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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. EC-09-1040-DJuBa
J.J. RE-BAR CORP., INC.,)	Bk. No. 98-21421
Debtor.)	
<hr/>		
J.J. RE-BAR CORP., INC.,)	
Appellant,)	
v.)	OPINION
UNITED STATES OF AMERICA,)	
Appellee.)	

Argued and Submitted on September 25, 2009
at San Francisco, California

Filed - November 4, 2009

Appeal from the United States Bankruptcy Court
for the Eastern District of California

Honorable Michael S. McManus, Bankruptcy Judge, Presiding.

Before: DUNN, JURY and BAUM,¹ Bankruptcy Judges.

¹ Hon. Redfield T. Baum, Sr., Bankruptcy Judge for the
District of Arizona, sitting by designation.

1 DUNN, Bankruptcy Judge:
2

3 The appellant, J.J. Re-Bar Corporation, Inc. ("JJ Re-Bar"),
4 appeals the bankruptcy court's denial of its motion 1) to enforce
5 provisions of the order confirming its chapter 11² plan and 2) to
6 hold the Internal Revenue Service ("IRS") in contempt for seeking
7 to collect "trust fund" tax liabilities from JJ Re-Bar's officers
8 as "responsible persons." We AFFIRM.

9 **I. FACTUAL BACKGROUND**

10 The facts in this appeal are not in dispute. JJ Re-Bar
11 filed a chapter 11 petition on January 30, 1998. Postpetition,
12 JJ Re-Bar continued to operate its business in chapter 11 as a
13 debtor in possession.

14 On July 21, 1998, the IRS filed its original proof of claim
15 in JJ Re-Bar's bankruptcy case in the amount of \$6,446.28. The
16 IRS filed an amended proof of claim in the amount of \$833,269.00
17 on December 2, 1998.

18 JJ Re-Bar filed a plan of reorganization ("Plan"), and on
19 December 9, 1998, the bankruptcy court issued an order approving
20 JJ Re-Bar's disclosure statement and fixing a deadline for filing
21 ballots accepting or rejecting the Plan. Pursuant to the order,
22 the hearing on confirmation of the Plan was scheduled for
23

24 ² Unless otherwise indicated, all "Code," chapter and
25 section references are to the federal Bankruptcy Code, 11 U.S.C.
26 §§ 101-1330, prior to its amendment by the Bankruptcy Abuse
27 Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub.
28 L. 109-8, 119 Stat. 23, as the case from which this appeal arises
was filed before October 17, 2005, the effective date of most
BAPCPA provisions.

1 January 19, 1999. The IRS did not object to confirmation of the
2 Plan. The Plan, as amended at the confirmation hearing, was
3 confirmed by order ("Confirmation Order") entered on March 18,
4 1999. The IRS did not appeal the Confirmation Order, and it is
5 final.

6 Article X of the Plan, entitled "Discharge of the Debtor,"
7 reads as follows:

8 Upon confirmation, the DEBTOR shall receive, to the
9 fullest extent possible, any and all discharges
10 afforded by the Bankruptcy Code. In addition, the
11 entry of an order confirming this Plan shall constitute
12 a release of any and all claims, causes of action,
13 rights, disputes in existence prior to the confirmation
14 whether known or unknown, liquidated or unliquidated,
15 fixed or contingent, by any parties against the DEBTOR
16 or claims on which the DEBTOR is the primary obligor.
17 Such parties' sole recourse as to claims against the
18 DEBTOR or on which the DEBTOR is the primary obligor
19 shall be to accept the treatment given to such party
20 under the Plan.

21 The Order of confirmation shall constitute a permanent
22 stay and permanent injunction prohibiting: 1) any
23 action by any party against the revested DEBTOR, 2) any
24 action by any party against property of the revested
25 DEBTOR, or 3) any action by any party against any party
26 based upon a claim, which existed prior to
27 Confirmation, pursuant to which the DEBTOR is the
28 primary obligor.

Paragraph 10 of the Confirmation Order provides that,
all creditors whose debts are discharged by this order
and all creditors whose judgments are declared null and
void by Article X of the Final Plan of Reorganization
Proposed by Debtor are permanently enjoined from
instituting or continuing any action or employing any
process or engaging in any act to collect on a debt
discharged herein and/or engaging in any act prohibited
by Article X of the Final Plan.

