ORAL ARGUMENT NOT YET SCHEDULED

Case No. 22–7072

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARTIN DOHERTY,

Appellant,

v.

TURNER BROADCASTING SYSTEM, INC.,

Appellee

On Appeal from the United States District Court for the District of Columbia No. 1:20-cv-0134 (Hon. Trevor N. McFadden)

BRIEF FOR DEFENDANT–APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. Parties And *Amici.*

Appellant. Martin Dougherty[1] ("Appellant" or "Mr. Dougherty"), was the sole plaintiff before the District Court (Case No. 1:20–cv–0134–TNM), and is the sole appellant.

Appellees. Turner Broadcasting System, Inc. ("Turner") was the only defendant before the District Court (Case No. 1:20–cv–0134–TNM), and is the only appellee.

Intervenors/Amici. There were no intervenors or *amici* in the District Court proceedings. Georgetown University Law Center Appellate Litigation Program ("Amicus") is appointed *amicus curiae* for Appellant in this appeal.

II. Rulings Under Review.

The only ruling on appeal is Judge Trevor McFadden's April 15, 2022, Opinion and Order granting Turner's Motion for Summary Judgment, denying Mr. Dougherty's Motion for Summary Judgment, and denying Mr. Dougherty's Motion to Strike. *See* Dkt. 59; *Doherty v. Turner Broadcasting System, Inc.*, No. 1:20–cv–0134–TNM, 2022 WL 1125564 (D.D.C. June 3, 2021) (JA774-JA783).[2]

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[1] In prior actions, and as an employee of Turner, Appellant spelled his last name "Dougherty." *See, e.g.,* First Am. Compl. at 1, *Dougherty v. Cable News Network*, No. 17-cv-00769-RC (D.D.C. filed July 7, 2017).

[2] Mr. Dougherty raises supplemental issues in his initial brief. (Appellant Br. at 8). As discussed herein, those issues are not ripe for appeal.

III. Related Cases.

This case has not previously been before this Court. There are no related cases in the United States District Court for the District of Columbia.

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GLOSSARY

District of Columbia Office of Workers' Compensation....."DC OWC"

District of Columbia Workers' Compensation Act....."DC WCA"

Internal Revenue Service....."IRS"

Internal Revenue Code....."I.R.C."

Long-Term Disability....."LTD"

Short-Term Disability....."STD"

JURISDICTIONAL STATEMENT

Mr. Dougherty filed his lawsuit in the United States District Court for the District of Columbia under 28 U.S.C. § 1331 on the theory that Turner willfully filed fraudulent information returns with the Internal Revenue Service in violation of 26 U.S.C. § 7434(a) (I.R.C. § 7434(a)).[3]

Mr. Dougherty filed a timely notice of appeal on May 10, 2022. (JA785). This Court has jurisdiction to resolve Mr. Dougherty's appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the District Court correctly conclude that there was no genuine issue of material fact that Mr. Dougherty's W-2s were not fraudulent pursuant to I.R.C. § 7434(a)?

[3] Turner cites to sections of Chapter 26 of the United States Code as "I.R.C. § ___" throughout this brief.

2. Did the District Court correctly conclude that there is no genuine issue of material fact that Turner did not act willfully, in violation of I.R.C. § 7434(a), when it included Mr. Dougherty's disability payments as taxable income on his W-2s?

INTRODUCTION

This case centers on two key issues: (1) whether the Form W-2s filed by Turner fraudulently misrepresented Mr. Dougherty's taxable income; and if so, (2) whether Turner willfully filed the fraudulent returns with the IRS. The answer is simple: the record does not contain any evidence that the W-2s were inaccurate, let alone fraudulent, and the District Court correctly determined that no reasonable jury could find that Turner willfully filed fraudulent W-2s for Mr. Dougherty in 2014, 2015, and 2016. Despite these two clear issues, Mr. Dougherty and Amicus have attempted to obfuscate the critical issues and instead construe this as a case about the requirements and parameters of the DC WCA; however, this is not a case requiring analysis under the DC WCA. Whether STD payments received by Mr. Dougherty should have been treated as non-taxable income is an irrelevant inquiry that cannot, and does not, establish fraud or willfulness.

Mr. Dougherty's sole claim alleges that Turner violated I.R.C. § 7434(a) by incorrectly stating his taxable income on W-2s filed with the IRS in 2014, 2015, and 2016. To succeed on the claim, Mr. Dougherty must prove by clear and convincing evidence that: (1) the W-2s were fraudulent; and (2) Turner willfully filed the fraudulent returns with the IRS. I.R.C. § 7434(a).

After the parties engaged in extended discovery and fully briefed cross-motions for summary judgment, the District Court found that no reasonable jury

could conclude either: (1) that the W-2s were fraudulent, or (2) that Turner willfully filed fraudulent returns. Accordingly, this case presents two issues for this Court: whether a reasonable jury could find that (a) Mr. Dougherty's 2014, 2015, and 2016 Form W-2s were fraudulent, and (b) Turner willfully filed fraudulent W-2s with the IRS. The answer to both questions is a resounding "no" – there is simply no genuine factual dispute that Mr. Dougherty's W-2s were accurate, that Turner had no knowledge of any supposed misrepresentation on the W-2s or intent to deceive the IRS, and that Turner did not willfully submit fraudulent W-2s to the IRS.

Appointed Amicus has presented additional arguments on behalf of Mr. Dougherty, who adopted Amicus' brief by reference. But Amicus' brief only analyzes the DC WCA – which is not relevant to the limited questions before the Court. Indeed, Amicus' brief does nothing but repeat the same scant, irrelevant arguments which in no way show that Mr. Dougherty's 2014, 2015, and 2016 W-2s were fraudulent, or that Turner willfully filed fraudulent returns. The fact is that Mr. Dougherty has not, and cannot, overcome the immense evidentiary burden of his claim, and Amicus has presented no compelling argument in his favor.

In this case, the District Court correctly found that Mr. Dougherty's claim fails because no reasonable jury could find that the relevant W-2s were fraudulent, or that Turner willfully filed fraudulent returns in violation of I.R.C. § 7434(a). As

the District Court found, there is no genuine dispute of fact that the W-2s at issue were not fraudulent, as Mr. Dougherty admitted that the W-2s accurately reflect compensation Turner paid him in 2014, 2015, and 2016, and there is simply no evidence of Turner's knowledge of any alleged fraud or an intent to deceive. (*See* JA778-JA780). Further, the District Court correctly found that there is no genuine dispute of fact that Turner did not willfully file fraudulent returns, as there is no evidence that Turner knew the W-2s were supposedly incorrect. (*See* JA780-JA782).

As explained in the following, the District Court's decision should be affirmed.

STATEMENT OF THE CASE

I. The Turner Disability Benefit Plan and Workers' Compensation.

Similar to many employers, Turner offers disability benefit plans to its employees. This case centers on Mr. Dougherty's unfounded belief that Turner improperly withheld payroll taxes from payments he received under Turner's STD Plan.

The STD Plan provides wage replacement to any employee absent from work for more than seven consecutive calendar days for medical needs. (JA383). The benefits are:

- Weeks 1-10: 100% pay
- Weeks 11-16: 80% pay
- Weeks 17-26: 60% pay

Under the terms of the STD Plan, the individual remains an active employee and Turner pays benefits directly from company payroll. (JA384; JA388). As with all active employees, Turner withholds payroll taxes along with contributions for benefit plans. (JA374 at ¶8).

In compliance with state laws, Turner also provides workers' compensation to Turner employees who are injured at work. Turner fulfills its workers' compensation obligation, in part, through the STD Plan for the first twenty-six weeks after the injury. Notably, however, the STD payments are not contingent on the employee receiving a workers' compensation determination. (JA388). Pursuant to Turner's policy, "[i]f state law requires pay at a higher rate," "the Company's Workers' Compensation insurer will pay the difference to bring your income up to the state-mandated amount." *Id.* Benefits paid to employees above that which they are entitled to under the applicable state workers' compensation statute is taxed. (JA374 at ¶ 8). After twenty-six weeks, employees eligible for continued workers' compensation are paid LTD benefits by Turner's workers' compensation insurer. *Id.* The benefits under the STD Plan are generally more generous than the workers' compensation entitlement under the DC WCA.

