IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

OCWEN USVI SERVICES, LLC,	)	
	)	**CASE NO. 3:24-cv-00005**
Plaintiff,	)	
v.	)	
	)	
THE UNITED STATES VIRGIN ISLANDS,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION and ORDER

At the April 25, 2024 scheduling conference, the parties jointly represented to the Court that this matter only required a truncated discovery period of four months as "minimal discovery needs" were anticipated and that they were eager to resolve the matter without trial. *See* [ECF 25] ⁋ 2. They did not anticipate the need to deviate from the presumptive limits on depositions, nor did they anticipate the need to conduct discovery in phases. *Id*. To say the landscape of the litigation has radically changed, would be an understatement. Defendant the United States Virgin Islands ("Government") has propounded sixty-six production requests, the vast majority of which seek documents associated with twenty-six non-parties, who the Government contends are subsidiaries and/or affiliated companies of Plaintiff Ocwen USVI Services, LLC ("Ocwen"). Ocwen, in turn, has noticed fourteen depositions, mostly of high-ranking government officials and counsel, including the governor of the Virgin Islands. These and other matters have culminated into the discovery disputes addressed herein.

Specifically, the Court has before it the following discovery motions: (1) Ocwen's motion for protective order and/or to quash subpoena [ECF 39]; (2) Ocwen's motion to compel due to impending discovery deadline [ECF 76]; (3) Ocwen's motion to compel production of documents and to amend responses to admission requests and interrogatories due to impending discovery

deadline [ECF 79]; and (4) the Government's motion to compel production of documents [ECF 81]. All motions have been fully briefed, with oral argument having been heard on November 19, 2024. At oral argument, the Court entered verbal orders from the bench as to three of the motions. This memorandum opinion and order supplements and/or supersedes these verbal orders, as well as rules upon the remaining fourth motion.[1]

Furthermore, as a byproduct of the November 19, 2024 oral argument, Ocwen moved to bifurcate its claims. This motion [ECF 127], which seeks to have Ocwen's causes of action tried in two phases—phase one addressing only Count IV, while phase two (if necessary) addressing the remaining three counts—is presently before the Court as well.

I. BACKGROUND

This matter stems from an earlier civil lawsuit in the District Court of the Virgin Islands involving the same parties, wherein Ocwen sought refunds of its tax overpayments for tax years 2013–15. [ECF 1] ⁋ 54; *see* 3:22-cv-00066 ("Ocwen I"). The present matter ("Ocwen II") concerns the income tax refunds for these same tax years and the Government's purported breach of the settlement and closing agreement entered into by the parties in Ocwen I. *See generally* [ECF 1]. Ocwen is a loan servicer and the successor entity to Ocwen Mortgage Servicing, Inc. ("OMS"), the entity that filed the tax returns at issue. *Id.* ⁋⁋ 1–2; *See* [ECF 2].

A. Underlying Factual Background

OMS filed income tax returns with the Virgin Islands Bureau of Internal Revenue ("VIBIR") for tax years 2013–15 and sought refunds for those years based on alleged overpayments and carryback deductions. *See id.* at 2–4. The VIBIR did not issue the refunds as

[1] The Court expects that this current memorandum opinion and order will likely moot the objection to magistrate judge order that was filed by the Government on January 3, 2025. *See* [ECF 134]. Any objections to the current memorandum opinion and order will need to be made in accordance with Fed.R.Civ.P. 72,

requested, but instead on July 23, 2018, initiated an audit of OMS for tax years 2013–16. *Id.* ⁋ 16.[2] Approximately 2½ years later, the VIBIR concluded its audit in 2021 and accepted OMS's amended returns and affirmative adjustments for tax years 2013–15, determining that OMS's refund claims for those years were allowable. *Id.* ⁋⁋ 27, 30–31; Exs. 12, 15–16; *see also* Ex. 17 (May 25, 2021 letter to OMS stating VIBIR had concluded its examination and was accepting OMS's returns). Thereafter, Ocwen began efforts to seek payment of the refunds. *See* [ECF 1] at 6–9. According to the complaint, on September 15, 2022, VIBIR Director Joel Lee sent an email to Ocwen stating "[t]he Bureau recognizes the outstanding refunds pending for Ocwen for tax years 2013, 2014 and 2015" and proposed a payment plan. *Id.* ⁋ 49. Ocwen submitted a counterproposal, but the VIBIR did not respond. *Id.* ⁋⁋ 52–53.

B. Ocwen I

On November 5, 2022, Ocwen filed Ocwen I. *See* 3:22-cv-00066. Nine days later, Ocwen filed its corporate disclosure statement pursuant to Fed.R.Civ.P. 7.1. *See* Ocwen I [ECF 6]. In the disclosure, Ocwen identified that it was a wholly owned subsidiary of Ocwen Financial Corporation ("OFC"), which in turn, was a publicly held corporation whose shares are traded on the New York Stock Exchange under ticker symbol "OCN." *Id*. On December 10, 2022, the Government moved for an unopposed extension of time through January 15, 2023 in which to file a responsive pleading. *See* Ocwen I [ECF 8]. After granting the Government's extension request, the parties on December 28, 2022 entered an agreement settling the case (the "Agreement"). *See* [ECF 1] ⁋ 55; [ECF 9] (sealed exhibit).

[2] In its answer, the Government states it is without sufficient information to either admit or deny the allegations as to when the audit commenced for tax years 2013–16, but to the extent a response is required, the Government denies the allegation. [ECF 15] ⁋ 16. However, in a separate matter—*Ocwen USVI Serv., LLC v. Dir. of Virgin Islands Bureau of Internal Revenue*—the Government admits to the commencement date of the audit for the tax years in question. *See* 3:24-cv-00014 [ECF 35] ⁋ 5.F.ii. The Court takes judicial notice of this admission pursuant to Fed. R. Evid. 201(b)(2).

The Agreement states the parties' intention that it operate as a closing agreement under 26 U.S.C. § 7121, as applied to the Virgin Islands via the Mirror Code, and sets forth a payment schedule under which the Government agrees to pay Ocwen a total of $27,923,234.00, plus interest. *See* [ECF 9] ⁋⁋ 2(a), 4(a). The Agreement prohibits the Government from making "any determination, assessment, or adjustment" to Ocwen's tax liability for the years at issue "absent a showing of fraud, malfeasance, or misrepresentation of material fact," and further provides that the Government "releases and forever discharges Ocwen . . . from any and all claims (i) that the USVI asserted or could have asserted, against Ocwen in [Ocwen I] and/or (ii) arising out of, in connection with, or otherwise related to Ocwen's [2013–15 Tax Refunds]." *Id.* ⁋⁋ 3(b), 4(a). On January 13, 2023, the parties filed a notice of stipulation of dismissal without prejudice in Ocwen I, with the Court closing the case the same day. *See* Ocwen I [ECF 10].

In accordance with the Agreement, the Government sent to Ocwen payments on January 11, 2023, and June 29, 2023. [ECF 1] ⁋⁋ 61, 65; [ECF 58] at 1; *see* [ECF 15] ⁋ 61; [ECF 9] ⁋ 2(a). The next payment was due by December 31, 2023; however, the Government has made no payments to Ocwen under the Agreement since June 29, 2023. *See* [ECF 1] ⁋ 74; [ECF 9] ⁋ 2(a). Ocwen alleges it made efforts to inquire as to the status of its unpaid income tax refunds and interest owing but was unsuccessful. *See* [ECF 1] at 12–13.

C. <u>Ocwen II</u>

1. <u>Rule 26(f) Conference / Discovery Plan</u>

Ocwen instituted the current action (Ocwen II) on February 8, 2024, alleging breach of the closing agreement and seeking a refund for the overpayments of its income taxes for 2013–15. *See generally* [ECF 1]. A comparison of the complaints filed in Ocwen I and Ocwen II show that the

allegations asserted in the first 53 paragraphs of the respective pleadings mirror one another.[3] The Government filed its answer on March 20, 2024 [ECF 15], with the Court entering an order on March 26, 2024 that set the Rule 16 scheduling conference for April 25, 2024. [ECF 21]. In its order, the Court instructed the parties—through counsel—to meet prior to the scheduling conference to address, among other things, the nature and basis of the parties' claims and defenses, the possibilities for a prompt settlement or resolution of the case, and the formation of a discovery plan. *Id.* at 1–2. The Court further instructed the parties to file individual discovery memoranda in accordance with LRCi 16.1. *Id.* at 3–4. In doing so, the Court advised the parties that it considered the memoranda to be of "significant value in that they require detailed thought about how the case must be discovered and prepared for trial." *Id.*[4] Finally, the Court advised the parties that they "will be expected to discuss in detail" all matters covered by Rule 16 and that a "firm and realistic" trial setting will be established at or shortly after the scheduling conference. *Id.* ⁋ 1.

In their April 23, 2024 joint proposed scheduling plan, the parties represented there would be "minimal discovery needs." [ECF 25] at 1–2. Ocwen suggested that "discovery should be limited to a.) whether and how much the USVI has paid Ocwen for income tax refunds and b.) those affirmative defenses that the USVI can articulate with factual specificity during the scheduling conference." *Id.* at 2. The Government proposed that discovery also include "an examination of Ocwen's tax returns to determine the presence of any material misrepresentation which may have impacted any subsequent agreements." *Id.* ⁋ 2.c.[5] The parties agreed to commence

[3] It is in these 53 paragraphs of both complaints that Ocwen alleges the tax returns and subsequent filings it made related to tax years 2013–15, the audits purportedly undertaken by VIBIR related to said returns, and the purported efforts of Ocwen to collect the refunds post-audits. *Compare* [ECF 1] with Ocwen 1 [ECF 1].

[4] The quoted language was further bolded in the order by the Court for emphasis. [ECF 21] ⁋ 5.

[5] In its separately filed discovery memorandum, the Government stated:

> [U]pon reviewing Ocwen's recent financial data, we have raised concerns about the legitimacy of their income sourcing claims, particularly for the year 2019. This concern also casts doubt on their tax filings for the years 2013 to 2015.

mediation by August 1, 2024 or earlier and stated their eagerness to resolve the matter without the need for trial. *Id.* ⁋ 3. They further proposed a discovery period of just over four months, with discovery to be completed by no later than August 30, 2024. *Id.* ⁋ 2.e. The parties did not anticipate a lengthy trial, with Ocwen estimating a half day to present its case-in-chief and the Government estimating two days for its defense. *Id.* ⁋ 6. Finally, the parties agreed that the earliest date the case should reasonably be expected to be ready for trial was December 2024. *Id.* ⁋ 5.

The scheduling conference took place on April 25, 2024. [ECF 29]. The Court entered a trial management order that same day, setting July 14, 2024 as the deadline to seek to amend pleadings, August 30, 2024 as the discovery deadline, and October 31, 2024 as the dispositive motion deadline. *Id*. Each of these deadline dates were suggested jointly by the parties. *See* [ECF 25]. Trial was set for February 17, 2025. [ECF 29].

2. <u>Discovery Disputes Arise</u>

Based on the filings in the Court's record, neither party conducted any formal discovery until June 14, 2024. On that date, the Government propounded sixty-six requests for production. [ECF 93–1]. In response to these requests, Ocwen forwarded a meet-and-confer letter dated June 28, 2024, wherein it sought their withdrawal. [ECF 88]. An excerpt from the Ocwen letter reads as follows:

> As a starting point, and as more fully explained below, the USVI's Discovery should be withdrawn. Through the Discovery, the USVI seeks impermissibly to confound a simple breach of settlement and closing agreement case involving a twice-settled tax refund matter

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> Even though we previously reached a financial settlement with Ocwen for those years, we are now wondering if the deal should stand, especially if there were significant mistakes or intentional misstatements involved. Specifically, we are looking into whether any potential false statements on Ocwen's tax filings were influential enough to affect any decisions made by the [VIBIR].

[ECF 26] at 1. Ocwen stated in response that "the Court should curtail such lines of discovery" because Ocwen's returns have already been audited by the VIBIR, the statute of limitations for assessment is expired, and the Agreement settling the refund claims may not be set aside. [ECF 27] at 2.

> by inserting a wholly speculative and unpleaded defense of fraud and misrepresentation related to Ocwen's 2013-2016 tax returns. Such discovery is beyond speculative, legally improper, and unduly expands the scope of this litigation.

[ECF 88–1] at 1.

On June 21, 2024, the Government sought to serve a subpoena upon the Virgin Islands Economic Development Authority ("EDA"). Thereafter, on July 15, 2024, the Government filed a motion and supporting memorandum to amend its answer and defenses, as well as to assert a counterclaim. [ECF 57–58]. On July 18, 2024, Ocwen propounded interrogatory, production, and admission requests. [ECF 80] at 2. Finally, on August 1, 2024, Ocwen began seeking to schedule the Rule 30(b)(6) deposition of the Government, as well as the depositions of several current or former officials and/or employees of the Government. [ECF 76]. Ultimately, Ocwen sought to conduct fourteen depositions, all of which were to have occurred over a nine-day period during the latter part of August (August 22-30) 2024. [ECF 77–1, 77–2, and 77–3].

On July 4, 2024, Ocwen filed its motion and supporting memorandum for protective order and/or to quash subpoena. [ECF 39–40]. The Government opposes the motion [ECF 72], with Ocwen having filed a reply. [ECF 74]. On August 27, 2024, Ocwen filed its motion and supporting memorandum to compel the fourteen depositions. [ECF 76–77]. The Government opposes the motion [ECF 88], with Ocwen having filed a reply. [ECF 97]. On August 30, 2024, Ocwen filed its motion and supporting memorandum to compel the production of documents, as well as to compel amended responses to its admission and interrogatory requests. [ECF 79–80]. The parties were able to resolve many of these disputes amongst themselves [ECF 99], with the Government filing an opposition [ECF 100] and Ocwen a reply [ECF 101] as to those that could not be resolved. Also on August 30, 2024, the Government filed its motion and supporting memorandum to compel the production of documents. [ECF 81–82]. Ocwen opposes the motion [ECF 93], with the Government having filed a reply [ECF 98].

