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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Jerry Sanders,

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No. MC 09-0125-PHX-JAT

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Petitioner,

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**ORDER**

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vs.

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United States of America; Wells Fargo  
Bank,

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Respondents.

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Pending before the Court are Petitioner Jerry Sanders' Petition to Quash Summons (Doc. # 1), and Respondent United States of America's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. # 4). For the reasons that follow, the Court grants Respondent's motion.

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**I. Background**

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The basis for the dispute between the parties is an alleged false refund claim made by Sanders. Respondent alleges that Sanders made the false refund claim on his 2008 federal income tax return. The alleged false refund was directly deposited into Sanders' bank account at Wells Fargo Bank. In September 2009, the IRS made assessments against Sanders in the amount of \$55,640.36 for the 2008 federal income tax year. In November 2009, IRS Revenue Officer D. Vahe issued a summons to Wells Fargo Bank, requesting copies of Sanders' bank signature cards, bank statements, cancelled checks, and loan applications for

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1 the period January 1, 2009 to November 18, 2009. In December 2009, Sanders commenced  
2 this action by filing the Petition to Quash Summons. Respondent now moves to dismiss this  
3 action for a lack of subject matter jurisdiction.<sup>1</sup>

## 4 **II. Analysis**

5 “Federal Rule of Civil Procedure 12(b)(1) allows litigants to seek the dismissal of an  
6 action from federal court for lack of subject matter jurisdiction.” *Tosco Corp. v. Cmtys. for*  
7 *a Better Env’t*, 236 F.3d 495, 499 (9th Cir. 2001) *overruled on other grounds by Hertz Corp.*  
8 *v. Friend*, 130 S.Ct. 1181 (2010); FED. R. CIV. P. 12(b)(1). Federal courts are courts of  
9 limited jurisdiction, and can thus only hear those cases the Constitution and Congress have  
10 authorized; namely, cases involving diversity of citizenship, a federal question, or cases to  
11 which the United States is a party. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375,  
12 377 (1994).

13 “It is to be presumed that a cause lies outside this limited jurisdiction, and the burden  
14 of establishing the contrary rests upon the party asserting jurisdiction.” *Id.* (internal citations  
15 omitted). Accordingly, on a motion to dismiss for lack of subject matter jurisdiction pursuant  
16 to Rule 12(b)(1), the plaintiff must demonstrate that subject matter jurisdiction exists to  
17 defeat dismissal. *See Stock W., Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir.  
18 1989).

19 As a general rule, the United States may not be sued unless it has waived its sovereign  
20 immunity. *Bramwell v. U.S. Bureau of Prisons*, 348 F.3d 804, 806 (9th Cir. 2003).  
21 Accordingly, unless the United States consents to be sued, the Court lacks subject matter  
22 jurisdiction over claims against the federal government. *United States v. Sherwood*, 312 U.S.  
23 584, 586 (1941); *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1998) (“The  
24 question whether the United States has waived its sovereign immunity against suits for  
25 damages is, in the first instance, a question of subject matter jurisdiction.”). “A waiver of  
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27 <sup>1</sup> Respondent also argues that the petition should be dismissed for insufficient process  
28 under Rule 12(b)(5). However, because the Court finds that it lacks subject matter  
jurisdiction under Rule 12(b)(1), the Court need not reach this issue.

1 the Federal Government's sovereign immunity must be unequivocally expressed in statutory  
2 text, and will not be implied." *Lane v. Pena*, 518 U.S. 187, 192 (1996) (internal citations  
3 omitted). Moreover, the Court construes any ambiguities in the scope of such waiver in favor  
4 of immunity. *Id.*; *State v. Williams*, 514 U.S. 527, 531 (1995).

5 In limited circumstances, Section 7609 of the Internal Revenue Code waives  
6 sovereign immunity for a judicial review of IRS summonses. 26 U.S.C. § 7609(a), (b)(2)(A).  
7 Congress provided that "any person who is entitled to notice of a summons under subsection  
8 (a) shall have the right to begin a proceeding to quash such summons not later than the 20th  
9 day after the day such notice is given in the manner provided in subsection (a)(2)." 26  
10 U.S.C. § 7609(b)(2)(A). Hence, under the plain language of Section 7609, a person must  
11 first be entitled to notice of a summons before he or she has the right to begin a proceeding  
12 to quash the summons. In fact, Congress included a list of express exceptions where there  
13 is no right to begin a proceeding to quash the summons. 26 U.S.C. § 7609(c)(2). One such  
14 exception is in the case of a summons being "issued in aid of the collection of . . . an  
15 assessment made or judgment rendered against the person with respect to whose liability the  
16 summons is issued." 26 U.S.C. § 7609(c)(2)(D)(i).

