

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

JIMMIE O. CLEMENTS

v.

**UNITED STATES OF AMERICA,
MICHAEL L. HERVEY, REVENUE
OFFICER¹**

§
§
§
§
§
§
§
§

A-17-MC-111 LY

**REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE**

**TO: THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE**

Before the Court are the United States' Motion to Summarily Deny Petition to Quash Summonses and for Enforcement of Summons (Dkt. No. 2); Petitioner's Response in Opposition (Dkt. No. 3); and United States' Reply to Petitioner's Response (Dkt. No. 4). The District Court referred the motion to the undersigned Magistrate Judge for Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B), Federal Rule of Civil Procedure 72, and Rule 1(d) of Appendix C of the Local Court Rules.

I. ANALYSIS

The Internal Revenue Service is conducting an investigation into the federal income tax liabilities of Jimmie O. Clements, an attorney who practices law in Travis County, Texas, for the tax years 2010, 2013 and 2014. In connection with that investigation, IRS Revenue Officer Michael Hervey issued summonses to Wells Fargo Bank, N.A. and Bank of America, N.A., pursuant to 26

¹The Government correctly notes that the IRS Officer Michael Hervey is not a proper defendant in his action as the United States is the only proper party in such a lawsuit. *See Kaebel v. United States*, 2015 WL 7731398, at *3 (N.D. Tex. Oct. 21, 2015). Accordingly, the District Court should dismiss Michael Hervey from this lawsuit.

U.S.C. §7603(b), seeking production of the banks' records regarding the financial accounts and transactions of Clements. Clements then filed this proceeding seeking to quash the summonses pursuant to 26 U.S.C. § 7609(b)(2), arguing that the IRS did not issue the summonses in good faith, the summonses are overbroad, the information requested is not relevant to the investigation and the summonses seek information protected by the attorney client privilege.² The United States requests that the Court summarily deny the petition, arguing that it meets the legal requirements under 26 U.S.C. § 7603 for enforcement. The Court agrees.

The IRS is granted wide latitude to issue summonses. *See* 26. U.S.C. § 7602. "Section 7602 of the Internal Revenue Code authorizes the IRS to summon an individual or third party to testify and produce documents relevant to any inquiry regarding tax liability." *United States v. Battle*, 213 F. App'x 307, 309 (5th Cir. 2007). Upon receipt of a summons to appear or produce information as part of an investigation by the IRS, a summoned individual may begin a proceeding to quash a summons. *See* 26 U.S.C. § 7609(b)(2)(a). In response, the IRS must show: (1) the investigation will be conducted for a legitimate purpose; (2) the material being sought is relevant to that purpose; (3) the information sought is not already in the IRS's possession; and (4) the IRS complied with all the administrative steps required by the Internal Revenue Code. *United States v. Powell*, 379 U.S. 48, 57-58 (1964). The IRS's burden to establish this *prima facie* case is minimal and may be met by introduction of an affidavit from the summoning IRS officer which attests the *Powell* requirements have been met. *Mazurek v. United States*, 271 F.3d 226, 229 (5th Cir. 2001); *United States v. Davis*, 636 F.2d 1028, 1034 (5th Cir.), *cert. denied*, 454 U.S. 862 (1981). If the IRS satisfies this minimal

²Clements has filed two previous Petitions to Quash in this Court that were dismissed as moot after the United States withdrew their summonses. *See* 1:16-MC-1148 LY and 1:16-MC-972 LY.

burden, the burden shifts to the party seeking to quash the summons to either refute one or more of the *Powell* factors, or demonstrate enforcement of the summons would result in an abuse of judicial process. *Powell*, 379 U.S. at 57-58; *Mazurek*, 271 F.3d at 229. An abuse of the judicial process occurs when a summons is sought for an “improper purpose, such as . . . harass[ing] the taxpayer, . . . put[ting] pressure on him to settle a collateral dispute.” *Mazurek*, 271 F.3d at 231 (quoting *Powell*, 379 U.S. at 58). The party seeking to quash a summons faces a heavy burden, and therefore, must assert specific facts and evidence. *Miller v. United States*, 150 F.3d 770, 772 (7th Cir.1998); *Liberty Fin. Servs. v. United States*, 778 F.2d 1390, 1392 (9th Cir.1985).