On November 5, 2024, the Court issued a memorandum opinion and order [ECF 109] denying the Government's motion [ECF 57–58] to amend its answer and defenses, as well as to assert a counterclaim. For the reasons set forth in the opinion, the Court denied the motion on the basis of undue delay, futility, and prejudice. *See* [ECF 109].

On November 19, 2024, oral argument was heard as to the four discovery motions. During the hearing, Ocwen voluntarily withdrew—with the right to revisit—its request to depose ten of the individuals, thus limiting its motion to compel to that of the Rule 30(b)(6) deposition of the Government, as well as the depositions of Joel Lee, the Hon. Venetia H. Velázquez, and Ariel Smith. *Id*. [ECF 129] at 23–32. During the hearing, the Court granted the motion [ECF 76] in part and denied the motion in part, compelling the Rule 30(b)(6) deposition, while denying without prejudice the depositions of Lee, Velázquez, and Smith on the basis there was not a showing of a proportional need to conduct these depositions at the time. *Id*. The Court further granted Ocwen's motion [ECF 39] for protective order and/or to quash the subpoena. *Id*. at 11–22, 50, while denying without prejudice the Government's motion [ECF 81] to compel production. *Id*. at 34–46, 52–54, 57–63. Lastly, the Court took under advisement Ocwen's motion [ECF 79] to compel the production of documents and to compel amended responses to its admission and interrogatory requests. *Id*. at 46–49, 52. Finally, on December 9, 2024, Ocwen filed a motion [ECF 127] to bifurcate its causes of action. The Government has filed an opposition to the motion [ECF 136], with Ocwen having filed a reply [ECF 141].

II. LEGAL STANDARDS

"In December 2015, a series of amendments to the Federal Rules were enacted to improve a system of civil litigation that 'in many cases … has become too expensive, time-consuming, and contentious, inhibiting effective access to the courts.'" *United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, 839 F.3d. 242, 258 (3d Cir. 2016) (citing Chief Justice John

Roberts, "2015 Year–End Report on the Federal Judiciary," Dec. 31, 2015 (Roberts Report), at 4, *available* http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf). To counter these problems, the amendments placed a greater emphasis on judicial involvement in discovery and case management, as well as cooperation among litigants' counsel. Among the rules amended was Rule 26, which governs discovery. *Id*. at 259.

Rule 26(f) requires that the parties confer as soon as practicable—and in any event at least 21 days before a scheduling conference is held by the court or a scheduling order is due under Rule 16(b). Fed.R.Civ.P. 26(f)(1). "In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan." Fed.R.Civ.P. 26(f)(2). The Rule 26(f) conference is distinct from a Rule 16(b) scheduling conference conducted by the court. *Assoc. Ins. Co. v. George J. Castle, Inc.*, 2005 WL 8173548, *6 (W.D.N.Y. 2005). During the Rule 26(f) conference, the parties attempt to reach an agreement as to the parameters of discovery and its timing, whether the limitations within the rules should be changed, as well as the necessity of discovery and other pretrial orders. Following the conference, the parties are to submit a joint discovery plan to the court. *Id*. The purpose of the joint plan is to assist the court regarding the timing and scope of discovery. *Guy v. Absopure Water Co., LLC*, 703 F.Supp.3d 813, 818 (E.D. Mich. Nov. 21, 2023). Under this Court's local rules, each party is further required to file a discovery memorandum at least 3-days prior to the Rule 16 scheduling conference. LRCi 16.1. Included in the information each party is to provide to the Court is an estimate of time needed to complete discovery. LRCi. 16.1(a)(5).

Rule 26(b)(1) provides the general scope for discovery. *See Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 2019 WL 117555, *2 (3d Cir. Jan. 7, 2019). That scope, however, is

prefaced by language giving district courts discretion to limit discovery. *Id*. Under the rule, parties may:

> … obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed.R.Civ.P. 26(b)(1). The rule's relevancy standard is described as "undemanding," with courts employing a liberal and broad discovery-type standard which requires only the probability that the desired information is relevant. *Petro Indus. Sol., LLC v. Island Project & Operating Serv., LLC*, 2023 WL 3864587, *2 (D.V.I. Jun. 7, 2023) (citing *Crozer Chester Med. Ctr. V. Nat'l Lab. Rels. Bd.*, 2023 WL 3018280, *2 (3d Cir. Apr. 20, 2023). While the scope of relevance in the discovery process is far broader than that allowed for evidentiary purposes, it is not without its limits and should not serve as a fishing expedition. *Id*.; *see Ainger v. Great Am. Assurance Co.*, 2022 WL 3139079, *8 (D.V.I. Aug. 4, 2022). The party seeking to compel discovery bears the initial burden of proving the relevance of the requested information. *Prime Energy and Chem., LLC v. Tucker Arensberg, P.C.*, 2022 WL 1642394, *4 (W.D.Pa. May 24, 2022). Upon satisfaction of the initial burden, "the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery (1) does not come within the broad scope of relevance as defined under Fed.R.Civ.P. 26(b)(1), or (2) is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure." *Id*. (citing *In re Urethane Antitrust Litigation*, 261 F.R.D. 570, 573 (D. Kan. 2009)).

Notwithstanding the relevancy standard, the court may limit discovery to ensure its scope is proportional to the needs of the case, with the court considering, among other factors, "whether

the burden or expense of the proposed discovery outweighs its likely benefit." *Democratic Nat'l*, 2019 WL 117555 at *2. Whether the court reasonably limited the scope of discovery is a fact-based inquiry. "Because district courts have their eyes and ears on a case from start to finish, they are in the best position to 'reach[] a case-specific determination of the appropriate scope of discovery.'" Matters of discovery are ultimately committed to the broad discretion of the district court, with a court having abused its discretion only if its decision is arbitrary, fanciful, or clearly unreasonable. *Id*.; *see Petro*, 2023 WL 3864587 at *2 (citing *United States v. Washington*, 869 F.3d 193, 220 (3d Cir. 2017).

Rule 37(a)(1) provides that on notice to other parties and all affected persons, a party may move for an order compelling discovery. Fed.R.Civ.P. 37(a)(1). Prior to filing such a motion, however, the movant must either confer in good faith or attempt to confer with the person or party involved in the discovery dispute in an attempt to avoid court intervention. *Id*. Where a party fails to answer an interrogatory submitted under Rule 33, a party may move for an order compelling an answer. Fed.R.Civ.P. 37(a)(3)(B)(iii). Rule 36(a)(6) provides the mechanism in which a requesting party may move to determine the sufficiency of an answer or objection to an admission request. Fed.R.Civ.P. 36(a)(6). If a motion to compel is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. Fed.R.Civ.P. 37(a)(5).[6] However, the court must not order payment if:

> (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
> (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or
> (iii) other circumstances make an award of expenses unjust.

[6] Rule 37(a)(5) is also applicable to motions to compel admission responses pursuant to Rule 36(a)(6).

Id.

Finally, Rule 1 provides that the Federal Rules of Civil Procedure are to be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed.R.Civ.P. 1.

III. DISCUSSION / ANALYSIS

What was presented to this Court as a case the parties anticipated needing only minimal discovery and voiced an eagerness to resolve without trial, has taken on a new life. *See* [ECF 25] ¶¶ 2–3. As discussed *supra*, the Government noted in its April 23, 2024 discovery memorandum that its review of Ocwen's recent financial data "raised concerns about the legitimacy of [Ocwen's] income sourcing claims, particularly for the year 2019" and that this "concern also casts doubt on [Ocwen's] tax filings for the years 2013 to 2015." [ECF 26] at 1. The Court notes, however, that VIBIR made its determination as to the 2019 tax return—specifically, that the income reported by Ocwen during said tax year was sourced outside the Virgin Islands—as of at least December 14, 2023,[7] or in other words, nearly three months *before* the Government's answer [ECF 15] filed in the present matter and more than five months *prior* to the April 25, 2024 scheduling conference conducted herein. Moreover, the Government has pointed to nothing that has occurred since the April 25, 2024 date that would justify its vast change in position.[8]

In this district, magistrate judges serve many functions, one of which is that of a discovery gatekeeper. *See Khal Anshei Tallymawr Inc. v. Twp. of Toms River*, 2024 WL 3728069, at *1 (D.N.J. Aug. 8, 2024) (addressing the discovery function of magistrate judges in the District of New Jersey). As the gatekeeper, the magistrate judge allows the discovery of relevant, proportional

[7] Reference is made to the December 14, 2023 determination letter issued by VIBIR, which is attached as Exhibit A [ECF 1–1] to Ocwen's lawsuit in *Ocwen USVI Serv., LLC v. Dir. of Virgin Islands Bureau of Internal Revenue*, 3:24-cv-00014. The Court takes judicial notice of this letter pursuant to Fed.R.Evid. 201(b)(2).

[8] The Government did, however, have new co-counsel make an appearance as of June 10, 2024. [ECF 30]. Whether this addition played a role in the Government's substantial shift is unknown.

material, while walling-off that which is not. *Id*. It is within these parameters that the Court addresses the discovery motions below. These parameters also play a role in the Court's decision to bifurcate Count IV from the remaining counts.

A. Ocwen's Motion for Protective Order and/or to Quash Subpoena

Ocwen moves for a protective order and/or to quash the Government's subpoena *duces tecum* ("subpoena") to the Virgin Islands Economic Development Authority ("EDA").[9] [ECF 40]. As for the subpoena—dated June 21, 2024—it commands that the EDA produce the following:

> 1. All applications for Economic Development Corporation (EDC) benefits filed by OMS and any of its subsidiaries.
>
> 2. Supporting documentation, correspondence, communications, and any other related materials for the above-mentioned applications for EDC benefits.
>
> 3. Notes, minutes, transcripts, and summaries of any communications or meetings concerning OMS's and its subsidiaries' EDC benefits applications.
>
> 4. Any decisions, memoranda, and evaluative documents concerning the EDC's action on providing certificates to OMS and its subsidiaries.
>
> 5. Full audit reports, including but not limited to, preliminary drafts, working papers, and final copies of the audits conducted by EDA on OMS and its subsidiaries.
>
> 6. All documents provided by OMS and its subsidiaries to the EDA, including compliance reports, financial statements, and any tax-related documents.
>
> 7. Correspondence, notifications, requests for information, and any compliance-related documents sent from EDA to OMS and its subsidiaries.
>
> 8. Records, electronic or otherwise, that pertain to the qualification, authorization, and compliance of OMS and its subsidiaries with regards to the EDC benefits program.

[9] Both the motion and the memorandum in support thereof [ECF 39 and 40] are referred to collectively by the Court as the "motion."

9. The full and complete file on Ocwen Mortgage Services, Inc.

10. The comprehensive files on any and all subsidiaries of OMS as they relate to the EDC benefits program or interactions with the EDA.

[ECF 40–1].

Ocwen contends the documents sought are neither relevant to the claims or defenses of the parties, nor proportional to the needs of the case. [ECF 40] at 3. According to Ocwen, this is because the Government has already recognized and agreed to the refunds that are owed, with the only issue being the Government's failure to pay same. *Id*. at 3–4. Ocwen further maintains the subpoena is an inappropriate fishing expedition as it seeks documents that are related to an unpled fraud defense. *Id*. at 3. It points to the Government's discovery memorandum—filed with the Court in preparation of the initial scheduling conference—to show the speculative objective of the subpoena. *Id*. at 8; *see* [ECF 26] at 1. In said memo, the Government stated that a review of Ocwen's recent financial data "raised concerns" about the legitimacy of their income sourcing, particularly for year 2019. [ECF 26] at 1; *see* [ECF 40] at 8. This concern, in turn, reportedly had the Government "now wondering" if its deal with Ocwen as to the returns/refunds at issue "should stand." [ECF 40] at 8; [ECF 26] at 1.

Even assuming, however, that a fraud defense was pled, Ocwen nonetheless argues that such a defense would be limited to the parties' conduct in the making of the Agreement, for which the documents sought have no relation. [ECF 40] at 3. Ocwen contends the Government is seeking the documents in an attempt to relitigate the underlying tax issues that were raised and concluded in the audit and/or in Ocwen I. *Id*. at 9–10. Finally, Ocwen contends the Government is equitably estopped from seeking the documents as it has previously represented to Ocwen on at least two occasions the latter's entitlement to the refunds for tax years 2013–15. *Id*. at 3. By way of example, Ocwen points to a September 15, 2022 email it received from the VIBIR director, which reads:

> The Bureau recognizes the outstanding refunds pending for Ocwen for tax years 2013, 2014 and 2015. It is the intention of the Government of the Virgin Islands to make arrangements to pay these refunds in intervals starting with the last quarter of 2022. As funds are available, the Government of the Virgin Islands will make quarterly payments of $1,000,000.00 by the end of each quarter, until some other arrangement can be made to pay the full refunds.

Id. at 11 (referencing [ECF 1] ¶ 49).