At the time that the Plan was confirmed, the IRS's claim
against JJ Re-Bar was not a final assessment because an audit was
being conducted. The Plan provided that JJ Re-Bar would pay the
IRS the full amount of its claim within 72 months of the

1 effective date of the Plan, or within 72 months of the assessment
2 date, whichever was later. When the audit was concluded, the IRS
3 sent a bill to JJ Re-Bar for payroll taxes, fraud penalties and
4 interest. JJ Re-Bar disagreed with the IRS and filed an
5 administrative appeal of the proposed assessment. The
6 administrative appeal was resolved in 2004 through a negotiated
7 settlement. However, apparently, bills reflecting the correct
8 assessments consistent with the settlement were not sent to JJ
9 Re-Bar for several years. The final IRS claim consisted of a
10 priority unsecured claim in the amount of \$1,435,083.52, and a
11 general unsecured claim, including a civil fraud penalty, in the
12 amount of \$1,675,951.92. The IRS provided JJ Re-Bar with a
13 payment schedule in late 2007. JJ Re-Bar began making payments
14 on the IRS's finally assessed claim pursuant to the confirmed
15 Plan in December 2007 and timely has made all required payments
16 to the IRS under the Plan since that time.

17 In spite of the settlement between the IRS and JJ Re-Bar and
18 JJ Re-Bar's compliance with its Plan obligations in making
19 payments to the IRS on its agreed claim, the IRS has initiated
20 efforts to assess and collect prepetition and preconfirmation
21 payroll taxes from Joseph J. Skokan and Joseph M. Skokan
22 (collectively, the "Skokans") as "responsible persons" under 28
23 U.S.C. § 6672. Joseph J. Skokan and his wife founded JJ Re-Bar
24 as a proprietorship business prior to its incorporation, and they
25 are JJ Re-Bar's sole shareholders. Joseph M. Skokan is Joseph J.
26 Skokan's son and currently is the president of JJ Re-Bar. The

1 Skokans are the principal officers of JJ Re-Bar.³

2 JJ Re-Bar advised the IRS that its efforts to collect its
3 claim from the Skokans violated the terms of JJ Re-Bar's
4 confirmed Plan; however, the IRS continued with its efforts to
5 collect against the Skokans "in order to protect [the IRS's]
6 interests should [JJ Re-Bar] default on its payments." On
7 February 8, 2008, JJ Re-Bar filed its "Motion for Enforcement of
8 Order Confirming Final Plan of Reorganization Proposed by Debtor
9 and to Hold the Department of the Treasury/Internal Revenue
10 Service in Contempt for Violation of Order Confirming Final Plan
11 of Reorganization Proposed by Debtor" ("Motion"). The IRS filed
12 its response to the Motion on May 19, 2008.

13 On January 26, 2009, the bankruptcy court held a hearing on
14 the Motion. The minutes of the hearing included the bankruptcy
15 court's final ruling ("Final Ruling") in favor of the IRS. The
16 Final Ruling was based on two principal conclusions of the
17 bankruptcy court: 1) The Anti-Injunction Act, 26 U.S.C.
18 § 7421(a), prohibits the bankruptcy court from exercising
19 jurisdiction over the IRS's efforts to collect taxes from
20 individuals who are not debtors in bankruptcy. 2) Even if the
21 bankruptcy court had jurisdiction in this case, the assessment
22

23 ³ In 2002, the United States filed a criminal case against
24 the Skokans for conspiracy to defraud the United States in
25 violation of 18 U.S.C. § 371, resulting from their alleged
26 willful and intentional failure to withhold and account for the
27 full and correct amount of federal income, social security and
28 Medicare taxes from wages paid to JJ Re-Bar employees, and Joseph
J. Skokan's alleged willful and intentional failure to report
income. The Skokans entered guilty pleas and subsequently were
convicted.

1 and enforcement of "trust fund" tax liabilities against the
2 Skokans as "responsible persons" under 26 U.S.C. § 6672 did not
3 violate the terms of JJ Re-Bar's Plan because JJ Re-Bar was not
4 the "primary obligor" for such liabilities. JJ Re-Bar's
5 obligation to pay employee tax withholdings arises under 26
6 U.S.C. §§ 3102(a) and 3402(a). Accordingly, the IRS was not
7 seeking to recover a debt covered by the Plan. The bankruptcy
8 court entered its order denying the Motion on January 29, 2009.

