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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 08-0121-B

GEORGE FOUNTAS

vs.

COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF REVENUE

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

The plaintiff, George Fountas (Fountas), brought this action against the defendant, Commissioner of the Massachusetts Department of Revenue (the Commissioner), asserting that various provisions of the Massachusetts Health Care Reform Act (the Act), G. L. c. 111M, violate his rights under the United States Constitution (the U.S. Constitution) and the Massachusetts Declaration of Rights.[1] This matter is before the court on the Commissioner's motion to dismiss the amended complaint under Mass. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. For the reasons discussed below, the Commissioner's motion is **ALLOWED**.

BACKGROUND

Fountas alleges the following facts in his amended complaint. Pursuant to the Act, Fountas was required to purchase a health insurance plan by December 31, 2007 and report

[1] Fountas captions his amended complaint "on behalf of himself and others similarly situated." However, as the Commissioner has noted, Fountas identifies only himself as a party in the body of his complaint, and provides no information specifically identifying others referenced in his caption. (See n. 1 to Commissioner's memorandum in support of motion to dismiss). In light of the Court's decision in this matter, it is not necessary to examine whether Fountas' complaint sets forth a class action pursuant to Mass. R. Civ. P. 23.

whether or not he had done so on his 2007 individual tax return. Fountas refused to furnish the requested information, and, as a result, the Commissioner assessed him a penalty. The penalty for the tax year 2007 was loss of the personal exemption under G. L. c. 62, § 3B(b).

DISCUSSION

A motion to dismiss for failure to state a claim permits "prompt resolution of a case where the allegations in the complaint clearly demonstrate that the plaintiff's claim is legally insufficient." Harvard Crimson, Inc. v. President & Fellows of Harvard Coll., 445 Mass. 745, 748 (2006). In June of 2008, the Supreme Judicial Court adopted the United States Supreme Court's refined standard for evaluating the adequacy of a civil complaint upon a challenge for failure to state a claim: "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact) . . . ." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008) (citing Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007)). Those allegations must plausibly suggest, not merely be consistent with, an entitlement to relief. Id. (internal quotation marks omitted) (citing Bell Atl. Corp., 127 S. Ct. at 1966). This standard replaces the familiar language that "a complaint is sufficient 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Eyal v. Helen Broad. Corp., 411 Mass. 426, 429 (1991), quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957), and Nader v. Cintron, 372 Mass 96, 98 (1977) (other citations omitted). The Supreme Judicial Court adopted the new standard after Fountas filed his initial complaint on January 17, 2008, but before he filed his amended complaint on July 11, 2008. The Commissioner has not asked the court to apply the heightened standard; however, the result would be the same under either analysis.

The Act, which became effective on July 1, 2007, obligated each resident of the Commonwealth age eighteen and above to obtain "creditable coverage"[2] by December 31, 2007 and maintain such coverage in effect thereafter. G. L. c. 111M, § 2(a), (b). Each resident who filed an individual tax return for the year 2007 was required to indicate on his return whether, as of December 31, 2007, he had creditable coverage in force, claimed a religious exemption,[3] or had a certificate issued by the board of the connector[4] stating that no plan meeting the definition of creditable coverage was deemed affordable by the connector for him. Id. § 2(b). If the filer did not so indicate, or indicated that he did not have the required coverage in force, his 2007 taxes were to be computed without the benefit of the personal exemption set forth in G. L. c. 62, § 3(B)(b).[5] Id.

Fountas's amended complaint includes allegations that the Act:

1. effects a taking of property without just compensation in violation of
   (a) the Fifth Amendment to the U.S. Constitution, and
   (b) Part 1, Article 10 of the Massachusetts Declaration of Rights;

2. interferes with his right to enjoy life, liberty, and property in violation of Part 1, Article 1 of the Massachusetts Declaration of Rights;

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[2] The Act defines "creditable coverage" as "coverage of an individual under any [number of listed] health plans or as a named beneficiary receiving coverage on another's plan with no lapse of coverage for more than 63 days." G. L. c. 111M, § 1.

