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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ELIZABETH BOARDMAN,

Plaintiff,

vs.

COMMISSIONER OF INTERNAL REVENUE, Douglas H. Shulman,

Defendant.

Case No.: 2:12-cv-00639-MCE-GGH

PLAINTIFF ELIZABETH BOARDMAN'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS OF DEFENDANT UNITED STATES (sued as Commissioner of Internal Revenue, Douglas H. Shulman)

Hearing Date: August 23, 2012
Time: 2:00 p.m.
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Plaintiff Elizabeth Boardman opposes the Motion to Dismiss of Defendant United States, sued herein as Commissioner Of Internal Revenue, Douglas H. Shulman.

STATEMENT OF FACTS AND SUMMARY OF ARGUMENT

Plaintiff Elizabeth Boardman is a lifelong Quaker and peace activist. As a practice of her religion and following the dictates of her conscience, Boardman refuses voluntarily to pay federal income taxes that are directed towards war. For tax years 2007 and 2008, Boardman filed full income tax returns, providing complete information about her tax liabilities and retentions. Her checks covered only about half the amounts due. She stated in attached correspondence that her conscience and religious beliefs would not allow her to pay the entire tax. She named the financial institution where she had deposited funds sufficient for the unpaid balances and declared a willingness to send the money to the government for peaceful uses. (Complaint, 1:21-2:3.)

Boardman is not trying to avoid taxes. She suffers spiritual distress from her involvement as a taxpayer in wars waged by the United States. Deaths, broken lives and material ruin resulting from such wars are painful to her conscience. Led by her religion, Boardman is moved to speak and act against all wars. She cannot voluntarily participate in the federal tax system that funds war. Commands of the government to pay taxes for war are opposed by commands of her religion. Boardman obeys commands of her religion when she resists government commands to pay for war. She understands that the Internal Revenue Service will collect the taxes by other means. Resisting commands to pay taxes for war, bearing witness for peace to the Service and to the world and suffering levies is a practice of Boardman's religion. (*Id*. at 2:22-3:1, 4:12-11:9, 13:19-15:16.)

Boardman contends that her core practice of religious war tax resistance has been given safe harbor and approved by law. In *Jenney v. U.S.,* 755 F.2d 1384, 1386 (9th Cir. 1985), the court quoted from a Senate Report, part of legislative history behind the original "frivolous filing" penalty statute, 26 U.S.C. § 6702, enacted in 1982. Congress intended to stop protesters from filing tax returns that stated falsehoods, such as the "conscience deduction" entered on the Jenneys' return.

> In contrast, the penalty will not apply if the taxpayer shows the correct tax due but refuses to pay the tax. In such a case, of course, the Secretary can assess and collect the tax immediately. (S.Rep. No. 494, 97th Cong., 2d Sess. at 278, see infra, pp. 17-18.)

The *Jenney* court held that the $500 penalty then imposed by § 6702 "is applicable to a taxpayer who claims a 'conscience' or 'war tax' deduction, unless the taxpayer reports the correct amount due but refuses to pay." (755 F.2d at 1386.) The Jenneys would not have been penalized under § 6702 had they reported "the correct amount due and explained in their attached statement their refusal to pay because of their objection to war." (*Id*. at 1386-1387.)

Section 6072 was amended by the Tax Relief and Health Care Act of 2006 ("TRHCA"). Current and former versions of § 6702 are set forth in the Appendix. Prior to TRHCA, any penalty required a defect in the "substantial correctness of the self-assessment" of the tax. Statements of a taxpayer did not lead to a penalty if the return accurately reflected monetary facts. At all times, refusals to pay, without further communications, have led to collection procedures and to statutory penalties and interest added at specific monthly percentages to unpaid tax.

As part of TRHCA, new provisions added to § 6702 give discretionary power to the Secretary of the Treasury. "The Secretary shall prescribe (and periodically revise) a list of positions which the Secretary has identified as being frivolous for purposes of this subsection." (26 U.S.C. § 6702(c).) If a person submits certain requests, e.g., for a hearing after notice of lien or for a hearing before levy, and "if any portion of such submission… is based on a position which the Secretary has identified as frivolous under subsection (c)," the "person … shall pay a penalty of $5,000." (26 U.S.C. §§ 6702(b)(1), (b)(2)(A)(i) and (b)(2)(B)(i) (I) and (II).)

The Service defines "frivolous" on its website to include "the refusal to file returns or pay taxes based on moral, religious or ethical objections to the government programs or policies for which the taxes will be used." (Complaint at 12:23-25.) The Service has expanded an authority to define "frivolous positions" into a pejorative label attached to action, e.g., a "refusal" that is accompanied by a religious message. The label is applied to the practice approved in *Jenney*.

As to tax year 2008, Boardman filed a 1040 return with attached correspondence on March 14, 2009. Her resistance to paying war taxes was not overcome until September 22, 2010, some 18 months later. (*Id*. at 14:5-16:8.) Although she conformed to the practice approved in *Jenney,* the Service led her into a bureaucratic morass. Apparently on the basis of a label of "frivolous," the Service misdirected Boardman procedurally, misrepresented her statements and blocked her from

access to Tax Court. (*Id*.) The Complaint alleges, in sum, that the Service is trying to suppress Boardman's practice that was given safe harbor in § 6702 and approved in *Jenney*.

Boardman contends that the Service is acting contrary to law. Principles stated in the Motion to Dismiss, e.g., the Anti-Injunction Act, do not shield it from correction. Correction will not involve restraint of tax assessment or collection. This Court has jurisdiction to correct the Service.

Boardman contends that, in violation of the Free Exercise Clause of the First Amendment, the Service is showing hostility to religion in general and, in particular, to the religious practice approved in *Jenney* when it declares that such a religious practice is "frivolous" and when it tries to suppress it. Boardman asks the Court to enjoin such declarations and attempted suppression.

