IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN, Defendants.	Civil No. 2:15-cv-00828 DN **ORDER DENYING DEFENDANTS' MOTION DISMISS** Chief Judge David Nuffer

Defendants moved to dismiss the United States' claims in this case as not ripe and therefore too speculative to be presented to this Court for adjudication and sought to have Plaintiff's Complaint dismissed for lack of subject matter jurisdiction.[1] For the reasons stated in the United States' brief in opposition,[2] the motion is denied.

I. Analysis

Under Article III of the Constitution, federal courts have subject matter jurisdiction to decide, among other matters, "all Cases, in Law and Equity, arising under . . . the Laws of the United States . . . [and] to Controversies to which the United States shall be a Party."[3] This

[1] ECF No. 257.

[2] ECF No. 262.

[3] U.S. Const. art. III, § 2, cl. 1; *see also* 28 U.S.C. § 1340 (granting district courts original jurisdiction over any civil action arising under any statute "providing for internal revenue"); 28 U.S.C. § 1345 (granting district courts original jurisdiction over all civil actions "commenced by the United States").

"cases" or "controversies" requirement has led federal courts to develop justiciability doctrines to "identify appropriate occasions for judicial action."[4] Two of the categories of justiciability concepts are standing and ripeness.[5]

Defendants did not dispute that Plaintiff has standing. The Court finds the United States has standing to sue when a statute expressly authorizes the United States to bring suit.[6] Sections §§ 7408 and 7402(a) authorize the United States to bring this suit.

Defendants motion, instead, argues that, because none of the 193 (to date) Tax Court cases filed by their customers have been decided on their merits, the United States' claims in this injunction case are not ripe.[7] According to Defendants, until the Tax Court decides their customers' tax liabilities, there is no basis to conclude whether Defendants made statements as to

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[4] Justiciability, 13 Fed. Prac. & Proc. Juris. § 3529 (3d ed.).

[5] *E.g.*, [Standing] In General, 13A Fed. Prac. & Proc. Juris. § 3531 (3d ed.); [Ripeness] In General, 13B Fed. Prac. & Proc. Juris. § 3532 (3d ed.).

[6] *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 484 (1985) ("We do not doubt . . . the standing of the [Federal Election Commission], which is specifically identified in [26 U.S.C.] § 9011(b)(1), to bring a declaratory action to test the constitutionality of a provision of the [Presidential Election Campaign] Fund Act."); *United States v. Ekblad*, 732 F.2d 562, 563 (7th Cir. 1984) (Under both 28 U.S.C. § 1345 and 26 U.S.C. § 7402(a), "[t]he United States has standing to seek relief from actual or threatened interference with the performance of its proper governmental functions."); *United States v. Reeves*, No. 2:12-CV-1916-RCJ-GWF, 2013 WL 1249616, at *3 (D. Nev. Mar. 25, 2013); *United States v. Castle*, No. CIV S-10-0613 GEB, 2011 WL 1585832, at *7 (E.D. Cal. Apr. 22, 2011), report and recommendation adopted, No. CIV S-10-0613 GEB, 2011 WL 4074024 (E.D. Cal. May 27, 2011); *United States v. Original Knights of Ku Klux Klan*, 250 F. Supp. 330, 335–36 (E.D. La. 1965) (The United States had standing to bring an injunction suit when (among other triggers) "any person has engaged, or there are reasonable grounds to believe that any person is about to engage" in practices that would violate voting rights. *E.g.* 52 U.S.C. § 10101(c). "In its sovereign capacity the Nation has a proper interest in preserving the integrity of its judicial system, in preventing klan interference with court orders, and in making meaningful both nationally created and nationally guaranteed civil rights."); *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982) (The first sovereign interest is "the exercise of sovereign power over individuals and entities within the relevant jurisdiction-this involves the power to create and enforce a legal code, both civil and criminal.").

[7] ECF No. 257 at 3.

material matters that were or are false or fraudulent, and the Tax Court's decision may make any outcome unfavorable to Defendants in this case subject to later reversal.

The Court disagrees. Based on the reasoning put forward by the United States in its opposition, the Court concludes that Plaintiff's claims are ripe for adjudication at this time.

Plaintiff argues that Section 7408 expressly allows "[a] civil action in the name of the United States to enjoin any person from further engaging in specified conduct may be commenced at the request of the Secretary [of the Treasury]."[8] The "specified conduct" means, among other things, "any action, or failure to take action, which is . . . subject to penalty under [26 U.S.C.] section 6700."[9]

A person is "subject to penalty" under § 6700 if it is proven that he (1) either organizes or assists in the organization of a plan or arrangement or participates in the sale of any interest in a plan or arrangement; and (2) makes or furnishes, or causes another to make or furnish, certain statements.[10] One such statement subject to penalty is a statement with respect to the securing of a tax benefit by reason of holding an interest in an entity or participating in a plan or arrangement that it is proven the person knows or has reason to know is false or fraudulent as to any material matter.[11] Another such statement subject to penalty is a "gross valuation overstatement as to any material matter."[12] A gross valuation overstatement is "any statement as to the value of any

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[8] 26 U.S.C. § 7408(a), (b).

[9] 26 U.S.C. § 7408(c); *see also* ECF No. 2 ¶¶ 157-160; ECF No. 251at 57.

[10] 26 U.S.C. § 6700(a)(2); *see also* ECF No. 2 ¶¶ 157-160; ECF No. 251 at 53-54.

[11] 26 U.S.C. § 6700(a)(2)(A); *see also* ECF No. 2 ¶¶ 157-160; ECF No. 251 at 53-54.

[12] 26 U.S.C. § 6700(a)(2)(B); *see also* ECF No. 2 ¶¶ 157-160.

property or services" if the value of the property or services is directly related to the amount of any tax deduction or credit and the stated value is more than 200 percent of the correct value of the property or services.[13]

A suit to enforce §§ 7408 and 6700 is ripe when it is shown by competent proof that a person has engaged in conduct subject to penalty under § 6700 and "injunctive relief is appropriate to prevent recurrence of such conduct."[14] This is consistent with the general idea that a case seeking an injunction is ripe when the conduct to be enjoined has already occurred, is continuing to occur, and will continue to occur absent a court order.[15]

II. Conclusion

The United States has standing to sue Defendants under the statutory authorization in §§ 7408 and 7402(a) and all of the United States' claims are therefore ripe for consideration.

ORDER

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss is DENIED.

Signed

BY THE COURT

David Nuffer
United States District Judge

[13] 26 U.S.C. § 6700(b)(1); *see also* ECF No. 2 ¶¶ 157-160.

[14] 26 U.S.C. § 7408(a)-(c).

[15] *See generally United States v. Elsass*, 978 F. Supp. 2d 901, 934-41 (S.D. Ohio 2013); *Original Knights of Ku Klux Klan*, 250 F. Supp. at 356. While neither *Elsass* nor *Original Knights of the Ku Klux Klan* directly addresses ripeness as a justiciability factor, the discussion of the defendants' past, current, and likely future conduct absent an injunction show that both cases were ripe.