[3] The Act provides that "[a]n individual shall be exempt from section 2 if he files a sworn affidavit with his income tax return stating that he did not have creditable coverage and that his sincerely held religious beliefs are the basis of his refusal to obtain and maintain creditable coverage during the 12 months of the taxable year for which the return was filed." G. L. c. 111M, § 3.

[4] The Commonwealth Health Insurance Connector Authority (the connector) is an independent public entity established by G. L. c. 176Q "to facilitate the availability, choice and adoption of private health insurance plans to eligible individuals and groups as described in this chapter." G. L. c. 176Q, § 2(a). The connector is governed by a board, one of the powers and duties of which is to provide certificates to those residents for whom it does not deem creditable coverage affordable. Id. § 3(a)(5).

[5] This provision sets forth the exemptions allowable to individuals against their adjusted gross incomes. G. L. c. 62, § 3(B)(b).

3. implicates separation of powers principles set out in Part 1, Article 30 of the Massachusetts Declaration of Rights;

4. provides for a non-proportional tax assessment in violation of Part 2, Chapter 1, Section 1, Article 4 of the Massachusetts Declaration of Rights;

5. violates the principle of frugality as established in Part 1, Article 18 of the Massachusetts Declaration of Rights;

6. constitutes an excessive fine and cruel and unusual punishment in violation of
   (a) the Eighth Amendment to the U.S. Constitution, and
   (b) Part 1, Article 26 of the Massachusetts Declaration of Rights;

7. violates the privilege against self incrimination guaranteed by
   (a) the Fifth Amendment to the U.S. Constitution, and
   (b) Part 1, Article 12 of the Massachusetts Declaration of Rights;

8. amounts to a bill of attainder under Article I, Section 10 of the U.S. Constitution; and

9. impairs the obligation of contracts in violation of Article I, Section 10 of the U.S. Constitution.

I. The Act does not violate any of the cited provisions of the Massachusetts Declaration of Rights or the Contracts Clause of the U.S. Constitution

The Massachusetts Declaration of Rights provides the Legislature with "full power and authority . . . from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to the constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same . . . ." Mass. Const., Part II, c.I., § 1, art.4. This power is known as the Legislature's "police power."

"Police power" is "an old-fashioned term for the Commonwealth's lawmaking authority, as bounded by the liberty and equality guarantees of the Massachusetts Constitution and its

express delegation of power from the people to their government." Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 321-322 (2003). It can be understood, in general terms, as "the Legislature's power to enact rules to regulate conduct to the extent that such laws are 'necessary to secure the health, safety, good order, comfort, or general welfare of the community'[6] (citations omitted)." Id. at 322 (citing Opinion of the Justices, 341 Mass. 760, 785 (1960)). The Legislature has discretion to determine "what the public interests require and what means should be taken to protect those interests. The field for the legitimate exercise of the police power is coextensive with the changing needs of society."[7] Merit Oil Co. v. Dir. of the Div. on the Necessaries of Life, 319 Mass. 301, 304-305 (1946).

A court evaluating any law enacted under the police power must make all rational presumptions in favor of its validity. Druzik v. Bd. of Health of Haverhill, 324 Mass. 129, 138 (1949). Such legislation may be struck down only if no rational basis of fact can reasonably be conceived to sustain it.[8] Slome v. Chief of Police of Fitchburg, 304 Mass. 187, 189 (1939). Where the question of rational basis is "fairly debatable," a court may not substitute its judgment for that of the Legislature. Simon v. Needham, 311 Mass. 560, 564-565 (1942). A proper

[6] While what constitutes the general welfare of the community, or the public welfare, cannot be precisely defined, "it has been said to include public convenience, comfort, peace and order, prosperity, and similar concepts, but not to include 'mere expediency.'" Opinion of the Justices, 333 Mass. 773, 778 (1955) (quoting Opinion of the Justices, 234 Mass. 597, 603 (1920)).

[7] See, e.g., Howes Bros. Co. v. Mass. Unemployment Comp. Comm'n, 296 Mass. 275 (1936) (statute requiring employers and employees to contribute to a common fund from which unemployment benefits were to be paid held to be a valid exercise of police power notwithstanding that no part of the contribution of a single employer might be applied for the benefit of his own employees); Commonwealth v. Mugford, 183 Mass. 249 (1903) (statute authorizing the city or town board of health, in its discretion, to require, and provide free of charge, the vaccination and revaccination of all of the inhabitants thereof, and authorizing the imposition of a monetary penalty for failure of those twenty-one years of age and older, and not under guardianship, to comply, held to be a valid exercise of police power).

