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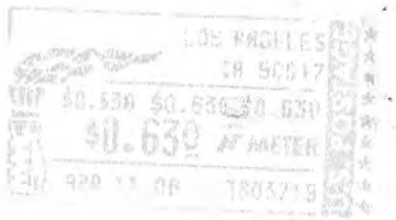

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FILED
CLERK, U.S. DISTRICT COURT
AUG 17 2006
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PEYMON MOTTAHEDEH, APRIL MOTTAHEDEH, FREEDOM LAW SCHOOL, Petitioners/Plaintiffs vs. UNITED STATES, GOLDEN HOTELS LIMITED PARTNERSHIP DBA ATRIUM HOTEL, KIRK TAMBORNINI, AND UNKNOWN DOES 1-10 Respondents/Defendants.	CASE NO. CV-06-02356 SJO (RZx) FIRST AMENDED PETITION TO QUASH SUMMONS, COMPLAINT FOR INJUNCTIVE, DECLARATORY RELIEF AND DAMAGES. JURY TRIAL DEMANDED

JURISDICTION

1. This Court has jurisdiction over the matters pursuant to 26 U.S.C. §7609(h), 28 U.S.C. §§1331 and 1340.

VENUE

2. Venue is proper in this Court since the summoned party is located within this district. Plaintiffs are also located within this district.

PARTIES

3. The Mottahedeh's are married natural individuals located within this district.

4. Freedom Law School is an unincorporated association located within this

district.

5. Defendant Golden Hotels Limited Partnership, dba Atrium Hotel, is a limited partnership doing business within this district.

6. Defendant Kirk Tambornini is an internal revenue agent. He is sued in his individual capacity.

7. Unknown DOES 1-10 are supervisors and superiors of defendant Tambornini whose true names are not known at this time. They are sued in their individual capacities.

FIRST CAUSE OF ACTION

(Quashing Internal Revenue Summons)

8. Defendant United States, through it agent (Tambornini), issued a summons dated March 20, 2006 to defendant Atrium Hotel, and served said summons on the hotel shortly thereafter. The summons states it is "in the matter of Peymon Mottahedeh, Freedom Law School, April Mottahedeh, and Live Free Now".

9. The summons generally seeks all records the hotel may have relating to *anyone* who had anything whatever to do with conferences (including mere attendance) that the plaintiffs have sponsored/produced from the years 2000 through 2006. These records include rental agreements and other contracts, number of hotel rooms reserved by and for *anyone*, names, addresses, and telephone numbers of *all* participants and attendees, all methods of payments made by *anyone*, including credit card information, and all billing statements and correspondence relating to *anyone*. A true and correct copy of the summons is attached as Exhibit 1.

10. Although plaintiffs were entitled to notice of the summons under 26 U.S.C. §7609(a), no such notice was ever given. The summons should be quashed for this reason alone.

11. Plaintiffs have a right to begin proceedings to quash the summons under §7609.

12. Although the summons states it was allegedly issued from the Criminal Investigation Division, on their face, most, if not all, of the records identified in the summons are not actually for the purpose of any possible criminal investigation, or anything else excepted under §7609(c) from plaintiff's rights to begin proceedings to quash the summons.

13. The summons was not issued for the purpose of the 'investigation of the administration or enforcement of the internal revenue laws' concerning the plaintiffs, and does not identify any internal revenue law violations allegedly being investigated.

14. Rather, the summons was issued for the purpose of obtaining information on how the plaintiffs and their associates exercise their First Amendment rights of Assembly, Association, Free Speech, and Petitioning activities, and to obtain identification and contact information on anyone who even so much as attended a meeting for purposes of future harassment and intimidation to dissuade any further association. Obtaining information such as hotel records of the identity, method, and amount people paid for their rooms, the number of rooms reserved, billing information and names and addresses of attendees, would have nothing whatever to do with any alleged (unspecified) criminal investigation of the plaintiffs.

15. The plaintiffs hold public conferences that are critical of government misconduct and abuse of power, and the IRS in particular. Included in these conferences are speakers, and the distribution of books and other written materials by attendees, that are critical of the government and the IRS.

16. The organization and promotion of the meetings/conferences represent a major part of plaintiff Peymon's exercising his First Amendment right to investigate issues surrounding governmental misconduct and abuse of power, to promote his beliefs about governmental misconduct and abuse of power orally and in print by assembling and Associating with other American Citizens, so that he and other American Citizens can assemble and organize with him to petition the government for the redress of grievances

to curtail or eliminate such government misconduct and abuse of power.

17. The government and its agents are seeking the above information for the purposes of chilling the plaintiff's Association, Assembly, Free Press, Free Speech, and Petition rights.

18. The summons should be quashed due to failure to follow required procedures in service of a copy of the summons on plaintiffs, and because it was issued for an improper purpose.

SECOND CAUSE OF ACTION

(Injunctive Relief Against Tambornini, DOES 1-10, & Golden Hotels)

19. Paragraphs 1-17 are incorporated herein.

20. Defendant Tambornini issued the summons for the improper purpose of attempting to obtain identification information of plaintiff's associates and to create and maintain a record of how they exercise their First Amendment protected rights of Assembly, Association, Petitioning, and Speech, with the purpose of chilling those rights through harassment of plaintiffs and their associates.

21. Defendant Tambornini was acting under the direction of his superiors, unknown DOES 1-10. These DOE defendants participated in the preparation of, and/or approved the issuance of the summons that was delivered by defendant Tambornini.

22. Plaintiffs seek a permanent injunction against defendant Golden Hotels from disclosing any of the records sought by Tambornini's summons, and for enjoining Tambornini and DOES 1-10 from seeking any such records.

THIRD CAUSE OF ACTION

(Declaratory Relief Against Defendants Tambornini and DOES 1-10)

23. Paragraphs 1-22 are incorporated herein.

24. The issuance of the summons by defendants TAMBORNINI and DOES 1-10 for the sort of information listed therein is prohibited by the obvious attempt to chill plaintiffs' First Amendment rights to Free Speech, Free Press, Assembly, Association,

and Petitioning For Redress of Grievances.

25. The Plaintiffs therefore request that the court enter an order declaring that Plaintiff's have a right to organize and present Freedom Conferences, such as those that they have been conducting since 1999, free of any interference by Defendants.

FOURTH CAUSE OF ACTION

(Damages Against Defendants Tambornini and DOES 1-10)

26. Paragraphs 1-25 are incorporated herein.

27. The issuance of the summons by defendants Tambornini and DOES 1-10 for the sort of information listed, and protected by the First Amendment rights, has caused plaintiffs mental anguish and suffering.

28. The Mottahedeh plaintiffs therefore seek damages against the defendants according to proof.

FIFTH CAUSE OF ACTION

(Freedom of Information Act)

29. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §1331 and 5 U.S.C. §552.

30. In April of 2003 plaintiff Peymon Mottahedeh submitted a request to defendant United States for certain documents it alleged to maintain. A copy of the request is attached as Exhibit 2.

31. The agency improperly denied Mottahedeh's initial request and administrative appeal by letters, copies of which are attached collectively as Exhibit 3.

32. Plaintiff has a statutory right to the records requested, and there is no legal basis for defendant's refusal to provide them to him.

JURY TRIAL

33. Trial by jury is demanded for all triable issues.

REQUEST FOR RELIEF

WHEREFORE, plaintiffs seek the following relief:

1. an Order from the Court quashing the summons directed to the Atrium Hotel, and award to the Petitioners their costs, fees and other just relief,

2. An Order declaring that defendant Tambornini and DOES 1-10 had no authority to issue the instant summons,

3. An Order declaring that the summons is void as exerting a chilling effect on the First Amendment rights of petitioners;

4. The Court declare that defendant's refusal to disclose the records requested in the FOIA request is unlawful, and order defendant to provide said records;

5. Damages against defendants Tambornini and DOES 1-10 according to proof.

Submitted by,

Peymon Mottahedeh, individually and as President of Freedom Law School

April Mottahedeh

COPY

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

PEYMON MOTTAHEDEH; APRIL MOTTAHEDEH; and FREEDOM LAW SCHOOL, Petitioners, vs. UNITED STATES; GOLDEN HOTELS LIMITED PARTNERSHIP, DBA ATRIUM HOTEL; KIRK TAMBORNINI, and UNKNOWN DOES 1-10, Respondents.	Case No. CV 06-2356-SJO(RZx) NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED PETITION TO QUASH IRS SUMMONS AND COMPLAINT FOR INJUNCTIVE RELIEF, DECLARATORY RELIEF AND DAMAGES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF [Exempt From Local Rule 7.3; Local Rule 16.11(c) and (g)] Date: October 16, 2006 Time: 10:00 a.m. Ctrm: 1600

TO THE PETITIONERS:

PLEASE TAKE NOTICE that on October 16, 2006, at 10:00 a.m., or as soon thereafter as counsel can be heard in the Courtroom of the Honorable S. James Otero, United States District Judge, in Courtroom 1600, United States Courthouse, 312 North Spring Street, Los Angeles, California, respondents United States and Kirk Tambornini ("Federal Respondents") will and do hereby move,

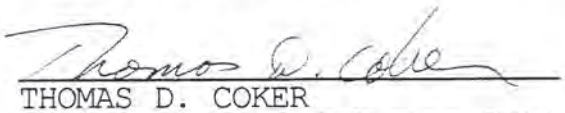
pursuant to Rules 12(b)(1) and 12(b)(2) of the Federal Rules of Civil Procedure, to dismiss the "First Amended Petition to Quash IRS Summons and Complaint for Injunctive Relief, Declaratory Relief and Damages" for lack of subject matter and personal jurisdiction.

The accompanying Memorandum of Points and Authorities more fully sets forth the grounds for this motion.

Respectfully submitted,

DEBRA W. YANG
United States Attorney
SANDRA R. BROWN
Assistant United States Attorney
Chief, Tax Division

DATED: 9/15/06



THOMAS D. COKER
Assistant United States Attorney

Attorneys for United States

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

Petitioners Peymon Mottahedeh, April Mottahedeh, and Freedom Law School ("Petitioners") brought their First Amended Petition and Complaint ("FAP") to quash an Internal Revenue Service ("IRS") summons issued to and served on The Atrium Hotel in the matter of Peymon Mottahedeh, April Beatty-Mottahedeh, Freedom Law School, and Live Free Now. (FAP, ¶ 8). Petitioners also seek injunctive relief, declaratory relief, damages and relief under the Freedom of Information Act. (FAP, second, third, fourth and fifth causes of action, respectively).

Respondent Kirk Tambornini ("Tambornini") is the IRS Special Agent who issued the subject summons on behalf of the United States. (Petition, ¶¶ 8, 12; summons attached to FAP). Petitioners filed the FAP seeking: (1) to quash the subject summons; (2) to enjoin Tambornini from seeking the records which are the subject of the summons; (3) an order declaring that Petitioners have a right to operate "free of any interference by Defendants;" (4) damages for "mental anguish and suffering;" and (5) an order compelling the United States to furnish information under the Freedom of Information Act ("FOIA").

By letter dated September 12, 2006, the subject administrative summons was withdrawn. A copy of the withdrawal letter is attached as Exhibit A. For the reasons

discussed below, the FAP should be dismissed for lack of jurisdiction.

II. ARGUMENT

A. The Petition to Quash the Summons is Moot.

The petition to quash the subject IRS summons is moot because the summons has been withdrawn. As stated in IUFA v. Pan American World Airways, Inc., 966 F.2d 457, 459 (9th Cir. 1992), "[t]he basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted." The court held in Aguirre v. S.S. Sohio Intrepid, 801 F.2d 1185, 1189 (9th Cir. 1986), that "[w]here the question sought to be adjudicated has been mooted by developments subsequent to the filing of the complaint, no justiciable controversy is presented."

Accordingly, "[i]t has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot effect the matter in issue before it.'" Church of Scientology of California v. United States, 506 U.S. 9, 12, 113 S.Ct. 447, 449 (1992). The existence of an actual controversy is required "at all stages of federal court proceedings," Acosta v. Pacific Enterprises, 950 F.2d 611, 616 (9th Cir. 1991), and not "only at the time of the filing of the complaint." Koger v. United States, 755 F.2d 1094, 1097 (4th Cir. 1985).

Here, because the summons has been withdrawn, the petition to quash the summons should be dismissed as moot.

B. The Action Against the Individual Federal Defendant is an Action Against the United States and Dismissal is Required for Lack of Jurisdiction.

Official Capacity

It is well settled that a suit against an IRS employee in his official capacity is essentially a suit against the United States. Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985). Under the doctrine of sovereign immunity, the United States, as sovereign, may not be sued without its consent, and the terms of its consent define the court's jurisdiction. United States v. Mitchell, 463 U.S. 206, 212 (1983).

Here, in an attempt to avoid the doctrine of sovereign immunity, Petitioners named as a respondent IRS employee Tambornini in his "individual" capacity. (Petition, ¶ 6) It is clear, however, from the allegations contained in the Petition that Tambornini acted in his official capacity as an employee of the IRS in issuing the subject summons. Consequently, Petitioner's action must be considered to be a claim against the United States. DaGrossa, supra, 756 F.2d at 1458. Therefore, the action against Tambornini should be dismissed.

