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United States District Court, C.D. California.

UNITED STATES of America
v.
Fariba Ely COHEN

Case No. CV 17-1652-MWF (JCx)
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Proceedings (In Chambers): ORDER RE: DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS [35]

MICHAEL W. FITZGERALD, U.S. District Judge

***1** Before the Court is the Motion for Judgment on the Pleadings (the "Motion"), filed by Defendant Fariba Ely Cohen on August 31, 2018. (Docket No. 35). On September 24, 2018, the United States of America filed an Opposition. (Docket No. 40). Defendant filed a Reply on October 8, 2018. (Docket No. 41). The Court has read and considered the papers on the Motion and held a hearing on October 22, 2018.

For the reasons set forth below, the Motion is **DENIED**. Defendant, who failed to report foreign financial accounts for the 2008 tax year, was assessed civil penalties in the amount of $1,549,849 on March 5, 2015. The Government commenced this action on March 1, 2017, within two years of the assessment date. The action, therefore, is not barred by the statute of limitations.

I. BACKGROUND

A. Relevant Regulatory Framework

On an annual basis, residents and citizens of the United States are required to report to the Commissioner of the Internal Revenue certain activity with foreign financial agencies for each year in which the activity occurs. *See* 31 U.S.C. § 5314(a); 31 C.F.R. § 1010.350(a). One such activity is "having a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country." § 1010.350(a). The form that needs to be completed for this annual reporting is the Report of Foreign Bank and Financial Accounts ("FBAR"). For calendar years before 2017, the FBAR report for foreign financial accounts exceeding $10,000 maintained during a calendar year was due by June 30 of the following calendar year. § 1010.306(c).

Civil penalties can be assessed against an individual who, whether willfully or non-willfully, fails to comply with these reporting requirements. § 5321(a)(5)(A). For willful violations, the penalty assessed is the greater of $100,000 or 50% of the balance in the foreign financial account at the time of the violation. § 5321(a)(5)(C)(i). There is no reasonable cause exception for willful violations. § 5321(a)(5)(C)(ii). An FBAR penalty must be assessed within six years from the due date of the FBAR report. § 5321(b)(1). After an assessment, the Government may then bring a civil action to recover the FBAR penalty at any time before the end of the two-year period beginning on the date the penalty was assessed. § 5321(b)(2)(A).

As an example, for the 2008 calendar year, an individual needing to file an FBAR report must do so by June 30, 2009. If an individual fails to file the FBAR report by that date, the Internal Revenue Service ("IRS") may assess an FBAR penalty at any time within six years, or June 30, 2015. After the IRS's assessment, the Government then has two years from the date of that assessment to bring a civil action to collect any unpaid balance, including interests, costs, and expenses.

B. The Government's Complaint

On March 1, 2017, the Government commenced this action. (*See generally* Complaint (Docket No. 1)). At all relevant times, Defendant was, and still is, a citizen of the United States. (*Id.* ¶¶ 11–12).

***2** On November 19, 1989, Defendant married Saeed Cohen. (*Id.* ¶ 34). At some unspecified point in 2004 and with the assistance of an attorney, Defendant and Mr. Cohen incorporated L&C Lighting Technology Ltd. ("L&C Lighting") under the laws of Samoa. (*Id.* ¶¶ 57–58). Defendant and Mr. Cohen were equal shareholders of L&C Lighting, each owning 50% of the stock. (*Id.* ¶¶ 67–69). Defendant also served as an officer, Director, and Secretary of L&C Lighting. (*Id.* ¶¶ 62–64).

Following the incorporation, Defendant and Mr. Cohen opened a bank account on behalf of L&C Lighting. According to a corporate resolution dated January 5, 2005, the Board of Directors of L&C Lighting (consisting solely of Defendant and Mr. Cohen) met and resolved to open a bank account with Bank Leumi (Luxembourg) S.A. ("Leumi Bank"), grant power of attorney to Defendant and Mr. Cohen to sign the necessary application documents, and designate and appoint Defendant and Mr. Cohen to operate the account under their individual signatures. (*Id.* ¶ 75). At an unspecified point in 2005 (presumably after January 5), Defendant and Mr. Cohen met with a Leumi Bank employee at the Beverly Hills hotel to complete an application to open an account at Leumi Bank's Luxembourg branch. (*Id.* ¶¶ 79–82). The Leumi Bank account had an account number ending in 6002 and an initial balance between $1.3 million and $1.5 million. (*Id.* ¶ 83). Defendant and Mr. Cohen also signed a "hold mail" request, instructing Leumi Bank not to send them any communications, email, or faxes. (*Id.* ¶¶ 84–85).

