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IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF UTAH

NELDON JOHNSON and	)	
GLENDIA JOHNSON,	)	Case No. 2:16-cv-0080-RJS
	)	
Plaintiffs,	)	MOTION TO SUMMARILY DENY
	)	PETITION TO QUASH SUMMONS
v.	)	AND COUNTER-PETITION FOR
	)	ENFORCEMENT OF THE SUMMONS
UNITED STATES OF AMERICA,	)	
	)	
Defendants.	)	
_____	)	

The United States, by and through its undersigned counsel, respectfully moves the Court to summarily deny the petition to quash summons that was issued by the Internal Revenue Service (“IRS”). Plaintiffs seek to a quash summons that was issued to Bank of American Fork as part of an IRS examination into Plaintiffs’ federal income tax liabilities for the years 2013 and 2014. The petition to quash should be summarily denied because, as shown below, the United States has made its prima facie showing under the standards set forth by the Supreme Court in *United States v. Powell*, 379 U.S. 48 (1964), and Plaintiffs have failed to overcome the heavy burden placed upon them to establish bad faith or an abuse of process on the part of the IRS.

Specifically, the IRS is entitled to the records summoned as part of its examination, and Plaintiffs' petition should be denied and the summons should be enforced.

### **BACKGROUND**

Revenue Agent Joel Zielke is a duly commissioned Revenue Agent employed by the Internal Revenue Service (IRS) in the Small Business Self-Employed Division in Salt Lake City, Utah. Declaration of Joel Zielke ("Zielke Decl."), ¶ 1. As a Revenue Agent, Mr. Zielke is authorized to issue IRS summonses. Zielke Decl., ¶ 2. In his capacity as a revenue agent, Revenue Agent Zielke was assigned to conduct an examination into the federal income tax liabilities of Plaintiffs, Neldon Johnson and Glenda Johnson, for the taxable years 2012, 2013, and 2014. Zielke Decl. ¶ 3.

Plaintiffs filed a tax return for the tax year 2012, and the return was selected for examination by the IRS. Zielke Decl. ¶ 4. By letter dated November 18, 2015, Revenue Agent Zielke informed Neldon and Glenda Johnson that the examination had been expanded to include a review of their 2013 and 2014 tax years. *Id.* Included with the November 18, 2015 letter was an Information Document Request (IDR) to Neldon and Glenda Johnson requesting documents for their 2012, 2013, and 2014 tax years. *Id.* Revenue Agent Zielke informed the Johnsons that the information requested on the IDR was due December 18, 2015. *Id.* In addition, Revenue Agent Zielke sent a copy of the November 18, 2015 letter and the IDR to Paul Jones, Esq., the Johnsons' designated representative. *Id.*

Revenue Agent Zielke did not receive a response from Neldon and Glenda Johnson with regard to the November 18, 2015 letter and the IDR. Zielke Decl. ¶5. By letter dated December 29, 2015, Revenue Agent Zielke requested Neldon and Glenda Johnson contact him by January 12, 2016, with regard to providing the documents requested in the IDR for inspection and if they

did not respond he informed them that a summons may be served. *Id.* A copy of this letter was also sent to Paul Jones, Esq., the Johnsons' representative. *Id.*

On January 13, 2016, in furtherance of the examination and in accordance with 26 U.S.C. §§ 7602 and 7603, Revenue Agent Zielke issued an IRS administrative summons on Bank of American Fork. Zielke Decl. ¶ 6. He served an attested copy of the IRS administrative summons on Bank of American Fork by mailing the summons by certified mail, which was stamped by the post office on January 14, 2016. *Id.* The summons directed Bank of American Fork to produce “copies of signature cards, monthly bank statements, bank deposits slips, deposit items, credit memos, cancelled checks, and debit memos drawn on accounts which Neldon Johnson or Glenda Johnson either owns or is a signer for the period December 2012 – January 2015.” *Id.* The IRS did not possess any of the information or documents requested in the summons. Zielke Decl. ¶ 7. The information and documents were needed to reconstruct Plaintiffs' income for the tax years 2013 and 2014, which is relevant to the determination of their correct income tax liability. Zielke Decl. ¶ 8. Neldon and Glenda Johnson had previously provided Revenue Agent Zielke with bank records from Bank of American Fork for tax year 2012.

On January 13, 2016, in accordance with 26 U.S.C. § 7609(a), Revenue Agent Zielke caused a notice of the issuance of the summons, a copy of the summons, and a notice explaining Plaintiffs' right to bring a proceeding to quash the summons to be sent via certified mail to Plaintiffs at their last known address. Zielke Decl. ¶ 9. The aforementioned notice was stamped by the post office on January 14, 2016. *Id.*

All administrative steps required by the Internal Revenue Code for issuance of the summons described above have been taken. Zielke Decl. ¶ 10. No Justice Department referral, as defined by 26 U.S.C. § 7602(d)(2), is in effect for Plaintiffs. Zielke Decl. ¶ 11.

### **ARGUMENT**

#### **The Petition Should Be Summarily Denied Because the Government Has Made a Prima Facie Case under *Powell* Which Plaintiffs' Defenses Do Not Rebut**

This Petition should be summarily denied because the United States has met its burden under the standards set forth in *United States v. Powell*, 379 U.S. 48 (1964) and Plaintiffs have failed to overcome their burden and establish that the IRS abused its process or was acting in bad faith in issuing the summons. Further, because the United States has established the validity of the summons, the United States' counter-petition to enforce the summons should be granted.

#### ***A. The Third-Party Administrative Summons at Issue Satisfies the Powell Requirements.***

When a party challenges a summons issued by the IRS or when the government asks that an IRS summons be enforced, the government must first establish a prima facie case of good faith as set forth in *United States v. Powell*, 379 U.S. at 57-58. Once the Government establishes its prima facie case, the burden of proof shifts to the taxpayer. The taxpayer bears a "heavy burden" of showing an abuse of process or the lack of institutional good faith. *Anaya v. United States*, 815 F.2d 1373, 1377 (10th Cir. 1987); *United States v. Balanced Financial Management, Inc.*, 769 F.2d 1440, 1443-44 (10 Cir. 1985); *see also Fortney v. United States*, 59 F.3d 117, 120 (9th Cir.1995). To meet this burden, the taxpayer must allege specific facts and evidence to support his allegations. *Balanced Financial Management, Inc.*, 769 F.2d at 1444.

In order to show that a summons is valid and proper, *Powell* requires the government to establish that the summons: (1) was issued for a legitimate purpose; (2) seeks information

relevant to that purpose; (3) seeks information not already within the IRS's possession; and (4) that the IRS satisfied all administrative steps required by the Internal Revenue Code. *See Powell*, 379 U.S. at 57-58. Courts have held that the government's burden of satisfying the *Powell* requirements is a "slight one" that can be satisfied by introducing a sworn declaration of the revenue agent who issued the summons that the *Powell* requirements have been met. *Balanced Financial Management, Inc.*, 769 F.2d at 1443; *Fortney*, 59 F.3d at 120 .

In this case, Revenue Agent Zielke's Declaration establishes that the summons at issue met all requirements of law and was issued in accordance with the four elements set forth in *Powell*. Each of these four elements is addressed in turn.

***i. The Summons Was Issued for a Legitimate Purpose***

The Internal Revenue Code specifically authorizes the Secretary of the Treasury to issue summonses for the purpose of determining the tax liability of any taxpayer or collecting any such liability. 26 U.S.C. § 7602(a). The courts have consistently held that § 7602 endows the IRS with expansive information-gathering authority in order to encourage effective tax investigations. *See United States v. Arthur Young & Co.*, 465 U.S. 805, 813–815 (1984); *United States v. Balanced Fin. Mgmt*, 769 F.2d 1440, 1446 (10th Cir. 1985); *United States v. Jose*, 131 F.3d 1325, 1327 (9th Cir. 1997) (*en banc*); *Hintze v. IRS*, 879 F.2d 121, 125–126 (4th Cir. 1989). Revenue Agent Zielke issued the third-party summons in furtherance of his investigation of Plaintiffs' federal income tax liabilities. It is proper to issue summonses for the purpose of verifying the correctness of the taxpayer's tax return, to determine the taxpayer's tax liabilities, or to prepare tax returns if they were not filed where such filings were required by law. 26 U.S.C. § 7602(a). Here, as set forth above, the IRS is examining the federal tax liabilities of Plaintiffs,

Neldon and Glenda Johnson, for tax years 2013 and 2014. (Zielke Decl. ¶ 3.) Thus, the summons was issued for a legitimate purpose.