Qualified Immunity

Additionally, Tambornini as an individual is immune

from suit because of qualified immunity. Hutchinson v. United States, 677 F.2d 1322 (9th Cir. 1982). In that case, the court stated:

> Thus, a government officer acting in the course of his official duties is insulated from suit if (1) there existed reasonable grounds for the belief that the challenged action was appropriate, and (2) the officer acted in good faith. Nothing in the taxpayer's conclusory allegations properly alleges facts that would suggest that the Commissioner or his employees acted unreasonably or that they acted in bad faith.

Id. at 1328.

Here, Petitioner's conclusory allegations do not allege any facts which suggest that Tambornini acted unreasonably or in bad faith in issuing the subject summons. Accordingly, Tambornini is immune from this suit. The proper federal party, if any, is the United States.

Lack of Personal Service

Petitioner's suit against Tambornini should be dismissed on the further grounds that the Court lacks personal jurisdiction over the individual federal respondent. It is the established rule that "in order to bring a damage action against a federal official in his individual capacity, and thereby avoid the bar of sovereign immunity, the normal rules for establishing *in personam* jurisdiction apply." States. Gilbert v. DaGrossa, 756 F.2d 1455, 1459 (9th Cir.

1985)(italics in original).

Here, Tambornini was not served in accordance with Rule 4(e) or 4(i)(2) of the Federal Rules of Civil Procedure, as is required by law. Absent effective service of process, the court lacks in personam jurisdiction over the individual federal respondent. Benny v. Pipes, 799 F.2d 489, 492 (9th Cir. 1982), modified on other grounds, 807 F.2d 1514 (1987).

In Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 347, 119 S.Ct. 1322, 1325 (1999), the Supreme Court held that: "An individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process." In that case, the court upheld the "bed-rock principal" that formal service of process, not mere notice, is required. At the outset, the high court stated that service of process, under long-standing tradition in our system of justice, is fundamental to any procedural imposition on a named defendant. Id. at 350. Consequently, "[i]n the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant." Id.

In this case, the individual federal respondent has not been served with a summons or any other "authority asserting measure" in accordance with law. Consequently, the case should be dismissed for lack of personal jurisdiction as to

Tambornini.

C. Dismissal is Required for Lack of Jurisdiction Because The United States has not Waived Sovereign Immunity.

Although the Petitioners named an individual federal employee as a respondent, courts have held that "[a]n action to quash an IRS summons is a suit against the United States." Barmes v. United States, 199 F.3d 386, 388 (7th Cir. 1999); Mississippi Gulf Coast Young Men's Christian Association, Inc. v. United States, 2006 WL 1454756,*2 (S.D.Miss, 2006).

In any suit against the United States, there must be: (1) a cause of action; (2) subject matter jurisdiction; and (3) a waiver of sovereign immunity. Presidential Gardens Associates v. United States of America, 175 F.3d 132, 139 (2d Cir. 1999). Under the long-standing doctrine of sovereign immunity, it is well established that: (1) the United States, as sovereign, may not be sued without its prior consent; (2) the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit; (3) waivers of sovereign immunity must be unequivocally expressed and are strictly construed in favor of the government; and (4) if a plaintiff cannot fit a claim against the United States within a waiver of sovereign immunity, the court lacks jurisdiction and must dismiss the action. United States v. Dalm, 494 U.S. 596, 608, 110 S.Ct. 1361, 1368 (1990); Holloman v. Watt, 708 F.2d 1399, 1401

(9th Cir. 1983).

The Ninth Circuit has clarified that both a waiver of sovereign immunity and a grant subject matter jurisdiction are required to sue the United States. Powelson v. United States, 150 F.3d 1103, 1104 (9th Cir. 1998)("We have previously explained that '[i]n an action against the United States, in addition to statutory authority granting subject matter jurisdiction, there must be a waiver of sovereign immunity.'"). Even if a statutory grant of subject matter jurisdiction exists, sovereign immunity provides an independent basis for dismissal of a case. Id. Thus, if a suit has not been consented to by the United States, dismissal of the action is required. Hutchinson v. United States, 677 F.2d 1322, 1327 (9th Cir. 1982).