II. Mr. Dougherty's Injuries and Benefit Payments.

Turner employed Mr. Dougherty from 2003 until 2019. (JA347; JA374). From 2013 until 2019, Mr. Dougherty worked at Turner as a photojournalist. (JA775). As an employee, Mr. Dougherty was aware of, and utilized on many occasions, Turner's STD Plan. (JA671, lines 4-6). Mr. Dougherty testified that no Turner employee told him that Turner's STD Plan did not comply with any applicable workers' compensation statutes. (JA692 at lines 1-22).

A. 2014 Payments

On December 30, 2012, Mr. Dougherty was injured while working and was forced to miss work during 2014 and 2015. (JA467). Pursuant to Turner's policies, Mr. Dougherty received disability compensation through Turner's STD plan. (JA 383-384; JA388). For part of 2014, Mr. Dougherty remained on Turner's payroll and received the compensation via paychecks from Turner. (JA668, lines 13-21; JA670 lines 14-19; JA671 lines 4-8; JA677 lines 5-17). As with all employees, Turner withheld taxes and benefit contributions from the paychecks issued to Mr. Dougherty pursuant to the STD Plan. (JA374 at ¶ 8).

After Mr. Dougherty exhausted his STD benefits, he began to receive compensation from ESIS, Turner's third-party workers' compensation insurer, pursuant to Turner's LTD Plan. (JA375 at ¶ 16). Today, he continues to receive payments for his 2012 injury. (*Id.*).

Sometime after Mr. Dougherty's STD benefits were exhausted, and after he began receiving payments from Turner's workers' compensation insurer, Mr. Dougherty received an order from the DC OWC determining that he was eligible for payments pursuant to the DC WCA. (JA468).

B. 2015 Payments

In 2015, Mr. Dougherty missed work again due to surgical intervention, apparently related to his 2012 injury. (JA670 at line 9 through JA 671 at line 8). Again, he received payments from Turner under its STD Plan. (*Id.*) These payments were also taxed in accordance with the STD Plan. (*Id.*).

C. 2016 Payments

At the end of 2015, Mr. Dougherty suffered another injury that caused him to miss work for part of 2016. (JA677). Again, Mr. Dougherty received compensation directly from Turner through the company's STD Plan. *Id.* Pursuant to the STD Plan, Mr. Dougherty was paid through the STD Plan for the first twenty-six weeks following his injury. By July 4, 2016, Mr. Dougherty had exhausted the STD benefits and began receiving payments through Turner's LTD Plan, which were paid by Turner's workers' compensation insurer. (JA375 at ¶ 15). Mr. Dougherty admits the LTD Plan payments were not taxed. (JA432 at n.16).

Sometime after Mr. Dougherty exhausted his STD benefits, the DC OWC issued an order finding that he was eligible for compensation for his late 2015 injury. (JA467).

III. Mr. Dougherty's W-2s.

As required by law, Turner reported the income it paid to Mr. Dougherty each year on IRS Form W-2s. (JA047; JA375 at ¶ 11). Mr. Dougherty testified that his W-2 for 2014 accurately reflects the compensation that Turner paid him. (JA707 lines 7-14). Mr. Dougherty also testified that his 2015 W-2 reflects the compensation that Turner paid him. (JA708 lines 3-7). Finally, Mr. Dougherty testified that his 2016 W-2 reflects the compensation Turner paid him that year. (JA710 lines 3-7).

Mr. Dougherty contested his 2015 W-2 with the IRS, alleging that amounts included on his 2015 W-2 were improperly taxed. (JA699 lines 5-16). The IRS confirmed that the amount taxed on the 2015 W-2 was correct. (JA048; JA470). Other than his 2015 W-2, Mr. Dougherty has not contested any other W-2 with the IRS. (JA699 at lines 5-8; JA701 at lines 5-8).

Despite these findings by the IRS, and Mr. Dougherty's own admissions that the income was accurate, Mr. Dougherty believes that Turner willfully filed fraudulent W-2s with the IRS in 2014, 2015, and 2016, although he testified that he

is unaware of any Turner employee who allegedly did so. (JA 694 at line 12 – JA695 at line 10; JA710 at lines 13-18; JA713 at line 16 through JA715 line 2).

PROCEDURAL HISTORY

I. Initiation Of This Case.

On July 19, 2016, Mr. Dougherty filed suit against Turner in the Superior Court for the District of Columbia alleging Turner "denied plaintiff statutory compensation [workers' comp.]" by treating "non-taxable statutory compensation as gross taxable wages." *See* Case No. 2016-CA-005213B. Judge Michael Rankin dismissed the case on August 30, 2017.

Following that dismissal, Mr. Dougherty initiated the instant case on December 18, 2020 in the Superior Court for the District of Columbia (JA019), and it was subsequently removed to the United States District Court for the District of Columbia (JA010).

II. Plaintiff's Sole Cause Of Action.

Mr. Dougherty's complaint initially raised claims that Turner discriminated and retaliated against him in violation of the DC WCA and the D.C. Human Rights Act, and that Turner willfully filed fraudulent returns in violation of I.R.C. § 7434(a). The District Court dismissed Mr. Dougherty's discrimination and retaliation claims. (JA239-JA254).

The sole remaining claim alleges that Turner violated I.R.C. § 7434(a) by submitting Mr. Dougherty's 2014, 2015, and 2016 W-2s to the IRS. (*See* JA047-

49; JA239-54). Mr. Dougherty argues that the disability payments he received from Turner for weeks 1 through 26 after his injury should have been non-taxable income under the DC WCA and as such, Turner fraudulently withheld payroll taxes and willfully submitted fraudulent W-2s to the IRS in 2014, 2015, and 2016.

III. Discovery In The District Court.

The parties engaged in extensive discovery related to the sole remaining cause of action brought under I.R.C. § 7434. Turner took Mr. Dougherty's deposition. (Reproduced in full at JA655-JA773). In turn, Mr. Dougherty took a deposition of Turner's in-house counsel, Faye Barbour, and served multiple discovery requests, to which Turner responded.

IV. Motion for Summary Judgment and Appeal.

The parties filed cross-motions for summary judgment. On April 15, 2022, Judge McFadden granted Turner's motion and denied Mr. Dougherty's motion.[4] In his memorandum opinion, Judge McFadden held in favor of Turner on the grounds that no reasonable jury would find that: (1) the 2014, 2015, and 2016 W-2s were fraudulent; and (2) that Turner willfully filed fraudulent W-2s. (JA774-83).

Mr. Dougherty timely filed a notice of appeal to this Court on May 10, 2022. (JA785).

[4] Mr. Dougherty also filed a motion to strike (JA548), which Judge McFadden denied in the same memorandum opinion addressing the cross-motions for summary judgment. (JA782-JA783).

STANDARD OF REVIEW

I. Appellate Standard.

The Court reviews *de novo* a District Court's grant or denial of summary judgment. *Hurd v. District of Columbia*, 997 F.3d 332, 337 (D.C. Cir. 2021). The Court will "view the evidence in the light most favorable to the party opposing summary judgment, draw all reasonable inferences in that party's favor, and avoid weighing the evidence or making credibility determinations." *Thompson v. District of Columbia*, 832 F.3d 339, 344 (D.C. Cir. 2016).

Summary judgment is appropriate where the record shows that "there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *Id.*; *see also Ocasio v. U.S. Dep't of Just.*, 219 F.Supp.3d 191, 194 (D.D.C. 2016). "There is a genuine issue of material fact 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Thompson v. District of Columbia*, 967 F.3d 804, 813 (D.C. Cir. 2020).

II. Standard For Claims Brought Under I.R.C. § 7434.

I.R.C. § 7434(a) provides a civil remedy against any person who "willfully files a fraudulent information return with respect to payments purported to be made to any other person."

