IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

HOFF STAUFFER, *et al*.,	)	
	)	
Plaintiff,	)	Case No. 1:15-cv-10271
	)	
v.	)	Judge Mark L. Wolf
	)	
INTERNAL REVENUE SERVICE	)	Magistrate Judge Donald L. Cabell
	)	
Defendants.	)	

DEFENDANT UNITED STATES' OBJECTION
TO MAGISTRATE JUDGE'S FINDINGS AND RECOMENDATION

Pursuant to Fed.R.Civ.P. 72(b)(2), the defendant United States of America (the "United States"), hereby objects to Magistrate Judge Cabell's Report and Recommendation, doc. no. 28 (the "Report"), denying the United States' motion to dismiss.

INTRODUCTION

The plaintiff Hoff Stauffer, Administrator of the Estate of Carlton Stauffer (the "plaintiff"), seeks a refund of federal income tax (interest and penalties charged and collected) for the taxable year ending December 31, 2006. Doc. No. 1 ("Compl.") at ¶ 8. Section 6511(b)(2)(A) of the Tax Code, *i.e.*, Title 26, bars refunds of taxes paid more than three years before the claim is filed. The Estate concedes that it did not timely file Mr. Stauffer's 2006 tax return pursuant to 26 U.S.C.§ 6511(b)(2)(A). Report at 1 – 2. The plaintiff contends, however, that Mr. Stauffer was under a medical disability that prevented him from timely filing his 2006 refund claim pursuant to 26 U.S.C. § 6511(h). That statute provides, in pertinent part:

> [A]n individual is financially disabled if such individual is unable to manage his financial affairs by reason of a **medically determinable physical or mental impairment** of the individual which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. **An individual shall not be considered to have such an impairment unless proof of the existence thereof is furnished in such form and manner as the Secretary may require**.

26 U.S.C. § 6511(h)(2)(A) (emphasis added).

The United States moved to have this matter dismissed based upon sovereign immunity and thus lack of subject matter jurisdiction, as the plaintiff's refund claim is time-barred because Mr. Stauffer purportedly made all of the tax payments for the 2006 tax year more than three years before the his tax return was filed and, therefore, 26 U.S.C § 6511(b)(2) barred any credit or refund. Doc. Nos. 19 (Motion to Dismiss) and 20 (Memo in Support). The tax return also constituted a claim for refund. The United States argued that the plaintiff has no viable "financial disability" claim under § 6511(h) that could toll the applicable limitations periods because the plaintiff failed to properly submit any such claim pursuant to Revenue Procedure ("Rev. Proc.") 99-21. To establish such a disability, Congress authorized the Treasury Secretary (the "Secretary"), *i.e.*, the Internal Revenue Service (the "IRS"), to require taxpayers to, *inter alia*, provide a physician's written statement containing certain information. The plaintiff wholly failed to provide this "doctor's note." Instead, almost a year after filing the refund claim, the plaintiff submitted a document from a psychologist that failed to satisfy the requirements of Rev. Proc. 99-21, even if the psychologist were a physician.

Although Magistrate Judge Cabell agreed that the plaintiff's note was not from a physician – a clear requirement of Rev. Proc. 99-21 – he nonetheless recommends for the Court to deny the United States' motion to dismiss. Report at 8. Magistrate Judge Cabell found that "[he is] not persuaded that the Court should defer to [the United States'] view that a psychologist's statement describing a mental impairment cannot constitute a physician's statement within the meaning of Rev. Proc. 99-21." Report at 15. In so doing, Magistrate Judge Cabell concluded that the plaintiff should be allowed to establish Mr. Shauffer's purported medical disability by evidence other than that prescribed by the Rev. Proc. 99-21.

Magistrate Judge Cabell also rejected the United States' alternative argument that, even if the psychologist was instead a medical doctor eligible to provide a statement concerning financial disability, the psychologist's statement at issue does not meet all the requirements in Rev. Proc. 99-21. Ultimately, Magistrate Judge Cabell found "no basis on [the] record to deem the plaintiff's claim for refund untimely under section 6511(h), and thus [does] not agree that the Court lacks jurisdiction to hear the plaintiff's suit." Report at 16 – 17.

The United States has numerous objections to the Report. First, the United States objects to Magistrate Judge Cabell's interpretation of Congress' delegation to the Secretary. The Report misapprehends the plain language of § 6511(h) and the Secretary's authority under that statute. The Secretary did what Congress told it to do and, as discussed in greater detail below, there is no reason to expand § 6511(h) beyond what is prescribed in Rev. Rule. 99-21, which is something that the Report attempts to do. Neither the language of § 6511(h) nor Rev. Proc. 99-21 support Magistrate Judge Cabell's view that a psychologist is permitted to medically determine a mental impairment. The Report's discussion regarding the proper level of deference afforded to Rev. Proc. 99-21 is simply irrelevant pursuant to § 6511(h). In short, a psychologist's statement is invalid pursuant to § 6511(h). Accordingly, the plaintiff's failure to comply with Proc. 99–21 is fatal to its refund claim because federal courts have no jurisdiction over a tax refund suit until a claim for refund or credit has been "duly filed" with the Secretary.

