MEMORANDUM OF LAW: PROCEDURAL ERRORS AND ABUSES

Defendant doesn't skulk. Trial judge and magistrate skulked from Day One, never ruling or even contacting them during the 9 ensuing months, as to Defendants' Motion for More Definite Pleadings. Trial judge thus prevented Defendants from formulating their Answer. Failing to even suggest or schedule status conferences during these 9 months, trial judge suddenly (within hours of receiving Magistrate findings) ruled (de novo!) on both pleadings motions and summary judgment motion despite having only received Defendants' responses to the Magistrate's Reports and Recommendations the prior afternoon. This reversible error of basic litigant Due Process rights rivals or exceeds the tainted Fuentes v Shevin trial (407 US 67 (1972)). Other trial-level abuses of discretion abound:

- Rewarding Plaintiff's utter failure to sustain its burdens of proof, transferring the entire burden to non-movant Defendant-- in a summary judgment ruling. Genuine disputes of material facts abound.
- Permitting Plaintiff's arrogant demands for vastly expanded power over thought and word, using a tarted-up constellation of innuendo and tendentiousness, while insulting, vilifying and crushing the citizenry in plain Taxpayer Bill of Rights ('TPBOR') violations. (We do not acknowledge being "taxpayers", but as long as Plaintiff and the District Court characterize or treat us as such, they've got to pay the price and abide by the TPBOR.)
- Failing to require high levels of specificity regarding Plaintiff fraud/misrep averments. see FRCP 9b; Bender v Southland Corp 749 F.2d 1205 (6thCir 1984)

- Permitting vexatious Plaintiff, with frivolous case support, to somehow tar Defendant as 'frivolous'
- Not only failing to invoke res judicata or collateral estoppel regarding any matter relating to Defendants' book *Cracking the Code* – attacks on which in the very same District Court IRS decided it would Voluntarily Dismiss (with adjudication on the merits for Defendants per FRCP 41) and which would inevitably result in throwing out IRS's case… but additionally incorporating in her rulings the same barred/estopped calumnies in order to illegitimately prop up fraud/misrep findings and to enjoin Defendants' thoughts, words and actions
- Denying Defendant's inviolate right to jury trial
- In the face of a vast IRS record of intense scrutiny, deliberation and intrigue, plus orchestrated, sustained media vilification campaign against Defendants, characterizing IRS refunds as "erroneous".
- Failing to aver or show that the Attorney General authorized this suit, a required element without which this case could not be brought. No, it's not in the record.

District court's Summary Judgment must be reversed outright. If remanded (for jury trial), trial judge must be instructed to follow TPBOR restrictions (inter alia, no Defendant vilification), to permit extensive Defendant discovery, and to instruct the jury on correct scienter requirements in fraud/misrepresentation its deliberations.

How should these numerous egregious denials of Defendants' due process rights be reviewed? We quote Baldwin County Welcome Center v. Brown, 466 US 147 (1984):

> *"Rule 8(f) provides that "[a]ll pleadings shall be so construed as to do substantial justice." We frequently have stated that pro se pleadings are to be given a liberal construction. Eg,* Haines v. Kerner, *404 US 519 (1972). If these pronouncements have any meaning, they must protect the pro se litigant who simply does not properly denominate her motion or pleading in the terms used in the Federal Rules."*

A. District Court denied Defendants' Constitutional right to be heard.

The Fifth Amendment plainly in mind, the Fuentes Court holds:

> *"…the central meaning of procedural due process [is] clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." Baldwin v. Hale, 1 Wall. 223, 233. See* Windsor v. McVeigh, *93 US 274;* Hovey v. Elliott, *167 US 409;* Grannis v. Ordean, *234 US 385. It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."* Armstrong v. Manzo, *380 US 545, 552."*

Trial judge's abuses of discretion savage each such litigant protection; these protections are from Natural Law, but were codified 900 years ago:

> *"No man shall be disseised, etc unless it be by the lawful judgment; that is, verdict of his equals, or by the law of the land (that is, by the due course and process of law)"* Coke (2 Inst. P46 commenting on 29th chapter of Magna Carta).

Trial judge timely received *but for 9 months did nothing* with Defendants' Motion for More Definite Pleading as to IRS averments of fraud/misrepresention, despite FRCP 9(b) requirement of specificity re each such averment. FRCP 72(b) requires a *prompt hearing* of defenses dispositive of the claim. Defendants could have prepared dispositive defenses… upon receiving timely rulings on said Motion. Instead, they were maneuvered by trial judge delay and stony silence, their elementary defense preparation (Answer, discovery—basics) were confounded; no specificity of fraud averments was provided; *no contact made by the court* and no reason given during the entire 9 months.

Defendants were thus unable to formulate an appropriate Answer (foundation of any defense), and frozen out of counterclaims, denials, discovery, document production and

interrogatories. Railroaded Defendants were utterly denied ALL these tools. What does the Supreme Court say about such manipulation?

> *"The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."* Conley v. Gibson, 355 US 41, 45 -46 (1957).Cf. Maty v. Grasselli Chemical Co., 303 US 197 "

> "*Because of understandable, self-interested fallibility of litigants, a court does not decide a dispute until it has had an opportunity to hear both sides…*" Fuentes.
> *'Hearing' means each side "must be permitted to conduct discovery before court-entered summary judgment*" Vance v United States #95-5391 (6thCir 1996).

> *'The principle, stated in this terse language, lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."* Windsor v. McVeigh, 93 U.S. 277 , 278

This pro se Defendant expected a prompt ruling on its More Specific Pleading Motion, then to formulate and file Answer, then to move for Discovery. This is utterly reasonable.

Applying settled basic Due Process law, to this case, then, we ask:

* When did District Court rule on Defendants' PRE-Answer Pleadings Specificity motions? *Why, after ruling on NOTHING for 9 months, the day it issued summary judgment for Plaintiff. Was that a "meaningful time"?*

* When were Defendants, awaiting rulings on pleadings motions, able to discover, or depose? *Why, not at all. Was that a "meaningful manner"?*

* Did Magistrate see fit to arrange a single interaction with Defendant in 9 'prompt' months? Perhaps a status conference? (eg Chocallo v IRS #06-539 (EDPa. 2007) ***Nope.***

* Did litigants ever get to test the merits, as Conley instructs? ***Uh-uh***.

Isn't this just excellent American jurisprudence?

> *"A court's dignity derives from the respect accorded its judgments. That respect is eroded, not enhanced, by excessive recourse to rules foreclosing consideration of claims on the merits.*" Degen v United States #95-173 (Supreme Court 1996)

B. New Issues on Appeal?

> *"Appellate courts will consider new issues when the proponent of the new issue can show that manifest injustice would otherwise result*." *Freeman v Ramada Inn Inc* 805 F.2d 1034 paragraph22, in pro se case quoting *Kline v Johns-Manville* 745 F.2d 1217, 1221 (9thCir 1984).

If elements of Defendants' appeal briefs appear to be "new" and our text rather long, perhaps it's because, until now, District court and magistrate have muzzled and kangarooed pro se Defendants, citing obscure rules only applicable in the Eastern District of Michigan (see, for instance, p1 of Order Denying Defendants' Motion for Reconsideration, citing 'Local Rule 7.1(g)(3)'. We show herein how grossly misapplied was this Local Rule by trial judge.

C. Numerous disputes of material facts

> *"26 USC §7491 (TPBOR) shifts the burden of proof to the Commissioner where the taxpayer "introduces credible evidence with respect to any factual issue relevant to ascertaining the (taxpayer's) liability*." Preslar v Comm'r of Internal Revenue, 167 F.3d 1323,paragraph91 (10thCir. 02/16/1999)

Award of summary judgment to a Movants requires: 1) That no material factual disputes remain, *whether in pleadings, affidavits and/**or** other written materials constituting the proffered evidence* AND 2) *if* material facts are 100% undisputed, in applying the law to these taken in lights most favorable to Non-Movant, Movant is still clearly entitled to judgment.

Trial judge failed wholly 3 basic duties—obstructing Defendants' Answer filing, ignoring material fact disputes and those likely to arise on discovery/deposition and, bizarrely, considering all documentary materials in lights most *favorable to Movant*. The "trial" judge thus runs entirely afoul of Adickes v S.H. Cress & Co., 398 US 144 (1970) and Celotex Corp v

Catrett, 477 US 317 (1986). 1996 TPBOR 26 USC 6201(d) additionally imposes on IRS, in any court proceeding where a *taxpayer disputes income* reported on information returns (W-2, 1099 or K-1) filed by a third party, the burden of producing *reasonable and probative* information concerning the deficiency.

> *"(T)he court is called on to sanction, by its judgment, an alleged obligation in a proceeding in which the existence, validity and extent of the obligation, the existence of the data, and the correctness of the computation may be put in issue."*
> Pope v United States 65 SCt 16 (1944).

The trial judge, in a single morning/2 hour multi-motion mish-mash-session, failed to discern that facts on record which might favor Non-Movant Defendants—underlying data (like 52 actual checks filed nearby), or correctness of IRS's computations, or, well, anything.

> *"The **plaintiff** must present more than a mere scintilla of evidence in support of his position; the plaintiff must present "evidence on which the jury could reasonably find for the plaintiff*." Anderson v. Liberty Lobby, Inc. 477 US 242, 252 (1986)."

The most pro-IRS pro-Summary Judgment Movant interpretation of the record here is simply "he said-she said". Defendants' record-building was stunted by judicial starvation. Plaintiff's record-building, however, was stunted by Plaintiff's own arrogance and laziness. IRS, secure it could vilify-to-victory, especially against pro se defendants in E.D. Michigan, lazily failed to document its case, relying *nearly entirely* on staff 'affidavits', ignoring easily-obtained highly-probative third party evidence in plain view. These trial judge errors require outright reversal.

> *"FRCP56(c) mandates that summary judgment (Non-Movants) be afforded notice and reasonable opportunity to respond to all the issues…"* Routman v Automatic Data Processing Inc, 873 F.2d 970 (1989 6thCir)".

It's not so hard to be fair, now, is it?

> "'***We have difficulty comprehending why the Government repeatedly fails to prove this element more carefully since the Government's burden is so simple and straightforward.***'" United States v Brown 616 F.2d 844, 849 (5thCir 1980)

D. Willful IRS TPBOR violations damage integrity of judicial proceedings

IRS fixes the conclusory label 'taxpayer' onto Defendants. Millions in this nation are not. If that designation *were* correct however, they have fouled their own nests.

> *TPBOR sec 89. Illegal Tax Protester Designation*
> *A. (1) (IRS) officers and employees… **shall not** designate taxpayers as illegal tax protesters (or any similar designation), and*
> *(2) In the case of **any such designation made on or before July 22, 1998***
> ***a. shall remove** such designation from the **individual master file**...*

Despite this simple, firm order to treat citizens with respect, IRS briefs continue its decade-long defamation of Defendants as "illegitimate tax protesters" *and similar designations (eg footnote at IRS Reply Brief p8).* TPBOR permits no exceptions to this prohibition, and sanctions intentional characterizations more sternly than negligent ones.

Its briefs prove IRS continues to haughtily besmirch Defendants in violation of TPBOR sec 89. For trial judge to permit into the record gross per se violations of vital citizen protections in a recent celebrated statute "*seriously affect[s] the fairness, integrity or public reputation of judicial proceedings*," United States vs Fraser, 448 F.3d at 841 (6th Cir). IRS should be sanctioned to the full extent allowed under TPBOR ($1 million).

In addition to TPBOR proscription, equity weighs in: Judge Friendly put it well

> "*An action to recover a tax refund is an action for restitution, and the plaintiff in such an action can prevail only by showing an affirmative ground that will move the conscience of the court*." United States v Russell Manufacturing, 349 F.2d 13 paragraph17 (2ndCir 1965). *"If the Government had made the refunds with the deliberate purpose that, having thus barred the taxpayer's recourse to the Court of Claims, it would initiate an action to recover the refunds as erroneously made, we cannot imagine that any court would find equity in its suit… The Government had no more reason for thinking the payments "erroneous" when it brought this suit in November, 1963, than when the highest legal officer of the Internal Revenue Service directed them to be made two years before; every fact known to it then was known earlier". Id* at paragraph20

Russell sounds uncannily like the instant case. IRS years'-long deviousness, planned centrally in its Frivolous Returns Headquarters, together with a slothful assumption that it always gets what it wants, should move this Court to reverse with prejudice.

E. Unproven/unspecified accusations of fraud/misrep 'bootstrap in' IRS 2002 claims

The trial judge foreclosed defenses against IRS accusations of fraud/misrepresentation regarding any yr2002 matter (ie, beyond 2 year statute of limitations), by failing to enforce FRCP 9(b) requiring: "*In all averments… the circumstances constituting fraud or mistake shall be stated with particularity*." Swierkiewicz *v* Sorema NA *534 US 506, 514 (2002).* This Circuit holds that FRCP 9(b) requires "at minimum, (allegation of) time, place and contents of the misrepresentation *upon which he relied*." Bender v Southland Corp 749 F.2d 1205 p'graph53 (6thCir 1984)

Of course, establishing fraud/misrepresentation is *logically impossible* when ruling on summary judgment motions, where as yet wholly unproven 'facts' like **Defendants' intents** must be construed wholly in Defendants' favor. We suppose it's possible a Non-Movant *could* agree 'there is no genuine dispute' that *their own intent* was fraudulent. But that's rather unlikely, wouldn't you say? Actual proof (beyond 100% reversible-error construal) of fraud/misrep hinges heavily on intent to deceive—making false representation of material facts with *intent to deceive, reasonably relied upon* to the other person's detriment.

Trial judge grossly erred, a) *presuming* fraudulent Defendant intent without properly specific circumstances averments AND b) torpedoing Defendant's Answer+Discovery AND c) *construing Defendants' own minds against them*! Meanwhile, the record shows Defendants' heavily-researched, Supreme Court-buttressed writings and entire pattern of conduct indicate

open, honest belief in, support for and advocacy of the rectitude of their position. Moreover no act of false representation exists, *nor could trial judge ascribe such to Defendants*, with their vast record of unimpeachably open, consistent, heavily-documented beliefs that government must operate within constitutional limits—all this is demonstrably non-fraudulent.