To succeed on a claim under I.R.C. §7434(a), Mr. Dougherty must prove that: "(1) the defendant[] issued an information return;[5] (2) the information return was fraudulent; and (3) the defendant[] willfully issued a fraudulent information return." *Dean v. 1715 Northside Drive, Inc.*, 224 F.Supp.3d 1302, 1310 (N.D. Ga. 2016) (citing *Leon v. Tapas & Tintos, Inc.*, 51 F.Supp.3d 1290, 1297 (S.D. Fla. 2014)).

Tax fraud under I.R.C. § 7434 must be proven by clear and convincing evidence. *Pitcher v. Waldman*, 2014 WL 1302551, at *6 (S.D. Ohio Mar. 28, 2014) (citing *Smith v. Comm'r*, 926 F.2d 1470, 1475 (6th Cir. 1991)); *see also Chedick v. Nash*, 151 F.3d 1077, 1082 (D.C. Cir. 1998) (affirming jury instructions requiring a finding of fraud by "clear and convincing evidence").

SUMMARY OF THE ARGUMENT

This is not a case which requires an interpretation of the DC WCA. The clear and limited issues before the Court are whether Mr. Dougherty's W-2s were fraudulent, and whether Turner willfully filed them with the IRS. Amicus expends great effort analyzing whether Mr. Dougherty's STD payments were non-taxable under the DC WCA, but this is an irrelevant point. Even if the payments were non-taxable, there is nothing in the record to prove that Turner had knowledge that the W-2s were false, that it intended to deceive the IRS, or that it willfully filed

[5] The Parties do not dispute that Mr. Dougherty's 2014, 2015, and 2016 W-2s were "information returns."

fraudulent returns. No reasonable jury would find in Mr. Dougherty's favor based on that alone.

The District Court's decision on summary judgment should be affirmed because there is no evidence in the record, which was developed after extensive discovery, that could create a genuine issue of material fact that could show that Mr. Dougherty's W-2s were fraudulent, or that Turner willfully filed fraudulent returns with the IRS.

First, the District Court correctly concluded that there is no dispute that Mr. Dougherty's W-2s were not fraudulent. Importantly, Mr. Dougherty cannot show that the W-2s were fraudulent because there is no evidence to show that the W-2s contain any false misrepresentations. In fact, Mr. Dougherty admits that the W-2s accurately reflect the payments he received from Turner in 2014, 2015, and 2016. In an effort to show Turner's knowledge of falsity or intent to deceive, Amicus for Mr. Dougherty separately extrapolates from two workers' compensation determinations from the DC OWC, emails between Mr. Dougherty and Turner, and Turner's policy to comply with workers' compensation laws, but these do not establish the necessary elements of fraud. Rather, the record shows that Mr. Dougherty's W-2s were based on Turner's reasonable interpretation of the law. And, thus, the District Court's decision should be affirmed.

Second, the District Court correctly found that no reasonable jury could find that Turner willfully filed fraudulent W-2s in 2014, 2015, and 2016. On this point, Amicus asserts that the District Court applied the wrong standard to determine Turner's "willfulness," arguing that it requires mere recklessness. This is incorrect. Based on the plain language of I.R.C. §7434(a) as well as a growing consensus in other jurisdictions, the applicable standard is, and should be, "willfulness". Yet, even under a recklessness standard, there is no genuine dispute that Turner did not act recklessly. As such, the District Court should be affirmed on this point.

Mr. Dougherty adopted Amicus' arguments by reference and focused his initial brief on supplemental issues such as alleged constitutional violations. But, as discussed herein, these issues were not preserved for appeal. Even if they were, they lack merit and should be rejected by this Court.

As there is no genuine issue of material fact that Mr. Dougherty's W-2s were not fraudulent, and that Turner did not willfully file fraudulent returns, summary judgment in Turner's favor was correct, and the District Court's decision should be affirmed.

ARGUMENT

I. The District Court Correctly Concluded That There is No Genuine Dispute Of Material Fact That Mr. Dougherty's W-2s Were Not Fraudulent.

A. It Is Undisputed That Mr. Dougherty's W-2s Did Not Contain Any False Representation Because The W-2s Accurately Reflect The Income He Received From Turner.

Mr. Dougherty has brought a claim under I.R.C. § 7434(a) alleging that Turner filed fraudulent W-2s on his behalf in 2014, 2015, and 2016. To prove that the W-2s were fraudulent, Mr. Dougherty must prove, by clear and convincing evidence, that Turner made a false representation. *Saucier v. Countrywide Home Loans,* 64 A.3d 428, 438 (D.C. 2013); *Chedick*, 151 F.3d at 1082; *Smith*, 926 F.2d at 1475. Although proceeding pro se, Mr. Dougherty understands that a false representation is a necessary element of fraud. (JA426 (reciting the elements of fraud)). Further, I.R.C. § 7434 "creates a private cause of action only where an information return is fraudulent with respect to the amount purportedly paid to the plaintiff." *Liverett v. Torres Adv. Enter. Sols., LLC*, 192 F. Supp. 3d 648, 653 (E.D. Va. 2016) (emphasis added); *see also Pacheco v. Chickpea at 14th Street, Inc.*, 2019 WL 2292641, at *2 (S.D.N.Y. May 30, 2019). In other words, there can be no "false representation" under I.R.C. § 7434 where the information returns do not misstate the income paid.

Here, there is no evidence that Turner falsely represented the income it paid Mr. Dougherty – the undisputed record shows the opposite. Indeed, Mr. Dougherty admits that the W-2s accurately show the income that he received from Turner. Mr. Dougherty testified that his 2014, 2015, and 2016 W-2s accurately reflect the income he received from Turner during those years. (JA707, lines 10-14 ("Q. Box one. Does that accurately reflect all compensation within – compensation replacement that you received in 2014 from Turner? A. Yes.") (emphasis added); JA708, lines 3-7 ("Q. And box one, does that accurately reflect all moneys paid to you by Turner in 2015? A. Well, I have to qualify that. That's the money that they paid me under their – under their scheme.") (emphasis added); JA710, lines 3-7 (Q. Did you receive $34,401.97 from Turner in the year 2016? A. I received that amount...") (emphasis added)). Mr. Dougherty indicated to the IRS that his 2015 W-2 was incorrect, and based on his compensation records, Turner and the IRS confirmed that the 2015 W-2 was correct. (JA470). However, Mr. Dougherty did not attempt to further appeal the determination with respect to his 2015 W-2 with the IRS, and never raised an issue with the IRS regarding his 2014 or 2016 W-2s.

Because Mr. Dougherty admits that the information returns accurately reflect the remuneration paid, and the IRS in fact verified as such with respect to 2015, there is no genuine dispute of fact that there were no false misrepresentations on the returns. As such, there can be no viable claim under I.R.C. § 7434. *See*

Ptasynski v. Shell Western E&P, Inc., 3:97-cv-1208-R, 1999 WL 423022 at *6 (N.D. Tex. June 16, 1999) *aff'd in part, rev'd in part as to other claims*, 99-11049, 2002 WL 32881277 (5th Cir. Feb. 13, 2002). Accordingly, for this reason alone, the District Court properly entered judgment for Turner on Mr. Dougherty's claim.[6]

B. No Reasonable Jury Could Find That Mr. Dougherty's W-2s Amounted To Fraud.

Even if Mr. Dougherty's returns were not accurate (they were), his claim still fails because no reasonable jury would find that his returns were fraudulent. In order to establish that his returns were fraudulent, Mr. Dougherty must prove intentional wrongdoing or intent to deceive, yet the record contains no such evidence. Amicus futilely attempts to connect the evidentiary gaps to establish fraud, but following Amicus' argument requires a massive speculative leap that is not supported, in any way, by the record evidence.