In 2004 and again in 2005 prior to any FBAR reporting deadline, Defendant and Mr. Cohen were informed of the FBAR reporting requirements. (*Id.* ¶¶ 60–61, 76). More specifically, the attorney who incorporated L&C Lighting sent a letter on February 3, 2005, to them, which stated the following:

> As I have indicated to you earlier, you will be required to report the activities of this company [L&C Lighting] and file various information returns as well as income tax

> returns and forms for both U.S. Federal Tax purposes as well as State of California. I strongly recommend that you contact your CPA [Certified Public Accountant] or tax advisor, and provide the details of this company's business activities, so they can prepare and file the proper forms for you and the company in a timely manner.

(*Id.*, Ex. 11).

For the tax years between 2003 and 2008 (coinciding with the calendar years), Defendant and Mr. Cohen filed joint federal income tax returns with the help of a CPA. (*Id.* ¶¶ 35–36). The 2008 tax year is the subject of this action.

For the 2008 tax year, Defendant and Mr. Cohen filed a joint federal income tax return ("Form 1040") and a supplemental disclosure of interest and ordinary dividends ("Schedule B"). (*Id.* ¶¶ 86–87). Pursuant to Schedule B, a taxpayer was required to complete Part III if she "had a foreign account." (*Id.* ¶ 88). Because Defendant and Mr. Cohen owned multiple foreign accounts, including the one at Leumi Bank, they completed Part III. (*Id.* ¶ 90). Line 7a of Part III contained the following question:

> At any time during 2008, did you have an ***interest in or a signature or other authority*** over a financial account in a foreign country, such as a bank account, securities account, or other financial account? See page B-2 for exceptions and filing requirements for Form TD F 90-22.1 9 [the FBAR report].

(*Id.* ¶ 91; Ex. 12) (emphasis added). Page B-2 then informed a taxpayer that if "[she] checked the 'Yes' box on line 7a, file Form TD F 90-22.1 [the FBAR report] by June 30, 2009, with the Department of the Treasury at the address shown on that form." (*Id.* ¶ 92; Ex. 13).

***3** Defendant and Mr. Cohen checked "No" on line 7a of Part III of Schedule B and, on September 29, 2009, electronically filed their Form 1040 with the IRS for the 2008 tax year. (*Id.* ¶¶ 95–96).

On October 27, 2009, Defendant filed a petition for dissolution of marriage and separated from Mr. Cohen at some point in 2010. (*Id.* ¶¶ 42–43). At some unspecified point in 2011, Defendant and Mr. Cohen both participated in the Offshore Voluntary Disclosure Program (the "Program") offered by the IRS. (*Id.* ¶¶ 44, 47). The IRS describes the Program as "a voluntary disclosure program specifically designed for taxpayers with exposure to potential criminal liability and/or substantial civil penalties due to a willful failure to report foreign financial assets and pay all tax due in respect of those assets ... is designed to provide to taxpayers with such exposure (1) protection from criminal liability and (2) terms for resolving their civil tax and penalty obligations." *See* Offshore Voluntary Disclosure Program, available at https://www.irs.gov/individuals/ international-taxpayers/offshore-voluntary-disclosure-program.

As part of the Program, Defendant and Mr. Cohen filed amended Forms 1040 for several tax years, now including previously unreported income from foreign accounts. (Compl. ¶ 45). For the 2008 tax year, Defendant and Mr. Cohen disclosed that tax liabilities were originally reported as $523,444 but should have been $3,643,193 if the unreported income from foreign accounts were included. (*Id.* ¶ 46). The tax deficiency was $3,119,749. (*Id.*).

Further, as part of the Program, Defendant separately filed belated FBARs for several tax years, including the 2008 tax year. (*Id.* ¶ 48). Defendant disclosed that (1) she owned or had signature authority for various foreign bank accounts, including the Leumi Bank account ending in 6002, (2) the highest balance for the Leumi Bank account in 2008 was $14,123,172, and (3) the balance for the Leumi Bank account as of June 30, 2009, was $6,199,395. (*Id.* ¶¶ 48–49, 104).