The United States has met its minimal burden of making a *prima facie* showing of the *Powell* factors. The United States has provided the Court with a sworn declaration by Officer Hervey, the Revenue Officer in charge of the investigation. *See Mazurek*, 271 F.3d at 230 (“The government’s minimal burden at this stage can be fulfilled by a ‘simple affidavit’ by the IRS agent issuing the summons”). In his declaration, Hervey states that the investigation of Clements is being conducted for the legitimate purpose of ascertaining the correctness of Clements’ tax returns, to collect tax liabilities and to ascertain whether Clements has committed any offense connected with the administration or enforcement of the Internal Revenue laws. Dkt. No. 2-1. The United States has also shown that the requested records are relevant to the investigation. *Id.* Further, Hervey’s declaration states that the requested documents are not already in the IRS’s possession. *Id.* Lastly, the declaration demonstrates that the required administrative steps set out in the Internal Revenue Code for the service and issuance of a summons were followed here.

As noted, to prevail, Clements must either refute one of the *Powell* factors that the United States has established or “show that the enforcement of summonses would amount to an ‘abuse’ of the judicial process.” *Mazurek*, 271 F.3d at 231. Clements has failed to do either. Indeed, Clements

only response was merely to argue that the United States' Motion is now moot because he has paid all his past-due taxes. Clements is mistaken. As stated in Hervey's declaration, the summonses had multiple purposes beyond collecting past-due taxes, including "to ascertain the correctness of Clements' tax returns, to verify the accuracy of the documents filed by Clements in his bankruptcy case, to collect the tax liabilities and to ascertain whether Clements has committed any offense connected with the administration or enforcement of the Internal Revenue laws." Dkt. No. 2-1 at ¶ 4. Because the IRS still needs the information sought in the summonses to ascertain the correctness of Clements' returns and to inquire into any offense connected with the administration or enforcement of the Internal Revenue laws, the summonses are not moot.³

Based upon the foregoing, the Court finds that the United States has met the legal requirements for enforcement of the summonses at issue in this case. Accordingly, the Court recommends that the United States' Motion to Summarily Deny the Petition to Quash Summonses be GRANTED.

II. RECOMMENDATION

In light of the foregoing, the undersigned **RECOMMENDS** that the District Judge **DISMISS** Michael L. Hervey as a Defendant in this case since he is not a proper party. The Court **FURTHER RECOMMENDS** that the District Judge **GRANT** the United States' Motion to Summarily Deny

³Clements also contends that the summons in part seek information protected by the attorney-client privilege. Again, he is incorrect. Courts have held that bank records relating to the transfer of funds into and out of a lawyer's trust account are not privileged communications. *See, e.g. SEC v. First Security Bank of Utah, N.A.*, 447 F.2d 166, 167 (10th Cir. 1971), *cert. denied*, 404 U.S. 1038 (1972); *Harris v. United States*, 413 F.2d 316, 319–20 (9th Cir. 1969); *O'Donnell v. Sullivan*, 364 F.2d 43, 44 (1st Cir.), *cert. denied*, 385 U.S. 969 (1966). That is because the attorney-client privilege extends only "to the substance of matters communicated to an attorney in professional confidence," and "[t]he deposit and disbursement of money in a commercial checking account are not confidential communications." *First Security Bank*, 447 F.2d at 167 (citations omitted). Clements cites no contrary authority to support his claim of privilege.

Petition to Quash Summonses and for Enforcement of Summons (Dkt. No. 2), **DENY** Jimmie O. Clements' Petition to Quash Two Internal Revenue Service Summons (Dkt. No. 1), and **ORDER** the enforcement of the two summonses. Finally, should the Court adopt this recommendation, it should **CLOSE** this case.

III. WARNINGS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from *de novo* review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(c); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

SIGNED this 7th day of April, 2017.



ANDREW W. AUSTIN
UNITED STATES MAGISTRATE JUDGE