1. Evidence of Intent Is Necessary To Prove That A Filing Is "Fraudulent."

It is well-established that fraud, including tax fraud, requires a showing of intent. Under I.R.C. § 7434(a), "fraud requires 'intentional wrongdoing' and an 'intent to deceive.'" *Mould v. NJG Food Service, Inc.*, 37 F.Supp.3d 762, 776-77

[6] Paradoxically, Mr. Dougherty and Amicus contend that Turner should have omitted the income from his W-2s. (*See* Amicus Br. at 17-19; JA432). However, Turner was required by law to report his STD benefit payments as taxable income (26 U.S.C. § 104(3)), and it did.

(D. Md. 2014) (quoting *Vandenheede*, 541 F. App'x 577); *see also Crespo v. Midland Credit Mgmt, Inc.*, 689 F. App'x 944, 946 (11th Cir. 2017) (no evidence of "intentional wrongdoing" where tax form was filed late); *Zell v. C.I.R.*, 763 F.2d 1139, 1143-44 (10th Cir. 1985) (civil tax fraud "means 'actual, intentional wrongdoing, and the intent required is the specific purpose to evade a tax being owed.'") (quoting *Mitchell v. Comm'r*, 118 F.2d 308, 310 (5th Cir. 1941)); *Maciel v. Comm'r*, 489 F.3d 1018, 1026 (9th Cir. 2007); *Douge v. Comm'r*, 899 F.2d 164, 165 (2d Cir. 1990); *Granado v. Comm'r*, 792 F.2d 91, 93 (7th Cir. 1986). "Mere error" on an information return "is not enough to establish fraud" under I.R.C. § 7434. *Sigurdsson v. Dicarlantonio*, 6:12-cv-920-Orl-TBS, 2013 WL 12121866, at *10 (M.D. Fla. Dec. 11, 2013) (emphasis added) (holding that the plaintiff "must also prove fraudulent intent.").

Despite this long-standing authority, Amicus asserts that merely "misreporting" income on a W-2 amounts to "fraudulent misrepresentation." (Amicus Br. at 22). This is incorrect. "Misreporting" implies that mere negligence or error on a W-2 would amount to fraud. To the contrary, a "fraudulent" claim requires more: a showing of intent by the filing party. *Chedick*, 151 F.3d at 1081 (applying D.C. law); *see also Vandenheede v. Veccio*, 541 F. App'x 577, 580 (6th Cir. 2013) (requiring intent in the context of tax fraud).[7] Indeed, the primary case

[7] Mr. Dougherty acknowledged this in briefing before the District Court. (JA426).

Amicus cites to support their position, *Butler v. Enter. Integration Corp.*, 459 F. Supp. 3d 78, 106-07 (D.D.C. 2020), also provides as such. In *Butler,* which was notably decided at the motion to dismiss stage, the district court understood that the claim requires a showing of intent – first, the district court held that a claim under I.R.C. § 7434 must meet the heightened pleading standards for fraud; and second, it found that the complaint adequately alleged that defendant intentionally misrepresented plaintiffs as independent contractors on information filings.[8] *Id.* Thus, as *Butler* recognized, to be successful under I.R.C. § 7434, there must be an intent to engage in fraudulence.

In this case, the record is completely devoid of any evidence that Turner intended to deceive the IRS when it filed Mr. Dougherty's accurate W-2s. In fact, Mr. Dougherty himself admitted that he lacked evidence to prove that the W-2s were fraudulent. To this point, Mr. Dougherty testified that no Turner employee told him that the STD plan did not comply with workers' compensation laws. (JA692 at lines 1-22). Further, Mr. Dougherty cannot identify any specific fraudulent act by a Turner employee in completing or filing his W-2s. (JA699 at lines 2-10 ("I can't answer that question yet."); JA710 at lines 13-18 ("I can't

[8] Notably, *Butler* appears to be the only opinion from a court in this Circuit analyzing a claim brought under I.R.C. § 7434 (other than in the instant case).

answer that question as to Turner's fraudulent doings."); JA713 at lines 20-21 ("I can't answer that in detail.").[9]

Moreover, as previously noted, Mr. Dougherty has admitted that the income Turner reported to the IRS on his W-2's in 2014, 2015, and 2016 was accurate. (JA707 lines 7-14; JA708 lines 3-7; JA710 lines 3-7). Thus, Mr. Dougherty has effectively admitted (again) that Turner had no intent to defraud the IRS. But, even if the income reported on Mr. Dougherty's W-2s is incorrect (it is not), "mere error … is not enough to establish fraud" under I.R.C. § 7434. *Sigurdsson*, 2013 WL 12121866, at *10. Again, it is not a violation of I.R.C. § 7434 unless there is "intentional wrongdoing" or "intent to deceive." *Mould*, 37 F.Supp.3d at 777 (granting summary judgment where W-2 may have been erroneous because there was no evidence of intentional wrongdoing or intent to deceive).

Accordingly, there is no evidence of fraud in the record, let alone sufficient evidence for a reasonable jury to find that there is clear and convincing evidence of "intentional wrongdoing" or "intent to deceive" by Turner.

2. The Record Contains No Evidence That Turner Intended To Falsify Dougherty's W-2s.

Neither Mr. Dougherty nor Amicus can cite to *any* evidence whatsoever of Turner's intent to falsify his W-2s. In an effort to do so, Amicus cites to three types

[9] Though Mr. Dougherty testified before the end of discovery, there was no evidence produced between his deposition and the close of discovery that would show fraud committed by Turner.

of evidence that they believe establishes Turner's intent: (1) Mr. Dougherty's workers' compensation determinations (Amicus Br. at 23-24); (2) Turner's policies to comply with workers' compensation laws (Amicus Br. at 24-29); and (3) an email sent to Mr. Dougherty by a Turner employee (*Id.*). However, as discussed herein, none of these – individually or collectively, is evidence of fraud. Nor is it enough because Amicus' purported "evidence", or lack thereof, does not save the fact that Amicus fails to address the elements required to show fraud, i.e. knowledge of falsity and an intent to deceive. *Chedick*, 151 F.3d at 1081 (among other elements, fraudulent misrepresentation requires "knowledge of its falsity...with the intent to deceive.").

Importantly, there is no evidence that Turner had knowledge that Mr. Dougherty's W-2s were supposedly false, or intended to deceive the I.R.S., and there is no evidence that anyone at Turner who completed and filed his W-2s knew that Mr. Dougherty received a workers' compensation determination or knew that his income should have been treated in any different manner. (JA699 at lines 2-10). Even if Mr. Dougherty's STD payments should have been non-taxable, the mere misclassification of taxable income on his W-2s would require an immense, speculative evidentiary leap that no reasonable jury would make.

Thus, it is clear that Mr. Dougherty and Amicus rest their arguments on mere conjecture – but, this is not enough to satisfy the substantial evidentiary

requirements for proving fraud, let alone amount to any evidence of intent to falsify the income reported on his W-2s. As there is no evidence of fraudulent intent, the District Court appropriately granted summary judgment in favor of Turner on Mr. Dougherty's claim.

a. No Reasonable Jury Would Find That Turner Had Knowledge That Mr. Dougherty's W-2s Were False.

Based on the evidence presented to the District Court, no reasonable jury would (or could) find that Turner had knowledge that the income reported on Mr. Dougherty's W-2s was false. Indeed, the only evidence identified by Mr. Dougherty and his Amicus – the workers' compensation determinations, Turner's policies, and the email from a Turner employee – cannot reasonably establish that Turner had any knowledge whatsoever that the W-2s falsely reported his income.

(1) Mr. Dougherty's Workers' Compensation Determinations Do Not Establish Knowledge Of Falsity.

Amicus and Mr. Dougherty make much of the fact that Mr. Dougherty received workers' compensation determinations, which they believe are somehow sufficient evidence that Mr. Dougherty's STD benefit payments should have been post-hoc classified as non-taxable income under the DC WCA. Notably though, Amicus for Mr. Dougherty does not argue that Turner had knowledge that the W-2s were fraudulent because of these determinations. (*See* Amicus Br. 23-24). This was for good reason – the determinations make no mention of the taxability of

the compensation Mr. Dougherty received pursuant to the STD Plan, or whether the compensation should (or should not) be included on his W-2s. Further, the determinations were made after Mr. Dougherty had received the STD benefit payments that were treated as taxable income by payroll. There is no evidence that the employees at Turner responsible for compiling and submitting Mr. Dougherty's W-2s knew about the workers' compensation determinations or about the taxability of workers' compensation in general. Thus, there is no evidence that the Turner employees responsible for his W-2s knew that the income on his W-2s were supposedly inaccurate.