Boardman contends that the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb *et. seq.,* further protects her core practice. The practice was accommodated during the 1970's and 1980's. Similar but much more expansive practices were accommodated in *Americans Friends Service Comm. v. U.S.*, 368 F.Supp. 1176 (E.D. Pa. 1973), which was only partially reversed in *U.S. v. Americans Friends Service Comm.*, 419 U.S. 7 (1974) ("*AFSC*"). Boardman's practice was recognized by the *AFSC* district court as an established custom and was left untouched by the Supreme Court decision and by rulings in later Quaker Tax Resistance cases.

Boardman asks the Court to restore her freedom to practice her religion.

Boardman submits that this Court has subject-matter jurisdiction to hear her claim and that her claim is valid. Correct tax filings, a Congressionally-defined safe harbor for the core practice and judicial recognition of it in *Jenney* and *AFSC* distinguish precedents on which Defendant relies. See, e.g., *Bradley v. U.S.*, 817 F.2d 1400 (9th Cir. 1987), a free speech case based on *Jenney*, oft-cited by Defendant, where the taxpayer filed a fake return; see also *Franklet v. U.S.*, 578 F.Supp. 1552, 1554, 1561 (N.D. Cal. 1984) (facts re incorrect return of taxpayer McKenna) *aff'd* 761 F.2d 529 (1985). Boardman is not challenging the statutory framework enacted by Congress, as in other cases filed by tax protestors. Instead, Boardman is seeking to enforce the intent of Congress, which is to protect and preserve an established religious practice. Such intent was expressed in the original penalty statute and in RFRA. Principles and precedents cited herein support Boardman's claim and authorize the Court to rule on its merits. Therefore, Defendant's Motion to Dismiss should be denied.

LEGAL DISCUSSION

I. The Court Has Subject-Matter Jurisdiction to Enjoin Illegal and Unconstitutional Actions by the Internal Revenue Service.

A. Legal Standard for a Motion to Dismiss Pursuant to Rule 12(b)(1).

"A motion to dismiss for lack of subject matter jurisdiction may either attack the allegations of the complaint or may be made as a 'speaking motion' attacking the existence of subject matter jurisdiction in fact." *Spencer Enterprises, Inc. v. U.S.*, 229 F. Supp. 2d 1025, 1031 (E.D. Cal. 2001).

In an attack on the allegations, factual allegations of the complaint are presumptively true. "A complaint will be dismissed for lack of subject matter jurisdiction (1) if the case does not 'arise under' any federal law or the United States Constitution, (2) if there is no case or controversy within the meaning of that constitutional term, or (3) if the cause is not one described by any jurisdictional statute." *Keeter v. U.S.*, 957 F. Supp. 1160, 1162 (E.D. Cal. 1997) (citations omitted).

"Speaking motions" require a more refined approach. "Where the jurisdictional issue is separable from the merits of the case, the district court is free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary." *Id.* However, where the jurisdictional issue and substantive issues are intertwined, a motion or trial may be required to make the jurisdictional determination. *Id.*

Plaintiff submits that subject matter jurisdiction is demonstrated here by the allegations of the Complaint. If there is doubt, a factual investigation and evaluation should be undertaken.

B. Subject-Matter Jurisdiction is Properly Based on 28 U.S.C. § 1331.

Plaintiff alleges subject-matter jurisdiction on the basis of 28 U.S.C. § 1331. (Complaint at 3:25-26.) Actions against federal agencies for violations of constitutional rights are commonly based on the section. *Reno v. Catholic Social Services, Inc.*, 509 US 43, 56 (1993), quoting from *Califano v. Sanders*, 430 U. S. 99, 105 (1977).

It is unnecessary to plead a particular jurisdictional statute; factual allegations show whether jurisdiction exists. *K2 America Corp. v. Roland Oil & Gas, L LC*, 653 F. 3d 1024, 1027 (9th Cir. 2011); *Multi Denominational Ministry v. Gonzales*, 474 F. Supp. 2d 1133, 1141 (N.D. Cal. 2007).

C. Sovereign Immunity Has Been Waived to Allow for Injunctive Relief Directed at Improper Government Agency Actions.

Defendant raises an issue of sovereign immunity, citing cases where plaintiff sought money damages. (Memorandum at 2:5-21 and 3:7-15) Plaintiff here seeks only injunctive relief.

"Prospective relief requiring, or having the effect of requiring, governmental officials to obey the law has long been available. Sovereign immunity does not bar such relief." *EEOC v. Peabody Western Coal Co.*, 610 F. 3d 1070, 1085 (9th Cir. 2010). "[S]ince 1976 federal courts have looked to § 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, to serve the purposes" of waiver of sovereign immunity, purposes that were previously served by case authority. *Id.*

See *Meese v. Keene*, 481 U.S. 465, 472-477 (1987) (affirming *Keene v. Meese*, 619 F. Supp. 1111 (E.D. Cal. 1985) on this point) (proponent of film burdened by pejorative label has standing for First Amendment challenge); *Cohen v. U.S.*, 650 F. 3d 717, 723 (D.C. Cir. 2011) ("The IRS is not special in this regard; no exception exists shielding it — unlike the rest of the Federal Government — from suit under the APA."); *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041 (D.C. Cir. 2012) (ruling on some claims of abuse of discretion, rejecting others); *Aiken v. Obledo*, 442 F. Supp. 628 (E.D. Cal. 1977) (standing of organization, injunction re USDA food stamp program).

D. The Anti-Injunction Act Does Not Bar Plaintiff From the Sole Forum Where She Can Seek a Remedy for Improper IRS Actions That Are Extraneous to Tax Collection.

Defendant relies on the Anti-Injunction Act ("AIA" or "the Act"), 26 U.S.C. § 7421(a), which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." (Defendant's Memorandum at 3:16-18:16.)

Defendant disregards the nature of Boardman's claim: "Plaintiff is not seeking to restrain assessment or collection of any tax." (Complaint, 4:1.) "Plaintiff Boardman has no adequate remedy at law. She does not contend herein that the amount of any determination of tax or penalty by the Service was improper and she does not seek any monetary damages." (*Id.* at 19:19-21.)