The Government opposes the motion, contending the subpoenaed records will provide a "holistic picture" of Ocwen's engagement with the Economic Development Corporation ("EDC") program and Ocwen's compliance therewith. [ECF 72] at 4. It further contends these records could verify whether Ocwen complied with specific statutes and regulatory provisions of the EDC program, including conditions associated with investment amounts, employment levels, and the geographical source of income. *Id*. at 4–5. The Government maintains that the records can help it "identify any discrepancies between Ocwen's representations and their actual business practices that may impact [Ocwen's] eligibility for tax benefits," as well as assist the Government in understanding the criteria and vetting process used to grant EDC incentives. *Id*. at 4. According to the Government, if the records reveal inconsistencies, they could establish grounds for estoppel as asserted in the Government's original answer. *Id*. at 5. It claims that these records could also potentially uncover the existence of undisclosed debts that might act as a set-off against Ocwen's claimed tax refunds. *Id*. The Government further states that the records might demonstrate "defects in the formation" of the Agreement, possibly rendering it void or voidable. *Id*. Lastly, the Government contends that if the counterclaims and affirmative defenses raised in its proposed amended answer are permitted,[10] the records could provide evidence that either substantiate or refute whether Ocwen made material misrepresentations to obtain EDC benefits. *Id*.

[10] At the time of its opposition, the Government had a pending motion [ECF 57] to amend its answer. That motion was denied by this Court on November 5, 2024, with the Government having filed a notice of objection on November 18, 2024. *See* [ECF 109] and [ECF 113]. That objection remains pending.

In its reply, Ocwen counters that the Government entered into the parties' Agreement with full knowledge of Ocwen's business in the Virgin Islands, with the Government having previously performed a multi-year audit of Ocwen. [ECF 74] at 2. Included in this audit was an information document request, wherein Ocwen provided the Government with copies of its EDC annual reports for tax years 2013–16, as well as with copies of the compliance reports issued by the EDC for the same period. *Id*.; *see* [ECF 74–1] at 3. According to Ocwen, the subpoena is nothing more than an "overbroad, scattershot [sic]" attempt by the Government to relitigate issues already settled by the parties in the hopes that one of its defenses might have merit. *Id*. at 2–3. It further claims this speculative nature is reflected throughout the opposition, wherein the Government repeatedly uses the words "could," "if," and "may" in support of its argument. *Id*. at 5. Ocwen also takes umbrage with the "holistic picture" the Government seeks via the subpoena, noting that such a holistic approach is tantamount to a fishing expedition. *Id*. at 8–9.

"A subpoena used for discovery purposes must be made in good faith and cannot be used as a general 'fishing expedition.'" *Burgess v. Galloway*, 2021 WL 2661290, at *2 (D.N.J. Jan. 28, 2021) (citing *U.S. v. Nixon*, 418 U.S. 683, 699-700 (1974)). In other words, when a party serves a subpoena under Federal Rule of Civil Procedure 45, the information and documents sought must fall within the permissible scope of discovery under Federal Rule of Civil Procedure 26(b)(1). *Id*. (citing *OMS Inv., Inc. v. Lebanon Seaboard Corp.*, 2008 WL 4952445 (D.N.J. Nov. 18, 2008)); *see Khal Anshei*, 2024 WL 3728069, at *3. If a subpoena seeks documentation that does not fall within this permissible scope, it may be quashed or modified. *Khal Anshei*, 2024 WL 3728069, at *4. Alternatively, it is within the court's discretion to consider the motion to quash as one for a protective order under Rule 26, since a protective order is another mechanism to challenge a subpoena that seeks irrelevant information. *Id*.

In order to quash or modify a subpoena, the movant must have standing to bring such a challenge. *Khal Anshei*, 2024 WL 3728069, at *5. For a party to have standing to quash or modify a subpoena upon a nonparty, the party must claim a personal right or privilege in the production sought. *Id.*; *Galloway v. Islands Mech. Contractor, Inc.*, 2013 WL 163985, at *3 (D.V.I. Jan. 14, 2013); *Willett v. Dahlberg*, 2025 WL 2256194, at *4 (D.V.I. Aug. 7, 2025). "Examples of the requisite personal right, privilege, or privacy interest include: the movant's financial or employment records or records of a criminal investigation of the movant, assertion[s] of work product or attorney-client privilege, interference with business relationships, or production of private information about the party that may be in the possession of a third party, an interest in one's personal identifying information, and the movant's medical and mental health records based on privilege and confidentiality of the records." *Willett*, 2025 WL 2256194, at *4 (citations and internal quotes omitted).

The party moving to quash has a heavy burden and must demonstrate the unreasonableness or oppressiveness of the subpoena. *Burgess*, 2021 WL 2661290, at *3; *Willett*, 2025 WL 2256194, at *6. There is no fixed definition as to what constitutes an "unreasonable or oppressive" request, with courts left to decide on a case-by-case basis as to what meets these criteria. *Id*. In applying Rules 26 and 45, the court balances several competing factors in assessing a subpoena's reasonableness, including (1) relevance, (2) the party's need for the documents, (3) the breadth of the document request, (4) the time period covered by it, (5) the particularity with which the documents are described, (6) the burden imposed, and (7) the subpoena recipient's status as a nonparty to the litigation. *Id*.

Even where a party lacks personal privilege or interest to quash or modify a subpoena, the court may still provide relief through a protective order pursuant to Rule 26(c), thereby limiting or disallowing third-party discovery that is beyond the permissible scope of Rule 26(b)(1). *Khal*

Anshei, 2024 WL 3728069, at *6. "In moving for a protective order, the 'burden of persuasion [is] on the party seeking the protective order.'" *Burgess*, 2021 WL 2661290, at *5 (citing *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986)). To satisfy this burden, the movant must show good cause by demonstrating a particular need for protection. *Id*. "Establishing 'good cause' requires the movant to 'specifically demonstrate [ ] that disclosure will cause a clearly defined and serious injury. Broad allegations of harm, unsubstantiated by specific examples, however, will not suffice.'" *Id*. (citing *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995), which cited *Pansy v. Borough of Stroudsburg,* 23 F.3d 772, 786 (3d Cir. 1994)); *see In re Avandia Mktg., Sales Practices and Prod. Liab. Litig.*, 924 F.3d 662, 671 (3d Cir. 2019). The "good cause" standard is a flexible one that requires an individualized balancing of the many interests present in a particular case. *H2E Americas, LLC v. Rymark Inc.*, 2025 WL 974297, at *3 (D.Del. 2025). Ultimately, it is the district courts that are best situated to determine which factors are relevant to any given dispute, with the courts to articulate their findings on the record that justify their decision to grant or deny a protective order. *In re Avandia*, 924 F.3d at 671–72.

In this instance, the subpoena was served upon a nonparty, the EDA. Thus, Ocwen must have standing if it wishes to quash said subpoena. Notably, the Government does not challenge such standing. *See* [ECF 72]. It is surmised that this is due to the obviousness of the issue. The records sought relate either to Ocwen and/or its subsidiaries. *See* [ECF 40–1]. These include, but are not limited to, such items as the applications and related materials submitted by Ocwen, as well as any correspondence, communications, notes, minutes, transcripts, summaries, memoranda, audit reports, compliance reports, financial statements, and tax-related documents related to this entity. *Id*. Without question, Ocwen has a personal right, privilege, and privacy interest in such records. As such, the Court finds that Ocwen has standing.

In analyzing motions to quash, courts use a burden-shifting framework. *Paramo v. Aspira Bilingual Cyber Charter Sch.*, 2018 WL 4538422, at *2 (E.D.Pa. Sept. 21, 2018); *see Willett*, 2025 WL 2256194, at *6. "First, the subpoenaing party must show that its request falls within the scope of Rule 26. Thus, a party may use a subpoena only to seek 'discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case.'" *Paramo*, 2018 WL 4538422, at *2 (citations omitted). Ocwen argues that the subpoena is nothing more than an inappropriate fishing expedition and the Court agrees. In denying the Government's motion to amend its complaint, the Court noted were it to permit the amendment, that

> … Ocwen would have to defend against a charge that it misrepresented its income sources and is not entitled to the refunds that the Government already agreed to pay, rather than focusing on the relatively straightforward argument that the Government failed to make payments as set forth in the Agreement.

[ECF 109] at 18. As detailed *supra*, the subpoena seeks discovery well beyond that identified by the Government during the Rule 16 conference. This alone warrants the quashing of the subpoena. The Court further notes the Government has yet to point to anything that has purportedly occurred and/or to information it has purportedly learned *since* said conference so as to justify its complete reversal, wherein it now seeks expansive discovery. *See* [ECF 109] at 10.[11]

Nor does the subpoena limit itself to that of sourced income with respect to Ocwen for the years at issue. *See* [ECF 40–1]; *see also* [ECF 74] at 7, n. 7. It also blindly seeks records of *any*

[11] In its prior opinion denying the Government's motion to amend, the Court found as follows:

> The docket in Ocwen I indicates that the Government served no discovery requests before it ultimately agreed to settle Ocwen's 2013–15 tax refund claims and voluntarily dismiss the suit. Moreover, the Government in 2018 initiated an audit into Ocwen's 2013–16 returns and concluded that process in 2021 by accepting Ocwen's returns for the years at issue. The Government now alleges Ocwen inaccurately represented its income sources on its 2013–15 tax returns, but provides no explanation as to why it did not or could not discover the alleged misrepresentation(s) earlier. Nor does the Government specify exactly when or how it discovered the alleged misrepresentation(s).

[ECF 109] at 10.

subsidiary of Ocwen—none of which are named—without any regard as to whether these unnamed subsidiaries are involved in the generation of Ocwen's income.[12] Moreover, Ocwen has already provided the Government with copies of its EDC annual reports for tax years 2013–16, as well as with copies of the compliance reports issued by the EDC / EDA for the same period. [ECF 74] at 2; [ECF 74–1] at 3. The Court is also loath to open a Pandora's box simply to satisfy the Government desire to have a "holistic picture" of Ocwen's interactions with the EDA. *See Khal Anshei*, 2024 WL 3728069, at *7. Finally, notwithstanding any of the above, given the Court's decision to bifurcate the trial as to Count IV (*see infra*), the quashing of the subpoena is warranted on this standalone basis as well.[13]

Although the Court shall grant Ocwen's motion pursuant to Rule 45, even if Ocwen had lacked standing to quash the subpoena, the Court would nonetheless grant the relief sought by the motion through a protective order under Rule 26(c). Under this rule, a court may limit or disallow third-party discovery that is beyond the permissible scope of Rule 26(b)(1). *See Khal Anshei*, 2024

[12] During the November 19, 2024 oral argument, the Government conceded that what it believed was happening was that there may be employees scattered around the globe that are working to generate income for Ocwen. The Government did not know, however, which of the subsidiaries or affiliated companies of Ocwen employ said employees. *See* [ECF 129] at 40–41.

[13] During oral argument, the Government stated it would understand the Court not allowing certain discovery—including that which was sought by the Government via the subpoena—if the Court were to bifurcate the trial for Count IV and then permit such discovery at a later stage of the litigation. *See* [ECF 129] at 10–14, 17, 60–62. Indeed, the Government recognized during argument that were Ocwen to prevail on Count IV, that such a determination may very well resolve the remaining counts. This is reflected in the following statement from the Government:

> So maybe four, [will] wipe out one, two, and three. Maybe count four goes the other way in favor of the government, in which case they're going to continue with their [counts], one, two, and three. They're going to continue with the refund suit.
>
> So at this point, you know, unless -- unless the taxpayer wants to withdraw their refund claim for '13, '14, and '15 it's a live issue, and we should, we're entitled to discovery.

[ECF 129] at 17; *see also Id*. at 61–62. The Government also stated that had Ocwen "… only brought count four, we would not be having this conversation," referencing the discovery sought in the Government's requests for production. *Id*. at 42. Subsequent to oral argument, however, the Government appears to have altered its position. In its opposition [ECF 136] to Ocwen's bifurcation motion, the Government now maintains that the legal and factual issues associated with the requests for income tax refunds and statutory interest are intertwined in all four counts. [ECF 136] at 8–9, 12.

WL 3728069, at *7. For the reasons discussed at length herein, the Court finds the subpoena to be of the type that the Federal Rules not only caution against, but in fact, prohibit. Moreover, even assuming *arguendo* that the subpoena was permissible, the material that it seeks would not be relevant as to the breach of contract claim of Count IV. Given that this count—which has the potential to be dispositive of all counts—has now been bifurcated, a protective order would be appropriate until that count has been resolved.

For the reasons above, the Court shall grant Ocwen's motion pursuant to Rule 45, with the order herein superseding the Court's verbal order of November 19, 2024.

B. Ocwen's Motion to Compel Depositions

In its motion,[14] Ocwen seeks to compel the Rule 30(b)(6) deposition of the Government, as well as the depositions of thirteen current and former officials and employees of the Government. *See* [ECF 77]. Of the thirteen individuals to be deposed, most are high-ranking officials and/or attorneys for the Government. [ECF 88] at 1–2. They are as follows:

(1) Governor Albert Bryan, Jr.;
(2) Joel Lee, Commissioner of VIBIR;
(3) Hon. Venetia H. Velázquez, former Civil Chief of the Virgin Islands Department of Justice ("VIDOJ"); [15]
(4) Ariel Smith, former Virgin Islands Attorney General and current Assistant Attorney General;
(5) Keven McCurdy, Commissioner of the Virgin Islands Department of Finance ("VIDOF");
(6) Tamarah Parson-Smalls, Chief Counsel of VIBIR;
(7) LeTishma Smith, Deputy Director of Operations;
(8) Perpetua Cranston, Chief of Audit for VIBIR;
(9) Gail Christopher, auditor for VIBIR;
(10) Shenique Lewis, legal assistant with VIDOJ;
(11) Jenifer O'Neal, former Director of the Virgin Islands Office of Management and Budget ("VIOMB");
(12) David Bornn, former Government House Chief Counsel; and
(13) Bosede Bruce, former Commissioner of VIDOF.

[14] Both the motion and the memorandum in support thereof [ECF 76 and 77] are referred to collectively by the Court as the "motion."

[15] The Honorable Venetia H. Velázquez has since been appointed as a Magistrate Judge with the Superior Court of the Virgin Islands.

