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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 **UNITED STATES' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION DISMISS** Chief Judge David Nuffer Magistrate Judge Evelyn J. Furse

Defendants have concocted a meritless argument that the United States' claims against them are too speculative to be presented to this Court for adjudication, and therefore should be

dismissed for lack of subject matter jurisdiction.[1] Their motion to dismiss is the latest iteration in their pattern of willful attempts to manipulate and muddy the plain terms of the United States' actual claims in this case, the law governing those claims, and the discovery the parties have taken.[2] But all of these features of this case show that the United States has standing to sue Defendants for an injunction under 26 U.S.C §§ 7408 and 7402(a) to stop the acute harm Defendants' conduct has caused the United States Treasury. The harm is ongoing and will not cease without an injunction from this Court, so this case is ripe for adjudication. Defendants' nonsensical motion to dismiss should be denied.

I. The United States' claims in this case.[3]

The United States seeks to enjoin Defendants from organizing, promoting, and selling the "solar energy scheme" that they have been promoting since or before 2010.[4] As described in the complaint, the solar energy scheme purportedly offers a "disruptive and revolutionary" approach to capturing and using solar energy.[5] The technology underlying the solar energy scheme, purportedly invented by Neldon Johnson, uses "solar lenses" on "solar towers."[6] This purported technology is, however, only the starting point of Defendants' solar energy scheme.

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[1] ECF No. 257.

[2] *See, e.g.*, ECF No. 173; ECF No. 202 at 2; ECF No. 253 at 2-3.

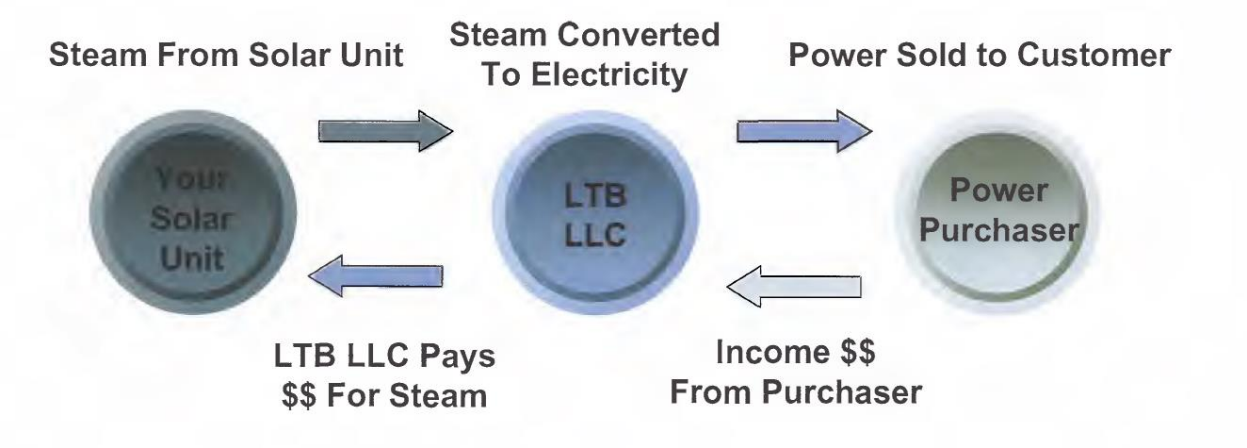
[3] The following information is drawn from the United States' complaint, ECF No. 2, and its motion for partial summary judgment, ECF No. 251, both of which are incorporated by reference herein.

[4] ECF No. 2 and ECF No. 35 ¶ 1(a).

[5] ECF No. 2 ¶ 16.

[6] ECF No. 2 ¶¶ 17, 22.