1. Plaintiff has no alternative remedy.

"Congress intended the Act to bar a suit only in situations in which Congress had provided the aggrieved party with an alternative legal avenue by which to contest the legality of a particular tax."

(*South Carolina v. Regan*, 465 US 367, 373 (1984).) "[W]e hold that the Act was not intended to bar an action where, as here, Congress has not provided the plaintiff with an alternative legal way to challenge the validity of a tax." (*Id*.)

The Court in the *South Carolina* action distinguished cases on which Defendant relies here, chiefly *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), *Bob Jones University v. Simon*, 416 U.S. 725, 736 (1974) and *United States v. American Friends Service Committee*, 419 U.S. 7 (1974) ("*AFSC*"), along with *Alexander v. "Americans United" Inc.*, 416 U. S. 752 (1974), decided the same day as *Bob Jones*. At 465 U.S. 374, the *South Carolina* Court addressed "the question whether the Act applies when Congress has provided no alternative remedy." It concluded that "a careful reading of *Williams Packing* and its progeny supports our conclusion that the Act was not intended to apply in the absence of such a remedy."

In *Bob Jones*, supra, "the Court relied on the availability of a refund suit, noting that 'our conclusion might well be different' if the aggrieved party had no access to judicial review.'" (465 U.S. 375 quoting from 416 U.S. 746.) In *"Americans United"* and *AFSC*, "the Court expressly relied on the availability of refund suits. 416 U. S., at 761; 419 U. S., at 11." (465 U.S. at 376.)

See also *Commissioner v. Shapiro*, 424 U.S. 614, 629 (1974) ("…where irreparable injury may result…the Due Process Clause requires … an opportunity for some kind of … hearing");

Application of the foregoing principles shows that Boardman's suit is not barred. She seeks relief from a label of "frivolous" attached to her religious practice, from discriminatory and obstructive treatment based on the label and from implied threats of a $5000 penalty. (Complaint at 19:2-8.) She is seeking an accommodation under RFRA for her religious practice. (*Id*. at 19:9-18.) None of the requested relief is available in any forum other than this one. See also *Estate of Branson v. Commissioner*, 264 F.3d 904 (9th Cir. 2001) (limited jurisdiction of Tax Court).

2. Plaintiff is not seeking to restrain tax assessment or collection.

In *Hibbs v. Winn*, 542 US 88, 102 *et. seq.* (2004), the Supreme Court discussed the AIA in context with the closely similar Tax Injunction Act or TIA, 28 U. S. C. § 1341, that prevents lower federal courts from restraining State tax assessment, levy or collection. The Court held that the suit could proceed without any TIA impediment. 542 U.S. at 112. At 542 U.S. 103-104, the Court

discussed relevant cases involving the AIA, e.g., *McGlotten v. Connally*, 338 F. Supp. 448, 453-454 (DC 1972). The Court briefed *McGlotten*: "§ 7421(a) does not bar action seeking to enjoin income-tax exemptions to fraternal orders that exclude nonwhites from membership, for in such an action, plaintiff does not contest the amount of his own tax, nor does he seek to limit the amount of tax revenue collectible by the United States." (inner quotation marks and footnote omitted).

In *McGlotten*, supra, the district court held: "Even where the particular plaintiff objects to his own taxes, the Court has recognized that the literal terms of the statute do not apply when 'the central purpose of the Act is inapplicable.'" (quoting from *Williams Packing*, supra, 370 U.S. at 7.)

Hibbs, in turn, was discussed in *Cohen v. U.S.*, supra, 650 F. 3d at 726, where the court allowed taxpayers to recover refunds of amounts illegally collected by the IRS. "The IRS envisions a world in which no challenge to its actions is ever outside the closed loop of its taxing authority." In actual practice, courts "define 'assessment and collection' as is done in the Internal Revenue Code." *Id*. "Assessment" means "the trigger for levy and collection efforts." " '[C]ollection' is the actual imposition of a tax." "The assessment and collection in this case are long-since completed and no 'single mechanism' theory will revive them." (650 F. 3d at 726.)

As in the foregoing precedents, Boardman is not asking to court to restrain any assessment or any collection of taxes. Boardman's self- assessments have not been questioned. Boardman relies on *Jenney*, which authorizes immediate collections. Requested restraints on abuse are extraneous to tax assessment and collection protected by the AIA. Certainly, as to some relief requested, e.g., requiring the Service to correct statements on its website, "the central purpose of the Act is inapplicable." (*McGlotten, Williams Packing*, supra.) Therefore, Defendant's Motion to Dismiss should be denied.

3. Illegal and unconstitutional acts of the IRS can be enjoined.

The leading AIA case, *Williams Packing*, supra, distinguished a precedent, *Miller v. Standard Nut Margarine Co*., 284 U. S. 498 (1932). "Prior to the assessment in issue [in *Standard Nut*], three lower federal court cases had held that similar products were nontaxable and, by letter, the collector had informed the manufacturer that 'Southern Nut Product' was not subject to the tax." The assessed tax could not have been legally collected "and therefore the reasons underlying § 7421 (a)] apply, if at all, with little force." [*Williams Packing*, 370 U.S. at 5; *Standard Nut*, 284 U.S. at 510.]

The reasons underlying § 7421(a) apply with little force here. Illegal and unconstitutional acts of the Service do not further "efficient and expeditious collection of taxes with 'a minimum of pre-enforcement judicial interference,'" or "protect[] the collector from litigation pending a refund suit." *AFSC*, supra, 419 U.S. at 12 quoting *Bob Jones*, supra, 416 U.S. at 736-737. Boardman asks for efficient and transparent collection of taxes. (Complaint at 19:9-18 and 20:7-11.) Boardman disclaims any right to a refund. (*Id*. at 19:19-21; compare to Defendant's Memorandum at 18:4-16.)