[8] As the inquiry focuses on the conceivability of a rational basis, the Legislature need not have actually made specific findings in support of its enactments. Marshal House, Inc. v. Rent Control Bd. of Brookline, 358 Mass. 686, 695 (1971).

exercise of the police power violates no provision of the Massachusetts Declaration of Rights and impairs no obligation of contract under the U.S. Constitution. Boston Elevated Ry. v. Commonwealth, 310 Mass. 528, 552-553 (1942).

The Legislature could have found that the Act bears a real and substantial relation to the health, safety, good order, comfort, and general welfare of the community because, by virtue of its mandate, more of those who fall ill will have insurance coverage and the burden of paying for such coverage will be more equitably distributed. As a rational basis of fact can reasonably be conceived to sustain it, the Act is a proper exercise of police power. Because proper exercises of police power do not offend either the Massachusetts Declaration of Rights or the Contracts Clause of the U.S. Constitution, Fountas's claims identified above as 1(b), 2, 3, 4, 5, 6(b), 7(b), and 9 must be dismissed.

II. The Act does not effect a taking of property without just compensation in violation of the Fifth Amendment to the U.S. Constitution

Fountas claims that requiring him to purchase health insurance at his own expense constitutes a taking of property without just compensation in violation of the Fifth Amendment to the U.S. Constitution.

The Takings Clause of the Fifth Amendment, which applies to the states through the Fourteenth Amendment, see Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897), provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Although "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all," Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028 n.15 (1992), the United States Supreme Court recognized in Pennsylvania Coal

Company v. Mahon, 260 U.S. 393, 415 (1922), that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

Two types of regulatory actions are generally considered "per se takings" under the Fifth Amendment. Lingle v. Chevron U.S.A., 544 U.S. 528, 538 (2005). First, "where government requires an owner to suffer a permanent physical invasion of her property . . . it must provide just compensation. Id. (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)). Second, the government must pay just compensation when its regulations "completely deprive an owner of 'all economically beneficial us[e]' of her property" unless nuisance or property law "independently restrict the owner's intended use of the property." Id. (quoting and citing Lucas, 505 U.S. at 1019, 1026-1032).

Outside of these two categories, "regulatory takings challenges are [usually] governed by the standards set forth in Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978)." Id. Under Penn Central, several factors are of "particular significance" in determining whether a regulation effects a Fifth Amendment taking: "[t]he economic impact of the regulation on the claimant[,] . . . the extent to which the regulation has interfered with distinct investment-backed expectations[, and] . . . the character of the governmental action." 438 U.S. at 124.

The Act does not constitute a per se taking under either the Loretto (physical invasion) or Lucas (total regulatory taking) lines of cases. The United States Supreme Court has suggested, in dicta, that while personal property is included in that category of property which might be subject to a physical invasion-type per se taking, money is not included because it is fungible. See United States v. Sperry Corp., 493 U.S. 52, 62 n.9 (1989). Further, the Act does not amount to a total

regulatory taking because requiring Fountas to purchase affordable health insurance does not deprive him of all economically beneficial use of his money.

Whether the Act can be considered a taking, then, must be determined by applying the Penn Central factors.[9] Under the Act, a resident can request a certificate of exemption from the board of the connector if no plan meeting the definition of "creditable coverage" is affordable for that individual. In other words, the Act does not require an individual to purchase health insurance that he cannot afford. Therefore, the Act's economic impact on Fountas can be considered minimal. Moreover, the character of the government action weighs against finding that the Act is a taking. Any interference with Fountas's property "arises from [a] public program adjusting the benefits and burdens of economic life to promote the common good." Penn Central, 438 U.S. at 124. The United States Supreme Court has acknowledged that "'[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,' . . . [and, accordingly, has] recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values." Id. (quoting Mahon, 260 U.S. at 413, and citing "[e]xercises of the taxing power" as an "obvious example").

