

EXHIBIT 2

Memorandum of Law in Opposition to Petition to Quash Summons in case no. 5:04-MC-07023-MMC-JCS presented by Melissa Siskind as Government Exhibit 48 in an attempt to falsely impeach Doreen Hendrickson's testimony concerning Defense Exhibit 562

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8
9 IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11 PETER HENDRICKSON,

12 Petitioner,

13 v.

14 UNITED STATES OF AMERICA,

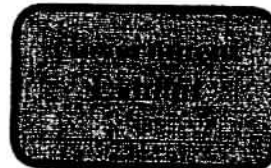
15 Respondent.

No. 5:04-MC-07023-MMC-JCS

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17 MEMORANDUM OF LAW IN OPPOSITION TO PETITION TO QUASH SUMMONS

18 The United States of America submits this memorandum of law in opposition to the petition to
19 quash an IRS summons issued to PayPal, Inc., seeking records related to Peter Hendrickson.¹
20 Hendrickson primarily opposes enforcement on First Amendment grounds. Because the government has
21 met the requirements for summons enforcement under *Powell* and because investigating Hendrickson's
22 potential promotion of abusive tax arrangements does not impinge upon any protected First Amendment
23 rights, the Court should deny the petition to quash.

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27 ¹ On July 27, 2004, the Internal Revenue Service issued a summons to PayPal, Inc., pursuant to
28 26 U.S.C. (I.R.C.) § 7602. Petitioner moved to quash that summons in action 3:04-MC-00177-
MMC based, in part, on alleged deficiencies in the notice sent to petitioner. On August 17, 2004,
the IRS withdrew and reissued the summons. Petitioner now moves to quash the second
summons.



1 BACKGROUND

2 IRS Revenue Agent Heidi Beukema is conducting an investigation into Hendrickson's promotion
3 of abusive tax arrangements through his company, Lost Horizons, Inc.² In furtherance of this investigation,
4 she issued a summons to PayPal seeking records and documents related to accounts of and transactions
5 involving petitioner and Lost Horizons.³

6 The summoned materials are necessary to investigate petitioner's promotion of abusive tax
7 arrangements.⁴ Revenue Agent Beukema states that, among other purposes, the materials will identify the
8 clients of petitioner and the extent of his relationship with those clients. The records and documents sought
9 by the summons are not already in the possession of the IRS.⁵ There has been no referral to the United
10 States Department of Justice for investigation or prosecution of the petitioner pursuant to 26 U.S.C.
11 (I.R.C.) § 7602(d).⁶ All administrative steps required for the issuance of the summons have been taken.⁷

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13 ARGUMENT

14 The Court should deny the motion to quash the IRS summons because the United States has made
15 a *prima facie* case for summons enforcement under *Powell* and because investigating Hendrickson's
16 potential promotion of abusive tax arrangements does not impinge upon any protected First Amendment
17 rights.

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21 ² Beukema Decl. ¶ 3.

22 ³ *Id.* ¶ 4. This summons, issued on July 24, 2004, was withdrawn and reissued by Revenue Agent
23 Paula Cochran on August 17, 2004. *Id.* ¶ 5; Cochran Decl. ¶ 3. The August 17, 2004, summons
is marked as Exhibit A to the Petition to Quash Summons.

24 ⁴ *Id.* ¶ 8.

25 ⁵ *Id.* ¶ 6; Cochran Decl. ¶ 6.

26 ⁶ *Id.* ¶ 9.

27 ⁷ *Id.* ¶ 7; Cochran Decl. ¶ 7.

1 A. Denial of the Motion to Quash the IRS Summons is Proper Because the Government Satisfies
2 the Powell Requirements for Judicial Enforcement of the Summons.

3 Section 7602 of the Internal Revenue Code provides the IRS authority to issue summonses in
4 support of its efforts to administer and enforce the internal revenue laws and to determine a taxpayer's tax
5 liability.⁸ Section 7604 provides the district courts jurisdiction to compel compliance with a summons.⁹
6 Although the United States has not brought a petition seeking judicial enforcement of an IRS summons, the
7 inquiry to defeat a petition to quash a summons is the same as that to enforce a summons.¹⁰

8
9 1. *The declaration of Revenue Agent Heidi Beukema establishes that the United States has*
10 *met its initial burden for judicial enforcement of the IRS summons.*

11 To obtain judicial enforcement of an IRS summons, the Government must establish that (1) the IRS
12 is conducting the investigation for a legitimate purpose; (2) the information sought is relevant to that
13 purpose; (3) the information is not already within the Government's possession; and (4) the IRS has
14 followed the administrative steps required by the Internal Revenue Code.¹¹ Further, a summons may not
15 be enforced if the IRS has referred the investigation to the Department of Justice for criminal prosecution.¹²
16 The Government need only make a minimal showing that the above requirements have been met.¹³ This

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20 ⁸ *United States v. Derr*, 968 F.2d 943, 945 (9th Cir. 1992).