Defendants make money by selling "lenses" to customers, which the customers purportedly lease to LTB, LLC. Although LTB is a company that exists only on paper,[7] Defendants tell customers that LTB will operate and maintain the customer's lens for them, as part of a system that will generate electricity. Defendants tell customers that LTB will sell electricity to a third-party power purchaser, and then pay customers "rental income" for use of their lenses[8]:



Defendants assure their customers that, by purchasing lenses, customers may claim a depreciation deduction and a solar energy tax credit. The underpinnings of Defendants' solar energy scheme are their statements assuring their customers that:

- customers who buy and then purportedly lease the lenses to LTB are in a "trade or business" and have bought the lenses for the purpose of making a profit;[9]

[7] LTB has never done anything; it has never had a bank account, any employees, or any revenue. ECF No. 252-28, Pl. Ex. 673, Deposition of LTB1, LLC, July 1, 2017, 10:10-11:1, 14:7-16:7, 18:2-9, 42:10-43:5; 69:6-74:21, 90:19-91:8. LTB and Defendant LTB1, LLC, are indistinguishable. *Id.* 11:9-15.

[8] ECF No. 252-21, Pl. Ex. 581, Deposition of International Automated Systems, Inc., June 29, 2017, 162:1-165:9, 171:10-173:20; ECF No. 252-19, Pl. Ex. 532 at 6; *see also* ECF No. 252-18, Pl. Ex. 531.

[9] *E.g.*, ECF No. 252-1, Pl. Ex. 1 at 2-3.

- by virtue of their "trade or business," customers may deduct "business" expenses, consisting mostly of depreciation[10] on the lenses, from their ordinary income like wages from their full-time jobs[11]; and

- customers may claim a solar energy tax credit to further reduce their tax liability.[12]

We allege (and showed) that Defendants' statements are false or fraudulent as to material matters under the internal revenue laws.[13] We allege (and showed) that Defendants knew or had reason to know that these statements were false or fraudulent when they made the statements while promoting the solar energy scheme.[14] We also allege that, to increase the tax benefits they promote to their customers, Defendants falsely inflate the value of the lenses to more than 200 percent of the correct value.[15] When Defendants tell customers this falsely inflated purchase price, Defendants make a gross valuation overstatement.[16] Defendants have not stopped making these statements and will not stop without an order form this Court.[17] As a result, Defendants should be enjoined under § 7408.[18]

All of this conduct, and other conduct by Defendants, shows that they should also be enjoined under § 7402(a) because an injunction (and other equitable relief including

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[10] 26 U.S.C. § 162; 26 U.S.C. § 167; ECF No. 252-4, Pl. Ex. 25 at 1-2.

[11] ECF No. 252-3, Pl. Ex. 24; ECF No. 252-6, Pl. Ex. 40 at 12; ECF No. 252-9, Pl. Ex. 214; ECF No. 252-10, Pl. Ex. 216; ECF No. 252-14, Pl. Ex. 492; ECF No. 252-29, Pl. Ex. 674.

[12] 26 U.S.C. § 48; ECF No. 252-4, Pl. Ex. 25 at 2.

[13] 26 U.S.C. § 6700(a)(2)(A); ECF No. 2, Counts VII-XI; ECF No. 251.

[14] 26 U.S.C. § 6700(a)(2)(A); ECF No. 2, Counts VII-XI; ECF No. 251.

[15] 26 U.S.C. § 6700(a)(2)(B), (b)(1); ECF No. 2, Counts VII-XI.

[16] 26 U.S.C. § 6700(a)(2)(B); ECF No. 2, Counts VII-XI.

[17] ECF No. 251 at 14-15, 36.

[18] *See* 26 U.S.C. §§ 6700, 7408; ECF No. 2, Counts VII-XI.

disgorgement) is appropriate for the enforcement of the internal revenue laws.[19] For example, all Defendants spread the solar energy scheme to as many people as possible through extensive marketing efforts.[20] They enriched themselves by collecting commissions and other income from recruiting still more people to sell lenses and expand the scheme still further.[21] R. Gregory Shepard and Roger Freeborn assisted customers in preparing tax returns to claim unlawful depreciation deductions and solar energy credits on their tax returns.[22] And Johnson and Shepard have facilitated and encouraged their customers' false or fraudulent arguments to both the IRS in audit and appeal and to the Tax Court[23] – where at least 193 of their solar lens customers have filed petitions to challenge the IRS's disallowance of the very tax benefits Defendants promote[24].

II. Legal Standard

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."[25] This "cases" or "controversies" requirement has led federal courts to develop justiciability doctrines

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[19] 26 U.S.C. § 7402(a); ECF No. 2 at Counts I-VI.

[20] ECF No. 251 at 7-14.

[21] ECF No. 251 at 7-14.

