Mr. Insinga are the entirety of the documents Stephen Whitlock based his determination and that Whitlock did not consider any documents not in the administrative record for Mr. Insinga's claim. It is the Commissioner's position that the documents made available to the Whistleblower Office are, by definition, the universe of relevant documents in this case, because (in the Commissioner's view) the Tax Court in a whistleblower case reviews the decision of the Whistleblower Office for an abuse of discretion and, in doing so, consults only the administrative record that was before the Whistleblower Office when it made its decision.

We need not resolve this standard- and scope-of-review question now, but may assume the Commissioner's position *arguendo*. Even if we were to agree with the Commissioner that the scope of review is limited to the administrative record, the Commissioner "cannot unilaterally decide what constitutes an administrative record." See Whistleblower One 10683-13W v. Commissioner, 145 T.C. __,__ (slip op. at 6) (September 16, 2015) (internal citations omitted). The Commissioner could not (and does not argue that he could) set up a procedure that so restricted the information given to the Whistleblower Office that it was unable to make its own decision about the use and value of the whistleblower's information. Such a procedure would, in itself, be an abuse of discretion that would invalidate the office's decisions. Thus, the critical question is whether the Commissioner's proffered administrative record contains the documents that are adequate to show to the Whistleblower Office (and eventually to show the reviewing Court) whether the IRS collected proceeds from the target taxpayers on the basis of Mr. Insinga's information. Some of the information that Mr. Insinga seeks would apparently be relevant to prove whether one or more collections of proceeds from the target taxpayers were attributable to the information Mr. Insinga provided. A petitioner-whistleblower cannot be denied discovery of relevant, unprivileged documents because the Commissioner asserts that the record is limited to the administrative claim file that the Commissioner compiled. If discovery were to show that information exists that would be necessary to determine whether the whistleblower's information yielded tax collection but that this information had been omitted from the administrative record developed by the Whistleblower Office, then that information would be relevant to the issue of an abuse of discretion by the Whistleblower Office.

3. Four claims that the documents seem to resolve

Without ruling on the merits of the outstanding motions for partial summary judgment, we note that the IRS's document production as to Dutch Bank, A Inc., C LLC, and the 94 Midco transactions appears to demonstrate that no proceeds were collected from these taxpayers on the basis of Mr. Insinga's information:

- Dutch Bank. The Commissioner produced internal IRS emails that demonstrate that the IRS did not initiate a promoter examination or assess any promoter penalties against Dutch Bank. The Commissioner also produced the IDRS results for Dutch Bank which show that the IRS made two examination tax assessments after Mr. Insinga's information was transferred by the SME to the field agents; but Mr. Insinga's submissions alleged only that Dutch Bank promoted

or facilitated tax avoidance transactions and structures; he did not assert that Dutch Bank had income tax underpayments or deficiencies.

- A Inc. The document production shows that the Commissioner produced a February 13, 2007 closing agreement between the IRS and A Inc. that covered the transaction Mr. Insinga reported and which was entered into two months prior to his April 2, 2007, submission.

- C LLC. The Commissioner produced a June 15, 2007, 30-Day Letter and Summary Report to C LLC that included the transaction in Mr. Insinga's submissions and which was issued two weeks before the SME sent Mr. Insinga's information to the C LLC examination team on June 29, 2007.

- 94 Midco transactions. Finally, the Commissioner's production included a document created by the SME that shows (by the absence of an entry) that Mr. Insinga's information about the 94 Midco transactions was not sent to a separate audit team. Also, the December 12, 2011 memo from Gardner to Whitlock confirms that while Mr. Insinga's information was sent from the Industry Office to five taxpayers on potential tax issues arising from Midco transactions, the information was not pursued further "and no other leads were developed or provided to other teams." This is further confirmed by the internal IRS documents that show that Dutch Bank was not pursued for a promoter examination or promoter penalties.

However, if there are additional documents related to these four subjects that tend to show otherwise, Mr. Insinga would be entitled to receive them. The Commissioner should either produce such documents or give a sworn assurance that they do not exist.

