

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

IN RE:  
ROBERT L. PENDERGRAFT and  
JANE M. PENDERGRAFT, Debtors

Case No. 16-33506-H1-11  
(Chapter 11)

JANE M. PENDERGRAFT,

Plaintiff

v.  
UNITED STATES OF AMERICA  
DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE,

ADV. No. 16-03246

Defendant

**JOINT STIPULATION OF DISMISSAL WITHOUT PREJUDICE**

TO THE HONORABLE MARVIN ISGUR, U.S. BANKRUPTCY JUDGE:

COMES NOW, JANE M. PEDNERGRAFT, Plaintiff, and UNITED STATES OF AMERICA DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Defendant, in the above styled adversary proceeding, and makes this their joint stipulation of dismissal pursuant to Federal Rule of Bankruptcy Procedure 7041 and Federal Rule of Civil Procedure 41 incorporated thereby, and would show as follows:

I.

**Relief Requested**

1. The parties asks this Court to dismiss this adversary proceeding, so that the Plaintiff may pursue her claims in the United States Federal Tax court.

**II.**

**Procedural Background**

2. On September 8, 2016, the Plaintiff filed her Debtor Jane M. Pendergraft's Objection to Proof of Claim Number 3 of the Internal Revenue Service. (Doc. No. 43, Case Number 16-33506).

3. On November 4, 2016, the Plaintiff filed her Adversary Complaint to Determine Claim of the IRS and Extend and Validity of Lien (Doc. No. 1, Adv. Pro. No. 16-3246). On February 17, 2017, the IRS filed its United States' (IRS) Motion to Dismiss Amended Complaint and Brief in Support (Doc. No. 11, Adv. Pro. 16-3246). On March 22, 2017, this Court entered an Order and a Memorandum Opinion denying the IRS' motion to dismiss but deferring determination of the Plaintiff's claims in the adversary while the Plaintiff filed and pursued a Form 8857 with the IRS. (Doc. Nos. 13 and 14, Adv. Pro. No. 16-3246).

4. On or about February 19, 2017, the Plaintiff submitted a completed, signed Form 8857 with the Internal Revenue Service. The Plaintiff has received a preliminary determination letter from the IRS denying her innocent spouse application. The Plaintiff has not yet received her final determination letter, but when she does she will have thirty (30) days time to file an appeal of the determination letter in United States Tax Court.

**III.**

**Argument and Authorities**

5. Under Fed. R. Civ. P. Rule 41(a)(2), an action may be dismissed at the Plaintiff's request by court order on terms that the court considers proper. The IRS has not filed a

counterclaim against the Plaintiff in this adversary. This adversary should be dismissed without prejudice so that the Plaintiff can pursue her claims in the United States Tax Court.

6. It is just to allow dismissal. The IRS has indicated that it will appeal any final judgment entered by this Court on the grounds of lack of jurisdiction. Since the Plaintiff has only thirty (30) days to file an appeal of a final determination letter under Form 8857, to the extent an appellate court ultimately determines that this Court did not have jurisdiction to make an innocent spouse determination, the Plaintiff would be left without a substantive determination of her innocent spouse status. It makes judicial sense and practical sense for the Plaintiff to pursue her claims in United States Tax Court as opposed to this bankruptcy court.

WHEREFORE, PREMISES CONSIDERED, the parties respectfully requests that this Court dismiss this adversary proceeding without prejudice.

Respectfully submitted,

**WAUSON ♦ PROBUS**

By: /s/ Matthew B. Probus

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*ATTORNEYS FOR THE DEBTOR,  
JANE M. PENDERGRAFT*

By: /s/ Manuel P. Lena, Jr.

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**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing has been served upon those entities listed below via PACER/ECF and via United States regular mail, first class postage prepaid, on this the 17<sup>th</sup> day of August, 2017.

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/s/ Matthew B. Probus  
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