See also: *Tax Analysts and Advocates v. Shultz*, 376 F. Supp. 889, 893 (DC 1974), discussed in *Hibbs*, supra, at 542 U.S. 103-104, along with *McGlotten* ("Tax Analysts and its members do not seek to restrain the enforcement of any tax whatsoever. Tax Analysts seeks to force the IRS to collect a tax which is due, but which has been allegedly avoided by an illegal Revenue Ruling."); *Jenkins v. Rucke*r, 95 A.F.T.R.2d 1182 (D.C.D.C. 2005) ("The allegation that Defendants maintain Plaintiff's name on a blacklist, therefore, is very different from her other allegations because it attempts to enjoin an illegal activity rather than the collection and assessment of taxes. Thus, Plaintiff's claim that Defendants have placed her on a tax blacklist does not fall within the scope of the AIA."); *Sherman v. Nash*, 488 F.2d 1081 (3d. Cir. 1973) ("IRS [allegedly] imposed the jeopardy assessment … to harass and coerce the plaintiffs for improper purposes").

II. Plaintiff Has a Valid Claim for Violation of Her Right to Free Exercise of Religion.

A. Legal Standard For a Motion to Dismiss Pursuant to Rule 12(b)(6).

On a motion to dismiss for failure to state a claim under Rule 12(b)(6), all allegations of material fact must be accepted as true and construed in the light most favorable to the plaintiff. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). In addition to the allegations of the Complaint, the Court may take judicial notice of materials published on government websites. *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974 (E.D. Cal. 2000).

Rule 8(a)(2) "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant a fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

A court is not required to accept as true a "legal conclusion couched as a factual allegation."

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009) (quoting *Twombly*, 550 U.S. at 555). "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, *id*.

Under *Twombly*, 550 U.S. at 570: "Without some factual allegation . . ., it is hard to see how a claimant could satisfy the requirements of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." *Id*. (citation omitted). However, a pleading need contain "only enough facts to state a claim to relief that is plausible on its face." *Id*.

B. The Free Exercise Clause Applies to Statements of and Actions by the Internal Revenue Service That Are Hostile to Religion.

The online Internal Revenue Manual states the position of the Service with respect to matters called "frivolous." The Manual refers to a Notice that specifies "frivolous positions" and to a Revenue Ruling: "This revenue ruling describes as frivolous the refusal to file returns or pay taxes based on moral, religious or ethical objections to the government programs or policies for which the taxes will be used." (Complaint at 12:23-25.)[1]

Boardman's religious practice includes refusals to pay taxes based on religious objections to government programs for which the taxes are used. As shown by other Quaker cases discussed infra, Boardman's practice was established by the 1970's and has been maintained since that time. Other religious pacifists refuse to file returns at all. The Service attaches the label "frivolous" to the practices and is trying to control practitioners on the basis of the label. Boardman alleges that the Service is attempting to suppress her practice through misdirections, misrepresentations and bureacratic manipulations. (Complaint at 12:1-13:18, 14:5-16:8, 19:2-8.)

Boardman contends that application of the label "frivolous" to her religious practice is contrary to law because the practice was actually accommodated during the 1970's, intentionally given safe harbor by Congress when it enacted § 6702 in 1982 and approved in *Jenney*. Enactment of RFRA in 1993 and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et. seq*., in 2000 show solid, continuing Congressional support for rights of religious practitioners. As

[1] The online Internal Revenue Manual has been revised since the Complaint was drafted. As of 7/31/12, the quoted text, emphasized in the Complaint, plus surrounding material, has been relocated verbatim (with updated references) at index 8.22.5.5.3 dated 03-29-12.

discussed in this point, pejorative labeling and attempted suppression of Boardman's religious practice are also prohibited by the Free Exercise clause of the First Amendment.

When the Supreme Court decided *Employment Div. v. Smith*, 494 U.S. 872 (1990), the previous expansive phase of interpretation of the Free Exercise clause of the First Amendment came to an end and a new, compacted phase began. At 494 U.S. 877, the Court re-affirmed the essential protections maintained under compacted principles. noting a major precedent that was being overruled, *Sherbert v. Verner,* 374 U. S. 398 (1963) (other citations omitted).

> The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such." *Sherbert v. Verner*, supra, 374 U.S. at 402. The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.
>
> But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.

Boardman contends that, through its labeling of her religious practice as "frivolous" and through attempts to suppress it, the IRS is seeking to "punish the expression of religious doctrines it believes to be false" and to "impose special disabilities on the basis of religious views." The IRS is attaching the label "frivolous" to a "refusal to file returns or pay taxes based on moral, religious or ethical objections," apparently seeking "to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display."

Defendant argues that actions of the Service are "neutral" and thereby entitled to deference.

(See Defendant's Memorandum at 11:13-17 and 11:24-14:22.) Defendant misconstrues Boardman's claim. Boardman does not dispute that, as to taxation, "The statutory structure contains only religiously neutral laws of general application." (*Id*. at 14:17-19.) This is true of 26 U.S.C. § 6702, the statute that authorizes labels of "frivolous." Although Boardman suggests that Congress had religious tax resisters in mind when it constructed the safe harbor, entry to the safe harbor requires only correct tax returns, not correct religious beliefs. Boardman is challenging IRS enforcement policies and practices that are not neutral and that were not authorized by Congress.

Neutrality was discussed in *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F. 3d 144, 165 (3d. Cir. 2002) (footnote omitted), where local government tried to suppress an Orthodox Jewish practice of marking utility poles with otherwise inconsequential pieces of plastic strips.

> If a law is "neutral" and "generally applicable," and burdens religious conduct only incidentally, the Free Exercise Clause offers no protection. *Employment Div. v. Smith*, 494 U.S. 872, 879. … On the other hand, if the law is not neutral (i.e., if it discriminates against religiously motivated conduct) or is not generally applicable (i.e., if it proscribes particular conduct only or primarily when religiously motivated), strict scrutiny applies and the burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 542 (1993).