A district court abuses discretion when "*we are left with a definite and firm conviction that the District court committed a clear error of judgment*." United States v. True, 250 F.3d 410, 422 (6thCir 2001). Trial judge here blatantly denied Defendants' *day in court to protect their reputations*, swallowing IRS's unproven defamatory assertions whole—in order to complete a reversibly-tainted chain leading to IRS-convenient one-stop-shoplift of 2002 claims. Devious obstruction of or refusal even to permit Defendants to Answer, depose or produce documents showing lack of deceptive intent, or acts constituting deception, is significant abuse of discretion

> "*When reviewing for plain error, this court must decide whether (1) there was (district court) error, (2) …error was plain, (3) …plain error affected…defendant's substantial rights, and (4) the plain error seriously affected the fairness, integrity or public reputation of judicial proceedings*." United States v. Fraser, 448 F.3d 833, 841 (6th Cir. 2006).

All 4 error elements are found regarding the other fraud/misrep element: *Reasonable Reliance to Detriment*. Whistling past Bender, IRS laughably suggests its huge, seasoned Frivolous Returns staff, focusing for years, visiting, reading and printing Defendants' website, were somehow 'bamboozled'-- an entire Federal Department becoming weirdly 'reasonably reliant' on Defendant's 'trickery'. Yet Defendant was forbidden to discover and show this key underpinning of fraud/misrep findings simply isn't there. Trial judge ignored all proofs and averments of this on record, just as she ignored, and even twisted, the Voluntarily Stipulated Facts of the book-banning case between these litigants, also on record in District Court.

Moreover, IRS could not credibly allege detrimental reliance with specificity in

its Complaint, *else it would perjure itself*. Ruling on far less-buttressed records,

> *"…plaintiffs' complaint does not allege what misrepresentations (or omissions) of material fact [Defendants] made to the plaintiffs that they reasonably relied upon to their detriment*" Bender, 749 F.2d at 1216 "*Accepting everything Plaintiffs state as true, they did not detrimentally rely*" Yax v UPS, 196 FedAppx 379, 2006 (6thCir 2006).

This Court must dismiss with prejudice all 2002-related elements of IRS's complaint.

F. "Frivolous & vexatious": Sure fits Plaintiff; grossly inapt to tag on Defendants

Embrace of repeated IRS characterizations of Defendants as "Frivolous/Vexatious" ('F&V') gravely enhances abuse of trial discretion and error. IRS briefs continue hugely reliant on calumnies, hoping courts consider citizens "inconvenient", 'vexatious'… blameworthy *as they* press government agencies to live within the Constitution. IRS was somehow able to obscure its Voluntary Dismissal regarding Defendants' book, which trial judge ignored, and, "being so ignorant" of this less-than-1-year-old Dismissal on file in her own court, denounces the book as fraudulent and frivolous in her very ruling (p8). Collapse of false F&V characterization collapses the IRS case.

F&V cannot be tagged to either Defendant without both 1) individual determinations *of reckless states of mind*, AND 2) wholesale disregard of their diligent citizen research of the vast US Code. Defendants' arguments are consistent, logical, Supreme Court precedent-loaded. Challenging government to live within the Constitution, asserting arguments deemed by the Complacent to be "unprecedented" or "inconvenient", vexes *someone* in government. Why, Plaintiff Thurgood Marshall vexed 17 States continuously during 1950-54. Telephone Excise Tax plaintiffs very much vexed the IRS with their rude, impertinent belief that the word **"and" means nothing other than "and"**. Surely, to vex IRS is never "OK". With great consistency IRS brutally crushes citizen inquiry and challenge, preferring to run amok among doltish,

compliant Sheeple. We trust it's still "OK" to "vex" courts by defending oneself with precedent, reason and fact from a predatory plaintiff. Rule 11 requires that

> *"to the best of [an attorney's or unrepresented party's] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, . . . claims, defenses, and other legal contentions…are warranted by existing law or by a nonfrivolous argument for the extension, modification* ***or reversal of existing law*** *or the establishment of new law" and "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." FRCP11(b)(2)-(3).*

Is it frivolous to

- pioneer digital USC searches back to 1862, learning long-obscured definitions of key 26 USC Defined Terms like "trade or business", "wage", "employee", "include", "State"? Is it frivolous to laboriously document that such definitions *have never changed*, thru decades and centuries, and to call for agency adherence in practice?
- engage *for hours every day* over 7 years in thoughtful debate on these findings with *any* who so desires (including, no doubt, countless times with Frivolous Returns staff)?
- document dozens of standing Supreme Court rulings and Executive Branch pronouncements from 1914 forward showing the Income Tax is an Excise Tax, and that only in this way can it conform to Constitutional requirements?
- under Rule 11 to demand that IRS tax *only what governing statutes permit it to tax*? Or, for that matter, to argue "for even" the reversal of existing law? Rule 11 says to so argue is NON-frivolous. (Defendants reach *no further* than arguing for IRS *conformance to the Constitution and existing law*!)

Were Defendants accorded Rule 11 rights in District Court to show their factual contentions, including such key factors as their studious intents were *'likely to have evidentiary support after a reasonable opportunity for further investigation or discovery'*, during months of non-response

to their pleadings motions or the one day rush to summary judgment?' Absolutely, reversibly not.

