THE UNITED STATES DISTRICT COURT
FOR DISTRICT OF MASSACHUSETTS

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Hoff Stauffer, Administrator of the Estate	)	
Of Carlton Stauffer,	)	
	)	Case No. 1:15-cv-10271
Plaintiff	)	
v.	)	Judge Mark L. Wolf
	)	
Internal Revenue Service,	)	Magistrate Judge Donald L. Cabell
	)	
Defendant	)	
	)	
**********	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION THAT DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION BE DENIED IN ITS ENTIRETY.

REQUEST FOR ORAL ARGUMENT

Plaintiff respectfully requests that, should this Court deem it helpful, oral argument be heard on Defendant's motion to dismiss for lack of subject matter jurisdiction, Defendant's Objections to the Magistrate's Report and Recommendation, and Plaintiff's opposition to them both.

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I. PRELIMINARY STATEMENT

By this action, Plaintiff seeks judgment on its tax year 2006 refund claim, which it filed with the Internal Revenue Service (hereafter, "IRS") on or about April 26, 2013, on behalf Mr. Carlton Stauffer (hereafter, "Carlton"), then deceased. In the administrative proceedings before the IRS Plaintiff submitted evidence that his refund claim was not time-barred since, as authorized by Congress in 26 U.S.C. §6511(h), the period allowed to file it had been tolled due to Carlton's financial disability. That disability had arisen from Carlton's severe mental impairments, which combined with his advanced age, serious health problems, and abusive domestic situation, left him completely unable to manage his financial affairs at least from 2006 until the time of his death.

The IRS requires that evidence of financial disability be submitted in accordance with the instructions set forth by Revenue Procedure 99-21 (hereafter, "RP 99-21"). In the administrative proceedings plaintiff complied with all those requirements save one: the required expert Statement of Disability was made by the licensed psychologist who had treated Carlton's severe mental illness for the nearly twelve years prior to his death, rather than by a psychiatrist. The psychologist's statement was submitted because, consistent with virtually everyone undergoing psychotherapeutic treatment, Carlton had been treated by a licensed psychologist, not by a psychiatrist.

The IRS, however, summarily denied Plaintiff's refund claim without consideration of its merits, stating that RP 99-21 permitted Statements of Disability to be made only by psychiatrists. Therefore, it refused to consider any statement from a psychologist, even one who had actually treated Carlton for more than a decade. The instant action in this Court followed.

This case presents the narrow question whether, when the taxpayer's financial disability arises primarily from a mental impairment, RP 99-21's insistence that a Statement of Disability be made only by a psychiatrist, while excluding all such statements made by licensed psychologists who actually treated the taxpayer for that disability, is so persuasive that this Court must now defer to it and thereby be deprived of subject matter jurisdiction. That is to say, at issue here is whether, per 26 U.S.C. §6511(h), the instant refund claim was timely filed.

By its motion submitted May 3, 2016, Defendant moved this Court to dismiss the instant complaint for lack of subject matter jurisdiction (Dkt. No. 19, 20), stating in its motion (and again in its Objections) that "the United States factually attacks" this Court's jurisdiction. On May 17, 2016, Plaintiff submitted its opposition to that motion and at that time requested oral argument (Dkt. No. 21). On October 17, 2016, argument was had before the Magistrate in a session that lasted nearly two hours (Dkt. No. 25, 26, 27).

On February 14, 2017, the Magistrate's Report and Recommendation issued, in which he categorically rejected each of Defendant's arguments. Consistent with those findings, the Magistrate recommends that the Defendant's motion to dismiss for lack of subject matter jurisdiction be denied in its entirety.

By its Objections Defendant now repeats the arguments it made unsuccessfully before the Magistrate.

II. STATEMENT OF FACTS[1]

Carlton's 2006 federal tax return was due on October 15, 2007, at which time Carlton would have been 85 years old. Had he been able to file that return Carlton would have been entitled to receive a refund of $137,403. By then, however, he had lost his decades' long battle with mental illness.[2] He was locked into a dysfunctional relationship with a woman who physically abused him, isolated and manipulated him, and stole from him, from which he could not escape. Added to all that, Carlton's body was rapidly failing him.

