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15
16 **IN THE UNITED STATES DISTRICT COURT**
17 **EASTERN DISTRICT OF CALIFORNIA**

18 UNITED STATES OF AMERICA,

19 Petitioner,

20 v.

21 JAMES W. WITT,

22 Respondent.

1:15-cv-00418-LJO-SAB

**AMENDED¹ ORDER ADOPTING
FINDINGS AND RECOMMENDATIONS
AND ENFORCING I.R.S. SUMMONS**

(ECF Nos. 7, 8)

23 The United States petitioned for enforcement of an I.R.S. summons issued July 29,
24 2014, to secure information needed to collect assessed federal income taxes (Form 1040) for tax
25 years ending December 31, 1997, December 31, 2003, December 31, 2004, December 31, 2005,

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27 ¹ Pursuant to Fed. R. Civ. P. 60(a), which permits the Court to correct clerical mistakes, this
28 Amended Order corrects and supersedes the Order entered July 6, 2015, which stated on the second
page the incorrect name for the Respondent. In addition, the July 6, 2015 Order directed the Clerk of
Court to close this case. The Amended Order directs the Clerk of Court to re-open the case, pending
the filing of a Notice of Compliance and Request for Closure or any other appropriate motion.

1 December 31, 2006, December 31, 2007, and December 31, 2008. (ECF No. 1.) The matter was
2 referred to United States Magistrate Judge Stanley A. Boone pursuant to 28 U.S.C. § 636, *et seq.* and
3 Local Rule 72-302.

4 On March 20, 2015, the magistrate judge ordered Respondent James W. Witt (“Respondent”)
5 to show cause why the I.R.S. summons issued to him on July 29, 2014, should not be enforced. (ECF
6 No. 5.) The Petitioner served Respondent with the Verified Petition (ECF No. 1), Points and
7 Authorities (ECF No. 3-1), and a certified copy of the Order to Show Cause (ECF No. 5) in
8 conformity with Fed. R. Civ. P. 4. (ECF No. 6.) On May 15, 2015, Respondent filed a motion to
9 dismiss. (ECF No. 7.)

10 On June 3, 2015, the magistrate judge assigned to this action, finding that the summons
11 enforcement requirements had been satisfied, issued a Findings and Recommendations
12 recommending that Petitioner United States of America’s petition to enforce the I.R.S. summons be
13 granted. (ECF No. 8.) The Findings and Recommendations contained notice that any objections
14 were to be filed within twenty-one (21) days. The Clerk of Court served Respondent by mail with the
15 Findings and Recommendations on June 3, 2015. Respondent filed objections on June 24, 2015.
16 (ECF No. 10.)

17 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this Court has conducted a
18 *de novo* review of this case. Having carefully reviewed the entire file, the Court finds that the
19 Findings and Recommendation are supported by the record and proper analysis, and determines that
20 the summons enforcement is properly granted.

21 Respondent argues that the magistrate judge “breached procedure” by construing
22 Respondent’s motion to dismiss (ECF No. 7) as a brief in opposition to the petitioner to enforce the
23 I.R.S. summons. This argument has no merit. By construing Respondent’s motion to dismiss as an
24 opposition, the magistrate judge construed Respondent’s filing in a light most favorable to
25 Respondent. Notably, on March 20, 2015, the Court ordered Respondent to file an opposition to the
26 petition at least ten (10) days before the show cause hearing scheduled for June 10, 2015. *See* ECF
27 No. 5. Respondent failed to file anything that could be construed as an opposition other than the
28 motion to dismiss. Accordingly, if the magistrate judge had not construed the motion to dismiss as an

1 opposition, Respondent would have been in violation of the Court’s March 20, 2015 order by failing
2 to file a written opposition and the petition would have been deemed unopposed.

3 Respondent also argues that United States Magistrate Judge Stanley A. Boone was
4 biased because Petitioner is represented by the United States Attorney’s Office and “[Judge]
5 Boone is a US attorney.” Respondent’s argument is factually incorrect, as Judge Boone is not
6 a U.S. Attorney. While Judge Boone was formerly employed by the United States Attorney’s
7 Office, he is only required to recuse himself from cases on which he actually participated. 28
8 U.S.C. § 455(b)(3); *see also U.S. v. Champlin*, 388 F. Supp. 2d 1177, 1181 (D. Haw. 2005)
9 (judge who was formerly an Assistant United States Attorney only disqualified from cases on
10 which he or she actually participated). There is no indication that Judge Boone participated in
11 the prosecution of this action while he was at the United States Attorney’s Office.

12 The remaining arguments raised in Respondent’s opposition are frivolous and were
13 addressed in the Findings and Recommendations. (ECF No. 8.) Petitioner’s petition was
14 supported by adequate evidence – namely, the Declaration of Revenue Officer Evan D.
15 Moses. (ECF No. 1, at p. 8.) Respondent fails to demonstrate an abuse of process or lack of
16 institutional good faith. *See, U.S. v. Dynavac, Inc.*, 6 F.3d 1407, 1414 (9th Cir. 1993).

17 Accordingly, it is HEREBY ORDERED that:

- 18 1. The Magistrate Judge’s Findings and Recommendations Re: I.R.S. Summons
19 Enforcement, filed June 3, 2015, are hereby ADOPTED IN FULL (ECF No. 8);
- 20 2. Respondent’s motion to dismiss is DENIED (ECF No. 7);
- 21 3. The I.R.S. summons issued to Respondent on July 29, 2014 is hereby ENFORCED;
- 22 4. Respondent James W. Witt is ordered to appear before investigating Revenue
23 Officer Evan D. Moses, or his designated representative, at the I.R.S. offices at
24 2525 Capitol Street, Suite 205, Fresno, California 93721-2227, twenty-one (21)
25 days after the issuance of this order, at 10:00 a.m., or such later date and time to be
26 set in writing by Revenue Officer Moses, then and there to be sworn, to give
27 testimony, and to produce for examination and copying the books, checks, records,
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papers and other data demanded by the summons. The examination shall continue from day to day until completed.

- 5. The Clerk of Court is directed to **re-open** this case and to **serve** this and future orders by mail to Mr. James W. Witt, 1343 N. 10th Avenue, Hanford, CA 93230.

IT IS SO ORDERED.

Dated: July 13, 2015

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE