17-503

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOHN M. LARSON,

Plaintiff-Appellant,

—against—

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

MEGAN L. BRACKNEY
KOSTELANETZ & FINK, LLP
7 World Trade Center
New York, New York 10007
(212) 808-8100

REED J. HOLLANDER
NELSON MULLINS RILEY
& SCARBOROUGH, LLP
4140 Parklake Avenue, Suite 200
Raleigh, North Carolina 27612
(919) 329-3800

C. WELLS HALL, III
NELSON MULLINS RILEY
& SCARBOROUGH, LLP
100 North Tryon Street, 42nd Floor
Charlotte, North Carolina 28202
(704) 417-3000

Attorneys for Plaintiff-Appellant

Contents

Cases

Statutes

Regulations

Legislative History

Rules

Other Authorities

JURISDICTIONAL STATEMENT

The United States District Court for the Southern District of New York had jurisdiction over the claims asserted in Appellant's Complaint under 26 U.S.C. § 7422, 28 U.S.C. § 1346(a)(1), and 5 U.S.C. § 702. On December 28, 2016, the district court (Caproni, J.) entered a final memorandum opinion and order dismissing the Complaint under Fed. R. Civ. P. 12(b)(1) and (6). (Joint Appendix ("JA") 37-58). On February 21, 2017, Appellant filed a timely notice of appeal. (JA 60). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Appellant is required to fully pay the $160,232,026 penalty assessed by the Internal Revenue Service (the "IRS") under 26 U.S.C. § 6707 in order for the district court to exercise subject matter jurisdiction over his claim for refund under 26 U.S.C. § 7422 and 28 U.S.C. § 1346(a).

2. Whether dismissal of the Complaint because Appellant cannot make full payment of the § 6707 penalty violates Appellant's Fifth Amendment right to due process of law.

3. Whether Appellant's claims should be reviewed under the Administrative Procedure Act, 5 U.S.C. § 702, et seq. (the "APA"), because a refund action is not an adequate remedy in this case.

4. Whether the district court erred in dismissing Appellant's claim that the $160,232,026 penalty is an excessive fine under Eighth Amendment of the United States Constitution.

STATEMENT OF THE CASE

A. Background

Appellant John Larson brought this action to challenge a $160,232,026 penalty assessed against him, of which the government is still seeking to collect over $60 million.[1] (JA 8-30). This penalty was assessed under § 6707[2] for failure to file two tax shelter registration forms. (JA 8-10). Section 6707, as in effect at the time of the transactions at issue, stated that a person who fails to timely register a tax shelter is subject to a penalty equal to the greater of "(A) 1 percent of the aggregate amount invested in such tax shelter, or (B) $500." The § 6707 penalty is not related to any tax deficiency, but is based on the "aggregate amount invested" in the transactions that the IRS determined should have been reported. IRS Chief Counsel Advisory ("CCA") 200112003 (Mar. 23, 2001) at § 3.

The IRS issues a notice of deficiency to assess income tax, interest, and penalties related to income tax understatements. § 6121. The taxpayer may file a

[1] Because the Complaint was dismissed under Fed. R. Civ. P. 12(b), the factual record was not developed. Accordingly, this brief refers to the factual allegations contained in, and the exhibits attached to, the Complaint. (JA 8-30).

[2] Unless otherwise indicated, all references to sections herein are to the United States Internal Revenue Code of 1986 (as amended), in effect during 1997-2000.

petition with the Tax Court for a redetermination of the deficiency, without being required to pay any amount stated in the notice of deficiency. § 6213(a); *Flora v. United States*, 362 U.S. 145, 158 (1960); *Sotiropoulos v. Comm'r*, 142 T.C. 269, 272 (2014) (describing the Tax Court as "a convenient prepayment forum in which taxpayers can challenge IRS deficiency determinations without paying the tax first."). Generally, the assessment is not final, and the IRS cannot collect the tax until the time for filing a Tax Court petition has elapsed or the Tax Court's decision has become final. § 6213(a); *Sotiropoulos*, 142 T.C. at 272. If the taxpayer does not petition the Tax Court, the taxpayer may obtain review of the notice of deficiency by paying the tax due and suing for a refund in federal district court or the Court of Claims. § 7422.

There are certain penalties for which the IRS does not issue a notice of deficiency, but which must be paid "upon notice and demand" by the IRS. § 6671. For these penalties, sometimes referred to as "assessable penalties," Tax Court review is not available. *See e.g., Smith v. Comm'r*, 133 T.C. 424, 430 (2009). Review of these penalties is typically through a refund action under § 7422 and 28 U.S.C. § 1346(a)(1). Section 6707 penalties are assessable penalties, *see* § 6671(a), and are thus not subject to review in the Tax Court. CCA 200112003, at § 4.

B. The Complaint

In 2003, the IRS began an audit of Appellant, and on February 15, 2011 the IRS determined that Appellant was a "tax shelter organizer" with respect to two separate tax shelter transactions: (i) "FLIPS/OPIS" transactions described in Notice 2001-45; and (ii) "BLIPS" transactions described in IRS Notice 2000-44. (JA9-11). The IRS further found that Appellant had to register these transactions under § 6111(a), but failed to do, so, and that he was therefore subject to penalties under § 6707. (*Id.*).

The notice showed that the IRS computed the § 6707 penalties based on its determination of the "aggregate amount invested" by each individual in the transactions. (JA 10). Using this method, the IRS assessed penalties against Appellant of $160,232,026. (*Id.*). In computing the penalties, the IRS interpreted the "aggregate amount invested" language in § 6707(a)(2) to include loans and loan premiums that were never actually invested by the participants in these transactions. (JA 11). The effect of including these amounts was to grossly inflate the 1% penalties from approximately $7 million (if the loans and loan premiums were not included) to $160,232,026 (if the loans and loan premiums were included). (*Id.*).

On March 18, 2011, the IRS notified Appellant that it proposed to assess the $160,232,026 in penalties personally against him under § 6707. (*Id.*). Appellant timely filed a request for reconsideration with the IRS Office of Appeals. (*Id.*).

During the appeals process, the IRS conceded that it had not credited Appellant for payments made by co-promoters. (JA 12). Liability under § 6707 is joint and several, such that all assessed persons or entities are liable for 100% of the liability, and payments of the assessed penalty by one liable party offset the liability owed by other liable parties. Treas. Reg. § 301.6707-1T. Consistent with this rule, after collecting payments from co-promoters, the IRS reduced the assessed penalty against Appellant from $160,232,026 to $67,661,349. (JA 12).

On February 18, 2015, Appellant submitted a Form 843 Claim for Refund and Request for Abatement (the "Refund Claim"), and payment of $1,432,735. (JA 11, 21-27). In the Refund Claim, Appellant presented several arguments to support his claim for refund and abatement of the § 6707 penalty, including, but not limited to: the IRS had not fully credited Appellant with payments made by alleged co-promoters; the IRS erroneously computed the § 6707 penalty by including the loans and loan premiums in the "aggregate amount invested"; and Appellant is not liable for the § 6707 penalty because he acted with reasonable cause when he attempted to determine his filing obligations, including by obtaining a legal opinion from tax counsel stating that he did not have to register the transactions. (JA 21-27).

On May 12, 2015, the IRS denied the Refund Claim without addressing any of Appellant's substantive legal arguments on the sole ground that he had not made full payment of the § 6707 penalties. (JA 13-14, 29-30).

On January 13, 2016, Appellant filed the Complaint asserting the following Claims for Relief: refund and abatement of the § 6707 penalty (and interest) under § 7422 and 28 U.S.C. §§ 1346, 2411 (First Cause of Action), review under the APA, 5 U.S.C. § 702 (Second Cause of Action); for violation of the Eighth Amendment excessive fines clause (Third Cause of Action); and for attorney's fees under § 7430 (Fifth Cause of Action). (JA 8-30).[3]

Specifically, the Complaint alleges that the IRS did not fully credit Appellant with payments made by alleged co-promoters; the IRS erroneously computed the § 6707 penalty by including the loan and loan premiums in the "aggregate amount invested;" Appellant is not liable for the § 6707 penalty because he acted with reasonable cause when he attempted to determine his filing obligations; the IRS impermissibly applied tax shelter registration regulations that were not in effect as of the dates on which Appellant allegedly provided material aid, assistance, or advice relating to the transactions at issue; the IRS incorrectly and improperly assessed § 6707 penalties against Appellant; the IRS did not act reasonably within its statutory authority but abused its discretion; the penalty assessment is arbitrary, capricious, and without sound basis in fact or law; and the

[3] Appellant does not seek review of the dismissal of his action to compel agency action under the APA (Fourth Cause of Action).

penalty is a punitive fine under the Eighth Amendment and violates the Excessive Fines Clause. (JA 8-18).

The Complaint further explains that Appellant "does not have the ability to pay the full penalty amount assessed by the IRS" (JA 14, ¶ 28), and therefore if the district court does not have jurisdiction over this action unless Appellant pays the entire amount due, which he cannot pay, Appellant will have no remedy to challenge the penalty assessment. (JA 16, at ¶ 43).

After Appellant filed the Complaint, the government notified him that it had applied an additional $4,250,000 paid by co-promoters to the penalties, reducing the amount due from Appellant to $61,534,027. (JA 35).

C. The District Court's Decision

On April 29, 2016, the United States moved to dismiss the Complaint (JA 31), and on December 28, 2016, the district court issued a Memorandum Opinion and Order granting the motion to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). (JA 32-57). The district court concluded that Appellant could not seek review of the IRS's actions under § 7422 without first making full payment of the penalty, and therefore dismissed Appellant's refund claim. (JA 40-48). Next, the district court dismissed Appellant's APA claim on the ground that § 7422 and 28 U.S.C. 1346(a) provided an adequate remedy, and that the Anti Injunction Act, § 7421(a) (the "AIA"), and/or the Declaratory Judgment Act (the "DJA"), 28 U.S.C.

§ 2201(a), barred Appellant's claims. (JA 48-52). In connection with this aspect of the decision, the district court found that Appellant's claim for refund of the penalty amount that he had paid was an action for monetary damages barred by sovereign immunity. (JA 49).[4]

Finally, the district court dismissed Appellant's Eighth Amendment claim for lack of jurisdiction for the same reasons as it dismissed the other claims under § 7422 and the APA. (JA 55-57). The district court also dismissed the Eighth Amendment claim under Fed. R. Civ. P. 12(b)(6) on the ground that the Complaint did not allege a plausible Eighth Amendment violation. (*Id.*).

SUMMARY OF ARGUMENT

The district court's order places Appellant in an inescapable paradox, making the government's assessment of the overwhelming penalty against him immune from review. Since the penalty cannot be challenged in the Tax Court, payment of the penalty and suit for refund is the only mechanism available to Appellant to obtain judicial review. After assessing penalties of over $160 million against him, the government contends that he must pay in full the unpaid portion of the penalty (another approximately $61 million) before the district court has

[4] The district court's decision covered other aspects of the Complaint, for which we are not seeking appellate review.

jurisdiction to consider any of his arguments regarding that penalty, including most notably whether he actually owes anything close to $61 million.

The district court's interpretation of *Flora v. United States*, 357 U.S. 63 (1958), *aff'd on reh'g*, 362 U.S. 145 (1960), to require Appellant to pay the IRS over $160 million before he can show a court that he owes $0, combined with its decision that the APA's alternative method of review is unavailable because Appellant has an "adequate remedy in court: a tax-refund claim" (JA 50), is an axiomatic affront to due process. *Flora* does not mandate such a paradoxically impassable barrier to judicial review.

Rather, the holding in *Flora* is limited to cases in which the taxpayer has an alternative, pre-payment forum for review of a notice of deficiency in Tax Court. Nothing in the Supreme Court's decision suggests that the full payment rule should be applied when the effect is to bar all review of IRS action. The Court should not apply the full payment rule against Appellant, but allow him to proceed with his challenge to the § 6707 penalty.

Alternatively, the Court has jurisdiction to review Appellant's claims under the APA because a tax refund claim is not an adequate remedy where the IRS has erroneously computed the penalty assessment so high that full payment is impossible. If the Court does not find either that the full payment rule does not

apply, or that APA review is available, the IRS's unilateral decision to assess a $160,232,026 penalty against Appellant will not be subject to any judicial review.

In addition to being improperly calculated and assessed against Appellant, the $160,232,026 penalty violated the excessive fines clause of the Eighth Amendment because it is grossly disproportionate to the harm to the government. This claim, which on its face presents a plausible Eighth Amendment violation, should be heard.

ARGUMENT

Standard of Review

On appeal from a dismissal under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, this Court reviews "the district court's factual findings for clear error and its legal conclusions *de novo*." *CBF Indústria de Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58, 77 (2d Cir. 2017) (internal citations omitted). This Court must "accept as true all material allegations [in] the complaint" and "construe the complaint in favor of the complaining party." *Id.* (internal citations omitted). Similarly, the standard of review of the dismissal of Appellant's Eighth Amendment claim under Fed. R. Civ. P. 12(b)(6), is *de novo*, "'accepting all factual allegations as true and drawing all reasonable inferences in the plaintiff's favor.'" *Id.* (quoting *Crawford v. Cuomo*, 796 F.3d 252, 256 (2d Cir. 2015) (citation omitted))).

POINT I

THE "FULL-PAYMENT RULE" DOES NOT APPLY TO § 6707 PENALTIES

Appellant's refund claim arises under 28 U.S.C. § 1346(a)(1), which provides that the district courts shall have jurisdiction over:

> Any Civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws . . . .

Appellant has made just such a claim. The district court's interpretation of the "full payment" rule disregards the logic of *Flora*, ignores the Supreme Court's explanation of the limited scope of *Flora* in *Laing v. United States*, 423 U.S. 161 (1976), and contradicts the Second Circuit's decision in *Irving v. Gray*, 479 F.2d 20 (2d Cir. 1973).

A. The Supreme Court's Decisions in *Flora*

1. *Flora I*

Flora comprised two cases—the initial hearing in *Flora v. United States*, 357 U.S. 63 (1958) ("*Flora I*"), and the rehearing in 362 U.S. 145 (1960) ("*Flora II*"). The IRS had assessed an income tax deficiency after disallowing certain losses on the taxpayer's return. *Flora I*, 357 U.S. at 63. The taxpayer, Flora, paid a portion of the assessment before filing a refund suit, and the district court held that it lacked subject matter jurisdiction because Flora failed to pay the full amount

of the assessment. *Id.* at 64. After the Tenth Circuit vacated the judgment and remanded with instructions to dismiss, the Supreme Court granted *certiorari* to resolve the conflict between the Tenth Circuit's decision and *Bushmaier v. United States,* 230 F.2d 146 (8th Cir. 1960), which held that partial payment of income taxes was sufficient to confer subject matter jurisdiction over a tax refund suit.

The issue addressed in *Flora I* was whether 28 U.S.C. § 1346(a) required full payment of the tax assessed against the plaintiff as a prerequisite to refund suit in district court. 362 U.S. at 63. Flora had argued that the Board of Tax Appeals (the "BTA") (later, the U.S. Tax Court) was created to ameliorate problems with post-litigation collection. After reviewing the legislative history behind the establishment of the BTA, the Court in *Flora I* stated that "the hardship about which the Congress was concerned was the hardship of prelitigation payment, not post-litigation collection." *Id.* at 74. Accordingly, the Court explained that a "part-payment remedy [in district court was not] necessary for the benefit of a taxpayer too poor to pay the full amount of the tax" because "[s]uch an individual is free to litigate in Tax Court without any advance payment." *Id.*

Citing to *Cheatham v. United States,* 92 U.S. 85 (1875), the *Flora I* Court said that it "understood the statutes of that time to require full payment of an assessed tax as a condition precedent to the right to sue the collector for a refund." *Id.* at 68. The *Flora I* Court then looked at § 1346(a), which "employ[ed] language

identical to that in the statute under which the full-payment understanding developed [in *Cheatham*]." *Id.* at 69. Critical to its analysis, the Court in *Flora I* accepted the government's contention that, prior to 1940, there were no cases in which courts heard refund suits without full payment of tax assessments. *Id.* at 69.

Flora moved for rehearing on the ground that the Supreme Court had ignored or disregarded many older cases in which full payment had not been a condition precedent to refund litigation. The motion was granted, leading to a rehearing and the decision in *Flora II*.

2. *Flora II*

On rehearing, the Supreme Court split 5-4. The majority affirmed its original decision, holding that Flora had to make full payment of his income tax assessment before suing for a refund. Critical to the instant case, however, is the fundamental logic of the opinion. Properly understood, the so-called "full payment rule" of *Flora II* only applies to taxpayers who are subject to a deficiency, giving them an alternative avenue for prepayment review in the Tax Court. Thus, *Flora II* does not apply to Appellant.

After struggling with the statutory language and the legislative history of 28 U.S.C. § 1346(a), the Court declared it was "presented with a vexing situation – statutory language which is inconclusive and legislative history which is irrelevant." *Id.* at 152. The Court next examined the "historical basis of a suit to

recover a tax illegally assessed," *id.*, but even after considering the *Cheatham* dictum, the Court declared the "determination of the issue at bar [to] be inordinately difficult," but that "[t]here are, however, additional factors which are dispositive." *Id.* These additional factors deemed "especially pertinent" by the *Flora II* Court are the statute establishing the BTA, the DJA, and § 7422. *Id.* at 157-58.

The Court then delved into the Congressional history of the 1924 establishment of the BTA, *id.* at 163, which provided taxpayers with a forum to challenge tax deficiency determinations before paying the contested liabilities, *see* Revenue Act of 1924, Pub. L. No. 68-176, § 900, 43 Stat. 253, 336-338 (1924). The BTA "furnish[ed] a forum where full payment of the assessment would not be a condition precedent to suit," *Flora II* at 163, and thus alleviated the hardship of being required to pay "a tax that is ruinous, [and] that the taxpayer cannot pay," 67 Cong. Rec. 3755 (1926) (statement of Sen. Reed), in order to have "his day in court by direct action" 67 Cong. Rec. 3530 (1926); *Flora II* at 161, n. 24. Congress recognized that "[t]he right of appeal after payment of [a] tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment." S. Rep. No. 68-398, at 8 (1924).

The Court's discussions of the DJA and § 7422(e) proceeded along the same lines: since the avenue of Tax Court litigation is open to the taxpayer, he should

not be permitted as a matter of policy to pay in part and sue for refund in district court. *Flora II* at 164 (discussing the DJA, citing S. Rep. No. 1240, 74th Cong., 1st Sess. 11 ("[E]xisting procedure both in the Board of Tax Appeals and the courts affords ample remedies for the correction of tax errors.")); and *Flora II* at 165 (discussing § 7422(a) ("[A] taxpayer might be able to split his cause of action, bringing suit for refund of part of the tax in a Federal District Court and litigating in the Tax Court with respect to the remainder.")) The five-member majority determined these "additional factors" were dispositive basing their holding on the assumption that Tax Court prepayment review is available to the taxpayer.

Ultimately, the majority concluded that a taxpayer seeking to contest a tax deficiency without advance payment had an avenue in the Tax Court, and thus that district court review should only be permitted after full payment:

> A word should also be said about the argument that requiring taxpayers to pay the full assessments before bringing suits will subject some of them to great hardship. This contention seems to ignore entirely the right of the taxpayer to appeal the deficiency to the Tax Court without paying a cent.

Flora II, 362 U.S. at 175. Note that the majority used the phrase "appeal the deficiency", applying its rule to those taxpayers who receive a notice of deficiency (such as Flora). Thus, the majority decision was tailored to address tax deficiencies, rather than setting a blanket rule that applies equally across all taxes, all interest, and all penalties. As discussed *infra*, both the Supreme Court in *Laing*

and the Second Circuit have concurred with this view of the deficiency requirement of *Flora II*. Notably, since no penalties had been assessed against Flora, the Court never addressed whether penalties must be paid in full prior to litigation. *Cf. Flora II*, 362 U.S. 145.[5]

3. *Flora II Dissent*

Even though *Flora* involved a typical income tax deficiency for which prepayment review was available in the Tax Court, the four dissenting Justices described the majority's holding as "grossly unfair" and "shockingly inequitable." *Id.* at 195, n. 22 (J. Whittaker dissenting, joined by Justices Frankfurter, Harlan, and Stewart). The dissent noted that the government had argued, "with some force, that our tax legislation as a whole contemplates the Tax Court as the forum for adjudication of deficiencies, and the District Court and Court of Claims as the forums for adjudication of refund suits." *Id.* at 193. The dissent, however, was unimpressed by the government's hypothetical scenario in which a taxpayer might make "only a 'token payment,' and then, by a suit for refund, adjudicat[e] the legality of the entire assessment." *Id.* at 194, n. 18. The dissent provides a lengthy hypothetical applying the majority's holding to a "commonplace set of facts," where a taxpayer could be deprived of the ability to challenge the invalidity of an

[5] Dictum in *Flora II* suggests that interest payments should be distinguished from taxes when determining whether the jurisdictional requirements are met. *Id.* at 171 n.37.

assessment, if Tax Court review was not available, a result that the dissent describes as "shocking" and "plainly proscrib[ed]" by § 1346(a). *Id.* at 195, n. 22.

Consider how the *Flora II* Court would have viewed this question had it faced the scenario presented here, in which there is no Tax Court jurisdiction to hear a challenge to the § 6707 penalty and the taxpayer cannot pay the entire $160,232,026 penalty. Based on the majority's reliance on the Tax Court as a pre-payment forum of review, and the dissent's outrage at the full payment limitation on refund jurisdiction, we can infer that the *Flora* court would have found that the full payment rule did not apply to Appellant's refund action.

B. The *Flora II* Full Payment Rule Does Not Apply to Non-Assessable Penalties

The scenario presented here – in which a $160,232,026 penalty, not reviewable in the Tax Court, but only reviewable through a suit for refund – was never contemplated in *Flora*. Given that tax disputes falling outside the jurisdictional scope of the Tax Court are rare, it is understandable that simple citation to *Flora II*'s "full payment rule" has been sufficient to address nearly all cases involving a notice of deficiency.

However, in a few instances, including a later Supreme Court decision and a Second Circuit decision, courts have faced the more difficult question posed by this case: Does the rule apply when there is no "tribunal for prepayment

litigation"? In both cases, the courts' answer was that the *Flora II* "full payment rule" does not apply.

1. *Laing v. United States* and *Irving v. Gray*: *Flora II* Applies Only Where the Taxpayer Has Access to the Tax Court

In *Laing v. United States*, 423 U.S. 161 (1976), the Supreme Court considered whether the IRS must assess a deficiency and issue a notice and demand for payment where it has prematurely terminated the taxable period under § 6851(a)(1) to prevent the taxpayer from prejudicing the ability of the Secretary to collect tax revenues. The government contended that a § 6851 termination assessment does not give rise to a "deficiency" and therefore that the procedures for assessment and collection of deficiencies do not apply. *Id.* at 164. The taxpayers contended that the tax owed after a § 6851 termination is a deficiency and must, therefore, be assessed by notice and demand for payment. *Id.* The majority decided for the taxpayers. *Id.*

The *Laing* Court suggested that the full-payment rule would not apply against a taxpayer who is deprived of the opportunity to litigate in Tax Court. Because the IRS had not issued to the taxpayers a deficiency notice, they could not challenge the terminations in the Tax Court. *Id.* at 171. Instead, the taxpayers each filed suit in district court, seeking to enjoin the actions of the IRS, and sought refunds of the amounts already collected (which were not full payment of the taxes allegedly owed). *Id.* at 165-168. The majority in *Laing*, siding with the taxpayers,

explained that "the Government's position in these cases would, for no discernable purpose, isolate the taxpayer subjected to a jeopardy termination from most other income-tax payers" by preventing them from accessing the Tax Court for review. *Id.* at 176.

The *Liang* dissent expressly states that *Flora* does not apply where there is no right of access to the Tax Court. Justice Blackmun, writing for himself, C.J. Burger and J. Rehnquist, explained that

> [a]lthough a taxpayer whose taxable period is terminated thus may not gain immediate access to Tax Court, he does have available appropriately prompt avenues of relief principally in the district court or in the Court of Claims…. [A taxpayer] may still sue for refund even if the value of the property seized is less than the amount of the assessment made against him. There is *no requirement in this situation that he pay the full amount of the assessment before he may claim and sue for refund*.

Id. at 207-208 (emphasis added). Justice Blackmun instructed further:

> At this point, [*Flora*] deserves comment. The ruling [in *Flora*] was tied directly to the jurisdiction of the Tax Court where litigation prior to payment of the tax was the usual order of the day . . . . The Court stated:
>
> > "A word should also be said about the argument that requiring taxpayers to pay the full assessments before bringing suits will subject some of them to great hardship. This contention seems to ignore entirely the right of the taxpayer to appeal the deficiency to the Tax Court without paying a cent." *Flora II*, at 175.
>
> This passage demonstrates that <u>the full-payment rule applies only where a deficiency has been noticed, that is, only where the taxpayer has access to the Tax Court for redetermination prior to payment</u>. This is the thrust of the ruling in Flora, which was concerned with the

> possibility, otherwise, of splitting actions between, and overlapping jurisdiction of, the Tax Court and the district court. Where, as here, in these terminated period situations, there is no deficiency and no consequent right of access to the Tax Court, there is and can be no requirement of full payment in order to institute a refund suit. The taxpayer may sue for his refund even if he is unable to pay the full amount demanded upon the termination of his taxable period.

Laing, 423 U.S. at 208-209 (emphasis added).[6] To support this reading of *Flora*, Justice Blackmun cited *Irving v. Gray*, 479 F.2d 20 (2d Cir. 1973), in which the Second Circuit interpreted *Flora* in the same manner.

In *Irving*, the taxpayers were subject to a jeopardy assessment, similar to *Laing*, but had not filed a return or commenced refund actions in district court, but sought to enjoin the tax collection in advance. *Id.* at 24. The Court affirmed the trial court's denial of the injunction, explaining that "[t]he taxpayers are not without a remedy, however, for they could have had their complaint of an overpayment heard in the district court below if they had filed full-year returns reporting overpayments of tax[.]" The Second Circuit further explained that *Flora* was not a bar to the taxpayers' filing of suit in district court to obtain refund of the taxes: "[t]he Flora 'full payment' rule is inapplicable here, however, since [in *Flora*] *a deficiency had been determined* and taxpayer had paid only a portion of

[6] There are few U.S. Supreme Court cases citing *Flora*. Of the few that exist, only *Laing* discusses *Flora*'s applicability in situations where Tax Court review is unavailable.

before seeking his refund claim in a federal district court. Here, as we have said, no deficiency has yet been determined." *Id.* at 25, n. 6 (emphasis in original).

Thus, in *Laing* and *Irving*, the Supreme Court and Second Circuit have stated that the *Flora* rule does not apply if a deficiency has not been determined and noticed – in other words, if the taxpayer could not seek Tax Court review. This is eminently sensible, given the policies underpinning the decision in *Flora II*, in which the majority explained at length that the basis for its decision lay in the availability of Tax Court review, and the dissent viewed the full payment rule as inequitable.

Contrary to the district court's description of Appellant's argument (*see* JA 46), the central argument here is that *Flora* does not apply to this case because *Flora* is premised on the existence of a notice of deficiency that triggers the availability of Tax Court jurisdiction as an avenue of prepayment review. This argument does not "strain[] to find due process arguments where none exists" (JA 46), but rather is a complete and developed reading of the *Flora* decision, informed by the later decisions of *Laing* and *Irving*, which each apply *Flora*'s rule specifically to tax deficiencies reviewable in Tax Court.

2. Other Cases Support the Determination that *Flora* Does Not Apply to Assessable Penalties

Other than *Laing* and *Irving*, the vast majority of cases that have cited *Flora II* have simply referred to the "full payment rule" and applied it mechanically, with

no analysis. Those cases almost uniformly involve run-of-the-mill income tax and similar cases for which Tax Court review was available, even though sometimes the taxpayers did not avail themselves of that review. Such cases shed no light on the case at bar and carry no weight on the question at issue.

For example, in *Ardalan v. United States*, 748 F.2d 1411, 1414 (10th Cir. 1984), the taxpayers brought income tax refund suit in district court seeking $215, in which the remaining income tax deficiency was $3,852. Instead of litigating in the Tax Court, which was available to them, they voluntarily waived their right to petition the Tax Court. In response to the government's argument that their refund suit was barred by *Flora*, the taxpayers contended that barring their suit would violate the Due Process Clause, since they would be deprived of all judicial forums.

The Tenth Circuit rejected this challenge, explaining that *voluntary* "waiver of that right to appeal in the Tax Court and preclusion from bringing suit in the district court under § 1346(a)(1) without payment does not deprive [a] taxpayer of any constitutional right." In concluding this, the court stated that § 1346(a)(1) "requires the taxpayer to first pay the full amount of an income tax *deficiency* assessed by the IRS before he/she may challenge the assessment in a suit for refund." *Id.* at 1413 (emphasis added). Taken together, this language could be read to imply that a non-voluntary barrier to Tax Court review, such as lack of a

deficiency, may allow suit for refund, although that issue was not before the *Ardalan* court.

Another inapposite case relied on by the district court is *Curry v. United States*, 774 F.2d 852 (7th Cir. 1985). (JA 46-47). In this income tax case, the taxpayers had not filed personal income tax returns for several years. A CPA advised the taxpayers to file, and the preparer used old invoices to determine the taxpayers' gross income but failed to realize that the invoices contained amounts due from prior invoices. The result was that many receipts were double-counted and led the taxpayers to overstate their income. *Id.* at 853. Even though the taxpayers knew the returns were incorrect and that they could not pay the tax due on those returns, they filed them based on advice of their accountant that they could later file amended returns. The IRS disallowed the refund claim on their amended returns because the taxpayers could not substantiate the changes to the returns. *Id.* at 853-854.

After the disallowance, the taxpayers were in the position of having filed original returns that overstated their tax owed, and their amended returns were rejected by the IRS. As a deficiency is "the amount by which the amount owed exceeds the amount of tax shown by the taxpayer upon his return," *id.* at 854, n. 1 (citing § 6211(a)), the IRS did not need to issue a notice of deficiency, but instead could simply insist on payment of the tax shown on the voluntarily-filed original

return. Without a notice of deficiency, the taxpayers could not petition the Tax Court. *Id.* at 854. The taxpayers filed a tax refund suit in the federal district court, and the government moved to dismiss because the taxpayers had not paid in full the amount they self-assessed on their original returns, citing *Flora II*. The trial court granted the motion to dismiss, and the Tenth Circuit affirmed.

The Tenth Circuit characterized the taxpayers' argument as seeking a "hardship exception" to the *Flora* rule, citing the language from *Flora* that "'[w]here the time to petition [the tax] court has expired, or where for some other reason a suit in the District Court seems more desirable, *the requirement of full payment may in some instances work a hardship*.'" *Id.* at 854 (quoting *Flora*, 357 U.S. at 75-76 (emphasis added in *Curry*)).

The district court here erroneously used this language to incorrectly characterize Appellant's argument as seeking a "hardship exception." (JA 47). Relying on the "hardship" comment in *Flora* to characterize Appellant's situation as analogous to *Curry*, *Ardalan*, or the many other cases that mechanical apply the "full payment" rule, elides the highly unusual scenario at bar.

In any event, the obvious distinction between *Curry* and the present case is that the tax obligation in *Curry* was self-assessed – in other words, the Currys imposed it upon themselves. Having done so, it is logical and consistent with the principles of *Flora* that they should pay in full before filing a refund claim. In

contrast, Appellant has not self-assessed the $160,232,026 penalty – it has been imposed upon him with only one avenue for judicial review – in district court.

Another case relied on by the district court, *Rocovich v. United States*, 933 F.2d 991 (Fed. Cir. 1991) (JA 47), is similarly inapposite and actually supports Appellant's position. The taxpayer argued that the IRS never assessed the estate tax at issue and thus the full payment rule did not apply. However, the government proved that it had assessed the tax, so the court never reached the issue of whether the full payment rule would have applied if there had not been a notice of deficiency. The court, however, stated that "[i]f the tax was not assessed at the time the refund suit was initiated, then payment of the deferred amount would not be required to give the Claims Court jurisdiction." *Id.* at 994.

Two other cases warrant discussion: *Pfaff v. United States*, 2016 2016 WL 915738 (D. Colo. Mar. 10, 2016), and *Diversified Group, Inc. v. United States*, 123 Fed. Cl. 442 (2016), *aff'd*, 123 F.3d 31 (Fed. Cir. 2016). These cases involve § 6707 penalties, similar to those imposed on Appellant. In both cases, the leading argument made by the taxpayers was that the penalties were divisible and thus fall within the "divisibility exception" to *Flora*. *See Diversified Group*, 123 F.3d at 980-85; *Pfaff*, 2016 WL 915738, at *2-4. Neither case grappled with the fundamental underlying issue – the scope of *Flora*.

In *Pfaff*, although the district court cited *Ardalan*, noting the requirement of a "deficiency," it did not consider the significance of the lack of a deficiency notice.[7] *Pfaff*, 2016 WL 915738, at *2 (citing *Ardalan*, 748 F.2d at 1413). Similarly, in *Diversified Group*, the Court of Claims began with the explanation that "[w]hen a taxpayer is assessed a *tax deficiency*, he may challenge that assessment in one of two ways," but did not address whether the IRS had issued a deficiency notice to the taxpayers. 123 Fed. Cl. at 448 (emphasis added). This may be because the *Diversified Group* taxpayers had already litigated some of the underlying fact issues in a separate income tax deficiency proceeding in the Tax Court. *Id.* at 452-453.

The *Pfaff* and *Diversified Group* decisions presuppose the applicability of the full payment rule, and do not consider *Flora*'s actual holding, the basis for the decision, or the limitations on the scope of the full payment rule.

C. Since the Full Payment Rule Does Not Apply the § 6707 Penalty Assessment, the District Court Had Jurisdiction over Appellant's Refund Action

As explained above, the *Flora* "full payment rule" does not apply to the penalties assessed against Appellant under § 6707. As Appellant has satisfied the other jurisdictional requirements of timely filing an administrative claim for refund and filing this action in district court, his refund claim should not have been

[7] *Laing* and *Irving* are not mentioned in either *Pfaff* or *Diversified*.

dismissed, but should be heard on the merits. Accordingly, the district court's dismissal of the Complaint should be reversed, and the case remanded for decision on the merits of Appellant's claims.

POINT II

APPLYING THE FULL-PAYMENT RULE TO THE § 6707 PENALTIES ASSESSED AGAINST APPELLANT VIOLATES HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS

If the Court concludes that *Flora* requires Appellant to pay a $160,232,026 penalty before he can demonstrate that he actually owes $0, the Court should consider whether such a ruling would violate Appellant's due process rights under the Fifth Amendment. The Fifth Amendment prohibits the government from depriving persons of "life, liberty or property without due process of law." U.S. Const. Amend. V. The full-payment rule cannot apply to § 6707 penalties without violating the Fifth Amendment where there is no alternative forum for a pre-payment challenge to such penalties and where an individual does not have the financial means to pay the penalties in full.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *United States v. Jones*, 160 F.3d 641, 645 (10th Cir. 1998) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Where tax deficiencies are challenged, the Supreme Court has explained that "[t]he procedure provided in [the Internal Revenue Code] *satisfies the*

requirements of due process because two alternative methods of eventual judicial review are available to the [taxpayer]." *Phillips v. Comm'r*, 283 U.S. 589, 612 (1931) (emphasis added). The taxpayer can either "voluntarily pay[] the tax" and "contest his liability by bringing an action . . . against the United States . . . to recover the amount paid"; or (2) "avail himself of the provisions for immediate redetermination of the liability by the [Tax Court] . . . ." *Id.* at 597-98. As previously explained, the establishment of the Tax Court was a key driver of the *Flora II* decision that requiring a taxpayer to pay income tax in full prior to a refund suit did not violate due process since the taxpayer could opt to seek pre-payment review in the Tax Court.

While not expressly referencing due process, the majority in *Flora II* cited to a House Committee Report on the legislation creating the BTA, explaining Congress's creation of the BTA to prevent "great financial hardship" caused by the full-payment requirement:

> The right to appeal after the payment of the tax is an incomplete remedy, and does little to remove the hardship caused by an incorrect assessment. The payment of a large additional tax on income received several years previous and which may have, since its receipt, been either wiped out by subsequent losses, invested in nonliquid assets, or spent, sometimes forces taxpayers into bankruptcy, and often causes great financial hardship and sacrifice.

362 U.S. at 159. The *Flora II* majority did not need to address the potential due process problem of the full-payment rule, given the existence of the Tax Court, explaining that "[a] word should also be said about the argument that requiring the taxpayers to pay the full assessment before bringing suits will subject some of them to great hardship. This contention seems to ignore entirely the right of the taxpayer to appeal the *deficiency* to the Tax Court without paying a cent." *Id.* at 178 (emphasis added). Contemplating a scenario in which no avenue of appeal was open to a taxpayer, the dissenting Justices expressed their strong concern about the unfairness and inequity of depriving a taxpayer of any means to establish the invalidity of an assessment, if Tax Court review was not available. *Flora II*, 362 U.S. at 195, n. 22 (J. Whittaker dissenting).

Applying the full-payment rule would bar all judicial review here because Appellant cannot pay the full $160,232,026 penalty. Unlike a typical income tax deficiency assessment, in which the tax rate is applied to income generated by the taxpayer which is, presumably, still available to him to pay the deficiency, the § 6707 penalty computation for the years at issue is based on "1% of the aggregate amount invested" in the tax shelters by the *participants*, not the person against whom the penalty is assessed. Therefore, while Appellant has alleged that IRS has grossly over-calculated the penalties, even a correct computation of the penalties could still force him to pay millions of dollars based on amounts invested by

others, which amounts were never owned by him. If these penalties are unreviewable absent full payment, Appellant is completely foreclosed from challenging the penalties, depriving him of "property, without due process of law," U.S. Const. amend. V. Although the "[f]undamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner[,]" Appellant asks, at minimum, for the opportunity to *be heard. Jones,* 160 F.3d at 645 (emphasis added) (citation omitted).

POINT III

THE DISTRICT COURT ERRED IN DISMISSING APPELLANT'S CLAIMS UNDER THE ADMINISTRATIVE PROCEDURE ACT

In the alternative, if the Court finds that the full payment rule applies to non-assessable penalties that are unreviewable in Tax Court, Appellant's claims should be heard under the APA, since a refund claim is not an adequate remedy. Without APA review, the IRS's actions in computing and assessing $160 million in penalties under § 6707 will be non-reviewable. The APA permits review of the IRS's actions just like other government agencies: "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." *Cohen v. United States*, 650 F.3d 717, 723 (D.C. Cir. 2011).

The APA states, in relevant part, that:[8]

> [A] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . . . The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States.

5 U.S.C. § 702; *see also Sharkey v. Quarantillo*, 541 F.3d 75, 83 (2d Cir. 2008). The APA is grounded in "'the strong presumption that Congress intends judicial review of administrative actions.'" *Sharkey*, 541 F.3d at 84 (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)). As stated by the Supreme Court, "[f]rom the beginning 'our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'" *Bowen*, 476 U.S. at 670 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (citing cases)).

[8] To the extent that the Court deems it necessary, we ask for leave of the Court on remand to amend the Complaint to add a reference to 28 U.S.C. § 1331 (federal question jurisdiction), which this Court has approved as a basis for jurisdiction for APA claims. *See Aurecchione v. Schoolman Transp. Sys., Inc.*, 426 F.3d 635, 638-39 (2d Cir. 2005) (describing Second Circuit's "policy of liberal construction of complaints" with respect to Fed. R. Civ. Pro. 12(b)(1) motions to dismiss, in which "a colorable pleading of subject matter jurisdiction upon which the district court could . . . rel[y] to adjudicate the complaint" is sufficient to allow a complaint to survive a 12(b)(1) motion, and the policy of liberally granting leave to amend to cure jurisdictional defects)).

Here, the allegations satisfy the APA; Appellant has alleged that he has been adversely affected or aggrieved by final agency action, and he has no adequate remedy through a refund action because the IRS has assessed a penalty so impossibly high that he cannot pay it in full.

A. The Complaint Satisfies the APA's Three Requirements

Agency actions, including those of the IRS, are generally reviewable under the APA as long as (1) there has been a "final agency action," (2) this "final agency action" is not committed to agency discretion by law, and (3) "Congress, subject to constitutional constraints, did not implicitly or explicitly preclude judicial review." *See Sharkey*, 541 F.3d at 87. The Complaint easily satisfies these three requirements.

1. The Penalty Assessment is a Final Agency Action Not Committed to the IRS's Discretion

The district court did not dispute that the penalty assessment was a final agency action or that the action was not committed to the IRS's discretion by law. (JA at 14, n.14). First, the assessment of § 6707 penalties is a "final agency action" of the IRS, as that assessment allows it to collect penalties from Appellant. *See* §§ 6203, 6303, 6671(a).

Second, this final agency action is not committed to the IRS's discretion by law. "[T]his restriction on the availability of APA review "'applies only in 'those rare instances where statutes are drawn in such broad terms that in a given case

there is no law to apply.'" *Conyers v. Rossides*, 558 F.3d 137 (2d Cir. 2009) (quoting *Sharkey*, 541 F.3d at 91) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)). Here, the Internal Revenue Code limits IRS's discretion to impose penalties. *See* §§ 6707 and 6111. These provisions provide a judicially manageable standard to permit review of Appellant's claims. *See e.g.*, *Salazar v. King*, 822 F.3d 61, 77 (2d Cir. 2016) (statute, regulations, and guidance from agency provided judicially manageable standards" for judging agency's exercise of discretion).

2. Congress Did Not Intend to Preclude Judicial Review of § 6707 Penalty Assessments

Appellant's claim satisfies the third requirement for APA review, that "Congress, subject to constitutional constraints, did not implicitly or explicitly preclude judicial review." *Sharkey*, 541 F.3d at 87. The "'strong presumption in favor of judicial review of administrative action'" requires that "'only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review [of administrative action].'" *Id.* at 84 (quoting *INS v. St. Cyr*, 533 U.S. 289, 298 (2001)). To determine whether there is such clear and convincing evidence, courts look to the language of the statute itself and "'the structure of the statutory scheme, its objective, its legislative history, and the nature of the administrative actions involved.'" *Conyers*, 558 F.3d at 143 (2d Cir. 2009).

Here, the statutory scheme provides that § 6707 penalties are assessable penalties not subject to review in the Tax Court. However, there is no "clear and convincing evidence" that Congress intended to restrict access to judicial review of § 6707 penalties. In the present case, the manner in which the IRS calculated the penalty has resulted in a penalty so enormous that few people could ever pay it. By *administrative* action, the IRS has effectively eliminated any possibility of judicial review through refund suits.

The legislative history of § 6707 is silent as to the meaning of the phrase, "aggregate amount invested." In temporary regulations, not subject to notice and comment and issued in a "Questions and Answers" format, the IRS defined "aggregate amount invested" as "the aggregate amount to be received from the sale of interests in the investment and includes all cash, the fair market value of all property contributed, and the principal amount of all indebtedness received in exchange for interests in the investment . . . ." Treas. Reg. §§ 301.6707-1T, A-1; 301.6111-1T, A-21.

In computing the "aggregate amount invested" in the transactions here, the IRS included the value of loans and loan premiums, which inflated the 1% penalty from approximately $7 million to approximately $160 million. The loan and loan premiums, however, should not be included because they are not part of the "aggregate amount invested." As stated in the explanation provided with the

February 15, 2011 penalty computation, the IRS disallowed the transactions here, in part, because it found that the loans were not bona fide. The very declaration submitted by the IRS to support its motion to dismiss states that the transaction involved clients "*purportedly* borrowing money from one of four banks" in the BLIPS transaction. (JA 34 (Declaration of Michael A. Halpert, at ¶ 6 (emphasis added)). Either the loans were bona fide or they were not. The IRS cannot treat the exact same loan transactions as bona fide to vastly inflate the § 6707 penalty, but not bona fide when it disallowed the tax benefits.

A review of the legislative history of § 6707 establishes that Congress did not contemplate the possibility of the current situation and never intended for the penalty to be anywhere near the amounts that the IRS has assessed in this case. Until recently, § 6707 penalties were rarely imposed. There is only one judicial decision between the original enactment of § 6707 and its 2004 repeal, and in that decision, the IRS's methodology for computing the penalties is not discussed since the amounts, totaling less than $*5,000*, were agreed to by the parties. *In re Mitchell*, 109 B.R. 434 (Bankr. W.D. Wash. 1989).

Section 6707 was enacted in 1984, and originally provided for a penalty of an "an amount equal to the greater of (A) $500, or (B) the lesser of (i) 1 percent of the aggregate amount invested in such tax shelter, or (ii) $10,000." *See* Deficit Reduction Act of 1984, § 141, Pub. L. 98-369, 98 Stat. 494 (July 18, 1994). This

$10,000 cap remained in the law until 1986, when the statute was amended to provide that the penalty would be "an amount equal to the greater of (A) 1 percent of the aggregate amount invested in such tax shelter, or (B) $500." *See* Tax Reform Act of 1986, § 1532, Pub. L. 99-514, 100 Stat. 2085 (Oct. 22, 1986).

In 1997, Congress amended §§ 6111 and 6707 to add a definition of confidential corporate tax shelters, and made the penalty for failure to register those transactions "an amount equal to the greater of – (i) 50 percent of the fees paid to all promoters of the tax shelter with respect to offerings made before the date such shelter is registered under § 6111, or (ii) $10,000." *See* Taxpayer Relief Act of 1997, § 2028, Pub. L. 105-34, 111 Stat. 788 (Aug. 5, 1997).

In 2004, Congress repealed the versions of §§ 6111 and 6707 discussed above, and overhauled the reporting and penalty regime for tax shelter transactions. Congress replaced § 6111 with a new disclosure obligation for material advisors and replaced former § 6707 with a new penalty for failure to comply with that disclosure obligation. *See* American Jobs Creation Act of 2004, § 816, Pub. L. 108-357, 118 Stat. 1418 (Oct. 22, 2004). At present, the § 6707 penalty is $50,000 for failure to report a non-listed reportable transaction, and for listed transactions, the greater of $200,000 or 50% of the gross income derived by the material advisor, or if the transaction is a listed transaction, and the material advisor acted

with intentional disregard, the penalty is 75% of the gross income derived from the transaction.[9]

The Jobs Act § 6707 penalties were intended to be *harsher* than the prior version of the statute, which strongly suggests that Congress was not aware of the impact of the IRS's method of computing the aggregate amount invested in the transaction. As stated in the legislative history,

> The Committee believes that providing a single, clear definition regarding the types of transactions that must be disclosed by taxpayers and material advisors, coupled *with more meaningful penalties* for failing to disclose such transactions, are necessary tools if the effort to curb the use of abusive tax avoidance transactions is to be effective.

P.L. 108-57, H.R. Rep. 108-548(I), 269 (June 16, 2004) (emphasis added). In addition, in his remarks at a Senate Finance Committee hearing on tax shelter reform, which led to the 2004 amendments, Senator Chuck Grassley stated that "[t]he proposal *puts teeth in the penalties* for those who skirt their current law disclosure responsibilities." *See* http://www.finance.senate.gov/imo/media/doc/81667.pdf (emphasis added). A penalty that is a percentage of the fees paid to

[9] Under the Jobs Act, "reportable transactions" are those identified by the IRS under regulation as having potential for tax avoidance or evasion, and "listed transactions" are reportable transactions that are the same as, or substantially similar to, transactions specifically identified by the IRS as tax avoidance transactions in published guidance. § 6011(c). "Material advisors" are persons who provide material aid, assistance, or advice with respect to organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction, and who directly or indirectly derives gross income in excess of certain threshold amounts. § 6111(b).

the material advisor, whether 50% or 75%, could not be "more meaningful" or have more "teeth" than a penalty equal to 1% of the aggregate amount invested, as interpreted by the IRS here.

The IRS's method of computing penalties under § 6707 conflicts with legislative history, which shows that Congress was not aware that the penalty could be imposed at the absurdly high level we see with the assessment against Appellant. Had Congress understood that the IRS would interpret § 6707 to impose penalties of this magnitude, it either would have clarified that the IRS's method of computing penalties was incorrect or expressly made the penalties divisible. Otherwise, judicial review is effectively eliminated (if *Flora* is interpreted to apply here and APA review is not available), and there is no indication in the legislative history this was ever contemplated.

The district court did not consider the implications of the legislative history of § 6707, stating instead that "the legislative history of section 6707 is irrelevant to the question of whether the APA is an instrument to obtain judicial review." (JA 52). The district court's dismissal of the legislative history as irrelevant is mistaken, as the threshold question for APA review is whether there is clear legislative intent for courts to restrict access to judicial review of an agency action. *Bowen*, 476 U.S. at 670; *Sharkey*, 541 F.3d at 84. In the typical APA case, the Court would consider whether there is a clear statement that Congress did not

intend for a particular agency action or decision to be subject to judicial review.[10] Here, the question of Congressional intent is slightly different but no less important. There is no indication from the statutory language or legislative history that Congress expected that the IRS would impose penalties at the level at issue here. Imposing such a large penalty effectively eliminates judicial review, if the full payment rule applies, because it is impossible for Appellant to pay and sue for a refund. It is unlikely that Congress understood that the IRS would set the penalty so high as to preclude review.

A review of the other assessable penalty provisions of the Internal Revenue Code further supports Appellant's position that the size of the § 6707 penalty precluding judicial review is an anomaly caused by the IRS's incorrect interpretation of the statute, not through Congressional design. Other than § 6707, which is unique, the assessable penalties under § 6671 fall into five broad categories: (1) penalties not especially onerous to the persons upon whom they are typically imposed;[11] (2) penalties determined to be divisible and thus allow the

[10] For instance, the current version of § 6707 (enacted in 2004), expressly states that the IRS's determination as to whether to *rescind* penalties for failure to report a reportable transaction under §§ 6707(c) and 6707A(d), "may not be reviewed in any judicial proceeding."

[11] *See e.g.*, § 6702 (penalty of $5,000 for filing frivolous tax return if the taxpayer does not withdraw the return after receiving notice); § 6695(a)-(c) (penalty of $50 per violation, not to exceed $25,000, for tax return preparer who fails to sign a return or furnish a tax identifying number); § 6679 (initial penalty of $10,000 for failure to file returns for foreign corporations or foreign partnerships).

taxpayer to pay a small portion and sue for a refund;[12] (3) penalties for which Congress has stated that the person subject to penalties only must pay a certain portion, such as 15% of the amount assessed, to sue for a refund;[13] (4) penalties for which the penalty is connected with some amount received by the taxpayer, such as a distribution from a foreign trust,[14] or fees received for a particular transaction;[15] and (5) penalties for which Congress has expressly foreclosed or limited judicial review.[16]

Section 6707, at least as interpreted by the IRS, is one of the few assessable penalties in which the amount of the penalty is not connected to any amount received by the person subject to the penalty,[17] and for which there is no express statutory procedure to pay less than the full amount to seek judicial review. As

---

[12] *See e.g.*, § 6672 (employer can pay the quarterly employment tax for one employee for review of trust fund recovery penalties, *Ardalan*, 748 F.2d at 1414); § 6700 (promoter can pay portion of penalty of $1,000 or 100% of gross income derived from one "activity," *Humphrey v. United States*, 854 F. Supp. 2d 1301(N.D. Ga. 2011)); § 6708 (advisor can pay the penalty for one day that he or she did not comply with the IRS's list maintenance request, *see* Chief Counsel Advisory 200646016).

[13] *See e.g.*, §§ 6694(c)(1), 6696 (preparer only required to pay 15% of penalties for understatement of taxpayer's liability to file a claim for refund).

[14] § 6677 (initial penalty for failure to file information with respect to certain foreign trusts is greater of $10,000 or 35% of "gross reportable amount," *i.e.*, the value of the property involved in the event, the gross value of the trust's assets treated as owned by the U.S. person, or the gross amount of distributions).

[15] *See e.g.*, §§ 6707(b), 6111(b)(1) (penalty of $50,000 where material advisor (who received fees of more than $50,000) failed to file report of reportable transaction).

[16] *See e.g.*, §§ 6707(c) 6707A(d)(2) (no judicial review of IRS's decision not rescind penalties).

[17] As stated by the IRS, "[f]rom the plain language of the statute, it is clear that the penalty is based on the aggregate amount invested in the tax shelter, which may have very little relation to amounts received by the party subject to the penalty." IRS CCA 200112003, at § 3.

there is no indication (unlike category 5, above), that Congress intended to prohibit judicial review of § 6707 penalties, the Court should allow review of the IRS's action outside of refund jurisdiction (unless the Court determines that the full payment rule does not apply here).

B. The Penalty Assessment Should Be Reviewed Under the APA Because Appellant Has No Other Adequate Remedy

As there is no indication that Congress intended to prevent judicial review of § 6707 penalties, the Court should allow Appellant the alternative remedy of APA review if it finds that Appellant cannot satisfy the jurisdictional requirements for a tax refund suit. The APA applies where "no other adequate remedy in a court" exists. *See* 5 U.S.C. § 704; *Sharkey*, 541 F.3d at 84. Because Appellant cannot petition the Tax Court, and he cannot afford to pay the excessive and erroneous penalties assessed, he has no adequate remedy.

Courts have recognized that in certain circumstances, a refund suit may not be an adequate remedy. For example, in *Nat. Rest. Ass'n v. Simon*, 411 F. Supp. 993 (D. D.C. 1976), the district court considered a restaurant trade association's action to enjoin implementation of a revenue ruling requiring the reporting of certain employee tip income. Failure to file the report would subject the restaurant to a penalty. The district court rejected the government's argument that the restaurants could obtain judicial review by not filing the form, being assessed the penalty, paying it, and suing for a refund since this put the restaurants "in the

untenable position of either complying, with no judicial review, or of defying the government's interpretation of their legal obligations under the code . . ." *Id.* at 996.

In *Estate of Michael ex. Rel. Michael v. Lullo*, 173 F.3d 502 (4th Cir. 1999), the court found it had jurisdiction over a mandamus action filed under 28 U.S.C. § 1361 to prevent the IRS from reducing the amount of previously allowed tax credits in order to collect additional estate tax after the statute of limitations for assessment had expired. The court acknowledged that the estate could pay the tax and sue for a refund, *id.* at 509, but did not require it to take these steps, finding that the mandamus action was "the only reasonable and efficient method by which the Estate may defend its rights, and the Estate will be irreparably harmed without it," *id.* at 512.

In *Cohen*, 650 F.3d 717, the court determined that it had jurisdiction over a tax dispute even though the taxpayers had not brought a refund claim. There, the taxpayers were challenging a procedure created by the IRS for claiming refunds for telephone excise taxes that the IRS had improperly assessed. *Id.* at 720-21. Because the only avenue for review would be for the taxpayers to comply with the procedures they claimed were unlawful, the court found that a refund suit was not an adequate remedy. *Id.* at 733.

While these cases present different factual scenarios, taken together they stand for the proposition that there can be unique and discrete circumstances in which the traditional refund action does not provide an adequate remedy, and therefore APA review of IRS action is permissible. The district court discounts this line of authority on the ground that these cases are not factually analogous to Appellant's. (JA 51-52, n. 15). Appellant's case does present an unusual factual situation for which the courts have not previously analyzed APA review. This is not a reason to dismiss Appellant's claim out of hand, but rather a reason to analyze fully whether a tax refund action is an adequate remedy for Appellant. The district court did not undertake this effort, but dismissed the action on the superficial basis that Appellant had an adequate alternative remedy of paying the remaining $60+ million of the penalty assessment and suing for a refund. (JA 51-52). This Court should hold, instead, that the IRS cannot avoid judicial review of its actions by assessing such a high penalty that full payment is impossible.

The district court further held that Appellant's claims for relief are barred by the AIA and the DJA because Appellant has an alternate remedy, refund claim. (JA 50). These statutes will not automatically prohibit a suit where, as here, a refund suit is not an "alternative avenue" for review. *See Cohen*, 650 F.3d at 727. As explained by the Supreme Court, the AIA "was intended to apply only when Congress has provided an alternative avenue for an aggrieved party to litigate its

claims on its own behalf." *South Carolina v. Regan*, 465 U.S. 367, 381 (1984). The question here is not whether there is another statutory remedy, but instead whether such remedy is "adequate" in Appellant's case. The district court says very little about the adequacy of the refund action although it is indisputable that it is not adequate for Appellant because the IRS has incorrectly assessed a penalty at an amount higher than could possibly be paid.

The cases cited by the district court do not support its holding here and do not even superficially address the issue at bar, whether the refund procedures are an adequate remedy for Appellant. First, the district court cites the unpublished decision in *Chatman v. United States*, No. CV 14-1244 PA (MANx), 2014 WL 6367110 (C.D. Cal. Oct. 22, 2014) (JA 51), in which a *pro se* taxpayer made various tax protester type arguments, such as that he was not taxable on his earned income, and sought money damages against various IRS employees. Regarding his tax claims, instead of paying the income tax assessment and suing for refund, the plaintiff brought a claim under the APA. *Id.* at *3. The plaintiff in *Chatman*, as in virtually all income tax cases, could have challenged his assessment without payment by filing a petition in the Tax Court, or he could have paid the tax, which was based on a percentage of his income, and brought a refund action in district court. *Chatman* stands for the uncontroversial proposition that where there is an assessment of income tax, if the taxpayer does not avail himself of the Tax Court's

pre-payment forum for review, his alternative method of judicial review is to pay the tax in full and sue for a refund. *See id*. *Chatman* does not address, and nor has any other court, the question presented here: whether refund jurisdiction is an adequate remedy where Tax Court review is not available and the IRS has erroneously computed the penalty assessment so that full payment is impossible? Unless the Court finds that the full-payment rule does not apply, a refund suit is not an adequate remedy.

The district court cites another unpublished decision, *Clark County Bancorporation v. United States Dep't of Treasury*, 2014 WL 5140004, Civil Action No. 13-632 (JEB) (D.D.C. Sept. 19, 2014), for support for its holding that a refund action provides an adequate remedy. (JA 50-51). This case also is distinguishable and does not address the question in this action. Unlike in the present case, the plaintiff in *Clark* did not bring a refund claim. 2014 WL 5140004 at *4. Here, Appellant has asserted a refund claim, but, as discussed in Points I and II, could not pay in full. Second, the plaintiff in *Clark* did not allege why the relief it sought would not be available through a tax refund suit. *Id.* at *9. Here, Appellant has alleged that (unless the Court holds there is limited exception to *Flora*, *see* Point I, *supra*.), the IRS's actions have prevented him from complying with the requirement of full payment, making the refund action remedy inadequate for him.

Similarly, the district court cited *Pudlin v. Office for (Not of) Civil Rights of the United States*, 186 F. Supp. 3d 288 (S.D.N.Y. 2016), and *Paganini v. U.S. Dep't of Agriculture*, 2012 WL 6822150 (S.D.N.Y. 2012), for the proposition that APA is not available to review the actions of federal agencies where there is an adequate alternative remedy. (JA 51). Neither address the question presented – whether a remedy is adequate where the IRS has impermissibly created a barrier to seeking judicial review.

The hypothetical presented at oral argument, but not addressed by the district court in its decision, illustrates the danger of the lower court's ruling. Assume that the IRS miscalculates a penalty of $30 million instead of $30,000 for failure to file a Form 3520 (Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts) to report a gift from a foreign relative. The IRS fails to correct the error, and assesses the penalty. The penalty for failure to file a Form 3520 is an assessable penalty, and thus the hypothetical taxpayer cannot obtain review in Tax Court. Must the taxpayer pay $30 million before obtaining judicial review? What if our hypothetical taxpayer cannot pay in full because she does not have the resources and likely never will? If the answer is that the taxpayer must pay and sue for a refund, otherwise the IRS can levy on her

wages, bank accounts, and other assets until the IRS's time for collection expires,[18] a refund action is plainly not an adequate remedy. The taxpayer either can never seek review and will be subject to continuous and repeated levies, or can only obtain review only after irreparable harm, such as being forced into bankruptcy.

Throughout these proceedings, we have assumed that that IRS has not intentionally inflated the penalty in order to bar Appellant from judicial review (although that is the effect of its actions). However, assume that the IRS becomes weary of a particular tax protestor and imposes a frivolous tax return penalty under § 6707(a) of $50,000, despite the statutory limit of $5,000, under a novel theory that each of the ten items on the return impacted by the frivolous position are subject to a separate penalty. The Appeals Officer also is not sympathetic to this taxpayer, and the taxpayer, who is *pro se*, cannot explain the defect in the IRS's position. Is this taxpayer now forced to pay the $50,000 assessment, which is far beyond his means, to obtain any judicial review of the IRS's intentionally illegal actions? Is the taxpayer in this hypothetical also either subject to enforced collection for decades and/or forced into bankruptcy? These hypothetical taxpayers, like Appellant, should be permitted to seek review under the APA of the

[18] In New York, the collection period can be up to 50 years under a combination of the 10-year statute of limitations for assessment under § 6502, plus two additional twenty-year periods if the IRS reduces the assessment to judgment, *see* New York CPLR 211(b).

IRS's actions so its unilateral ability to determine the size and applicability of penalties is not unchecked.

C. The District Court Erred in Finding that Appellant Sought Monetary Damages under the APA

The district court also erred in its holding that Appellant's claim was one for monetary relief and thus falls outside of the APA's waiver of sovereign immunity. (JA 49, at n. 12). This is neither an accurate characterization of Appellant's claims nor an accurate statement of the law. Appellant is not seeking money damages. The Complaint does not demand damages, but rather, seeks a judgment that the IRS improperly assessed the § 6707 penalty and thus he does not owe the remaining $60+ million, and is entitled to a refund of the amount he has already paid. (JA 18). There is a difference between damages and an equitable action for specific relief, which may include "the recovery of specific property or monies." *Bowen v. Massachusetts*, 487 U.S. 879, 999 (1988).

In two recent cases, courts have analyzed whether a claim for a refund of amounts paid to the government seeks an "equitable remedy" or money damages. First, in *Steele v. United States*, 200 F. Supp. 3d 217, 222-25 (D.D.C. 2016), the court explained that an action under the APA for return of Preparer Tax Identification Number ("PTIN") fees that the IRS allegedly wrongfully assessed was not an action for damages but a claim for other equitable relief because the plaintiffs' request for return of their PTIN fees was properly characterized as

"restitution." Relying on the decision in *America's Community Bankers v. FDIC*, 200 F.3d 822 (D.C. Cir. 2000), the *Steele* court explained:

> Similar to *America's Community Bankers*, this case "questions whether the government can retain funds which originally belonged to [the plaintiffs]." *Id.* . . . plaintiffs "are not seeking compensation for economic losses suffered by the government's alleged wrongdoing;" rather, they want the government to return that which "rightfully belonged to them in the first place." *America's Community Bankers*, 200 F.3d at 830. The Court therefore finds that, as in *America's Community Bankers*, plaintiffs' request for monetary relief constitutes restitution, not money damages, and accordingly falls under the APA's waiver of sovereign immunity.

Steele, 200 F. Supp. 3d at 222-23. Similarly, in *Resolute Forest Products, Inc. v. U.S. Dep't of Agriculture*, -- F. Supp. 3d -- , 2016 WL 7008991, at **3-6 (D.D.C. Nov. 30, 2016), the court held that a refund of an assessment by the USDA was not a damage claim barred by the APA, but a permissible recovery of specific monies unlawfully assessed.

Likewise, here, Appellant is not seeking compensation for an economic loss in the nature of damages, but a refund of an unlawful assessment, *i.e.*, the return of the portion of the § 6707 penalty he paid to the IRS. Sovereign immunity does not bar Appellant's claim for refund as that relief falls within the scope of the APA's waiver of sovereign immunity. *See Cohen*, 650 F.3d at 723 ("there is no doubt that Congress lifted the bar of sovereign immunity in actions not seeking money

damages.") (citing *Trudeau v. Federal Trade Comm'n*, 456 F.3d 178, 186 (D.C. Cir. 2006).

POINT IV

THE DISTRICT COURT ERRED IN DISMISSING APPELLANT'S CLAIM THAT THE $160,232,026 PENALTY VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION ON EXCESSIVE FINES

The § 6707 penalty assessed against Appellant of $160,232,026 is an excessive fine under the Eighth Amendment of the United States Constitution because it is grossly disproportionate to the gravity of the offense. *See Austin v. United States*, 509 U.S. 602, 622-23 (1993); *United States v. Bajakajian*, 524 U.S. 321, 334 (1988).

The district court dismissed the Appellant's claim on the ground that sovereign immunity barred Appellant's Eighth Amendment claim because it was a claim for money damages. (JA 55). This is not an accurate statement of Appellant's claims. As explained in Point III, C., *supra*, the Complaint does not demand money damages, but a refund of the penalties that he has paid and an abatement of the remaining penalties, which is a claim for equitable relief, and not money damages. (JA 17-18).

The district court also held that it did not have jurisdiction over Appellant's Eighth Amendment claim in a tax refund suit because Appellant had not made full payment, and that an APA claim is barred under the AIA or DJA. (JA 55-56). As

explained in Points I and II, the Court should confine the full payment rule to deficiency matters reviewable in Tax Court or, as explained in Point III, the Court should find that jurisdiction is proper over Appellant's APA claim because he does not have another adequate remedy.

The district court has jurisdiction to review the Eighth Amendment claim as part of the APA action. Two recent cases support this outcome. First, in *Callister Nebeker & McCullough v. United States*, 2015 WL 5918494 (W.D. Wash. Oct. 9, 2015), the plaintiff brought an APA action that included a claim that the $10,000 per day penalty imposed by the IRS under § 6708 violates the Eighth Amendment. *Id.* at *7. The district court exercised jurisdiction over the claim, and ordered further proceedings to develop the factual record to decide the merits. *Id.*

Second, in *Moore v. United States*, No. C13-2063 RAJ, 2015 WL 1510007 (W.D. Wash. Apr. 1, 2015), the district court exercised jurisdiction over a taxpayer's claim under the APA that the assessment penalties against him under 31 U.S.C. § 5321(a)(5)(B) (Bank Secrecy Act) for failure to report foreign financial accounts violated the Eighth Amendment.

In the present case, the district court stated that it did not view *Callister Nebeker* or *Moore* as authority because in *Callister Nebeker*, "the court . . . considered the plaintiff's Eighth Amendment argument after concluding that the court had subject matter jurisdiction over the case," and in *Moore*, "the court's

subject matter jurisdiction did not appear to be disputed by either the parties or the court." (JA 56, n. 18). It is perplexing why the district court viewed these courts' exercise of jurisdiction over similar Eighth Amendment claims as undermining Appellant's argument for jurisdiction, rather than supporting it. These courts correctly decided that they had subject matter jurisdiction over similar claims under the APA. Likewise, the Court should find that the district court has jurisdiction over Appellant's APA claims, including that the $160,232,026 penalty violated the excessive fines clause of the Eighth Amendment.

The district court also dismissed Appellant's Eighth Amendment claim under Fed. R. Civ. P. 12(b)(6), on the ground that it did not allege sufficient factual information. A complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 556. "[C]ourts may draw a reasonable inference of liability when the facts alleged are suggestive of, rather than merely consistent with, a finding of misconduct." *N.J. Carpenters Health Fund v. Royal Bank of Scot. Grp., PLC*, 709 F.3d 109, 121 (2d Cir. 2013). A complaint "should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th

Cir. 2009) (citing *Vila v. Inter–Am. Inv. Corp.*, 570 F.3d 274, 285 (D.C. Cir. 2009)).

The Complaint adequately pleads the elements of an Eighth Amendment excessive fines claim, *i.e.*, "a lack of proportion between the gravity of the offense and the harshness of the penalty." *United States v. Milbrand*, 58 F.3d 841, 845 (2d Cir. 1995). In ruling that the Complaint stated no claim for violation of the Eighth Amendment, the district court looked at two paragraphs of the Complaint:

> 46. The § 6707 penalty of $160,232,026 is grossly disproportionate to the gravity of the alleged misconduct: Mr. Larson's failure to file two tax shelter registration forms.
>
> 47. The § 6707 penalty that the IRS seeks to collect, $67,661,349, also is grossly disproportionate to the gravity of the alleged misconduct: Mr. Larson's failure to file two tax shelter registration forms.

(JA 17, 56-57). However, the Complaint should not be "parsed piece by piece," but looked at as a whole. The Complaint contains other factual allegations (incorporated by reference into the cause of action under the Eighth Amendment (JA 17, ¶ 44)) that support a finding that Appellant's Eighth Amendment claim is plausible, *i.e.*, that Appellant can show a lack of proportion between the gravity of the offense and the harshness of the penalty. Specifically, the Complaint alleges that the IRS assessed penalties against him of $160,232,026 based on his failure to file two forms, ¶¶ 6-9. These penalties were reduced to reflect payments from co-

promoters, but at the time of the filing the Complaint, the IRS was still seeking $67,661,349 from Appellant, ¶ 20. (JA 10-12). These allegations, with those stated above from ¶¶ 46-47, plead a violation of the Eighth Amendment, as it is plausible that a penalty of over $160 million for the mere failure to file two forms is an excessive fine. *See e.g.*, *Brown v. Transurban USA, Inc*., 144 F. Supp. 3d 809, 838 (E.D. Va. 2015) (allegations that penalties and fees for toll violations were several hundred thousand times the value of the unpaid tolls stated a claim for violation of the Eighth Amendment).

To support its dismissal under Fed. R. 12(b)(6), the district court cited to *Drimal v. Tai*, 786 F.3d 219, 223 (2d Cir. 2015), in which this Court found that the district court had erred in finding that the complaint was sufficient even though the claims were asserted in a conclusory fashion. (JA 56). There, the complaint alleged that several FBI agents violated a federal statute that provides for civil liability against government agents who fail to "minimize the interception of communications not otherwise subject to interception." *Id.* at 221. The complaint alleged, in a conclusory fashion, that the defendants intercepted marital telephone calls, but did not allege that the required element that the defendants had violated the duty to minimize the interception. *Id.* at 223. *Drimal* does not support dismissal here because the Complaint includes the elements of an Eighth Amendment claim, *i.e.*, that the penalty is a punitive fine, the offense was failure to

file two forms, and that the penalty was grossly disproportionate to the harm to the government.

Given that the IRS has assessed an over $160 million penalty against Appellant, and is still seeking to collect approximately $61 million from him, for failing to file two forms, plausible and serious Eighth Amendment concerns need to be addressed, and the Court should reverse the dismissal, and remand the Eighth Amendment claim to the district court for a decision on its merits.

CONCLUSION

The decision of the district court dismissing the Complaint should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

MEGAN L. BRACKNEY
KOSTELANETZ & FINK, LLP
7 World Trade Center
New York, New York 10007
(212) 808-8100

REED J. HOLLANDER
NELSON MULLINS RILEY & SCARBOROUGH, LLP
4140 Parklake Avenue, Suite 200
Raleigh, North Carolina 27612
(919) 329-3800

C. WELLS HALL, III
NELSON MULLINS RILEY & SCARBOROUGH, LLP
100 North Tryon Street, 42nd Floor
Charlotte, North Carolina 28202
(704) 417-3000

Attorneys for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 13,697 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times Roman 14-point font.

Dated: May 23, 2017

Respectfully submitted,

/s/ Megan L. Brackney
MEGAN L. BRACKNEY
KOSTELANETZ & FINK, LLP
7 World Trade Center
New York, New York 10007
(212) 808-8100