In December of 2011, Defendant requested to withdraw from the Program, which the IRS approved on July 3, 2012. (*Id.* ¶ 53).

Because the Leumi Bank account had a balance of $6,199,395 as of June 30, 2009, Defendant "was entitled to $3,099,698 (50% of $6,199,395)" based on her equal co-ownership with Mr. Cohen. (*Id.* ¶ 104). Based on this information, on March 5, 2015, the IRS assessed an FBAR penalty in the amount of $1,549,849 (or 50% of $3,099,698) against Defendant for her willful failure to report her interest in a foreign financial account for the 2008 tax year. (*Id.* ¶ 107). Exhibit 17 to the Complaint contains a Penalty Assessment Certification dated May 22, 2014, rather than March 5, 2015. (*Id.*, Ex. 17).

After the IRS assessed the civil penalty, the Government then has two years within the date of assessment to bring an action to collect any unpaid balance. § 5321(b)(2)(A). The Government brought this action on March 1, 2017, within two years of March 5, 2015, but not of May 22, 2014. Through her Motion, Defendant seeks, pursuant to Federal Rule of Civil Procedure 12(c), dismissal of the Government's action on statute of limitations grounds.

II. LEGAL STANDARD

***4** The same standard of review applies to motions made under Rules 12(c) and 12(b)(6) of the Federal Rules of Civil Procedure. "Rule 12(c) is 'functionally identical' to Rule 12(b)(6) and ... 'the same standard of review' applies to motions brought under either rule." *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011) (quoting *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989)). "A judgment on the pleadings is properly granted when, taking all the allegations in the pleadings as true, a party is entitled to judgment as a matter of law." *Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877, 883 (9th Cir. 2011) (quoting *Dunlap v. Credit Prot. Ass'n, L.P.*, 419 F.3d 1011, 1012 n.1 (9th Cir. 2005) (per curiam)).

In ruling on the Motion under Rule 12(b)(6), the Court follows *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and their progeny. "To survive a motion to dismiss, a complaint must contain sufficient factual matter ... to 'state a claim to relief that is plausible on its face.' " *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). The Court must disregard allegations that are legal conclusions, even when disguised as facts. *See id.* at 681 ("It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."); *Eclectic Properties E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014). "Although 'a well-pleaded

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complaint may proceed even if it strikes a savvy judge that actual proof is improbable,' plaintiffs must include sufficient 'factual enhancement' to cross 'the line between possibility and plausibility.' " *Eclectic Properties*, 751 F.3d at 995 (quoting *Twombly*, 550 U.S. at 556–57) (internal citations omitted).

The Court must then determine whether, based on the allegations that remain and all reasonable inferences that may be drawn therefrom, the complaint alleges a plausible claim for relief. *See Iqbal*, 556 U.S. at 679; *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 (9th Cir. 2011). "Determining whether a complaint states a plausible claim for relief is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.' " *Ebner v. Fresh, Inc.*, 838 F.3d 958, 963 (9th Cir. 2016) (quoting *Iqbal*, 556 U.S. at 679). Where the facts as pleaded in the complaint indicate that there are two alternative explanations, only one of which would result in liability, "plaintiffs cannot offer allegations that are merely consistent with their favored explanation but are also consistent with the alternative explanation. Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs' allegations plausible." *Eclectic Properties*, 751 F.3d at 996–97; *see also Somers v. Apple, Inc.*, 729 F.3d 953, 960 (9th Cir. 2013).

III. <u>DISCUSSION</u>

Through her Motion, Defendant argues that the Government failed to bring this action in a timely manner and points to the apparent contradiction between paragraph 107 and Exhibit 17 of the Complaint. (Mot. at 5). Paragraph 107 alleges that the IRS assessed the FBAR penalty for the 2008 tax year on March 5, 2015, while Exhibit 17 indicates that that the IRS penalty was assessed on May 22, 2014. (*Compare* Compl. ¶ 107 *with* Ex. 17). Based on this purported contradiction, Defendant argues that the Court may disregard the statement in the Complaint and conclude that the IRS in fact assessed the FBAR penalty on May 22, 2014. (Mot. at 5–6). Because the Government's Complaint was filed two years and 283 days after that assessment date, the entire action is barred by the statute of limitations. (*Id.* at 6).

