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15 UNITED STATES DISTRICT COURT FOR THE
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18 FACEBOOK, INC. AND SUBSIDIARIES,)
)
19 Plaintiff,)
)
20 v.)
)
21 INTERNAL REVENUE SERVICE, and)
22 DAVID KAUTTER, in his official capacity as)
Acting Commissioner of Internal Revenue)
)
23 Defendants.)
_____)

Case No. 3:17-cv-06490-LB
**NOTICE OF MOTION AND
DEFENDANTS' MOTION TO
DISMISS**
Date: April 12, 2018
Time: 9:30 a.m.
Courtroom: 15-C
Judge: Hon. Laurel Beeler

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1 PLEASE TAKE NOTICE that on April 12, 2018 at 9:30 a.m., or as soon thereafter as counsel
2 can be heard, Defendants will move the Court to dismiss Plaintiff's claims for lack of subject matter
3 jurisdiction. Defendants' motion is made pursuant to Rule 12(b)(1) of the Federal Rules of Civil
4 Procedure.

5 I. INTRODUCTION

6 This baseless lawsuit is spun off from a case that Facebook filed in the U.S. Tax Court ("Tax
7 Court"). In its Tax Court petition, Facebook contests the Internal Revenue Service's ("IRS")
8 determination that Facebook undervalued by approximately \$7 billion dollars intangible property it
9 transferred to its Ireland-based subsidiary, resulting in a substantial under-reporting of income for U.S.
10 tax purposes in 2010 and later years. Facebook wants this Court to compel the IRS attorneys in charge
11 of litigating its Tax Court case (who are also the IRS attorneys with whom Facebook would negotiate a
12 settlement of that case) to send its case to different IRS employees, those in the IRS Office of Appeals
13 ("IRS Appeals"). Facebook claims to have mined statutes and regulations to unearth this heretofore
14 unknown and unenforced right; however, the claim cannot hold up to any serious scrutiny. IRS Chief
15 Counsel's Office ("Chief Counsel") has had for decades, and continues to have, discretion to decline to
16 transfer a Tax Court case to IRS Appeals. Chief Counsel's discretionary decisions about whether to
17 transfer a case are not subject to judicial review. Moreover, Facebook has failed to show that it suffered
18 any harm. Facebook apparently believes that it could negotiate a more favorable settlement with the
19 IRS employees in IRS Appeals than it could negotiate with the IRS attorneys in Chief Counsel it is now
20 dealing with. That belief is unverifiable speculation. We simply cannot know what kind of settlement
21 Facebook could negotiate with IRS Appeals, nor can we know what kind of settlement Facebook could
22 negotiate with the Chief Counsel attorneys handling its Tax Court case, nor can we know how these two
23 conjectural settlements compare.

24 This Court should dismiss this suit for two reasons. First, Facebook lacks standing to sue.
25 Facebook has not suffered a concrete harm because nothing but unverifiable speculation indicates that it
26 would be better off attempting to negotiate a settlement with IRS Appeals. Facebook also has not
27 suffered any legally cognizable harm because it does not have a right to have its case transferred to IRS
28

1 Appeals. Second, even if Facebook could assert an injury that gives rise to standing, the decision not to
2 refer Facebook's case to IRS Appeals is unreviewable under the Administrative Procedures Act
3 ("APA"). That decision was an internal procedural decision, not final agency action.

4 **II. PROCEDURAL BACKGROUND**

5 **A. Chief Counsel's discretion over Tax Court cases and the role of IRS Appeals**

6 The Chief Counsel for the IRS speaks for the IRS Commissioner in Tax Court and serves as the
7 IRS's chief legal officer. 26 U.S.C. § 7803(b)(2); *Roth v. Commissioner*, T.C. Memo. 2017-248, 2017
8 WL 6628658, at *4 (Dec. 28, 2017) (Chief Counsel is "sole representative" of the IRS in Tax Court).¹
9 With respect to tax litigation, the Chief Counsel reports to the IRS Commissioner and to the General
10 Counsel for the Secretary of the Treasury. 26 U.S.C. § 7803(b)(3). The Chief Counsel has historically
11 exercised wide discretion over cases pending in Tax Court. *See Estate of Jones v. Commissioner*, 795
12 F.2d 566, 572 (6th Cir. 1986); *Gilliland v. Brooks*, 651 F. Supp. 73, 76 (M.D. Tenn. 1986). By statute,
13 any diminishment in the Chief Counsel's authority may only be accomplished after the Secretary of the
14 Treasury has notified certain Congressional committees, an event that, to date, has not occurred. *See* 26
15 U.S.C. § 7803(b)(2).

16 From the time the Board of Tax Appeals was created in 1924 (a predecessor body to the Tax
17 Court) to the present, the sheer volume of disputes between taxpayers and the IRS has dictated a need
18 for the IRS to have a unit dedicated to resolving disputes short of litigation and trial. *See Tucker v.*
19 *Commissioner*, 135 T.C. 114, 135-36 & n. 49 (2010), *aff'd*, 676 F.3d 1129 (D.C. Cir. 2012). That unit,
20 administratively created by the IRS in 1927, and which has operated under various titles, is now known
21 as the IRS Office of Appeals.

22 Over the years, the IRS Commissioner and Chief Counsel have exercised discretionary authority
23 to internally allocate to IRS Appeals authority to settle certain matters through issuance of delegation
24 orders, procedural rules and revenue procedures. Pursuant to those internal procedures, the IRS has

25 ¹ The Chief Counsel is appointed by the President and confirmed by the United States Senate. 26 U.S.C.
26 § 7803(b)(1). The Chief Counsel and the IRS Commissioner are the two offices created by Congress
27 that are subject to the appointment and confirmation process. 26 U.S.C. § 7803. The Chief of IRS
Appeals is not so appointed.

1 afforded almost all taxpayers engaged in run-of-the-mill disputes an opportunity to seek resolution
2 through IRS Appeals either before, or after, the IRS issues a notice of deficiency and a taxpayer elects to
3 challenge that notice in Tax Court. *See* 26 C.F.R. §§ 601.105 & 601.106.²

4 Generally, the facts of a tax dispute are well-developed by the IRS audit team before a case goes
5 to IRS Appeals. If that factual development has occurred by the close of the examination, the IRS will
6 generally issue a so-called “30-day letter” to the taxpayer, containing a proposed notice of adjustment
7 detailing the conclusions of the audit team. *See* 26 C.F.R. § 601.105. When an examination is
8 incomplete and the statute of limitations for assessment of tax is imminent, the IRS may issue the
9 statutory notice of deficiency to the taxpayer immediately, bypassing the 30-day letter. *Id.* If a taxpayer
10 chooses to challenge the notice of deficiency in Tax Court and has not already been through the IRS
11 Appeals process, Chief Counsel generally, but not always, will then refer the case to IRS Appeals. *See*
12 26 C.F.R. § 601.106, as modified by Rev. Proc. 2016-22.

