

JOHN W. HUBER (#7226)
United States Attorney
JOHN MANGUM (#2072)
Assistant United States Attorney

VIRGINIA CRONAN LOWE (admitted Pro Hac Vice)
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 683, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 307-6484
Facsimile: (202) 307-0054

Attorneys for the United States

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH

INTERNATIONAL AUTOMATED)	
SYSTEMS, INC.)	Case No. 2:16-cv-00370-JNP
)	
Petitioner,)	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 summonses that were issued by the Internal Revenue Service (“IRS”). Petitioner seek to a quash summonses that were issued to Zions Bank, Wells Fargo Bank, and Bank of American Fork as part of an IRS examination into Petitioner’s federal corporate income tax liability for the tax year ending June 30, 2013. 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 the Petitioner has failed to overcome the heavy burden placed upon it 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 Petitioner's petition should be denied and the summonses 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 corporate income tax liability of Petitioner International Automated Systems, Inc. (IAS) for the taxable year ending June 30, 2016. Zielke Decl. ¶ 3.

During an examination of Neldon and Glenda Johnson, Revenue Agent Zielke received documents pursuant to summonses to Zions Bank and Bank of American Fork. *See* Declaration of Revenue Agent Joel Zielke, filed in *Neldon and Glenda Johnson v. United States*, Civil No. 2:15-cv-00742 JNP, Doc No. 5. Pursuant to the summonses served on Zions Bank and Bank of American Fork, Revenue Agent Zielke received bank documents involving Neldon and Glenda Johnson and IAS, including a cashier's check from an account at Zions Bank made payable to Glenda Johnson and deposited into an account for IAS at Bank of American Fork. Zielke Decl. ¶4. In addition, the bank documents revealed that IAS had an account at Wells Fargo Bank. *Id.* As a result of that examination, Revenue Agent Zielke opened an examination of IAS for the tax year ending June 30, 2013. *Id.* On February 24, 2016, Revenue Agent Zielke sent a letter and an Information Document Request (IDR -0001) to IAS which requested IAS contact him to schedule a meeting to the review the records set forth in IDR-0001. *Id.* Revenue Agent Zielke

did not get a response to the February 24, 2016 letter. *Id.* On March 11, 2016, Revenue Agent Zielke sent a letter to IAS requesting again that IAS contact him to schedule a meeting to review the records requested in IDR-0001 within the next two weeks. Zielke Decl., ¶5. Revenue Agent Zielke did not get a response to his March 11, 2016 letter. *Id.*

On April 14, 2016, in furtherance of the examination and in accordance with 26 U.S.C. §§ 7602 and 7603, Revenue Agent Zielke issued IRS administrative summonses to Zions Bank, Wells Fargo Bank, and Bank of American Fork. Zielke Decl., ¶7. Each summons directed the receiving bank 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 International Automated Systems, Inc (TIN #xx-xxx7580) owns for the period June 2012-July 2013.” *Id.* In accordance with 26 U.S.C. §7603, Revenue Agent Zielke served an attested copy of each of the summonses attached to this Declaration on IAS by certified mail. Zielke Decl., ¶8.

Although pursuant to the prior summonses on Zions Bank and Bank of American Fork with regard to Neldon Johnson and Glenda Johnson’s 2012 tax year, the IRS received bank records for the period from June 2012 through January 2013, on accounts of IAS for which the Johnsons were signatories, the IRS did not receive any bank records of IAS for the period from February 2013 through July 2013. Zielke Decl., ¶9. In addition, the IRS did not receive any Zions Bank or Bank of American Fork records for IAS for which the Johnsons are not signatories. *Id.* Therefore, the United States does not seek enforcement of the summonses to Zions Bank and Bank of American Fork with regard to the bank records of IAS for which Neldon and Glenda Johnson are signatories for the period from June 30, 2012 through January 30, 2013. However, the United States does seek enforcement of the summonses with regard to

the bank records for which Neldon and Glenda Johnson are signatories for the period from February 2013 through July 2013 and for any other accounts of IAS at Zions Bank and Bank of American Fork for which the Johnsons are not signatories. The IRS did not possess any of the information or documents requested in the summons to Wells Fargo Bank. Zielke Decl., ¶ 10.