In *Lukumi*, the City improperly tried to suppress animal sacrifice at a planned Santeria Church through ostensibly general regulation of slaughtering practices. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue… regulates or prohibits conduct because it is undertaken for religious reasons." (508 U.S. at 532.) Such protections pertain to Boardman's case: the Service is trying to suppress conduct because it is undertaken for religious reasons. See also *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995) (Army regulations improperly suppressed religious practices in homes providing care for children of military personnel serving overseas.)

The Service declares that "religious objections" to government programs are grounds for a label of "frivolous." Simple refusals to file returns or to pay are penalized according to schedules set by Congress. (26 U.S.C. § 6651.) The schedules are neutral as to any reason for such refusal.

The Service is implying that it will pejoratively label and further penalize a refusal to file or pay when the refusal is made for religious reasons. The implication is not neutral. The obvious purpose is to suppress practices of religious tax resistance like Boardman's. The declaration "discriminates against religiously motivated conduct." (*Tenafly Eruv Ass'n*, quoted supra.) The Service appears to "proscribe[] particular conduct only or primarily when religiously motivated." (*Id.*) Religious practices are burdened by the label, by suppression attempts and by threats of a $5000 penalty. Therefore, strict scrutiny applies.

C. Statements and Actions of the Service Do Not Survive Strict Scrutiny.

"*Smith* and *Lukumi* state unambiguously that strict scrutiny applies when government discriminates against religiously motivated conduct. See *Smith*, 494 U.S. at 884, 110 S.Ct. 1595; *Lukumi*, 508 U.S. at 546, 113 S.Ct. 2217." *Tenafly Eruv Ass'n,* supra, 309 F. 3d. at 166, n. 27.

> To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "'interests of the highest order'" and must be narrowly tailored in pursuit of those interests. *McDaniel v. Paty*, 435 U. S. [618], at 628 [1978], quoting *Wisconsin v. Yoder*, 406 U. S. 205, 215 (1972). … A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.
>
> *Lukumi*, 508 U.S. at 546.

Plaintiff recognizes Defendant's "interests of the highest order" in implementing the federal tax system in a uniform, mandatory way. See *Hernandez v. Comm.*, 490 U.S. 680 (1989); *U.S. v. Lee*, 455 U.S. 252 (1982); *Adams v. Comm.*, 170 F.3d 173 (3d Cir. 1999). Such interests extend to imposing taxes and to administering the tax system. *Miller v. Comm.*, 114 T.C. 511, 517 (2000).

Under *Lukumi*, a method used in such administration "must be narrowly tailored in pursuit of those interests" when it "targets religious conduct for distinctive treatment." The approach of the Service to Boardman's religious practice is not "narrowly tailored." The Service apparently attaches the label "frivolous" to her practice and blocks and frustrates her efforts. There is no need for the Service to block Boardman's access to Tax Court. Tax Court has its own methods for dealing with protests. *Jenkins v. C.I.R.*, 483 F.3d 90 (2d Cir. 2007) ($5000 Tax Court penalty).

Where, as here, "it is only conduct motivated by religious conviction that bears the weight of the governmental restriction" (*Lukumi*, 508 U.S. at 547), impermissible underinclusion may appear.

Here, underinclusion is clear because there is nothing in the interests asserted by the Service that justifies targeting refusals "based on moral, religious or ethical objections." Such refusals are no more disruptive of tax administration, burdensome to the Service or "frivolous" than refusals based on political objections or refusals based on the taxpayer's plans for parties. Boardman's refusal, like others that qualify for the safe harbor, is minimally burdensome because correct tax reporting is required to enter the safe harbor. In contrast, a "frivolous" label is not applied to a bad check, although Congress has defined a penalty for the deed. (26 U.S.C. § 6657.) The apparent purpose of the "frivolous" label, as the Service is using it, is to enable the Service to target religious objectors like Boardman for suppression. The suppression can selectively target, apparently at the will of IRS agents, one sect or another of religious objectors. Discretionary underinclusion, almost by definition, fails to qualify as "narrowly tailored." See *Lukimi*, at 508 U.S. 543-545.

The Complaint alleges that the Service is trying to squeeze away a religious practice that Boardman shares with a community of practitioners. The squeezing is hostile to religion in general and to Boardman's religious practice in particular. Such squeezing and hostility are contrary to the Free Exercise clause of the First Amendment and to the religious freedom that it protects. Plaintiff submits that she has stated a valid constitutional claim and that, therefore, Defendant's Motion to Dismiss should be denied.

III. The Court Has Subject-Matter Jurisdiction to Enforce RFRA.

Principles and authorities set forth supra as to the Legal Standard Under Rule 12(b)(1) and Sovereign Immunity also apply to support Boardman's claim under RFRA. See also *Webman v. Federal Bureau of Prisons*, 441 F.3d 1022 (D.C.Cir.2006) (standing under RFRA).

Subject-matter jurisdiction for Boardman's RFRA claim is based on 42 USC § 2000bb–1(c), titled "Judicial relief" and providing: " A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution."

Boardman's standing under article III is established by her actual, concrete and personalized injury resulting from the policy and practice of the Service in its pejorative labeling and attempted suppression of her religious practice. A favorable decision of this Court will lift a cloud that hangs over Boardman's practice and will strengthen her capacities to persuade others to join her in it. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Meese v. Keene*, supra.

RFRA fortifies principles, discussed supra, that overcome the AIA. In *National Fed'n of Indep. Business v. Sebelius* (No. 11–393, decided 6/28/12), at slip opinion, p. 13,, the Court stated:

> The Anti-Injunction Act and the Affordable Care Act, however, are creatures of Congress's own creation. How they relate to each other is up to Congress, and the best evidence of Congress's intent is the statutory text.