**ii. The Records Are Relevant to the Purpose of the Investigation**

The second element of the *Powell* test requires that the IRS summonses seek information that may be relevant to the purpose of the examination. *Powell*, 379 U.S. at 57-58. The Supreme Court has held that the information sought by the IRS only needs to be potentially relevant, and not actually relevant. *United States v. Arthur Young & Co.*, 465 U.S. 805, 813-814 (1984). Information is deemed relevant where it “might have thrown light upon the correctness of [the taxpayer’s] return.” *See id.* at 813 n.11 (noting that standard “appears to be widely accepted among the Courts of Appeals”). The Tenth Circuit has held that the IRS may issue a summons for items of even potential relevance to an ongoing investigation. *Villarreal v. United States*, 524 Fed. Appx. 419, 423 (10<sup>th</sup> Cir. 2013). In this case, the examination concerns the correct tax liability of Plaintiffs for tax years 2013 and 2014. Towards that end, Plaintiffs’ bank and financial records will facilitate the examination by showing the source and amount of income received by Plaintiffs. Therefore, the summoned documents may be relevant to the purpose of the examination. Revenue Agent Zielke’s declaration shows that the issuance of the administrative third-party summons to Bank of American Fork may be relevant to his examination. Zielke Decl., ¶¶ 10-13. Accordingly, the summons satisfies the second *Powell* requirement.

**iii. Records Not Already in the Possession of the IRS**

The third element of the *Powell* test requires that the IRS not summon documents that it already has in its possession. *Powell*, 379 U.S. at 57-58. This requirement originates from 26 U.S.C. § 7605(b), which forbids “unnecessary” summonses. *See United States v. Davis*, 636

F.2d 1028, 1037 (5th Cir. 1981). As such, the requirement is not “an absolute prohibition against the enforcement of any summons to the extent that it requests the production of information already in the possession of the IRS.” *Id.* Revenue Agent Zielke has verified that the materials, books, records, papers, and other data sought by the summons were not in the possession of the IRS at the time the summons was issued. *See* Zielke Decl., ¶ 11. Accordingly, the summons satisfies the third *Powell* requirement.

***iv. All Administrative Steps Have Been Satisfied***

Finally, the fourth element of the *Powell* test requires that the summons meet the administrative steps required by the Internal Revenue Code. *Powell*, 379 U.S. at 57-58. An averment by a Revenue Agent that all administrative procedures have been complied with is sufficient to satisfy the government’s slight burden under *Powell*’s fourth requirement. *See Balanced Financial Management, Inc.* 769 F.2d at 1443; *Stewart v. United States*, 511 F.3d 1251,1255 (9th Cir. 2008). Here, Revenue Agent Zielke declares that all administrative steps were followed. *See* Zielke Decl., ¶ 17. Revenue Agent Zielke served a copy of the summons, and he timely mailed certified copies to Plaintiffs as required under Section 7609(a). *See* Zielke Decl., ¶ 13. Thus, this final element of the *Powell* test is satisfied.

***B. Plaintiffs Have Not Alleged Sufficient Facts Nor Presented Sufficient Evidence to Rebut the United States’ Prima Facie Case for Enforcement***

Once the government establishes a prima facie case under *Powell*, the burden immediately shifts to the petitioner to establish a valid defense to the summons. *Balanced Financial Management, Inc.* 769 F.2d at 1444. Unless Plaintiffs can show that the government’s issuance of the summons was an abuse of process “or that in issuing the summons the IRS lack[ed] institutional good faith” the summons must be enforced. *See Anaya*, 815 F.2d at 1377; *see also 2121 Arlington Heights Corp. v. I.R.S.*, 109 F.3d 1221, 1224 (7<sup>th</sup> Cir.1997). As set forth

below, Plaintiffs have not made a sufficient showing that the petition should be quashed.