As the Act does not constitute a per se taking, and, on balance, does not amount to a taking under the Penn Central factors, Fountas's claim identified above as 1(a) must be dismissed.

III. The Act does not constitute either an excessive fine or cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution

For those individuals, subject to the mandate, who either failed to obtain creditable

[9] Given the nature of the property at issue in this case, i.e., money, the first factor under Penn Central (the economic impact of the regulation on the claimant) essentially subsumes the second (the extent to which the regulation has interfered with distinct investment-backed expectations).

coverage or report whether or not they had done so, the penalty for the tax year 2007 was loss of the personal exemption. Fountas claims that this penalty constitutes both an excessive fine and cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution. The Eighth Amendment, which applies to the states through the Fourteenth Amendment, see Furman v. Georgia, 408 U.S. 238, 239 (1972) (per curiam), provides: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

A. The Act does not constitute an excessive fine

The Excessive Fines Clause of the Eighth Amendment is implicated any time the government "extract[s a] payment, whether in cash or in kind, 'as punishment for some offense.'" See Austin v. United States, 509 U.S. 602, 609-610 (1993) (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989)). The Clause is not violated, however, unless a payment is so large as to be considered excessive. See id. at 622-623 (declining to establish criteria for excessiveness and leaving the factors to be considered to the discretion of the trial court). In 1998, the United States Supreme Court held that a punitive fine or forfeiture is constitutionally excessive if it is grossly disproportional to the gravity of the offense that it is designed to punish. United States v. Bajakajian, 524 U.S. 321, 334 (1998).[10]

Even assuming, without deciding, that the forfeiture of the personal exemption in this case is punitive, it is not constitutionally excessive. The value of the personal exemption at issue is only a few hundred dollars.[11] A forfeiture of this size cannot be said to be grossly disproportionate to

[10] Although Bajakajian involved a criminal forfeiture, the Court has previously held punitive civil forfeitures subject to the limitations of the Excessive Fines Clause. E.g., Austin, 509 U.S. 602.

[11] In Massachusetts, the personal exemption operates to lower a taxpayer's taxable income. Although Fountas's complaint fails to specify the value of the personal exemption to him, the Department of Revenue's website states that, in 2007, this benefit was $219 for an individual taxpayer. Massachusetts Department of Revenue,

the failure to comply with a legitimate governmental regulatory scheme.[12]

B. The Act does not constitute cruel and unusual punishment

Exactly what constitutes cruel and unusual punishment under the Eighth Amendment is subject to change. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). The scope of the proscription against such punishment is tied to the "evolving standards of decency that mark the progress of a maturing society." Id. While the State has the power to punish, the Eighth Amendment's proscription against cruel and unusual punishment "stands to assure that this power be exercised within the limits of civilized standards." Id. at 100. "Fines, imprisonment and even execution may be imposed depending on the enormity of the [offense], but any technique outside the bounds of these traditional penalties is constitutionally suspect." Id.

Provided that the technique is within the bounds of traditional penalties, then, whether a punishment is cruel and unusual depends on its proportionality to the offense. By its categorization as a fine or forfeiture, loss of the personal exemption is clearly within the bounds of traditional penalties. Further, it cannot be said that a forfeiture of only a few hundred dollars is a penalty so disproportionate to the gravity of failing to comply with a legitimate governmental regulatory scheme as to exceed the limits of civilized standards.

As forfeiture of the personal exemption constitutes neither an excessive fine nor cruel and unusual punishment, Fountas's claim identified above as 6(a) must be dismissed.

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http://www.mass.gov/dor/individualsandfamilies/personalincometax (follow "Guide to Personal Income Tax" hyperlink; then follow "Exemptions" hyperlink; then follow "Prior Year Exemptions" hyperlink; then follow "Personal Exemptions" hyperlink).

[12] While Bajakajian does not mandate consideration of a particular set of factors in evaluating the gravity of an offense, the factors the Court focused on in that case—the nature and circumstances of the offense and the harm caused thereby—are instructive. See Bajakajian, 524 U.S. at 338-339.