Second, the United States objects to Magistrate Judge Cabell's conclusion that the Eighth Circuits decision in *Abston v. Commissioner*, 691 F.3d 992 (8th Cir. 2012), is distinguishable from the case at bar. Contrary to the Report, the Eighth Circuit, as well as numerous other federal courts, have found that taxpayers cannot establish a medical disability under § 6511(h) without submitting a "doctor's note" as required by Rev. Proc. 99-21. The plaintiff did not

provide a doctor's note as it was required to do. Third, the United States objects to Magistrate Judge Cabell's rejection of the United States' alternative argument. Even if the psychologist's statement at issue could be considered a "doctor's note," it continues to be deficient pursuant to Rev. Rule 99-21.

Once the Court completes its *de novo* review of the basis set forth in the United States' motion to dismiss, the United States respectfully requests that this Court decline to adopt the Report. As discussed in greater detail below, the plaintiff failed to "duly file" its 2006 claim for refund within the time period prescribed in 26 U.S.C. §§ 6511(a)(1), 6511(b)(2)(A). This is true, despite the fact that Congress amended § 6511 to suspend the running of the time periods therein "during any period of [a taxpayer's] life that such individual is financially disabled." 26 U.S.C. § 6511(h)(1). The plaintiff's refund claim is barred by sovereign immunity and, as such, this Court lacks jurisdiction because the claim is time barred pursuant to 26 U.S.C. § 6511. This action should thus be dismissed *with prejudice*.

FACTS[1]

On or about October 29, 2012, at the age of 90, Mr. Carlton Staffer (the "taxpayer") passed away. Compl. at ¶ 5. On or about April 26, 2013, a return for the tax year 2006 was filed on the taxpayer's behalf by his estate. *Id*. at 6; Taxpayer's Form 1040 for the 2006 tax year, attached hereto as **Exhibit 1** (hereinafter, the "2006 Return"). The taxpayer's 2006 return was due on October 15, 2007, after the application of a six month extension of time to file. 26 U.S. Code § 6072 (Time for filing income tax returns); 26 U.S. Code § 6081 (Extension of time for filing returns).

[1] The facts are taken from the complaint and the Psychologist's Statement of Financial Disability, which is referenced in the complaint.

On or about April 26, 2013, the administrator of the Estate, *i.e.*, the plaintiff, filed the taxpayer's 2006 tax returns, claiming a refund of taxes in the amount of $137,403. Compl. at ¶ 7; 2006 Return at p. 2. On February 18, 2014, the IRS issued a claim disallowance letter denying the plaintiff's refund claim. *Id*. at 8. On April 11, 2014, the plaintiff prepared an administrative appeal, *i.e.*, the protest, in response to the claim disallowance letter, claiming that the statute of limitations on obtaining a refund should have been tolled because the taxpayer was financially disabled from 2006 through his death in 2012. *Id*. at 8 and 9. Included with the protest was a "physician's statement" dated April 9, 2014. *Id*. at 9.

The "physician's statement" submitted is entitled "Psychologist's Statement of Financial Disability." *See* Psychologist's Statement of Financial Disability, dated April 9, 2014, attached hereto as **Exhibit 2** (the "psychologist's statement"); Compl. at ¶ 9. The psychologist's statement is signed and dated on April 9, 2014. *Id*. The psychologist's statement provides that it was prepared by a psychologist who treated the taxpayer from 2001 until his death on October 29, 2012. *Id*. The psychologist's statement provides that the taxpayer was treated for "psychological problems [that] were in addition to a variety of chronic ailments, including congestive heart failure, chronic obstructive pulmonary disease ("COPD"), leukemia, and chronic pneumonia." *Id*. The psychologist's statement concludes that "during the period including 2006 until his death in 2012, Mr. Carlton H. Stauffer's physical and mental impairments prevented him from managing his financial affairs." *Id*. The psychologist's statement includes a certification by the psychologist. *Id*.

On December 2, 2014, the IRS Office of Appeals issued a preliminary letter stating that there was no basis to allow the taxpayer's claim for refund. Compl. at ¶ 11. The letter also states that the taxpayer is not considered to be financially disabled since he did not provide a

statement from a physician as required by Rev. Proc. 99-21, 1999-1 C.B. 960. *Id*. On January 7, 2015, the IRS Office of Appeals issued a letter sustaining the government's position to deny the refund claim. *Id*. at 14.

