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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

NELDON JOHNSON and GLENDA JOHNSON, Petitioners v. UNITED STATES OF AMERICA, Respondent	**MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTIONS TO SUMMARILY DENY PETITIONS TO QUASH SUMMONSES AND COUNTER-PETITIONS FOR ENFORCEMENT OF THE SUMMONSES** Consolidated Case No. 2:15-cv-00742-JNP-PMW (Formerly Nos. 2:16-cv-80-RJS-EJF; 2:16-cv-81-CW-EJF; and 2:16-cv-203-CW-EJF) Judge: Jill N. Parrish Referred to: Magistrate Judge Paul M. Warner

PETITIONERS, through their attorney, respectfully submits this *Memorandum In Opposition to Respondent's Motion To Summarily Deny Petition to Quash Summons and Counter-Petition For Enforcement of the Summons*. Petitioners filed petitions for an order quashing the Internal Revenue Service ("IRS") third-party Summonses served on Wells Fargo Bank, N.A. ("Wells Fargo"), Millard County Credit Union ("MCCU"), Bank of American Fork ("BAF"), and Morgan Stanley ("MS") in the matter of Neldon Johnson and Glenda Johnson (the "Johnsons" or the "Petitioners") for the calendar years 2012, 2013, and 2014.[1] On January 6, 2016, in response to the first Petition filed the United States of America's (the "Government")

[1] The Summons issued to Wells Fargo is for the year 2012. The Summonses issued to MCCU and BAF is for the years 2013 and 2014. The Summons issued to MS by the IRS was returned in the mail to the IRS and therefore the Petition Quash as to the MS Summons has not yet been served on the United States of America.

filed its *Motion to Summarily Deny Petition to Quash Summons and Counter-Petition For Enforcement of the Summons*. Petitioners then filed their *Memorandum In Opposition to Respondent's Motion To Summarily Deny Petition to Quash Summons and Counter-Petition For Enforcement of the Summons*. On January 20, 2016 the Government filed its *Reply Memorandum*. On March 22, 2016 the Government moved to consolidate the Wells Fargo Summons Petition with the other Petitions to Quash filed by the Johnsons. The Petitioners did not and do not oppose the consolidation of the Petitions. On April 19, 2016 the Court granted the Government's Motion to Consolidate. The Government previously filed its *Motion To Summarily Deny Petition to Quash Summons and Counter-Petition For Enforcement of the Summons* as to the Petitions seeking to quash Summonses issued to MCCU and BAF. Petitioner now files its opposition to the Government's requested enforcement of all the Summonses in the consolidated action and hereby incorporates its previous filed opposition herein. As to the Government's most recent motions to summarily deny and in support of their Petition, Petitioners argue as follows:

I. The Government Has Not Met Its Burden Under *U.S. v. Powell*

The Government correctly notes that *United States v. Powell,* 379 U.S. 48 (1964) *Powell* requires the Government to establish that the summonses: (1) were issued for a legitimate purpose; (2) seek information relevant to that purpose; (3) seek information not already within the IRS's possession; and (4) that the IRS satisfied all administrative steps required by the Internal Revenue Code (these four elements are referred to hereinafter as the "Powell Test"). However, it is clear that the Government has not met its burden as it alleges.

a. The Summonses Were Not Issued For A Legitimate Purpose.

As to allegedly meeting this first element of the Powell Test, the Government makes only one argument. The Government alleges that the Summonses were issued "in furtherance of [the IRS agent's] investigation of Plaintiffs' federal income tax liabilities." To support that allegation Government states only that "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." The Government makes no further argument and provides no support to the specific facts from the case on this element.

However, the information that the IRS would obtain through the Summonses will not assist the government in "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." The bank statements that will be produced pursuant to the Summonses are bank statements of third-party taxpayer businesses that file separate tax returns from the Johnsons. These separate tax returns are not pass-through information tax returns where the Johnsons would receive a distributive share of the profits or losses. Rather, they are independent from the Johnsons and pay their own taxes, file separate tax returns, and are separate persons under the law.