[22] ECF No. 251 at 31-35.

[23] ECF No. 251 at 14-15; ECF No. 254-35, Pl. Ex. 157.

[24] ECF No. 257 at 2.

[25] 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").

to "identify appropriate occasions for judicial action."[26] Two of the categories of justiciability concepts are standing and ripeness.[27]

"Standing and ripeness are closely related in that each focuses on whether the harm asserted has matured sufficiently to warrant judicial intervention."[28] To establish standing, a plaintiff must allege that it has suffered "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[29] "In evaluating ripeness the central focus is on whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all."[30]

The burden of establishing that the court has subject matter jurisdiction is upon the party asserting jurisdiction.[31]

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

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

[28] *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1097 (10th Cir. 2006) (quotation omitted).

[29] *Allen v. Wright*, 468 U.S. 737, 751 (1984) *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386-88 (2014); *accord Lujan v. Defenders. of Wildlife*, 504 U.S. 555, 560–61 (1992).

[30] *Initiative & Referendum Inst.*, 450 F.3d at 1097 (quotation omitted). Ripeness questions often arise in suits that challenge statutes before they are enforced. Although that is not the context here, another framework for evaluating whether a case is ripe in that context "turns on the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983).

[31] *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)

III. Argument

This case is, and has always been, a justiciable case. United States has standing to sue when a statute expressly authorizes the United States to bring suit.[32] Sections §§ 7408 and 7402(a) authorize the United States to bring this suit. The facts the United States alleged, has found in discovery, has shown (in part) on summary judgment, and will prove at trial, are clear. Both the law and the facts show that the United States has standing to sue Defendants for the requested relief and that this case is ripe for decision by this Court. It is an ideal occasion for judicial action.

A. The United States has standing to sue Defendants under § 7408 and its claims under that statute are ripe.

Section 7408 expressly provides: "[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]."[33] The "specified conduct" means, among other things, "any

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[32] *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.").

[33] 26 U.S.C. § 7408(a), (b).

action, or failure to take action, which is . . . subject to penalty under [26 U.S.C.] section 6700."[34]

A person is "subject to penalty" under § 6700 if 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.[35] 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 the person knows or has reason to know is false or fraudulent as to any material matter.[36] Another such statement subject to penalty is a "gross valuation overstatement as to any material matter."[37] A gross valuation overstatement is "any statement as to the value of any 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.[38]

Congress enacted §§ 7408 and 6700 in 1982 to combat "the onerous burden abusive tax shelters place on the federal tax system."[39] Before §§ 7408 and 6700, the IRS could only react to abusive tax shelters by auditing hundreds or thousands of customers and then waiting for such

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[34] 26 U.S.C. § 7408(c); *see also* ECF No. 2 ¶¶ 157-160; ECF No. 251at 57.

[35] 26 U.S.C. § 6700(a)(2); *see also* ECF No. 2 ¶¶ 157-160; ECF No. 251 at 53-54.

[36] 26 U.S.C. § 6700(a)(2)(A); *see also* ECF No. 2 ¶¶ 157-160; ECF No. 251 at 53-54.

[37] 26 U.S.C. § 6700(a)(2)(B); *see also* ECF No. 2 ¶¶ 157-160.

[38] 26 U.S.C. § 6700(b)(1); *see also* ECF No. 2 ¶¶ 157-160.

[39] D. French Slaughter, *The Empire Strikes Back: Injunctions of Abusive Tax Shelters After TEFRA*, 3 Va. Tax Rev. 1, 9 (1983).

customers to file suit to challenge the assessments.[40] This enforcement mechanism was inadequate to combat the deluge of abusive tax shelters and resulting drain on the Treasury.[41] "By allowing the government to attack abusive tax shelters directly at their source with injunctive actions and penalties against the promoters [with §§ 7408 and 6700]. . . [Congress] created affirmative downside risks to . . . promoters . . . who participate in abusive tax shelters."[42] With §§ 7408 and 6700, the United States no longer need wait to combat abusive shelters until the legitimate tax liability of a shelter customer (or hundreds of them) is adjudicated.[43] Rather, the United States has standing to sue because of the "personal injury" caused by a defendant having violated its laws by engaging in penalty conduct under § 6700, which harm is likely to be redressed by injunctive relief.[44]

It follows that a suit to enforce §§ 7408 and 6700 is ripe when a person has engaged in conduct subject to penalty under § 6700 and "injunctive relief is appropriate to prevent recurrence of such conduct."[45] This is consistent with the general (and uncontroversial) idea that

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[40] *Id.* at 1-8.

