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IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH

DCL16BLT, INC.)	
)	Case No. 2:16-cv-00754-DN
Petitioner,)	
)	MOTION TO SUMMARILY DENY
v.)	PETITION TO QUASH SUMMONS
)	AND COUNTER-PETITION FOR
UNITED STATES OF AMERICA,)	ENFORCEMENT OF THE SUMMONS
)	
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. Petitioner seeks to quash summonses that were issued to Zions Bank, Wells Fargo Bank, and Millard County Credit Union as part of an IRS examination into Petitioner’s federal corporate income tax liability for the tax years ending December 31, 2012, December 31, 2013, and December 31, 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 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 DCL16BLT, Inc. (DCL) for the taxable years ending December 31, 2012, December 31, 2013, and December 31, 2014. ¶ 3.

During an examination of the federal income tax liabilities of Neldon and Glenda Johnson, Revenue Agent Zielke received documents pursuant to summonses issued to Zions Bank and Millard County Credit Union with regard to an entity named RaPower-3 LLC, for which Neldon Johnson was the signatory on bank accounts. *See* Declaration of Revenue Agent Joel Zielke (Zielke Decl.), ¶4. Revenue Agent Zielke searched for the entity RaPwer-3 LLC on the Intergrated Data Retrieval System (IDRS). *Id.* The IDRS is a database maintained by the Internal Revenue Service that stores taxpayer account information. IDRS indicated that RaPower-3 LLC is a disregarded entity for federal tax filing purposes as it is wholly owned by DCL16BLT, Inc. *Id.* DCL16BLT, Inc. is the sole member of RaPower-3 and they have the same mailing address. *Id.* Thus, any income received by RaPower-3 LLC would flow through and be reported on the corporate income tax return for DCL16BLT, Inc. A review of the IDRS revealed that DCL16BLT, Inc. had not filed a federal corporate income tax return for the year 2012. *Id.*

On January 13, 2016, Revenue Agent Zielke sent a letter to DCL16BLT, Inc. informing it that he was conducting an examination of its 2012 tax year for which it had not filed a Form 1120, U.S. Corporation Income Tax Return. *See* Zielke Decl., ¶5. He scheduled a conference with DCL16BLT, Inc. for January 27, 2016 and requested that if this date was inconvenient to call him. *Id.* DCL16BLT, Inc. failed to appear at the conference or to contact Revenue Agent Zielke with regard to the examination. *Id.*

On January 27, 2016, Revenue Agent Zielke sent DCL16BLT, Inc. a second letter requesting a meeting with it and he also issued a Form 4564, Information Document Request (IDR) to DCL16BLT, Inc., which requested financial statements, detailed general ledger, bank statements and credit card statements for tax year 2012. *See* Zielke Decl., ¶6. He requested that DCL16BLT, Inc. provide the information to him by February 10, 2016, but he did not receive a response to this letter or the IDR. *Id.*

On March 2, 2016, Revenue Agent Zielke sent DCL116BLT, Inc. a letter with regard to his request for a meeting and the IDR issued to it on January 27, 2016, and requested that DCL16BLT, Inc. respond to the request for a meeting and the IDR by March 17, 2016. *See* Zielke Decl., ¶7. In addition, he informed DCL16BLT, Inc. that if he did not hear back that he may issue a summons. *Id.*

On May 24, 2016, Revenue Agent Zielke sent a letter to DCL16BLT, Inc. to inform it that the examination had been expanded to include the 2013 and 2014 tax years. *See* Zielke Decl., ¶ 8. DCL16BLT, Inc. had not filed federal corporate income tax returns for the years 2013 and 2014. *Id.* In addition, he attached a second IDR and requested that the documents requested in this IDR be provided to him by June 15, 2016. *Id.* In this letter, he also explained that after repeated requests to review records, he issued summonses to obtain bank records and

after reviewing the bank records provided by Zions Bank, Millard County Credit Union, and Zions Bank he prepared a bank deposit analysis, which listed the deposits made into its business bank accounts. *Id.* According to this analysis, \$4,342,867.65 was deposited into business bank accounts in 2012, and of that amount, \$508,579.80 was identified as being non-taxable deposits. *Id.* In the IDR, he requested that DCL16BLT, Inc. explain the remaining \$3,834,287.85 of deposits made into the business bank accounts in 2012. *Id.* He requested a response by June 15, 2016, but he did not get a response to the May 24, 2016 letter or the second IDR. *Id.*