13 This system of referrals to IRS Appeals promotes efficiency and allows Chief Counsel to focus
14 on those taxpayers who do not wish to settle their disputes, and also on those cases that, for reasons
15 within the discretion of Chief Counsel, should be retained by litigating counsel. The balance between
16 reducing the overwhelming volume of tax disputes through a resolution process and properly managing
17 a docket of cases, some of greater policy and fiscal significance than others, is reflected in carefully-
18 considered internal orders and procedural rules, which are often revised or modified.

19 Courts have consistently construed the IRS Commissioner’s discretionary grant of authority to
20 IRS Appeals, through these internal orders and procedural rules, as affording taxpayers no substantive
21 rights to require adherence to those procedures. *See e.g., Estate of Jones*, 795 F.2d at 571 (procedural
22 rules not mandatory); *Rosenberg v. Commissioner*, 450 F.2d 529, 531-33 (10th Cir. 1971); *Luhring v.*
23 *Glotzbach*, 304 F.2d 560, 563-65 (4th Cir. 1962); *see also Ellis v. Commissioner*, 346 Fed. Appx. 346,

24 _____
25 ² As discussed below, the “601” rules contained in the Code of Federal Regulations are not regulations.
26 They are internal procedural rules. Moreover, the cited procedural rules have, in some instances
27 (including § 601.106 (“Appeals functions”)), been modified by subsequent revenue procedures
28 published in the Internal Revenue Bulletin, including, most recently, by Rev. Proc. 2016-22. *See* 26
C.F.R. § 601.601(d)(1) (“Rules and regulations”) (“Procedures set forth in Revenue Procedures
published in the Bulletin which are of general applicability and which have continuing force and effect
are incorporated as amendments to the Statement of Procedural Rules.”)

1 350-52 (10th Cir. 2009); *Streiffert v. Commissioner*, T.C. Memo. 2014-62, at *6 (Apr. 8, 2014).

2 Accordingly, IRS internal procedural rules such as those at issue here do not impose legal obligations
3 that can be enforced by taxpayers. *See Ward v. Commissioner*, 784 F.2d 1424, 1430-31 (9th Cir. 1986)
4 (citing various cases, including *Luhring*, 304 F.2d 563-64); *Vosters v. United States*, No. C-88-20458-
5 WAI, 1989 WL 90554, at *2 (N.D. Cal. Jun. 2, 1989).

6 Moreover, under those purely internal procedures, the IRS Commissioner and Chief Counsel
7 have consistently reserved the ultimate authority and discretionary power to choose when, or if, to settle
8 particular cases pending in Tax Court. Chief Counsel attorneys have a long history of consulting with
9 IRS Appeals regarding settlement amounts in cases sent from Chief Counsel to IRS Appeals. *See Rev.*
10 *Proc. 60-18*, 1960 WL 13429. If there was a disagreement between IRS Appeals and the Chief Counsel
11 attorney, the Chief Counsel resolved the disagreement. *Id.* Even after the Commissioner expanded IRS
12 Appeals' jurisdiction in 1978 to include resolving some cases docketed in Tax Court, subsequent
13 procedures clarified that Chief Counsel retained discretion over whether to attempt to resolve a case
14 through IRS Appeals; attempt to collectively resolve a case through a joint effort involving both IRS
15 Appeals and Chief Counsel; or simply proceed to trial. *See Rev. Proc. 87-24*, Sec. 2, 1987 WL 350407;
16 *compare Rev. Proc. 82-42*, 1982 WL 196359; & *Rev. Proc. 78-9*, 1978 WL 41410. Notably, before the
17 issuance of the revenue procedure at issue, Chief Counsel had the ability to "determine that a case, or an
18 issue or issues in a case, should not be considered by [IRS] Appeals," after first consulting with IRS
19 Appeals. *Rev. Proc. 87-24*, 1987 WL 350407.

20 In 2015, the IRS published for notice and comment a draft updated revenue procedure to further
21 refine the roles of IRS Appeals and Chief Counsel in processing taxpayer disputes pending in Tax Court.
22 *See Notice 2015-72*, 2015-44 I.R.B. 613 (Nov. 2, 2015). After considering the four comments received
23 in response to the notice, the IRS published *Rev. Proc. 2016-22* on March 23, 2016, thereby updating 26
24 C.F.R. § 601.106. *See 2016-15 I.R.B. 577*. Although this latest revenue procedure instructs Chief
25 Counsel to refer almost all docketed cases to IRS Appeals for settlement consideration, consistent with
26 past internal procedures, the procedure reserves to Chief Counsel ultimate discretion over which cases to
27 refer to IRS Appeals for settlement:

1 Counsel will not refer to Appeals any docketed case or issue that has been
 2 designated for litigation by Counsel. In limited circumstances, a docketed
 3 case or issue that has not been designated for litigation will not be referred
 4 to Appeals if Division Counsel or a higher level Counsel official
 5 determines that referral is not in the interest of sound tax administration.
 6 For example, Counsel may decide not to refer a docketed case to Appeals
 in cases involving a significant issue common to other cases in litigation
 for which it is important that the IRS maintain a consistent position or in
 cases related to a case over which the Department of Justice has
 jurisdiction. If Counsel determines that a docketed case or issue will not
 be referred to Appeals, Counsel will notify the taxpayer that the case will
 not be referred to Appeals.

7 Rev. Proc. 2016-22, Sec. 3.03.

8 Rev. Proc. 2016-22, which updates 26 C.F.R. § 601.106, is an articulation of the IRS's continued
 9 discretion over the handling of cases docketed in Tax Court. It is up to Chief Counsel to decide, in its
 10 discretion, what is, or is not, "in the interest of sound tax administration." Here, Chief Counsel fully
 11 complied with IRS procedures in declining to refer Facebook's case to IRS Appeals.

