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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

UNITED STATES OF AMERICA,
Plaintiff

2:11-cv-00698-FJM

v.

JAMES LESLIE READING, CLARE L.
READING, FOX GROUP TRUST,
MIDFIRST BANK, CHASE, FINANCIAL
LEGAL SERVICES, STATE OF ARIZONA
Defendants

**REPLY MEMORANDUM IN SUPPORT
OF
MOTION TO DISMISS
COMPLAINANT'S SEVENTH CLAIM
ON BEHALF OF JAMES LESLIE
READING, CLARE L. READING AND
FOX GROUP TRUST**

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

This cause was filed on April 8, 2011, by plaintiff, United States of America, hereinafter "government" or "the government", seeking, among other relief, to have a transfer from James Leslie Reading and Clare L. Reading (hereinafter "Readings") to Fox Group Trust set aside as a fraudulent transfer on the basis of Arizona Uniform Fraudulent Transfer Act (AFTA), A.R.S. 44-1001 *et seq.* The claim to set the transfer aside is identified in the complaint as plaintiff's Seventh Claim.

The complaint alleges that the Readings transferred property to Fox Group Trust on or about June 10, 2005, which date is confirmed by examination of the certified copy of the transfer attached as Exhibit "A" to the instant motion.

Readings and the Fox Group Trust moved the Court dismiss plaintiff's Seventh Claim due to the fact that on the basis of the face of plaintiff's complaint any cause of action that may have existed no longer exists by virtue of statutory extinguishment as provided by AFTA, A.R.S. 44-1009, and, therefore, plaintiff fails to state a claim upon which relief may be granted. This memorandum is offered as a reply to the government's response opposing the motion.

ARGUMENT AND LAW

The government in its response memorandum relies solely on the case of *Bresson v. Commissioner*, 213 F.3d 1173, (9th Cir. 2000). In that case the Ninth Circuit was not considering the Arizona Fraudulent Transfer Act, but rather a similar California statute, and determined that the California legislature's intent was not to make timely filing a substantive element in the existence of a cause of action under the CUFTA, but rather to merely disguise its statute of limitations provision as a substantive extinguishment provision in order to evade the federal government's evasion of the statute of limitations provision.

Readings and the Trust, however, are relying on a more apt and more applicable holding of this court in *Warfield v. Alaniz*, 453 F. Supp.2d 1118 (D.Ariz. 2006). This Court also reviewed the extinguishment provision, looking to Arizona case pronouncements and other indicia and concluded that the legislative intent was to make the extinguishment clause a substantive part of the cause of action. Thus we are looking at two different states and two different legislative states of mind, as well.

In *Bresson*, the Ninth Circuit found that the intent of the *California* legislature was to disguise a procedural limitation, although it did not cite any California or other federal authority for that finding. In *Alaniz*, however, the specific finding, based on Arizona pronouncements, was that the Arizona legislature intended the extinguishment provision to become an integral part of the cause of action, a substantive, not procedural, provision of repose.

The Ninth Circuit has acknowledged that although the federal government is free to avail itself of the portions of State law that afford it a cause of action, it is not required to take the action as offered where procedural limitations of action, such as a statute of limitation defense, is concerned. The Ninth Circuit has also acknowledged that the federal government is, however, subject to statutes of repose, which are preconditions to the continued existence of a cause of action. See *U.S. v. Bacon*, 82 F.3d 822, 823 (9th Cir. 1996). In that case the court distinguished substantive provisions, such as the subject extinguishment provision, which is an elemental requisite for the existence of a cause of action under the Transfer Act, from a procedural provision, such as a statute of limitations which merely establish a defense against the action. The Ninth Circuit acknowledged in *Bacon* that the federal government is not restricted by State procedural time limitations, but that the federal government is bound by substantive statutes of repose, such as a statute of extinguishment making timely filing an essential element for the existence of the cause of action.

In the case of a statute of repose, such as Arizona's, the extinguishment provision constitutes an element of the cause of action, while in the case of a procedural time limitation, it merely creates a defense. In the former, the plaintiff must establish that the filing was made during the time frame for that cause of action. An unopposed plaintiff who filed outside the time period would be unable to secure a judgment because he could not make a prima facie showing that he initiated the action within the required period, an essential element.

On the other hand, a procedural time limitation is not an element, but merely a procedural defense. An unopposed plaintiff who files after the time limitation *can* obtain a judgment, since defenses that are not raised are waived, and even after the running of the statute of limitations on an action the cause of action *continues to exist*. Not so, where the cause of action ceases to exist.

Bacon was concerned with the retroactive effect of an amendment of Washington's Fraudulent Transfer Act, changing the time period from being a statute of limitation to one of a statute of extinguishment. The Ninth Circuit held that the revised form, a statute of repose or extinguishment was a *substantive* provision, not procedural, and, thus, was not retroactive in effect. *Bacon*, at p. 824:

"With these principles in mind we turn to the Transfer Act's claim extinguishment provision. This provision is not merely remedial or procedural; it seeks to affect substantive rights. Its purpose is "to make clear that lapse of the statutory periods prescribed by the section bars the right and not merely the remedy." *McMaster*, 886 P.2d at 242 (quoting Unif. Fraudulent Transfer Act § 9, comment (1), 7A U.L.A. 665-66 (1984)). It imposes a condition upon the right to bring an action and therefore **introduces a new element** of a fraudulent transfer claim. *Id.* (citing *In re Estate of Speake*, 743 P.2d 648, 652(Okla. 1987)).
(emphasis added)

The court went on to hold that since the extinguishment provision was substantive, rather than procedural, as in the case of a statute of limitations, and that the Act did not expressly make that provision retroactive, that amendment was prospective only and should not have been applied to a case arising under the previous statute of limitation provision.

Thus, we have no conflict between the authorities cited. *Bresson's* holding was regarding the California legislatures legislative intent, which this court has found to have been a totally different intent in the case of the Arizona legislature. The Ninth Circuit's general rule is still accurately expressed in *U.S. v. Bacon, supra*, that substantive provisions defining a cause of action, such as the extinguishment provision, do govern even where the federal government is

concerned, because such provisions become conditions precedent to the existence of the action, while statutes of limitation, procedural limitations only, do not apply to the federal government.

While California's amendment to adopt an extinguishment provision was found to have been superficial, failing to genuinely alter the nature of the cause of action, this Court has found otherwise in the case of Arizona's legislature, which, like Washington in *Bacon*, intended the extinguishment provision to be a substantive and elemental requisite for the existence of the cause.

CONCLUSION

Accordingly, it is respectfully submitted that the correct rule to apply in this case is the Ninth's Circuit's rule as expressed in *Bacon*, and this Court's finding regarding the substantive nature of Arizona's extinguishment provision in *Alaniz*, and that, therefore, the motion to dismiss the government's Seventh Claim should be granted.

Respectfully submitted,

/s/ Tommy K. Cryer

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CERTIFICATE OF SERVICE

I hereby certify that I have on this date electronically filed the foregoing Memorandum in Support of Motion to Dismiss Complainant's Seventh Claim with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following counsel for the parties:

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Shreveport, Louisiana, this 30th day of May, 2012.

/s/ Tommy K. Cryer