Accordingly, their petition should be summarily denied.

The Plaintiffs argue that the IRS failed to comply with the Right to Financial Privacy Act (RFPA), 12 U.S.C. §3401 *et seq.*, and therefore the summons should be quashed and the Court should award civil penalties to the plaintiffs that are allowed pursuant to 12 U.S.C. §3417(a). *See* Petition to Quash, p. 5. In support of their allegation, plaintiffs cite to *Neece v. Internal Revenue Service*, 922 F.2d 573 (10<sup>th</sup> Cir. 1990). However, *Neece* is inopposite because *Neece* was not a summons enforcement case. In *Neece*, the Tenth Circuit held that the IRS and a bank were not exempt from the requirements of the RFPA where the bank voluntarily chose to allow the IRS to examine financial records pertaining to a taxpayer. Contrary to the plaintiffs' implications nothing in the *Neece* decision purports to limit the authority of the IRS to serve a summons pursuant to the provisions of the Internal Revenue Code. To the contrary courts have repeatedly held that IRS summonses are exempt from the RFPA. *See United States v. MacKay*, 608 F.2d 830, 834 (10th Cir. 1979) (no express or implied provision of the RFPA overrides the summons authority contained in the IRC); *United States v. Hill*, 537 F. Supp. 677, 678 (N.D. Tex. 1982) (Sec. 3413(c) is a clear exception to RFPA requirements); *United States v. Wills*, 475 F. Supp. 492, 494 (M.D. Fla. 1979) (Sec. 3413(c) makes RFPA inapplicable to IRS summons); *Raikos v. Bloomfield State Bank*, 703 F. Supp. 1365, 1369 (S.D. Ind. 1989) (“a number of courts have appropriately followed the letter of the law to hold that the I.R.S. need not follow the Act in issuing its administrative summonses”); *King v. United States*, 684 F.Supp. 1038, 1041 (D. Neb. 1987) (claim that IRS summons violates RFPA is “irrelevant” in view of Sec. 3413(c)); *McTaggart v. United States*, 570 F. Supp. 547, 550 (E.D. Mich. 1983) (Sec. 3413(c) contains a

“clear exception to the requirements of the Right to Financial Privacy Act”). Accordingly, there is no merit to the plaintiffs’ allegation with regard to the RFPA and it should be denied.

Finally, the plaintiffs argue that the summons was not issued in good faith because the summons is more intrusive than necessary. The plaintiffs maintain that the summons is more intrusive than necessary because they are willing to provide their banking information voluntarily without the need to unnecessarily involve their financial institutions. *See* Petition to Quash, p. 6. The plaintiffs’ allegations lack merit and are directly contradicted by the fact that Revenue Agent Zielke sent them a letter and an IDR on November 18, 2015 asking for the information sought by the summons and when the plaintiffs failed to respond he sent them a follow-up letter on December 29, 2015 giving them an additional two weeks to provide the information. It was only when the plaintiffs failed to provide the information voluntarily that Revenue Agent Zielke issued the summons to Bank of American Fork. Accordingly, there is not support for the plaintiffs’ allegation that the summons was not issued in good faith and it should be denied.

**CONCLUSION**

For the foregoing reasons, the United States respectfully requests that this Court deny the Petition to Quash Summons and enforce the summons.

Respectfully submitted this 1<sup>st</sup> day of April, 2016.

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**CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED that service of the foregoing MOTION TO SUMMARILY DENY PETITION TO QUASH SUMMONS has been made this 1<sup>st</sup> day of April, 2016, via the Court's CM/ECF system to:

Paul W. Jones, Esq.  
*Attorney for Plaintiffs*

And by U.S. Mail, postage prepaid, addressed to:

Bank of American Fork  
P.O. Box 307  
American Fork, UT 84003

/s/ Virginia Cronan Lowe  
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