[41] *Id.* at 9.

[42] *Id.* at 9.

[43] Federal district courts have subject matter jurisdiction to hear and determine suits under § 7408 regardless of whether the United States has brought any other action against the same promoter, such as an action to collect penalties assessed under § 6700. § 7408(a); Slaughter, *The Empire Strikes Back*, 3 Va. Tax Rev. at 21 ("Congress intended that the new injunctive remedy be available without regard to any other power or authority of the Service, including the assessment of penalties.").

[44] *See Allen*, 468 U.S. at 751; *Lujan*, 504 U.S. at 560–61.

[45] 26 U.S.C. § 7408(a)-(c).

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.[46]

The United States has standing to bring this injunction suit against Defendants under § 7408, and its claims are ripe, because Defendants have engaged in conduct, continue to engage in conduct, and will engage in conduct that violates the internal revenue laws including (but not limited to) § 6700. The United States alleged sufficient facts to show both standing and ripeness in its Complaint,[47] and has offered numerous undisputed facts to show that Defendants engaged in penalty conduct under § 6700(a)(2)(A) in its motion for partial summary judgment[48]. Defendants will not stop their penalty conduct without an injunction from this Court. There is nothing uncertain, contingent, or speculative about these facts or the United States' cause of action. In cases just like this one, federal district courts routinely decide whether a defendant has engaged in penalty conduct under § 6700 and should be enjoined under § 7408.[49] This is exactly what Congress intended when it enacted §§ 7408 and 6700.

Defendants do not address this legal authority. They do not even acknowledge that § 7408 is at issue here,[50] even though the complaint,[51] their answers,[52] filings *by Defendants* in

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[46] *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.

[47] *See generally* ECF No. 2.

[48] *See generally* ECF No. 251.

[49] *E.g.*, *United States v. Stover*, 650 F.3d 1099 (8th Cir. 2011), *Elsass*, 978 F. Supp. 2d at 934-41; *United States v. United Energy Corp.*, No. C-85-3655-RFP (CW), 1987 WL 4787 (N.D. Cal. Feb. 25, 1987); *United States v. Music Masters, Ltd.*, 621 F. Supp. 1046, 1055 (W.D.N.C. 1985).

[50] *E.g.*, ECF No. 257 at 3 (the complaint "is premises [*sic*] solely on a violation of 28 U.S.C.A. § 6700").

this case,[53] and orders of this Court[54] all readily acknowledge that § 7408 authorizes the injunctive relief we seek. Defendants' lead attorney knows that § 7408 is at issue in this case: he asked the United States' expert witness on solar energy technology about the statute mere weeks before Defendants filed the motion to dismiss.[55] Instead of addressing standing and ripeness under § 7408, Defendants cite inapposite legal authority to this Court.[56] Nearly all of Defendants' citations involve standing and ripeness decisions in which a plaintiff makes a pre-enforcement challenge to a statute, regulation, or ordinance. These authorities are wholly irrelevant to the evaluation of standing and ripeness here, where the United States has express statutory authority to sue.

Defendants use the irrelevant legal authority they cite to argue 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.[57] According to Defendants, until the Tax Court decides their customers' tax liabilities, there is no way to know whether Defendants made statements as to material matters that were false or fraudulent.[58] Carried to its logical

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(…continued)

[51] ECF No. 2.

[52] ECF No. 22, ECF No. 23, ECF No. 26.

[53] *E.g.*, ECF No. 32 at 2, ECF No. 35 ¶ 1(a).

[54] *E.g.*, ECF No. 43 at 1, ECF No. 158 at 2.

[55] ECF No. 253-2, Deposition of Dr. Thomas Mancini, October 23, 2017, 9:14-10:14.

[56] *See* ECF No. 257 at 3-4.

[57] ECF No. 257 at 3.