Id.; *See* [ECF 77]. Ocwen contends each of these individuals took personal actions with regards to the Government's failure to pay Ocwen its tax refunds. [ECF 77] at 11. As for those individuals who are high ranking government officials, Ocwen maintains there are clear exceptions to the *Morgan* doctrine to justify their depositions. *Id*.

At the commencement of its motion, Ocwen acknowledges that the parties represented to the Court there would be "minimal discovery needs." [ECF 77] at 3. The fourteen depositions sought above certainly deviate from that representation. A fact not lost on the Government. In its opposition, the Government challenges the proposed breadth of the Rule 30(b)(6) deposition, while contending the depositions of the thirteen individuals are not warranted. [ECF 88]. In doing so, it notes that Ocwen has failed to seek leave to exceed the presumptive limit of 10 depositions as required under Rule 30(a)(2)(A)(i), while also contending that several of the notices of deposition were untimely. As for the individuals to be deposed, the Government asserts various privileges—the *Morgan* Doctrine, attorney-client privilege, work-product doctrine, and deliberative-process privilege—while also maintaining that the depositions are disproportionate to the needs of the case "because Ocwen's breach-of-contract claim is too narrow for the depositions to provide relevant non-duplicative testimony that will outweigh the substantial burden the depositions will impose on the [Government] and the Court." [ECF 88] at 1. The Government further cites to the parties' joint scheduling plan, wherein Ocwen's view of discovery was limited to "whether and how much the [Government] has paid Ocwen for income tax refunds …." *Id*. at 2–3.

The Government contends that Ocwen has taken a "shotgun approach" in its requests for depositions and has done so with the designed intent to "inflict maximum harassment" on the Government by compelling current and former government employees to be deposed. [ECF 88] at 4. Moreover, the Government claims that the depositions sought go directly to the issues it seeks to raise in its amended answer:

> While Ocwen has opposed [the Government's] pending motion to amend its Answer, the depositions it seeks to compel go directly to the issue of [the Government's] claims that Ocwen misrepresented the source of its income that was the basis of the underlying tax refund at the heart of the settlement agreement. Following Ocwen's own logic that the Government's Answer does not allow for discovery into the settlement agreement being void, all the depositions are wholly irrelevant to Ocwen's claim for enforcement of the settlement agreement.

[ECF 88] at 4, *see also* [ECF 88] at 13.

In its reply, Ocwen attempts to downplay the number of depositions it seeks, stating that it "did not intend that all the depositions would go forward." [ECF 97] at 18. Ocwen further claimed the depositions would not be burdensome, as Ocwen anticipated they would be "short in duration," lasting less than 3 hours each. *Id*.

During oral argument, Ocwen voluntarily withdrew—with the right to revisit—its request to depose ten of the individuals. [ECF 129] at 23–32. Instead, it now sought to conduct the Rule 30(b)(6) deposition of the Government, as well as the depositions of Joel Lee, the Hon. Venetia H. Velázquez, and Ariel Smith.[16] *Id*. The Court inquired as to the information Ocwen seeks to obtain from the individuals and found that there was not a proportional need to conduct these depositions at this juncture, as this information could likely be obtained in the Rule 30(b)(6) deposition. *Id*. at 23–32, 50–51. Accordingly, the Court verbally granted the motion in part, compelling the Rule 30(b)(6) deposition, and denied the motion in part, without prejudice, as to the depositions of Lee, Velázquez, and Smith. *Id*. The Court further ordered that Ocwen provide its amended Rule 30(b)(6) topics to the Government by no later than December 3, 2024. [ECF 129] at 55–56.

In the parties' joint proposed scheduling plan, Ocwen provided that discovery should be limited to (a) whether and how much the USVI has paid Ocwen for income tax refunds and (b)

[16] Joel Lee is the Commissioner of the Virgin Islands Bureau of Internal Revenue, the Honorable Venetia H. Velázquez is the former Civil Chief of the Virgin Islands Department of Justice who has since been appointed as a Magistrate Judge with the Superior Court of the Virgin Islands, and Ariel Smith is the former Virgin Islands Attorney General and is a current Assistant Attorney General.

those affirmative defenses that the USVI can articulate with factual specificity during the scheduling conference. [ECF 25] at 2. In its reply, Ocwen sets forth the "expected individualized information" that Lee, Smith, and Velázquez would provide during their respective depositions. [ECF 97] at 12, 14. Much of this information predates Ocwen I. Given this Court's memorandum opinion and order [ECF 109] of November 5, 2024, such information is not relevant. Indeed, of the three would-be deponents, only Smith and Velázquez have information which postdates Ocwen I. With respect to Smith, all that is asserted is that she hand-delivered the settlement check for the first installment. [ECF 97] at 12. Such information is innocuous and can likely be ascertained during the Rule 30(b)(6) deposition, to the extent it even has any bearing. Velázquez, on the other hand, purportedly has information related to both the settlement payments made and those that were not, as well as information related to the interest included in the payments. [ECF 97]. Velázquez, who was the VIDOJ civil chief during the events at issue, is currently a magistrate judge with the Superior Court of the Virgin Islands.

Where a party seeks to compel the deposition of a high-level government official, the *Morgan* Doctrine applies. *8 Erie St. JC LLC v. City of Jersey City*, 2023 WL 3735949, *3 (D.N.J. May 31, 2023). While the Third Circuit has yet to speak directly on the issue, courts in the circuit have interpreted the *Morgan* Doctrine to hold that absent extraordinary circumstances, good cause exists to preclude the deposition of a high-level government official. *Id*. (collecting cases). A bright-line rule for classifying individuals as "high-ranking" has yet to be established by the circuit, with courts making such decisions on a case-by-case basis. *See Holt v. Pennsylvania*, 2020 WL 435752, *3 (M.D. Pa. Jan. 28, 2020). Additionally, it is the current position of the individual, and not any former position, which is evaluated. *Id*. While the Court has been unable to locate any case law addressing whether a judge will be classified as a high-ranking government official, the Court feels confident that such classification would apply. Such classification, however, does not end the

conversation, as high-ranking officials are not necessarily immune from depositions. *8 Erie St.*, 2023 WL 3735949 at *4. Under such circumstances, the party seeking the deposition must satisfy a five-prong test:

> (1) that the official's testimony is necessary to obtain relevant information that is not available from another source;
> (2) the official has first-hand information that could not be reasonably obtained from other sources;
> (3) the testimony is essential to that party's case;
> (4) the deposition would not significantly interfere with the ability of the official to perform his government duties; and
> (5) that the evidence sought is not available through any alternative source or less burdensome means.

Id.

As with its ruling from the bench, the Court continues to find the request to depose Velázquez not to be proportional to the needs of the case—at least at this juncture—as the information sought which postdates Ocwen I can likely be obtained during the Government's Rule 30(b)(6) deposition and/or from the materials (i.e., emails, etc.) referenced in Ocwen's complaint and/or reply brief. Accordingly, the Court need not conduct the five-prong *Morgan* Doctrine test with respect to Velázquez. As for Lee and Smith, Ocwen has failed to show a proportional need to conduct their depositions as well. The Court continues to grant the motion in part, compelling the Rule 30(b)(6) deposition, and deny the motion in part, without prejudice, as to the depositions of Velázquez, Lee, and Smith, with the order set forth herein superseding the Court's prior November 19, 2024 verbal order to the extent the orders conflict.

C. Ocwen's Motion to Compel Production of Documents and to Amend Responses to Admission Requests and Interrogatories

In its motion,[17] Ocwen seeks to compel the Government to: (1) produce non-privileged documents responsive to production requests nos. 3, and 5–7; (2) serve amended and compliant

[17] Both the motion and the memorandum in support thereof [ECF 79 and 80] are referred to collectively by the Court as the "motion."

responses to interrogatory nos. 4–5; and (3) serve amended and compliant responses to admission requests nos. 1–4. [ECF 80] at 1. Ocwen also seeks an order overruling the Government's general objections and finding that the Government has waived any privilege objections due to both inadequate objections and failure to produce a privilege log. *Id*.

Prior to the completion of briefing, the parties were able to amicably resolve many of their disputes. [ECF 99]. The Government also amended its responses to Ocwen's interrogatory and admission requests. *Id*. at 2. Finally, during oral argument, Ocwen advised that the only remaining disputes are interrogatory no. 4 and admission requests nos. 1–4. [ECF 129] at 47.

1. <u>Interrogatory Request</u>

"An answer to an interrogatory 'must be responsive to the question. It should be complete in itself and should not refer to the pleadings, or to depositions or other documents, or to other interrogatories….'" *Petro*, 2023 WL 3864587 at *3 (citing *Russell v. FirstBank Puerto Rico*, 2021 WL 7709714, *1 (D.V.I. Dec. 10, 2021). Under Rule 33(b)(3), each interrogatory must, to the extent it is not objected to, be answered "separately and fully" in writing under oath. Fed.R.Civ.P. 33(b)(3). Courts have interpreted this language as requiring a narrative response. *Petro*, 2023 WL 3864587 at *3 (collecting cases). "Parties must provide true, explicit, responsive, complete, and candid answers to interrogatories." *Oke v. Garman*, 2019 WL 6328022, *9 (M.D. Pa. Nov. 26, 2019) (citing *Hansel v. Shell Oil Corp.*, 169 F.R.D. 303, 305 (E.D. Pa. 1996)). "If a party is unable to supply the requested information, the party may not simply refuse to answer, but must state under oath that he is unable to provide the information and 'set forth the efforts he used to obtain the information.'" *Id*.

The response in dispute, as well as the request itself, are as follows:

> **<u>Interrogatory No. 4</u>**. Explain with particularity why USVI failed to make a payment of $6,024,000.00 to Ocwen on December 31, 2023 as agreed in Section 2.a of the Closing Agreement.

> **Amended Answer**: The Government did not make payment on December 31, 2023, because the Government denies such amounts were due Ocwen. The Closing Agreement subjects Ocwen to all of the terms and conditions therein, including fixing Ocwen's tax liability for the Relevant Years at Issue "absent a showing of fraud, malfeasance, or misrepresentation of material fact" as set forth in the General Terms of the Closing Agreement 9 (see paragraph 'a'). Section 2.a of the Closing agreement is not enforceable, given Ocwen's material misstatement of fact, which induced the Government to execute the Closing Agreement.

In its opposition, the Government argues its response—"because the Government denies such amounts were due to Ocwen … given Ocwen's material misstatement of fact"—clearly states why the Government did not make the payment on December 31, 2023, thus no further response is necessary. [ECF 100] at 2. Ocwen counters that the response merely reiterates the Government's "broad and general legal theory" for why the payment was not due but does not explain with particularity why the Government did not make the payment on the specific date as noted in the interrogatory. [ECF 101] at 4. The Court agrees that the response is deficient. If the Government knew of a particular material misstatement or misstatements of fact as of December 31, 2023, it must identify such in its response, as opposed to making a generic reference. In other words, the Government must provide a candid answer as to why it did not make payment to Ocwen on December 31, 2023. The Court thus grants Ocwen's motion to compel as to interrogatory no. 4.

2. Admission Requests

Under Rule 36, a party may serve requests for admissions upon the opposing party within the scope of Rule 26(b)(1) relating to: (a) facts, the application of law to fact, or opinions about either; and (b) the genuineness of any described documents. Fed.R.Civ.P. 36(a)(1); *see BITCO Gen. Ins. Corp. v. Port Vue Plumbing, Inc.*, 2024 WL 5118431, *2 (W.D. Pa. Dec. 16, 2024); *see Guinan v. A.I. duPont Hosp. for Children*, 2008 WL 938874, *1 (E.D. Pa. Apr. 7, 2008). The purpose of the rule, to the extent possible, is to narrow the issues for trial to those that are genuinely contested. *BITCO*, 2024 WL 5118431 at *2. The substance of the requests should contain

statements of fact that are simple and concise so that they can be admitted or denied with minimal need for explanation or qualification, and they "should be answered yes, no, the answerer does not know, or a very simple and direct explanation should be given as to why an answer cannot be supplied, such as when privilege is invoked. *Id*.

Answers that appear to be non-specific, evasive, ambiguous, or that appear to go to the accuracy of the requested admissions, rather than the essential truth contained therein, are impermissible. *BITCO*, 2024 WL 5118431 at *2; *Guinan*, 2008 WL 938874, at *1. While a party may qualify its answer if the request posits a statement that contains some truth but conveys unwarranted or unfair inferences when standing alone and out of context to the whole truth, it may not make "disingenuous, hair-splitting distinctions whose unarticulated goal is to unfairly burden an opposing party." *BITCO*, 2024 WL 5118431 at *2. Should the court be requested to evaluate the sufficiency of the answers and objections provided, it should consider: "(1) whether the denial fairly meets the substance of the [r]equest; (2) whether good faith requires that the denial be qualified; and (3) whether any 'qualification' which has been supplied is a good faith qualification. *Id*. (citing *Guinan*, 2008 WL 938874, at *1).

In its opposition, the Government contends that its amended responses sufficiently admit and/or deny each part of each admission request. [ECF 100] at 2. It also maintains that Ocwen has failed to explain how the answers are not responsive. Otherwise, the Government offers no further argument, choosing instead to rely upon the amended responses, which "speak for themselves." *Id*. Ocwen, in turn, argues that while the Government's responses admit certain aspects of each request, they also inappropriately qualify the admissions by rehashing their theory of the case with denials to unrequested statements. [ECF 101] at 7. Ocwen further notes that the Government has not objected to any of the requests, nor has it characterized them as being complex. *Id*. at 7–8. As such, given the straightforward nature of the requests, Ocwen maintains the Government should

be compelled to limit its responses to either simple admissions or denials, with qualifications being limited to those portions of any request the Government cannot in good faith admit or deny. *Id*. at 8. The requests in question, as well as the amended responses to same, are set forth individually below, as are the Court's findings.

