

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re :  
: Chapter 11 Case Nos.  
CIS CORPORATION, CONTINENTAL :  
INFORMATION SYSTEMS : 89-10073 (PCB) through  
CORPORATION, *et al.* : 89-10084 (PBC) Inclusive  
: Debtors. :  
: :  
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MEMORANDUM DECISION DENYING THE MOTION TO RECONSIDER  
ORDER DIRECTING RELEASE OF UNCLAIMED FUNDS

BEATTY, PRUDENCE CARTER, U.S.B.J.

The County of Los Angeles Treasurer and Tax Collector (“LA County”) has moved for reconsideration pursuant to Rule 9024 of the Bankruptcy Rules, which incorporates Federal Rule of Civil Procedure 60(b), of the Court’s order entered on April 13, 2004 (the “April 13 Refund Order”).<sup>1</sup> The April 13 Refund Order directed LA County to turn over to Reorganized CIS the sum of \$912,483.29 (the “Unclaimed Funds”) as to which LA County had published an escheat notice. Following entry of the April 13 Refund Order, LA County promptly turned over the Unclaimed Funds to Reorganized CIS.

The April 13 Refund Order also provided for the payment of interest to Reorganized CIS. Within days after paying over the Unclaimed Funds, LA County disputed its obligation to pay interest. Reorganized CIS then pursued the claim for interest in the Superior Court for the County of Los Angeles. LA County opposed the relief sought by Reorganized CIS. The present motion by LA County followed while that litigation was ongoing.

Based on the findings of fact and conclusions of law which follow, the Court denies the motion to reconsider the April 13 Refund Order and directs that the case be re-closed. However, the April 13 Refund Order will be modified to delete the provisions for the payment of interest since Reorganized CIS has withdrawn all requests for interest.<sup>2</sup>

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<sup>1</sup> LA County also moved to have these closed cases reopened. That portion of the motion was granted in order that this Court could proceed to the merits of the motion for reconsideration.

<sup>2</sup> Reorganized CIS dismissed its state court action for interest in January 2005.

## BACKGROUND

On January 13, 1989, Continental Information Systems Corporation and its affiliates (collectively the “Debtors” or “Reorganized CIS” when referred to post-confirmation) filed voluntary petitions in this Court under Chapter 11 of the Bankruptcy Code (the “Code”). The Debtors were in the business of leasing computers and other equipment. In October 1989, this Court appointed James P. Hassett as the Chapter 11 (the “Chapter 11 Trustee”). On November 29, 1994, the Court issued an order confirming the Chapter 11 Trustee’s Joint Chapter 11 Plan of Reorganization (the “Plan”). After the confirmation, the Debtors continued in business.

While the chapter 11 cases were pending, LA County filed seven proofs of claim for taxes owed for the years 1984 to 1992 with respect to equipment leased by the Debtors to various lessees in the County of Los Angeles. LA County originally filed proofs of claims in the total amount of \$2,756,480.02. Following extensive reconciliation, ultimately the Chapter 11 Trustee and LA County agreed on an aggregate reduced allowed amount of \$912,483.29. In July 1995, this Court approved an order allowing LA County’s claims in the agreed to reduced amount (the “Allowed Claims”), as part of an omnibus claims motion.

In August 1995, the Chapter 11 Trustee paid the Allowed Claims to LA County in a series of seven checks, each of which identified the payor as James P. Hassett in his capacity as Chapter 11 Trustee for the Liquidating Estate of CIS Corporation *et al.* On December 29, 1998 the Court entered an order closing the Chapter 11 cases (the “Final Decree”).<sup>3</sup>

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<sup>3</sup> The Final Decree provided that once all distributions were made under the Plan, any remaining assets held by the Chapter 11 Trustee became property of Reorganized CIS and released the Chapter 11 Trustee from his duties and obligations in connection with the Liquidating Estate. The Final Decree also provided that:

“Any holder of an Allowed Claim that does not present for payment any such check \*\*\* shall forfeit any right, title or interest in the funds represented by the check and/or Shares, which funds

Upon receipt, LA County deposited the checks into LA County's general suspense account. Apparently they were deposited there because LA County was unable to allocate the payments to any particular tax payor account. The funds remained in the suspense account for nearly seven years.<sup>4</sup>

In July 2002, LA County, which had still not reconciled the funds to a particular tax obligation, posted a Notice of Unclaimed Funds (the "Notice") in various publications listing a total of \$912,483.29 (the "Unclaimed Funds") as having been paid by James P. Hassett, Trustee for the Liquidating Estate of CIS Corporation, et al. The Notice directed that if no claims were made to any of the funds listed, which included funds other than the Unclaimed Funds at issue here, by August 13, 2002, the funds would escheat to the State of California.