On June 16, 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 Millard County Credit Union. *See* Zielke Decl., ¶10. 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 drawn on accounts which DCL16BLT, Inc. (TIN #xx-xxx1997), or its wholly owned limited liability company, RaPower-3 LLC (TIN # XX-XXX2043) owns for the period December 2012-January 2015.” *Id.* The summonses were served by certified mail on June 20, 2016. *Id.* True and complete copies of the Zions Bank, Wells Fargo Bank, and Millard County Credit Union summonses are attached as Exhibits 1, 2, and 3 to the Zielke Declaration. In accordance with 26 U.S.C. §7609, Revenue Agent Zielke served an attested copy of each of the summonses on DCL16BLT, Inc, the taxpayer and the sole member of RaPower-3 LLC, by certified mail on June 20, 2016. *See* Zielke Decl, ¶11.

Although pursuant to a prior summons on Zions Bank and Millard County Credit Union with regard to Neldon Johnson and Glenda Johnson’s 2012 tax year, the IRS received bank records for the period from December 2012 through January 2013, on accounts of DCL16BLT,

Inc. and its wholly owned subsidiary RaPower-3 LLC for which the Johnsons were signatories, the IRS did not receive any bank records of DCL16BLT, Inc. or RaPower-3 LLC for the period from February 2013 through January 2015. *See* Zielke Decl., ¶12. In addition, the IRS did not receive any Zions Bank and Millard County Credit Union records for DCL16BLT, Inc. or RaPower-3 LLC for which the Johnsons are not signatories. *Id.* Therefore, the United States does not seek enforcement of the summonses to Zions Bank and Millard County Credit Union with regard to the bank records of DCL16BLT, Inc. or RaPower-3 LLC for which Neldon and Glenda Johnson are signatories for the period from December 2012 through January 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 January 2015 and for any other accounts of DCL16BLT, Inc. or RaPower-3 LLC at Zions Bank and Millard County Credit Union for which the Johnsons are not signatories. The IRS does not possess any of the information or documents requested in the summonses to Wells Fargo Bank. *See* Zielke Decl., ¶13.

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 DCL16BLT, Inc.'s bank accounts for the tax year ending December 31, 2013 and December 31, 2014. *See* Zielke Decl., ¶13. In turn, that information is relevant to what DCL16BLT, Inc.'s income was for these years. *Id.* The bank records may also be relevant because they demonstrate the date, amount, and nature of expenditures made from those bank accounts during DCL16BLT, Inc. tax years ending December 31, 2013 and December 31, 2014. *Id.* That information is relevant to what deductions DCL16BLT, Inc. was entitled to claim for these years. *Id.*

All administrative steps required by the Internal Revenue Code for issuance of the summonses described above have been taken. Zielke Decl. ¶ 14. No Justice Department referral, as defined by 26 U.S.C. § 7602(d)(2), is in effect for DCL16BLT, Inc. Zielke Decl. ¶ 15.