It is particularly relevant that since the time the Summonses were issued and the taxpayers filed the petitions to quash the summonses the United States of America filed a "Complaint for Permanent Injunction and Other Equitable Relief" in this Court, Case No. 2:15-cv-00828 DN (the Honorable David Nuffer is the assigned judge).[2] Said complaint names Neldon Johnson individually and some of the businesses whose bank statements would be

[2] Pursuant to Federal Rule of Evidence 201 Petitioner respectfully requests the Court take judicial notice of the filing referred to in Case No. 2:15-cv-00828.

affected by the Summonses.[1] Because it is this Court's process which is invoked to enforce the Summonses this Court should not permit its processes to be abused. An abuse of process would take place if a Summons was issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. See *United States v. Powell*, 379 U.S. 48 (1964); *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 318, n.20 (1978) ("future cases may well reveal the need to prevent other forms of agency abuse of congressional authority and judicial process"); *United States v. Berg*, 20 F.3d 304 (7th Cir 1994) (taxpayer who refused to comply with IRS summons on grounds that IRS acted in bad faith by not returning documents summoned in earlier separate audit was properly held in contempt).

The Summonses appear to be an improper information gathering tool for that separate case and not for the taxpayers' examination. This is true because the production of documents from the Summonses would result in the production these third-party businesses' bank statements and their related banking information rather than production of documents of the taxpayers that would be used to determine the taxpayers' tax liability.

Lastly, a summons issued to determine the identity of, or gather information about, unidentified taxpayers should be held invalid and found to be issued for an improper purpose when the IRS fails to comply with the John Doe summons requirements of 26 U.S.C. §7609(f). See 26 U.S.C. §7609(f) and *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310 (1985). 26 U.S.C. §7609(f) states:

> (f) Any summons described in subsection (c)(1) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that—
>
> (1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,

> (2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and
>
> (3) the information sought to be obtained from the examination of the records or testimony (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

In this case, although the Summonses were issued to MCCU and BAF as to the Petitioners they seek information of several unidentified taxpayers. It is also important to note that these taxpayers were not notified of the IRS's Summonses. The IRS did not provide any notice to the third-parties affected. More importantly, the IRS did not comply with the requirements of 26 U.S.C. §7609(f) as to the third-parties whose information will be produced and may be attempted to be used in Case No. 2:15-cv-00828.

Further, the Right to Financial Privacy Act "RFPA"[3] requires that account owners be given notice of, and an opportunity to challenge, a government agency's intent to obtain records of their finances from a financial institution. See 12 U.S.C. § 3402. In the case of the Summonses there are third-parties whose rights will be infringed upon if the Summonses are not quashed. Specifically, the Summonses seek information for accounts for which the Petitioners are "signers". Thus, the results of the Summonses will produce bank accounts for which Glenda Johnson is a signer for her elderly mother and for third-party businesses that do not relate to this examination. None of these third-parties received the notice that is required under the RFPA or pursuant to 26 U.S.C. §7609(f) as set forth above.

Respondent argues that the RFPA does not apply because 12 U.S.C. § 3413(c) states, "Nothing in this chapter prohibits the disclosure of financial records in accordance with procedures authorized by title 26." However, because the IRS did not comply with 26 U.S.C. §7609(f) the procedures of the RFPA do apply. 12 U.S.C. § 3403(b) states, "A financial

[3] 12 U.S.C. § 3401 et seq.

institution shall not release the financial records of a customer until the Government authority seeking such records certifies in writing to the financial institution that it has complied with the applicable provisions of this chapter." In this case, the IRS did not certify to the financial institutions that it complied with the RFPA.

The IRS also wholly failed to comply with any of the provisions required by 12 U.S.C. § 3405 as to the Summonses as to the affected third-parties. Because the IRS failed to follow the procedures required by the RFPA the Summonses should be quashed. Additionally, because of this failure the Court should award the civil penalties to the taxpayers that are allowed pursuant to 12 U.S.C. § 3417(a).

Because the Summonses were not issued for a legitimate purpose as set forth above the Summonses should be quashed.

b. The Summonses Do Not Seek Relevant Information.