4. Five claims that the documents do not seem to resolve

As to the balance of Mr. Insinga's claims, we do not think that the Commissioner's document production shows definitively that there is no legitimate question whether proceeds were collected from French Bank, B Corp., D Co., V Inc., and X Inc. on the basis of his information. Again, without ruling on the merits of the motions for partial summary judgment we will discuss the Commissioner's production for each of these five taxpayers:

- French Bank. The Commissioner's production shows that the IRS made two assessments of additional tax against French Bank which included a

December 8, 2009, assessment (for tax year 2003) and a September 7, 2009, assessment (for tax year 2006). French Bank challenged the December 2009 proposed deficiency but eventually settled with Appeals. The Commissioner produced the settlement letter and the Form 5278 to demonstrate that the assessment concerned an adjustment to French Bank's alternative minimum tax. For the September 2009 assessment, the Commissioner produced a Form 4549-B which also shows an increase in French Bank's alternative minimum tax. Mr. Insinga asserts that the two alternative minimum tax adjustments were not separate and unrelated to his information. He asserts that his submissions (which predate the two adjustments) reported the complicated FASIT transactions and that it was the FASIT transactions that triggered the alternative minimum tax adjustments.

- B Corp. The Commissioner's production for B Corp. includes several documents that support the conclusion on the Form 11369--that the IRS was already aware of the monetization transactions and that the issue was previously reviewed in the 1999-2000 audit cycle. The Commissioner produced the January 2005 RAR that described the audit findings and proposed deficiency against B Corp. for the 1999-2001 audit cycle. He also produced a January 2005 30-Day letter that notified B Corp. of the proposed audit adjustments.

Mr. Insinga's submissions, however, also identified what appears to be the financing component of the monetization transactions. He asserts that the February 6, 2001, credit application is the basis for the IRS's adjustments for the Q financing transaction in tax years 2006 and 2007. The Commissioner produced Forms 4549-B for tax years 2004 through 2007, and they show that the IRS made an adjustment related to a Q financing transaction in tax years 2006 and 2007. The Commissioner also produced internal audit team correspondence from July-August 2004 and the March-July 2004 Financial Product Specialists' Workpapers from the 1999-2001 examination cycle to show that any adjustments related to the Q financing transaction were the result of the IRS's investigation prior to Mr. Insinga's submissions.

Although it is true that the Commissioner produced documents that show that the IRS was investigating the Q financing transaction prior to Mr. Insinga's submissions, we cannot say that the record in this case definitively demonstrates whether the IRS used Mr. Insinga's information, particularly his submission of the credit application and its supporting documentation. The IRS made adjustments in

tax years 2006 through 2007[7] for the Q financing transaction, and the record demonstrates that the IRS was investigating the Q financing transaction prior to Mr. Insinga's submissions. However, the extent of their knowledge--and whether Mr. Insinga's submissions contributed to their understanding of the Q financing transaction and ultimately their ability to collect proceeds from B Corp.--remains unclear.

- D. Co. The Commissioner's production for D Co. includes several documents that support the conclusion on the Form 11369--that the IRS was already aware of the monetization transactions and that "no taxes, interest, or penalties were assessed or collected based on the information provided by the informant." The Commissioner produced internal IRS documents that confirm that the IRS National Office decided not to challenge the monetization transactions through audit, but rather decided to pursue a legislative solution. The documents include an email between the Associate Area Counsel and members of the audit team in which the Associate Area Counsel explained the IRS National Office's reasoning for not allowing the audit team to challenge the transaction by applying judicial doctrines. A separate set of emails shows that a subsequent audit team in a subsequent audit cycle did not challenge the monetization transactions under a different theory because they did not have the IRS National Office's support.

However, through discovery Mr. Insinga obtained a letter 950(DO) which shows that the IRS increased D Co.'s capital gain income by more than $1 billion for tax years 2001-2003. He questions why there is no explanation in the record for this adjustment but asserts that the adjustment appears to have reduced D Co.'s NOLs. He asserts that the adjustment was the result of his submissions and requests to see the underlying exam documents, appeals documents, and audit team correspondence relating to the adjustment and the monetization transactions.

The Commissioner's document production shows that the audit team was prohibited by the IRS National Office from challenging the monetization transactions; however, D Co. has a large unexplained adjustment that, for all we can tell, might have been related to the monetization transactions. For instance, a

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[7]The Commissioner produced the Form 4549-B for 2006 and 2007, that reflects a 12/2006 increase adjustment related to "[Q financing transaction] - Subpart F Income" in the amount of $55,351,379 and a 12/2007 increase adjustment in the amount of $60,102,483. We do not have the IDRS transcripts that show date of assessment, although Mitzel memo says it was a 12/5/07 assessment.

subsequent audit team could have revisited the monetization transaction and challenged it on a basis other than those not supported by the IRS National Office.

