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9

10 IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF ARIZONA

11 United States of America,

12 Plaintiff,

13 v.

14 Maria D. Forman, et al.,

15 Defendants.

Civil No. 09-CV-444-PHX-SRB

UNITED STATES' UNOPPOSED  
MOTION FOR RELIEF FROM  
REQUIREMENT THAT AN  
INDIVIDUAL WITH FULL  
SETTLEMENT AUTHORITY ATTEND  
THE SETTLEMENT CONFERENCE

16  
17 The United States of America, through undersigned counsel, hereby requests  
18 that the Court excuse the United States from the requirement that an individual with  
19 full settlement authority personally attend the Settlement Conference currently  
20 scheduled for Tuesday, April 19, 2011 at 9:00am. Undersigned counsel avers that she  
21 consulted with Elmer P. Vild, Trustee for Defendant DLP LT 13; Defendant Jimmy C.  
22 Chisum; Dulce Shimkus, representing her mother, Defendant Maria D. Forman; and

1 counsel for the state of Arizona. All parties have indicated that they do not oppose the  
2 Motion. A memorandum in support is filed herewith.

3 Respectfully submitted this 29<sup>th</sup> day of March, 2011.

4 DENNIS K. BURKE  
United States Attorney

5 By: /s/ Alexis V. Andrews  
6 ALEXIS V. ANDREWS  
7 U.S. Department of Justice  
8 P.O. Box 683  
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Washington, D.C. 20044

9 Attorneys for the United States

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**CERTIFICATE OF SERVICE**

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2 It is hereby certified that service of the foregoing UNITED STATES'  
3 UNOPPOSED MOTION FOR RELIEF FROM REQUIREMENT THAT AN  
4 INDIVIDUAL WITH FULL SETTLEMENT AUTHORITY ATTEND THE SETTLEMENT  
5 CONFERENCE; MEMORANDUM IN SUPPORT, and PROPOSED ORDER has been  
6 made this 29<sup>th</sup> day of March, 2011, by placing copies in the United States Mail addressed  
7 to the following:

8 Maria D. Forman  
9 c/o 5640 E. Duane Lane  
10 Cave Creek, AZ 85331

Denise Ann Faulk  
Office of the Attorney General  
1275 W Washington St  
Phoenix, AZ 85007

11 Jimmy C. Chisum, 84388-008  
12 Herlong-CA-Herlong-FCI  
Federal Correction Institution  
P.O. Box 800  
Herlong, CA 96113

Elmer P. Vild  
989 S. Main St.  
#A-269  
Cottonwood, AZ 86326

13 /s/ Alexis V. Andrews  
14 ALEXIS V. ANDREWS  
15 Trial Attorney, Tax Division  
16 United States Department of Justice  
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10 IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF ARIZONA

11 United States of America,

12 Plaintiff,

13 v.

14 Maria D. Forman, et al.,

15 Defendants.

Civil No. 09-CV-444-PHX-SRB

MEMORANDUM IN SUPPORT OF  
UNITED STATES' UNOPPOSED  
MOTION FOR RELIEF FROM  
REQUIREMENT THAT AN  
INDIVIDUAL WITH FULL  
SETTLEMENT AUTHORITY ATTEND  
THE SETTLEMENT CONFERENCE

17 The United States, by and through its undersigned counsel, submits this  
18 memorandum in support of its Unopposed Motion for Relief from Requirement that an  
19 Individual with Full Settlement Authority Attend the Settlement Conference, and states  
20 as follows in support:

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1 The federal government's power to tax is awesome and touches almost every  
2 citizen. Because this power is so far-reaching and formidable, the Tax Division  
3 approaches its mission of fairly and uniformly enforcing the tax laws with the utmost  
4 seriousness. However, because Tax Division attorneys handle cases all over the United  
5 States, maintaining uniformity and fairness in how cases are litigated and settled  
6 presents something of a challenge. One way that the Tax Division seeks to meet that  
7 challenge is by centralizing its lawyers and managers in Washington, DC. There, the  
8 lawyers can interact on a daily basis and communicate with each other about what is  
9 happening in their cases. Centralization also allows close supervision of the lawyers  
10 and their cases by the Tax Division's regional section chiefs, each of whom is  
11 responsible for the litigation of cases within a specific geographic region of the United  
12 States. This arrangement may appear from the outside to be overly bureaucratic, but it  
13 is important to keep in mind that the Tax Division is organized in this way due to the  
14 special nature of tax litigation and the need to ensure that the litigation and settlement  
15 of tax cases is closely scrutinized by officials with many years of experience and a  
16 broad, historical perspective on tax enforcement. The close supervision of tax litigation  
17 is not designed for administrative convenience, but to ensure, as much as is humanly  
18 possible, that all taxpayers are treated alike.