21 ⁹ *Id.*

22 ¹⁰ *Crystal v. United States*, 172 F.3d 1141, 1143-44 (9th Cir. 1999).

23 ¹¹ *United States v. Powell*, 379 U.S. 48, 57-58 (1964).

24 ¹² I.R.C. § 7602(d).

25 ¹³ *Liberty Fin. Servs. v. United States*, 778 F.2d 1390, 1392 (9th Cir. 1985). "This is
26 necessarily true because the statute must be read broadly in order to ensure that the enforcement
27 powers of the IRS are not unduly restricted." *Id.* "The government's burden is a slight one."
28 *Crystal*, 172 F.3d at 1144.

1 is typically done by affidavit or declaration of the issuing agent averring that each of the *Powell*
2 requirements has been met.¹⁴

3 The declarations of Revenue Agents Heidi Beukema and Paula Cochran establish the United
4 States' *prima facie* case under *Powell* in this case. Revenue Agent Beukema states that she is
5 investigating petitioner's promoter activities and that the summoned materials are relevant and necessary
6 for this investigation. Additionally, she states that the information requested is not in the possession of the
7 Government and that the IRS has taken all administrative steps required for the issuance of this summons.
8 Finally, she states that there has been no referral from the IRS to the Department of Justice.

9
10 2. *Petitioner fails to provide specific evidence to disprove that the United States is entitled*
11 *to judicial enforcement of the IRS summons.*

12 Once the Government makes the requisite *prima facie* showing, the party opposing the summons
13 bears the burden to disprove one of the elements or to demonstrate that judicial enforcement of the
14 summons would otherwise constitute an abuse of the Court's process.¹⁵ The burden on the party opposing
15 the summons is a heavy one.¹⁶ The party must "allege specific facts and evidence to support his
16 allegations."¹⁷ Judicial review to enforce an IRS summons is "generally a summary proceeding to which
17 a taxpayer has few defenses."¹⁸

18 Here, petitioner does not argue any hidden government motive that would make enforcement of
19 the summons an abuse of this Court's process. He does argue that the customer and sales information
20 sought by the PayPal summons are not needed to establish a violation of I.R.C. § 6700, the section under
21 which the IRS is investigating petitioner.¹⁹ His only support for this argument, however, is his statement that

22 ¹⁴ *Crystal*, 172 F.3d at 1144.

23 ¹⁵ *Liberty Fin. Servs. v. United States*, 778 F.2d 1390, 1392 (9th Cir. 1985).

24 ¹⁶ *Id.*

25 ¹⁷ *Id.*

26 ¹⁸ *Derr*, 968 F.2d at 945.

27 ¹⁹ Memorandum in Support of Petition to Quash ("Mem.") at 4.

1 the subject matter of the summons is "particularly sensitive" and "unrelated and/or insufficiently important
2 to any existing need."²⁰ No further support is provided.

3 Treating this argument as a challenge to the second requirement under *Powell* (that the inquiry be
4 relevant to the legitimate purpose of the investigation), petitioner fails to meet his heavy burden to disprove
5 the assertion by Revenue Agent Beukema that the summoned materials are relevant and necessary to the
6 investigation. She states that, among other purposes, the materials will identify petitioner's clients and the
7 extent of the relationship between petitioner and his clients. This is clearly relevant to learning more about
8 the scope of any plans or arrangements subject to penalty under I.R.C. § 6700.

9 Thus, the United States has met its burden to make a *prima facie* case for judicial enforcement of
10 the summons under *Powell*. Petitioner, on the other hand, has failed to provide any specific facts regarding
11 his argument that the inquiry is not relevant. He fails to meet his burden to disprove Revenue Agent
12 Beukema's assertion that the relevance requirement, along with all of the requirements for judicial
13 enforcement, has not been met.

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15 B. Denial of the Motion to Quash the IRS Summons is Proper Because the Mere Investigation
16 of the Potential Promotion of Abusive Tax Arrangements Does Not Impinge Upon First
Amendment Rights.