- V Inc. The Commissioner's production for V Inc., includes the Form 11369 in which the revenue agent conceded that the accounts receivable transaction that Mr. Insinga reported was a tax-noncompliance issue that was previously unknown or not well understood and that the IRS used Mr. Insinga's information to develop document requests and other inquiries to V Inc. Nonetheless, the revenue agent stated that the IRS had already been examining V Inc., for this issue and that it was included in the 2005 tax year examination plan. The revenue agent also conceded that the information attached to the credit application Mr. Insinga submitted was helpful because it confirmed that Dutch Bank viewed its interest in the W SPV as debt and not equity, but that the information did not impact the examination plan because it was received after the examination plan was completed.

The Commissioner's document production also includes the Appeals Case Memorandum that describes the IRS's position on the proposed adjustments for the 2005 and 2006 tax years. In the Appeals Case Memorandum the IRS conceded the debt-versus-equity issue on the basis of litigation hazards. Nonetheless, the Appeals Case Memorandum contains a closing agreement executed in September 2010, in which V Inc., and the IRS agreed to substantial adjustments for the 2005 and 2006 tax years relating to the accounts receivable transaction. It is unclear to the Court whether Mr. Insinga's submission and the resulting information the IRS received by issuing the IDRs were the basis of its collection of proceeds from V Inc. The Commissioner asserts that Mr. Insinga's information was limited to the debt-versus-equity issue that the IRS conceded, while Mr. Insinga argues that his information regarding the entire transaction resulted in the IRS's collection of proceeds from V Inc.

- X Inc. The Commissioner's production for X Inc. includes audit team email correspondence in which the team manger states that on October 27, 2006, he drafted the issue audit plan covering the issue and an undated powerpoint presentation describing the X Inc. accounts receivable transaction that the team manager said was presented on March 20, 2007. The record also contains the Appeals Case Memorandum that described the parties' positions on the proposed adjustments and the ultimate resolution where the taxpayer conceded fifty-seven percent of the issue. It also includes the Form 11369 which stated that Mr. Insinga confirmed the audit team's understanding of the transaction, brought their attention to the premium paid by X Inc. to Dutch Bank, and gave them the names of the

types of documents that they should seek from Dutch Bank; however, it states that the transaction Mr. Insinga reported "was already under examination and had been for many months." Absent production of additional documents (or sworn statements) indicating whether Mr. Insinga's submissions contributed to the ultimate collection of tax, it is unclear whether the IRS collected proceeds on the basis of his submissions.

After reviewing the Commissioner's document production in light of Mr. Insinga's claims as to the incompleteness of the disclosure and the inaccuracy of the IRS's statements, we find that some additional response to Mr. Insinga's document requests is appropriate in connection with all of Mr. Insinga's claims to ensure the completeness of the record before the Court, so that the Court can determine whether the IRS collected any proceeds from the target taxpayers on the basis of Mr. Insinga's information. The Commissioner's document production to date reveals that the administrative record before the Whistleblower Office may have been deficient as to several of Mr. Insinga's claims that the IRS collected any proceeds on the basis of Mr. Insinga's information. Therefore, we will require the Commissioner to make some additional response to the document requests.

5. The additional response to be required

The remedy Mr. Insinga seeks is the nearly wholesale disclosure of the IRS's files related to the target taxpayers for broad periods of time. This request is improper. Section 6103 generally protects these taxpayers from disclosure of their tax return information, and the exception in section 6103(h)(4)(B) and (C)[8] applies only where "the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding" or the "return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding . . . ". Using Mr. Insinga's proposed approach, section 6103 could be cynically evaded by the filing of a reward claim and, when the award is denied, the filing of a petition and the serving of broad discovery requests on the Commissioner, for the ostensible purpose of seeing whether, somewhere in the IRS's records of that taxpayer, there is evidence to contradict the denial of an award. We will not follow that approach. Rather, we will require the

[8]See 26 C.F.R. sec. 301.6103(h)(4)-1(a) (providing that a whistleblower administrative proceeding is a judicial or administrative proceeding pertaining to tax administration within the meaning of section 6103(h)(4)).

Commissioner to produce only documents (if any) that show a relationship to Mr. Insinga's information.

