IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS & ST. JOHN

JAMAL A. MORTON, individually and on behalf of all others similarly situated, Plaintiff, v. THE UNITED STATES VIRGIN ISLANDS, The Honorable ALBERT BRYAN, JR., in his official capacity as the Governor of the United States Virgin Islands, JOEL A. LEE, in his official capacity as the Director of the Bureau of Internal Revenue, CLARINA MODEST ELLIOT, in her official capacity as acting the Commissioner of the Department of Finance, Defendants.	Case No. 3:20-cv-109 **CLASS ACTION CASE**

REPLY RE: MOTION FOR PRELIMINARY INJUCTION

COMES NOW, Plaintiff, JAMAL A. MORTON, on behalf of himself and all others similarly situated, replies to the Defendants' opposition (Doc. # 37) to the Plaintiff's motion for a preliminary injunction (Doc. # 5). For the reasons that follow, the Defendants' arguments fail; the Court should enjoin the Defendants forthwith.

INTRODUCTION

The Defendants' arguments fail for a few reasons.

First, Defendants fail to address, because they cannot refute, that 26 U.S.C. § 6428 is mirrored in full to the USVI, which creates the obligation to issue the stimulus funds to incarcerated individuals. Consequently, the Federal Government is not an indispensable party in this case. Additionally, the fact that the Federal Government has conditioned funding under Section 2201(c)(1) does not negate the Defendants' obligations under the Internal Revenue Code.

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Second, the Federal Government has been permanently enjoined from withholding payments to individuals based on their incarcerated status. Moreover, Fed. R. Civ. P. 71, and the legal doctrine of collateral estoppel, require that this Court enforce the relief obtained by the class in *Scholl* against the Defendants in this case. Consequently, the Federal Government is not an indispensable party in this case.

Third, and *finally,* this Court should not split with the District Court in *Scholl* on a matter federal taxation (i.e. the CARES Act) because, as our Circuit has instructed, courts are to "temper the independence of the analysis in which [they] engage by according great weight to the decisions of the other circuits on the same question, … because the need for uniformity of decision applies with special force in tax matters." *Birdman v. Office of the Governor*, 677 F. 3d 167, 177 (3d Cir. 2012) (cleaned up). Just as incarcerated individuals on the mainland are receiving their EIP from the Federal Government, so should the incarcerated individuals in the USVI receive their EIP from the Defendants.

DISCUSSION

I. LIKELIHOOD OF SUCCESS

A. The Mirror Code Obligates Payment Irrespective of Federal Funding

In the Naval Service Appropriation Act of 1922, Congress passed legislation applying the Internal Revenue Code of the United States to the Virgin Islands. 48 U.S.C. § 1397; *Chase Manhattan Bank, NA. v. Gov't of the Virgin Islands*, 300 F.3d 320, 322 (3d Cir. 2002). This legislation provides that "[t]he income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in the Virgin Islands of the United States, except that the proceeds of such taxes shall be paid into the treasuries of said

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islands." 48 U.S.C. § 1397. "This statutory scheme has come to be known as the 'mirror code' because Congress designed Virgin Islands tax law to mirror the tax laws in effect on the mainland. As a result of this legislation, the words 'Virgin Islands' are substituted for the words 'United States' throughout the Internal Revenue Code." *Cooper v. C.I.R.*, 718 F.3d 216, 219 (3d Cir. 2013) (cleaned up). Under this "Mirror Code", the provisions of the Internal Revenue Code and its accompanying regulations apply to taxes levied in the Virgin Islands except where displaced by local law. *Oelsner v. Virgin Islands,* 294 F.Supp.2d 689, 693 (D.V.I. 2003).

To put a finer point on it, the Circuit has

> developed three rules of construction to guide the mirroring mechanism. The simplest is the substitution principle, whereby the words "Virgin Islands" are substituted for "United States." Second, the equality principle dictates that the tax burden on individuals in the Virgin Islands be equivalent to what the United States would collect on the same income if the taxpayer resided in the United States. Finally, the manifest incompatibility principle requires that the IRC should not apply to Virgin Islands tax law if the result is "manifestly inapplicable or incompatible with a separate territorial income tax."

Chase Manhattan, *supra* (cleaned up).

26 U.S.C. § 6428 is mirrored in full to the USVI. There is nothing in the text of Section 6428 that would lead to any other conclusion. The Defendants' position violates the equality principle as they treated state-side incarcerated individuals differently than territorial incarcerated individuals. Thus, the tax burden is higher (and the benefit is lower) on territorial incarcerated individuals. Further, there is nothing manifestly incompatible with having incarcerated individuals treated similarly irrespective of location. Moreover, Section 6428 has not been displaced by local law (Morton does not concede that such could be displaced in the first instance).