On February 2, 2015, the plaintiff filed the instant complaint alleging that the statute of limitations is tolled because the taxpayer was financially disabled. Compl. at ¶ 10. The complaint alleges that the taxpayer provided a statement from a psychologist confirming that he had a "variety of mental and physical conditions" which prevented the taxpayer from managing his financial affairs. *Id*. at ¶ 9. The plaintiff contends that the psychologist's statement meets the requirements set forth under 26 U.S.C. § 6511 to allow equitable tolling and that the denial of the psychologist's statement is unreasonable. *Id*. at 9, 10, 12, 13. The plaintiff's position is groundless and the following explains why.

ARGUMENT

I. STANDARD OF REVIEW

District Courts are not bound by the recommendations of the Magistrate Judge. *Mathews v. Weber,* 423 U.S. 261, 271 (1976). The court may accept, reject, or modify the recommended decision. 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72(b). When a party timely objects to any portion of a Magistrate Judge's Findings and Recommendation, the district court must conduct a *de novo* review of those portions of the Magistrate's report. Fed.R.Civ.P. 72(b).

II. THE UNITED STATES OBJECTS TO THE REPORT BECAUSE THE LIMITATIONS PERIOD PRESCRIBED BY 26 U.S.C. §§ 6511(a) and (b), Is A JURISDICTIONAL BAR TO THE PLAINTIFF'S REFUND CLAIM.

A. Applicable Legal Standard.

The United States, as sovereign, may not be sued without its consent, and the terms of its consent define the Court's jurisdiction. *U.S. Dept. of Energy v. Ohio*, 503 U.S. 607, 615 (1992); *United States v. Testan*, 424 U.S. 392, 399 (1976); *Murphy v. United States*, 45 F.3d 520, 522

(1st Cir.1995) (citations omitted). Where, by statute, the sovereign consents to be sued, the suit may be maintained if brought in compliance with the exact terms of the statute. *United States v. Sherwood*, 312 U.S. 584, 590 (1941). Any such consent must be unequivocally expressed by Congress; however, is to be strictly and narrowly construed in favor of the United States. *United States v. Idaho*, 508 U.S. 1, 7 (1993); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992).

The plaintiff has the burden of proving the subject matter jurisdiction of the court and establishing compliance with the waiver of sovereign immunity. *See Murphy,* 45 F.3d at 522*; United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942, 946 (7th Cir. 2003); *Cole v. United States*, 657 F.2d 107, 109 (7th Cir. 1981); *See also Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 324 (6th Cir. 1990) ("The burden is on the plaintiff since the statute outlines the terms under which the United States has waived sovereign immunity and thereby consented to suit.") (citations omitted).

A motion to dismiss for lack of jurisdiction can be based on a facial attack upon the complaint or a factual attack. The United States factually attacks the plaintiff's complaint and moves to dismiss this action for lack of jurisdiction. A facial attack "merely questions the sufficiency of the pleading" and the "court takes allegations in the complaint as true." *Ohio Nat'l Life Ins. Co.*, 922 F.2d at 325; *Torres–Negron v. J & N Records, LLC*, 504 F.3d 151, 162 (1st Cir. 2007). Conversely, under a factual attack, "no presumptive truthfulness applies to the factual allegations." *Id.* The "court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Grafon Corp. v. Hausermann*, 602 F.2d 781, 783 (7th Cir. 1979) (citing *Gibbs v. Buck*, 307 U.S. 66, 72 (1939)).

A plaintiff may bring suit against the United States to recover any "tax alleged to have been erroneously or illegally assessed or collected . . . ." 28 U.S.C. § 1346(a)(1). For a court to have jurisdiction over an action brought under section 1346(a)(1), however, the plaintiff must also satisfy the claim for refund requirements of 26 U.S.C. § 7422 and the timeliness requirements of 26 U.S.C. § 6511. *See United States v. Dalm*, 494 U.S. 596, 601-02 (1990); *Oropallo v. United States*, 994 F.2d 25, 26 (1st Cir. 1993).