Between 2000 and his death in 2012 Carlton sought treatment for his mental impairments from Dr. Stanley E. Schneider and Dr. Michael J. Eshleman, both psychologists duly licensed to practice in Pennsylvania, where Carlton lived the last years of his life.[3] At his deposition, Dr. Schneider described Carlton as a man so depressed that he was immobilized, unable to make decisions, a state which persisted from at least 2001 until Carlton's death. Dep., Schneider, p. 42-43. Dr. Schneider also brought to the deposition a "Psychiatric Evaluation", dated October 5, 1999, in which Carlton is diagnosed by Dr. Benjamin Hoover, M.D., FACP, a psychiatrist, as suffering from "dysthymia…a long-term (chronic) form of depression characterized by loss of interest, low energy, poor concentration, little or no joy, difficulty with concentration/decision making." Dep. Exhibit 19; Dep., Schneider, p. 7.

By his affidavit submitted to the IRS, Dr. Schneider stated that, based on his many years treating Carlton, it was his professional opinion that from 2006 until his death in 2012 Carlton's

[1] These facts were also set forth before the Magistrate in Plaintiff's Reply in Opposition to Defendant's motion to dismiss for lack of subject matter jurisdiction. For this Court's convenience a somewhat truncated version is presented here. To the extent necessary, Plaintiff incorporates into this Opposition all facts and legal authority as previously provided to the Magistrate on his opposition to Defendant's motion to dismiss for lack of subject matter jurisdiction.

[2] The same mental impairments treated by Doctors Schneider and Eshleman were also described by Carlton's ex-wife, Nancy, in a letter she wrote to him, dated September 17, 1960. Dep. Exhibit 21.

[3] Dr. Eshleman treated Carlton from Sept 20, 2005 through September 10, 2012. Dep., Eshleman, p. 18. Dr. Schneider treated Carlton from 2000 until just before his death in 2012. Dep., Schneider, p. 11.

combined mental and physical impairments were so severe that he was unable to manage his financial affairs. Defense Motion, Exhibit 1, ¶7. At his deposition, Dr. Schneider remained steadfast in that opinion. Dep., Schneider, p. 50.

Dr. Schneider has been listed by Plaintiff as an expert witness expected to be called in this case. In preparation for that, Dr. Schneider prepared a report, in which he states:

> To a reasonable degree of psychological certainty, it is my clinical opinion that Carlton H. Stauffer's mental capacity, cognitive functioning, decision making, and emotional well-being were severely and negatively impacted and were in decline significantly from 2006 through 2012. It is my professional opinion that during this period, Mr. Carlton H. Stauffer's physical and mental impairments prevented him from managing his financial affairs.

Schneider Expert Report, p. 3.

Dr. Eshleman, based on his years treating Carlton, described him as having "features of obsessive-compulsive personality disorder" and as a man who "struggled all his life with procrastination and had a lifelong history of struggling to pay bills, to file taxes." Dep., Eshleman, p. 22-23. According to Dr. Eshleman:

> A big part of our treatment was his struggle with why can't I get myself to do the things that I know that I need to do for my business and my family…And in the chart there were a few references to bills but particularly to taxes that his hoarding problem meant that getting documents was overwhelming to him.

Dep., Eshleman, p. 23. Between 2006 and 2012, Carlton also exhibited "hoarding behavior", i.e., an inability to let go of anything:

> [H]e would describe to me boxes and boxes of papers that had no organizational scheme to them at all and that he was deeply perplexed and embarrassed, as many hoarders are, by the extent of it…[H]e would refer to boxes and boxes of papers, most of which contained some pretty important papers but buried in things that were totally junk mail.

Dep., Eshleman, p. 54-55. In his report, Dr. Schneider put it this way:

> Your father did not see himself as capable of navigating what he saw as a complex world. He spoke often of having piles of paper on his kitchen table, multiple boxes of paperwork, which he struggled to sort out.

Schneider Expert Report, p. 2.

By the Fall of 2005, Carlton still had assets worth approximately five million dollars, which he had originally inherited from his father. Dep., H. Stauffer, p. 19. Carlton had, however, depleted the cash in his checking account and could not figure out how to replenish it. By January 10, 2006, Carlton was "begging for help" from his son. Schneider Patient Notes, dated January 10, 2006. Desperate, he asked Hoff for a $100,000 loan, saying he "couldn't handle the complexity" of making alternative arrangements, that he "just didn't care", and that he couldn't stand the thought of "letting go" of any of his assets. Dep., H. Stauffer, p. 19-20, 34.