12 **B. The procedural history leading up to this lawsuit**

13 In November 2011, the IRS initiated an audit of Facebook for the tax years ending December 31,
 14 2008 and December 31, 2009. (Complaint ¶ 34.) In January 2013, the IRS expanded the audit to
 15 include the tax year ending December 31, 2010. *Id.* Because of the size and complexity of the audit, the
 16 IRS sought, and received, five extensions of time to issue a statutory notice of deficiency for the relevant
 17 tax years.³ (See Complaint ¶ 35). On January 25, 2016, the IRS requested Facebook's acquiescence to
 18 an additional extension of time, but Facebook declined. (Complaint ¶ 36). Facebook's refusal to agree
 19 to an additional extension required the IRS to issue a statutory notice of deficiency before the audit was
 20 complete to protect the limitations period for assessing tax.⁴ The IRS issued a notice for several items,
 21 including a redetermination of royalty income arising out of the transfer of intangible property to a
 22 Facebook foreign subsidiary based in Ireland. Facebook then filed a petition with the Tax Court on
 23 October 11, 2016, seeking a redetermination of the deficiency the IRS determined for 2010.
 24 (Appendix 1).

25 _____
 26 ³ A notice of deficiency is an IRS determination that the taxpayer owes taxes for the relevant time
 27 period, and "starts the clock" for allowing the taxpayer to challenge the deficiency in Tax Court. 26
 U.S.C. § 6213(a).

28 ⁴ The IRS generally has 3 years from the later of the date the return was filed or due to assess tax. 26
 U.S.C. § 6501(a).

1 The IRS denied Facebook’s request for a referral to IRS Appeals on March 16, 2017.
2 (Complaint ¶ 42). At that time, Facebook had yet to produce well over half a million pages of
3 documents requested by the IRS in mid-2016. (Summons Enforcement Case, No. 3:16-cv-03777-LB,
4 Dkt. No. 45 at 2:8-20). Obviously, the IRS was continuing to gather additional information to fully
5 determine Facebook’s proper tax liability. Facebook further alleges that the IRS indicated it would not
6 reconsider its decision by letter dated August 2, 2017. (Complaint ¶ 43). At that time, Facebook was
7 still in the process of producing additional documents responsive to summonses the IRS issued, and the
8 IRS was still in the process of considering this information. (Summons Enforcement Case, Dkt. No. 45
9 at 2:8-20).

10 Facebook’s disputed deficiency arising out of transfers in 2010 of high-value intangible property
11 is not only complex and document intensive, it also appears that its dispute may well entail issues of first
12 impression regarding the validity of a complicated transfer pricing regulation regarding cost sharing
13 arrangements. (See Respondent Status Report of Dec. 14, 2017 ¶¶ 3-5, Appendix 2; see also,
14 Petitioner’s Status Report of Dec. 13, 2017 ¶¶ 16-17, Appendix 3 (Indicating that “[w]hile a negotiated
15 resolution is preferable, Petitioner appreciates that a trial may be necessary” and proposing pretrial
16 dates).

17 The Tax Court has scheduled trial to commence on August 21, 2019. (Appendix 4). The parties
18 are to file a joint status report and proposed pretrial schedule by February 12, 2018. (Appendix 4).

19 **III. ARGUMENT**

20 **A. Facebook lacks standing because it has no legally cognizable injury and suffered no 21 actual harm**

22 **1. Legal framework**

23 Article III of the Constitution limits the jurisdiction of federal courts to “cases” and
24 “controversies.” U.S. Const., Art. III § 2. To bring a case or controversy before the Court, Facebook
25 must have suffered an “injury in fact” which has a “causal connection” with the injury it complains of
26 and which is likely to be “redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S.
27 555, 560-61 (1992) (internal citations and quotes omitted). An “injury in fact” for purposes of standing
28 must be more than a mere perceived slight or general grievance. The injury must rise to the level of an

1 “invasion of a legally protected interest.” *See id.* The injury must also be “concrete and particularized”
2 and “actual or imminent,” as opposed to “conjectural or hypothetical.” *See id.*

3 The injury-in-fact requirement is not met where a plaintiff “allege[s] a bare procedural violation,
4 divorced from any concrete harm” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016), *as*
5 *revised* (May 24, 2016); *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (“[D]eprivation of a
6 procedural right without some concrete interest that is affected by the deprivation—a procedural right *in*
7 *vacuo*—is insufficient to create Article III standing.”). In addition, if a plaintiff makes a claim with no
8 foundation in law, the plaintiff has no standing to sue. *See Arjay Assoc. v. Bush*, 891 F.2d 894, 898
9 (Fed. Cir. 1989) (no standing where injury was to a “nonexistent right”); *see also State of Utah v.*
10 *Babbitt*, 137 F.3d 1193, 1207-10 (10th Cir. 1998).⁵ In such a case, there is no violation of a “legally
11 protected interest.”

12 **2. Facebook does not have a legally protected interest in having its case referred** 13 **to IRS Appeals**

14 Here, Facebook fails to allege any “legally protected interest.” It simply has no right to a referral
15 to IRS Appeals. Facebook’s alleged injury is no different in nature than a taxpayer complaining about
16 being selected for an audit or about a specific agent assigned to the matter.

17 Facebook points to no statute that creates an independent right to a referral to IRS Appeals, but
18 claims only that this presumed right is “grounded” in multiple statutory provisions. The Tax Court has
19 concluded that a taxpayer in Tax Court has no right to a referral to IRS Appeals. *Estate of Weiss v.*
20 *Commissioner*, T.C. Memo. 2005-284, at *1 (2005) (petitioner in Tax Court had no “substantive right to
21 take its case to [IRS] Appeals”); *Swanson v. Commissioner*, 106 T.C. 76, 99-100 (1996) (“No such right
22 exists, however, once the taxpayer’s case is docketed in the Tax Court.”). According to Facebook, this
23 “grounding” is to be found in 26 U.S.C. §§ 7803 and 7123, as well as IRS procedural rule 26 C.F.R.

24 _____
25 ⁵ Where a claim of injury arises out of a right that one party contends is nonexistent, then if the claim is
26 meritorious, standing will exist; if not, “standing not only fails but also ceases to be relevant.” *ACLU v.*
27 *FCC*, 523 F.2d 1344, 1348 (9th Cir. 1975); *Doucet v. Int’l Hair Inst., LLC*, Case No. 17cv823-LAB
(KSC), 2017 WL 5563987, at *1-2 (S.D. Cal. Nov. 20, 2017); *compare Parker v. D.C.*, 478 F.3d 370,
377 (D.C. Cir. 2007) (discussing application of standing doctrine versus a merits determination in this
context), *aff’d sub nom. Heller*, 554 U.S. 570 (2008).