Under 26 U.S.C. § 7422(a), the jurisdictional grant to the district courts is subject to the requirement of a "duly filed" claim for refund. Section 7422(a) provides in relevant part:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been **duly filed** with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

26 U.S.C. § 7422(a) (emphasis added). To be "duly filed," a claim for refund must be timely filed under 26 U.S.C. § 6511. *Dickow v. United States*, 654 F.3d 144, 149 (1st Cir. 2011) (citation omitted); *Danoff v. United States*, 324 F. Supp. 2d 1086, 1092 (C.D. Cal. 2004). Jurisdiction is measured as of the filing of a complaint. *Innovative Therapies, Inc. v. Kinetic Concepts, Inc.*, 599 F.3d 1377, 1383-84 (Fed. Cir. 2010) ("unless there was jurisdiction at the filing of the original complaint, jurisdiction could not be carried back to the date of the original pleading."); *GAF Building Materials Corp. v. Elk Corp. of Dallas*, 90 F.3d 479, 483 (Fed.Cir.1996) ("[L]ater events may not create jurisdiction where none existed at the time of filing."). 0

B. Pursuant to § 6511(b)(2)(A), the Plaintiff's refund claim was untimely.

As the Report notes, a claim for a refund of an overpayment of a tax for which the plaintiff is required to file a return "shall be filed by the taxpayer within 3 years from the time

the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid." 26 U.S.C. § 6511(a)(1); *Dickow*, 654 F.3d at 149 (citations omitted). A claim for refund can be made on an original tax return or an amended return. *See* Treas. Reg. § 301-6402-3(a)(5) (26 C.F.R.).

The limitations periods of § 6511 are jurisdictional in nature and cannot be waived. *United States v. Dalm*, 494 U.S. 596, 601 (1990). *United States v. Brockamp*, 519 U.S. 347, 350 (1997) ("Section 6511 sets forth its time limitations in unusually emphatic form."). This refers partly to the fact that § 6511(b) explicitly prohibits the IRS from refunding an overpayment if one is not timely claimed under subsection (a). 26 U.S.C. § 6511(b)(2)(A) ("the amount of credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years"). As stated above, § 6511(b)(2)(A) jurisdictionally bars untimely refund claims. The Supreme Court rejects any equitable remedies as an escape hatch from the strict conditions of § 6511. *Brockamp*, 519 U.S. at 350 ("Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into [§ 6511].").

Here, the plaintiff claims that it overpaid taxes for the 2006 tax year by $135,403. Compl. at ¶ 7. As the Report notes, due to an extension, the plaintiff had until October 15, 2010 to timely file the claim for refund. Report at 5 – 6. There is no dispute that the plaintiff did not submit the claim for refund until April 26, 2013, which is well beyond the deadline and limitations period pursuant to § 6511(b). Report at 6. For this reason alone, the plaintiff's claim for refund was not "duly filed" under 26 U.S.C. § 7422 for the amounts sought to be refunded and, as a result, the Complaint should be dismissed on jurisdictional grounds. *See Dalm*, 494 U.S. at 602, 608-10.

C. The time limitations prescribed by § 6511(b) are only tolled in instances of "Financial Disability."

Congress has legislated only one exception to the limitations periods set forth in §§ 6511(a) and (b). The statute of limitations for filing a claim and obtaining a refund is suspended during any period of a taxpayer's life in which the taxpayer is unable to manage his or her financial affairs because of a medically determinable mental or physical impairment that can be expected to result in death, has lasted, or can be expected to last for a continuous period of not less than twelve months. 26 U.S.C. § 6511(h)(2)(A)(1). An individual will not be treated as "financially disabled" during any period in which another person is authorized to act on the individual's behalf in financial matters. 26 U.S.C. § 6511(h)(2)(A). To claim this financial disability exception, Congress enacted legislation providing that "[a]n individual shall not be considered to have such an impairment unless proof of the existence thereof is furnished **in such form and manner as the Secretary may require**." *Id*. (emphasis added). The Secretary has set forth in detail the form of required proof in Revenue Procedure 99-21.

Rev. Proc. 99-21 (1999-1 C.B. 960) first provides that a taxpayer seeking tolling due to financial disability must provide a written statement by a qualified physician, stating:

(a) The name and a description of the taxpayer's physical or mental impairment;

(b) The physician's medical opinion that the physical or mental impairment prevented the taxpayer from managing the taxpayer's financial affairs;

(c) The physician's medical opinion that the physical or mental impairment was or can be expected to result in death, or that it has lasted (or can be expected to last) for a continuous period of not less than 12 months;

(d) To the best of the physician's knowledge, the specific time period during which the taxpayer was prevented by such physical or mental impairment from managing the taxpayer's financial affairs; and

(e) The following certification, signed by the physician: I hereby certify that, to the best of my knowledge and belief, the above representations are true, correct, and complete.

Rev. Proc. 99-21 § 4(1). Second, the person signing the claim for refund must submit a statement that no one was authorized to act on behalf of the taxpayer in financial matters during the period of disability, or, if someone was authorized to so act for the taxpayer, submit the beginning and end dates of any period of authorization. *Id*. at § 4(2). "This information is required to be submitted with the taxpayer's claim for credit or refund of tax." *Id*. § 1. Rev. Proc. 99-21, at its most basic level, "requires the taxpayer to bring a doctor's note, an entirely reasonable proposition." Report at 12.