IV. The Act does not violate the privilege against self incrimination guaranteed by the Fifth Amendment to the U.S. Constitution

For the year 2007, the Act required Massachusetts residents who were not claiming a religious exemption, and for whom creditable coverage was deemed affordable, to file with their tax returns a certification stating whether or not they had obtained such coverage. Fountas refused to furnish the requested information. He argues that requiring disclosure of his failure to comply with the Act violates his Fifth Amendment privilege against self incrimination.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The United States Supreme Court held, in Malloy v. Hogan, that "the Fifth Amendment's exception from compulsory self-incrimination is . . . protected by the Fourteenth Amendment against abridgment by the States." 378 U.S. 1, 6 (1964). In addition to protecting an individual against "being involuntarily called as a witness against himself in a criminal prosecution," the Amendment "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, *where the answers might incriminate him in future criminal proceedings*." Lefkowitz v. Turley, 414 U.S. 70, 77 (1973) (emphasis added). The privilege, then, has no application where the claimant is not confronted by "substantial and real . . . hazards of incrimination." See Marchetti v. United States, 390 U.S. 39, 53 (1968) (citing Rogers v. United States, 340 U.S. 367, 374 (1951); Brown v. Walker, 161 U.S. 591, 600 (1896)).

Assuming Fountas was required to obtain health insurance under the Act, i.e., that he was not exempt, truthfully reporting on his 2007 tax return that he had failed to comply would not have created a substantial and real hazard of incrimination. Rather the only penalty to which Fountas

would have been subject is forfeiture of his personal exemption. Therefore, the right against self incrimination is not implicated, and Fountas's claim identified above as 7(a) must be dismissed.

V. The Act does not amount to a bill of attainder under Article 1, Section 10 of the U.S. Constitution

Fountas claims that because the Act provides for a sanction in the event of noncompliance—in 2007, the loss of the personal exemption—the Act also constitutes a bill of attainder in violation of Article I, § 10 of the U.S. Constitution.

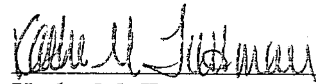
A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468 (1977). Although, historically, bills of attainder usually named the individuals to be punished, "[t]he singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is *past conduct*, operates only as a designation of *particular persons*." Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 86 (1961) (emphasis added).

The Act does not single Fountas out for legislatively prescribed punishment either by identifying him by name or by describing conduct which, because it is past conduct, operates as a designation of particular persons, including Fountas. Although the Legislature established a penalty in the Act for noncompliance, the persons to whom the penalty applied could not be ascertained until after the Act's passage and after such persons' tax returns were due on April 15, 2008. Thus, the Act cannot be considered a bill of attainder and Fountas's claim identified above as 8 must be dismissed.

<u>**ORDER**</u>

For the foregoing reasons, it is hereby <u>**ORDERED**</u> that the defendant Commissioner of the Massachusetts Department of Revenue's motion to dismiss the amended complaint is <u>**ALLOWED**</u>.

Dated: February 6, 2009



Kathe M. Tuttman
Justice of the Superior Court

Commonwealth of Massachusetts
County of Essex
The Superior Court

Civil Docket **ESCV2008-00121**

RE: Fountas v Dormitzer in his capacity as Commissioner

TO: Amy Spector, Esquire
Mass Atty General's Office
One Ashburton Place
Room 2019
Boston, MA 02108

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CLERK'S NOTICE

This is to notify you that in the above referenced case the Court's action on **02/11/2009**:

RE: Defendant Henry Dormitzer in his capacity as Commissioner's MOTION to Dismiss (MRCP 12b) amended Complaint of George Fountas, memo in support, plff's. opposition, plff's. rebuttal to memo in support, rule 9A, filed 8/22/08

is as follows:

Motion (P#18) After hearing, allowed. See Memorandum of Decision and Order issued this date (Kathe Tuttman, Justice).(dated 2/6/09) Notices mailed 2/11/2009

Dated at Salem, Massachusetts this 11th day of February, 2009.