(2) Turner's Policies Do Nothing To Establish Knowledge.

Amicus also cites Turner's policy to comply with workers' compensation laws and extensively examined the similarities of the STD benefits Mr. Dougherty received to workers' compensation under the DC WCA. (Amicus Br. at 24-26). These points are also red herrings – they do nothing to prove Turner's knowledge of falsity regarding the W-2s. Whether Mr. Dougherty's STD benefits should have been considered non-taxable under the DC WCA is irrelevant to the question of fraudulence of the W-2s. Even if the STD benefits should have been treated as non-taxable income, Turner's policies and administration of the STD Plan do not prove that Turner knew Mr. Dougherty's W-2s may have been false.

(3) The Turner Employee's Email to Mr. Dougherty Does Not Establish Knowledge.

Finally, Amicus cites to an email sent to Mr. Dougherty from a Turner Human Resources representative stating that his pay will be "coded as WC pay." Amicus Br. at 27 (citing JA501). But Amicus omitted the second half of the email, which stated, "[a]ll your normal deductions will be taken out of your check." (JA501). At best, this shows that representatives at Turner believed that Mr. Dougherty's income should be taxed, but it does not in any way establish that they had any awareness that his W-2s may have been incorrect.[10]

Indeed, the record shows that Turner held a reasonable belief that Mr. Dougherty's STD benefit payments were taxable income, as employer-paid disability compensation must be treated as taxable under I.R.C. § 104(3). Turner had done it this way for all employees, including Mr. Dougherty in 2008, without issue. (JA374 at ¶ 8; *see also* JA396 at ¶¶ 10-12). Mr. Dougherty and Amicus can cite to no authority expressly stating that STD benefit payments for workplace injuries must be treated as non-taxable income. As the evidence supports a finding that Turner had a reasonable belief that Mr. Dougherty's W-2s were accurate, no reasonable jury would find that Turner had knowledge of their falsity, and as such, cannot succeed on a claim under I.R.C. § 7434.

[10] Stating that the payments would be "coded" as workers' compensation, but deductions would still be made is contradictory and indicates that the individual who sent the email did not understand the taxability of workers' compensation.

Other than Mr. Dougherty's own subjective opinion, there is no evidence that Turner's STD plan, and treating STD compensation as taxable income, runs contrary to the DC WCA, which expressly permits advance payments of workers' compensation. The DC WCA and the I.R.C. are silent as to the tax treatment of advance payments of workers' compensation. Accordingly, there is no factual or legal basis to conclude that Turner knew, or even should have known, that the W-2s were false. Thus, no reasonable jury would find that Turner had knowledge, and Mr. Dougherty's claim therefore fails.

b. No Reasonable Jury Would Find That Turner Had Intent To Deceive.

Regardless of whether Turner had knowledge that the STD benefit payments Mr. Dougherty received were non-taxable workers' compensation, Mr. Dougherty's claim still fails under Amicus' arguments because there is no evidence of intent. Knowledge and intent are separate elements required to establish fraudulent misrepresentation. *See Chedick*, 151 F.3d at 1081 (fraudulent misrepresentation requires "knowledge of its falsity...with the intent to deceive."). Amicus proffers no argument or evidence that go to Turner's intent. Indeed, as discussed *supra*, Section I.B.1, there is no evidence in the record that Turner, or anyone employed by Turner, intended to misrepresent Mr. Dougherty's income on his W-2s.

Again, Mr. Dougherty's Amicus only points to Turner's policies and his workers' compensation determinations (Amicus Br. at 22-29), but, that does not show intent. Indeed – neither Mr. Dougherty, nor his Amicus, can cite to any evidence in the record that Turner intended to deceive the IRS by filing W-2s with incorrect amounts of taxable income paid to him. Even if the W-2s were incorrect, Turner's actions did not rise above mere error, which "is not enough to establish fraud" under Section 7434. *Sigurdsson*, 2013 WL 12121866, at *10 (listing cases). In short, a reasonable jury could not equate knowledge and intent to find that the workers' compensation determinations and Turner's policies regarding workers' compensation amount to intent to deceive. Accordingly, there is no dispute of material fact that Mr. Dougherty's W-2s were not fraudulent, and judgment was properly entered in favor of Turner on this ground by the District Court.

3. Whether Mr. Dougherty's STD Payments Were Workers' Compensation Under The DC WCA Is Irrelevant To The Issues Before This Court.

Amicus expends significant effort examining whether the payments Mr. Dougherty received from Turner for his disability were more properly classified as workers' compensation under the DC WCA. This is an irrelevant analysis that distracts from the only essential questions before the court – whether the W-2s were fraudulent, and if so, whether Turner willfully filed them in violation of I.R.C. § 7434. The record shows that Turner relied on a reasonable belief that Mr.

Dougherty's STD payments were taxable under the I.R.C. – precluding any evidence that Turner acted with knowledge of falsity or intent to deceive, as required to establish fraud.

Mr. Dougherty does not dispute that this compensation was paid directly by Turner under its STD Plan before the workers' compensation determinations were made. (*See* JA433). It is well-settled that employer-paid STD benefits are taxable income. 26 U.S.C. § 104(3) (excluding income from accident or health insurance except "amounts received by an employee, to the extent such amounts (A) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (B) are paid by the employer."); *see also Hopp v. Aetna Life Ins. Co.*, 2 F.Supp.3d 1335, 1342 (M.D. Fla. 2014) (quoting benefit plan that states "Employer-paid STD benefits are considered taxable income"); *Rooney v. Sprague Energy Corp.*, No. CV-06-20-B-W, 2008 WL 2568157, at *1 (D. Maine June 24, 2008) (noting that the parties agreed that disability payments "were taxable income."). Accordingly, even if Mr. Dougherty's payments were more properly classified as workers' compensation under the DC WCA, Turner's payroll department completed his W-2s based on its reasonable belief that his STD payments were taxable under the law.[11] The record does not show that Turner

[11] Though it has not been considered in the context of the DC WCA, it is worth noting that it is not uncommon for employers to remit taxable STD payments after a workplace injury. Whether such payments should be taxed is an issue between

completed the W-2s with knowledge that the payments should not be included in his taxable income, or intent to deceive the IRS. As such, Mr. Dougherty's claim still fails because there is no evidence of fraud.

II. The District Court Correctly Concluded That Turner Did Not Act Willfully.

The District Court reinforced its grant of summary judgment in favor of Turner on Mr. Dougherty's claim by finding that, in addition to a lack of any evidence of fraud, there was, and continues to be, no evidence that Turner "willfully" filed fraudulent W-2s because there is no evidence that Turner "filed the W-2s with knowledge that the STD program violated the WCA." (JA781 (Mem. Op. at 8)). Amicus for Mr. Dougherty argues that the Court applied the improper standard – that the record need only create a genuine dispute that Turner knew or had a reckless disregard of a "grave risk" that Mr. Dougherty's W-2s were false. (Amicus Br. at 38).

Contrary to Amicus' argument, the District Court applied the correct standard – as discussed below, the vast majority of courts require specific knowledge and intent to prove willfulness under I.R.C. § 7434. Further, even if

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the employee and the taxing authority – not the employer. *West Penn Allegheny Health Sys., Inc. v. Wkrs' Compensation Appeal Bd.*, 251 A.3d 467 (Comm. Ct. Penn. 2021) ("[t]o the extent there may have been amounts withheld for tax purposes that Claimant should have received, she may seek refunds from the appropriate taxing authorities."); *see also Wkrs' Compensation Appeal Bd.*, 673 A.2d 33, 35 (Comm. Ct. Penn. 1996) (finding that STD benefit payments that were treated as taxable income could still be credited as workers' compensation).

willfulness only requires evidence of a reckless disregard as Amicus contends, the District Court committed no reversable error as I.R.C. § 7434 claims still require evidence of intent. Finally, even if the proper standard does not require intent, no reasonable jury would find that Turner acted with reckless disregard for the compliance of Mr. Dougherty's W-2s with federal tax law. Accordingly, Mr. Dougherty cannot show that Turner willfully filed fraudulent W-2s.