> **Admission Request No. 1**. On December 28, 2022, the Taxpayer and the USVI entered into the Confidential Settlement Agreement settling the refund lawsuit (the "Closing Agreement"). A copy of the Closing Agreement is attached as Exhibit 1.
>
> **Amended Answer**: The Government admits that the document is dated December 28, 2022. The Government admits that Plaintiff and Defendant decided and agreed that, to avoid additional costs and burdens of litigation and for their mutual convenience, the parties compromised and settled the prior filed refund lawsuit without further litigation or other proceedings. The Government further admits that the Closing Agreement constitutes the settlement of disputed claims and that the parties agreed that the settlement does not and shall not constitute an admission of liability by either of the Parties.
>
> The Government further admits that as part of the settlement, the Closing Agreement subjects Ocwen to all of the other terms and conditions of the Closing Agreement, including fixing Ocwen's tax liability for the Relevant Years at Issue "absent a showing of fraud, malfeasance, or misrepresentation of material fact" as set forth in the General Terms of the Closing Agreement (see paragraph 'a'). The Government denies that the Closing Agreement is enforceable, given Ocwen's material misstatement of fact, which induced the Government to execute the Closing Agreement on that date. The Government is entitled to rescind the Closing Agreement, and the Government is due restitution for the payments made for the 2013 year.

Ocwen, in noting that the Government denies the enforceability of the Closing Agreement in its response, contends that the admission request does not ask this question. [ECF 101] at 7. The Court agrees and finds the Government's response evasive. Under Rule 36(a)(1)(B), a party can request that another party admit to the genuineness of any described document. The Government's qualifications go well beyond what was requested of it. The request simply asks the Government to admit or deny that the parties entered into the Closing Agreement on a date certain to settle the

refund lawsuit (Ocwen I). If this is what occurred, the Government must admit so without any additional surplusage. *See BITCO*, 2024 WL 5118431 at *3; *see also Johnson v. Miskell*, 2017 WL 3701784, *5 (M.D. Pa. Aug. 28, 2017). The Court notes that such an admission will not preclude the Government from arguing at trial that the agreement is unenforceable. *See BITCO*, 2024 WL 5118431 at *3. Accordingly, the Court grants Ocwen's motion to compel as to admission request no. 1.

> **Admission Request No. 2**. Pursuant to Section 2.a. of the Closing Agreement, the USVI agreed to pay the Taxpayer $27,923,234, plus all accrued interest required to be paid on the tax refund.
>
> **Amended Answer**: The Government admits that pursuant to Section 2.a of the Closing Agreement, the Government agreed to pay Ocwen $27,923,234, plus all accrued interest, subject to all of the other terms and conditions of the Closing Agreement, including fixing Ocwen's tax liability for the Relevant Years at Issue "absent a showing of fraud, malfeasance, or misrepresentation of material fact" as set forth in the General Terms of the Closing Agreement (see paragraph 'a"). The Government denies such amounts were or are due Ocwen. Section 2.a of the Closing agreement is not enforceable, given Ocwen's material misstatement of fact, which induced the Government to execute the Closing Agreement. The Government is entitled to rescind the Closing Agreement, and the Government is due restitution for the payments made for the 2013 year.
>
> **Admission Request No. 3**. Pursuant to Section 2.a. of the Closing Agreement, the Parties agreed that the USVI would make payments on the refunds with statutory interest according to the following schedule:

Tax Year	Due Date	Amount
2013	Not later than January 15, 2023	$1,000,000.00
2013	Not later than June 30, 2023	$6,680,772.00
2014	Not later than December 31, 2023	$6,024,000.00
2015	Not later than June 30, 2024	$7,109,231.00
2015	Not later than December 31, 2024	$7,109,231.00

> **Amended Answer**: The Government admits that the document contains payment amounts in section 2.a, including the above chart, and that the Parties agreed that USVI would make such payments, subject to all of the other terms and conditions of the Closing Agreement, including fixing Ocwen's tax liability for the Relevant

> Years at Issue "absent a showing of fraud, malfeasance, or misrepresentation of material fact" as set forth in the General Terms of the Closing Agreement (see paragraph 'a')[sic] The Government denies such amounts were or are due Ocwen. Section 2.a of the Closing agreement is not enforceable, given Ocwen's material misstatement of fact, which induced the Government to execute the Closing Agreement. The Government is entitled to rescind the Closing Agreement, and the Government is due restitution for payments made for the 2013 year.

It is an appropriate use of a request for admission to ask a party to admit that a document contains certain language or provisions. *Miskell*, 2017 WL 3701784 at *5; *Guinan*, 2008 WL 938874, at *5. If the party believes the language or provision in an agreement does not say what the requesting party seeks admission of, or are otherwise "taken out of context," the party may deny the request. *Guinan*, 2008 WL 938874, at *5. If, however, the language or provisions are accurately quoted or referenced, the party must admit the request. Of course, in doing so, the party is still free to present evidence at trial contradicting the quoted or referenced statement. *Id.*; *BITCO*, 2024 WL 5118431 at *3. The Court finds the Government's qualifiers in its responses go well beyond the questions posed. Again, nothing precludes the Government from arguing at trial that it is entitled to rescind the Closing Agreement. But this is not the question that has been asked. As such, the Court grants Ocwen's motion to compel as to admission requests nos. 2 and 3.

> **Admission Request No. 4**. The Parties intended that the Closing Agreement would constitute a closing agreement as defined under I.R.C. § 7121.
>
> **Amended Answer**: The Government admits that the parties intended that the Closing Agreement would constitute an agreement as defined in IRC § 7121, which such section of the Code provides that the Closing Agreement can be nullified based on fraud, malfeasance, or misrepresentation of material fact. The Closing Agreement was executed by the Government based on Ocwen's material misrepresentation of material fact. The Government is entitled to rescind the Closing Agreement, and the Government is due restitution pursuant to IRC § 7121, and the terms of the Closing Agreement, for the payments made for the 2013 year.

The final request asked is simple and direct. This is apparent from the opening of the Government's response. The qualifications supplied, however, do not constitute good faith qualifications. The Court thus grants Ocwen's motion to compel as to admission request no. 4 as well.

3. Requests for Fees / Costs

Ocwen seeks fees and costs in accordance with Rule 37(b)(5). While the Court has granted each of Ocwen's requests to compel in its motion, the Court notes the parties were able to resolve many of their disputes without court intervention. Also, barring the unwarranted qualifications, the Government's amended answers to the admission requests were, for the most part, responsive. Finally, nothing before the Court demonstrates that the Government was acting in bad faith in its responses. Accordingly, the Court denies Ocwen's request for fees and costs.

D. Government's Motion to Compel Production of Documents

The Government propounded a total of sixty-six requests for production upon Ocwen, with Ocwen having objected to each request without further response. [ECF 82]; *see* [ECF 93–1]. In its motion,[18] the Government seeks to compel responses to all sixty-six requests.

In its background introduction, the Government describes the subject matter of the lawsuit as follows:

> The dispute involves a conflict over a settlement agreement between Ocwen and the Government, concerning claims for tax refunds for the years 2013 to 2015. These claims are based on Ocwen's participation in the EDC program, which offers tax incentives for local economic growth. The Government is disputing these claims, pointing out Ocwen's business practice of outsourcing jobs, which contradicts the EDC's intention to stimulate the local job market.

[18] Both the motion and the memorandum in support thereof [ECF 81 and 82] are referred to collectively by the Court as the "motion."

[ECF 82] at 1. It further contends its original defenses questioned the validity of the settlement agreement,[19] arguing it could be void or voidable due to potential defects in its formation, as well as argued that any refunds due might be offset by other debts owed by Ocwen. *Id*. at 2. According to the Government, it was not until it moved to amend its answer on July 15, 2024, that it sought to assert the affirmative defense of material misstatement as to Ocwen's tax refund claims for 2014 and 2015, as well as assert a counterclaim of recission and restitution for the tax refund payment made by the Government for the 2013 tax return. The Government stated it had uncovered that Ocwen's representation of its income sources had been inaccurate for "some time." It does not, however, state when it uncovered this inaccuracy. *Id*.

The Government claims that Ocwen has multiple subsidiaries, many of which operate outside the Virgin Islands, as well as companies it contracts with to perform services. [ECF 82] at 5. In its requests for production, the Government seeks discovery related to twenty-six of these subsidiaries and/or companies, as well as a twenty-seventh company, Ocwen Mortgage Servicing, Inc., which merged into Ocwen.[20] *See Id*.; *see* [ECF 93-1] at 5–21. The Government contends its production requests are proportionate given the complexity of a large company such as Ocwen with numerous subsidiaries, which have created a "web of complicated transactions." [ECF 82] at 5. It further contends the requests are narrowly tailored to 12 categories of documents, despite Ocwen's use of multiple affiliated companies. *Id*. at 2. Finally, the Government maintains the requests are not burdensome on Ocwen and its "army of attorneys," as the requests are a "necessary and reasonable step to fully understand Ocwen's practices and policies, and that all of [Ocwen's] income is not sourced from the Virgin Islands." *Id*. at 5.

[19] The "settlement agreement" referenced by the Government is the agreement entered into the parties on December 28, 2022, which settled Ocwen I.

[20] Although the Government seeks discovery related to "Ocwen Mortgage Services, Inc.," it appears these requests are directed towards "Ocwen Mortgage Servicing, Inc.," which is the company that was merged into Ocwen. *See* [ECF 93–1]; *see* [ECF 2].

In its opposition, Ocwen argues the Government is seeking to confound a simple breach of settlement agreement and refund case, which Ocwen contends has already been twice settled by the parties. [ECF 93] at 2. It contends the requests are expansive and are "nothing like" what the Government represented to the Court during the Rule 16 conference on April 25, 2024. *Id*. at 5. According to Ocwen, the requests are irrelevant, voluminous, and burdensome and seek 10-year-old documents for more than twenty-five entities, none of which are parties in the case. *Id*. at 2. Ocwen further contends the documents being sought have been expansively defined to include contracts, agreements, emails, communications, board minutes, payment records, entity formation documents, and documents describing job descriptions, physical locations, and number of employees employed. It argues the Government's motion should be denied for three reasons. First, the documents being sought are irrelevant to any claim or defense currently at issue. Second, the requests seek documents to challenge Ocwen's tax liability for the years 2013–2016, despite such tax liability having been fully and conclusively resolved in Ocwen I. Third, the Government has failed to address Ocwen's specific objections to each of the requests. *Id*. at 2–3.

With respect to the first basis, Ocwen points to the defenses raised by the Government in its operative answer. [ECF 93] at 8; *see also* [ECF 15]. These had to do with the formation of the settlement agreement, the potential for an offset, and the possibility that some or all of the current claims might have been settled under the agreement. [ECF 93] at 8; *see* [ECF 15] at 13–14 (defenses and affirmative defenses). Ocwen contends the documents being sought are not relevant to the defenses asserted but instead relate to the tax benefits Ocwen received for conducting business in the Virgin Islands, which is not at issue before the Court. [ECF 93] at 8.

As for the second basis, Ocwen argues that even were the Court to grant the Government's motion to amend its complaint,[21] the discovery sought would still be irrelevant. [ECF 93] at 8–11. Ocwen maintains the settlement agreement resolved the issue as to the tax liability and that the Government is precluded under 26 U.S.C. § 7121 from reopening the matter. While acknowledging that an agreement under § 7121 can be challenged upon a showing of fraud or malfeasance, or misrepresentation of a material fact, Ocwen states this applies only to conduct that occurs "in the making of the agreement" and cites to *Smith v. Comm'r of Internal Revenue*, 159 T.C. 33, 60 (T.C. 2022) for this premise. According to Ocwen, the requests seek documents from almost a decade prior to the parties entering into the closing agreement and were unrelated to conduct in the making of the agreement. *Id*.

Lastly, Ocwen contends that beyond the relevancy issue, the requests are overbroad, unduly burdensome, and disproportionate to the needs of the case given the narrow issue presented. [ECF 93] at 11. By way of example, Ocwen notes the requests seek all documents for any unidentified companies that represents an agreement, contract, or written arrangement for services, documents of all employment related information for the twenty-six entities,[22] and all documents describing the sourcing of income within the Virgin Islands. According to Ocwen, in order to respond to the requests, it would have to coordinate with its parent company—a publicly traded company servicing over 1.3 million customers—to attempt to locate responsive documents related to the parent company's twenty-six subsidiaries. Ocwen claims this burden is further magnified by the

[21] In a memorandum opinion and order entered on November 5, 2024, this Court denied in part the motion to amend. *See* [ECF 109]. The Government has filed a notice of objection [ECF 113], which remains pending before the District Court.

[22] Ocwen identifies "more than twenty-five" entities in its brief. As noted earlier in this memorandum, the Court counts twenty-six nonparty entities in the Government's production requests not counting the company that merged with Ocwen; namely Ocwen Mortgage Servicing, Inc.

fact that the Government has failed to provide an explanation as to the relevance of these entities. *Id*. at 12–13.

In its reply, the Government contends each of Ocwen's arguments are baseless irrespective of the Government being permitted to amend its complaint. [ECF 98]. The Government points to the defenses of offset/set-off and estoppel, which the Government contends necessarily requires a consideration regarding the sources of Ocwen's income so that the amount of tax owed by Ocwen can be redetermined. Thus, the records are relevant. The Government further maintains Ocwen has failed to properly support its claims of undue burden, relying entirely on unsubstantiated attorney argument rather than on affidavits or other evidence. *Id*. at 2–6.