If despite Rule 11 protections, this Court too wishes to "*disregard the interest of a State in providing a forum for its citizens"* to press for Rule of Law Johnson & Hardin Co vs NLRB ElecCitation 1995 FEDApp.0091P (6thCir), to discourage defense of Common Law and Constitutional rights to life, livelihood and property when assaulted by agencies of vast powers, and to herd The Sheeple back into their pens, then Defendant should be judged "F&V".

99% of all sanctionings for frivolity/vexation are, of course, directed at plaintiffs, for the obvious reason that d*efendants aren't the ones plastering courts with garbage claims*. Contrariwise, Defendants have rights to defend, thougth perhaps not in E.D.Michigan.

Relevant statutes make clear the "F&V" tag applies cannot apply to Defendants:

> ***Section 7482. Courts of review.*** *The United States Court of Appeals and the Supreme Court shall have the power to require the taxpayer to pay to the United States a penalty in any case where the decision of the Tax Court is affirmed and it* ***appears*** *that the appeal was* ***instituted or maintained primarily for delay*** *or that the taxpayer's position in the appeal is* ***frivolous or groundless****.*

Neither 'instituting', multiplying, maintaining, nor maneuvering primarily to delay, Defendants were denied primal rights to Answer vicious Complaints alleging generalized fraud. Defendants have a heavily researched bona-fide defense, and dispute numerous key factual elements asserted by IRS. Defendants can't be sanctioned for that.

This Court should instead adjudge *IRS as Frivolous & Vexatious*. IRS *instituted* this action, "*maintaining"* it (despite *grossly delaying* its review of 2002 returns 4 years) far past the statute of limitations. Montana. v. United States, 99 SCt 970 (1979) makes clear what F&V **really means** regarding powerful agencies *suing citizens*:

> "*To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending*

> *multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions*." Id,graf19

Yes, Montana denounces litigious 'vexation'. And yes, Montana bars IRS from harassing citizens after its FRCP 41 Voluntary Dismissal /adjudication-on-merits that Defendant Peter Hendrickson's book *CtC* doesn't promote abusive tax shelters. or otherwise violate any part of sec 6700.

"(*F)rivolous" means "[g]roundless[,] . . . with little prospect of success . . . ."* United States v. Gilbert, 198 F.3d 1293, 1299 (11th Cir. 1999). In addition to the frivolity/vexation of propping its case atop estopped/barred/res judicata'd 'CtC-is-evil' foundation of sand, IRS proffered no Dworkin-1099 affidavits, despite TPBOR sec6201(d) obligation to do so. *Especially* in context of summary judgment motion, IRS proffers are virtually groundless and thus frivolous.

Again from Gilbert:

> *"(T)he term "vexatious" embraces the …purpose of irritating, annoying, or tormenting the opposing party*. *See* Webster's Third New International Dictionary 2548 (1986); *see also* United States v. Knott, 256 F.3d 20, 29-30 (1st Cir. 2001). See also United States v. Sherburne, 249 F.3d 1121, 1126 (9th Cir. 2001) (*noting "vexatious" "includes an element of* ***maliciousness****, or intent to harass*").

The long history of IRS persecution of Defendants fits this definition only too well: IRS has long sought to suppress Defendants' free speech rights, and now defames them while demanding unconstitutional injunctions that they perjure themselves until the day they die.

Keyword searches of 'frivolous' or 'frivolous & vexatious' among *all* Circuits and Supreme Court show that 98%+ of such cases involve sanctioning irritating court-clogging, sloppy behavior and irritating repetitive pleadings of **plaintiffs.** It's obvious why. *Defendants* don't initiate legal actions that vex and clog the courts with frivolous, wasteful, unsupported

claims…but some plaintiffs do. Defendants are expected to defend themselves. In the Departments of Sloth, Deceit and Whining, this Plaintiff

- received monies on behalf of Defendant from PM, all while its Frivolous Returns Division hit Defendants' website *untold times*
- then received Defendant's timely well-documented requests for return of said monies, with good faith, correctly using Plaintiff's own forms and procedures,
- then returned some of said monies to Defendants, carefully allocating the rest in a remarkable demonstration of intricate familiarity with Defendants' entire case,
- after a period of 4 years' slothful delay, *outrunning* the Statute of Limitations as to 2002, sued, while lazily violating TPBOR prohibitions against launching its vicious Dirty Dozen vilification campaign
- then told the court to disregard the statute of limitations and just accept that Defendants "are fraudulent" (ie, they have fraudulent states of mind *and* somehow *caused* IRS, with its vast staff, giant computerized cross-checking engines and its unbelievably intense focus on Defendant's website… to somehow "reasonably rely" on Defendants' "false representations" to send Defendants' funds back, then
- finally, secure that trial judge foreclosed even Defendants' right to file an Answer or discover/depose, moving for summary, sought to close off Defendants' ability to show otherwise.

It also bears noting in regards F&V that Plaintiff's brief suffers 'shortness of breadth'. Supreme Court support for IRS's key elements is, to put it charitably, lacking. We urge 6th Circuit's fine clerks to read *all* Plaintiff-cited cases… because the great mass of them either help Defendant or quote mere dicta. Together, numerous mis-directional *Plaintiff citations are*

frivolous, vexatious and must be sanctioned. Examples: Baral (only applicable to 26 USC 6511-12-13 situations (and thus wholly inapposite), US v Guy 978 F.2d 978 (6thCir 1992) (amended return signed by Guy agreeing all his receipts were 'income', erroneous refund based on invalid return due to divorce factors, and thus wholly inapposite); O'Gilvie v United States 519 US 79 (1996) (not even dicta are apposite. Quoting from opinion: "*The issue before us is whether (26 USC 104(a)(2) applies to punitive damages received by a plaintiff in a tort suit*"); and United States v McRee 7 F.3d 976 (11thCir 1993) (Inapposite holding: Government may reclaim erroneously issued funds where recipient did nothing to induce issuance)

Whether lazy/sloppy or intricately scheming, IRS actions are frivolous, irritating, overbearing and vexatious. Defendants have every right to defend themselves with any legal argument and dispute of fact at their disposal. That's what Defendants do!

Given that IRS wholly depends for its case on tagging Defendants as F&V and further defaming them, but has instead exposed its own frivolous, vexatious laziness like so many plaintiffs, this Court should reverse with prejudice and sanction IRS to the full extent of allowable damages under TPBOR.

G. DoJ/IRS Voluntary Dismissal of Book-Banning 6700 Action Estops Injunction against or Denunciation of Book's Arguments.

> "*One bite at the apple is enough.*" "*…for purposes of issue preclusion… 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.*" Employees Own FCU v City of Defiance 752 F.2d 243 paragraph23 (6thCir 1985).

In March and August 2004, proving beyond doubt it was hovering intently above its intended prey for years, DoJ/IRS obtained a summons to a) learn the entire list of Defendants' book-buying-customers, and b) to suppress the book Cracking the Code ('CtC') itself claiming Defendant's book violated 26 USC 6700 for 'promoting abusive tax shelters'. In March 2005

DoJ/IRS moved for voluntary withdrawal of this action (all above items on record). Defendant, prevented from filing an Answer by District Court, was unable to counter-claim or otherwise defend citing res judicata/estoppel of the instant action. Such defense should be unnecessary, given that the same parties were before the same judge one year earlier! FRCP #41 mandates that

> *"an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs… a notice of dismissal operates as an adjudication upon the merits* ***when filed by a plaintiff who has once dismissed in any court*** *of the United States or of any state an action based on or including the same claim."*

> "*The law of collateral estoppel precludes Petitioner from relitigating factual issues determined against them.*" Parklane Hosiery v Shore 99 SCt 645 (1979); supported: Union Carbide v Commissioner of Internal Revenue 671 F.2d 67 (2nd Cir 1982).

This Circuit has ruled:

> "*To recover, Plaintiffs' reliance on the alleged misrepresentation must be reasonable*. Novak v. Nationwide Mut. Ins. Co., 599 N.W.2d 546, 553-54 (Mich. Ct. App. 1999); Nieves v. Bell Indus., Inc., 517 N.W.2d 235, 238 (Mich. Ct. App. 1994). *Unreasonable reliance includes relying on an alleged misrepresentation that is expressly contradicted in a written contract that the plaintiff reviewed and signed.* Novak, 599 N.W. 2d at 553-54; Nieves, 517 N.W.2d at 237-38" Aron-Alan, LLC v Tanfran, Inc, #06-2087 (6th Cir 2007).

In the instant case, express written contradiction is IRS's Voluntary Withdrawal of its sec 6700 action, constituting its unilateral, irrevocable agreement that Defendant's positions in CtC are meritorious, and forever barring a contrary use such as to prop up a fraudulent, frivolous, or abusive shelter, tax protester, or any related charge.

Despite *Parklane*'s, *Montana*'s, *Aron-Alan's* and FRCP41's crystal clarity, IRS *continues to attack CtC* throughout its briefs and in its publicity stunts (violating TPBOR too). CtC is indeed an excellent précis of Defendant's thinking. This Court should rule as a matter of law, that a) IRS is deemed to have *accepted the merits* of CtC in *all its particulars* which they

explicitly or implicitly attacked as 6700 violations, b) IRS be estopped henceforth from attacking Defendant using anti-CtC vilification, and c) in light of this key FRCP #41 Voluntary Dismissal and 6thCircuit precedent, summary judgment be awarded in favor of Defendant.

H. IRS's intensive hovering over Defendants' tax situation eviscerates entire "Erroneous" refund case

"*The government bears the burden, in a section 7405(b) action, of establishing that the refund in question was indeed erroneous*" Soltermann v. United States, 272 F.2d 387 (9thCir 1959). The record already shows that IRS's Frivolous Returns Department *hovered intensively* over Defendants' website, their taxes, even CtC sales since 2003. IRS held Defendants' 2002-03 monies well into 2004. Thus it's impossible for IRS to establish *reasonable detrimental reliance* to break through the 2 year statute of limitations on its 2002 claims. IRS received W-2s, 1099s, Defendants' 4852-returns, precisely timed & allocated refunds, and then launched its court and PR attacks as a calculated cat-and-mouse strategy. Nothing accidental. All is on record. Plaintiff's Brief's p22 case citations all involve accidental (oops) payments. See for instance, US v MacPhail, 313 FSupp2d 729 (SDOhio 2004) "*the erroneous refund was made because the 1996 overpayment was credited to Defendant MacPhail's 1997 tax return*".

Yes, Scheming and Deliberate...This is why IRS cannot prevail in any 'erroneous' refund suit. Far from erroneous clerical errors emanating from mistaken clerks or computers, Defendants' returns, based on Forms 4852, were easily identified, heavily-flagged tiny minority of all returns—1/25,000th. And of these, "Dirty Dozen Defendants" formed a return cluster *countable on the 12 grasping fingers of two IRS hands*.

Brookhurst v United States 931 F.2d 554 (9thCir 1991), like MacPhail, clearly defines what is erroneous: (refund of fully paid up tax). See also United States v Young 79-2 USTC

(CCH p9609 1979) (IRS mistakenly credited payment to wrong account). Each of these involve clerical error. Others involve deceit, plus reasonable detrimental reliance by a vast impersonal machine. The record shows neither situation obtains here.

Consider the convergence of this strategically-deliberate refund to Defendants, so closely timed around IRS's 2005 voluntary dismissal of its 6700 action, and compare it to the *Russell* situation analyzed by Judge Friendly:

> "*Unlike the mine run of cases allowing recovery of refunds, in this instance the Government's payment was* ***not*** *made in the mistaken belief that the merits of the claim required it; on the contrary, the Service indicated that the issue decided against it by a court of high authority would be relitigated in the future. Here, we have no clerical misunderstanding,* Woolner Distilling Co. v. United States, 62 F.2d 228 (7 Cir. 1932); Rushlight Automatic Sprinkler Co. v. United States, 294 F.2d 572 (9 Cir. 1961), *nor controlling decisions overruled or undermined,* Talcott v. United States, 23 F.2d 897 (9 Cir.), cert. denied, 277 U.S. 604, 48 S. Ct. 601, 72 L. Ed. 1011 (1928); United States v. Green, 28 F. Supp. 549 (E.D. Pa. 1939), *nor even a simple change of mind by the Service on the substantive law,* United States v. Tuthill Spring Co., 55 F.2d 415 (N.D. Ill. 1931); United States v. Heilbroner, 22 F. Supp. 368 (S.D.N.Y.), aff'd, 100 F.2d 379 (2 Cir. 1938); United States v. Ellis, 154 F. Supp. 32 (S.D.N.Y. 1957), AFF'D, 264 F. 2D 325 (2 CIR. 1959). *The Service's position on the merits when it made the refund is precisely what it propounds today, and it is hardly possible for the Government to call this a mistake, let alone one responsible for the refund. We limit our decision to the unusual facts here presented, where the Government deliberately made what it then considered an erroneous refund to a taxpayer prevailing in a court decision whose authority remains unimpaired*." United States v Russell Mfg, 349 F.2d 13 paragraph20 (2ndCir1965)

The Russell and Hendrickson fundamental factual situations could not be more convergent. Unless Judge Friendly or his reasoning are disgraced in this Circuit, the IRS "erroneous" refund case collapses entirely. We urge summary judgment for Defendants.

I. Proposed Injunctive Relief Outrageous; It Also Fails 6th Circuit Tests

26 USC 7408 permits injunction grants when

> *"(1) defendant has engaged in conduct subject to penalty under 26 USC 6700, and (2) injunctive relief is appropriate to prevent recurrence of such conduct*." United States v Gleason 432 F.2d 678 (6thCir 2005)

IRS *voluntarily withdrew* its sec 6700-based CtC "abusive tax shelter" attack, which courts must treat as permanent adjudication of CtC's rectitude/non-controversiality re 26 USC 6700 (on the merits in favor of Defendants). Thus res judicata and FRCP41 bar IRS from threatening 'horrifying consequences to the public fisc and the tax system' if CtC is sold, read and/or believed. And thus trial judge's injunction order must be reversed with prejudice, sanctioning IRS from frivolously/vexatiously relitigating these matters which IRS knowingly, calculatingly, voluntarily *self-settled.*

Even were it not so plainly estopped, the Gleason injunction-worthiness analysis should be applied here:

1) Does Defendants' conduct (laid out ultra consistently/carefully/openly in CtC) violate sec6700? Unlike Gleason, IRS has voluntarily admitted/agreed *it doesn't,* and this admission was accepted by the selfsame District Court enjoining CtC in thought, word and practice!
2) Is injunction appropriate to 'prevent recurrence'. Maybe in Gleason's case. But see (1) above. Tough luck.
3) Is CtC part of the record? Unlike in Gleason, Yes. Agreed true and on record.
4) Would injunction unduly burden Defendants' livelihood. Unlike in Gleason, Yes.
5) Are Defendants preparing income tax returns for others? Unlike Gleason, No.