To his credit Hoff agreed to help, but insisted that his father give him Power of Attorney (hereafter, "POA") to manage Carlton's financial affairs. On October 8, 2005, the POA was signed and by early 2006 Hoff was working his way through his father's myriad boxes, which he described as filled with randomly stored documents. Dep., H. Stauffer, p. 35.

In the course of that process Hoff found in his father's home uncashed dividend and social security checks, made out to Carlton, totaling several hundred thousand dollars. Dep., H. Stauffer, p. 34. Hoff also found in his father's home records of $100,000 of New York City bonds, owned by Carlton but of which he had also lost track. Dep., H. Stauffer, p. 19.

Most significantly, Hoff discovered that Carlton had been unable to claim, despite for years receiving repeated notices, some as long ago as the late 1980's, approximately $2.5 million dollars of York Bank stock which he owned but had "lost track of". Dep., H. Stauffer, p. 19, 36.

By the time Hoff became aware of the situation the stock had been sold and the proceeds escheated to New Jersey.[4] Dep., H. Stauffer, p. 19, 36.

Despite these advances, as Hoff continued to work setting Carlton's finances to right his father began to argue with him about how the money should be handled. Dep., H. Stauffer, p.17. At one point, for example, Carlton insisted that the funds discovered by Hoff, which Hoff had deposited into a mutual fund opened in Carlton's name, be closed and the balance brought to him in cash. "I want to touch it…I want it on my kitchen table," Carlton said. Dep., H. Stauffer, p. 38. Failing that, Carlton demanded that Hoff move the funds into Carlton's checking account, where it would earn no interest. Dep. Exhibit 20, p. 1.[5]

By March, 2006, their split was formalized, with Carlton telling Hoff he no longer wished Hoff to have the POA, and Hoff telling his father he would no longer assist his father in any way with his finances.[6] Plaintiff's Supplemental Answers to Interrogatories. From that point on, Carlton was left alone with his then girlfriend, Ms. Marzanna Bielava (hereafter, "Marzanna"). Dep., H. Stauffer, p. 20, 40; Answers to Interrogatories; Dep., Eshleman, p. 28.

Marzanna was much younger than Carlton and "quite attractive", according to Dr. Schneider. She routinely beat Carlton and stole from him over a period of many years. Dep., Schneider, p. 41, 47. At one point Carlton told Dr. Schneider, that in addition to her thieving, he had given Marzanna in excess of $400,000 over a period of several years. Dep., Schneider, p. 14. Dr. Eshleman knew her as a "gold digger" who was "less than honest". Dep., Eshleman, p. 52-53.

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[4] Hoff was ultimately able to retrieve that money, which he deposited in a mutual fund opened in his father's name. Dep., H. Stauffer, p. 36.

[5] Hoff refused to do so as the interest earned in the mutual fund, about $10,000 per month, would have been sacrificed. Instead, Hoff wrote a check on his father's account, gave it to his father, and then re-deposited a different check from his father for the same amount the next day. Dep., H. Stauffer, p. 38.

[6] After that exchange Hoff expressly advised those he had been working with that he was no longer Carlton's agent per the POA. *See* Plaintiff's Supplemental Answers to Interrogatories; Dep., H. Stauffer, p. 16-17.

On May 15, 2006, Marzanna was convicted in Pennsylvania of harassment after she attacked and physically assaulted Carlton. In that instance, angry because Carlton had been refusing to give her more money, on the evening of April 9, 2006, Marzanna burst into Carlton's home, pushed him to the floor, and began throwing things about his living room. Dep. Exhibit 3 (Transcript of Proceedings, *Commonwealth of PA v. Marzanna Bielava*), p. 5-9.[7]

According to Dr. Schneider, it was common for Marzanna to attack Carlton physically. Dep., Schneider, p. 47. Dr. Eshleman testified that Carlton was "very embarrassed" by Marzanna's physical assaults and the fact that often "the police would be called." Dep., Eshleman, p. 52-53. On May 3, 2006, concerned about his father's safety, Hoff wrote a letter to Carlton, in which he described Marzanna as a "very evil person":

> I sincerely fear that her repeated drunken violence could be extremely detrimental to your health. You are a gentle 85-year-old man with a heart condition. You cannot expose yourself to situations that are so violent…Remember when she pointed the gun at your head? Remember when she got so violent (on Christmas day) that Stevie had to pin her to the floor? Remember the time she threw you out into a frozen evening without a coat, hat, or gloves?