On October 24, 2024, the Court conducted a status conference. *See* [ECF 107]. During said conference, the Court inquired from the Government how it identified the twenty-six nonparty companies for which its production requests seek documents. In response, the Government advised that the companies were identified from filings made by Ocwen's parent company with the U.S. Securities and Exchange Commission ("SEC"). *See* [ECF 129] at 59. Upon further inquiry, the Government acknowledged that each of these filings predated the Ocwen I lawsuit. *Id*.

On November 19, 2024, the Court heard oral argument on this motion, as well as the other discovery motions then pending. The Government confirmed that its requests seek discovery from twenty-six entities the Government believes to be subsidiaries or affiliated companies of Ocwen. [ECF 129] at 35. In doing so, the Government admitted having no knowledge as to which of these entities might have been involved in activity generating income claimed by Ocwen on its tax returns. *Id*. at 39–42. Instead, the Government pointed to Ocwen having generated income of over a billion dollars per year and argues that if persons (i.e., employees) and the type of work being performed are not located in the Virgin Islands, Ocwen should not have sourced its income (or a

portion thereof) to the Virgin Islands. *Id*. at 39–40. This position, however, is premised upon a theory, as acknowledged by Government's counsel during the hearing:

> We don't know, and I haven't heard from counsel, but if there are entities here that have nothing to do with the generation of income for this entity, this U.S.V.I. entity, tell us and we will drop it. But I haven't heard anything like that.
>
> We also don't know if there's other entities out there. But what we believe is happening is that there may be employees scattered around the globe, either in the United States or [] outside of the United States, that are working to generate the income that was reported on these tax returns for '13, '14, and '15.
>
> …
>
> They just need to tell us. But let's assume that there's fifteen entities. We can't reward companies that decide to create a spaghetti full of entities in a way to say, well, you can't. Look, it's too complicated. Well, they could have had one entity, but they didn't. So it, there's no difference here.
>
> …
>
> But if they did, and there's employees, then we need to see where they're [at], what are they doing? What's the nature of their activities? How can you economically source a hundred percent of your income to the U.S. Virgin Island[s] when you have people not here doing the work, that's the heart of their case.[23]

Id. at 40–41.

The Government maintained that discovery related to the twenty-six entities goes directly to the heart of Counts I–III of the complaint, wherein Ocwen asserts entitlement to refunds for tax years 2013–2015. [ECF 129] at 40–41. When asked by the Court why the Government had not sought such discovery during Ocwen I, the Government replied that the matter had yet to become a case of controversy, as the parties chose to enter into a settlement prior to the Government

[23] The Court notes the transcript is replete with typographical errors, incorrect spellings, and even words erroneously substituted by the transcriber for what was said during oral argument. This is likely due to the proceeding having been recorded, as opposed to having a court reporter present. Accordingly, when oral argument is recited in this opinion, such errors are delineated by brackets.

responding to the complaint. *Id*. at 42. The Government further stated that had Ocwen limited its current complaint to just Count IV—breach of closing agreement—the Government would not be seeking the discovery from the twenty-six entities that it presently seeks. *Id*. at 42–44, 61–62.[24]

In response, Ocwen claimed the Government is seeking to delay the proceeding through its discovery requests. [ECF 129] at 45. Indeed, the Government conceded that were its production requests to be permitted, it would require the discovery deadline to be extended significantly.[25] *Id*. at 32. Regarding Counts I–III, Ocwen stated these were raised in the present lawsuit because they are still live actions, but claimed the only evidence required to prove said claims is the closing agreement itself. *Id*. at 44–45. To this end, Ocwen maintained the tax liability had previously been litigated and settled, thereby fixing the refund amounts for tax years 2013–2015. As for the scope of the requests, Ocwen estimated the searches alone would cost tens of thousands of dollars and likely require the retention of a third-party vendor to assist. By way of example, Ocwen facetiously described the request seeking all documents reflecting year-end gross income as "you might as well just back up the truck …." *Id*. at 44–46.

To each request, Ocwen provides almost *verbatim* objections. The response / objections repeated most often is as follows:

> **Response / Objections**: Ocwen objects to this Request because it exceeds the scope of permissible discovery under Rule 26 of the Federal Rules of Civil Procedure. This Request, as well as USVI's sixty-five additional Requests, amounts to an impermissible third

[24] During oral argument, counsel for the Government stated in pertinent part as follows:

> … if they [Ocwen] only brought count four, we [the Government] would not be having this conversation. They resurrected Ocwen I as referring to it by putting count one, two, and three, which are identical to the counts. They did this, we did not. They bought back '13, '14, '15 back to life. They're claiming the refund. We have a right to discovery, just like in Ocwen I. If they just did count four, we would just talk about a breach of contract case, they didn't.

[ECF 129] at 42–43.

[25] The Court notes that in responding to an inquiry posed to it during a status conference, the Government anticipated that such discovery could require more than a year to complete.

bite at the apple seeking to re-audit Ocwen through irrelevant and burdensome discovery.

Specifically, this Request seeks irrelevant documents unrelated to any claim or defense in this matter that only relates to the USVI's failure to pay the refunds Ocwen is entitled to and that USVI has already recognized and agreed to pay. The requested documents are not proportional to the needs of the case, as seeking documents from 2013, 2014, 2015, and 2016 has absolutely nothing to do with the USVI's failure to pay Ocwen or any of the affirmative defenses asserted by the USVI. Further, to the extent USVI seeks the requested documents in an attempt to undo the Settlement Agreement because of fraud, misrepresentation, or malfeasance under Section 7121—that affirmative defense is not before the Court, as USVI failed to plead fraud or misrepresentation as a defense, which must be pleaded with particularity. See Fed. R. Civ. P. 8(c), 9(b); *Smith v. Comm'r of Internal Revenue*, No. 5191-20, 2022 WL 3654871, at *23 (T.C. Aug. 25, 2022) (stating that with regards to Section 7121, "fraud must be affirmatively alleged and the party alleging fraud must state with particularity the circumstances giving rise to it."); *see also Carr v. Wisecup*, 263 F.2d 157, 159 (3d Cir. 1959) (fraud defense must be affirmatively alleged with particularity). Even if the USVI were entitled to seek discovery under Section 7121, the Discovery here amounts to an improper legal application of Section 7121. The "fraud," "malfeasance," and "misrepresentation of a material fact" that can be examined under Section 7121 is only that which relates to conduct "in the making of the agreement." *Smith*, 2022 WL 3654871, at *17 (collecting cases); *see also In re Hopkins*, 146 F.3d 729, 733 (9th Cir. 1998) ("[C]ourts have strictly enforced closing agreements, finding them binding and conclusive on the parties even if the tax at issue is later declared to be unconstitutional or in conflict with other internal revenue sections.").

Ocwen also objects to this Request as overbroad because it seeks an enormous volume of documents from over a decade ago related to a long-settled matter based on speculation vaguely articulated in USVI's Discovery Memorandum [ECF No. 26] that Ocwen's 2019 tax returns "cast doubt" on the 2013-2016 tax returns and USVI is "now wondering" if the Settlement Agreement "should stand." Basing discovery on speculation alone amounts to a fishing expedition undertaken in hopes of stumbling upon a viable affirmative defense. *See Petro Indus. Sols., LLC v. Island Project & Operating Services, LLC*, No. 21-cv-00312-WAL-EAH, 2023 WL 3864587, at *6 (D.V.I. June 7, 2023) (denying motion to compel response to an interrogatory when plaintiff's general theory behind the interrogatory was "not particularized to the claims in this case

> and thus . . . speculative"). Absent proper, particularized pleading regarding USVI's desired defense, the Request is improper. *Id*.
>
> Ocwen further objects to this Request as vague and ambiguous because Ocwen does not know what USVI means by "owned MSR servicing portfolios," or who it is suggesting owns the MSR servicing portfolios.
>
> Finally, Ocwen objects on the basis that the Request is overbroad, unrelated to any claim or defense in this matter, and not proportional to the needs of the case as the Request seeks a vast amount of mortgage servicing agreements, as well as related documentation regarding those agreements, that Ocwen has for the Relevant Tax Years. Moreover, the assembly of such a vast amount of information would unduly burden Ocwen and far outweigh any proposed benefit this irrelevant information could possibly have. This Request is not proportional to the needs of the case and necessarily implicates nearly every document Ocwen has for a multiyear period relating to its mortgage servicing practices for over 100 clients, implicating thousands of potential agreements. Further, many of these documents are not in the direct possession, custody or control of Ocwen, but are in the possession, custody and control of Ocwen's parent in the United States, Onity Group Inc. In that regard, gathering these documents would require not only the work and effort of Ocwen, but also of Onity Group Inc. Therefore, the burden, expense and time expenditure not only impacts Ocwen, but also Onity Group Inc.

[ECF 93–2].[26]

Ultimately, the Court's decision *infra* to bifurcate Count IV from the remaining counts, with the former count to be tried first, warrants denial of the Government's motion in its own right. It is on this basis that the Court denies the motion, and the present order supersedes the Court's verbal order of November 19, 2024.

In its oral argument, the Government stated that it would not be seeking the documents that are sought in its requests for production had Ocwen limited its lawsuit to just that of Count IV. *See*

[26] Ocwen's response / objections to request no. 56 swaps out the fourth paragraph above with a paragraph that objects to the term / phrase "allocation of income" as vague and ambiguous. [ECF 93–2] at 86–87. The responses / objections to requests nos. 58, 59, 61–66 remove the fourth paragraph altogether, with the response / objections to request no. 63 also adding additional objections to the first paragraph. *Id*. at 89–94, 96–107.

[ECF 129] at 34–44. This is reflected not only in those portions of the record already recited herein, but also in the following statements of the Government:

> … if they [Ocwen] only brought count four, we [the Government] would not be having this conversation. They resurrected Ocwen [I] as referring to it by putting count one, two, and three, which are identical to the counts. They did this, we did not.
>
> They brought '13, '14, '15 back to life. They're claiming the refund. We have a right to discovery, just like in Ocwen [I]. If they just did count four, we would just talk about a breach of contract case, they didn't.
>
> …
>
> …. But count one, two, and three right now, they're hiding. They're not giving us anything. It's been five months and we still don't have records.
>
> And we're entitled to them under these three counts. Unless they're going to withdraw the counts, Your Honor, with all due respect, we – we're -- we can ask the -- the pertinent questions as to how do they have management agreements? Who's getting paid? Where are these people?
>
> Because if they're operating in India or they're operating in the UK or they're operating out of a company in Delaware, that – that's a problem because they're not here in the U.S. Virgin Island doing the work.

Id. at 42–44.[27]

As discussed in more detail in the section that addresses the motion to bifurcate, the Court finds that while the breach of contract claim of Count IV relates to the refund claims of Counts I–III, the claim is materially different. And although the Government appears to have backtracked on its statements made during oral argument regarding the scope of the discovery needed for Count IV; *see* [ECF 136] at 8–9, 12, the Court is not persuaded. Removing for the moment the issue of

[27] As noted earlier in this opinion, based on the Government's opposition [ECF 136] to Ocwen's bifurcation motion, it appears the Government has since altered its position as to what it believes the scope of discovery should be as to Count IV. In said opposition, the Government now maintains that the legal and factual issues associated with the requests for income tax refunds and statutory interest are intertwined in all four counts. [ECF 136] at 8–9, 12.

relevance given the Court's order of November 5, 2024;[28] *see* [ECF 109], as well as the nature of the requests themselves, which amount to an inappropriate fishing expedition, the proportionality of the requests far exceed the needs of the case, and in particular, that of Count IV.

Notwithstanding the bifurcation, however, the Court would still deny the motion. The Court finds it ironic that on one hand, the Government has taken the stance that Ocwen has employed a "shotgun approach" in its requests to depose various current and former government employees; *see* [ECF 88] at 4, while on the other it attempts to employ the exact same approach through its own production requests. Production requests nos. 1–28 mirror one another, as do nos. 29–55, with the only difference being the entity identified in each particular request.[29] *See* [ECF 93–1]. These mirrored requests are as follows:

> **Production Requests Nos. 1–28**. Produce each document in force for the Relevant Tax Years that references [insert entity name or catchall][30] and represents an agreement, contract, or written arrangement for the (i) performance of mortgage servicing for owned MSR servicing portfolios or subservicing portfolios, and/or (ii) that discuss the acquisition, ownership, administration, or sale of MSRs or SARs.
>
> **Production Requests Nos. 29–55**. Produce each document in force for the Relevant Tax Years that reflects payments made by [insert entity name] to any third party for the performance of mortgage servicing for owned MSR servicing portfolios or subservicing portfolios.

Of the twenty-seven entities identified, twenty-six are purported subsidiaries and/or affiliated companies of Ocwen, while the twenty-seventh company—Ocwen Mortgage Servicing, Inc.—is the entity that Ocwen succeeded. The Government has acknowledged that the identities

[28] The Government has objected to undersigned's magistrate judge order, with said objection still pending. *See* [ECF 113].

[29] The final request in the first mirrored grouping (request nos. 1–28) does not identify a specific entity, but instead includes a catchall, wherein it seeks materials from "any entity not previously referenced" in nos. 1–27. See [ECF 93–1] at 11.