9 JJ Re-Bar filed a timely Notice of Appeal on the same day.

10 **II. JURISDICTION**

11 The bankruptcy court had jurisdiction under 28 U.S.C.
12 §§ 1334 and 157(b)(2)(I) and (O), and its retention of
13 jurisdiction in the order confirming the Plan. We have
14 jurisdiction under 28 U.S.C. § 158.

15 **III. ISSUES**

16 1. Did the Anti-Injunction Act preclude the bankruptcy
17 court from exercising jurisdiction over the IRS's efforts to
18 collect "trust fund" taxes from the Skokans as "responsible
19 persons" because they were not in bankruptcy?

20 2. If the bankruptcy court did have jurisdiction, did the
21 bankruptcy court correctly determine that the IRS's collection
22 efforts against the Skokans were not precluded by the terms of JJ
23 Re-Bar's confirmed Plan because JJ Re-Bar was not the "primary
24 obligor" with respect to the Skokans' alleged obligations as
25 "responsible persons" under 26 U.S.C. § 6672?

26 **IV. STANDARDS OF REVIEW**

27 This appeal involves no issues of fact. We review issues of
28 statutory construction and conclusions of law de novo. Ransom v.

1 MBNA Am. Bank, N.A. (In re Ransom), 380 B.R. 799, 802 (9th Cir.
2 BAP 2007), aff'd, 577 F.3d 1026 (9th Cir. 2009).

3 **V. DISCUSSION**

4 This appeal concerns acts of the IRS to collect unpaid
5 employee withholding "trust fund" taxes from the Skokans while JJ
6 Re-Bar is making installment payments on essentially the same
7 obligations pursuant to the Plan. As noted by this Panel in
8 United States v. Condel, Inc. (In re Condel, Inc.), 91 B.R. 79,
9 80 n.1 (9th Cir. BAP 1988):

10 "Trust fund taxes" are those income and social security
11 taxes that an employer is required to withhold from the
12 wages and salaries paid to its employees. They are so
named since they are directed to be held "in trust for
the United States." 26 U.S.C. § 7501.

13 The employer, JJ Re-Bar in this case, is directly liable for
14 payment of the withheld trust fund taxes. See 26 U.S.C. §§ 3102
15 and 3402. However, a "separate and distinct" remedy for
16 collecting delinquent trust fund taxes is provided by 26 U.S.C.
17 § 6672. United States v. Huckabee Auto Co., 783 F.2d 1546, 1548-
18 49 (11th Cir. 1986) ("It is well established that the liability
19 imposed under section 6672 is separate and distinct from that
20 imposed on the employer under sections 3102 and 3402 of the
21 Internal Revenue Code." (citations omitted)).

22 Section 6672(a) provides, in relevant part:

23 Any person required to collect, truthfully account for,
24 and pay over any tax imposed by this title who
willfully fails to collect such tax, or truthfully
25 account for and pay over such tax, or willfully
attempts in any manner to evade or defeat any such tax
26 or the payment thereof, shall, in addition to other
penalties provided by law, be liable to a penalty equal
27 to the total amount of the tax evaded, or not
collected, or not accounted for and paid over.

28 Although the "responsible person" liability provided for in

1 § 6672(a) is described as a "penalty," it
2 is not penal in nature, [Moday v. United States, 421
3 F.2d 1210, 1216 (7th Cir. 1970)], but is "simply a
4 means of ensuring that the tax is paid." [Newsome v.
5 United States, 431 F.2d 742, 745 (5th Cir. 1970)]
6 (quoting Botta v. Scanlon, 314 F.2d 392, 393 (2d Cir.
7 1963)). The primary purpose of the section is thus the
8 protection of government revenue. Newsome, 431 F.2d at
9 745 (citations omitted).

10 United States v. Huckabee Auto Co., 783 F.2d at 1548. Consistent
11 with that purpose, it is IRS policy to collect the subject
12 liability only once. See United States v. Sotelo, 436 U.S. 268,
13 279 n.12 (1978).