1 § 601.106.⁶ In fact, that internal procedure has been modified to include the very revenue procedure that
 2 Facebook challenges. *See* 26 C.F.R. § 601.601(d)(1); Rev. Proc. 2016-22. An analysis of these three
 3 purported statutory or procedural bases reveals that none of them provide Facebook with any substantive
 4 right to a referral to IRS Appeals, and Facebook therefore lacks the “injury in fact” required for
 5 standing.

6 a. The IRS Restructuring and Reform Act of 1998 did not create a right to a
 7 review by IRS Appeals

8 Facebook claims that the Restructuring and Reform Act of 1998 (“RRA ‘98”) provides support
 9 for its alleged right to review by IRS Appeals. (Complaint, ¶¶ 7-8, 10). It does not. Section 1001(4) of
 10 the RRA ‘98 required the IRS to submit a plan to reorganize the IRS that would “ensure an independent
 11 appeals function within the Internal Revenue Service.” Pub. L. 105-206 § 1001(4), 112 Stat. 685, 689.
 12 Section 7123(b), codified by the RRA ‘98, requires the IRS to prescribe procedures for a taxpayer
 13 requesting arbitration or mediation, after unsuccessful attempts to resolve issues with IRS Appeals. On
 14 their face, neither provision affords a general right to have a dispute reviewed by IRS Appeals, nor a
 15 more specific right to bring a deficiency dispute pending before the Tax Court to IRS Appeals. The one
 16 provision, Section 1001(4), merely requires the IRS to maintain IRS Appeals’ independence; the other,
 17 Section 7123(b), merely “codifie[d] the [IRS’s] *existing* [alternative dispute resolution] procedures, as
 18 modified by eliminating the dollar threshold.” H.R. Rep. 105-599, at 291 (emphasis added). By no
 19 stretch of logic do these provisions create a blanket right for taxpayers to go to IRS Appeals.

20 By contrast, Congress gave taxpayers the right to have certain expressly-defined determinations
 21 such as collection and levy determinations reviewed by IRS Appeals. *See e.g.*, 26 U.S.C. §§ 6320 &
 22 6330. The fact that Congress chose *not* to extend that right in RRA ‘98 demonstrates that Congress
 23 knew how to create a right to IRS Appeals when it wanted to, but that it chose not to extend such a right
 24 for deficiency disputes. Congress opted not to disturb or modify the discretion that the Commissioner
 25

26 _____
 27 ⁶ Facebook also refers to Rev. Proc. 2012-18 (Complaint ¶ 14). That procedure addresses issues
 28 regarding *ex-parte* communications between IRS Appeals and other employees, including Chief
 Counsel, and modifies Rev. Proc. 2000-43, also addressing *ex parte* communications.

1 and Chief Counsel historically exercised over disputes pending in Tax Court. Thus, 26 U.S.C. § 7123
2 gives Facebook no authority to demand Chief Counsel refer its case to IRS Appeals.

3 b. The 2015 amendments to 26 U.S.C. § 7803 create no right to IRS Appeals

4 Facebook also claims that 26 U.S.C. § 7803(a)(3)(E) imposes a “mandatory statutory obligation
5 ... to provide Facebook access to an independent administrative forum.” (Complaint, ¶ 66). Facebook is
6 mistaken here as well. As discussed below, the statute itself states it does not create any new rights.
7 Second, the statute does not refer to an “independent *administrative* forum” but only an “*independent*
8 *forum*.” The Tax Court is an independent forum, and Facebook has filed a petition in Tax Court. Thus,
9 Facebook has already exercised any rights granted to it under the Internal Revenue Code.

10 Section 7803(a)(3) was added to the Internal Revenue Code in 2015, when Congress codified ten
11 general principles known as the Taxpayer Bill of Rights. See “Protecting Americans from Tax Hikes
12 Act of 2015,” Pub. L. No. 114-113, Div. Q, Title IV, § 401(a), codified at 26 U.S.C. § 7803(a)(3)
13 (“PATH Act”). But neither the express language of these general principles, nor the available legislative
14 history for the PATH Act provide taxpayers any basis for inferring a generalized, enforceable “right” to
15 IRS Appeals. To the contrary, the ten enacted “general principles” were directly followed by qualifying
16 language that the Commissioner is to ensure that IRS employees are familiar with, and act in accord
17 with, “taxpayer rights as afforded by **other provisions of this title, including** -- . . . (E) the right to
18 appeal a decision of the Internal Revenue Service in an independent forum.” 26 U.S.C. § 7803(a)(3)
19 (emphasis added).⁷ Facebook identifies no “other provision” affording any right to a review by IRS
20 Appeals applicable in this case. That is, to the extent a *pre-existing* statutory right to seek review from
21 IRS Appeals existed (such as certain challenges to levies or collections mentioned above), the general
22 principles apply. That is not the case here.

23 In addition, the text of the statute refers to an “independent forum,” and not to an independent
24 *administrative* forum. The Tax Court is as an independent forum. *A. & A. Tool & Supply Co. v.*
25 *Commissioner*, 182 F.2d 300, 304 (10th Cir. 1950) (“The Tax Court and the Board of Tax Appeals,
26 which it succeeded, was created to afford a taxpayer an independent forum where he could be heard

27 ⁷ Under Facebook’s reasoning, a taxpayer would also have a cause of action if it was denied “the right to
28 quality service” (subsection (3)(B)) or “the right to a fair and just tax system” (subsection (3)(J)).

1 speedily, equitably and impartially on a tax assessment which he thought had been improperly levied or
2 assessed.”) In fact, in the same 2015 PATH Act legislation that referred to the right to an independent
3 forum, Congress emphasized that the “Tax Court is not an agency of, and shall be *independent* of, the
4 executive branch of the Government.” 26 U.S.C. § 7441 (emphasis added); Pub. L. No. 114-113.

5 c. 26 C.F.R. § 601.106 does not afford a taxpayer any substantive rights,
6 including any right to IRS Appeals

7 Facebook also claims that the “U.S. Treasury Department’s regulations provide that after the
8 filing of a petition in the Tax Court,” Chief Counsel will refer the matter to IRS Appeals, which shall
9 have exclusive jurisdiction, with some exceptions, for a period of four months. (Complaint ¶ 12) (*citing*
10 26 C.F.R. § 601.106(a)). Facebook then claims that this provision creates a mandatory obligation to
11 provide Facebook with access to IRS Appeals. (Complaint ¶ 66). The provision creates no such
12 obligation.