We will require the Commissioner to produce, from IRS audit, Appeals, and collection records, any documents that have not already been produced that show any direct relation to the transactions that Mr. Insinga reported for each of the target taxpayers. For any instance in which the Commissioner's response is that no responsive documents exist, he will substantiate that response by a sworn statement in response to the interrogatories, to which we now turn.

C. Motion to compel responses to interrogatories

Mr. Insinga's interrogatories seek responses about how his information was circulated internally within the IRS, whether it was used in the audit teams' investigations of the target taxpayers or any other investigations, and whether it resulted in the collection of any proceeds, including the amounts. The Commissioner's responses simply directed Mr. Insinga to the IRS's business records that were produced in this case. The Commissioner contends that these were sufficient answers to Mr. Insinga's interrogatories because (the Commissioner contends) the answer to the particular interrogatory could be derived from those business records.

Rule 71(e), in pertinent part, provides:

> (e) Option To Produce Business Records: If the answer to an interrogatory may be derived or ascertained from the business records (including electronically stored information) of the party upon whom the interrogatory has been served, or from an examination, audit, or inspection of such records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is sufficient to answer such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries.

It may be true that (unsworn) answers to Mr. Insinga's interrogatories can be found in the Commissioner's document production, but in this case--and particularly in the absence of depositions to probe the answers--we think the Commissioner ought to be required to give sworn answers to Interrogatories Nos. 2, 3, 12, and 13.

Additionally, we will grant, in part Mr. Insinga's motion to compel as to Interrogatory No. 5. As to Interrogatory No. 5, the Commissioner must give a sworn answer with respect to each taxpayer identified by Mr. Insinga in his submission, as to any actions undertaken by the IRS since 2007 to collect any tax liability (including additions) subsequent to Mr. Insinga's original submission with respect to each such taxpayer, stating whether or not such collection efforts were the result of any "administrative action" taken as a result of the information provided by Mr. Insinga.

In addition, as we have previously stated, if there are no additional documents, responsive to Mr. Insinga's requests, that have a direct relation to a transaction that Mr. Insinga reported for any of the target taxpayers, then the Commissioner should submit a sworn response by one or more IRS employees with personal knowledge affirming that no additional documents exist.

II. The motions for partial summary judgment

We will defer ruling on the Commissioner's motion for partial summary judgment and Mr. Insinga's motion for partial summary judgment until after Mr. Insinga has received any supplemental document discovery and we have learned whether the parties wish to make supplemental filings with respect to the motions for partial summary judgment.

To give effect to the foregoing, it is

ORDERED that petitioner's motion to compel the depositions of Robert Gardner, Robert Piatka and Steven Mitzel is hereby denied without prejudice. It is further

ORDERED that petitioner's motion to compel production of documents, as supplemented, is hereby granted in part, and that no later than August 31, 2016, respondent shall produce to petitioner, from IRS audit, Appeals, and collection records, any documents that have not already been produced that show any direct relation to the transactions that petitioner reported for each of the target taxpayers: A Inc., B Corp., C LLC, D Co., V Inc., X, Inc., Dutch Bank, French Bank, and the 94 Midco transactions. In response to the interrogatories (see below) respondent shall include a sworn assurance, by one or more IRS employees with personal knowledge, that all responsive documents have been produced (or that such documents do not exist). It is further

ORDERED that petitioner's motion to compel responses to interrogatories, is hereby granted in part, and that no later than August 31, 2016, respondent shall give sworn answers to Interrogatories Nos. 2, 3, 12, and 13. As to Interrogatory No. 5, respondent shall give a sworn answer with respect to each taxpayer identified by the petitioner in his submission (consisting of A Inc., B Corp., C LLC, D Co., V Inc., X, Inc., Dutch Bank, French Bank, and the 94 Midco transactions), as to any actions undertaken by the IRS since 2007 to collect any tax liability, including additions, subsequent to the petitioner's original submission with respect to each such taxpayer, stating whether or not such collection efforts were the result of any "administrative action" taken as a result of the information provided by the petitioner. It is further

ORDERED that after respondent has complied with the previous directions of this order, and no later than September 26, the parties shall jointly initiate a telephone conference call with the Court to discuss whether supplemental memoranda should be filed in connection with the parties' motions for partial summary judgment. It is further

ORDERED that the parties are reminded that the protective order issued on August 8, 2013, remains in full force and effect.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
July 27, 2016