The Government has also failed to meet the second element of the Powell Test. As set forth in the Petitioners' petitions the test for whether or not a summons seeks relevant information is whether or not (1) the requested documents have no impact on the outcome of the examination; and (2) the requests lack any relevance to the underlying examination. See *Powell*, 379 U.S.at 57; *United States v. First Nat'l St. Bank of N.J.*, 616 F.2d 668 (3rd Cir. 1980). The Government failed to address either of those points of authority.

Although Petitioners do have a personal bank account at both BAF and MCCU during the time period of the examination, the information sought is not specifically identified as to how it pertains to the Johnsons' examination and is therefore irrelevant to the examination. The Government fails to even discuss this point or articulate how the information sought would have an "impact on the outcome of the examination."

Further, the Government fails to articulate how the requested information has any relevance to the underlying examination—especially when much, if not most, of the information sought is the financial records of third-parties not under examination here.

The Government argues that the information sought by the IRS in the Summonses only needs to be potentially relevant, and not actually relevant and cite to *United States v. Arthur Young & Co.*, 465 U.S. 805, 813-814 (1984). However, when summonses are too broad, indefinite, and/or burdensome they will be found to constitute an unreasonable search in violation of the Fourth Amendment of the United States Constitution. Additionally, 26 USC § 7603 limits the summons power of the IRS by requiring that the materials sought be described with "reasonable" certainty. A Summons should not be broader than necessary to achieve its purpose. See *United States v. Powell*, 379 U.S. at 58; *United States v. Lewis*, 604 F. Supp. 1169 (E.D. La 1985); *United States v. Richards*, 479 F. Supp. 828, 833 (E.D. Va. 1979), aff'd, 631 F.2d 341 (4th Cir. 1980).

A document demand for "all information which would be necessary to enable a representative of the IRS to properly determine total income earned or sources of funds received" was considered overbroad and in violation of the Fourth Amendment. See also *United States v. Klir*, 47 AFTR2d 81-1399 (E.D. Tex. 1979), aff'd by unpub. order, 644 F.2d 33 (5th Cir. 1981), wherein a case involving a similar provision, the Court reasoned that because the respondents were forced to determine whether documents were relevant, it would be impossible to enforce the summons by a contempt proceeding. The IRS may not conduct an unfettered "fishing expedition" through a person's records, but "must identify with some precision the documents it wishes to inspect." See *Dauphin Deposit Trust Co.*, 385 F.2d 129, 131 (3d Cir. 1967). In testing for overbreadth, the question is not whether the summons calls for the production of a large

volume of records. Instead, the questions are rather, first did the summons describe the requested documents in enough detail to inform the summoned party of exactly what is to be produced,[4] and, second, may the summoned records be relevant to the inquiry.[5]

These cases are highly relevant here because the Government is merely conducting a fishing expedition. It is particularly telling that a fishing expedition is occurring because the Government argues that "Plaintiffs' bank and financial records will facilitate the examination by showing the source and amount of income received by Plaintiff." However, the Government is seeking bank and financial records of third-party businesses rather than those of the taxpayers. This is also shown because of the commencement of Case No. 2:15-cv-00828 where these third-parties are named parties in that matter and the Government is the Plaintiff.

When the documents sought pursuant to a summons are not relevant to determining a taxpayer's tax liability courts will quash the issued summons. See generally, *United States v. Richards*, 631 F.2d 341 (4th Cir.1980) (affirming denial of enforcement because summoned information was not relevant to tax liability); *United States v. Coopers & Lybrand*, 550 F.2d 615 (10th Cir. 1977) (affirming denial of enforcement because demanded documents were not relevant), cited favorably *by US v. Goldman*, 637 F.2d 664 (9th Cir. 1980); *United States v. Matras*, 487 F.2d 1271 (8th Cir. 1973); *United States v. Theodore*, 479 F.2d 749, 755 (4th Cir. 1973); *United States v. Pritchard*, 438 F.2d 969 (5th Cir. 1971); *United States v. Dauphin Deposit Trust Co.*, 385 F.2d 129 (3rd Cir. 1967).