19 Under the rules developed for the settlement of tax cases, line attorneys have no  
20 independent settlement authority; settlement authority for this case rests with the  
21 Attorney General of the United States or his delegate. 26 U.S.C. § 7122. The case may  
22 be settled by delegates of the Attorney General only in accordance with regulations

1 published in 28 C.F.R. §§ 0.70, 0.160, 0.162, 0.164, 0.166, and 0.168, and Tax Division  
2 Directive No. 105, published in 28 C.F.R. Part O, Subpart Y, Appendix, as effective on  
3 June 14, 1995 ("Settlement Regulations"). Justice Department regulations confining  
4 settlement authority to selected officers and officials are valid and binding. *See White v.*  
5 *United States Dep't of Interior*, 639 F. Supp. 82, 88-90 (M.D. Pa. 1986); *Bohlen v. United*  
6 *States*, 623 F. Supp. 595, 596-97 (C.D. Ill. 1985).

7         In the present case, the United States seeks to collect an outstanding tax liability  
8 of approximately \$27,427.87 (balance as of January 5, 2009). Under the regulations cited  
9 above, the Chief of the Western Region Civil Trial Section is the lowest ranking  
10 Government official with full settlement authority, though he may delegate this  
11 authority to an Assistant Chief. Pursuant to the Settlement Regulations, an Assistant  
12 Chief of the Civil Trial Section of the Western Region is authorized to accept settlement  
13 offers in which the amount of the Government's concession does not exceed \$250,000,  
14 provided that the Chief has delegated settlement authority to him. There are two  
15 Assistant Chiefs in the Western Region Civil Trial Section. The Chief and two Assistant  
16 Chiefs currently supervise 30 trial attorneys and 14 support staff members who are  
17 based in Washington, D.C. They are responsible for monitoring more than 600 active  
18 cases assigned to trial attorneys in the Western Region office. Accordingly, it is not  
19 feasible for them to appear in person at every settlement conference as it would render  
20 them unable to discharge their other important duties. *See In re Stone*, 986 F.2d 898, 904-  
21 05 (5th Cir. 1993).

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1 Problems inherent in requiring government officials with full settlement  
2 authority to attend settlement conferences were recognized in Section 473(c) of the  
3 Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5093 (1990):

4 Nothing in a civil justice expense and delay reduction plan  
5 relating to the settlement authority provisions of this section  
6 shall alter or conflict with the authority of the Attorney  
General to conduct litigation on behalf of the United States,  
or any delegation of the Attorney General.

7 The legislative history of the Judicial Improvements Act, likewise reveals that Congress  
8 was aware of, and believed district courts should account for:

9 the unique situation of the Department of Justice. The  
10 Department does not delegate broad authority to all trial  
11 counsel, but instead reserves that authority to senior officials  
12 in the United States Attorneys' Offices or in the litigating  
divisions in Washington. Clearly the Department cannot  
realistically send officials with full settlement authority to  
each settlement conference.

13 H.R. Rep. No. 101-732, 101st Cong., 2d Sess. 16-17; S. Rep. No, 101-426, 101st Cong. 2d  
14 Sess. 59 (emphasis added); see also In re Stone, 986 F.2d 898, 904-05 (5th Cir. 1993). The  
15 Advisory Committee Notes on the amendment to Rule 16 of the Federal Rules of Civil  
16 Procedure, effective December 1, 1993, specifically provide that:

17 [p]articularly in litigation in which governmental agencies or  
18 large amounts of money are involved, there may be no one  
19 with on-the-spot settlement authority, and the most that  
20 should be expected is access to a person who would have a  
21 major role in submitting a recommendation to the body or  
22 board with ultimate decision-making responsibility. The  
selection of the appropriate representative should ordinarily  
be left to the party and its counsel.

1 The Tax Division of the Department of Justice is committed to the just and  
2 efficient resolution of all cases involving the United States. Many of its cases are  
3 resolved through settlements, both with the court's assistance and without. In  
4 accordance with the regulations promulgated by the Attorney General, the Division has  
5 adopted procedures to make settlement conferences as productive as possible. The trial  
6 attorney with primary responsibility for the handling of the case engages in discussions  
7 with her section chief and/or appropriate superior officers before the settlement  
8 conference in order to determine the range of settlement offers that they would be  
9 willing to concur in recommending. The trial attorney then represents the United States  
10 at the conference, and, for this case, an individual with full settlement authority – either  
11 the Chief or, if he delegates settlement authority thereto, one of the Assistant Chiefs – is  
12 available for consultation by telephone with the trial attorney or the Court during the  
13 conference in the event that there are unexpected developments. The Tax Division has  
14 used this method for some time and is not aware of any instance in which a trial  
15 attorney was unable to engage in energetic and frank negotiations.