[30] For purposes of conserving space, the Court does not repeat each mirrored request but instead inserts brackets where the identity of the entity (or the catchall provision) is identified. The Court does the same for nos. 29–55.

of the twenty-six entities were ascertained from SEC filings submitted by Ocwen's parent company and that each of these filings predated the Ocwen I lawsuit. The Government has further conceded that it does not know which of these entities might generate income for Ocwen. The Court finds this to be the type of fishing expedition that is not permissible. The same is true for the following production requests:

> **Production Request No. 58**. Produce all initial entity formation documents in whatever form, including, but not limited to, articles of incorporation, bylaws, limited liability company membership agreements, and the like, for the following entities:
>
> a. Ocwen Mortgage Services, Inc.
> b. Ocwen Loan Servicing, LLC
> c. REO Management, LLC
> d. Ocwen Luxembourg S.a.r.l.
> e. Litton Loan Servicing, LP
> f. Property VIII, LLC
> g. LLS Commercial Servicing, Inc.
> h. Ocwen Financial Services S.R.L.
> i. Ocwen Advance Facility Transferor, LLC
> j. Ocwen Master Advance Receivables Trust
> k. Ocwen Servicers Advance Funding (SBC), LLC
> l. Ocwen – Freddie Servicer Advance Funding, LLC
> m. Ocwen – Freddie Servicer Advance Receivables Trust 2012 ADVI
> n. Hastings Servicer Advance Facility Transferor, LLC
> o. Hastings Servicer Advance Receivables Trust
> p. Ocwen Servicer Advance Facility Transferor III, LLC
> q. Ocwen Servicer Advance Receivable Trust III
> r. Ocwen Financial Solutions Private Limited
> s. Homeward Residential, Inc.
> t. Ocwen Business Solutions, Inc.
> u. PHH Mortgage Corporation
> v. Ocwen MSR Holdco, Inc.
> w. Homeward Residential Corporation India Private Ltd.
> x. Financial Management Solutions, Inc.
> y. Ocwen Mortgage Asset Holdings, Inc.
> z. Ocwen Mortgage Asset Holdings General Partner
> aa. Ocwen Mortgage Asset Partners, L.P.
>
> **Production Request No. 59**. Produce all board of directors meeting minutes from the Relevant Tax Years for the following entities:

> [listing the 27 entities identified in Production Request No. 58 above][31]
>
> **Production Request No. 61**. Produce each document that reflects the amount of year-end gross income (not taking into consideration any costs or expenses) for the following entities during the Relevant Tax Years:
>
> > [listing the 27 entities identified in Production Request No. 58 above]
>
> **Production Request No. 63**. Produce each document that describes the job descriptions, physical locations, and number of employees who were employed by the following entities during the Relevant Tax Years:
>
> > [listing the 27 entities identified in Production Request No. 58 above]

[ECF 93–1]. As with request nos. 1–55, these requests likewise cast a large net to see what might be caught.

The remaining productions requests are as follows:

> **Production Request No. 56**. Produce each document for the Relevant Tax Years that discusses or reflects the allocation of income between Ocwen Mortgage Services, Inc. and Ocwen Loan Servicing, LLC.
>
> **Production Request No. 57**. Produce each document for the Relevant Tax Years that discusses or reflects the allocation of income between Ocwen Mortgage Services, Inc. and any other related or unrelated entity for the (i) performance of mortgage servicing for owned MSR servicing portfolios or subservicing portfolios, and/or (ii) that discuss the acquisition, ownership, administration, or sale of MSRs or SARs.
>
> **Production Request No. 60**. For the Relevant Tax Years, produce all communications between Ocwen Mortgages Servicing, Inc. and Deloitte Tax LLP, the paid preparer of the Form 1120, in which such communications reference the (i) performance of mortgage servicing for owned MSR servicing portfolios or subservicing portfolios, and/or (ii) that discuss the acquisition, ownership, administration, or sale of MSRs or SARs.

[31] For purposes of conserving space, the Court does not list each entity identified in the request but instead inserts brackets making reference to the entities identified in request no. 58, which are the same. The same is true with respect to requests nos. 61 and 63.

> **Production Request No. 62**. Produce each Form W–2 VI issued by Ocwen Mortgage Services, Inc., for the Relevant Tax Years.
>
> **Production Request No. 64**. Produce each document that describes the sourcing of income within the USVI for the Relevant Tax Years.
>
> **Production Request No. 65**. Produce all (i) transfer pricing studies, (ii) econometric models (iii) econometric studies, (iv) or any document, that reflects or discusses the allocation of income, or expense, or Federal tax attributes between the U.S. Virgin Islands and any other taxing jurisdiction, including, but not limited to any of the 50 States within the United States or its territories; Luxembourg, India, or the United Kingdom.
>
> **Production Request No. 66**. Produce all Master Service Agreements entered into by and between Altisource Solutions SARL and Ocwen Mortgage Services, Inc., including but not limited to:
>
> a. The Master Service Agreement bearing identification number 557111 and titled "All services provided from Altisource to OMS."
>
> b. Amendment #1, titled OMS-Amendment #1 to Services Agreement, to the aforementioned Master Service Agreement.

[ECF 93–1].

All of the above production requests far exceed the "minimal discovery needs" the parties conveyed to the Court during the April 25, 2024 initial Rule 16 conference, wherein the parties further sought a limited four-month discovery period. *See* [ECF 25] at 1–2. Again, this is what was presented by the parties. The purpose of the Rule 26(f) conference—which necessarily precedes the Rule 16(b) scheduling conference—is for the parties to reach an agreement as to the parameters of discovery and its timing, whether the limitations within the rules should be changed, as well as the necessity of discovery and other pretrial orders. *See Assoc. Ins. Co.*, 2005 WL 8173548, at *6. It is this agreement that the Government now seeks to drastically alter. Furthermore, it is not lost upon the Court that the Government contends that it was its review of Ocwen's recent financial

data—and in particular, for year 2019—that raised concerns about the legitimacy of Ocwen's income sourcing claims. [ECF 26] at 1. But this review—at the very latest—concluded on December 14, 2023, well before the filing of the present lawsuit.[32,33] Indeed, the only new revelation the Government has identified subsequent to the Rule 16(b) conference is that it has since decided to review SEC filings of Ocwen's parent company, all of which predate the lawsuit by years. Again, there is a purpose for the Rule 26(f) conference, a purpose that the Government now seeks to circumvent. This too would warrant denial of the motion.

Likewise, given the Court's opinion at [ECF 109], the production sought is not relevant. Even assuming that opinion was to be reversed—the matter is currently pending before the District Court; *see* [ECF 113]—other issues of relevance and proportionality exist. Nonetheless, seeing as how the Court's present denial of the motion is premised upon the bifurcation of Count IV from the remaining counts, the Court need not address these issues and chooses not to do so herein.

E. <u>Ocwen's Motion to Bifurcate</u>

As a likely byproduct of the November 19, 2024 oral argument,[34] Ocwen has moved to bifurcate the case into two phases. [ECF 127].[35] The first phase would limit the litigation to Count IV of the complaint, while the second phase—if necessary—would litigate the remaining three counts (Counts I–III). *Id*. at 1. The Government has filed an opposition to the motion [ECF 136], with Ocwen having filed a reply [ECF 141].

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[32] *See* [ECF 1–1] in *Ocwen USVI Serv., LLC v. Dir. of Virgin Islands Bureau of Internal Revenue*, 3:24-cv-00014, for which the Court takes judicial notice pursuant to Fed.R.Evid. 201(b)(2).

[33] Indeed, prior to the filing of the present lawsuit, the Government had completed a 2-plus year audit for tax years 2013–15, as well as had an opportunity to conduct discovery in Ocwen I, which the Government voluntarily chose to forego.

[34] During oral argument, the Court advised it would be considering, *sua sponte*, the potential for bifurcation and invited the parties to do the same. *See* [ECF 129] at 63–65.

[35] Both the motion and the memorandum in support thereof [ECF 127 and 128] are referred to collectively by the Court as the "motion."

In its motion, Ocwen contends that in "large part," its case in the present matter "rises and falls" on the enforceability of the Agreement entered in Ocwen I. [ECF 128] at 1–2. This is because the Agreement sets forth Ocwen's income tax liability for tax years 2013 through 2015. *Id*. at 2. Thus, if the Agreement is found to have been breached (Count IV), then the amount of refunds claimed for tax years 2013 through 2015 (Counts I–III respectively) will necessarily be fixed, and Ocwen will rely on this fixed tax liability to prove the refunds that are owed to it as to each return. *Id*. According to Ocwen, bifurcation of the breach of contract claim will conserve judicial resources and maximize efficiency, while not prejudicing either party or the Court. *Id*. at 3, 5. In arriving at this conclusion, Ocwen states that resolution of Count IV may have a significant impact on how Counts I–III are tried and may potentially eliminate the need for any additional proof as to these counts. *Id*. at 4. Ocwen further contends that such bifurcation will expedite resolution of the core issue; namely does the Government owe Ocwen money stemming from the tax refunds sought in Counts I–III. *Id*. It also maintains that the case will be streamlined through the proposed first phase of the litigation, saving both parties from the fees and costs associated with the expansive discovery the Government seeks to conduct as it relates to Counts I–III. *Id*. at 4–5. Finally, Ocwen states that bifurcation will not result in any delay or additional expense to the parties, while also having the potential advantage of reducing expenses and streamlining (or eliminating altogether) the issues presented in Counts I–III. *Id*. at 5.

In its opposition, the Government argues that Ocwen has failed to state grounds sufficient to bifurcate this matter into two separate trials. [ECF 136] at 3. In doing so, the Government notes bifurcation is the exception and is not routinely ordered. *Id*. at 8. It maintains that Ocwen has failed to demonstrate that bifurcation will provide expediency, or that neither party will suffer prejudice if separate trials are granted. *Id*. It further notes that some courts have held that the party seeking bifurcation must demonstrate it will suffer prejudice if separate trials are not granted—for which

the Government contends Ocwen has failed to do—while still others have held the most important consideration being that of the prejudice suffered by the nonmovant. *Id*. at 11. The Government further argues that bifurcation will cause duplication and undue delay, maintaining that the legal and factual issues associated with the requests for income tax refunds and statutory interest are intertwined in all four counts. *Id*. at 8–9, 12. It further claims the cases cited in Ocwen's motion that seek to overcome the overlap issue are inapposite. *Id*. at 12–13. Finally, the Government argues that this Court lacks subject matter jurisdiction to consider the common law breach of contract claim asserted in Count IV, which seeks to recover amounts characterized as refunds of income taxes.[36] *Id*. at 14.

Ocwen counters in its reply that Count IV has no substantive overlap with Counts I–III, stating further that should Count IV be resolved in its favor, the claims of the other counts would be wholly resolved. [ECF 141] at 2. Ocwen explains that this is because the tax refunds sought in those counts are explicitly governed by the terms of the Agreement. *Id*. As such, a separate trial on Count IV would be limited to the validity of the Agreement, whether the Agreement was breached, and the resulting damages as provided for in the Agreement. *Id*. at 5. According to Ocwen, the Government's opposition fails to even confront the effect a Count IV resolution will have on the remaining claims, and instead generically states that bifurcation will lead to duplication without providing examples of what duplicate efforts would occur. *Id*. at 3. Ocwen maintains that a trial limited to just Count IV would, in fact, actually negate the need for expansive discovery and thus safeguard the Government from any unnecessary expenditures of its limited governmental resources. *Id*. at 6.

[36] The Government has challenged the Court's subject matter jurisdiction as to Count IV in a separate partial motion to dismiss [ECF 137] and [ECF 138] that remains pending before the District Court.

Federal Rule of Civil Procedure 42(b) allows a court to order a separate trial of one or more claims "[f]or convenience, to avoid prejudice, or to expedite and economize." Fed.R.Civ.P. 42(b); *Kiskidee, LLC v. Certain Interested Underwriters*, 2012 WL 1067918, at *2 (D.V.I. Mar. 26, 2012). "Courts are afforded large discretion in deciding whether to [bifurcate] claims for trial." *Id*. (citing *Idzojtic v. Pennsylvania R. Co.,* 456 F.2d 1228, 1230 (3d Cir.1972)); *see Malone v. Indem. Ins. Co. of North America*, 2023 WL 4744152, *1 (D.V.I. July 25, 2023). However, bifurcation is not meant to be a routine practice and separate trials are the exception, not the norm. *Kiskidee*, 2012 WL 1067918, at *2 (citing *Pease v. Lycoming Engines,* 2011 WL 4458841, at *2 (M.D.Pa. Sept. 23, 2011) and *Cranston Print Works Co. v. J. Mason Prods.,* 1998 WL 799171, at *3 (S.D.N.Y. Nov. 13, 1998)); *see also Lis v. Robert Packer Hosp.*, 579 F.2d 819, 824 (3d Cir.1978). Nonetheless, bifurcation is "encouraged where experience has demonstrated its worth." *Lis*, 579 F.2d at 824. Moreover, "[b]ifurcation 'is appropriate where claims are factually intertwined, such that a separate trial may be appropriate, but final resolution of one claim affects the resolution of the other.'" *Toll JM EB Residential Urban Renewal LLC v. Tocci Residential, LLC*, 2023 WL 3510877, at *3 (D.N.J. May 16, 2023) (citing *Est. of Grieco by Grieco v. Nat'l Med. Consultants, P.C.*, 2021 WL 1248533, at *5 (D.N.J. Apr. 5, 2021)).

Before a decision to bifurcate may be made, the court—in the exercise of its discretion—must weigh the various considerations of convenience, prejudice to the parties, expedition, and economy of resources. *Emerick v. U.S. Suzuki Motor Corp.,* 750 F.2d 19, 22 (3d Cir.1984). Courts weigh the same factors in deciding a motion to bifurcate under Rule 42(b) as they do a motion to sever under Rule 21. *Guitierrez v Lamar Contractors, LLC*, 2023 WL 3181670, at *4 (D.V.I. May 1, 2023); *see also Toll*, 2023 WL 3510877, at *3. Those factors are:

> (1) whether the issues sought to be [bifurcated] are significantly different from one another and would require distinct evidentiary proof; (2) whether [bifurcation] would promote judicial economy;

> and (3) whether either party will be unduly prejudiced by [bifurcation] or its absence.