A. The District Court Applied The Correct Standard Of Establishing Fraud.

1. Amicus' Reliance On *Safeco* Is Misguided.

Amicus' argument for a "reckless disregard" standard relies heavily on *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007). This is misplaced as *Safeco* does not support a "reckless disregard" standard of willfulness for claims under I.R.C. § 7434.

In *Safeco*, the Supreme Court analyzed the meaning of the phrase "willfully fail[ing] to comply" with the Federal Credit Reporting Act ("FCRA") as stated in 15 U.S.C. § 1681n(a). *Id.* at 56-57. The Court found that at it is used in the FCRA, "willfully" covers both knowing and reckless violations. *Id.* However, the Court's holding in *Safeco* does not impose the same standard for claims brought under I.R.C. § 7434.

Critically, the *Safeco* Court recognized that the term "'willfully' is a 'word of many meanings whose construction is often dependent on the context in which it

appears.'" *Id.* (quoting *Bryan v. United States*, 524 U.S. 184, 191 (1998)) (emphasis added). Though the Court found that in civil claims, willfulness will "generally" include recklessness (*Id.* at 57), it did not hold that recklessness is always the standard for willfulness in civil cases, nor did it find recklessness to be appropriate, let alone required, in the context of civil tax claims.

Indeed, the plain language of I.R.C. § 7434 shows that mere recklessness is insufficient to impose liability. I.R.C. § 7434 creates a civil cause of action against any person who "willfully files a fraudulent information return..." I.R.C. § 7434(a) (emphasis added). The statute's inclusion of the word "fraudulent" requires a higher standard of proof than mere recklessness – fraud, even in the civil context, requires knowledge and intent to deceive. *Chedick*, 151 F.3d at 1081 (applying District of Columbia law). Even Mr. Dougherty recognized this heightened standard in summary judgment briefing. (JA426).

If the plain language of the statute is not clear enough, the legislative history of I.R.C. § 7434 is: the Report of the House Committee on Ways and Means stated that the purpose of I.R.C. § 7434 is to recognize that "[s]ome taxpayers may suffer significant personal loss and inconvenience as the result of the IRS receiving fraudulent information returns, which have been filed by persons intent on either defrauding the IRS or harassing taxpayers." H.R. Rep. 104-506, at 35, reprinted in 1996 U.S.C.C.A.N. 1143, at 1158 (Mar. 28, 1996) (emphasis added). In other

words, Congress expressly drafted the statute to impose liability on persons who intentionally violate the I.R.C. or harass taxpayers.

Based on the language of the statute and the evidence of Congress' intent, mere reckless disregard is insufficient to support a claim under I.R.C. § 7434, and Amicus' reliance on *Safeco* is misguided.

2. Other Jurisdictions Overwhelmingly Require Proof Of Knowledge and Intent To Prove Willfulness.

Contrary to Amicus' argument, mere recklessness is not the prevailing standard for willfulness under I.R.C. § 7434. Though it has not been decided in this Circuit, other courts overwhelmingly agree that willfulness requires evidence of knowledge and intent, recognizing that "willfulness" under I.R.C. § 7434 differs from "willfulness" in other civil contexts. The Court should adopt this standard.

For example, in a frequently cited opinion, the Sixth Circuit recognized that under I.R.C. § 7434(a), "willfulness in this context connotes a voluntary, intentional violation of a legal duty." *Vandenheede*, 541 F. App'x at 580 (internal quotation omitted). Several years before *Vandenheede*, the Second Circuit affirmed a Southern District of New York opinion finding, "[t]he phrase 'willfully filing a fraudulent information return' under Section 7434 requires a showing of deceitfulness or bad faith." *Katzman v. Essex Waterfront Owners, LLC*, No. 09-cv-7541, 2010 WL 3958819, at *3 n.5 (S.D.N.Y. Sept. 29, 2010) *aff'd*, 660 F.3d 565 (2d Cir. 2011). More recent cases in the Southern District of New York have

reenforced the applicability of *Katzman*. *See, e.g., Osuagwu v. Home Point Financial Corp.*, 7:22-cv-3830-CS, 2022 WL 1645305, at *10 (S.D.N.Y. May 24, 2022).

More recently, district courts in other Circuits have followed the Sixth and Second Circuits, requiring more than mere recklessness to prove willfulness. *See, e.g., Schmelzer v. Animal Wellness Center of Monee, LLC*, No. 18-cv-01253, 2022 WL 3026911, at *12 (N.D. Ill. Aug. 1, 2022) (requiring proof of knowledge that the returns were false before filing); *S. USA Life Ins. Co, Inc. v. Foster*, No. 7:18-cv-590, 2019 WL 6569660, at *6 (W.D. Va Oct. 15, 2019) (requiring evidence that the defendant possessed knowledge and "specifically intended to flout the statute") *report and recommendation adopted,* No. 7:18-cv-590, 2019 WL 6534156 (W.D. Va. Dec. 4, 2019); *Tran v. Tran*, 239 F.Supp.3d 1296, 1298 (M.D. Fla. 2017) ("[t]o prove willfulness, the plaintiff must show that the defendants, aware of the duty purportedly imposed by Section 7434, specifically intended to flout the statute."); *1715 Northside Drive*, 224 F.Supp.3d at 1310 (finding that willfulness requires "proof of deceitfulness or bad faith in connection with filing an information return."); *Leon*, 51 F.Supp.3d at 1298 (willfulness "connotes a voluntary, intentional violation of a legal duty, and that tax fraud typically requires intentional wrongdoing.").

This Court should not hesitate to join the consensus in other circuits that "willfulness," as used in I.R.C. § 7434, requires more than mere recklessness. The District Court followed the majority of other jurisdictions by requiring more than mere recklessness to prove willfulness, and thus this Court should affirm the District Court's decision.

B. There Was No Reversable Error Because A Claim Under I.R.C. § 7434 Requires Evidence Of Intent To Prove Fraud.

Even if "willfulness" under I.R.C. § 7434 does not require a showing of intent or knowledge, the District Court committed no error, let alone reversable error. As discussed, *supra*, Section I, I.R.C. § 7434 creates a civil cause of action against any person who "willfully files a <u>fraudulent</u> information return..." I.R.C. § 7434(a) (emphasis added) – the term "fraudulence" still requires knowledge and intent with respect to the payments stated on the W-2s. Moreover, tax fraud requires proof of "'intentional wrongdoing' and an 'intent to deceive.'" *Mould*, 37 F.Supp.3d at 762 (quoting *Vandenheede*, 541 F. App'x 577); *see also Zell*, 763 F.2d at 1143-44; *Maciel*, 489 F.3d at 1026; *Douge*, 899 F.2d at 165; *Granado*, 792 F.2d at 93. But, here, because there is no genuine dispute of material fact with respect to Turner's knowledge and intent, the District Court committed no reversable error.

Similar to the lack of evidence that the W-2s falsely represented Dougherty's income, Amicus also cannot point to any evidence that Turner

knowingly and intentionally filed a fraudulent information return for Mr. Dougherty. In an effort to hide this, Amicus cites to Turner's "antecedent knowledge" that workers' compensation benefits are not taxable income (Amicus Br. at 36); yet, that does nothing to prove that Turner knew that Mr. Dougherty's W-2s contained false statements of income and intentionally filed them.