14 Initially, the bankruptcy court held that the Anti-
15 Injunction Act, 26 U.S.C. § 7421(a), precluded the bankruptcy
16 court from exercising jurisdiction over the IRS's efforts to
17 collect trust fund taxes from the Skokans because they were not
18 debtors in bankruptcy, citing American Bicycle Ass'n v. United
19 States (In re American Bicycle Ass'n), 895 F.2d 1277 (9th Cir.
20 1990).⁴ The Anti-Injunction Act provides, in relevant part, that
21 "no suit for the purpose of restraining the assessment or
22 collection of any tax shall be maintained in any court by any
23 person, whether or not such person is the person against whom
24 such tax was assessed." 26 U.S.C. § 7421(a).

25 In American Bicycle Ass'n, the Ninth Circuit held that the
26 Anti-Injunction Act precluded a bankruptcy court from enjoining

27 ⁴ The bankruptcy court actually first held that the United
28 States Department of the Treasury and IRS officer Bennett
individually were protected by sovereign immunity from suit
and/or motion for injunctive relief in the matter before the
bankruptcy court. These holdings have not been appealed and are
not before us.

1 the collection of trust fund taxes from the responsible officer
2 of a debtor corporation. 895 F.2d at 1279-80. American Bicycle
3 Association's ("American Bicycle") confirmed chapter 11 plan
4 provided that its unpaid federal tax obligations would be paid in
5 full in installments over time, and nothing in the record
6 indicated that American Bicycle had defaulted on its plan
7 obligations to the IRS. Id. at 1278. Nevertheless, the IRS
8 notified Mr. Anderson, American Bicycle's secretary-treasurer,
9 that a penalty would be assessed against him personally as a
10 "responsible officer" for a portion of the federal taxes owed by
11 American Bicycle. American Bicycle's confirmed plan did not
12 purport to release Mr. Anderson from such liabilities, but
13 American Bicycle and Mr. Anderson filed a complaint before the
14 bankruptcy court seeking to enjoin the IRS under § 105(a)⁵ from
15 collecting the taxes from Mr. Anderson on the ground that such
16 collection would impair Mr. Anderson's ability to make capital
17 contributions to American Bicycle necessary to fund its plan.

18 The bankruptcy court in American Bicycle Ass'n, taking the
19 plaintiffs' allegations as true, issued a preliminary injunction
20 against the IRS, but recognizing that authorities diverged on the
21 issue of the bankruptcy court's authority to issue such an
22 injunction, granted the IRS leave to appeal the preliminary
23 injunction order. On appeal, the district court reversed, and
24 the Ninth Circuit affirmed the district court's decision,
25 concluding that the "specific and unequivocal" provisions of the
26

27 ⁵ Section 105(a) authorizes a bankruptcy court to "issue
28 any order, process, or judgment that is necessary or appropriate
to carry out the provisions" of the Bankruptcy Code.

1 Anti-Injunction Act overrode the general grant of authority in
2 § 105(a). Id. at 1279-80. See also In re Condel, Inc., 91 B.R.
3 at 82 ("Allowing a debtor to avoid or forestall the tax
4 liabilities of its officers by use of a Plan would violate the
5 policy of the Anti-Injunction Act as readily as allowing the
6 debtor to avoid such liability by filing a suit for injunctive
7 relief.").

8 JJ Re-Bar disputes the relevance of American Bicycle Ass'n
9 in the factual and procedural context of this case: The issue
10 before the bankruptcy court here was not whether an injunction
11 should issue against the IRS, but whether the injunction
12 contained in the Confirmation Order that had been final for years
13 should be enforced against the IRS.

14 Section 1141(a) provides, in relevant part, that "the
15 provisions of a confirmed plan bind . . . any creditor . . .
16 whether or not the claim . . . of such creditor . . . is impaired
17 under the plan and whether or not such creditor . . . has
18 accepted the plan." JJ Re-Bar argues that the terms of a
19 chapter 11 plan that has been confirmed by a final order are
20 binding in spite of the fact that terms of the plan otherwise are
21 contrary to law, relying on Trulis v. Barton, 107 F.3d 685 (9th
22 Cir. 1997). In Trulis v. Barton, the Ninth Circuit considered
23 the effects of a chapter 11 plan that included release provisions
24 covering nondebtor third parties asserted to be contrary to
25 § 524(e),⁶ where no concerned party had appealed the confirmation

27 ⁶ Section 524(e) provides, in relevant part, that
28 "discharge of a debt of the debtor does not affect the liability
of any other entity on, or the property of any other entity for,
such debt." Arguably, the same issue could have been raised by
(continued...)