The Defendants' arguments rest on a complaint that paying the $1200 stimulus payment would operate as an unfunded mandate. Perhaps so, but this is absolutely irrelevant. Congress

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has passed, and the President has signed into law, the CARES Act. Section 6428 is now part of the Internal Revenue Code, and the Defendants have no authority to pick and choose which parts of the Internal Revenue Code they will comply with. *Accord Duncan v. Walker*, 533 U.S. 167, 174 (2001) (the "surplusage canon" requires courts to give each word and clause of a statute operative effect, if possible). Indeed, the Defendants' position not only has no limiting principle, but taken to its logical conclusion could be used to justify never paying refunds.

Morton brings one example for this Court's consideration. The Earned Income Tax Credit ("EITC"), 26 U.S.C. § 32, is a benefit for working people with low to moderate income. EITC reduces the amount of tax you owe and may give you a refund, in tax parlance the EITC is a "refundable credit." Congress has not funded the EITC that the U.S. Territories and Possessions must issue by operation of mirrored Section 32. Nonetheless, the BIR must recognize (and when appropriate issue a refund to) those individuals who properly claim the EITC. Taking the Defendants' argument to it logical conclusion, the Defendants could justify not issuing the EITC because such is an unfunded mandate. The Court should reject the Defendants' protestations.

At bottom, should the Defendants have complaints about how the Internal Revenue Code affects the local budget, such complaints are properly directed to the elected representatives and to the U.S. Treasury Department, and, in all events, not taken out on those whom Congress has determined are statutorily entitled to the EIPs.

B. A Close Inspection of Section 2201(c)(1) does NOT Support the Defendants' Position

Section 2201(c)(1) of the CARES Act addresses the payments to U.S. Possessions, and states:

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> (A) MIRROR CODE POSSESSION.—*The Secretary of the Treasury shall pay to each possession of the United States which has a mirror code tax system amounts equal to the loss (if any) to that possession by reason of the amendments made by this section*. Such amounts shall be determined by the Secretary of the Treasury based on information provided by the government of the respective possession.

CARES Act, § 2201(c)(1)(A) (emphasis added).

At no point has Section 2201(c)(1)(A) of the CARES Act conditioned payment to eligible individuals in mirror code possessions, such as the USVI, based upon funding by the Treasury Department. The Defendants' position is unsupported by the text. Consequently, the Defendants' arguments regarding federal funding (based on an erroneous reading of Section 2201(c)(1)(A) of the CARES Act) fail and, in turn, their arguments that the Federal Government is an indispensable party (again based on an erroneous reading of Sectin 2201(c)(1)(A)) in this case likewise is misplaced.

Furthermore, the fact that Congress has directed the Treasury Department to remit funds to the USVI is not the same as having an express statutory condition limiting funding. In essence, the Defendants ask that this Court "read in" a limitation that is not in the text of the Act. This, violates the well-established canons of statutory construction that courts must "begin with the text" and "enforce [that text] according to its terms." *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291, 296 (2006) (cleaned up). Here, there is nothing in Section 2201(c)(1)(A) of the CARES Act that supports that proposition that Section 6428 stimulus payments are conditioned on funding in the territories.

The Defendants' position must be rejected in full.

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C. The Federal Government has been Enjoined

1. Rule 71

Fed. R. Civ. P. 71 provides, in full: "[w]hen an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party." Rule 71 "allows a non-party to enforce a court order in its favor just as a party could." *Washington Hosp. v. White*, 889 F.2d 1294, 1299 (3d Cir. 1989).

There can be no dispute, the Federal Government was permanently enjoined in *Scholl*, and that injunction remains outstanding. There can also be no dispute that the Defendants' admit that they are the agent of the Federal Government (*see* Doc. # 37 at p. 16 ("Defendants merely act as payment agent for the United States of America, …"), and, consequently, they are bound by the terms of the injunction order. Mr. Lee's affidavit demonstrates that, notwithstanding the permanent injunction, the Federal Government and the Defendants in this case are all still taking actions to deprive incarcerated individuals of their EIP. This Court must enforce the *Scholl* injunction against the Defendants in this case, they cannot stand behind the excuse "the IRS made me do it." This Court should give no quarter to the Defendants who are actively flouting a district court injunction.