D. Contrary to Magistrate Judge Cabell's view, the Plain Language of § 6511(h) Jurisdictionally Bars the Plaintiff's Refund Claim.

1. The Report's Discussion Regarding the Proper Level of Deference Afforded to Rev. Proc. 99-21 is Irrelevant Pursuant to § 6511(h).

Much of the Report provides an analysis of the level of deference that should be afforded to Rev. Proc. 99-21. Report at 9 –15. Specifically, the Report provides that "[a]n agency's interpretation of a statute that it administers may warrant judicial deference, depending on the degree to which the agency's exposition of the issue is deemed authoritative." Report at 9 (citation omitted). The level of deference afforded to the IRS in interpreting § 6511(h), however, is irrelevant because Rev. Proc. 99-21 was created pursuant to the Congressional mandate in § 6511(h)(2)(A). The language of that section could not be clearer: "[a]n individual shall not be considered to have an impairment unless proof of the existence thereof is furnished in such form and manner as the Secretary [of the Treasury] may require." 26 U.S.C. § 6511(h)(2)(A). The plain language of the statute leaves no room for a taxpayer to attempt to prove the requisite

impairment by means other than that prescribed by the IRS, as the plaintiff attempted to do in this case.

In addition, it is irrelevant that the Secretary chose a revenue procedure instead of a regulation to prescribe the form and manner that a taxpayer must show to prove the existence of a medical impairment. This is because Congress did not direct the Secretary in § 6511(h) to prescribe the rules on impairment through the insurance of regulations. *C.f.* 26 U.S.C. § 1502 (Secretary directed to prescribe by "regulations" the rules for filing consolidated returns). The force of the mandate in § 6511(h)(2)(A) is in no way lessened by the Secretary's decision to utilize a revenue procedure to implement that mandate.

Rev. Proc. 99-21 is not an interpretive pronouncement. It was issued pursuant to a Congressional directive to the Secretary in § 6511(h) delegating authority to determine the form and manner in which an individual must establish the existence of a claimed impairment. Given that Congress coupled that delegation of authority with the mandate that no individual shall be considered to have an impairment unless he establishes the existence of such impairment in the form and manner prescribed by the Secretary, courts have no leeway to substitute their judgment for that of the Secretary in this regard. Thus, acceptance of Magistrate Judge Cabell's view that the plaintiff is entitled to establish "financial disability" by means other than what is prescribed in Rev. Proc. 99-21 effectively nullifies the Congressional mandate in § 6511(h)(2)(A). Therefore, any discussion regarding the amount of deference afforded by the courts to IRS's interpretations of ambiguous statutory language is beside the point.

Pursuant to § 6511(h), the courts do not have need to engage in whether the taxpayer at issue actually suffered from a medical impairment. Rather, courts are limited to deciding whether the IRS correctly determined whether a taxpayer satisfied the requirements of the Rev.

Proc. 99-21. Based upon a fair reading of the Report – particularly the discussion about the IRS's level of deference – it is clear that Magistrate Judge Cabell goes beyond that limitation.

2. The Psychologist's Statement is Invalid Pursuant to § 6511(h).

As stated above, the plaintiff never provided a "doctor's note." Notwithstanding, Magistrate Judge Cabell concludes that he is "not persuaded that the Court should defer to the defendant's view that a psychologist's statement describing a mental impairment cannot constitute a physician's statement within the meaning of Revenue Procedure 99-21." Report at 5. Section 6511(h), however, plainly contradicts that position because it unambiguously states, "an individual is financially disabled if such individual is unable to manage his financial affairs by reason of a **medically determinable physical or mental impairment** . . . ." 26 U.S.C. § 6511(h)(2)(A) (emphasis added). Without question, psychologists are not medical doctors. Accordingly, psychologist cannot provide a medical opinion because psychologist do not base their treatment or views on medical tests or medical diagnoses, and do not have medical training. *See Edmonds v. Ill. Central Gulf Railroad Co*., 910 F.2d 1284, 1286-87 (5th Cir. 1990); *Craft v. Bowen*, 812 F.2d 1406 (Table), at *1 (6th Cir. Jan.17, 1987)) ("Because the psychologist ... was not medically trained, he was not competent to evaluate the medical significance of the objective findings of an examining medical doctor").

More importantly, psychologists are not considered physicians for the purposes of determining financial disability under section 6511(h) and Rev. Proc. 99-21. Rev. Proc. 99-21 specifically provides that only a physician as defined in 42 U.S.C. § 1395x(r) is qualified to provide the statement of financial disability. Section 1395x(r) defines physician to include only chiropractors and doctors of medicine, osteopathy, dental surgery or medicine, podiatric medicine, and optometry. *Green v. Commissioner*, T.C. Memo. 2009-105 (holding that clinical

psychologists are not considered physicians for the purposes of determining financial disability under section 6511(h) and Rev. Proc. 99-21).