1 order. Id. at 689. The Ninth Circuit held that,

2 Once a bankruptcy plan is confirmed, it is binding on
3 all parties and all questions that could have been
4 raised pertaining to the plan are entitled to res
judicata effect.

5 Id. at 691. See also Espinosa v. United Student Aid Funds, Inc.,
6 553 F.3d 1193, 1199 (9th Cir. 2008), cert. granted, 77 U.S.L.W.
7 3531, 77 U.S.L.W. 3673, 77 U.S.L.W. 3678 (U.S. Jun. 15, 2009)
8 (No. 08-1134); Great Lakes Higher Educ. Corp. v. Pardee (In re
9 Pardee), 193 F.3d 1083, 1086 (9th Cir. 1999) ("This court has
10 recognized the finality of confirmation orders even if the
11 confirmed bankruptcy plan contains illegal provisions.") (citing
12 Trulis v. Barton, 107 F.3d at 691).

13 JJ Re-Bar argues that the Plan provided for a release of any
14 and all claims upon which JJ Re-Bar was the "primary obligor,"
15 with the sole recourse for creditors with such claims being to
16 rely on their treatment under the Plan. The Plan further
17 provided for a "permanent injunction" against such creditors
18 taking any action against third parties to collect such claims.
19 The IRS did not object to JJ Re-Bar's Plan, and it did not appeal
20 the Confirmation Order. Accordingly, JJ Re-Bar argues that the
21 IRS is bound by the Plan provisions and cannot undertake to
22 assess and collect the subject trust fund taxes from the Skokans.

23 In its Final Ruling, the bankruptcy court agreed with JJ Re-
24 Bar's Trulis v. Barton argument that once a chapter 11 plan has

25
26 _____
27 ⁶(...continued)

28 the IRS before the Plan was confirmed in this case. However,
neither of the parties has raised any issue with respect to
illegality of the release and injunction provisions included in
the Plan in light of § 524(e) before us (or before the bankruptcy
court for that matter) in this appeal.

1 been confirmed, it is binding on all interested parties.
2 However, it held that even if it had jurisdiction, and in light
3 of the Ninth Circuit's holding in Trulis v. Barton, IRS
4 enforcement of trust fund tax liabilities against the Skokans
5 under 26 U.S.C. § 6672 did not violate the proscriptions of JJ
6 Re-Bar's confirmed Plan because JJ Re-Bar was not the "primary
7 obligor" with respect to such liabilities. The Skokans, as
8 "responsible persons," were the primary obligors under 26 U.S.C.
9 § 6672. We agree for the following reasons.

10 It is true that the Trulis v. Barton line of authority in
11 the Ninth Circuit stands for the proposition that once a
12 bankruptcy plan is confirmed, if an objection is not preserved
13 through an appeal and the confirmation order becomes final, the
14 terms of the plan have the same preclusive effect as a final
15 judgment. 107 F.3d at 691; Espinoza v. United Student Aid Funds,
16 Inc., 553 F.3d at 1199; In re Pardee, 193 F.3d at 1086-87. It is
17 equally true, however, that for a plan term to have such
18 preclusive effect, it must be clear. See Espinoza v. United
19 Student Aid Funds, Inc., 553 F.3d at 1201, which states:

20 [I]t's not clear why letting the creditor know, in
21 plain terms, that its rights will be impaired by the
22 proposed plan--and then leaving it up to the creditor
23 and his lawyers to figure out what objections or
remedies are available--doesn't satisfy the Tenth
Circuit's "heart of the ... notice" standard.
(emphasis added);

24 In re Pardee, 193 F.3d at 1085-86, includes:

25 The Pardees' plan contained a provision that expressly
26 purported to discharge the post-petition interest on
27 their student loan debt and relieve them of liability
28 language in their plan that, if confirmed, would
clearly have a negative impact on Great Lakes' ability
to collect postpetition interest. (emphasis added);

1 Trulis v. Barton, 107 F.3d at 691, states:

2 The release provisions and the bankruptcy court order
3 expressly apply to the same parties and claims as the
4 present suit. The bankruptcy court order confirming
5 the Joint Plan clearly stated that members of each
class who elected to become members of the new club,
which each plaintiff in this case did, release all
claims against the Berg Defendants. (emphasis added).