Thomas H. Driscoll Jr.,
Clerk of the Courts

BY:

JoDee Doyle
Assistant Clerk

Telephone: (978) 462-4474

Copies mailed 02/11/2009

Commonwealth of Massachusetts
County of Essex
The Superior Court

Civil Docket **ESCV2008-00121**

RE: Fountas v Dormitzer in his capacity as Commissioner

TO: Amy Spector, Esquire
Mass Atty General's Office
One Ashburton Place
Room 2019
Boston, MA 02108

CLERK'S NOTICE

This is to notify you that in the above referenced case the Court's action on **02/11/2009**:

RE: Plaintiff George Fountas's emergency MOTION requesting an injunction demanding the return of his seized funds and compensation for any and all attendant bank penalties incurred during the seizure, filed 11/14/08

is as follows:

Motion (P#25) DENIED (Kathe Tuttman, Justice) Notices mailed 2/11/2009

Dated at Salem, Massachusetts this 11th day of February, 2009.

Thomas H. Driscoll Jr.,
Clerk of the Courts

BY:

JoDee Doyle
Assistant Clerk

Telephone: (978) 462-4474

Copies mailed 02/11/2009

Commonwealth of Massachusetts
County of Essex
The Superior Court

Civil Docket **ESCV2008-00121**

RE: Fountas v Dormitzer in his capacity as Commissioner

TO: Amy Spector, Esquire
Mass Atty General's Office
One Ashburton Place
Room 2019
Boston, MA 02108

CLERK'S NOTICE

This is to notify you that in the above referenced case the Court's action on **02/11/2009**:

RE: Plaintiff George Fountas's MOTION requesting the equal protection of the law with respect to Ma. General Law 12 section 11 J, filed 11/14/08

is as follows:

Motion (P#26) ALLOWED to the extent that the Commissioner shall not alter of destroy the plaintiff's 2007 tax return form until further order of this court.(Tuttman, Justice) Notices mailed 2/11/2009

Dated at Salem, Massachusetts this 11th day of February, 2009.

Thomas H. Driscoll Jr.,
Clerk of the Courts

BY:

JoDee Doyle
Assistant Clerk

Telephone: (978) 462-4474

Copies mailed 02/11/2009

Commonwealth of Massachusetts
County of Essex
The Superior Court

Civil Docket **ESCV2008-00121**

RE: Fountas v Dormitzer in his capacity as Commissioner

TO: Amy Spector, Esquire
Mass Atty General's Office
One Ashburton Place
Room 2019
Boston, MA 02108

CLERK'S NOTICE

This is to notify you that in the above referenced case the Court's action on **02/11/2009**:

RE: Plaintiff George Fountas's MOTION to amend complaint filed 11/14/08

is as follows:

Motion (P#27) DENIED (Kathe Tuttman Justice) Notices mailed 2/11/2009

Dated at Salem, Massachusetts this 11th day of February, 2009.

Thomas H. Driscoll Jr.,
Clerk of the Courts

BY:

JoDee Doyle
Assistant Clerk

Telephone: (978) 462-4474

Copies mailed 02/11/2009

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Commonwealth of Massachusetts
County of Essex
The Superior Court

CIVIL DOCKET# **ESCV2008-00121**

Fountas,

Plaintiff(s)

vs

Commissioner of the Massachusetts Department of Revenue,

Defendant(s)

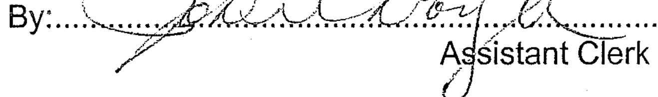
JUDGMENT ON MOTION TO DISMISS
[Mass. R. Civ. P. 12(b)(6)]

This action came on for hearing before the Court, Kathe Tuttman, Justice upon the Defendant's, Commissioner of the Massachusetts Department of Revenue, motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(6), the Court having rendered a "Memorandum of Decision and Order on Defendant's Motion to Dismiss" datedFebruary 6, 2009, and upon consideration thereof,

It is **ORDERED** and **ADJUDGED**:

That the Amended Complaint of the plaintiff, George Fountas, is hereby dismissed against the defendant, Commissioner of the Massachusetts Department of Revenue, without costs.

Dated at Newburyport, Massachusetts this 10th day of February, 2009.

By: 

Assistant Clerk

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