The plaintiff has failed to satisfy the requirements of § 6511(h) because the administrator failed to fulfill his obligations under Rev. Proc. 99-21. Section 6511(h) does not simply instruct the Secretary to prescribe rules as to when a taxpayer will be considered impaired, but instead, says no individual shall be considered impaired "**unless proof of the existence thereof is furnished in such form and manner as the Secretary may require**." 26 U.S.C. § 6511(h)(2)(A) (emphasis added) It is § 6511(h) itself that precludes district courts from granting relief to a taxpayer that has failed to satisfy the requirements of Rev. Proc. 99-21. To toll the statute of limitations on filing a claim for refund, taxpayers must satisfy the requirements of Rev. Proc. 99-21 and courts do not have the authority to make an independent determination as to whether the taxpayer was suffering from an impairment.[3] Accordingly, the United States respectfully request that the Court decline to adopt the Report and dismiss this matter on jurisdictional grounds.

E. Contrary to the Report, *Abston v. Commissioner*, 691 F.3d 992 (8th Cir. 2012), is indistinguishable to this Matter.

In the Report, Magistrate Judge Cabell states that "all of the cases cited by the *Abston* court and relied on by the [United States] either explicitly involve physical impairments –the sort

[3] Furthermore, allowing a medical disability to be proved by means other than the systematic, relevant, uniform evidence required to be included (and attested to) in the physician's written statement would impose an onerous burden upon the IRS and the courts. As the Supreme Court observed in addressing whether the statute of limitations on refund claims may be tolled on equitable grounds, it is reasonable and even necessary to "pay the price of occasional unfairness in individual cases" to "maintain a more workable tax enforcement system." *Brockamp*, 519 U.S. at 352-53. Indeed, the burden occasioned by Rev. Proc. 99-21 is both reasonable and necessary. It is reasonable because a taxpayer who has suffered impairment sufficiently serious to warrant a finding of financial disability would be expected to be under the treatment of a physician (or physicians) who could provide the written statement prescribed in Rev. Proc. 99-21.

of impairment one might not consider a psychologist competent to comment on, or make no mention of the type of impairment, but none discusses the appropriateness of relying on a psychologist's statement to satisfy Revenue Procedure 99-21 or section 6511(h)." Report at 15 – 16. In making that determination, the Report clearly ignores that compliance with Rev. Proc. 99-21 is a threshold requirement for consideration of a taxpayer's refund claim of financial disability under § 6511(h). *Abston v. Commissioner*, 691 F.3d 992, 996 (8th Cir. 2012).

"As evidenced by the statutory definition in 26 U.S.C. § 6511(h)(2)(A), Congress chose to define 'financially disabled' very narrowly, and left it to the Secretary of the Treasury to determine the 'form and matter' of financial disability claims. Courts have given deference to the promulgated procedure." *Meconi v. United States*, 2014 WL 2590925 at *5 (D. Del. June 6, 2014) (citing *Abston*, 691 F.3d at 996). Thus, the plaintiff's failure to provide the IRS with a doctor's note that complies with Rev. Proc. 99-21 denies the plaintiff recourse to the tolling provisions in § 6511. The proposition was made abundantly clear by the Eighth Circuit, which became the first appellate court to speak on the issue of whether compliance with the Rev. Proc. 99-21 is necessary to establish financial disability under § 6511(h). *Abston*, 691 F.3d at 996.

In *Abston*, as in this case, the taxpayer "did not submit a physician statement with her initial refund claim." *Abston*, 691 F.3d at 995. The plaintiff argued that "the failure to comply with Revenue Procedure 99–21 should not be dispositive—that the district court should have made an independent determination that she was "financially disabled" for purposes of § 6511(h) after she submitted an affidavit and 137 pages of medical records that chronicled her medical conditions." Rejecting the taxpayer's argument, the Eighth Circuit held that "[a]lthough no circuit court has considered this issue, numerous district courts have dismissed taxpayer refund suits as time-barred by § 6511 because the taxpayer's claim of financial disability was not

supported by a physician's statement complying with Revenue Procedure 99–21." *Abston*, 691 F.3d at 995 (citing *Castaners v. United States*, 2012 WL 1802151, at *4 (N.D.Ill. May 16, 2012); *Henry v. United States*, 2006 WL 3780878, at *4 (N.D.Tex. Dec. 26, 2006); *Glover v. United States*, 2005 WL 1926614, at *2 (E.D.Mich. July 11, 2005).