Dep. Exhibit 20, p. 3.

Between 2006 and 2012, Marzanna repeatedly stole money and items of value from Carlton. She stole, even though Carlton was giving her approximately $150,000 to $200,000 per year. Dep., H. Stauffer, p. 20.

For some unknown reason, on May 30, 2012, less than five months prior to his death, Marzanna went to Dr. Eshleman's office, expressing concern about Carlton. She told the doctor that "the situation at home was bad" and that "Carlton was not taking care of himself, not going to doctors' visits, no relationship with family." Dep., Eshleman, p. 52.

[7] At her deposition, Marzanna specifically denied any knowledge of this hearing, even after being shown a transcript of the proceedings. Dep., Bielava, p. 54-57.

Also during the period between 2006 and 2012 Carlton's physical problems rapidly accumulated, which served to exacerbate his psychological difficulties. Schneider Dep, p. 46-47. These included congestive heart failure, chronic obstructive pulmonary disease ("COPD"), leukemia, and chronic pneumonia. Schneider affidavit,¶4, Dep., Schneider, p. 47. As Dr. Schneider states in his report, after treating Carlton for more than a decade:

> In sum, the information I reviewed noted above, in addition to my clinical notes, reflect a chronic struggle to deal with depression, poor concentration, poor decision making, procrastination, highly conflicted and strained relationship, which resulted in his being overwhelmed, experiencing emotional pain which consumed him in addition to worsening medical/health conditions.

Schneider Expert Report, p. 3.

On October 29, 2012, having reached the age of ninety, Carlton passed away. At that time he still had not filed his 2006 tax returns. Thereafter, the Estate submitted that return (as well as returns not filed for many other years) and claimed the refund to which Carlton was due. On January 7, 2015, the IRS issued a final denial of that claim for refund. As its only reason, the IRS cited RP 99-21's requirement that a Statement of Disability by a physician, as that term is defined by the Social Security Act, i.e., be made by a psychiatrist and not by the licensed psychologist who had actually treated Carlton.[8]

III. DEFENDANT'S OBJECTIONS TO THE MAGISTRATE'S REPORT AND RECOMMENDATION ARE UNSUPPORTED BY FACT OR LAW.

A. Despite the Magistrate's Findings to the Contrary, Defendant Continues to Assert That Any Noncompliance With Even a Single Requirement Set Forth by RP 99-21 Automatically Deprives This Court of Jurisdiction to Review the Reasonableness of that Requirement.

[8] Having denied the refund claim on that procedural ground, the IRS never addressed the question whether Carlton was, per 26 U.S.C. §6511(h), in fact financially disabled.

In its Objections, Defendant takes the extreme position that the IRS can, by internally generating a rule, one made without any outside input and certainly not the Notice and Comment procedures attendant to a Regulation, exempt itself from all judicial review of its actions. That is, in Defendant's view, the Magistrate erred by daring to determine whether RP 99-21's blanket exclusion of Statements of Disability by licensed psychologists, even one who actually treated the taxpayer for the mental impairments giving rise to the financial disability, passed muster under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).[9] In complete contravention of this long settled case law, Defendant claims in his Objections that "[t]he level of deference afforded to the IRS in interpreting §6511(h)…is irrelevant because Rev. Proc. 99-21 was created pursuant to the Congressional mandate in 6511(h)(2)(A)." Objections, p. 11.

The Magistrate, on reviewing the entire record in this case, studying the memoranda of law submitted by the parties, and spending considerable time conducting oral argument on the issue, quite properly entirely rejected Defendant's argument.