[58] As the United States showed in its motion for partial summary judgment, Defendants have, in fact, made statements regarding the allowability of a depreciation deduction and the solar energy tax credit in connection with

(continued...)

conclusion, Defendants' argument would eliminate §§ 7408 and 6700 from the Internal Revenue Code. Defendants wish for the pre-1982 days, before those statutes were enacted, when the IRS could only combat abusive tax shelters by 1) disallowing tax benefits claimed by shelter customers; 2) waiting for a customer to file suit in Tax Court or federal district court; 3) litigating that case; and 4) waiting for that case to be resolved before taking further action. But Congress could not have been more clear that those days are over. By enacting §§ 7408 and 6700, Congress directed that the United States may bring a suit like this one against an abusive tax shelter's promoters, no matter the status of any customer's tax liability.

B. The United States has standing to sue Defendants under § 7402(a) and its claims under that statute are ripe.

Defendants fail to address the United States' claims under § 7402(a).[59] But the United States has standing to sue Defendants under that statute, and its claims are ripe. Just like § 7408, § 7402(a) expressly authorizes this suit: "[t]he district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions . . . orders of injunction, . . . and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws." An injunction under § 7402 may be issued "in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws."[60] "It would be difficult to find

(…continued)

buying solar lenses, which statements Defendants knew, or had reason to know, were false or fraudulent as to material matters. *See generally* ECF No. 251.

[59] *See generally* ECF No. 257.

[60] 26 U.S.C. § 7402(a).

language more clearly manifesting a congressional intention to provide the district courts with a full arsenal of powers to compel compliance with the internal revenue laws" than the language in § 7402(a).[61]

The United States need not show that a Defendant "has violated a particular Internal Revenue Code section in order for an injunction to issue" under § 7402(a).[62] All the United States must show is that an injunction (or other order, such as one for disgorgement and other equitable relief) "may be necessary or appropriate for the enforcement of the internal revenue laws."[63] It follows that all of Defendants' conduct that warrants an injunction under § 7408 also warrants an injunction under § 7402(a). Because the United States' claims under § 7408 are ripe, for the reasons described above, so are its claims under § 7402(a). The additional facts supporting an injunction and order of disgorgement (along with other equitable relief) under § 7402(a) (like Defendants' personal enrichment from their widespread sales of solar lenses through an internet-based, commission-incentivized multi-level marketing arrangement and their assistance to customers in both preparing unlawful tax returns and defending them to the IRS and Tax Court) only bolster the United States' standing and the ripeness of its claims under this statute.

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[61] *Brody v. United States*, 243 F.2d 378, 384 (1st Cir. 1957).

[62] *E.g.*, *United States v. Ernst & Whinney*, 735 F.2d 1296, 1300 (11th Cir. 1984); Elsass, 978 F. Supp. 2d at 941 ("[E]ven if the Defendants' business structure somehow left them outside the legal definition of tax return preparers, broad relief would still be appropriate, as § 7402(a) is undoubtedly designed to prevent individuals from undermining the Nation's tax laws through exploiting loopholes in the [Internal Revenue Code]'s overall regulatory scheme.").

[63] 26 U.S.C. § 7402(a); *accord*, *e.g.*, *United States v. ITS Financial, LLC*, 592 F. App'x 387, 394 (6th Cir. 2014) ("The fact that no other court has ever granted the precise injunction granted in this case does not mean [§ 7402(a)] does not authorize it."); *United States v. Stinson*, 239 F. Supp. 3d 1299, 1326 (M.D. Fla. 2017) ("Because § 7402(a) encompasses a broad range of powers necessary to compel compliance with the tax laws, the Court has determined that disgorgement is an available remedy in this case." (quotation omitted)).

IV. Conclusion

The United States has standing to sue Defendants under its explicit statutory authorization in §§ 7408 and 7402(a). All of the United States' claims are ripe for decision because Defendants have engaged in conduct and continue to engage in conduct that violates the internal revenue laws including (but not limited to) penalty conduct under § 6700. An injunction, and other equitable relief, against Defendants is appropriate for the enforcement of the internal revenue laws. Defendants' motion to dismiss should be denied.

Dated: December 15, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2017, the foregoing document and its exhibits were electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to all counsel of record.

/s/ Erin Healy Gallagher
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Trial Attorney