13 First, the provisions found at Section 601 are not “Treasury regulations,” as Facebook claims.
14 Rather, these provisions, which constitute the IRS’s “Statement of Procedural Rules,” are procedural
15 rules governing internal IRS affairs that do not have the force and effect of law. *Ward*, 784 F.2d at 1430-
16 31; *Ellis*, 346 Fed. Appx. at 350-51; *Estate of Weiss*, 90 T.C.M. (CCH) 566 at *1 (Section 601.106 does
17 not “afford a substantive right to an Appeals hearing” because it is part of the Statement of Procedural
18 Rules that have no force of law) (also listing cases); *see also Luhring*, 304 F.2d at 563-65; *Rosenberg*,
19 450 F.2d at 531-33; *Streiffert*, T.C. Memo. 2014-62, at *6; *Vosters*, No. C-88-20458-WAI, 1989 WL
20 90554, at *2.

21 Courts have consistently construed the IRS Commissioner’s discretionary grant of jurisdiction to
22 IRS Appeals, through these internal orders and procedural rules, as affording taxpayers no substantive
23 rights to require adherence to those procedures. *See e.g., Estate of Jones*, 795 F.2d at 571 (procedural
24 rules not mandatory); *Rosenberg*, 450 F.2d at 531-33; *Luhring*, 304 F.2d at 563-65; *see also Ellis*, 346
25 Fed. Appx. at 350-51 (10th Cir. 2009); *Streiffert*, T.C. Memo. 2014-62, at *6. Accordingly, IRS internal
26 procedural rules such as those at issue here serve to direct IRS personnel, they do not have any legal
27 effect. *See Ward*, 784 F.2d at 1430-31 (citing various cases, including *Luhring*, 304 F.2d 563-64);
28 *Vosters*, No. C-88-20458-WAI, 1989 WL 90554, at *2.

3. Facebook has not suffered any concrete non-conjectural harm

1 The claimed right that Facebook asserts in this litigation is a procedural one. Facebook urges
2 this Court to conclude that the IRS must give it the opportunity to negotiate a settlement of its case with
3 IRS Appeals. It therefore asks this Court to compel the IRS to provide it access to IRS Appeals. But
4 even assuming *arguendo* that Facebook had the right to attempt to negotiate a settlement with IRS
5 Appeals, it would not meet the Article III injury-in-fact requirement.
6

7 As the Supreme Court and the Ninth Circuit have explained, an allegation that a governmental
8 agency has failed to meet a procedural requirement will give rise to an injury sufficient to confer
9 standing only when “the plaintiff also asserts a concrete interest that is threatened by the failure to
10 comply with that requirement.” *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 816 (9th Cir.
11 2017) (citations omitted); *see also Spokeo*, 136 S. Ct. at 1549; *Summers*, 555 U.S. at 496. Here,
12 Facebook asserts that, as a result of Chief Counsel’s decision not to refer its case to IRS Appeals, it must
13 “incur the cost of litigating an issue without first pursuing an independent administrative resolution with
14 IRS Appeals.” (Complaint ¶ 52.) The Complaint also asserts that IRS Appeals has settled transfer
15 pricing cases for amounts much less than the amount stated in the notice of deficiency. (Complaint ¶
16 50.) These assertions fail to allege concrete harm.

17 As an initial matter, even if this case were to be referred to Appeals by Chief Counsel, the trial
18 attorneys assigned to the Tax Court litigation would, out of necessity, continue to develop the case for
19 litigation, because a settlement is never a foregone conclusion. Thus, Facebook would continue to incur
20 costs to defend its Tax Court case regardless of whether Facebook has an opportunity to go to Appeals.
21 Moreover, it is clear that the fact that—of its own volition—Facebook’s case is in Tax Court does not
22 mean that Facebook must litigate rather than seeking to settle its dispute. Facebook is free to pursue
23 settlement with the Chief Counsel attorneys assigned to the case. Indeed, the Tax Court offers a
24 voluntary mediation program to facilitate such discussions. (Rule 124 of the Tax Court Rules of
25 Practice and Procedure).

26 The only concrete harm that could possibly flow from the purported procedural violation
27 Facebook alleges is economic harm. Although Facebook does not say it directly, its decision to bring
28

1 this lawsuit certainly suggests that Facebook believes it would get a more favorable settlement if it could
2 negotiate with IRS Appeals rather than negotiating with Chief Counsel. By implication then the
3 concrete harm to Facebook that flows from Chief Counsel's decision not to refer its case to IRS Appeals
4 is the difference between the settlement it could have negotiated with IRS Appeals and the settlement it
5 will be able to negotiate with Chief Counsel. That anticipated harm is not the least bit "concrete" and is
6 without question "conjectural" and "hypothetical." *See Lujan*, 504 U.S. at 560-61.

7 The difference between a hypothetical settlement with IRS Appeals and a settlement with Chief
8 Counsel is both unknown and, ultimately, unknowable. Facebook's Complaint indicates that other
9 litigants whose cases involved a similar issue reached favorable settlements with IRS Appeals. Even if
10 there was reliable data that indicated that historically litigants generally negotiated more favorable
11 settlements with IRS Appeals than with Chief Counsel, such data would not necessarily be predictive in
12 this case. Quite obviously, the considerations that impact settlement vary from case to case. Moreover,
13 even beyond the impossibility of comparing hypothetical settlements, there are other possible outcomes.
14 For example, perhaps, if Facebook's case had been transferred to IRS Appeals, Facebook would have
15 spent significant time and resources attempting to negotiate a settlement but ultimately decide to litigate
16 the case to judgment in Tax Court, thereby expending more resources to reach the same end result. In
17 short, there is simply no way to know whether Facebook will suffer any economic harm because of
18 Chief Counsel's decision not to transfer the case to IRS Appeals. As such, Facebook's allegations of
19 harm are conjectural and cannot give rise to Article III standing.

20 In sum, Facebook lacks Article III standing because it articulates no legally cognizable injury
21 and has suffered no concrete harm.