***5** The Government, in opposition, argues that the IRS in fact assessed two penalties against Defendant, each for same amount of $1,549,849, and now seeks to reduce only the second assessment to judgment. (Opp. at 7). The Government also notes that Exhibit 17 was erroneously submitted and attaches a Penalty Assessment Certification dated March 5, 2015, as the new Exhibit 17. (Notice of Errata (Docket No. 39)). Because its Complaint was filed on March 1, 2017, within two years of the assessment, the Government argues that the action is not barred by the statute of limitations. (Opp. at 7).

In her Reply, Defendant argues that the Government's contention that there were two assessments leads to two improbable factual theories: (1) that the IRS's assessments improperly doubled the amount of Defendant's liabilities, or (2) that the IRS improperly assessed the same FBAR penalty twice through a redundant recording. (Reply at 2). Defendant also argues, for the first time, that accepting either of the theory as true would be unlawful under the Administrative Procedures Act ("APA"). (*Id.* at 12–13, 18).

The Court concludes that Defendant's arguments are unpersuasive and will address each in turn.

A. Double Assessment

Defendant argues that to accept the Government's contention as true would impose on her two separate FBAR penalties: one in the amount of $1,549,849 for her interest in the Leumi Bank account and another in the same amount for her ex-husband's, totaling $3,099,698. (Reply at 2). Defendant offers several supporting rationales, all of which the Court finds unpersuasive.

First, Defendant contends that she is subject to a penalty up to only 50% of her interest in the Leumi Bank account (or $1,549,849) because the account had a balance of $6,199,395 as of June 30, 2009, and because she held only a 50% ownership interest in that account (or $3,099,698). (Reply at 3). This characterization, however, is inconsistent with the statutory language, which clearly permits the IRS to assess as penalties the greater of $100,000 or 50% of "the ***balance*** in the account at the time of the violation." § 5321(a)(5)(C)(i) (emphasis added). The statute does not limit FBAR penalties to only Defendant's interest. Because the Leumi Bank account had a balance of $6,199,395 as of June 30, 2009, the IRS may assess up to $3,099,698, the statutory ceiling, in FBAR penalties against Defendant.

Second, Defendant next contends that, "[b]ased on [her] 50% interest in the [Leumi Bank] account", the IRS clearly "had computed the [FBAR] penalty as 50% times [her] interest," or only $1,549,849. (Reply at 3). Contrary to Defendant's contention, however, the Government makes no suggestion that the IRS had assessed FBAR penalties based on Defendant's interest. The Government instead alleges that (1) "[a]s of June 30, 2009, the Luemi [sic] Bank account ... had a balance of $6,199,395, of which [Defendant] was entitled to $3,099,698 (50% of $6,199,395)," and (2) "[o]n March 5, 2015, the [IRS] assessed an FBAR penalty in the amount of $1,549,849 (50% of $3,099,698) against [Defendant] for her willful failure to report her interest in a foreign financial account ..." (Compl. ¶¶ 104, 107). A close read of these two paragraphs suggests the following inferences: the Leumi Bank account had a balance of $6,199,395 as of June 30, 2009; Defendant was entitled to half of that balance; Defendant failed to timely report her interest in that balance; and the IRS assessed penalties in the amount of $1,549,849, or half of Defendant's interest. But the IRS may assess more, and in fact did, up to the statutory ceiling as noted above. The Government does not allege that the amount of the penalties assessed was based on Defendant's interest.

***6** Defendant also, unpersuasively, points to two exhibits, and the corresponding paragraphs describing them, for further support. (Reply at 5–9). For example, Defendant points to Exhibit 18, a notice and demand for payment that the IRS sent to her on March 5, 2015, to argue that the "current balance" for FBAR penalties listed was $1,549,849. (*Id.* at 5–6; Compl., Ex. 18). Defendant notes that if the Government's contention that the IRS had imposed two separate FBAR penalties were true, then the "current balance" should have

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been $3,099,698. (Reply at 6). The Court finds no ambiguity, however, as Exhibit 18 does not purport to state, and neither does the Government, that the "current balance" refers to the balance of all FBAR penalties rather than only the balance of the second FBAR penalty. But even if there is any ambiguity, the Court, as it must, would accept the allegations in the Complaint as true and resolve the ambiguity in the Government's favor. And the Complaint alleges that Exhibit 18 is a copy of the notice and demand for the FBAR penalty assessed on March 5, 2015. (Compl. ¶¶ 109–10).