17 Petitioner focuses his argument to quash the summons on the First Amendment. He argues that
18 both the summons and the investigation of which it is a part violate his rights under the First Amendment.²¹

19 It is well established, however, that the First Amendment cannot be used to quash a summons
20 served upon a third party when the summons is used merely to acquire information as part of an IRS
21 investigation.²² For example, in *Steinhardt v. United States*, the IRS issued a summons to a bank
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23 ²⁰ *Id.*

24 ²¹ Petition to Quash ¶ 14; Mem. 2.

25 ²² *Hintze v. IRS*, 879 F.2d 121, 129 (4th Cir. 1989), *overruled on other grounds by Church*
26 *of Scientology v. United States*, 506 U.S. 9 (1992); *United States v. First Nat'l Bank*, 691
27 F.2d 386, 388 (8th Cir. 1982); *United States v. Freedom Church*, 613 F.2d 316, 320 (1st Cir.
1979).

1 pursuant to I.R.C. § 7602 to obtain information regarding the petitioner's accounts as part of an
2 investigation of a potential abusive tax arrangement.²³ The investigating revenue agent stated in her
3 declaration that the records were needed to determine the nature and extent of the customers' respective
4 deposits and withdrawals and to identify other customers of the potential scheme.²⁴ She stated further that
5 the records would help determine whether the petitioner and others were liable for penalties under I.R.C.
6 §§ 6700 and 6701.²⁵

7 The court ruled in favor of the government and denied the petition to quash the summons.²⁶ With
8 respect to the constitutional argument, the court held that the First Amendment defense lacked merit
9 because the IRS had issued the summons for a permissible use, namely, to acquire information to determine
10 whether the petitioner was liable under Sections 6700 and 6701.²⁷ The court refused to determine that the
11 IRS issued the summons for the impermissible use of deterring the petitioner from exercising his First
12 Amendment right to criticize or protest against the government.²⁸

13 As in *Steinhardt*, the IRS in this case issued the summons as part of a legitimate investigation: to
14 determine whether petitioner is liable for civil penalties under I.R.C. § 6700 and whether petitioner can be
15 enjoined under I.R.C. § 7408 for such violations. The IRS did not issue the summons to regulate or
16 suppress petitioner's activities. Because the IRS seeks the requested information from PayPal as part of
17 its investigation, petitioner's First Amendment argument is not relevant and cannot be used to quash the
18 summons served upon PayPal.

20 ²³ 326 F. Supp. 2d 1113, 1116 (C.D. Cal. 2003). A First Amendment argument was also
21 rejected in two companion cases related to the same § 6700 investigation: *Strough v. United*
22 *States*, 326 F. Supp. 2d 1118 (C.D. Cal. 2003) and *Hargis v. United States*, No. SACV 03-
1146 DOC (ANX), 2003 WL 23654056 (C.D. Cal. Dec. 21, 2003).

23 ²⁴ *Id.* at 1117.

24 ²⁵ *Id.*

25 ²⁶ *Id.* at 1114.

26 ²⁷ *Id.* at 1118.

27 ²⁸ *Id.*

1 Petitioner's argument itself proves the legitimacy of the request. His First Amendment argument
2 hinges on his assertion that he does not use the book to promote "any kind of other service."²⁹ He argues
3 that the sale of the book is an isolated event with respect to each customer and that the relationship
4 between him and the customer does not continue beyond the sale. The IRS needs to know the identity of
5 the customers, among other reasons, to interview them to learn about sales of other materials, to learn
6 whether petitioner provided additional advice or guidance to these customers, and to learn whether
7 petitioner prepared or assisted in preparing tax returns or other documents for these customers.

8 Thus, the customer information sought by the summons is critical to verifying the factual accuracy
9 of petitioner's argument. The United States cannot be expected to rely on petitioner's factual assertions
10 with respect to his customers and simultaneously be denied access to information about the customers.
11 Because the information sought by the summons is necessary to the investigation, the IRS is seeking it
12 legitimately and thus cannot be barred from gathering the information by the First Amendment.

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27 ²⁹ Mem. 2-3.

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CONCLUSION

The United States respectfully requests that the Court deny the motion to quash the IRS summons. The United States has made a *prima facie* case for judicial enforcement under *Powell*, and the investigation of the potential promotion of abusive tax arrangements does not impinge upon any protected First Amendment rights as claimed by petitioner.

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CERTIFICATE OF SERVICE

This is to certify that on the 18th day of October, 2004, a copy of this Memorandum in Opposition of Petition to Quash Summons along with copies of the supporting declarations of Heidi Beukema and Paula Cochran were sent to petitioner by First Class United States Mail, postage prepaid, and addressed to:

Michael E. Rosman
Center for Individual Rights
1233 20th Street, NW, Suite 300
Washington, DC 20036

/s/ _____
GREGORY E. VAN HOEY