Did trial judge follow 6thCircuit practice and employ Gleason tests? No. Should Reverse.

K. Which is the Higher Public Policy Objective in this case?

IRS repeatedly demands this Court enjoin citizens' thoughts and words, citing heavily the "public policy" of engorging the government fisc using tools and meanings of *its sole choosing*.

Is there a fiscal crisis today? Caused by Defendants? Why, the Fisc is 'suffering' breathtaking year-over-year gains for the past 5 years in a row! Annual Federal receipts 'have been suppressed' *by Defendants* to BELOW $3 trillion!!

Meanwhile higher public policy is being savaged by IRS defamations, frivolities, vexations, oppressions… by its rabid hatred of adhering to TPBOR, or of debating simple word meanings, in open court. Exposed in the Telephone Excise Tax cases, IRS reflexively, haughtily and chronically mangled for decades the meanings of very simple words like "and".

Defendants' case is about Defined Terms and simple meanings of other key words. Defendant proposes that IRS live by Defined Terms of US Statutes and Constitutional limitations. Defendants' case is the least-frivolous, best researched citizen case of this kind in years. It's only possible due to newfound powers of ordinary citizens to digitally search the entire USC. Unpaid upright citizens now, at long last, watchdog vital letter-of-law-compliance over their Constitutional delegee, the government. These diligent citizens plainly wish government to conform to Law. This Court's duty is to allow Defendants to make their case, not to crush their earnest initiatives, overturning Fuentes rights, leaving only trail of venomous IRS invective against citizens in plain violation of TPBOR, FRCP, the Constitution and of their very own Voluntary Admissions on record!

This Court's duty is to promote civics education, illuminating what simple Defined Terms mean in US Statutes and how the Constitution limits –or doesn't limit-- taxing powers. Even were this Court to determine some Defined Term's meaning is different than Defendant proposes, this Court must state so clearly on record. It's terrible public policy for District Court to summarily rule despite material factual disputes, without allowing defense—even an Answer--against IRS's posture that these terms mean *whatever the IRS chooses them ridiculously to mean,*

irrespective of Supreme Court opinion, plain statutory requirements, and legal research assembled by Defendant.

Defendants have long challenged IRS to come out of its fortress to justify its interpretations of key words' meanings affecting all citizens. But IRS too has skulked, refusing debate, *even now in its briefs to this Court today it continues refusing*. IRS prefers never to delineate STATUTORILY DEFINED meanings of 'income', 'includes', 'State' or 'taxpayer', or to establish facts about Defendants' (or anyone else's) W-2. It prefers to enfeeble CPAs, overawe employers, and roll its judges. IRS brute power and invective often gain its ends… thank goodness at long last it was exposed as to its decades-long Humpty Dumpty-bizarre self-definition of the word "and" in Telephone Excise Tax cases.

Defendants didn't burden this Court as do many unprepared, half-wacky **Plaintiffs**. This Court must allow vigorous defenses to brutish, sloppily-prepared IRS actions, even if defenders are pro se. "*The right of a citizen to defend his property against attack in a court is corollary to the plaintiff's right to sue there*." Degen v United States No. 95-173 (US Supreme Court 06/10/1996), citing McVeigh v. United States, 11 Wall., at 267

> "*Our annoyance at spurious and frivolous claims, and our real concern with burdened dockets, must not drive us to adopt interpretations of the rules that make honest claimants fear to petition the courts. We may be justified in imposing penalties on attorneys for negligence or mistakes in good faith; but it is quite a different matter, and the exercise of a much greater and more questionable authority, for us to impose that primary liability on* ***citizens in general***." Business Guides v. Chromatic Comm. Enterprises, 498 US 533 (1991).

A more venerable word comes from the Hovey Court:

> "*To say that courts have inherent power to deny all right to defend an action, to render decrees without any hearing whatever, is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends*." Hovey v Elliott 167 US 409 (1897)

This Court must punish this lazy Plaintiff and illuminate the law to serve the paramount public purpose of teaching Citizens that brute IRS aggression, dictat and calumny are not master of an abject Sheeple, but rather that Law governs behavior among honest, far-from-frivolous citizens and their governmental delegees.

> ***"When a party (IRS) presents the question whether "and" means "or," it is tempting to be dismissive of the claim or, worse, to make a crack about the demise of the rule of law."*** Office Max v United States, 2005 6thCir

Thank you, 6th Circuit, for speaking so plainly. Public policy demands that when citizens are sued, and their defense seeks clarification of word meanings and conformity with Constitutional strictures and TPBOR, this Court show all citizens what *Stands to Reason*. To acquiesce in gross due process denials without such an airing threatens Citizens to *Stand and Deliver*.