The banking records sought by the summonses are relevant to the examination because they may demonstrate the date, amount and source of deposits made into IAS' bank accounts for the tax year ending June 30, 2013. Zielke Decl., ¶11. In turn, that information is relevant to what IAS' income was for that year. *Id.* The bank records may also be relevant because they demonstrate the date, amount, and nature of expenditures made from those bank accounts during IAS' tax year ending June 30, 2013. *Id.* That information is relevant to what deductions IAS was entitled to claim for that year. *Id.*

All administrative steps required by the Internal Revenue Code for issuance of the summonses described above have been taken. Zielke Decl. ¶ 12. No Justice Department referral, as defined by 26 U.S.C. § 7602(d)(2), is in effect for Plaintiffs. Zielke Decl. ¶ 13.

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 Summonses at Issue Satisfy 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 summonses at issue meet all requirements of law and were issued in accordance with the four elements set forth in *Powell*. Each of these four elements is addressed in turn.

i. The Summonses Were 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). Revenue Agent Zielke issued the third-party summonses in furtherance of his investigation of IAS' federal corporate income tax liability for the tax year ending June 30, 2013. 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 liability of IAS for tax year ending June 30, 2013. (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 (10th Cir. 2013). In this case, the examination concerns the correct tax liability of IAS for tax year ending June 30, 2013. Towards that end, the summonsed bank and financial records will facilitate the examination by showing the source and amount of deposits into IAS' bank accounts which is relevant to determining the amount of income received by IAS. In addition, the records may demonstrate the date, amount and nature of expenditures made from

the bank accounts during the tax year which is relevant to what deductions IAS was entitled to claim for that year. 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 Zions Bank, Wells Fargo Bank, and Bank of American Fork may be relevant to his examination. Zielke Decl., ¶ 11. Accordingly, the summonses satisfy 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.* As set forth in detail in the declaration of Revenue Agent Zielke, although pursuant to prior summonses on Zions Bank and Bank of American Fork with regard to Neldon Johnson and Glenda Johnson's 2012 tax year, the IRS received bank records for the period from June 2012 through January 2013, on accounts of IAS for which the Johnsons were signatories, the IRS did not receive any bank records of IAS for the period from February 2013 through July 2013. Zielke Decl., ¶9. In addition, the IRS did not receive any Zions Bank or Bank of American Fork records for IAS for which the Johnsons are not signatories. *Id.* Therefore, the United States does not seek enforcement of the summons to Zions Bank with regard to the bank records of IAS for which Neldon and Glenda Johnson are signatories for the period from June 30, 2012 through January 30, 2013. The United States does seek enforcement of the summonses with regard to the Zions Bank and Bank of American Fork

records for which Neldon and Glenda Johnson are signatories for the period from February 2013 through July 2013 and for any other accounts of IAS at Zions Bank for which the Johnsons are not signatories.

Additionally, Revenue Agent Zielke has verified that the materials, books, records, papers, and other data sought by the summons to Wells Fargo Bank were not in the possession of the IRS at the time the summons was issued. *See* Zielke Decl., ¶ 10. Accordingly, the summonses satisfy 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., ¶ 12. Revenue Agent Zielke served a copy of the summonses, and he timely mailed certified copies to IAS as required under Section 7609(a). *See* Zielke Decl., ¶ 8. 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 (7th Cir.1997). As set forth below, IAS has not made a sufficient showing that the petition should be quashed. Accordingly, the petition should be summarily denied.

In the petition to quash, IAS sets forth three arguments: the IRS already possesses the documents sought by the summonses; the summonses are overly broad; and the summonsed information is not relevant to the IRS examination of IAS. With regard to the first argument that the IRS already possesses the documents sought by the summonses, as set forth above the United States is not seeking enforcement of the Zions Bank and Bank of American Fork summonses with regard to the bank records of IAS for which Neldon and Glenda Johnson are signatories for the period from June 30, 2012 through January 30, 2013. A court may partially enforce a summons which in effect narrows the scope of the summons by limiting the amount of documents that the summoned party must produce. *See United States v. Monumental Life Ins. Co.*, 440 F.3d 729, 737 (6th Cir. 2006). As set forth in Revenue Agent Zielke's declaration, the IRS is not in possession of any of IAS' bank records from Zions Bank and Bank of American Fork for the period from February 2013 through July 2013 and there may be other IAS accounts at Zions Bank and Bank of American, during the period from June 30, 2012 through July 30, 2013, for which the Johnsons were not signatories.