Amicus also points to Turner's failure to amend Mr. Dougherty's W-2s after the D.C. OWC's determinations and after Mr. Dougherty emailed Turner employees. (Amicus Br. at 36). These points also do not establish knowledge or intent. The workers' compensation determinations made no mention of the taxability of the compensation Mr. Dougherty received as advance payments, and the DC WCA and I.R.C. are silent as to the taxability of payments made to an employee before a workers' compensation determination. Further, Mr. Dougherty's emails merely state his personal opinion that the compensation should not be taxed, which is in contravention of the tax treatment of all other Turner employees under the STD plan. (JA374 at ¶ 8).

It is abundantly clear that the record contains no evidence whatsoever that Turner received professional or official guidance that its STD payments should be treated as non-taxable income from Turner's payroll department, human resources, legal, or any other knowledgeable Turner employees, and there is no evidence of advice that went ignored from outside sources such as Hartford (its STD Plan

insurer), ESIS (its workers' compensation insurer), the DC OWC, the IRS, or any other knowledgeable institution. There is no genuine dispute regarding Turner's knowledge and intent, and as such, no reasonable jury would find that Turner willfully filed fraudulent 2014, 2015 and 2016 W-2s for Mr. Dougherty.

C. No Reasonable Jury Would Find That Turner Acted Recklessly When It Filed Mr. Dougherty's W-2s.

Even if this Court departs from the majority of Courts that have addressed this issue and instead concludes that recklessness is the appropriate standard of willfulness under I.R.C. § 7434, Mr. Dougherty's claim still fails because no reasonable jury would find that Turner acted with reckless disregard when it filed Mr. Dougherty's W-2s.

Once again, Amicus cites to the same scant record evidence to argue that Turner acted recklessly: (1) that Turner knew or should have known that Mr. Dougherty's W-2s were incorrect because of the workers' compensation determinations, (2) Mr. Dougherty's emails to Turner, and (3) Turner's policy to comply with workers' compensation statutes. (*See* Amicus Br. at 31-33). None of these facts create a genuine issue of material fact such that a reasonable jury could find that Turner acted recklessly.

Amicus bases their argument on non-binding case law in which the courts found reckless behavior where the defendant was "made aware of" the risks of the behavior (*Blanton v. Office of the Comptroller of the Currency*, 909 F.3d 1162,

1173-74 (D.C. Cir. 2018)) or was in "'full' awareness of its [statutory] duties" (*Yellow Pages Photos, Inc. v. Ziplocal LP*, 795 F.3d 1255, 1272 (11th Cir. 2015)). (Amicus Br. at 33). There is a fatal flaw to this argument – Amicus wrongly assumes that the taxability of Dougherty's STD Plan payments was obvious under the DC WCA and the I.R.C.

The DC WCA and I.R.C. do not clearly express the tax treatment of payments made under an STD Plan for injuries that occur on a job – particularly before a workers' compensation determination is made. Further, the I.R.C. requires STD benefit payments to be taxed (I.R.C. § 104(3). Finally, there is no evidence that Turner received any indication or advice – internally or externally – that STD Plan payments for workplace injuries must be treated as non-taxable income.

In short, the income stated on Mr. Dougherty's W-2s were based on Turner's reasonable belief that his STD payments were taxable. Contrary to the case law cited by Amicus, there is no evidence that Turner was in "full awareness" of the taxability of the payments, or that it was ever "made aware" of the risks of the STD Plan payments. Thus, there is no genuine dispute regarding Turner's willfulness, and Mr. Dougherty's claim fails.

III. The Supplemental Arguments Raised In Appellant's Brief Lack Merit and Are Not Subject to Appeal.

Mr. Dougherty raised several issues in addition to the two addressed by appointed Amicus. (Appellant Br. at 7-8). None of these supplemental issues

should be considered by this Court as Mr. Dougherty did not preserve them for appeal. However, even if he preserved them, they lack merit.

A. Mr. Dougherty Did Not Preserve Issues III through VII For Appeal.

In his initial brief, Mr. Dougherty raised issues in addition to the two addressed by Amicus:

- Issue III claims that by granting Turner's motion to dismiss and denying his motion for leave to file a sealed sur reply, he was denied due process of law by the District Court;
- Issue IV claims that he was denied due process by the District Court in denying his motion to compel;
- Issue V argues that he was denied due process during a post-discovery status conference;
- Issue VI alleges that he was denied due process during another status conference;[12] and
- Issue VII claims that the District Court's summary judgment decision was influenced by allegedly improper references to "confidential collateral source payments" in Turner's statement of undisputed material facts filed with its motion for summary judgment.

[12] Mr. Dougherty states that the status conference occurred on March 1, 2021 (Appellant Br. at 8); however, the record transcript to which he cites indicates that it occurred on July 26, 2021. (JA800).

These issues are not ripe for appeal and should not be considered by the Court.[13]

"Arguments not raised in the trial court are not usually considered on appeal." *Miller v. Avirom*, 384 F.2d 319, 321 (D.C. Cir. 1967); *see also Thornton v. Norwest Bank of Minnesota*, 860 A.2d 838, 842 (D.C. 2004) (citing *Miller*); *Whelan v. Abell*, 48 F.3d 1247, 1251 (D.C. Cir. 1995) ("issues not raised before judgment in the district court are usually considered to have been waived on appeal."); *Murthy v. Vilsack*, 609 F.3d 460, 465 (D.C. Cir. 2010). This is applicable to *pro se* parties. *Horowitz v. Peace Corps*, 428 F.3d 271, 281-82 (D.C. Cir. 2005) (finding that *pro se* plaintiff waived arguments raised for the first time on appeal). Mr. Dougherty only raised arguments regarding the alleged fraudulence of his W-2s (Issue I), and whether Turner willfully filed fraudulent returns (Issue II). Mr. Dougherty did not raise Issues III through VII in the District Court and as such, he did not preserve the arguments for appeal.

Mr. Dougherty's Issues III through VI raise the constitutional argument that the district court denied him due process by issuing certain orders (Issues III and IV) and determinations in status conferences (Issues V and VI). Mr. Dougherty never raised these constitutional arguments before his appellate brief, and as such, he did not preserve them for appeal.

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[13] Amicus appears to agree that these issues are not properly before the Court as their brief states that only issues I and II are ripe for consideration before this Court. (Amicus Br. at 2).

Mr. Dougherty's Issue VII claims that the inclusion of certain statements in Turner's Statement of Undisputed Material Facts were improper, and influenced the District Court's decision on summary judgment. Again, this issue is not ripe for appeal because Mr. Dougherty never raised an objection to inclusions in Turner's Statement of Undisputed Material Facts. *Thornton*, 860 A.2d at 842.

Because Mr. Dougherty did not preserve these additional issues for appeal, this Court should not consider them.

B. Mr. Dougherty's Fifth and Fourteenth Amendment Right to Due Process Was Not Violated.

In Issues III through VI, Mr. Dougherty argues that the District Court denied him due process under the Fifth and Fourteenth Amendments of United States Constitution several times while litigating his claim. Even if the issues were properly preserved for appeal, they lack merit.

As an initial matter, the due process clause of the Fourteenth Amendment applies only to the states and does not govern the United States District Court for the District of Columbia, a federal institution. *See Chandler v. Kiely*, 539 F.Supp.2d 220, 223 (D.D.C. 2008).

More to the point, the District Court never denied Mr. Dougherty due process. The Due Process clause of the Fifth Amendment prohibits the deprivation of liberty or property without due process of law. U.S. Const. Amend. V. The first inquiry in every due process challenge is whether the plaintiff has been deprived of

a protected interest in 'property' or 'liberty'." *Parker v. D.C.*, 293 F. Supp. 3d 194, 203-04 (D.D.C. 2018) (citations omitted).

Mr. Dougherty argues that the District Court denied him due process by denying various motions and requests to the court, seemingly believing that merely by denying these motions and requests the court was depriving him of a protected interest in liberty. However, this erroneously equates due process with the judicial process. "[D]ue process is not necessarily judicial process...neither is the right of appeal essential to due process of law...[r]ather, [t]he crux of due process is an opportunity to be heard and the right to adequately represent one's interests." *BiotechPharma, LLC v. Ludwig & Robinson, PLLC*, 98 A.3d 986, 998 (D.C. 2014) (citations omitted). Due process does not require that the defendant in every civil case actually have a hearing on the merits, just a meaningful opportunity to be heard. *Boddie v. Connecticut*, 401 U.S. 371, 378–79 (1971).