Defendant further points to Exhibit 19, a screenshot of Defendant's penalty balance as of September 27, 2016, to argue, again, that the balance listed should have listed $3,099,698 rather than $1,549,849. (Reply at 7). This contention is also incorrect, and in fact, supports the Government's position. By September 27, 2016, the first IRS assessment could not be reduced to judgment as it had been issued on May 22, 2014. (At the hearing, Defendant noted this assessment had not completely "lapsed" because it could still be used in regard to tax offsets, and the government agreed.)

Exhibit 19 is therefore consistent with the Complaint in stating that the balance of Defendant's penalty is $1,549,849.

Defendant also relies on *Sumner Peck Ranch v. Bur. Of Reclamation*, for the proposition that the Court may disregard statements in the Complaint when contradicted by facts established by exhibits attached to the Complaint. 823 F. Supp. 715, 720 (E.D. Cal. 1993). But *Sumner Peck Ranch* also advises that "unreasonable inferences or unwarranted deductions of fact" need not be accepted and "the court must assume the truthfulness of the material facts alleged in the complaint ... and must be construed in favor of the responding party." *Id.* Here, there is no contradiction between the Complaint and Exhibits 18 and 19. And as noted above, to the extent there is any ambiguity, which there is not, the Court must resolve such ambiguity in the Government's favor.

There is also no contradiction between the Complaint and the substituted Exhibit 17, as it appears that the Government filed the errata in good faith to remedy an inadvertent filing error. Defendant is also not objecting to the errata itself, but rather challenges the impropriety of being imposed multiple penalties by the IRS. Accordingly, the Court concludes, as other courts frequently do, that the errata adequately corrects the filing error. *See, e.g.*, *Harman v. Target Corp.*, No. 12-cv-7398-MWF, 2012 WL 12892305, at *2 (C.D. Cal. Oct. 29, 2012) ("[T]he Court accepts that Target's Notice of Errata was filed in good faith ..."); *Chowning v. Kohl's Dept. Stores, Inc.*, No. 15-cv-8673-RGK, 2016 WL 1072129, at *4 (C.D. Cal. Mar. 15, 2016) ("After a careful consideration of the circumstances, the Court accepts Plaintiff's deposition errata ... all of which are supported by ample clarification.").

Finally, Defendant argues that the Government's contention that there were two penalties contradicts IRS policies and guidelines. (Reply at 10–11). Defendant points to the following statement issued in the IRS's Internal Revenue Manual ("IRM"):

> If an account is co-owned by more than one person, a penalty determination must be made separately for each co-owner. The penalty against each co-owner will be based on his [or] her percentage of ownership of the highest balance in the account.

(Reply at 10). Defendant notes that this guidance, coupled with the fact that she owns only 50% of the interest in the Leumi Bank account, suggest that the IRS had imposed penalties that exceeded the statutory ceiling as set forth in § 5321(a)(5)(C)(i). (*Id.* at 11). But this argument is incorrect, because as explained by the IRS, the "statutory penalty computation provides a ceiling on the FBAR penalty" whereas the "actual amount of the penalty is left to the discretion of the examiner." *See* IRM 4.26.16.6.6, available at https://www.irs.gov/irm/part4/irm_04-026-016.

***7** In other words, section 5321(a)(5)(C)(i) sets forth the statutory ceiling for penalties against Defendant based on the balance of an unreported account (or $6,199,395) while the IRM advises examiners to consider co-ownership of an unreported account (or $3,099,698 for Defendant) when assessing penalties. But examiners may still choose to assess as penalties the statutory ceiling. The IRM guidance reflects an examiner's wide latitude in assessing penalties:

> When a penalty is appropriate, IRS penalty mitigation guidelines aid the examiner in applying penalties in a uniform manner. The examiner may determine that a penalty under these guidelines is not appropriate or that a lesser penalty amount than the guidelines would otherwise provide is appropriate or that the penalty should be increased (***up to the statutory maximum***).

See IRM 4.26.16.6.7, available at https://www.irs.gov/irm/part4/irm_04-026-016 (emphasis added).