Here, the burden is on the Petitioners to demonstrate that this suit is in compliance with the terms of a statute in which the United States has unequivocally waived sovereign immunity. United States v. Sherwood, 312 U.S. 584, 586, 61 S. Ct. 767, 769-70 (1941); Holloman v. Watt, supra, 708 F.2d at 1401. The Petitioners cannot meet their burden. There is no applicable waiver in this case and, therefore, the case is barred by sovereign immunity.

No Waiver of Immunity

Pursuant to 26 U.S.C. § 7609(b)(2)(A), only a person entitled to notice can petition a court to quash an administrative summons. If a summons is issued by the IRS

in connection with a criminal investigation and if the summons is not issued to a third-party recordkeeper, then the person to whom the records relate (the taxpayer) is not entitled to notice. 26 U.S.C. § 7609(c)(2)(E). Here, both statutory exceptions have been met.

First, the face of the summons, attached to the FAP as Exhibit 1, reflects that it was issued by Tambornini, "Special Agent, IRS-CID". CID is the Criminal Investigation Division of the IRS. Thus, the initial requirement of 26 U.S.C. § 7609(c)(2)(E) has been met as the summons was issued in connection with a criminal investigation. Second, the summons was issued to The Atrium Hotel (the "Hotel"). The Hotel is not a third-party recordkeeper as defined by statute. *See*, 26 U.S.C. § 7603(b)(2)(defining seven different types of recordkeepers). Since the Hotel is not a third-party recordkeeper, the second requirement of 26 U.S.C. § 7609(c)(2)(E) has been met.

Because the summons was issued in connection with a criminal investigation and the summons was not issued to a third-party recordkeeper, Petitioners are not persons who were entitled to notice under 26 U.S.C. § 7609(a)(1). Accordingly, they have no right to assert. In this case, the waiver of sovereign immunity provided in 26 U.S.C. § 7609(b)(2) does not apply and, therefore, the Court lacks

subject matter jurisdiction.[1]

D. Petitioners' Other Claims for Relief Require Dismissal.

Injuncitive Relief Barred

Petitioners have also asked this Court to issue an injunction precluding the IRS (Tambornini) from obtaining the records sought by the summons. (Petition, ¶ 22) Not only is the issue moot, the Anti-Injunction Act, 26 U.S.C. § 7421(a), provides in pertinent part: "[n]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." Under § 7421, courts lack jurisdiction to enjoin the government from collecting information that is intended to or may culminate in the assessment or collection of taxes. Linn v. Chivatero, 714 F.2d 1278, 1282 (5th Cir. 1983); Lowrie v. United States, 824 F.2d 827 (10th Cir. 1987) (action by taxpayer seeking return of business records seized by government officials during allegedly unconstitutional search and seizure was barred by Anti-Injunction Act, where taxpayer's admitted purpose in seeking return of records was to "head off" action against him by IRS).

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[1] Stated otherwise, because the Petitioners were not entitled to statutory notice, they lack standing to quash the summons under section 7609(b)(2)(A). Whether viewed as a sovereign immunity issue or a standing issue, in either case the Court lacks jurisdiction to quash the summons issued to the Hotel.

Courts have held that they are without jurisdiction to enjoin IRS investigations or "harassment" allegedly occurring in the course thereof. United States v. Dema, 544 F.2d 1373 (7th Cir. 1976) (plaintiff requested permanent injunction against IRS issuing any subpoenas or requesting his books and records); Black v. United States, 534 F.2d 524 (2d Cir. 1976) (plaintiff, who ran tax preparation service, requested that IRS be enjoined from contacting his clients). Barnes v. United States, 1990 WL 42385, 71A A.F.T.R.2d 93-3483, 90-1 USTC ¶ 50,149 (W.D.Pa. 1990) (court lacked jurisdiction to enjoin IRS from pursuing criminal investigation of taxpayer, and to quash and suppress information obtained through that investigation).

Here, the Anti-Injunction Act bars the court from enjoining the Government from obtaining the information sought by the subject summons.

FOIA

Petitioners include in their Petition a request that the Court order the Government to produce documents under the Freedom of Information Act. 5 U.S.C. § 552 contains specific provisions for its enforcement, none of which contemplate a proceeding in the context of quashing a summons.

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III. CONCLUSION

For the reasons discussed above, the FAP should be dismissed.

Respectfully submitted,

DEBRA W. YANG
United States Attorney
SANDRA R. BROWN
Assistant United States Attorney
Chief, Tax Division

DATED: 9/15/06

THOMAS D. COKER
Assistant United States Attorney

Attorneys for Federal Respondents