6 For example, the chapter 13 plan in the Pardee case provided as
7 follows with respect to the Pardees' student loan debt:

8 e. Education Loan(s): The Debtor has two separate
9 obligations for their student loans which are as
follows:

10 (1) . . .
11 (2) Great Lakes Higher Education, 2401 International
12 Way, Madison, WI 53704 in the amount of \$26,235.00.
13 This obligation was incurred by Robert McKnight Pardee
14 and [is] in default. Great Lakes Education shall be
paid through the Plan and Great Lakes Higher Education
shall receive the total amount of \$26,235.00 for its
claim and any remaining unpaid amounts, if any,
including any claims for interest, shall be discharged
by the Plan. (emphasis in original).

15 Pardee, 193 F.3d at 1086 n.5.

16 In contrast, the relevant terms of JJ Re-Bar's Plan provide
17 that:

18 [T]he entry of an order confirming this Plan shall
19 constitute a release of any and all claims . . . on
20 which the DEBTOR is the primary obligor. Such parties'
sole recourse as to claims . . . on which the DEBTOR is
the primary obligor shall be to accept the treatment
given to such party under the Plan.

21 . . .
22 The Order of confirmation shall constitute a permanent
23 stay and permanent injunction prohibiting: . . . 3) any
24 action by any party against any party based upon a
claim, which existed prior to Confirmation, pursuant to
which the DEBTOR is the primary obligor.

25 The Confirmation Order only adds that,

26 all creditors whose debts are discharged by this order
27 . . . are permanently enjoined from instituting or
28 continuing any action or employing any process or
engaging in any act to collect on a debt discharged
herein and/or engaging in any act prohibited by Article
X of the Final Plan.

1 There is no specific reference to a release or discharge of
2 IRS claims either in the Plan or in the Confirmation Order.
3 There certainly is no "clear" or express provision in the Plan or
4 Confirmation Order purporting to enjoin the IRS from pursuing
5 collection actions for employee payroll withholding or trust fund
6 taxes against "responsible persons" under 26 U.S.C. § 6672. In
7 fact, there is no reference in the subject provisions of the Plan
8 and the Confirmation Order to the IRS at all, in spite of the
9 fact that the amended IRS claim for \$833,269.00 in tax
10 liabilities meant that the IRS claim undoubtedly represented a
11 very material concern in the case. As the bankruptcy court
12 noted at the hearing on the Motion, "The reason this language is
13 so cute, is you were dancing, or whoever drafted this, was
14 dancing around the statutory prohibition against doing this."

15 In support of its argument that use of the term "primary
16 obligor" in the release of claims and injunction provisions of
17 the Plan is clear enough to bind the IRS, JJ Re-Bar cites two
18 bankruptcy court decisions from outside the Ninth Circuit. In In
19 re Greenberg, 105 B.R. 691 (Bankr. M.D. Fla. 1989), the
20 bankruptcy court's characterization of claims for unpaid payroll
21 taxes as the "primary obligations" of two dental services
22 corporations but only "secondary obligations" of the individual
23 debtors under 26 U.S.C. § 6672 is purely dicta in a case dealing
24 with the appropriate allocation of chapter 11 debtors' payments
25 on tax claims under their plan of reorganization. Id. at 692,
26 696-97.

27 In re Fiesole Trading Corp., 315 B.R. 198 (Bankr. D. Mass.
28 2004), dealt with the question of whether "responsible persons"

1 who paid trust fund tax liabilities were entitled to be
2 subrogated to the claim of the IRS in the chapter 7 case of a
3 corporate debtor under § 509. Although the Fiesole bankruptcy
4 court's finding that "the corporate Debtor is primarily liable
5 for the unpaid Trust Fund taxes, while the liability of Movants
6 as responsible individuals is secondary to the underlying tax
7 obligation" (id. at 207) was more central to its holdings than in
8 Greenberg, the Fiesole court recognized that the obligations of
9 employers and "responsible persons" to pay trust fund tax
10 liabilities arise from different sources. Id. at 206. The
11 Fiesole court further acknowledged the existence of contrary
12 authorities concluding that "responsible persons" who pay trust
13 fund tax liabilities may not be entitled to subrogation rights.
14 Id. at 207. See, e.g., In re Barnes, 304 B.R. 489, 492 (Bankr.
15 N.D. Ala. 2004) ("subrogation is not available to a party who
16 satisfies an obligation for which he is primarily liable");
17 Mason v. Pa. Dept. of Revenue (In re Davis), 145 B.R. 499 (Bankr.
18 W.D. Pa. 1992); Patterson v. Yeargin (In re Yeargin), 116 B.R.
19 621, 622-23 (Bankr. M.D. Tenn. 1990), which states:

20 Payment of a \$ 6672 tax penalty does not give rise to a
21 right of subrogation of one responsible person against
22 another. Section 6672 liability is personal and
23 separate from the corporation's debt. (citations
24 omitted) Although the IRS has discretion to assess the
25 100% penalty against more than one responsible person
26 until all withholding taxes are satisfied, a
27 responsible person does not have a right of
28 contribution or indemnification from either the
29 employer or another responsible person. (citations
30 omitted) Here, Patterson has not paid the liability of
31 another, he has only discharged the tax penalty for
32 which he was primarily liable. (emphasis added);

33 In re FJS Tool & Mfg. Co., Inc., 88 B.R. 866, 870-71 (Bankr. N.D.
34 Ill. 1988) states:

1 A responsible officer's personal liability under 26
2 U.S.C. § 6672 is separate and distinct from the
3 corporation's debt. (citation omitted) ... Spencer is
4 not an "innocent party"; he is stipulated to be a
5 responsible officer under 26 U.S.C. § 6672 and
6 therefore he was responsible for the unlawful corporate
7 use of taxes withheld from debtor's employees. The
8 small corporate debtor was not a "wrongdoer"; it was
9 the inanimate pawn of its responsible officer who was
10 its president, Spencer;

11 and Ridge v. Smothers (In re Smothers), 60 B.R. 733 (Bankr. W.D.
12 Ky. 1986).

13 Section 6672 does not provide that responsible persons will
14 not be pursued for collection of trust fund taxes until efforts
15 to collect from the employer have been exhausted. Abramson v.
16 United States, 39 B.R. 237, 239 (Bankr. E.D.N.Y. 1984) ("Cases on
17 point firmly reject a hierarchical system wherein the IRS must
18 first pursue the corporation, usually in the Bankruptcy Court, to
19 obtain taxes the corporation's officers are separately obligated
20 to pay under § 6672." (citations omitted)). Responsible persons
21 are liable under § 6672 for the payment of unpaid trust fund
22 taxes primarily and as principals. The obligations of employers
23 to withhold and pay trust fund taxes are certainly related to the
24 obligations of "responsible persons" to make sure that those
25 taxes are paid, but these obligations can be separately and
26 independently pursued. As the review of authorities above
27 indicates, there is no unanimity of opinion outside the Ninth
28 Circuit that the obligation of the employer is "primary," and the
obligation of "responsible persons" is purely "secondary." In
fact, the majority view appears to be that the obligation of
"responsible persons" to pay trust fund taxes is a primary
liability. We have not been able to find any opinion of a court

1 within the Ninth Circuit that has taken a position on this issue
2 prior to the Final Ruling of the bankruptcy court in this case.

3 For reasons about which we could speculate but that are not
4 clear from the record before us, JJ Re-Bar chose to draft its
5 Plan provisions dealing with releases of claims and the
6 postconfirmation injunction against collection of discharged
7 claims in general terms that did not state clearly that the IRS's
8 claim would be affected by those provisions, and if so, how. The
9 burden of that lack of clarity appropriately falls on JJ Re-Bar
10 and the Skokans. We agree with the bankruptcy court that JJ Re-
11 Bar was too "cute," or at least, too cryptic in drafting its Plan
12 provisions. The subject Plan provisions did not provide adequate
13 notice to the IRS of their purported effects. In these
14 circumstances, the bankruptcy court correctly concluded that it
15 was not appropriate for it to enjoin the IRS's efforts to collect
16 unpaid trust fund taxes from the Skokans.

17 **VI. CONCLUSION**

18 Based on the foregoing analysis of authorities in light of
19 the undisputed factual record before us in this appeal, we
20 conclude as a matter of law that the bankruptcy court did not err
21 in denying the Motion. Accordingly, we AFFIRM.
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