22 **4. Facebook lacks prudential standing**

23 Facebook brings its action under the APA. But the APA, in and of itself, cannot confer standing
24 on a litigant seeking review of a governmental action. *Lujan v. National Wildlife Federation*, 497 U.S.
25 871, 883 (1990) (discussing 5 U.S.C. § 702). In addition to satisfying the requirements of Article III
26 standing, Facebook must satisfy a prudential standing requirement. *Nat'l Credit Union Admin. v. First*
27 *Nat. Bank & Tr. Co.*, 522 U.S. 479, 488 (1998). This requires that Facebook also show that it has

1 “‘suffer[ed] legal wrong’ because of the challenged agency action, or is ‘adversely affected or
2 aggrieved’ by that action ‘within the meaning of a relevant statute.’” *Lujan*, 497 U.S. at 883 (quoting 5
3 U.S.C. § 702). Here, a similar analysis applies for both prudential and Article III standing: Facebook
4 has suffered no legal wrong, and there is no relevant statute because there is no legal right to a referral to
5 IRS Appeals.⁸

6 **B. This case is not justiciable under the APA because Facebook failed to establish a**
7 **waiver of sovereign immunity**

8 Facebook bases its request for judicial review on the APA; however, the APA does not constitute
9 a waiver of sovereign immunity here. *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). The United
10 States can only be sued if it waives its sovereign immunity. The doctrine of sovereign immunity
11 precludes suit against both federal agencies and their employees, if acting in their official capacities.
12 *Hodge v. Dalton*, 107 F.3d 705, 707 (9th Cir. 1997). Although analytically distinct from the concept of
13 subject matter jurisdiction, a Rule 12(b)(1) motion is the proper vehicle for raising this ground for
14 dismissal. *See Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015); *see also United States v. Park*
15 *Place Assoc.*, 563 F.3d 907, 924 (9th Cir. 2009). Facebook bears the burden of establishing the
16 existence of an unequivocal waiver of sovereign immunity. *See, e.g., Baker v. United States*, 817 F.2d
17 560, 562 (9th Cir. 1987).

18 The APA can provide such a waiver of immunity. But the APA does not apply, and immunity is
19 not waived, where: (1) statutes preclude judicial review; or (2) agency action is committed to agency
20 discretion by law. 5 U.S.C. § 701(a). In addition, the APA does not apply if the decision under review
21 does not constitute a “final agency action for which there is no other adequate remedy in a court. . . .” 5
22 U.S.C. § 704; *Gallo Cattle Co. v. U.S. Dep’t of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998). Facebook
23 challenges IRS actions committed to agency discretion by law. Consequently, the APA does not apply,
24

25 ⁸ Assuming *arguendo* that Facebook actually alleged a colorable claim that the IRS had violated 26
26 U.S.C. § 7803(a)(3)(E) by issuing Rev. Proc. 2016-22 or by not affording Facebook access to IRS
27 Appeals, Facebook would have to prove that its interest in going to IRS Appeals was “arguably within
28 the zone of interests to be protected or regulated by the statute ... in question” to have prudential
standing under the APA. *Nat’l Credit Union Admin.*, 522 U.S. at 488. In this regard, it is worth noting
that the Taxpayer Bill of Rights is written in terms of imposing duties on IRS employees, not granting
enforceable rights to taxpayers.

1 and no other exception waives sovereign immunity. In addition, the non-referral to IRS Appeals that
 2 Facebook complains of, both as applied to Facebook’s request and more generally with respect to the
 3 procedural rule itself, constitutes non-final agency action for which Facebook, or any other taxpayer, has
 4 an adequate remedy: review of a notice of deficiency in an independent forum known as Tax Court.

5 **1. Rev. Proc. 2016-22 is not reviewable under the APA**

6 Facebook asks the Court to invalidate Rev. Proc. 2016-22. It complains that the IRS failed to
 7 adequately explain or justify why it provided “IRS Counsel the ability to deny access to IRS Appeals.”
 8 Facebook further complains that the IRS failed to adequately explain the choice of a “sound tax
 9 administration” standard for such a denial as set forth in the revenue procedure. (Complaint ¶¶ 31-33).
 10 Facebook alleges that the procedure “changed IRS practice” and “for the first time” afforded Chief
 11 Counsel a “unilateral ability to deny a taxpayer access to IRS Appeals” (Complaint ¶ 16). In
 12 addition, Facebook alleges that the IRS failed to consider comments received from the public after the
 13 IRS published a draft of the proposed procedure in the Federal Register. (Complaint ¶ 31). Based on
 14 the allegations, Facebook concludes that IRS actions in issuing the revenue procedure were arbitrary and
 15 capricious and not in accordance with law. (Complaint ¶¶ 55 & 60). These contentions lack merit.

16 a. The APA does not require that Rev. Proc. 2016-22 be submitted for notice
 17 and comment

18 Facebook has no basis for challenging the IRS’s alleged failure to consider the import of
 19 comments received from the public following publication in the Federal Register. The APA’s notice
 20 and comment requirements do not apply to rules of agency procedure. *See* 5 U.S.C. § 553(b)
 21 (explaining that the notice and comment rules do not apply to “rules of agency organization, procedure,
 22 or practice”); *Erringer v. Thompson*, 371 F.3d 625, 630, 632 fn. 15 (9th Cir. 2004). The IRS has no
 23 obligation to offer a draft of its internal procedure, such as Rev. Proc. 2016-22, to the public for notice
 24 and comment, much less act on comments that Facebook believes to be apt.⁹ A revenue procedure is a
 25 “procedural rule promulgated by the Commissioner of the IRS . . . [that is] a mere internal procedural
 26 guide and is not mandatory.” *Estate of Shapiro v. Commissioner*, 111 F.3d 1010, 1018 (2d Cir. 1997).

27 ⁹ Though not required, the IRS provided notice to the public of this revenue procedure, and considered
 28 the comments it received.

1 b. Rev. Proc. 2016-22 is a proper internal procedure issued in the exercise of
2 the IRS's discretion

3 “[C]ourts that have had occasion to address the issue have uniformly held that an agency’s
4 decision to settle falls under the penumbra of agency inaction that has traditionally been subject to a
5 rebuttable presumption against judicial review.” *Garcia v. McCarthy*, 649 Fed. Appx. 589, 591 (9th Cir.
6 2016) (citing cases, including *United States v. Carpenter*, 526 F.3d 1237, 1241-42 (9th Cir. 2008)); *see*
7 *also Balt. Gas & Elec. v. FERC*, 252 F.3d 456, 460 (D.C. Cir. 2001). Discretion to settle, of course,
8 encompasses a decision to not settle. As noted in *Garcia*, a danger that agencies “may not carry out
9 their delegated powers with sufficient vigor” is one best addressed by Congress, not by courts. 649 F.3d
10 at 1242 (citing *Chaney*, 470 U.S. at 834).