2. Collateral Estoppel

"Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citing *Montana v. United States*, 440 U.S. 147 (1979)). Given that the USVI is not a sovereign, *see Puerto Rico v.*

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Sanchez Valle, 136 S. Ct. 1863 (2016) (single sovereign doctrine), the *Scholl* case binds the U.S. Territories and Possessions.

"As commonly explained, the doctrine of collateral estoppel can apply to preclude relitigation of *both issues of law and issues of fact* if those issues were conclusively determined in a prior action." *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 170–71 (1984) (citations omitted, emphasis added). In order for collateral estoppel to be applied, a court must have actually and finally decided an issue of fact or of the application of law to fact, and that decision must have been necessary to the outcome of the prior action. *See Allen*, 449 U.S. at 94; *Brown v. Felsen*, 442 U.S. 127, 139 n.10 (1979).

In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), the U.S. Supreme Court observed:

> assuming that the issue was resolved correctly in the first suit, there is reason to be concerned about the plaintiff's allocation of resources. *Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table* or a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure. Although neither judges, the parties, nor the adversary system performs perfectly in all cases, *the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard*.

Id. at 328 (cleaned up, emphasis added).

In this case, the issues of law and fact were all conclusively determined in the *Scholl* litigation. This is especially true in this case as the "Defendants take no position on the eligibility of incarcerated persons[,]" Doc. # 27 at p. 2, but rather appear to be merely complying with the Federal Government's "restrictions in the Plan: CARES Act Trust Fund monies cannot be used by VIBIR to pay EIPs to incarcerated persons." *Id.* (citing to Declaration of Joel A. Lee ¶9). The Defendants (which admit are acting as the Federal Governments "agent", *see* Doc. # 37 at p. 16) in

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this case cannot stand upon a legal position of the Federal Government that has been affirmatively rejected by the *Scholl* court. The Defendants must be estopped from attempting to now do so.

II. IRREPARABLE HARM

A. Morton is suffering Irreparable Harm

The Defendants attempt to apply generic preliminary injunction caselaw to the atypical facts at hand. Distilled to its essence, the Defendants' argument is that this case is about money, which cannot form the basis for irreparable harm. But the loss of typical income is not the same as the loss of Congressionally created stimulus funds (which is why Congress prohibited the attachment of the $1200, further demonstrating the unique characteristics and nature of stimulus funds). Simply stated, this is not a difference of degree but of kind.

What the Defendants fail to grasp is that the CARES Act stimulus checks were designed to help the most vulnerable of individuals during a pandemic. *See Scholl I,* 2020 WL 5702129, at *1 ("[o]ne fairly obvious impact of the pandemic was the loss of employment for millions of Americans[.]"). Indeed, "[i]n response [to the pandemic], Congress passed the CARES Act that included many provisions totaling $2.2 trillion in relief. As part of that relief package, Congress provided for a mechanism to distribute stimulus payments, the EIP, directly to Americans." *Id.* (citations omitted). One need only look to the text of the CARES Act to see why this is so.

Title II of the CARES Act is entitled "ASSISTANCE FOR AMERICAN WORKERS, FAMILIES, AND BUSINESSES"), subtitle B is "Rebates and Other Individual Provisions" (§§ 2201-2206), which required the Treasury Department to conduct a public awareness campaign regarding the availability of the credit codified at 26 U.S.C. § 6428. *See* Section 2201(e) of the CARES Act. Moreover, Congress provided that the stimulus funds provided in 26 U.S.C. § 6428

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are excepted from reduction or offset (including for "other Federal taxes that would otherwise be subject to levy or collection."). Section 2201(d) of the CARES Act.

Indeed, the bipartisan support regarding the need for the stimulus to protect the American economy, writ large, by helping individual citizens, writ small, is telling. *See* REMARKS BY PRESIDENT TRUMP AT SIGNING OF H.R.748, THE CARES ACT, 2020 WL 1485787, at *6–7 (REPRESENTATIVE CHABOT: "On behalf of small businesses, they're the backbone of the American economy. About half the people that work in America work for a small business, and they're hurting out there right now. I'm from Ohio. I'm the ranking member of the House Small Business Committee. And back there, nonessential small businesses are shut down. Without this legislation, it's questionable whether they would reopen. Because of this legislation, they now have a great chance of that. And those people that work for small businesses, who are shuttered now, will be paid. That's really important. This wouldn't have passed without your leadership, Mr. President. Thank you."); *see id.* (MR. UELAND: "We've made sure that we can provide significant reinforcement to the American economy as a result of your leadership.").[1]

The Defendants claim that *Morton v. Beyer*, 822 F.2d 364, 372 (3d Cir. 1987), *holding modified by Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421 (3d Cir. 1994) supports its position. But in the *Morton* decision, the Circuit stated that it "has recognized that the fact that the *payment of monies is involved does not automatically preclude a finding of irreparable injury*[.]"