The text of RFRA shows that Congress wanted all federal agencies to accommodate religion and religious practices. RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb–3(a). "Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter." *Id*., § 2000bb–3(b).

Boardman submits that this Court has subject-matter jurisdiction to hear her claim in the same way courts had such jurisdiction to hear earlier RFRA challenges to tax laws. *Droz v. Comm.*, 48 F.3d 1120, 1122-24 & n. 2 (9th Cir.1995); *Adams*, supra; 170 F.3d at 176-177 *U.S. v. Philadelphia Yearly Meeting of Religious Society of Friends,* 322 F. Supp. 2d 603, 608 (E.D. Pa. 2004).

IV. Plaintiff Has a Valid Claim Under RFRA for Restoration of Her Religious Freedom.

The Legal Standard for testing Boardman's RFRA claim under Rule 12(b)(6) is the same as that used to test her constitutional claim, discussed in point II.A supra. Elements of a RFRA claim were set forth in *U.S. v. Zimmerman*, 514 F. 3d 851, 853 (9th Cir. 2007):

> To prevail under RFRA, defendant must first (1) articulate the scope of his beliefs, (2) show that his beliefs are religious, (3) prove that his beliefs are sincerely held and (4) establish that the exercise of his sincerely held religious beliefs is substantially burdened. If defendant successfully demonstrates all this, the government must then prove that the burden on defendant's exercise of religion is nonetheless permissible because (1) it

furthers a compelling governmental interest (2) through the least restrictive means.

In her Complaint, Boardman articulates the scope of her beliefs. (Complaint, ¶¶ 16 – 21, "The Quaker Peace Testimony and War Tax Resistance"). She shows that her beliefs are religious. (*Id*., ¶¶ 11 – 15, "The Religious Character of Quaker Testimonies"). She proves through her life history that her beliefs are sincerely held. (*Id*., ¶¶ 5 – 10, "Elizabeth Boardman, Quaker Pacifist"). Boardman's sincerely held religious beliefs and practices have been substantially burdened. (*Id*., ¶¶ 22 – 29, "Conflict Between the Voluntary Tax System and the Quaker Testimony of Integrity" and ¶¶ 30 – 41, "Defendant Commissioner Refuses to Recognize Religious War Tax Resistance").

Boardman's satisfactory showing of the initial RFRA elements parallels similar satisfactory showings by other tax protestors, e.g., *Lee* at 455 U.S. 257; *Adams* at 170 F.3d 179. Protests in previous cases foundered on the principle that the *Adams* court (*id.*) distilled from precedents:

> The least restrictive means of furthering a compelling interest in the collection of taxes – a compelling interest that Adams has conceded – is in fact, to implement that system in a uniform, mandatory way, with Congress determining in the first instance if exemptions are to built into (sic) the legislative scheme.

Boardman contends that Congress built a safe harbor into the scheme, an exemption from penalty for her "core religious practice" of correct tax reporting accompanied by a refusal to pay. Congress never closed the safe harbor. Congressional and court accommodation and approval of her "core practice" distinguish it from other practices that did not have such accommodation.

The core practice was discussed in cases where tax resisters attempted to enlarge on it. The attempts at enlargement failed but the core practice was implicitly approved.

In *U.S. v. AFSC*, supra, conscientious objectors employed by the Quaker AFSC wanted to perform an enlarged practice. Like Boardman, they "wished to bear witness to their beliefs by reporting the amounts as taxes owed on their annual income tax returns but refusing to pay such amounts. They would thus compel the Government to levy in order to collect the taxes." (419 U.S. at 8.) Their wishes were blocked by the compulsory system of employer-based withholding and payment. To circumvent the block, employer and employees entered into an arrangement where employer paid withholding taxes but did not deduct from employees' salaries, employees refused to

pay amounts reported as being due and the Service levied on employees. Then employer sued for a refund on grounds of double payment. The arrangement worked but was subject to changes in IRS collection methods . See *U.S. v. Phil. Yearly Meeting*, supra, 322 F.Supp.2d at 606.

The resisters in *AFSC* further wished to have the employer avoid paying withholding taxes altogether. The district court granted their further wishes, noting (368 F.Supp. at 1184):

> We further note that if plaintiffs Cleveland and Cadwallader were self-employed, they would not be in Court seeking the relief requested because they would not be subject to the withholding requirements of the Internal Revenue Code. The Internal Revenue Service would then be forced to deal with them as it must deal with any self-employed person who has refused to pay his or her income taxes. Consequently, we do not feel that we are creating a new problem for the Internal Revenue Service which will necessitate its having to devise a new procedure for collecting the tax to which it is entitled. As we noted above, the Service has been levying on plaintiffs' property since 1970 and has received all monies currently due it by that process.

The district court's comment shows that Boardman's core religious practice was recognized in the early 1970's. The district court enlarged the rights of religious practitioners by finding tax withholding statutes unconstitutional as applied and enjoining IRS enforcement of the withholding laws that applied to the employer. Such finding and injunction led to Supreme Court review, 419 U.S. at 9, n.4. The Court reversed the injunction on narrow grounds of the AIA but declined to criticize the arrangement or the core practice of tax refusal, rather stating (*Id*. at 11):

> Even though the remitting of the employees to a refund action may frustrate their chosen method of bearing witness to their religious convictions, a chosen method which they insist is constitutionally protected, the bar of the Anti-Injunction Act is not removed.

The *AFSC* scenario was repeated in *Lee*, involving an Amish employer who was opposed to Social Security. Privileges of the self-employed were unavailable in an employer-employee situation. The Court stated (455 U.S. 255, citation and footnotes omitted):

> The District Court held the statutes requiring appellee to pay social security and unemployment insurance taxes unconstitutional as applied. … The District Court

observed that in light of their beliefs, Congress has accommodated self-employed Amish and self employed members of other religious groups with similar beliefs by providing exemptions from social security taxes. 26 U.S.C. § 1402(g).

As in *AFSC*, the Supreme Court reversed. "Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system." 455 U.S. at 260. "The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise." *Id*. at 261.