The Eighth Circuit also provided three reasons for why taxpayers are required to comply with Rev. Proc. 99-21 to establish a "financial disability" pursuant to § 6511(h). First, the Eighth Circuit looked to the plain meaning of the statute. In so doing, the circuit court held:

> Federal courts have no jurisdiction over a tax refund suit 'until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard.' 26 U.S.C. § 7422(a) . . . . § 6511(h)(2)(A) expressly provides that a taxpayer 'shall not be considered [financially disabled] unless proof of [a disabling impairment] is furnished in such form and manner as the Secretary may require.' Thus, Abston's refund claim was not "duly filed." The limited waiver of sovereign immunity in § 6511(h) does not grant district courts power to decide *de novo* that a taxpayer was financially disabled.

Abston, 691 F.3d at 995. Next, the Eighth Circuit held that "the independent judicial determination of financial disability [the taxpayer] seeks would be the kind of nonstatutory tolling the Supreme Court barred in *Brockamp*." *Id*. Acknowledging the burden of responding to belatedly filed claims for refund, the Supreme "Court explained, 'tells us that Congress would likely have wanted to decide explicitly whether, or just where and when, to expand the statute's limitations periods, rather than delegate to the courts a generalized power to do so whenever a court concludes that equity so requires.'" *Id*. at 995 – 96 (quoting *Brockamp*, 519 U.S. at 353). In this regard, the Eighth Circuit concluded that the remedy for which the taxpayer sought "is contrary to that principle and therefore beyond the power of the lower federal courts." *Id*. at 996.

Finally, the Eighth Circuit rejected the taxpayer's challenge that Rev. Proc. 99-21 should be scrutinized because it was "adopted without the benefit of notice-and-comment rulemakings." *Abston*, 691 F.3d at 996. In so doing, the Eighth Circuit found that unlike 26 U.S.C. § 1502

(rules for filing consolidated returns), "[i]n § 6511(h)(2)(A), Congress did not direct the Secretary to prescribe requirements by regulation, as it has elsewhere in the Internal Revenue Code." *Id.*[4] Noting Congress' definition of "financial disability" in § 6511(h)(2(A), the circuit court held:

> Knowing that the IRS would need to fairly and efficiently process a potentially large number of such claims, Congress instructed the Secretary to prescribe the method by which an individual could prove such an impairment. In Revenue Procedure 99–21, the Secretary logically prescribed, "Bring a doctor's note." Under any standard of judicial review of executive agency action, we must uphold this threshold requirement as an appropriate exercise of the authority Congress delegated to the Secretary.

Id.

Contrary to the Report, *Abston* is indistinguishable from the case at bar. As in *Abston*, because the plaintiff at his case failed to submit a physician's statement altogether, the plaintiff is not entitled to the tolling relief set forth in § 6511(h)(2)(A). The Eighth Circuit properly concluded that the plain language of § 6511(h) "expressly provides that a taxpayer shall not be considered financially disabled unless proof of [a disabling impairment] is furnished in such form and manner as the Secretary may require." *Abston*, 691 F.3d at 995. Thus, following *Abston*, the plaintiff's refund claim was not "duly filed" because the limited waiver of sovereign immunity in § 6511(h) does not grant district courts power to decide *de novo* that a taxpayer was financially disabled, which is something that Report attempts to do.

In addition, Magistrate Judge Cabell's conclusion that *Abston* – and other cases relied upon by the United States – is distinguishable because the taxpayer at issue purportedly had a

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[4] Similar to Magistrate Judge Cabell's view, the taxpayer in *Abston* argued that Rev. Proc. 99-21 has no "power to persuade," so it should receive no deference as an authority. Specifically, the taxpayer argued that Rev. Proc. 99-21 is not a regulation, does not benefit from such due deliberation, and is not entitled to any level of deference. *See* Reply Brief of Appellant Rani Abston, 2012 WL 948134 at *3 – 6 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984) and *Skidmore v. Swift & Co*., 323 U.S. 134 (1944).

mental impairment, as opposed to a physical one, is groundless. As discussed in section D., above, courts are not permitted to make their own determination of "financial disability" because that "would be the kind of nonstatutory tolling the Supreme Court barred in *Brockamp*." *Id*. Magistrate Judge Cabell's attempt to make a distinction between the two impairments is impermissible as a matter of law. Likewise, the level the deference afforded to Rev. Proc. 99-21 is irrelevant because "Congress did not direct the Secretary to prescribe requirements by regulation, as it has elsewhere in the Internal Revenue Code." *Id*. at 996.