Defendant also cites the Program to note that "[t]axpayers were encouraged to enter [the Program] because it would help the taxpayer avoid substantial civil penalties and provide the opportunity to calculate, with a reasonable degree of certainty, the total cost of resolving all offshore tax issues." (Reply at 10 (internal quotation marks omitted)). This reference is somewhat puzzling, considering that after entering the Program, Defendant requested to withdraw from it, which the IRS approved. (Compl. ¶ 53). Defendant therefore cannot rely on the stated benefits of the Program.

Accordingly, the Court is not persuaded by Defendant's argument that accepting the Government's contention that there were two assessments of penalties would be an improper doubling of Defendant's liabilities.

B. Redundant Recording

Defendant next argues that to accept the Government's contention as true would, alternatively, mean that the IRS improperly assessed the same FBAR penalty twice through a redundant recording. (Reply at 15). She continues to contend that she is subject to a penalty of only $1,549,849, which the IRS correctly assessed on May 22, 2014. (*Id.* at 16). Because an "assessment" is essentially a bookkeeping notation used to record the liability of a taxpayer, the second "assessment" on March 5, 2015, is a legal nullity with no significance. (*Id.* at 16–17). In other words, Defendant argues that "there were somehow two valid assessments for [her] one liability" of $1,549,849 (*Id.* at 15). If the IRS were allowed to "assess" a penalty multiple times, then it would effectively rewrite § 5321(b)(2)(A) – which currently permits the Government to bring a civil action to recover an FBAR penalty at any time before the end of the two-year period beginning on the date the penalty was assessed – to be two years from the time the six-year penalty assessment period expires. (*Id.* at 17).

The Court, without needing to address Defendant's statutory reinterpretation argument, finds unpersuasive Defendant's reasoning. As discussed above, Defendant is liable for a maximum penalty of $3,099,698, not $1,549,849. There are two valid assessments by the IRS: one on May 22, 2014, and another on March 5, 2015, both for $1,549,849. The Government's Complaint, filed on March 1, 2017, seeks to reduce to judgment only the latter assessment, to which it is entitled. The Court is hard-pressed to conclude that there were two assessments for the same penalty or a redundant recording.

Defendant appears to argue, though not explicitly, the impropriety of having multiple assessments by the IRS for a single FBAR violation. (Reply at 16). But the IRM guidance explicitly permits an examiner to assess multiple penalties for the same FBAR violation:

> ***8** Given the magnitude of the maximum penalties permitted for each violation, ***the assertion of multiple penalties*** and the assertion of separate penalties for multiple violations ***with respect to a single FBAR***, should be carefully considered and calculated to ensure the amount of the penalty is commensurate to the harm caused by the FBAR violation

See IRM 4.26.16.6.7, available at https://www.irs.gov/irm/part4/irm_04-026-016 (emphasis added); *see also Moore v. United States*, No. 13-cv-2063-RAJ, 2015 WL 1510007, at *8 (W.D. Wash. Apr. 1, 2015) ("[N]o codified procedures bind the IRS when it assesses FBAR penalties.... [and the IRS] has considerable latitude to fashion their own procedures.").

Accordingly, the Court is not persuaded by Defendant's argument that accepting the Government's contention that there were two penalty assessments would amount to an acceptance that the IRS improperly assessed the same FBAR penalty twice through a redundant recording.

C. APA Violations

Defendant finally argues, for the first time in her Reply, that the IRS's assessment of two FBAR penalties "is the hallmark of a government action that is arbitrary, capricious, and an abuse of discretion," and is unlawful under the APA. (*Id.* at 12–13, 18). Defendant did not assert this argument in her Motion and, of course, the Court will not consider an argument raised for the first time in the Reply. *See, e.g.*, *Turtle Island Restoration Network v. U.S. Dept. of Commerce*, 672 F.3d 1160, 1166 n. 8 (9th Cir. 2012) ("[A]rguments raised for the first time in a reply brief are waived.") (internal quotation marks and citations omitted); *Nathanson v. Polycom, Inc.*, No. 13-cv-3476-SC, 2015 WL 12964727, at *1 (N.D. Cal. Apr. 15, 2015) ("As numerous courts

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(including the Ninth Circuit) have concluded, it is inappropriate to consider arguments raised for the first time in a reply brief.") (internal quotation marks, citations, and alterations omitted).

Accordingly, the Motion is **DENIED**.

IT IS SO ORDERED.

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