Lee was decided in February of 1982. In September of 1982, Congress enacted § 6702. Boardman submits that, with awareness of legal issues surrounding the matter, Congress intentionally included a safe harbor for the religious practice that had been noted in *AFSC*. Those Congressional intentions were highlighted in *Jenney v. U.S.,* 755 F.2d 1384 (9th Cir. 1985).

Jenney, introduced supra on p. 1, repeated the pattern of *AFSC* and *Lee*. The taxpayer was not satisfied with accommodations provided by Congress and wanted the courts to enlarge upon them. The Jenneys entered a specious "Conscience deduction" on their 1040 return and claimed a refund. In attached correspondence, they provided correct figures and noted a balance due. The IRS imposed a penalty pursuant to § 6702 but the district court found in favor of the taxpayers. The court of appeals reversed and held (755 F.2d at 1386):

> The legislative history of the Tax Equity and Fiscal Responsibility Act of 1982 discusses the returns which Congress considered to be within the scope of section 6702: [T]he penalty could be imposed against any individual filing a "return" showing an incorrect tax due, or a reduced tax due, because of the individual's claim of a clearly unallowable deduction, such as ... a "war tax" deduction under which the taxpayer reduces his taxable income or shows a reduced tax due by that individual's estimate of the amount of his taxes going to the Defense Department budget, etc. *In contrast, the penalty will not apply if the taxpayer shows the correct tax due but refuses to pay the tax. In such a case, of course, the Secretary can assess and collect the tax immediately.* S.Rep. No. 494, 97th Cong., 2d Sess. 278, reprinted in 1982 U.S.Code Cong. &

> Ad.News 781, 1024 (emphasis added [by the court for rhetorical purposes]).
>
> … The legislative history of section 6702 clearly indicates that the $500 penalty is applicable to a taxpayer who claims a "conscience" or "war tax" deduction, unless the taxpayer reports the correct amount due but refuses to pay.

See also *Drefchinski v. Regan*, 589 F.Supp. 1516, 1521 (W.D.La.1985) ("the penalty does not apply if the taxpayer correctly reports the tax owed but refuses to pay the tax. S.Rep. No. 494, supra, at 278"), collected with other § 6702 cases in *Nelson v. United States*, 796 F. 2d 164 (6th Cir. 1986).

Boardman is a taxpayer like one noted in *Jenney* who "reports the correct amount due but refuses to pay." Such is her core practice of religious war tax resistance. Boardman submits that her religious practice was established by customary law,[2] as shown in *AFSC*, that Congress gave it safe harbor in 1982 and that courts have pointed to the safe harbor. Boardman submits that Congress never closed the safe harbor. Congress intended the safe harbor to stay open for sincere protestors who minimize burdens of their protests. Keeping it open avoids constitutional confrontations.

The safe harbor fit into the statutory system as it existed in 1982. "Congress enacted § 6330 in 1998 [providing for administrative hearings before levy] and did not provide for any collection due process until 1999." (Defendant's Memo at 11:17-19.) Procedures adopted by the Service after 1998 evidently made no accommodation for religious tax resisters despite the safe harbor and despite enactment of RFRA in 1993. Simple collection procedures of the 1980's turned into bureaucracies. Bureaucratic complexity and enactment of TRHCA in 2006 set the stage for present apparent attempts of the Service to suppress religious war tax resistance altogether.

Boardman submits to the Court that her core practice of religious war tax resistance should be accommodated under RFRA. In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), the Court held that RFRA required law enforcement to accommodate importation by

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[2] "Customary law arises, then, out of situations of human interaction where each participant guides himself by an anticipation of what the other will do and will expect him to do. There is, therefore, in customary law something approaching a contractual element; its underlying principle is a reciprocity of expectations. … customary law has perhaps performed its most significant historical function in setting limits to conflict between enemies. If it has not succeeded in eliminating warfare, it has at least served to lift it above a blind, reciprocal destructiveness and has instead made of it a purposeful enterprise of restricted goals." Lon L. Fuller, *Anatomy of the Law* (1968) at 116-117.

a religious sect of plants, used in their ceremonies, that contained banned substances. The Court noted that a similar religious exception for peyote use by Native Americans had been enacted by Congress. The statutory exception established a basis for a judicial exception revised to work in a different situation. "RFRA, however, plainly contemplates that *courts* would recognize exceptions – that is how the law works." (546 U.S. at 434, emphasis in original). The *Centro Espirita* Court (546 U.S. at 436) noted that methods used for "case-by-case consideration of religious exemptions to generally applicable rules" under RFRA were also applied under RLUIPA, supra, "which allows federal and state prisoners to seek religious accommodations pursuant to the same standard as set forth in RFRA." See also *U.S. v. Bauer*, 84 F.3d 1549, 1558 (9th Cir.1996).

Boardman submits that, in this case and unlike prior RFRA tax cases, Congress created a safe harbor for the core religious practice she maintains. Congress defined the scope, anchor and bounds for accommodation of the practice when Congress enacted § 6702.

Boardman's core practice of religious war tax resistance has been maintained through succeeding phases of constitutional law. *AFSC*, 368 F.Supp. at 1178, 1183 (district court), 419 U.S. at 13–16 (Douglas dissent); *Phil. Yearly Meeting*, supra, 322 F.Supp.2d at 605-606; *Packard v. U.S.*, 7 F. Supp. 2d 143 (D. Conn. 1998). See also Boardman's Complaint, ¶¶ 16-21. The simplicity and continuity of the core practice make modernization of accommodation a relatively easy task. Accommodations given to religious practices of prisoners under RLUIPA show in practical ways how the Court might order the Service to accommodate Boardman's core practice of religious war tax resistance. See, e.g., *Greene*, supra (maximum security prisoner must be allowed to attend group worship); *Love v. Reed*, 216 F. 3d 682 (6th Cir. 2000) (prison required to provide food for prisoner to eat in cell during solitary sabbath self-confinement); *Shakur v. Schriro*, 514 F. 3d 878 (9th Cir. 2008) (religious and medical dietary restrictions create factual issues); *Rouser v. White*, 630 F. Supp. 2d 1165, 1195-98 (E.D. Cal. 2009) (detailed analysis and resolution of various disparate claims).