First, it must be pointed out that pursuant to 5 U.S.C. §706 this Court, when reviewing an agency action, is ***obligated*** to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." In fact, the statute requires that this Court ***shall***, *inter alia*, "hold unlawful and set aside agency action, findings, and conclusions" found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court." 5 U.S.C. §706(2)(A), (C), (F)(emphasis

[9] In *Skidmore*, more than seventy years ago now, the U.S. Supreme Court first promulgated the standard by which courts must review non-regulation based administrative actions by federal agencies. *See also Navarro v. Pfizer Corp.*, 261 F.3d 90 (1st Cir. 2001)*; Regan v. U.S.*, 421 F. Supp.2d 319, 335-36 (D. Mass. 2006); *Doe v. Leavitt*, 552 F.3d 75, 80 (1st Cir. 2009); *Lovgren v. Locke*, 701 F.3d 5, 30 (1st Cir. 2012).

supplied). That statute further provides that "[i]n making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

Second, it is well-settled that when this Court conducts that required review the IRS cannot be allowed to occupy a privileged place among the federal agencies. Rather, as the U.S. Supreme Court has stated:

> [W]e are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly "[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.

Mayo Foundation for Medical Educ. and Research v. U.S., 562 U.S. 44, 55 (2011), *citing Dickinson v. Zurko*, 527 U.S. 150, 154 (1999). *See also Dickow v. United States*, 654 F.3d, 144 (1st Cir. 2011). Accordingly, this Court's review of RP 99-21 is governed by the same law and standards as would apply to the action of any federal agency.

Finally, Defendant's position is entirely based on the language in §6511(h) which states that the Secretary is authorized to make rules which implement that statute's grant of a tolling of the limitation period for filing a refund claim in cases of financial disability arising from mental or physical impairments. Defendant now seeks to convince this Court that those words, by themselves, deprive this Court of its statutory right and obligation to review the rules the IRS generates.

In that regard, Defendant is severely mistaken. After all, every federal agency, including the IRS, is empowered by statute to make rules implementing the laws which Congress enacts. For the IRS, that authority is set forth as follows:

> Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and

> regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

26 U.S.C. §7805(a). See also 26 U.S.C. §7801. Indeed, it is this very agency rule-making authority that is made subject to this Court's jurisdiction by the Administrative Procedure Act. Accordingly, the language of §6511(h), into which Defendant now seeks to read so much, does not impart to the IRS any new power or authority enabling it to generate internal rules, never subject to any outside input, notice, or comment, which are forever beyond judicial scrutiny.

Defendant's argument amounts to nothing less than the extreme statement that all rules made by any federal agency pursuant to a Congressional grant are not subject to judicial review, an absurd result which the Magistrate quite properly rejected. To the contrary, consistent with decades of well-established case law and statutory authority, the Magistrate rightly considered the question whether the IRS rule at issue here was entitled to judicial deference.

B. Defendant Raises No Objection to the Magistrate's Finding That RP 99-21 is Entitled to Deference on Judicial Review Only According to Its Power to Persuade.

As is set forth in more detail by Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss it is long settled that the standard of review to be applied by a reviewing court differs greatly with the type of agency rule at issue, with the greatest deference shown to regulations, which arise from "notice-and-comment rulemaking". *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *U.S. v. Mead Corp.*, 533 U.S. 218, 229-30 (2001).

Revenue Procedures, on the other hand, including RP 99-21, are not the product of notice-and-comment rulemaking. Rather, they are generated entirely within the IRS and not

considered to carry "the force of law". *See, e.g., Merrimon v. Unum Life Ins. Co. of America*, 758 F.3d 46, 54-55 (1st Cir. 2014). As such, they are ***not*** granted *Chevron*-level deference on judicial review. Instead, a reviewing court's deference to a revenue procedure is limited only to that warranted by the procedure's "power to persuade" (the "*Skidmore* standard"). *Mead, supra* at 228, *citing Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

This greatly diminished standard of review has been embraced by the First Circuit:

> For example, when an agency speaks with the force of law, as through a binding regulation, its interpretation of ambiguous provisions of a statute that falls within its purview is due judicial deference as long as that interpretation is reasonable…. But when an agency speaks with something less than the force of law, its interpretations are entitled to deference "only to the extent that those interpretations have the 'power to persuade.' "