ARGUMENT

The Petition Should Be Summarily Denied Because the Government Has Made a Prima Facie Case under *Powell* Which Petitioner's 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 DCL has failed to overcome its 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 DCL's federal corporate income tax liability for the tax years ending December 31, 2013 and December 31, 2014. 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, DCL failed to file returns for the years 2012, 2013, and 2014 and the IRS is examining the federal tax liabilities of DCL for these tax years. (Zielke Decl. ¶ 3.) Thus, the summonses were 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 DCL for tax years 2012, 2013, and 2014. Towards that end, the summonsed bank and financial records will facilitate the examination by showing the source and amount of deposits into DCL’s bank accounts which is relevant to determining the amount of income received by DCL. 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 DCL was entitled to claim for these years. 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 Millard County Credit Union 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 a prior summons on Zions Bank and Millard County Credit Union with regard to Neldon Johnson and Glenda Johnson’s 2012 tax year, the IRS received bank records for the period from December 2012 through January 2013, on accounts of DCL16BLT, Inc. and its wholly owned subsidiary RaPower-3 LLC for which the Johnsons were signatories, the IRS did not receive any bank records of DCL16BLT, Inc. or RaPower-3 LLC for the period from February 2013 through January 2015. *See Zielke Decl.*, ¶12. In addition, the IRS did not receive any Zions Bank and Millard County Credit Union records for DCL16BLT, Inc. or RaPower-3 LLC for which the Johnsons are not signatories. *Id.* Therefore, the United States does not seek enforcement of the summonses to Zions Bank and Millard County Credit Union with regard to the bank records of DCL16BLT, Inc. or RaPower-3 LLC for which Neldon and Glenda Johnson are signatories for the period from December 2012 through January 2013. The United States does seek enforcement of the Zions Bank and Millard County Credit Union summonses with regard to the bank records for which Neldon and Glenda Johnson are signatories for the period from February 2013 through January 2015 and for any other accounts of DCL16BLT, Inc. or RaPower-3 LLC at Zions Bank and Millard County Credit Union 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 Wells Fargo Bank summonses were not in the possession of

the IRS at the time the summonses were issued. *See* Zielke Decl., ¶ 13. 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., ¶ 15. Revenue Agent Zielke served a copy of the summonses, and he timely mailed certified copies to DCL, the taxpayer and the sole member of RaPower-3 LLC, at 4035 S 4000 West, Delta, UT 84624, as required under Section 7609(a). *See* Zielke Decl., ¶ 11. 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, DCL has not made a sufficient showing that the petition should be quashed. Accordingly, the petition should be summarily denied.

In the petition to quash, DCL sets forth four arguments: the IRS has failed to comply with the Right to Financial Privacy Act, the IRS already possesses the documents sought by the summons issued to Zions Bank, the IRS is already seeking the documents from the Millard County Credit Union and Wells Fargo from other summonses, and the summonses are overly broad. In the first argument, DCL maintains 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 petitioner that are allowed pursuant to 12 U.S.C. §3417(a). *See* Petition to Quash, p. 5. In support of its allegation, DCL cites to *Neece v. Internal Revenue Service*, 922 F.2d 573 (10th Cir. 1990). However, *Neece* is inapposite 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 DCL's 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 summonses); *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 DCL’s allegation with regard to the RFPA and it should be denied.

With regard to the second 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 Millard County Credit Union summonses with regard to the bank records of DCL for which Neldon and Glenda Johnson are signatories for the period from December 2012 through January 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 DCL’s bank records from Zions Bank and Millard County Credit Union for the period from February 2013 through January 2015 and there may be other DCL accounts at Zions Bank and Millard County Credit Union during the period from December 2012 through January 2013, for which the Johnsons were not signatories.

Next, with regard to the summonses issued to Wells Fargo and Millard County Credit Union, DCL 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 Millard County Credit Union 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.

Finally, DCL argues that the summonses are overly broad and are an unfettered “fishing expedition.” *See* Petition, p. 8. This argument is without merit. As set forth in detail in the declaration of Revenue Agent Zielke, he is conducting an examination of DCL’s tax liability for the years 2012, 2013, and 2014. To that end, he is summoning bank records which may demonstrate the date, amount and source of deposits made into DCL’s bank accounts for the tax years 2012, 2013, and 2014. In turn, that information is relevant to what DCL’s income was for those years. The bank records may also be relevant because they demonstrate the date, amount, and nature of expenditures made from those bank accounts during DCL’s 2012, 2013, and 2014 tax years. That information is relevant to what deductions DCL was entitled to claim for those years. 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 DCL for the years 2012, 2013, and 2014. Therefore, DCL’s 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 14th day of September, 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 14th day of September, 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
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Wells Fargo Bank
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/s/ Virginia Cronan Lowe
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