In response to the Notice, both the Chapter 11 Trustee and Reorganized CIS contacted LA County. The Chapter 11 Trustee wrote stating that the payments had been made to LA County in accordance with the LA County claims allowed during the chapter 11 bankruptcy cases. He listed each of the tax claims that LA County had filed with this Court as well as the reduced amount each had been allowed for. He expressly advised LA County that "it is apparent that the funds belong to governmental entities that you collect taxes for." He also included in his letter a CD-ROM containing supporting documentation with respect to the tax claims and their reconciliation.

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and/or Shares shall upon such forfeiture become the sole property of Reorganized Continental."

*Order and Final Decree in Chapter 11 case nos. 89-10073 through 89-10084 (PBA), In re CIS Corporation, et al., Docket No. 5147, pp. 4-5.*

<sup>4</sup>At some point between August 1995 and July 2002, LA County began an internal "Suspense Remittance Procedure." Under this procedure, a memorandum is written to note the date funds are received, the nature of the funds, the payor, the amount of the payment, the check number and the signature of the clerical employee who recorded the information. This information is recorded on a computer system where it is available for further research and is used to aid LA County in reconciling funds to a particular tax obligation.

Reorganized CIS, having conducted its own tax lien search and having found no liens outstanding against the Debtors or Reorganized CIS, contacted Sharon Perkins (“Perkins”), the LA County employee responsible for the oversight of all unclaimed funds. The then CEO of Reorganized CIS also contacted the law firm of Wilmer, Cutler & Pickering LLP (“Wilmer Cutler”), counsel to the former Chapter 11 Trustee, to request a legal opinion regarding the Unclaimed Funds. After a review of the facts, Wilmer Cutler concluded in a legal opinion letter to Reorganized CIS, that the Unclaimed Funds belonged to Reorganized CIS. On August 16, 2002, after consultation with the former Chapter 11 Trustee and in order to avoid any risk that the funds would escheat to the State of California, Reorganized CIS filed a claim with LA County for the Unclaimed Funds.

Almost a year later, during the summer of 2003, Perkins informed Reorganized CIS that LA County could still not identify any unpaid taxes. On August 20, 2003, representatives of Reorganized CIS flew to Los Angeles to meet with LA County representatives, including Perkins and Joyce Aiello (“Aiello”), a member of LA County’s legal department. At this meeting Perkins and Aiello reaffirmed that LA County’s records had been searched and they could not locate any outstanding tax liabilities of the Debtors or any related entities to which the Unclaimed Funds should be applied. Rather, Reorganized CIS was told that all taxes due from the Debtors had been paid in full.

At this meeting LA County stated that in order to remit the funds to Reorganized CIS, it needed an order of the Bankruptcy Court directing payment to Reorganized CIS since the payor of the checks was technically the Liquidating Estate of the Debtors, which was a different entity. LA County was concerned that there were possibly competing claims to the funds. Although

the Chapter 11 Trustee had not made any claims that were, in fact, adverse to that of Reorganized CIS, LA County requested that an order be obtained from the Court directing the payment of the Unclaimed Funds to Reorganized CIS.

On December 24, 2003, Reorganized CIS filed a motion in this Court to reopen these chapter 11 cases to obtain an order clarifying that the Unclaimed Funds should be paid to Reorganized CIS. In February 2004 the Court reopened the cases. On April 13, 2004, after a hearing on notice to LA County, the Court signed the April 13 Refund Order which declared the Unclaimed Funds to be the property of Reorganized CIS and directed LA County to turnover the Unclaimed Funds to Reorganized CIS. On May 4, 2004, Reorganized CIS served the April 13 Refund Order upon LA County. In response LA County stated that it could not immediately refund the monies since the monies had inadvertently been paid to the State of California as if an escheat had occurred. On May 18, 2004, LA County remitted the Unclaimed Funds to Reorganized CIS.<sup>5</sup>

The April 13 Refund Order also provided for the payment to be with interest although it did not include calculation of the amount of interest. LA County, however, resisted the payment of interest, apparently believing that it had only agreed to the return of the Unclaimed Funds themselves. After a series of letters between Reorganized CIS and LA County over the interest issue, Reorganized CIS filed a petition for a writ of mandate in Superior Court of the County of Los Angeles in or about the summer of 2004 to compel the payment of interest. LA County opposed the relief sought by Reorganized CIS.