11 More generally, decisions by an agency to refrain from acting, in accordance with the agency’s
12 discretionary power, are presumed not suitable for judicial review. *Chaney*, 470 U.S. at 830 (an
13 agency’s discretionary refusal to act is presumed unreviewable under the APA) In *Chaney*, plaintiffs
14 sought review of a decision by the FDA not to take enforcement actions with respect to drugs utilized by
15 certain states for execution by lethal injection. *Chaney*, 470 U.S. at 823. The Court opined that
16 decisions to not take enforcement action committed to agency discretion were especially ill-suited for
17 judicial review under the APA because such decisions “often involve[d] a complicated balancing of
18 factors within the expertise of the agency.” *Id.* at 831-32. These factors include how an agency
19 allocates its resources, whether the agency will succeed if it does act, whether an action fits agency
20 policies. *Id.*

21 The ability of Chief Counsel to withhold certain cases docketed in Tax Court from IRS Appeals
22 is a textbook example of discretionary agency non-action ill-suited for judicial review. Rev. Proc. 2016-
23 22 is the latest effort to strike balance between a need to resolve a large docket of cases pending in Tax
24 Court through robust referral to IRS Appeals and a need to manage these cases in a manner that protects
25 the public fisc and develops case law in accordance with agency priorities. It makes clear that Chief
26 Counsel continues to have discretion to choose not to refer a particular Tax Court case to IRS Appeals.
27 Moreover, it is entirely up to Chief Counsel to figure out which cases are more or less likely to yield
28 favorable litigating results. As in *Chaney*, the agency action here is unreviewable under the APA.

1 Moreover, the particular provision in Rev. Proc. 2016-22 that Facebook challenges, namely,
2 Chief Counsel’s ability to exercise discretion in not referring a docketed case to IRS Appeals for
3 settlement resolution, is not a “change in direction,” nor is it a “first.” Rev. Proc. 2016-22 is the most
4 recent articulation of a long-standing ability of Chief Counsel to control, in its discretion, which cases
5 are referred to IRS Appeals.¹⁰ See Rev. Proc. 87-24; see also *Estate of Jones*, 795 F.2d at 572; *Gilliland*,
6 651 F. Supp. at 76. Thus, even if the Court were to invalidate this current revenue procedure, Chief
7 Counsel would still have the discretion to decide not to refer taxpayers to IRS Appeals.

8 In addition, “review is not to be had if the statute is drawn so that a court would have no
9 meaningful standard against which to judge the agency’s exercise of discretion.” *Chaney*, 470 U.S. at
10 830. Thus, Section “701(a)(2) requires careful examination of the statute on which the claim of agency
11 illegality is based.” *Webster v. Doe*, 486 U.S. 592, 600 (1988). In other words, “it’s well-settled that the
12 touchstone of reviewability under section 701(a)(2) is whether there’s law to apply.” *Oregon Nat. Res.*
13 *Council v. Thomas*, 92 F.3d 792, 798 (9th Cir. 1996). Here, there is no law to apply. Facebook has not
14 identified any underlying statute granting it a right to a hearing before IRS Appeals; thus, there is no
15 meaningful standard for the Court to determine whether the IRS’s internal allocation of jurisdiction
16 between IRS Appeals and Chief Counsel over cases docketed in Tax Court was a lawful exercise of
17 discretion. See, e.g., *E.J. Friedman Co. v. United States*, 6 F.3d 1355, 1359 (9th Cir. 1993) (concluding
18 that a statute that gave the IRS discretion over whether to discharge a lien was “drawn such that there is
19 no standard against which to judge the IRS’s exercise of discretion,” and that review was therefore
20 precluded by 5 U.S.C. § 701(a)(2)). To the contrary, Congress has left Tax Court litigation under the
21 plenary discretion of the Chief Counsel, who reports only to the IRS Commissioner and the General
22 Counsel of the Secretary of the Treasury. 26 U.S.C. § 7803(b).

23
24
25
26 ¹⁰ The fact that predecessor Rev. Proc. 87-24 called for consultation with IRS Appeals before
27 determining that a case should not be considered by Appeals is of no import because Chief Counsel had
28 the ultimate authority to decline to refer cases to IRS Appeals.

- 1 c. Rev. Proc. 2016-22 is not a final agency action for which there is no
 2 adequate remedy because Tax Court provides an adequate remedy

3 As discussed in Part III.B.2.b, below, a decision to not refer a taxpayer to IRS Appeals under
 4 Rev. Proc. 2016-22 is not a final agency decision, and any such a taxpayer has an adequate alternative
 5 remedy to IRS Appeals: Tax Court.

6 **2. The IRS's application of Rev. Proc. 2016-22 in deciding not to refer**
 7 **Facebook's pending dispute in Tax Court to IRS Appeals is also unreviewable**

- 8 a. This decision is committed to agency discretion

9 For the same reasons articulated above, Chief Counsel's non-referral of Facebook's Tax Court
 10 dispute to IRS Appeals is an action committed to agency discretion and not reviewable under the APA.
 11 This would be the case *with or without* Rev. Proc. 2016-22. Rev. Proc. 2016-22, which updates 26
 12 C.F.R. § 601.106, is patently an articulation of Chief Counsel's continued discretion over the handling
 13 of cases docketed in Tax Court. It is up to Chief Counsel to decide, in its discretion, what is, or is not,
 14 "in the interest of sound tax administration." Here, Chief Counsel fully complied with IRS procedures
 15 in declining to refer Facebook's case to IRS Appeals.¹¹

16 As to Facebook's allegation that the letter from Chief Counsel declining to refer Facebook's
 17 dispute to IRS Appeals did not explain why referral was "not in the interest of sound tax
 18 administration," (Complaint ¶¶ 42-45), that decision is not subject to review here. As explained above,
 19 IRS procedural rules do not create rights enforceable by taxpayers. The APA does not override this
 20 established precedent.