Because the Summonses do not seek information that is relevant to the taxpayers' examination as set forth above the Summonses should be quashed.

c. The IRS Has Not Satisfied All Administrative Steps Required By The Internal Revenue Code

[4] *United States v. Abrahams*, 905 F.2d at 1282, 1285
[5] *In the Matter of the Tax Liabilities of John Does v. United States*, 866 F.2d 1015, 1021 (8th Cir. 1989)

The Government also argues that it has followed all administrative steps required by the Internal Revenue Code. However, this is also erroneous. A summons issued to determine the identity of, or gather information about, unidentified taxpayers is invalid and improper when the IRS fails to comply with the John Doe summons requirements of §7609(f). See 26 U.S.C. §7609(f) and *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310 (1985). The Summonses specifically seek information about unidentified taxpayers. The Summonses specifically ask for "the payor account name" and "the recipient account name" but does not identify whose information is sought.

In *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310 (1985) the U.S. Supreme Court examined the legislative history of 26 U.S.C. §7609(f) and noted one specific congressional concern: that the party receiving a summons would not have a sufficient interest in protecting the privacy of the records if that party was not itself a target of the summons.[6] 26 U.S.C. §7609(a) and (b) gave the identified taxpayer the right to intervene in a third–party recordkeeper summons. The John Doe requirements of 26 U.S.C. §7609(f) were adopted as a substitute for the intervention procedure when the affected third-party taxpayer could not be identified. Thus, if some of the records requested are not relevant to a legitimate investigation of the summoned party, the IRS may not obtain all the information it seeks unless it complies with 26 U.S.C.§7609(f). This is clearly a case where the Government should have complied with the 26 U.S.C.§7609(f), but they did not. The Government has filed its complaint in Case No. 2:15-cv-00828 and is clear investigating third-parties in that case that would be affected by the Summonses. However, the procedures set forth in 26 U.S.C.§7609(f) were not followed, but should have been as set forth in *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310 (1985).

[6] See S. Rep. No. 94–938 at 368–369 (1976); H.R. Rep. No. 94–658 at 307 (1975).

Because the IRS did not follow proper administrative procedures this Court should quash the Summonses.

II. The Government Has Not Met Its Burden, Therefore Its Motion Must Be Denied

The Government argues that the burden should shift to for Petitioners to establish a valid defense to the Summonses. However, as has been amply set forth above the Government has not met any of the four elements that it is required to meet under the Powell Test to meet its burden. When the Government does not meet their burden the burden will not shift to the taxpayer, but rather the Summonses should be quashed. *United States v. Powell*, 379 U.S. 48(1964); *United States v. Ritchie*, 15 F.3d 592, 600 (6th Cir. 1994), cert. denied, 115 S. Ct. 188 (1994); *Mimick v. United States*, 952 F.2d 230, 232 (8th Cir. 1991). Therefore, in this case the Court must deny the Government's motion and quash the Summonses.

III. If the Court Grants the Government's Motion the Court Should Issue a Protective Order Regarding the Information of Third-Parties Produced.

If the Court grants the Government's motion then the Petitioners respectfully request that any information obtained through the Summonses that is not protected by 26 U.S.C. §6103 be protected from disclosure or use in separate proceedings through a protective order pursuant to Federal Rules of Civil Procedure 26. Specifically, any information of third-parties that is not the taxpayers' information should be covered by a protective order.

IV. The Right To Financial Privacy Act Does Apply.

The Government argues that the RFPA does not apply because the production of document pursuant to the Summonses was compelled and not voluntary. See Pages 7-9 of Respondent's Motion. However, this is only true as to the taxpayer Petitioners. 12 U.S.C. § 3413(c) states, "Nothing in this chapter prohibits the disclosure of financial records in

accordance with procedures authorized by title 26." As to the third-parties that are affected by the Summonses the procedures of title 26 were not followed as set forth above.

WHEREFORE, Respondent respectfully requests this Court quash the IRS third-party Summonses served on BAF and MCCU in the matter of Neldon Johnson and Glenda Johnson for the calendar years 2013 and 2014.

Respectfully submitted this 22th day of April, 2016.

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTIONS TO SUMMARILY DENY PETITIONS TO QUASH SUMMONSES AND COUNTER-PETITIONS FOR ENFORCEMENT OF THE SUMMONSES has been made this 22nd day of April, 2016, via the Court's CM/ECF system to:

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