Merrimon v. Unum Life Ins. Co. of America, 758 F.3d 46, 54-55 (1st Cir. 2014), *quoting Skidmore, supra*. *See also Navarro v. Pfizer Corp.*, 261 F.3d 90 (1st Cir. 2001)*; Regan v. U.S.*, 421 F. Supp.2d 319, 335-36 (D. Mass. 2006); *Doe v. Leavitt*, 552 F.3d 75, 80 (1st Cir. 2009); *Lovgren v. Locke*, 701 F.3d 5, 30 (1st Cir. 2012); *Tualatin Valley Builders Supply, Inc. v. USA*, 522 F3d 937 (9th Cir. 2008); *Aeroquip-Vickers, Inc. v. CIR*, 347 F.3d 173, 181 (6th Cir. 2004); *Landmark Legal Foundation v. I.R.S.*, 267 F.3d 1132, 1135-36 (D.C. Cir. 2001); *Webber v. C.I.R.*, 144 T.C. 324, 352-53 (2015); *In re Worldcom, Inc.*, 723 F.3d 346, 357-58 (2nd Cir. 2013).

In this case, the Magistrate correctly found that RP 99-21 was entitled to deference on judicial review only according to its "power to persuade", i.e., the *Skidmore* standard. By his Objections, Defendant raises no claim to the contrary as to that issue, which is understandable given that this lower standard of deference on judicial review has been accepted by the IRS. In particular, on May 10, 2011, the Department of Justice (Tax Division) Appellate Section Chief

stated publicly that, following the *Mayo* decision, *supra*, the Department of Justice would ***no longer*** seek *Chevron* level deference for any IRS revenue ruling:

> Rothenberg said that if the issue is important enough for *Chevron* deference, "I'm going to ask my client agency if they would just issue a regulation."

See Article dated May 10, 2011, posted on www.taxnotes.com, reporting a speech by Section Chief Rothenberg to the Low-Income Taxpayer session of the American Bar Association section on Taxation.

C. Defendant Raises No Objection to the Magistrate's Application of the *Skidmore* Standard of Review to Revenue Procedure 99-21.

By his Report and Recommendation the Magistrate found that RP 99-21's blanket exclusion of all Statements of Disability made by licensed, treating psychologists utterly failed to meet the *Skidmore* standard of judicial review. That is, the Magistrate found that that rule lacked any power to persuade that it was entitled to judicial deference. In particular, the Magistrate found:

- In the case of a mental impairment, the IRS insistence on a psychiatrist's statement "directly undermines the goal of IRC §6511", i.e., to toll the statutorily allowed time for filing a refund claim;
- That the IRS had made no showing that it had considered the implications of taking a drafting short-cut by borrowing its definition of "physician" from the Social Security Act;

- That RP 99-21 appeared to have been written by a single employee, and showed evidence of sloppy drafting by stating that its borrowed definition of "physician" came from a non-existent portion of the Social Security Act;
- That the Social Security Administration does in fact have a disability determination process in which psychologists are permitted to participate;
- That the IRS had failed to provide any evidence whatsoever as to the deliberative process it engaged in before issuing RP 99-21.

Accordingly, the Magistrate correctly determined that Plaintiff's refund claim was not rendered untimely solely as a consequence of having filed a Statement of Disability written by the licensed psychologist who actually treated Carlton for the mental impairments giving rise to his financial disability.

For its part, by its instant filing Defendant has raised no objection to any of these findings by the Magistrate.

D. Defendant's Objection That the Magistrate Erred By Finding *Abston* Not On Point Is Without Merit.

Before the Magistrate Defendant asserted, as he does by his instant filing, that *Abston v. Commisioner*, 691 F.3d 992 (8th Cir. 2012), was "indistinguishable" from this case. In *Abston*, however, the entirely unsympathetic taxpayer had delayed filing her tax return so as not to have her tax refund seized to repay student loans on which she had defaulted. *Abston* at 993. Years later, having attempted to claim that refund long after the window to do so had closed, she tried to qualify as financially disabled due to a ***physical impairment***, apparently submitting to the IRS only her voluminous medical records while utterly failing to provide a Statement of Disability

from any health care provider of any sort. On that record the *Abston* court deemed her "refund claim had not been 'duly filed'". *Abston at* 995.

As to both fact and law, therefore, *Abston* is inapposite to the issue now before this Court. First, at no time did that taxpayer claim her disability was due to a ***mental impairment***. Rather, her claim arose entirely from alleged physical impairments.