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<sup>5</sup>These cases were re-closed by this Court on September 23, 2004.

On December 15, 2004, LA County moved in this Court to reopen these cases yet again for this Court to reconsider and vacate the April 13 Refund Order on the grounds that LA County's office mishandled the entire reconciliation of the Unclaimed Funds. It asserted in its motion papers that LA County's "cumbersome protocol" in its "operations and procedures" impaired its ability to allocate the money paid by the Chapter 11 Trustee to the proper account. LA County further stated that its failures were further exacerbated by LA County's new computer system, a move to a different location, the misplacement of taxpayer files and the displacement of civil service personnel. *See* Motion to Reconsider by County of Los Angeles, dated December 15, 2004, p. 5-6. LA County claims that it is entitled to the return of the Unclaimed Funds as a result of its new discoveries with respect to its claims in the Chapter 11 cases. It also seeks to vacate the April 13 Refund Order.

Reorganized CIS urges that LA County's pre-turnover failures, both before and after publication of the escheat Notice, to be able to identify or allocate the Unclaimed Funds were of its own making. It further urges that LA County's errors are not of the extraordinary type which should cause this Court to reconsider the April 13 Refund Order, particularly many months after LA County had already paid over the Unclaimed Funds.<sup>6</sup>

### **DISCUSSION**

LA County moves to vacate the April 13 Refund Order pursuant to Bankruptcy Rule 9024, which incorporates Federal Rule of Civil Procedure Rule 60(b) ("Rule 60(b)"). More particularly, LA County seeks relief pursuant to Rule 60(b)(1) and 60(b)(6) arguing that mistake,

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<sup>6</sup>Since interest is no longer at issue the Court will not discuss LA County's arguments on that topic.

inadvertence, surprise, excusable neglect or other reasons are cause to vacate the April 13 Refund Order.

Rule 60(b) sets forth the grounds on which a court, in its discretion, can rescind or amend a final judgment or order. *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986). It provides in relevant part, that

“[T]he court may relieve a party \* \* \* from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; \* \* \* or (6) any other reason justifying relief from the operation of the judgment\*\*\*.” *Fed. R. Civ. P. 60(b)*.

The purpose of Rule 60(b)(1) is to afford relief to a party from a material mistake that would have changed the outcome of the court’s judgment. *See Fetik v. New York Law School*, 97 Civ. 7746, 1999 WL 459805, at \*4 (S.D.N.Y. June 29, 1999). Rule 60(b) should be broadly construed to do “substantial justice,” yet final judgments should not “be lightly reopened.” *Nemaizer v. Baker*, 793 F.2d at 61. Since Rule 60(b) allows extraordinary judicial relief, it is invoked only upon a showing of exceptional circumstances. *Id.* This is not one of those circumstances.

In the first instance, LA County had seven years to determine how it should apply the \$912,483.29, which sat languid in LA County’s suspense account from the time it was received in 1995, before the escheat Notice was published. Once the escheat Notice was published it had an additional year and a half before the April 13 Refund Order was entered. During that period it repeatedly ignored or failed to adequately consider its own records and the information provided to it by the Chapter 11 Trustee and Reorganized CIS, in writing and in person, that the monies LA County had received were on account of its Allowed Claim in the Debtors’ bankruptcy cases. Indeed, LA County was provided duplicate copies of its Proofs of Claim and



the relevant tax returns on a CD-Rom by the Chapter 11 Trustee. Finally it was LA County itself that asked Reorganized CIS obtain the April 13 Refund Order.