As in *Green*, the plaintiff in this case provided a statement prepared by a psychologist who is not a physician eligible to provide the statement of financial disability. The plaintiff therefore did not comply with the threshold requirements of Rev. Proc. 99-21 because he failed to submit a physician's written statement altogether. *Abston*, 691 F.3d at 996. Therefore, the plaintiff was not eligible for tolling pursuant to § 6511(h), and its claim was properly time-barred by the IRS. *See* 26 U.S.C. § 6511(b)(2)(A). For this reason alone, the plaintiff's complaint should be dismissed. *See, e.g., Pull v. IRS*, 2015 WL 4634761 (E.D. Cal. June 5, 2015) (dismissing taxpayer's complaint by finding that clinical psychologists are not considered physicians for the purposes of determining financial disability under section 6511(h) and Rev. proc. 99-21); *Haller v. Comm'r*, 100 T.C.M. (CCH) 9 (2010); *Walter v. United States*, 2009 WL 5062391 (W.D. Pa. Dec. 16, 2009); *Henry, supra* (dismissing taxpayer's complaint where two statements were submitted, but neither was from a physician).

In summary, the plaintiff failed to "duly file" the taxpayer's 2006 claim for refund within the time period prescribed in 26 U.S.C. §§ 6511(a)(1), 6511(b)(2)(A). This is true despite the fact that Congress amended § 6511 to suspend the running of the time periods therein "during any period of [a taxpayer's] life that such individual is financially disabled." 26 U.S.C. § 6511(h)(1).

Congress instructed the Secretary to prescribe the method by which an individual could prove such impairment and, in so doing, it enacted § 6511(h)(2)(A) (expressly providing that a taxpayer "shall not be considered [financially disabled] unless proof of [a disabling impairment] is furnished in such form and manner as the Secretary may require.")

The plaintiff's refund claim is barred by sovereign immunity and, as such, this Court lacks jurisdiction because the claim is time barred pursuant to 26 U.S.C. § 6511. This action should thus be dismissed *with prejudice*.

III. THE REPORT ON PAGE 17, NOTE 4, ERRONEOUSLY REJECTS THE UNITED STATES' ALTERNATIVE ARGUMENT.

Even if the psychologist was instead a medical doctor eligible to provide a statement concerning financial disability, the psychologist's statement at issue does not meet all the requirements in Rev. Proc. 99-21. For example, section 4 of Rev. Proc. 99-21 requires the physician's statement to be submitted with the claim for credit or refund to claim "financial disability." The psychologist's statement in this case was submitted with the plaintiff initial appeal, *i.e.*, tax protest, on April 11, 2014. The return claiming the refund, however, was filed with the IRS on April 26, 2013. This was well before the psychologist's statement was submitted. The IRS was not required to accept a late physician's statement under Rev. Pro. 99-21. Section 6511(h) authorized the IRS to establish a time deadline for the filing of the physician's statement and that deadline cannot be extended by the Court.

Moreover, the 2006 Return fails to discuss or even mention the taxpayer's purported impairment. Indeed, it does not reference § 6511(h) or Rev. Proc. 99-21, and it fails to provide any basis for why the refund claim was proper, even though it was filed many years after the due date. *See* 2006 Return. Contrary to the Report, the failure to do so is not a "technical deficiency." Instead, the 2006 Return is completely devoid of any rational as to why the claim is

timely. In fact, the psychologist's statement was not written until April 9, 2014, which was almost a year after the claim for refund was submitted, almost two years after the taxpayer died, and roughly eight years after the 2006 tax return was due. Thus, the plaintiff did not remotely comply with the timing requirement in Rev. Proc. 99-21. *See Bryuhanova v. IRS*, 2014 WL 2178584, at *7 (D. Minn. Mar. 24, 2014) (dismissing for lack of jurisdiction because the taxpayer failed to submit a physician's statement with her refund claim). Dismissal is therefore warranted for this reason alone.[5]

CONCLUSION

Based upon the foregoing, the United States respectfully requests that this Court decline to adopt the Report.

Date: February 27, 2017

Respectfully submitted,

UNITED STATES OF AMERICA,
DEFENDANT

/s/ W. Damon Dennis
W. DAMON DENNIS
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 55
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 616-1460

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ W. Damon Dennis
W. DAMON DENNIS

[5] Moreover, in contrast to the Report, Rev. Proc. 99-21 specifies that the statement must be from a doctor qualified to make the determinations regarding the taxpayer's impairments. The statement from the psychologist submitted by the plaintiff provides that the taxpayer's physical and mental impairments prevented him from managing his financial affairs. However, the psychologist only states that he treated the taxpayer for his psychological problems. As the psychologist based his determination of the taxpayer's financial disabilities at least in part on taxpayer's physical ailments, it is unquestionable that the psychologist was not qualified to make that determination because psychologist are incapable of making a medical diagnosis. *See Edmonds,* 910 F.2d at 1286-87.