- 21 b. The decision not to refer Facebook's pending dispute in Tax Court to IRS
 22 Appeals is not a final agency action for which there is no other adequate
 23 remedy

24 The APA provides a right to judicial review of all "final agency action for which there is no
 25 other adequate remedy in a court...." 5 U.S.C. § 704. Two conditions must be satisfied for an agency
 26 action to be final: first, the action must mark the consummation of the agency's decision-making
 27 process, and second, the action must be one by which rights or obligations have been determined, or

28 ¹¹ Should the Court deny the instant motion, Government will show how its actions in withholding the
 case from IRS Appeals did not abuse its discretion and fall within the realm of reasoned
 decisionmaking.

1 from which legal consequences will flow. *See Gallo*, 159 F.3d at 1198–99; *Bennett v. Spear*, 520 U.S.
2 154, 177-78 (1997) (overruled on other grounds) (citations omitted). Thus, even an “ultimate
3 administrative position” is not final for purposes of the APA unless it is one “by which ‘rights or
4 obligations have been determined.’” *Fairbanks North Star Borough v. United States Army Corps of*
5 *Engineers*, 543 F.3d 586, 591, 593 (9th Cir. 2008) (quoting *Bennett*, 520 U.S. at 178) (dismissing a
6 claim challenging agency action because it was not “final” on that standard). Facebook does not even
7 allege that the Chief Counsel’s decision not to refer its case to IRS Appeals is a final agency action
8 subject to review (Complaint ¶¶ 59-63).

9 Chief Counsel’s decision not to refer a case pending in Tax Court to IRS Appeals is not final
10 agency action because it meets neither of the above conditions. First, it is not the consummation of the
11 agency’s decision-making process. No statute, regulation, or even internal guidance document, puts any
12 time limitation on Chief Counsel’s decision about whether to refer a Tax Court case to IRS Appeals.
13 Second, Chief Counsel’s decision not to refer a case to IRS Appeals does not determine any rights or
14 obligations of the taxpayer from which legal consequences will flow.

15 Additionally, Congress has provided specific rules for judicial review of tax determinations;
16 those specific rules control over the more general rules for judicial review embodied in the APA. *See*
17 *Hinck v. United States*, 550 U.S. 501, 506 (2007); *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988).
18 Congress has established a comprehensive system by which aggrieved taxpayers can seek judicial
19 review of a vast array of IRS actions and determinations.¹² Given that nearly 240,000,000 tax returns
20 are filed each year (*see* IRS Data Book for 2014 at www.irs.gov), Congress, the IRS, and the courts have
21 a compelling interest in ensuring that taxpayers follow the statutory system provided by the Internal
22 Revenue Code when seeking review. In this case, Facebook has an adequate remedy within this
23 statutory system to seek redress. Indeed, because a statutory notice of deficiency has been issued,
24 Facebook can, and in fact has, petitioned the Tax Court for a redetermination of its deficiency. *See* 26

25 ¹²*See e.g.*, 26 U.S.C. §§ 6212 and 6213 (review of deficiency notices by the Tax Court); 6226 and 6247
26 (judicial review of partnership determinations); 6234 (judicial review of oversheltered returns); 7422
27 (suit for refund); 7426 (suit for wrongful levy); 7428 (declaratory judgment with respect to tax exempt
organizations); 7429 (judicial review of jeopardy levy and assessments); 7431 (suit for unauthorized
disclosure or inspection); 7433 (suit for wrongful collection activity).

1 U.S.C. § 6213(a). Facebook is currently availing itself of the exact remedy that Congress created for
2 judicial review of a IRS deficiency determination.

3 Further, if what Facebook truly seeks is “to resolve its tax controversy, without litigation, on a
4 basis which is fair and impartial to both the IRS and Facebook” (Complaint ¶ 41) as it alleges, it is not
5 clear why Tax Court and Chief Counsel are insufficient to the task. There is no restraint on the part of
6 Facebook to negotiate a settlement directly with Chief Counsel. *See* 26 U.S.C. § 7122. In addition, the
7 Tax Court can assist litigants who want to explore settlement informally or even formally with the
8 selection of a mediator or even appointment of a Special Trial Judge. *See* IRM 35.5.5.7 (08-11-2004);
9 Rule 124 of the Tax Court Rules of Practice and Procedure. Further, the Tax Court’s authority extends
10 to its supervising settlement negotiations and discussions. *See* Tax Court Standard Pretrial Order
11 (Appendix 5); Rule 131(b) of the Tax Court Rules of Practice and Procedure. And, a failure to negotiate
12 in good faith by either the taxpayer or Chief Counsel can result in the imposition of sanctions by the Tax
13 Court. *Id.* A ruling by this Court directing the parties to IRS Appeals for settlement purposes
14 encroaches on the Tax Court’s settlement authority. Facebook has avenues both to challenge the IRS’s
15 determination of its deficiency and to engage in settlement discussions with Chief Counsel for resolution
16 of that deficiency absent further litigation. There is simply no reason for this Court to grant Facebook
17 the extraordinary relief it seeks in order to pursue settlement, when there is no restraint on its ability to
18 pursue settlement now.

19 **C. Facebook is not entitled to “Mandamus-Like Relief”**

20 Mandamus is an extraordinary equitable remedy, and it may only be granted if (1) a plaintiff’s
21 claim is “clear and certain;” (2) the defendant’s duty is “ministerial and so plainly prescribed as to be
22 free from doubt;” and (3) “no other adequate remedy is available.” *Oregon Nat. Res. Council v. Harrell*,
23 52 F.3d 1499, 1508 (9th Cir. 1995) (citation omitted). For the reasons articulated above, Facebook’s
24 claims fail all three elements. Notably, the non-referral to IRS Appeals was a discretionary act, and
25 Facebook has an adequate alternative remedy in Tax Court. *See Gilliland*, 651 F. Supp. at 75-76; *see*
26 *also In re 1900 M Rest. Assocs., Inc.*, 352 B.R. 1, 8 (D.D.C. 2006) (no right to relief where statute
27 afforded Commissioner discretionary power to compromise cases under 26 U.S.C. § 7122).
28

IV. CONCLUSION

1 For the reasons set forth above, Defendants' motion should be granted and Plaintiff's claims
2 dismissed with prejudice.
3

4 Dated this 9th day of February, 2018.

5 DAVID A. HUBBERT
6 Deputy Assistant Attorney General

7 /s/ James E. Weaver

8 /s/ Amy Matchison

9 /s/ Landon M. Yost

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing (with attached appendices) has been made this 9th day of February, 2018, via the Court's ECF system to all users.

/s/ James E. Weaver
JAMES E. WEAVER
Senior Litigation Counsel, Tax Division
U.S. Department of Justice

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