16 This method is consistent with Federal Rule of Civil Procedure 16. Pursuant to  
17 28 U.S.C. §§ 515 through 519, the trial attorney is authorized to represent the United  
18 States in this lawsuit, and may negotiate settlement offers which the trial attorney is  
19 willing to recommend to appropriate Department officials. In exercising their  
20 settlement authority, Department of Justice officials accord substantial weight to the  
21 trial attorney's recommendation regarding settlement, because the recommendation  
22 will be based on the trial attorney's knowledge of the strengths and weaknesses of the



1 parties' positions. Further, the Tax Division employs over 300 attorneys, who work on  
2 cases all over the United States, and who may be involved in settlement discussions at  
3 any given time. It would be unduly expensive and time-consuming for those officials in  
4 the Tax Division to routinely appear for settlement conferences in each of the cases in  
5 which they hold final settlement authority, while continuing to execute the other duties  
6 assigned to them by the Attorney General of the United States. See In re Stone, 986 F.2d  
7 at 904-05.

8       Because the United States' claim in this case is \$27,427.87, settlement of this case  
9 will require the approval of either the Chief or an Assistant Chief of the Western Region  
10 Civil Trial Section. The undersigned counsel is the trial attorney assigned to handle this  
11 case. Undersigned counsel has had several discussions with her superiors regarding  
12 this case, and will discuss the case thoroughly with individuals with full settlement  
13 authority – the Chief or an Assistant Chief, if settlement authority is so delegated – and  
14 other appropriate officials prior to the conference in order to determine the range of  
15 settlement offers that would be considered acceptable. An individual with full  
16 settlement authority will also be available for consultation by telephone with counsel, or  
17 the Court, throughout the duration of the conference in the event the conference  
18 produces unexpected developments.

19       The requirement that a person with full settlement authority personally appear is  
20 also unlikely to help achieve a settlement. First of all, the Court has not yet resolved the  
21 issue of Mr. Vild's representation of Defendant DLP LT 13; the United States' motion to  
22 strike all pleadings filed by Mr. Vild – a *pro se* individual serving as Trustee – on behalf

1 of DLP LT 13 remains pending before the District Court Judge (Doc. No. 107). Second,  
2 it is by no means certain that Defendant Maria Forman — who is in very poor health —  
3 will attend the conference; she has not appeared at any of the previous proceedings.  
4 Counsel for the United States has been advised that her daughter, Dulce Shimkus,  
5 intends to represent her at the settlement conference and has obtained a Power of  
6 Attorney for settlement purposes. However, since Dulce Shimkus is one of the ultimate  
7 beneficiaries of DLP LT 13, there may be conflict of interest issues associated with her  
8 representation of her mother. Finally, counsel for the United States has contacted all  
9 parties involved in this matter and none of them oppose this motion.

10 Based on the foregoing reasons, the United States respectfully requests that it be  
11 excused from the Court's order requiring that a person with full settlement authority  
12 attend the early neutral evaluation conference in this matter. Instead, undersigned  
13 counsel will personally appear at the conference and have an individual with full  
14 settlement authority available by telephone.

15 A proposed order is attached.

16 Respectfully submitted this 29th day of March, 2011.

17 DENNIS K. BURKE  
18 United States Attorney

19 By: /s/ Alexis V. Andrews  
20 ALEXIS V. ANDREWS  
21 U.S. Department of Justice  
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Attorneys for the United States

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United States of America,

Plaintiff,

v.

Maria D. Forman, et al.,

Defendants.

Civil No. 09-CV-444-PHX-SRB

[PROPOSED] ORDER GRANTING  
UNITED STATES' UNOPPOSED  
MOTION FOR RELIEF FROM  
REQUIREMENT THAT AN  
INDIVIDUAL WITH FULL  
SETTLEMENT AUTHORITY ATTEND  
THE SETTLEMENT CONFERENCE

Pending before the Court is the United States' Unopposed Motion for Relief from Requirement that an Individual with Full Settlement Authority Attend the Settlement Conference, presently scheduled for April 19, 2011, at 9:00a.m. before Magistrate Judge Voss. Upon consideration of the Motion, and for good cause shown, it is HEREBY ORDERED THAT:

1 (1) The person with full settlement authority is hereby excused from the  
2 Settlement Conference;

3 (2) Alexis V. Andrews will personally attend the Settlement Conference; and

4 (3) An individual with full settlement authority for the United States will be  
5 available by telephone for consultation during the Settlement Conference.

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