[1] *See also* 166 Cong. Rec. S2007 (Mar. 24, 2020) (statement of Sen. McConnell) (stating that purpose of Act was to "rush financial assistance to Americans through direct checks to households from the middle class on down"); 166 Cong. Rec. E339 (Mar. 31, 2020) (statement of Rep. Jayapal) (stating the CARES Act provides "relief to the vast majority of everyday people to immediately help put cash in people's pocket to pay those mounting bills") (emphasis added); 166 Cong. Rec. S1929 (Mar. 23, 2020) (statement of Sen. Lankford) (same).

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Id. (citation omitted, emphasis added). Thus, the purported, black-letter rule that the Defendants advance is much more nuanced than they recognize.

Accordingly, given the potential harm to American citizens and the American economy, stimulus funds are *sui generis* and, therefore, the Supreme Court's decision in *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (holding that a complete loss of financial aid under the federally assisted program of Aid to Families with Dependent Children ("AFDC") required a pre-termination hearing), is controlling. To be clear, "for some, the temporary loss of income is a temporary inconvenience and can be easily remedied at law[,]" *Scholl I,* 2020 WL 5702129, at *17, but "[f]or others, the temporary loss of income or benefits could seriously impair their ability to procure the basic necessities of life[,]" *id.* Thus, for those who meet the statutory definition that Congress detailed in creating the *sui generis* stimulus funds, American citizens and the American economy will suffer irreparable harm if they do not timely obtain them. The Defendants' position is as wrong as it is insensitive.

B. The Defendants will NOT suffer Irreparable Harm

In *Scholl,* Judge Hamilton observed: "the IRS is relying on incarcerated individuals to voluntarily return those advance refunds." *Scholl II,* 2020 WL 6065059, at *12. If the IRS, which has already issued some EIPs to incarcerated individuals, could rely on incarcerated individuals to return erroneously issued EIPs, it stands to reason that the BIR is in the same position and can do the same. Thus, just as Judge Hamilton rejected the IRS's claim that the Federal Government would suffer irreparable harm, so too should this Court conclude as to the Defendants in this case. At bottom, "an order enjoining unlawful conduct cannot harm the government." *Id.*

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III. EQUITY & PUBLIC INTEREST

The Defendants make no mention of the third and forth prongs for the entry of a preliminary injunction. Accordingly, by failing to respond to these arguments, the Defendants have waived any counterarguments to Morton's position. *See Clem v. Lomell*, 566 F.3d 1177, 1182 (9th Cir. 2009) ("where appellees fail to raise an argument in their answering brief, 'they have waived it'") (citing *United States v. Nunez*, 223 F.3d 956, 958-59 (9th Cir. 2000)); *United States v. Ford*, 184 F.3d 566, 577 n.3 (6th Cir. 1999) ("Even appellees waive arguments by failing to brief them") (citing *Thaddeus-X v. Blatter*, 175 F.3d 378, 403 n.18 (6th Cir. 1999) (*en banc*)).

CONCLUSION

This Court should not split with the *Scholl* court, as doing so would run counter to the Circuit's directive that "the need for uniformity of decision applies with special force in tax matters." *Birdman*, 677 F. 3d at 177 (cleaned up). The Defendants present no compelling reason for this Court to create a circuit-split and it should not do so.

WHEREFORE, based on the foregoing, and in the Plaintiff's initial motion, the Court should grant Morton's request to preliminarily enjoin the Defendants.

Respectfully Submitted,

By: /s/Joseph A. DiRuzzo, III
Joseph A. DiRuzzo, III
USVI Bar No. 1114
DIRUZZO & COMPANY
401 East Las Olas Blvd., Suite 1400
Ft. Lauderdale, Florida 33301
954.615.1676 (O)
954.827.0340 (F)
jd@diruzzolaw.com

Dated Nov. 23, 2020

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Notice of with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to counsel of record.

By: /s/Joseph A. DiRuzzo, III Dated Nov. 23, 2020
Joseph A. DiRuzzo, III

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401 East Las Olas Blvd., Suite 1400, Ft. Lauderdale, FL 33301 • T: 954.615.1676 • F: 954.827.0340 • www.diruzzolaw.com