Far from a case of inadvertence, mistake or excusable neglect, this is a situation where the conscious, knowing, intentional and deliberate action by LA County resulted in the very order it now seeks the Court to reconsider and vacate. Deliberate and willful conduct on the part of the party seeking relief pursuant to Rule 60(b)(1) precludes a finding of mistake and inadvertence. *See e.g. Andrulonis v. United States*, 26 F.3d 1224, 1235 (2d Cir. 1994) (The court refused to set aside the judgment from a consent decree because the party was dissatisfied with their settlement.); *see also McCormick v. City of Chicago*, 230 F.3d 319, 327-28 (7th Cir. 2000) (Court refused to provide party relief under Rule 60(b)(1) when the party makes a deliberate choice to settle case.); *see 12 James Wm. Moore et al., Moore's Federal Practice §60.40d, 60-83 (3d ed. 2002)*.

Moreover, the facts cannot support a claim of surprise.<sup>7</sup> Nor can they support a claim for excusable neglect. Quite the opposite is true. The Chapter 11 Trustee and/or Reorganized CIS provided LA County over a period of eighteen months with the means necessary for LA County to determine how to properly apply the Unclaimed Funds. LA County apparently failed to establish proper procedures with respect to dealing with receipt of payment on claims such as it had filed in these cases. In addition, LA County appears to have failed to properly communicate amongst its various departments. It was not until Reorganized CIS sought to collect interest under the terms of the April 13 Refund Order that LA County took any action that finally led it to the belated conclusion that it should not have turned over the Unclaimed Funds. That LA

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<sup>7</sup> Surprise “[d]enotes an unforeseen disappointment against which ordinary prudence would not have afforded protection.” Black’s Law Dictionary 1443 (6th ed. 1990).

County's procedures were cumbersome and ineffective, its departments failed to communicate effectively with each other, it misplaced relevant papers and its computer system was revamped are not grounds for the Court to reconsider the April 13 Refund Order under the facts of this case. See *Pioneer Investment Services Company v. Brunswick Assoc. Ltd. P'ship.*, 507 U.S. 380, 385 (1993) (Holding that the determination of what sorts of neglect will be considered excusable is an equitable one, taking account of all relevant circumstances surrounding the omission, including the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.); *Nemaizer v. Baker*, 793 F.2d at 62 ("Mere dissatisfaction in hindsight with choices deliberately made by counsel is not grounds for finding the mistake, inadvertence, surprise or excusable neglect to justify Rule 60(b)(1) relief."); *Rogers v. Hartford Life & Accident Ins. Co.*, 167 F.3d 933 (5th Cir. 1999) (Defendant took no steps to establish minimum internal procedural safeguards to ensure receipt of complaint.); *North Central Illinois Laborers' District Council v. S.J. Groves*, 842 F.2d 164, 167-68 (7th Cir. 1988) (Company's failure to respond to a complaint because the legal department was short-handed does not mean that its error are excusable since the error was within the company's control.); *Gibbs v. Air Canada*, 810 F.2d 1529, 1537 (11th Cir. 1987) ("Default that is caused by the movant's failure to establish minimum procedural safeguards for determining that action in response to a summons and complaint is being taken does not constitute default through excusable neglect.").

Alternatively, LA County urges that the Court act within its broad equitable powers under Rule 60(b)(6). Rule 60(b)(6) may override the finality of judgments in the interests of

justice when extraordinary circumstances apply. *See Andrulonis v. United States*, 26 F.3d at 1235. Rule 60(b)(6) applies when no other subsection is available and provides for relief from a judgment based on any other reason. *See Nemaizer v. Baker*, 793 F.2d at 63; *see also Unites Stated v. Cirami*, 563 F.2d 26, 32 (2d Cir. 1977).

This Court finds nothing extraordinary surrounding the facts of this case to warrant use of any equitable powers under Rule 60(b)(6). LA County voluntarily turned over the Unclaimed Funds to Reorganized CIS on the basis of the April 13 Refund Order that it suggested it needed to verify the identity of the proper payee. It would be inequitable for this Court to allow LA County to come in many months later and disturb the *status quo*. The time for LA County to have taken action was before the April 13 Refund Order was entered, not afterward.

### CONCLUSION

For the reasons set forth above, LA County's motion to reconsider the April 13 Refund Order is denied. The April 13 Refund Order shall be modified to delete the provisions for interest. These cases should be re-closed.

Settle Order in conformity with this decision.

Dated: New York, New York  
May 31, 2007

/s/ Prudence Carter Beatty  
United States Bankruptcy Judge