Boardman's religious practice is motivated by the spiritual pain she feels in empathy with the actual pain felt by victims of war. She feels responsible, as a taxpayer, for acts of war carried out by the United States. Her conscience prohibits her from simply writing a check for the amount of taxes due, attaching it to a completed return and dropping the envelope in the mail. Abhorrence of war has

led Boardman to the religious practice of war tax resistance, as others have been led. The core practice has a tradition that includes recognition by the courts. Boardman submits that Congress has given it safe harbor. The Service is both factually and legally erroneous in labeling the practice "frivolous" and in trying to suppress it. Boardman submits that this Court is the proper place for her to seek correction of the errors and that RFRA provides the means.

Boardman's claim is different from claims of other tax protestors who wanted something more than what Congress gave them. Boardman's core practice does not conflict with Congressional intentions or with tax statutes. Congress intended to accommodate Boardman's practice. A safe harbor was incorporated in the tax statute in 1982 providing for such accommodation. Boardman asks the Court to put Congressional intentions into effect in this later era. Boardman submits that RFRA authorizes her to sue the Service to put Congressional intentions into effect and to restore her religious freecdom. Boardman submits that Congress wanted her to have that right under RFRA. Therefore, Defendant's Motion to Dismiss should be denied.

V. If the Motion to Dismiss is Granted, Plaintiff Asks for Leave to File an Amended Complaint.

Boardman asks leave to amend her complaint to overcome defects identified by the Court. *Lopez v. Smith*, 203 F.3d 1122 (9th Cir.2000). Additional facts that might be alleged involve Boardman's 2010 tax return and unnecessary, punitive harshness in collection methods. The Court's reasons for granting the Motion may cause Plaintiff to consider expanding the bases of her claim to include also the Free Speech clause of the First Amendment and/or the Due Process clause of the Fifth Amendment, which are not presently alleged. Plaintiff may consider joining her claim with those of other religious war tax resisters if joinder will enable her to proceed.

CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss should be denied. If the Motion is granted, Plaintiff asks for leave to file an Amended Complaint.

Dated: July 31, 2012

/s/ Robert L. Kovsky
Robert L. Kovsky, Attorney at Law
Attorney for Plaintiff
Elizabeth Boardman

Appendix: Current and former versions of 26 U.S.C. § 6702

26 U.S.C. § 6702 - Frivolous Tax Submissions (current version, enacted in 2006)

(a) Civil penalty for frivolous tax returns

A person shall pay a penalty of $5,000 if—

(1) such person files what purports to be a return of a tax imposed by this title but which—

(A) does not contain information on which the substantial correctness of the self-assessment may be judged, or

(B) contains information that on its face indicates that the self-assessment is substantially incorrect, and

(2) the conduct referred to in paragraph (1)—

(A) is based on a position which the Secretary has identified as frivolous under subsection (c), or

(B) reflects a desire to delay or impede the administration of Federal tax laws.

(b) Civil penalty for specified frivolous submissions

(1) Imposition of penalty

Except as provided in paragraph (3), any person who submits a specified frivolous submission shall pay a penalty of $5,000.

(2) Specified frivolous submission

For purposes of this section—

(A) Specified frivolous submission

The term "specified frivolous submission" means a specified submission if any portion of such submission—

(i) is based on a position which the Secretary has identified as frivolous under subsection (c), or

(ii) reflects a desire to delay or impede the administration of Federal tax laws.

(B) Specified submission

The term "specified submission" means—

(i) a request for a hearing under—

(I) section 6320 (relating to notice and opportunity for hearing upon filing of notice of lien), or

(II) section 6330 (relating to notice and opportunity for hearing before levy), and

(ii) an application under—

(I) section 6159 (relating to agreements for payment of tax liability in installments),

(II) section 7122 (relating to compromises), or

(III) section 7811 (relating to taxpayer assistance orders).

(3) Opportunity to withdraw submission

If the Secretary provides a person with notice that a submission is a specified frivolous submission and such person withdraws such submission within 30 days after such notice, the penalty imposed under paragraph (1) shall not apply with respect to such submission.

(c) Listing of frivolous positions

The Secretary shall prescribe (and periodically revise) a list of positions which the Secretary has identified as being frivolous for purposes of this subsection. The Secretary shall not include in such list any position that the Secretary determines meets the requirement of section 6662 (d)(2)(B)(ii)(II).

(d) Reduction of penalty

The Secretary may reduce the amount of any penalty imposed under this section if the Secretary determines that such reduction would promote compliance with and administration of the Federal tax laws.

(e) Penalties in addition to other penalties

The penalties imposed by this section shall be in addition to any other penalty provided by law.

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26 U.S.C. § 6702 (prior version enacted in 1982)

(a) Civil penalty. — If —

(1) any individual files what purports to be a return of the tax imposed by subtitle A but which —

(A) does not contain information on which the substantial correctness of the self-assessment may be judged, or

(B) contains information that on its face indicates that the self-assessment is substantially incorrect; and

(2) the conduct referred to in paragraph (1) is due to —

(A) a position which is frivolous, or

(B) a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws,

then such individual shall pay a penalty of $500.

(b) Penalty in addition to other penalties

The penalty imposed by subsection (a) shall be in addition to any other penalty provided by law.

CERTIFICATE OF FILING AND SERVICE

I certify that I filed and served the foregoing **Plaintiff 's Memorandum in Opposition to Motion to Dismiss** on July 31, 2012 by means of the Court's CM/ECF system, which, I am informed and believe, served electronic notice on Defendant, described as follows:

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Dated: July 31, 2012

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