Next, with regard to the summonses issued to Wells Fargo and Bank of American Fork, IAS argues that the information requested by these summonses would overlap information requested on the summonses at issue in the consolidated case no. 2:15-cv-00742 JNP-PMW. This argument is unavailing, as the validity of a summons is determined at the time it is issued. *See United States v. Gimbel*, 782 F.2d 89 (7th Cir. 1986). At the time the Wells Fargo and Bank of American Fork summonses were issued the IRS was not in possession of any of the

summonsed documents. Moreover, as with the Zions Bank summons, the information sought by these summonses is not completely duplicative.

Second, IAS argues that the summonses are overly broad and are an unfettered “fishing expedition.” *See* Petition, p. 6. This argument is without merit. As set forth in detail in the declaration of Revenue Agent Zielke, he is conducting an examination of IAS’ tax liability for the year ending June 30, 2013. To that end, he is summoning bank records which may demonstrate the date, amount and source of deposits made into IAS’ bank accounts for the tax year ending June 30, 2013. In turn, that information is relevant to what IAS’ income was for that year. The bank records may also be relevant because they demonstrate the date, amount, and nature of expenditures made from those bank accounts during IAS’ tax year ending June 30, 2013. That information is relevant to what deductions IAS was entitled to claim for that year. Section 7602(a) of the Code authorizes the Commissioner, “[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, [or] determining the liability of any person for any internal revenue tax, . . . [t]o examine any books, papers, records or other data which may be relevant or material to such inquiry” and to summon any person to appear and produce such documents and to give relevant testimony. *See* 26 U.S.C. § 7601(a)(1) and (2). The courts have consistently held § 7602 gives the IRS expansive information-gathering authority to facilitate effective tax investigations. *See Church of Scientology v. United States*, 506 U.S. 9, 10 n.2 (1992); *United States v. Arthur Young & Co.*, 465 U.S. 805, 813-15 (1984). As such, the summonses at issue herein are valid requests for information to determine the tax liability of IAS for the year ending June 30, 2013.

Finally, IAS argues that the summonsed documents are not relevant to determining IAS’ tax liability and IAS’ financial records are publicly available through public websites such as the

Securities and Exchange Commission's (SEC) website. *See* Petition, p. 7. As set forth above, the summonsed documents are relevant to determining IAS' tax liability as the documents may provide information as to its income and the validity of its deductions. 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 (10th Cir. 2013). Moreover, the reporting requirements for the SEC differ from reporting an income tax liability and IAS has not shown how any SEC filings would duplicate or provide the information sought by the summonses. A review of the SEC website included in the Petition does not reveal any filings by IAS with the SEC for the period ending June 30, 2011 through December 31, 2014. Therefore, IAS' argument is without merit and 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 summonses as set forth above.

Respectfully submitted this 11th day of July, 2016.

JOHN W. HUBER
United States Attorney

JOHN K. MANGUM
Assistant United States Attorney

/s/ Virginia Cronan Lowe
VIRGINIA CRONAN LOWE
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 683
Ben Franklin Station
Washington, D.C. 20044-0683
Telephone: (202) 307-6484

Attorneys for the United States

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing MOTION TO SUMMARILY DENY PETITION TO QUASH SUMMONS has been made this 11th day of July, 2016, via the Court's CM/ECF system to:

Paul W. Jones, Esq.
Attorney for Plaintiffs

And by US Mail, postage prepaid to:

Zions Bank
Legal Department
1875 S Redwood Road
Salt Lake City, UT 84104

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

Wells Fargo Bank
2700 S. Price Road, 2nd Floor
Chandler, AZ 85286

/s/ Virginia Cronan Lowe
VIRGINIA CRONAN LOWE
Trial Attorney, Tax Division
United States Department of Justice