Second, the plaintiff in *Abston* never submitted a Statement of Disability from any health care provider attesting that her physical impairments had given rise to financial disability. Accordingly, the question whether RP 99-21's requirement for a psychiatrist's statement (and its blanket exclusion of statements by licensed, treating psychologists) required that Court's deference was simply not part of the Eighth Circuit's decision.

Third, unlike *Abston*, in the case before this Court, Plaintiff did present to the IRS a Statement of Disability but the IRS refused to consider it. That refusal is precisely the issue now before this Court and to that issue *Abston* simply does not speak.

Finally, it must be noted that *Abston* offers no support for Defendant's extreme claim that ***any*** non-compliance with any portion of RP 99-21 completely destroys this Court's power to resolve a question of the reasonableness of a rule proffered by RP 99-21. To the contrary, in *Abston* the Eighth Circuit did review RP 99-21's requirement of a physician's statement, as it applied to a claim of physical impairment, and found it persuasive.

Accordingly, Defendant's objection in this regard is without merit and should not be further considered by this Court.

E. Defendant's Objection That the Magistrate Erred By Rejecting Its Argument That a Statement of Disability Can Only Be Considered if it is Submitted Simultaneously with the Original Refund Claim is Both Disingenuous and Without Merit.

On October 29, 2012, at age 90, Carlton Stauffer passed away. Thereafter, on or about April 26, 2013, his son, Hoff, acting as administrator of Carlton's estate, filed his father's 2006 tax return seeking refund of an overpayment. The IRS denied that refund claim as untimely and advised Hoff of his right to object to that decision before IRS Appeals.

As Defendant is well aware, on or about April 11, 2014, Plaintiff filed that administrative appeal. At that time Plaintiff submitted all documents as required by RP 99-21, including the psychologist's statement at issue here. Those documents were accepted by IRS Appeals and it conducted its initial review. Thereafter, on or about December 2, 2014, Defendant issued its preliminary decision letter stating that it intended to deny Plaintiff's refund claim because, per RP 99-21, "the letter from the psychologist provided cannot be used as the statement that can certify Mr. Stauffer's condition." On January 7, 2015, the IRS made its decision final.

As the Magistrate correctly notes in his Report and Recommendation (p. 17, footnote 4), the fact that a refund claim may not be perfected at the instant it is first received by the IRS is not in any way fatal to the refund claim. To the contrary, standard IRS operating procedure is exactly as outlined above. That is, a taxpayer is not expected to know at the outset every nuance of the entirety of Title 26. To take such a position, as Defendant does in his present Objection, is unrealistic and unfair in the extreme, and a denial of long-standing IRS practice.

Very much to the contrary of Defendant's present assertion, IRS standard operating procedure is to accept documents as filed, review them, and seek further information from the taxpayer as required. Such additional information can be submitted to a revenue officer or on

administrative appeal. In fact, it often happens that a claim initially denied by a revenue officer is later allowed by IRS Appeals after it receives additional information from the taxpayer.

Indeed, if RP 99-21 were interpreted to exclude any refund claims filed by taxpayers who had not yet learned of its existence, much less its requirements, then surely the IRS would have no financial disability claims to consider at all. Under such an interpretation RP 99-21 would entirely subvert the obvious intention of 26 U.S.C. §6511(h). Perhaps for that reason alone Defendant has not claimed in this Objection that the IRS has even once acted in accordance with the position Defendant now advances as dispositive in this case.

More disturbing still is that Defendant is, or at the very least should be, well aware of the IRS procedures described above, and that no requirement of simultaneous submission has ever been foisted on taxpayers during the approximately eighteen years that RP 99-21 has been in effect. Notwithstanding all that, however, Defendant has once again chosen to raise this meritless argument before this Court.

Accordingly, it is plain that the Magistrate correctly rejected Defendant's argument and it should not now find traction with this Court.

IV. CONCLUSION

For all the reasons set forth above Defendant's objections to the Magistrate's Report and Recommendation should be rejected in their entirety. In addition, as the record in this case wholly supports the Magistrate's findings of both fact and law Plaintiff respectfully now urges this Court to adopt the Magistrate's Report and Recommendation in its entirety, and deny Defendant's motion to dismiss this action for lack of subject matter jurisdiction.

Date: March 3, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 3, 2017, I electronically filed the foregoing document with the Clerk of the District Court using the CM/ECF system, which will send notification of such filing to all registered parties.

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