17 Here, an assessment has been made against Sanders in the amount of \$55,640.36 for  
18 the 2008 federal income tax year. Sanders, as the assessed taxpayer, has a legally cognizable  
19 interest in the documents and records requested from Wells Fargo. *See Ip v. United States*,  
20 205 F.3d 1168, 1176 (9th Cir. 2000). Therefore, the notice exception applies and Sanders  
21 was not legally entitled to notice under Section 7609(a), nor may he resort to the procedure  
22 to quash the summons set forth in Section 7609(b). Without the right to notice, there is no  
23 standing under section 7609(h) to bring a petition to quash. *See Ip*, 205 F.3d at 1170 n. 3.

24 Sanders argues that the summons was not "issued in aid of the collection of" the IRS'  
25 assessment, but rather for the purpose of a criminal investigation. While a civil summons  
26 may not be issued when a Justice Department referral is in effect for that taxpayer, 26 U.S.C.  
27 § 7602(d)(1), Sanders has offered no evidence that there has been an official  
28 recommendation to the Justice Department, nor has Sander offered any evidence that the IRS

1 has already decided to make a recommendation of prosecution. Rather, IRS Officer Vahe,  
2 the officer who issued the summons in question, avers that Sanders was erroneously refunded  
3 \$40,041, and that this refund was directly deposited into Sanders' Wells Fargo account.  
4 Officer Vahe also avers that the summons was issued in an effort to collect the alleged false  
5 refund claim. The type of documents the IRS is seeking from Wells Fargo are consistent  
6 with tracing and collecting the allegedly erroneously refund. Given that the IRS has declared  
7 that the purpose of the summons was to aid in the collection of the assessment made against  
8 Sanders, and there are no other facts plead or in affidavit to support a contrary position, the  
9 Court will not infer a pretext for criminal prosecution.

10 Similarly, Sanders argues that the IRS has an institutional commitment to criminally  
11 prosecute all participants in the tax scheme he is allegedly involved in. Again, Sanders offers  
12 nothing but conjecture in support of such an alleged institutional commitment. As discussed  
13 above, the summons was issued in order to aid in the collection of the assessment made  
14 against Sanders. Sanders' argument to the contrary is unavailing.<sup>2</sup>

### 15 **III. Conclusion**

16 The Court finds that the summons were issued in aid of the collection of the  
17 assessment made against Sanders. As such, the United States has not waived sovereign  
18 immunity such that Sanders may maintain this action. *C.I.R. v. Hayes*, 631 F.Supp. 785, 787  
19 (N.D. Cal. 1985) ("Accordingly, since the right to petition to quash a summons is contingent  
20 upon the right to notice thereof, under § 7609(b)(2)(A), and petitioners herein have no right  
21 to notice, the court finds that petitioners have no standing to bring the present motion to  
22 quash.").

23 Accordingly,

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25 <sup>2</sup> The Court expressly notes that it need not address the factors contained in *United*  
26 *States v. Powell*, 379 U.S. 48 (1964), because the Court does not reach the merits of Sanders'  
27 motion to quash the summons in light of Section 7609(c)(2)(D)(i). *See Stewart v. United*  
28 *States*, 511 F.3d 1251 (9th Cir. 2008) (addressing a petition to quash summonses where  
petitioner did not have standing, and also a petition to quash where petitioner did have  
standing; and, in the latter, addressing the *Powell* factors, but not in the former).

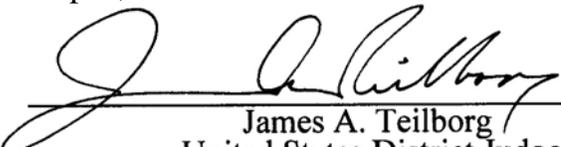
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**IT IS ORDERED** that Respondent United States of America's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. # 4) is granted.

**IT IS FURTHER ORDERED** that Petitioner Jerry Sanders' Petition to Quash Summons (Doc. # 1) is denied.

**IT IS FINALLY ORDERED** that the Clerk of the Court shall close this case.

DATED this 21<sup>st</sup> day of April, 2010.

  
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James A. Teilborg  
United States District Judge