Here, the District Court made its decisions after considering the positions of both parties. Judge McFadden gave both parties ample opportunity to argue their positions during telephonic status conferences (*see, e.g.,* JA800-821 (Jul. 26, 2021 Telephone Conference)) and hearings (*see, e.g.,* JA788-799 (Sept. 24, 2021 proceedings). Further, it is clear from the District Court's memorandum opinions that Judge McFadden carefully considered arguments from both parties before reaching a decision. (*see, e.g.,* JA332-333 (order denying motion to compel)).

Mr. Dougherty was given the opportunity to present arguments to support his motions and requests – at every turn, Judge Tolliver gave him a meaningful opportunity to be heard. Thus, Mr. Dougherty was never deprived his right to due process under the Fifth Amendment and his arguments in Issues III through VI lack merit.

C. The District Court Was Not Influenced By A Reference To "Collateral Source Payments" In Turner's Statement of Undisputed Material Facts Filed With Its Motion For Summary Judgment.

Finally, Mr. Dougherty argues in Issue VII that references to "collateral source payments" related to his workplace injuries in Turner's Statement of Undisputed Material Facts were improper and influenced the District Court's decision to grant Turner's motion for summary judgment. (Appellant Br. at 20-21). There is no merit to this argument as the District Court's memorandum opinion did not cite to these statements and clearly did not consider them material, persuasive, or influential in deciding to dismiss Mr. Dougherty's claim. Mr. Dougherty does not cite any specific part of the memorandum opinion which was allegedly "influenced" by these statements. Instead, Mr. Dougherty avers that "the adjudicators at the Motion for Summary Judgement phase could possibly be influenced by the disclosure of these payments." (*Id.* at 21). This does not give merit to his argument under Issue VII.

CONCLUSION

For all of the foregoing reasons, the Court should affirm the District Court.

Dated: January 17, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type–volume limits of Fed. R. App. P. 32(a)(7) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 9,148 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type–style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14–point Times New Roman.

/s/ Denise E. Giraudo
Denise Giraudo

CERTIFICATE OF SERVICE

I certify that on January 17, 2023, the foregoing was electronically filed through this Court's CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Denise E. Giraudo
Denise Giraudo

STATUTORY ADDENDUM
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26 U.S.C. § 104 (I.R.C. § 104).

§ 104. Compensation for injuries or sickness

Effective: March 23, 2018

(a) In general.--Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include--

(1) amounts received under workmen's compensation acts as compensation for personal injuries or sickness;

(2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness;

(3) amounts received through accident or health insurance (or through an arrangement having the effect of accident or health insurance) for personal injuries or sickness (other than amounts received by an employee, to the extent such amounts (A) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (B) are paid by the employer);

(4) amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country or in the Coast and Geodetic Survey or the Public Health Service, or as a disability annuity payable under the provisions of section 808 of the Foreign Service Act of 1980;

(5) amounts received by an individual as disability income attributable to injuries incurred as a direct result of a terroristic or military action (as defined in section 692(c)(2)); and

(6) amounts received pursuant to--

(A) section 1201 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796);[1] or

(B) a program established under the laws of any State which provides monetary compensation for surviving dependents of a public safety officer who has died as the direct and proximate result of a personal injury sustained in the line of duty,

except that subparagraph (B) shall not apply to any amounts that would have been payable if death of the public safety officer had occurred other than as the direct and proximate result of a personal injury sustained in the line of duty.

For purposes of paragraph (3), in the case of an individual who is, or has been, an employee within the meaning of section 401(c)(1) (relating to self-employed individuals), contributions made on behalf of such individual while he was such an employee to a trust described in section 401(a) which is exempt from tax under section 501(a), or under a plan described in section 403(a), shall, to the extent allowed as deductions under section 404, be treated as contributions by the employer which were not includible in the gross income of the employee. For purposes of paragraph (2), emotional distress shall not be treated as a physical injury or physical sickness. The preceding sentence shall not apply to an amount of damages not in excess of the amount paid for medical care (described in subparagraph (A) or (B) of section 213(d)(1)) attributable to emotional distress.

(b) Termination of application of subsection (a)(4) in certain cases.--

(1) In general.--Subsection (a)(4) shall not apply in the case of any individual who is not described in paragraph (2).

(2) Individuals to whom subsection (a)(4) continues to apply.--An individual is described in this paragraph if--

(A) on or before September 24, 1975, he was entitled to receive any amount described in subsection (a)(4),

(B) on September 24, 1975, he was a member of any organization (or reserve component thereof) referred to in subsection (a)(4) or under a binding written commitment to become such a member,

(C) he receives an amount described in subsection (a)(4) by reason of a combat-related injury, or

(D) on application therefor, he would be entitled to receive disability compensation from the Department of Veterans Affairs.

(3) Special rules for combat-related injuries.--For purposes of this subsection, the term "combat-related injury" means personal injury or sickness--

(A) which is incurred--

(i) as a direct result of armed conflict,

(ii) while engaged in extrahazardous service, or

(iii) under conditions simulating war; or

(B) which is caused by an instrumentality of war.

In the case of an individual who is not described in subparagraph (A) or (B) of paragraph (2), except as provided in paragraph (4), the only amounts taken into account under subsection (a)(4) shall be the amounts which he receives by reason of a combat-related injury.

(4) Amount excluded to be not less than veterans' disability compensation.--In the case of any individual described in paragraph (2), the amounts excludable under subsection (a)(4) for any period with respect to any individual shall not be less than the maximum amount which such individual, on application therefor, would be entitled to receive as disability compensation from the Veterans' Administration.

(c) Application of prior law in certain cases.--The phrase "(other than punitive damages)" shall not apply to punitive damages awarded in a civil action--

(1) which is a wrongful death action, and

(2) with respect to which applicable State law (as in effect on September 13, 1995 and without regard to any modification after such date) provides, or has been construed to provide by a court of competent jurisdiction pursuant to a decision issued on or before September 13, 1995, that only punitive damages may be awarded in such an action.

This subsection shall cease to apply to any civil action filed on or after the first date on which the applicable State law ceases to provide (or is no longer construed to provide) the treatment described in paragraph (2).

(d) Cross references.--

(1) For exclusion from employee's gross income of employer contributions to accident and health plans, see section 106.

(2) For exclusion of part of disability retirement pay from the application of subsection (a)(4) of this section, see section 1403 of title 10, United States Code (relating to career compensation laws).

26 U.S.C. § 7434 (I.R.C. § 7434).

§ 7434. Civil damages for fraudulent filing of information returns

Effective: July 22, 1998

(a) In general.--If any person willfully files a fraudulent information return with respect to payments purported to be made to any other person, such other person may bring a civil action for damages against the person so filing such return.

(b) Damages.--In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the greater of $5,000 or the sum of--

(1) any actual damages sustained by the plaintiff as a proximate result of the filing of the fraudulent information return (including any costs attributable to resolving deficiencies asserted as a result of such filing),

(2) the costs of the action, and

(3) in the court's discretion, reasonable attorneys' fees.

(c) Period for bringing action.--Notwithstanding any other provision of law, an action to enforce the liability created under this section may be brought without regard to the amount in controversy and may be brought only within the later of--

(1) 6 years after the date of the filing of the fraudulent information return, or

(2) 1 year after the date such fraudulent information return would have been discovered by exercise of reasonable care.

(d) Copy of complaint filed with IRS--Any person bringing an action under subsection (a) shall provide a copy of the complaint to the Internal Revenue Service upon the filing of such complaint with the court.

(e) Finding of court to include correct amount of payment.--The decision of the court awarding damages in an action brought under subsection (a) shall include a finding of the correct amount which should have been reported in the information return.

(f) Information return.--For purposes of this section, the term "information return" means any statement described in section 6724(d)(1)(A).

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