Guitierrez, 2023 WL 3181670, at *4; *Toll*, 2023 WL 3510877, at *3. "No one factor is determinative, and a court must consider the overall equities of a case in ruling on a motion to sever or bifurcate." *Toll*, 2023 WL 3510877, at *3 (citing *Est. of Grieco*, 2021 WL 1248533, at *5)). The burden rests with the party seeking bifurcation to present evidence that a separate trial is proper in light of the general principal that a single trial tends to lessen the delay, expense, and inconvenience to all parties. *Kiskidee*, 2012 WL 1067918, at *4 (citing *McCrae v. Pitts Corning CoMadrp.,* 97 F.R.D. 490, 492 (E.D.Pa.1983)).

Turning to the case at hand, the Court begins its analysis by considering whether the issues sought to be bifurcated are significantly different from one another and would require distinct evidentiary proof. To this end, during oral argument, the Government acknowledged that Count IV carries a different burden of proof than that of the refund claims asserted in Counts I–III.[37] Specifically, in pertinent part, the Government stated as follows:

> We have four counts in this case. We have a refund suit for '13, a refund suit for '14, a refund suit for '15. And a -- the fourth count is the -- the closing agreement issue. So on the refund claims under 7422, the code, the taxpayer has an obligation to come forward. They have the burden of production and the burden of proof to establish that their refund is proper, to establish their tax return is proper. And the government has an obligation to look at those tax returns and conduct discovery because the government has a right of set off. So to the extent that there are errors in the tax returns that results in a reduction in the refunds those -- that evidence will be put in -- in put -- put into trial. So we do see a lot of discovery that needs to get done …
>
> …
>
> While the Court's order[38] addressed count four, which is whether or not the closing agreement was breached, Plaintiff has brought in

[37] At the time of oral argument, the motion for bifurcation was not yet before the Court.

[38] The Government was referencing the Court's memorandum opinion and order at [ECF 109].

> three other counts. They have under 7422, the Internal Revenue Code, they say they're entitled to a refund. What does that mean? That means their tax have to come forward, present evidence that their tax return is pristine, that their refund claim is pristine, and the government has an obligation to look at those tax returns and raise any issue of set off for count one, count two, and count three.
>
> …
>
> Those submissions, those representations go to the heart of our concern, which is that the -- it was improper to source the income to the U.S. Virgin Island[s] if all of the activity was not taking place in the U.S. Virgin Islands, so I know we'll get to our discovery. So we are -- we are requesting all of the submissions that were made by Ocwen for these -- for these years and look at the representations that they made to the E.D.C., that they qualified, and where did they source their income, how much, and -- and what was their basis for it. Those records are in E.D.C., and we think it's relevant to count one, count two, and count three.[39]

[ECF 129] at 10–13. In an additional exchange with the Court, the Government further provided as follows:

> THE COURT: -- I'm – I'm going to ask you some questions. Let me ask first, with respect to count one through three of the complaint, are these not the -- the same tax returns that were settled as part of the closing agreement that was entered into by the parties, I believe in either I think it was either December or January, either December o[f] 2022 or January of 2023?
>
> MR. MASTRACCHIO: They're the same tax returns. There is a different burden and standard that the Court would have to -- would have to impose here. If count four goes away, for some reason, the case doesn't go away. In other words, if -- if the -- if the closing agreement is invalid, what happens? That's not the case, because there's count one, count two, and count three under 7422 with the internal revenue code. They put that at issue. They put the '13 year, the '14 year, and the '15 year on a 7422 basis, meaning they have an obligation to come forward and prove that their tax return is valid, that their refunds are perfect, and the government has the obligation to look at those returns and refunds. And to the extent that there were – there's missing income or there's too many expenses can reduce the refund down to zero. So if it's a seven million dollar claim and there's a twelve million dollar error in 2013 tax return, the

[39] During this portion of the oral argument, the Government was arguing why it believed it was entitled to the documents that were requested in its subpoena *duces tecum* [ECF 40–1] to the EDA. *See* [ECF 129] at 11.

> government has a right of set off, and they can bring that seven million dollars all the way down to zero.

Id. at 13–14.

Despite the differences in burden, the Government nonetheless maintains in its opposition that the factual development, deposition testimony, trial preparation, and evidentiary issues will necessarily be duplicated if this matter is bifurcated into two trials. [ECF 136] at 9. This was not, however, its position during oral argument, where it acknowledged that a favorable ruling for Ocwen on its contractual claim of Count IV could potentially be dispositive of Ocwen's claims in Counts I–III:

> … in a breach of contract claim under number four, they're – they're either, it's a contract, so either there's going to be provisions in the contract have to be followed or not. Count one, two, and three require the taxpayer to present evidence that they're entitled to the refund. And we have -- and the government has an obligation and responsibility to look at that and set off that refund if it's improperly taken.
>
> …
>
> So maybe four, we'll wipe out one, two, and three. Maybe count four goes the other way in favor of the government, in which case they're going to continue with their [counts], one, two, and three. They're going to continue with the refund suit. So at this point, you know, unless -- unless the taxpayer wants to withdraw their refund claim for '13, '14, and '15 it's a live issue, and we should, we're entitled to discovery.

[ECF 129] at 17.[40] Further, from the Government's perspective during oral argument, if Count IV goes in the Government's favor, it is then that Ocwen will continue with the remaining claims. Moreover, in response to the Court advising it would be limiting the discovery sought by the Government, the Government stated in oral argument that it would understand the Court's ruling if Count IV were to be bifurcated. Specifically, the Government stated as follows:

[40] Reference is also made to [ECF 129] at 60–62, wherein the Government acknowledged that it would "understand" the Court limiting the discovery if the Court were to bifurcate Count IV from Counts I–III.

> I've just never had a situation in which the Plaintiff brings four separate counts. And -- and count four could wipe out one, two, and three, but it hasn't been finally determined. And I -- I don't -- I -- I just never -- I don't know how to-- I don't know how to call this. What do we do with count one, two, and three? It's live. There's – there's [ ] responsibilities with respect to this -- not just discovery, but production under 7422 with the Internal revenue code. I don't – I'm just -- I -- I just, I mean, I would understand if -- if the Court were to bifurcate and say, we're going to handle this section of this, this case now, and we're going to go back later. But then, to leave live counts and then, and not allow discovery of a live count without bifurcating the issue. I -- I don't know, I –

[ECF 129] at 61–62.

For its part, Ocwen's position during oral argument was mostly similar to that set forth in its motion. This is reflected in the following exchange between the Court and Ocwen:

> THE COURT: All right. Attorney Dwyer, again, you know, I know that we -- I -- the Court asked you this a little earlier today and I -- I don't want to reopen it too much. But counts one, two, and three, you heard what counsel had to say regarding that reopening the issue, and -- and what is the position of your client. And --and again, why were those counts raised? If this was just a -- a matter to enforce the closing agreement?
>
> MR. DWYER: Your Honor, they were raised because they're live actions, but to prove them, we only need the settlement agreement. That's it. The U.S.V.I., the Attorney General and the director of the B.I.R. signed an agreement that said the U.S.V.I. shall not make any determination assessment or adjustment of any kind whatsoever to Ocwen tax liability for any of the tax years at issue. It also said that Ocwen's income tax liability for the tax years at issue shall be fixed by virtue of this agreement. Plaintiff's Exhibit Number One, what the government wants to do is not pay and delay. And that's the elephant in the room.

[ECF 129] at 44–45.

The Court finds that while the breach of contract claim of Count IV relates to the refund claims of Counts I–III, the claim is materially different. Moreover, the issue is not whether the parties entered into the Agreement—they agree upon that—but whether the Government breached said contract. It is the Government's position that it requires substantial discovery in order to

determine exactly where Ocwen's income was sourced for tax years 2013, 2014, 2015, and 2016.[41,42] Such discovery, in turn, would involve all of the proverbial rabbit-holes that the Government seeks to explore as to the twenty-six entities it believes to be subsidiaries or affiliated companies of Ocwen. During oral argument, the Government stated this discovery was necessary to defend against Counts I–III. Its opposition attempts to enlarge this need to include Count IV as well. The Court is not persuaded. The Court finds the contractual claim to be much more straightforward. Again, this is a fact the Government acknowledged during oral argument. The Agreement sets forth specific terms, including each of the refund amounts that were agreed upon by the parties for tax years 2013, 2014, and 2015. According to the Government, in each of the refund claims Ocwen has the burden to establish that their tax returns and refunds are proper. [ECF 129] at 10. Such is not the case with the breach of contract claim of Count IV.

The Court likewise finds that bifurcation of Count IV promotes judicial economy. During oral argument, both parties acknowledged that resolution of Count IV could very well be dispositive of the remaining counts. The Court agrees. Further, from the Government's perspective during oral argument, it could understand the Court limiting the scope of the discovery sought by the Government if the Court were to bifurcate Count IV. Thus, even assuming *arguendo* that the Government is correct and it is entitled to some or all of the discovery that it currently seeks, bifurcation would negate the need for such expansive discovery during the first phase of litigation, the resolution of which might affect the resolution of the other counts. In such an instance, the Court would also likely avoid the multiple disputes that often accompany such expansive

[41] As the refund for the 2014 tax year applies a carryback from the 2016 tax year, income sourcing for tax year 2016 would need to be determined as well.

[42] To put this in perspective, for tax year 2013, Ocwen's total income exceeded $1.7 billion. For tax year 2014 it exceeded $1.8 billion, for tax year 2015 it exceeded $1.4 billion, and for tax year 2016 it exceeded $1.2 billion. *See* [ECF 1–1]; [ECF 1–2]; [ECF 1–3]; and [ECF 1–5].

discovery. Indeed, if the parties' numerous prior filings are any indication, such an avoidance will greatly serve judicial economy.

On the issue of prejudice, the Government contends two separate trials will result in undue delay. [ECF 136] at 11. It further argues that both trials will turn on the validity of the income tax refund claims and the related statutory interest payable on these refunds. *Id*. As a result, the Government maintains it will suffer from increased costs of litigation, that it will be forced to unfairly expend its limited governmental resources on a matter that can be resolved in a single trial, and that it will experience delay in resolving the matter in its entirety. *Id*. The Court does not agree. Bifurcation of Count IV has the potential of limiting the costs of litigation by narrowing the issue for the first trial to that of the Agreement. Moreover, any arguments of fraud, malfeasance, or misrepresentation of a material fact under 26 U.S.C. § 7121 are limited to conduct that occurred *in the making* of the Agreement. *Smith*, 159 T.C. at 60.

It must also be remembered that this is a bench trial, as opposed to a jury trial. The Government itself has acknowledged that Count IV carries with it a different burden of proof than that of the other three counts. It has also acknowledged that if Count IV is found in favor of Ocwen it could be dispositive of the remaining counts. At the very least, it will narrow the issues in these counts. While the Court questions whether the Government would sustain any prejudice from the bifurcation, it nevertheless finds the pros (concise issue, limited discovery, greater costs associated with expansive discovery, etc.) outweigh any cons.

On the other hand, the Court finds that Ocwen will be unduly prejudiced if bifurcation is not permitted. This is the second lawsuit that Ocwen has had to initiate related to these tax returns following a 2-plus year audit process. The first lawsuit resulted in the Agreement, which is at issue in Count IV. In this, the second lawsuit, the Government now seeks a barrage of records to not only account for the sourcing of billions of dollars of income—an issue arguably resolved by the

Agreement—but also from numerous affiliated entities of Ocwen in which the Government takes a dart board approach. The Court finds this to be patently unfair when the resolution of Count IV could potentially resolve all claims while avoiding any possible prolonged and expensive discovery process.

Finally, the Court finds that by bifurcating Count IV, this claim can be resolved in a much more expeditious manner than that of the other claims, given the expansive discovery the Government contends it is entitled to for those claims. This count—which again, has the potential of being dispositive of the other counts—will allow the parties (and the Court) to focus its resources on the limited contractual issue of the Agreement.[43]

IV. CONCLUSION

Accordingly, based on the reasoning above, it is hereby

ORDERED that this memorandum opinion and order supplements and/or supersedes as set forth herein the Court's verbal orders entered from the bench on November 19, 2024; it is further

ORDERED that Ocwen's Motion for Protective Order and/or to Quash Subpoena [ECF 39] is **GRANTED**; it is further

ORDERED that Ocwen's Motion to Compel Due to Impending Discovery Deadline [ECF 76] is **GRANTED IN PART** as to compelling the Rule 30(b)(6) deposition of the Government, and **DENIED IN PART**, without prejudice, as to compelling the depositions of the other individuals; it is further

ORDERED that Ocwen's Motion to Compel Production of Documents and to Amend Responses to Admission Requests and Interrogatories Due to Impending Discovery Deadline [ECF

[43] As for the Government's challenge that the Court lacks subject matter jurisdiction as to Count IV, the Government has filed a partial motion to dismiss [ECF 137] and [ECF 138] that remains pending before the District Court. Accordingly, the present order to bifurcate defers this issue to the District Court.

79] is **GRANTED IN PART** as to Interrogatory No. 4 and Admission Requests Nos. 1–4, and **DENIED IN PART** as to Ocwen's request for fees and costs; it is further

ORDERED that the Government's Motion to Compel Production of Documents [ECF 81] is **DENIED**; and it is further

ORDERED that Ocwen's Motion to Bifurcate [ECF 127] is **GRANTED**, with Count IV of the complaint [ECF 1] to be tried in the first phase of the litigation, with the remaining counts (Counts I–III) to be tried in the second phase, if necessary. An amended scheduling order setting forth the deadlines in each respective phase to be issued by the Court.

ENTER:

Dated: November 4, 2025

/s/ G. Alan Teague
G. ALAN TEAGUE
U.S. MAGISTRATE JUDGE