IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19-50506

TAYLOR LOHMEYER LAW FIRM P.L.L.C.,

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA,

Defendant - Appellee

Appeal from the United States District Court for the Western District of Texas

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(Filed Apr. 24, 2020)

Before BARKSDALE, HIGGINSON, and DUNCAN, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

At issue is whether the district court erred by granting the Government's counter petition to enforce a summons issued to Taylor Lohmeyer Law Firm P.L.L.C. (Firm), notwithstanding the Firm's blanket claim that all documents responsive to the summons are protected by the attorney-client privilege. AFFIRMED.

I.

The Firm, located in Kerrville, Texas, provides estate- and tax-planning advice to its clients. In October 2018, the Internal Revenue Service (IRS) served a John Doe summons on the Firm, seeking documents for "John Does", U.S. taxpayers,

> who, at any time during the years ended December 31, 1995[,] through December 31, 2017, used the services of [the Firm] . . . to acquire, establish, maintain, operate, or control (1) any foreign financial account or other asset; (2) any foreign corporation, company, trust, foundation or other legal entity; or (3) any foreign or domestic financial account or other asset in the name of such foreign entity.

A John Doe summons is "[a]ny summons described in [26 U.S.C. § 7609(c)(1) (covered summonses)] which does not identify the person with respect to whose liability the summons is issued". 26 U.S.C. § 7609(f) (Internal Revenue Code's special procedures for John Doe summonses). Issuing a John Doe summons first requires an *ex parte* court proceeding, in which the Government establishes: "(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons"; "(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law"; and "(3) the information sought to be obtained from the examination of the records or testimony (and the identity of the person or persons with respect to whose liability the

summons is issued) is not readily available from other sources". *Id.*; *see also id.* § 7609(h)(2) (requiring the proceeding be *ex parte*). The Government successfully made this showing at an October 2018 hearing, prior to issuing the summons to the Firm.

The Government sought documents from the Firm based on the 2018 declaration of IRS Agent Russell-Hendrick, "an Offshore Special Matters Expert in the [IRS'] Special Enforcement Program", which "identifies and examines [U.S.] taxpayers involved in abusive transactions and other financial arrangements for the purpose of avoiding U.S. taxes". Agent Russell-Hendrick has submitted two supporting declarations for the Government in this case: the above-described declaration in 2018, prior to the *ex parte* proceeding; and the other in 2019, attached to the Government's counter petition. The following is from the Agent's 2019 declaration.

The Government "is conducting an investigation to determine the identity and correct federal income tax liability of U.S. taxpayers for whom [the Firm] acquired or formed any foreign entity, opened or maintained any foreign financial account, or assisted in the conduct of any foreign financial transaction". The investigation arose because, during the IRS' audit of one U.S. taxpayer (Taxpayer-1), its investigation "revealed that Taxpayer-1 hired [the Firm] for tax planning, which [the Firm] accomplished by (1) establishing foreign accounts and entities, and (2) executing subsequent transactions relating to said foreign accounts and entities". Additionally, "[f]rom 1995 to 2009, Taxpayer-1

engaged [the Firm] to form 8 offshore entities in the Isle of Man and in the British Virgin Islands" and "established at least 5 offshore accounts so [Taxpayer-1] could assign income to them and, thus, avoid U.S. income tax on the earnings". "In June 2017, [however,] Taxpayer-1 and his wife executed a closing agreement with the IRS in which they admitted that Taxpayer-1 . . . earned unreported income of over $5 million for the 1996 through 2000 tax years, resulting in an unpaid income tax liability of over $2 [m]illion."

"Ultimately, Taxpayer-1 paid almost $4 million to the IRS to resolve his unpaid federal tax, interest, and penalties for those tax years." Consequently, the John Doe summons at issue here

> seeks records that may reveal the identity and international activities of certain clients of [the Firm], from January 1, 1995, through December 31, 2017. This information may be relevant to the underlying IRS investigation into the identity and correct federal income tax liability of U.S. persons who employed [the Firm] to conceal unreported taxable income in foreign countries. In particular, the IRS is seeking information on U.S. taxpayers for whom [the Firm] created and maintained foreign bank accounts and foreign entities that may not be properly disclosed on tax returns.

After receiving the Government's summons, the Firm filed in federal district court a petition to quash the summons on various grounds, asserting "the summons is overbroad and represents an unprecedented

intrusion into the attorney-client relationship and is plainly abusive". Regarding attorney-client privilege, the Firm claimed that, despite the general rule a lawyer's clients' identities are not covered by the privilege, an exception to that rule exists whereby "a client's identity is protected by the attorney-client privilege if its disclosure would result in the disclosure of a confidential communication". Accordingly, the Firm asserted the exception applies here, rendering all documents requested in the summons protected by the privilege.

The Government responded by filing a motion to dismiss the petition to quash and a counter petition to enforce the summons. Although the Government contended the Firm's petition was "jurisdictionally deficient", which supported the petition's dismissal, it highlighted that the petition itself "indicate[d] an unwillingness to comply with the summons" and supported enforcing it. As relevant here, the Firm responded to the Government's motion and counter petition, and the Government filed a reply.

At an April 2019 status hearing to discuss the pending filings, the court, with the parties' agreement, proceeded directly with the Government's counter petition. The counter petition was granted on 15 May 2019, with the court's ruling, *inter alia*: "blanket assertions of privilege are disfavored, the Firm bears a heavy burden at this stage, and the Firm relies only on a narrowly defined exception to the general rule that identities are not privileged[; therefore,] the Firm does not carry its burden". Moreover, the court noted in its

order that, "if [the Firm] wishes to assert any claims of privilege as to any responsive documents, it may . . . do so, provided that any such claim of privilege is supported by a privilege log which details the foundation for each claim on a document-by-document basis". Finally, the court stated it would "retain jurisdiction in th[e] case pending any challenges by the Government of the Firm's privilege log, should the Firm produce one".

II.

In challenging the court's ruling, the Firm presents only its contentions as to attorney-client privilege. The district court, upon the Firm's motion, has stayed its proceedings pending this appeal. In doing so, the court stated: "The Firm produced no privilege log, so there is no longer a need for this Court to retain jurisdiction. Accordingly, the Clerk's office is directed to CLOSE this case".

"[A] district court order enforcing an IRS summons is an appealable final order". *Church of Scientology v. United States*, 506 U.S. 9, 18 n.11 (1992) (citation omitted). The party challenging the summons may do so "on any appropriate ground", including because the information sought "is protected by the attorney-client privilege". *Reisman v. Caplin*, 375 U.S. 440, 449 (1964) (citation omitted).

But "[r]eview of a district court's determination with respect to the attorney-client privilege, even on direct appeal, . . . is limited". *In re Avantel, S.A.*, 343

F.3d 311, 318 (5th Cir. 2003). "The application of the attorney-client privilege is a question of fact, to be determined in the light of the purpose of the privilege and guided by judicial precedents." *EEOC v. BDO USA, L.L.P.*, 876 F.3d 690, 695 (5th Cir. 2017) (internal quotation marks and citations omitted). "In evaluating a claim of attorney-client privilege, [our court] review[s] factual findings for clear error and the application of the controlling law *de novo*." *In re Itron, Inc.*, 883 F.3d 553, 557 (5th Cir. 2018) (italics added) (internal quotation marks and citation omitted).

In this instance, of course, federal privilege-law applies. *See, e.g.*, *Avantel*, 343 F.3d at 323 (citation omitted). In that regard, for the attorney-client privilege to protect from disclosure, either in whole or in part, a document responsive to the Government's summons in this case, the Firm must establish that the document contains a confidential communication, between it and a client, made with the client's "primary purpose" having been "securing either a legal opinion or legal services, or assistance in some legal proceeding". *BDO USA*, 876 F.3d at 695 (citation omitted). "Because the attorney-client privilege has the effect of withholding relevant information from the fact-finder, it is interpreted narrowly so as to apply only where necessary to achieve its purpose." *Id.* (alteration, internal quotation marks, and citation omitted). Construing the privilege narrowly is particularly important with IRS investigations because of the "congressional policy choice *in favor of disclosure* of all information relevant to a legitimate IRS inquiry". *United States v. Arthur*

Young & Co., 465 U.S. 805, 816-17 (1984) (emphasis in original) (citations omitted).

As discussed in part, "[d]etermining the applicability of the privilege is a highly fact-specific inquiry, and the party asserting the privilege bears the burden of proof'. *BDO USA*, 876 F.3d at 695 (internal quotation marks and citations omitted). In that regard, "[a]mbiguities as to whether the elements of a privilege claim have been met are construed against the proponent". *Id.* (citation omitted). Additionally, as a general rule, "the attorney-client privilege may not be tossed as a blanket over an undifferentiated group of documents". *United States v. El Paso Co.*, 682 F.2d 530, 539 (5th Cir. 1982) (citations omitted). Instead, "[t]he privilege must [generally] be specifically asserted with respect to particular documents". *Id.*; *see also United States v. Davis*, 636 F.2d 1028, 1038-39 (5th Cir. 1981) ("It is generally agreed that the recipient of a summons properly should appear before the issuing agent and claim privileges on a question-by-question and document-by-document basis." (citations omitted)).

Moreover, "[a]s [another] general rule, client identit[ies] and fee arrangements are not protected as privileged". *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 926 F.2d 1423, 1431 (5th Cir. 1991) (*Reyes-Requena II*) (citation omitted). That said, a "narrow exception" exists "when revealing the identity of the client and fee arrangements would itself reveal a confidential communication". *Id.* (citation omitted). This "limited and rarely available sanctuary, which by virtue of its very

nature must be considered on a case-to-case basis", recognizes that "[u]nder certain circumstances, an attorney must conceal even the identity of a client, not merely his communications, from inquiry". *United States v. Jones (In re Grand Jury Proceedings)*, 517 F.2d 666, 671 (5th Cir. 1975) (citation omitted).

The exception, however, does not expand the scope of the privilege; it does not apply "*independent of* the privileged communications between an attorney and his client". *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 913 F.2d 1118, 1124 (5th Cir. 1990) (emphasis added). Rather, a client's identity is shielded "only where revelation of such information would disclose other privileged communications such as the confidential motive for retention". *Id.* at 1125 (citation omitted). In that regard, the privilege "protect[s] the client's identity and fee arrangements in such circumstances not because they might be incriminating but because they are *connected inextricably* with a privileged communication—the confidential purpose for which [the client] sought legal advice". *Reyes-Requena II*, 926 F.2d at 1431 (emphasis added).

Because the Firm contends this case falls within this exception to the general rule that a law firm's clients' identities are not protected by the attorney-client privilege, it asserts: "[a]s a matter of law, all documents responsive to the summons are privileged"; and the district court erred in concluding otherwise. To support its position, the Firm relies on, *inter alia,*

Reyes-Requena II and *United States v. Liebman*, 742 F.2d 807 (3d Cir. 1984).

As discussed, our court made clear in *Reyes-Requena II* that, "[i]f the disclosure of the client's identity will also reveal the confidential purpose for which he consulted an attorney, we protect both the confidential communication and the client's identity as privileged". *Reyes-Requena II*, 926 F.2d at 1431. And, as stated, "[w]e protect the client's identity and fee arrangements in such circumstances not because they might be incriminating but because they are connected inextricably with a privileged communication—the confidential purpose for which [the client] sought legal advice". *Id.* The Firm asserts such an inextricable connection is present here.

In *Liebman*, the third circuit, in applying the relevant exception to the general attorney-client privilege rule for client identities, determined:

> The affidavit of the IRS agent supporting the request for [a John Doe] summons not only identifies the subject matter of the attorney-client communication, but also describes its substance. That is, the affidavit does more than identify the communications as relating to the deductibility of legal fees paid to [the firm] in connection with the acquisition of a real estate partnership interest. It goes on to reveal the content of the communication, namely that "taxpayers . . . were advised by [the firm] that the fee was deductible for income tax purposes." Thus, this case falls

> within the situation where "so much of the actual communication had already been established, that to disclose the client's name would disclose the essence of a confidential communication. . . ."

Liebman, 742 F.2d at 809 (alterations added) (citations omitted). Along that line, the Firm contends: Agent Russell-Hendrick's 2018 declaration, like that of the IRS agent in *Liebman*, establishes the Government already knows the content of the legal advice the Firm provided the Does; and, if the Firm is "required to identify [its] clients as requested, that identity, when combined with the substance of the communication . . . that is already known, would provide all there is to know about a confidential communication between the taxpayer-client and the attorney", breaching the attorney-client privilege. *See id.* at 810.

Both cases, however, are distinguishable. In *Reyes-Requena II*, which involved whether a defense attorney was required "to reveal the identity of an anonymous third[-]party benefactor who paid the attorney's fees for [a] drug defendant", both the district court and our court, unlike in this case, inspected sealed documents relevant to the privilege claim. *Reyes-Requena II*, 926 F.2d at 1425, 1428, 1432 (citations omitted). Moreover, the benefactor whose identity was at issue intervened in the case, and the district court determined, "[r]elying upon the sealed affidavits presented *in camera*", that: "an attorney/client privilege existed between [the defense attorney] and Intervenor . . . and . . . the relationship was ongoing"; "Intervenor retained [the

defense attorney] to represent [the criminal defendant] and Intervenor *jointly* for a confidential purpose"; and "if [the defense attorney] were to reveal the Intervenor's identity, Intervenor's confidential motive for retaining [the defense attorney] would be exposed as apparent". *Id.* at 1428 (emphasis in original) (citations omitted). It was under these specific circumstances, not present here, that the district court found, and our court agreed, the intervening client's "confidential motive for consulting [the defense attorney] was intertwined inextricably with his identity and fee arrangements". *Id.* at 1431 (citation omitted).

In *Liebman*, the IRS agent's declaration explicitly identified taxpayers' communications "as relating to the deductibility of legal fees paid to [the firm] in connection with the acquisition of a real estate partnership interest" and that, as the defendant firm conceded, "taxpayers . . . were advised by [the firm] that the fee was deductible for income tax purposes". *Liebman*, 742 F.2d at 809 (alteration in original) (citations omitted). The IRS contended the fee was not deductible, and the John Doe summons at issue in that case, therefore, sought identity information explicitly for the discrete subset of clients "who paid fees in connection with the acquisition of real estate partnership interests". *Id.* at 808 (citation omitted). "Because the IRS request was limited to the group of persons who paid for *specific* investment advice, the IRS would automatically identify those who were told they could make the questionable deductions", and this "would [have] provide[d] all there [was] to know about a confidential

communication between the taxpayer-client and the attorney[,] . . . breach[ing] the attorney-client privilege to which that communication [was] entitled". *Id.* at 809-10 (emphasis added).

Importantly, however, and contrary to the Firm's contention, Agent Russell-Hendrick's 2018 declaration did *not* state the Government *knows* the substance of the legal advice the Firm provided the Does. (Nor, for that matter, does her 2019 declaration.) Rather, it outlined evidence providing a "reasonable basis", as required by 26 U.S.C. § 7609(f), "for concluding that the clients of [the Firm] are of interest to the [IRS] because of the [Firm's] services directed at concealing its clients' beneficial ownership of offshore assets". The 2018 declaration also made clear that "the IRS is pursuing an investigation to develop information about other unknown clients of [the Firm] *who may have* failed to comply with the internal revenue laws by availing themselves of similar services to those that [the Firm] provided to Taxpayer-1". (Emphasis added.) Therefore, unlike the declaration in *Liebman*, neither of the Agent's declarations in this case identified specific, substantive legal advice the IRS considered improper and then supported the Government's effort to receive the identities of clients who received that advice. *See Liebman*, 742 F.2d at 809.

Instead, the John Doe summons at issue seeks, *inter alia*: documents "reflecting *any* U.S. clients at whose request or on whose behalf [the Firm] ha[s] acquired or formed *any* foreign entity, opened or maintained *any* foreign financial account, or assisted in the

conduct of *any* foreign financial transaction"; "[a]ll books, papers, records, or other data . . . concerning the provision of services to U.S. clients relating to setting up offshore financial accounts"; and "[a]ll books, papers, records, or other data . . . concerning the provision of services to U.S. clients relating to the acquisition, establishment or maintenance of offshore entities or structures of entities". (Emphasis added.) As the Government asserted, this broad request, seeking relevant information about *any* U.S. client who engaged in *any one of a number* of the Firm's services, is not the same as the Government's knowing whether any Does engaged in allegedly fraudulent conduct, or the content of any specific legal advice the Firm gave particular Does, and then requesting their identities.

This is particularly true given statements made by Fred Lohmeyer, one of the Firm's name partners, in his declaration attached to the Firm's memorandum supporting its petition to quash the summons. He stated the Firm's other clients "ha[ve] facts that are distinguishable from" those of Taxpayer-1 "because[,] to the best of [his] knowledge, [the Firm] never advised any other client with respect to the treatment of earned income as income earned by a foreign corporation". This undermines the Firm's contention that the Government knows the substantive content of legal advice the Firm gave the Does.

In that regard, the circumstances here, as contended by the Government, are more like those in *United States v. BDO Seidman*, 337 F.3d 802 (7th Cir. 2003). That case involved unnamed clients of a public

accounting and consulting firm seeking to intervene in an IRS enforcement action against the firm "to assert a confidentiality privilege regarding certain documents that [the firm] intended to produce in response to [IRS] summonses . . . because the[ ] documents reveal[ed] their identities as [firm] clients who sought advice regarding tax shelters and who subsequently invested in those shelters". *Id.* at 805-06. According to the clients, disclosing their identities "inevitably would violate the statutory privilege [26 U.S.C. § 7525] protecting confidential communications between a taxpayer and any federally authorized tax practitioner giving tax advice". *Id.* at 806 (citation omitted).

BDO Seidman, of course, does differ in some respects from this case. Namely, the clients sought to intervene in *BDO Seidman* (in which the IRS targeted the firm's, *not the clients*, compliance with the Internal Revenue Code); and a statutory, not the attorney-client, privilege, was at issue. *See id.* at 805-06. Critically, however, the statutory privilege was modeled after the attorney-client privilege, including its rule that "ordinarily the identity of a client does not come within the scope of the privilege" and its "limited exception" allowing that "the identity of a client may be privileged in the rare circumstance when so much of an actual confidential communication has been disclosed already that merely identifying the client will effectively disclose that communication". *Id.* at 810-11 (citations omitted). Ultimately, the seventh circuit's rationale in analyzing the privilege claim on the facts of the case before it, and affirming the district court's denial of the

clients' motions to intervene, is instructive: "[d]isclosure of the identities of the Does will disclose to the IRS that the Does participated in one of the 20 types of tax shelters described in its summonses"; but, "[i]t is less than clear . . . as to what motive, or other confidential communication of tax advice, can be inferred from that information alone". *See id.* at 812-13.

The same is true here: disclosure of the Does' identities would inform the IRS that the Does participated in at least one of the numerous transactions described in the John Doe summons issued to the Firm, but "[i]t is less than clear . . . as to what motive, or other confidential communication of [legal] advice, can be inferred from that information alone". *See id.* at 812. Consequently, the Firm's clients' identities are not "connected inextricably with a privileged communication", and, therefore, the "narrow exception" to the general rule that client identities are not protected by the attorney-client privilege is inapplicable. *See Reyes Requena II*, 926 F.2d at 1431 (citations omitted).

III.

For the foregoing reasons, the 15 May 2019 enforcement order is AFFIRMED.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

TAYLOR LOHMEYER LAW FIRM PLLC, *Petitioner,* *v.* UNITED STATES OF AMERICA, *Respondent*	§ § § § § § § § § §	Civil Action No. SA-18-CV-1161-XR

ORDER

(Filed May 19, 2019)

On this date, the Court considered the status of this case. On November 6, 2018, Petitioner Taylor Lohmeyer Law Firm PLLC filed a petition to quash an IRS summons. Docket no. 1. The United States, as Respondent, filed a motion to dismiss this petition to quash and a counter-petition to enforce the summons. Docket no. 4. At the April 11 status conference, the parties agreed, for efficiency's sake, to proceed only as to the counter-petition to enforce. Having considered the original petition (docket no. 1), the counter-petition (docket no. 4), the Firm's response (docket no. 5), the Government's reply (docket no. 7), the Firm's supporting memorandums (docket nos. 8, 9), and the Government's responses to these memorandums (docket nos. 11, 12), the Court GRANTS the Government's counter-petition to enforce.

BACKGROUND

This case is about the Internal Revenue Service's attempt to seek by John Doe summons certain information related to the clients of Taylor Lohmeyer Law Firm PLLC ("the Firm"), including the clients' names. The Firm is the Kerrville estate-planning practice of Fred Lohmeyer and, until his death in 2016, John Taylor. The IRS previously audited a taxpayer (Taxpayer-1) who used the Firm to "set up foreign accounts, foreign trusts, and foreign corporations to avoid paying U.S. taxes for which he was liable." Docket no. 4 at 7. This audit led to a closing agreement with Taxpayer-1 "admitting an unpaid income tax liability of over $2 million from unreported income of over $5 million for the 1996 through 2000 years, as well as additional penalties (including civil fraud penalties) from foreign entities set up and managed by Taylor Lohmeyer." *Id.*

Here, the IRS seeks names of and other information related to the Firm's clients between 1995-2017 to investigate the tax liability of those who used the Firm to "create and maintain foreign bank accounts and foreign entities that may have been used to conceal taxable income in foreign countries." *Id.* at 8. The Government undertakes this investigation, it states, because offshore tax evasion usually involves a foreign financial account and an offshore entity controlled by nominee directors to hide the taxpayers' beneficial ownership. *Id.* at 7.

Before this John Doe summons could issue, the Government was required to make certain showings in an *ex parte* proceeding before this Court. *See* 5:18-MC-1046-XR. On October 15, 2018, the Court found that the Government had made these showings. On November 6, 2018, the Firm brought this suit as a petition to quash the summons, and on February 13, 2019, the Government brought the motion to dismiss the petition to quash and counter-petition to enforce that is now before the Court. The Government met its burden at the *ex parte* proceeding and attempts to meet its burden here with the declarations of Revenue Agent Joy Russell-Hendrick.

DISCUSSION

I. Applicable Law

Before a third-party John Doe summons like this one can be issued, there must be a court proceeding in which the United States establishes that:

> (1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,
>
> (2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and
>
> (3) the information sought to be obtained from the examination of the records or testimony (and the identity of the person or persons with respect to whose liability the

> summons is issued) is not readily available from other sources.

26 U.S.C. § 7609(f).

The Court, in ordering service of the summons in the earlier *ex parte* proceeding, made these three findings. Importantly, these findings are not subject to challenge in an enforcement proceeding—they relate only to issuance of the summons. *See United States v. Samuels, Kramer & Co.*, 712 F.2d 1342, 1346 (9th Cir. 1983) ("[T]he three factual determinations that a district court must make under section 7609(f) before issuing its ex parte authorization of a John Doe summons may not be challenged. There is, therefore, no reason why these factual determinations should be subject to de novo review at an enforcement hearing.")

Then, to enforce the summons, the Government's burden "is a slight one because the statute must be read broadly in order to ensure that the enforcement powers of the IRS are not unduly restricted." *United States v. Balanced Fin. Mgmt., Inc.*, 769 F.2d 1440, 1443 (10th Cir. 1985). "The government's minimal burden at this stage can be fulfilled by a 'simple affidavit' by the IRS agent issuing the summons." *Mazurek v. United States*, 271 F.3d 226, 230 (5th Cir. 2001). Under the Supreme Court's decision in *United States v. Powell*, 379 U.S. 48, 57-58 (1964), the Government must establish that the summons: (1) is issued for a legitimate purpose; (2) seeks information which may be relevant to that purpose; (3) seeks information that is not already within the IRS's possession; and (4) satisfies all

administrative steps required by the Internal Revenue Code.

If the Government makes out its case, the burden shifts to the Firm to challenge the case on "any appropriate ground." *Powell*, 85 S.Ct. at 255. Thus, the burden shifts to the Firm: "(1) to show the Government has failed to meet its burden under *Powell*; (2) to assert and prove that enforcement would constitute an abuse of the court's process; or (3) to show any other appropriate ground under which the summons should not be enforced." *United States v. Battle*, 213 F. App'x 307, 309-10 (5th Cir. 2007). "An abuse of the judicial process occurs when the summons is sought for an 'improper purpose, such as . . . harass[ing] the taxpayer, . . . put[ting] pressure on him to settle a collateral dispute' or obtaining information solely for a criminal prosecution under the guise of a civil liberty investigation." *Johnson v. United States*, 2006 WL 505844, at *2 (W.D. Tex. Jan. 3, 2006) (citing *Mazurek*, 271 F.3d at 230-31). Contrary to the IRS's minimal burden, Petitioner's burden to rebut a *Powell* prima facie case is "heavy". *Id.*

II. Application

Here, the Government makes out *a prima facie* case and the Firm, despite its arguments regarding abuse of process and attorney-client privilege, does not meet its "heavy" rebuttal burden.

a. The Government's *prima facie case* under *Powell*

The U.S. makes out its *prima facie* case using the affidavit of Revenue Agent Joy Russell-Hendrick. Docket no. 4-1. First, she states the legitimate purpose stems from the widespread practice of using offshore entities and foreign financial accounts for offshore tax evasion. And because the IRS's evaluation of Taylor Lohmeyer revealed the Firm played a key role in helping taxpayers operate offshore, she states, the IRS began investigating the identity and correct income tax liability of those who used the Firm to hide unreported taxable income. Second, she states the summons seeks information relevant to this purpose because it seeks records that may reveal the identities and international activities of certain clients of the Firm between 1995 and 2017. Third, the IRS does not have this information, and fourth, Russell-Hendrick states all required administrative steps were taken. Given the Government's "slight" burden, which can be met by "simple affidavit," the Government easily makes out a *prima facie* case.

b. The Firm's attempts to meet its 'heavy' burden

The burden then shifts to the Firm to rebut this case, show an abuse of process, or argue any appropriate ground. Generally, the Firm's arguments throughout the proceeding center on inaccuracies it perceives in the narrative presented in the Russell-Hendrick affidavit used to support issuance of the summons. The

Court interprets this both as an attack on the findings made in the *ex parte* proceeding and an argument that the Government abused the Court's process in that proceeding.

As stated above, however, the affidavit in question is only relevant to the necessary findings for issuing a John Doe summons, and the Court already found that the government met its burden. The Firm cannot now challenge those findings. Even if it could, the affidavit amply justifies the necessary findings. There is clearly an ascertainable group (firm clients between 1995 and 2017) and the information sought (these clients' identities) is not readily available elsewhere. As to the remaining required finding, a central argument in the Firm's response—that there is no meaningful connection between the Firm's representation of these clients and the IRS's enforcement action against one client—is best interpreted as challenging the reasonable basis for believing that this group may have failed to comply with internal revenue law.

But the bar for "reasonable basis" is not high and the affidavit of Russell-Hendrick from the *ex parte* proceeding establishes a reasonable basis. She details her conclusion that Taxpayer-1 concealed his connection to offshore structures—for which Taxpayer-1 remained the beneficial owner—created under the advice of the firm. Taxpayer-1 entered an agreement with the IRS in June 2017, admitting that Taxpayer-1 owned all assets owned by the offshore trusts and earned over $5 million in unreported income between 1996 and 2000. Taxpayer-1 accepted liability for civil fraud penalties

and penalties for failing to file the required forms for reporting foreign income.

Russell-Hendrick then states the basis for her opinion that the Firm provided similar advice to other clients. Among other pieces of evidence, she states that in an interview with John Taylor, former partner of the firm, Taylor estimated that he structured offshore entities for tax purposes for 20 to 30 clients between the 1990s and early 2000s. Russell-Hendrick, states in part that:

> Taylor Lohmeyer PLLC's services to their U.S. clients, as described by Taxpayer-I and Taylor himself, are the kinds of activities that, in the experience of the IRS, are hallmarks of offshore tax evasion, including: (1) structures of offshore trusts with compliant trustees, and foundations and anonymous corporations managed by nominee officers and directors, (2) the use of "straw men" to contribute nominal funds to foreign trusts to create the false appearance that such trusts have foreign grantors, and (3) the concealment of beneficial ownership of foreign accounts and assets in jurisdictions with strong financial secrecy laws and practices.
>
> The information obtained by the IRS and discussed in this Declaration suggests that the still-unknown U.S. taxpayers doing business with Taylor Lohmeyer PLLC may not have reported their offshore accounts, entities, or structures. Instead, they have likely relied on the assistance of Taylor, and the fact

> the structures are hidden offshore to support a decision not to report the existence of those entities and accounts, expecting that the IRS would not discover the accounts, omitted income, and/or the existence of the entities.

18-MC-1046, docket no. 1-2 at 37. Thus, assuming for argument that the Firm could challenge the *ex parte* proceeding at this stage, issuance was proper.

Next, the Firm argues that the Russell-Hendrick affidavit in the *ex parte* proceeding is "replete with misrepresentations and inaccuracies demonstrating a serious abuse of the summons process." Docket no. 1 at 4. The Firm argues these alleged misrepresentations are "cooked up . . . to support [Russell-Hendrick's] erroneous conclusion that Taylor Lohmeyer was providing illegal services to other U.S. clients." *Id.* at 9. These alleged misrepresentations are, for example, the conclusion that "[o]n the advice of Taylor that no income was reportable from the offshore arrangement, Taxpayer-1 never told his return preparer about the offshore structure or the incentive fees." *Id.* at 8 (other allegedly unsupported representations are presented on pages 4-11). The Firm contends Russell-Hendrick cites no source to support her inference, and argues that had Taxpayer-1 followed the advice given "there would have been a lawful position that no income was reportable . . . [but] the taxpayer obviously did not follow the lawful advice he followed." *Id.*

Further, the Firm argues that Lohmeyer "has reviewed his remaining client files and has determined that they are distinguishable from Taxpayer-1"

because unlike with Taxpayer-1, "there is no evidence that any of the remaining taxpayers disregarded Taylor Lohmeyer's advice regarding the proper structure and maintenance of foreign grantor trusts." *Id.* at 11.

All told, the Firm argues the alleged misrepresentations and the fact that the remaining clients are distinguishable from Taxpayer-1 means enforcement of the summons is an abuse of process and the first two *Powell* factors are not met. As to the *Powell* factors, these arguments do not rebut the government's showing that investigating offshore tax evasion is a legitimate purpose and that these records may be relevant to that purpose. As to abuse of process, the Firm first states "we believe that the Court was actively misled during the *ex parte* proceeding by false or misleading misrepresentations made in a supporting declaration," docket no. 1 at 1 n.1, but it then states "[w]e do not necessarily allege that the government is acting with sinister motive," *id.* at 11 n.4. This does not meet the "heavy" burden, if alleging abuse of process, to show an improper purpose like harassing the taxpayer or pressuring the taxpayer to settle a collateral dispute.

Next, the Firm argues that the information sought by the summons is protected by attorney-client privilege. Attorney-client privilege is a ground courts have recognized as a means of rebutting a prima facie case under *Powell*. *See United States v. El Paso Co.*, 682 F.2d 530, 538 (5th Cir. 1982) (citing *Powell* and stating that El Paso Co., in opposing enforcement of an IRS summons, bore the burden of establishing its defense

that attorney-client privilege protects the information sought).

The attorney-client privilege covers confidential communications "for the purpose of obtaining legal advice." *El Paso Co.*, 682 F.2d 530, 538 (5th Cir. 1982). Although privileges pertaining to documents can be asserted in an enforcement proceeding, the party seeking to assert the privilege must allege its applicability with specificity as to each document. *Id.* at 539 ("[W]e have made clear that the attorney-client privilege may not be tossed as a blanket over an undifferentiated group of documents.").

"It is well established that '(t)he identity of a client is a matter not normally within the privilege.'" *In re Grand Jury Proceedings in Matter of Fine*, 641 F.2d 199, 204 (5th Cir. 1981) (quoting *Frank v. Tomlinson*, 351 F.2d 384, 384 (5th Cir. 1965)). "Despite the general rule," under a "limited and rarely available" exception, "an attorney must conceal even the identity of a client, not merely his communications." *In re Grand Jury Proceedings* ("*Jones*"), 517 F.2d 666, 671 (5th Cir. 1975). The exception applies "when the disclosure of the client's identity by his attorney would have supplied the last link in an existing chain of incriminating evidence likely to lead to the client's indictment." *In re Grand Jury Proceedings*, 680 F.2d 1026, 1027 (5th Cir. 1982).

In *Jones*, the court stated that "[t]he cases applying the exception have carved out only a limited and rarely available sanctuary, which by virtue of its very nature must be considered on a case-by-case basis. It

could hardly be otherwise, since the purpose of privilege to suppress truth runs counter to the dominant aims of the law." *Jones*, 517 F.2d at 672; *see generally DeGuerin v. United States*, 214 F. Supp.2d 726, 735-36 (S.D. Tex. 2002). ("If revelation of a client's identity would also reveal a privileged communication, both the identity and the communication are privileged.").

The Firm argues this exception applies because the summons seeks the identities based on the advice and services sought from the firm, and "when the specific requests are combined with the client identities (not to mention the related client files), the net effect is to identify individuals as well as the specific services and structures they were provided." Docket no. 5 at 14. The Firm relies on an IRS enforcement case from the Third Circuit, *United States v. Liebman*, 742 F.2d 807 (3d Cir. 1984), in which client identities were privileged. This was because the government was already aware of the advice the law firm had provided its clients (that certain fees were tax deductible), so it "falls within the situation where so much of the actual communication had already been established, that to disclose the client's name would disclose the essence of a confidential communication." Docket no. 5 at 13 (quoting *Liebman*, 742 F.2d at 809).

The Government distinguishes *Liebman* because in that case the summons sought the identities of those clients who had been advised that they could deduct, rather than amortize, certain fees. Docket no. 7 at 10. The Government argues this situation is distinct because the client class is defined not by receipt of certain

legal advice, but by whether the Firm "acquired or formed any foreign identity, opened or maintained any foreign financial account, or assisted in the conduct of any foreign financial transaction on behalf of the identified class." *Id.* Thus, "for Taylor Lohmeyer's blanket 'attorney-client privilege' assertion to arguably apply, it would have to show that all members of the identified class received the same privileged communications as Taxpayer-1, and that by disclosing the identities of the identified class, it would be tantamount to disclosing the privileged communications." *Id.*

Separately, the U.S. argues the summons does not seek privileged information because it does not seek legal advice and it was tailored to avoid the attorney-client privilege. *Id.* at 6 (citing, e.g., *Seibu Corp. v. KPMG LLP*, 2002 WL 87461 (N.D. Tex. 2002) ("Where an attorney is functioning in some other capacity—such as an accountant, investigator, or business advisory—there is no privilege.") (applying Texas law) (collecting cases)). In an enforcement proceeding, the party seeking to assert privileges pertaining to documents must allege specifically how the privilege applies to each document. *El Paso Co.*, 682 F.2d at 539 (5th Cir. 1982). The Government contends the Firm must produce a privilege log with specific objections to the summons' requests, but the Firm has not done so.

Instead, at the status conference in this case, the Firm sought and obtained leave to file an additional memorandum on the attorney-client privilege issue. This memorandum includes a supporting declaration

from Fred Lohmeyer that purportedly details "the types of legal services the firm provides, the types of structures employed by the firm's clients, and the nature of the firm's relationships with its clients." Docket no. 8 at 7. The Firm also provided "a sampling of redacted client billing records further showing . . . that the services were legal in nature, and that the legal services received by the clients were similar to the legal services received by Taxpayer-1." *Id.* Finally, the Firm again argues that the client identities are privileged because "so much is already known about the reasons the clients sought advice from the law firm and the types of services that the law firm provides that the government is already aware of the confidential communications between the clients and the law firm." *Id.* at 9.

Here, the Firm's attorney-client privilege arguments do not meet its burden to rebut a *Powell* showing, in large part because the Firm makes a blanket assertion and does not produce a privilege log or similar device. *See, e.g.*, *Hanse v. United States*, 2018 WL 1156201, at *6 (N.D. Ill. Mar. 5, 2018) (concluding that a "blanket assertion of privilege," which did not properly assert attorney-client privilege on a document-by-document basis, was "insufficient to challenge the validity of the IRS summons"). These additional filings do not persuade the Court to the contrary. The sample billing records only show, at most, that some services were legal in nature and protected by privilege, but this does not show that the 32,000 responsive documents the Firm claims to have are *all* privileged.

Likewise, the new Lohmeyer declaration provides only generalities that do not show the IRS already knows so much that disclosure of client identities falls in the narrow exception to the general rule that identities are not privileged.

Ultimately, because blanket assertions of privilege are disfavored, the Firm bears a heavy burden at this stage, and the Firm relies only on a narrowly defined exception to the general rule that identities are not privileged, the Firm does not carry its burden. As the Government suggests, "[u]pon this Court ordering enforcement of the summons, if Taylor Lohmeyer wishes to assert any claims of privilege as to any responsive documents, it may then do so, provided that any such claim of privilege is supported by a privilege log which details the foundation for each claim on a document-by-document basis." Docket no. 7 at 8. Whether certain documents fit the *Liebman* argument the Film advances is better decided individually or by discrete category.

CONCLUSION

Accordingly, the Court GRANTS the Government's counter-petition to enforce its John Doe summons. The Court will retain jurisdiction in this case pending any challenges by the Government of the Firm's privilege log, should the Firm produce one.

It is so ORDERED.

SIGNED this 15th day of May, 2019.

/s/ Xavier Rodriguez
XAVIER RODRIGUEZ
UNITED STATES
DISTRICT JUDGE

United States Court of Appeals
for the Fifth Circuit

No. 19-50506

TAYLOR LOHMEYER LAW FIRM P.L.L.C.,

Plaintiff—Appellant,

versus

UNITED STATES OF AMERICA,

Defendant—Appellee.

Appeal from the United States
Western District of Texas
USDC 5:18CV1161-XR

ON PETITION FOR REHEARING EN BANC

(Filed Dec. 14, 2020)

(Opinion – 04/24/2020, 5 Cir., ___, 957 F.3d 505)

Before BARKSDALE, HIGGINSON, AND DUNCAN, *Circuit Judges.*

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Circ. R. 35), the petition for rehearing en banc is **DENIED**.

In the en banc poll, eight judges voted in favor of rehearing (Chief Judge Owen, and Judges Smith, Elrod, Haynes, Willett, Ho, Engelhardt, and Oldham), and nine judges voted against rehearing (Judges Jones, Stewart, Dennis, Southwick, Graves, Higginson, Costa, Duncan, and Wilson).

ENTERED FOR THE COURT:

/s/ Rhesa H. Barksdale
Rehsa Hawkins Barksdale
United States Circuit Judge

JENNIFER WALKER ELROD, *Circuit Judge*, joined by OWEN, *Chief Judge*, and SMITH, WILLETT, ENGELHARDT, and OLDHAM, *Circuit Judges*, dissenting from the denial of rehearing *en banc*:

The IRS served the Taylor Lohmeyer law firm with a broad summons requesting the identities of the firm's clients who had engaged the firm to achieve certain offshore financial arrangements from 1995 to 2017. The IRS has traditionally served such summonses on financial institutions and commercial couriers. Not lawyers. There is good reason to be wary of investigations that exert pressure on lawyers. The relationship between a customer and a financial institution or commercial courier plays little, if any, role in our system's ability to administer justice—but the same cannot be said of the lawyer-client relationship. When the IRS pursues John Doe summonses against law firms, serious tensions with the attorney-client privilege arise.

Courts play a crucial role in moderating the executive power with respect to a John Doe summons. *See United States v. Bisceglia*, 420 U.S. 141, 146 (1975) ("Substantial protection is afforded by the provision that an Internal Revenue Service summons can be enforced only by the courts.").

Hearing this case *en banc* would have helped clarify the boundaries of attorney-client privilege in this precarious area.[1] I write to explain that the opinion can and should be read—consistently with our existing precedent—not to impose any new standard with respect to what is required for the attorney-client privilege to protect client identity.

* * *

Attorney-client privilege matters. And it matters not only for particular parties but for the system of justice at large. "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Although the privilege may at times prevent the government from obtaining useful information, "this is the price we pay for a system that encourages individuals to seek legal advice and to make full disclosure to the attorney so that the attorney can render informed advice." *In re Grand Jury Subpoena for*

[1] Amici, the American College of Tax Counsel and the National Association of Criminal Defense Lawyers, both supported rehearing *en banc*.

Attorney Representing Criminal Defendant Reyes-Requena, 926 F.2d 1423, 1432 (5th Cir. 1991) (*Reyes-Requena II*) (quoting *Matter of Grand Jury Proceeding, Cherney*, 898 F.2d 565, 569 (7th Cir. 1990)). *See also In re Grand Jury Proceedings*, 517 F.2d 666, 674 (5th Cir. 1975) (*Jones*) ("The purpose of the [attorney-client] privilege would be undermined if people were required to confide in lawyers at the peril of compulsory disclosure every time the government decided to subpoena attorneys it believed represented particular suspected individuals.").

Tax, in particular, can be a complex area of law, and our system relies on self-reporting and voluntary compliance. Many individuals, especially with sophisticated business interests, seek assistance to navigate the Internal Revenue Code. Tax attorneys can help clients comply—but only if they have the clients' full disclosure.

We have previously held that client identities are privileged where disclosure would reveal the client's confidential motive for retaining an attorney. "If the disclosure of the client's identity will also reveal the confidential purpose for which he consulted an attorney, we protect both the confidential communication and the client's identity as privileged." *Reyes-Requena II*, 926 F.2d at 1431. *See also Jones*, 517 F.2d at 674-75 ("The attorney-client privilege protects . . . the clients' identities when such protection is necessary in order to preserve the privileged motive.").

Our enduring precedent in *Jones* and *Reyes-Requena II* aligns with the long-established case law of other circuits. *See, e.g.*, *Cherney*, 898 F.2d at 568 ("The client's identity . . . is privileged because its disclosure would be tantamount to revealing the premise of a confidential communication: the very substantive reason that the client sought legal advice in the first place."); *Tornay v. United States*, 840 F.2d 1424, 1428 (9th Cir. 1988) (client identities are privileged when "disclosure of the client's identity or the existence of a fee arrangement would reveal information that is tantamount to a confidential professional communication"); *United States v. Liebman*, 742 F.2d 807, 809 (3d Cir. 1984) (client identities are privileged "where so much of the actual attorney-client communication has already been disclosed that identifying the client amounts to full disclosure of the communication"); *N.L.R.B. v. Harvey*, 349 F.2d 900, 905 (4th Cir. 1965) ("The privilege may be recognized when so much of the actual communication has already been disclosed that identification of the client amounts to disclosure of a confidential communication.").

The amici raised important concerns about how to interpret the opinion in this case. However, the opinion assures us, in its citations to *Jones* and *Reyes-Requena II*, that it does not diverge from our settled precedent. *Taylor Lohmeyer Law Firm P.L.L.C. v. United States*, 957 F.3d 505, 510-11 (5th Cir. 2020). I take the opinion at its word. Whenever disclosing a client's identity would reveal the confidential purpose for which the client consulted the attorney, attorney-client privilege

applies. This protection may obtain even if the government does not know the specific, substantive legal advice that was provided to the client.

In the district court, the enforcement order is currently stayed and the case has been administratively closed to facilitate our review of the enforcement order. Once our mandate issues, it may be that the case is reopened and the stay lifted. If so, the May 15, 2019 enforcement order provides that the Lohmeyer law firm will have the opportunity to produce a privilege log, asserting privilege on particular responsive documents. If the law firm does so, the district court may choose then to conduct an *in camera* review of those documents.[2] I am confident that any such review will be guided by the following: "[i]f the disclosure of the client's identity will also reveal the confidential purpose for which he consulted an attorney, we protect both the confidential communication and the client's identity as privileged." *Lohmeyer*, 957 F.3d at 511 (quoting *Reyes-Requena II*, 926 F.2d at 1431).

[2] The fact that the law firm made "blanket" assertions of privilege was perhaps because the IRS demanded a very broad array of documents to be identified using a client list. When a summons is so structured, a blanket assertion of privilege may be appropriate.

26 U.S.C.A. § 7609.
Special procedures for third-party summonses

(a) Notice. –

(1) In general. – If any summons to which this section applies requires the giving of testimony on or relating to, the production of any portion of records made or kept on or relating to, or the production of any computer software source code (as defined in 7612(d)(2)) with respect to, any person (other than the person summoned) who is identified in the summons, then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain an explanation of the right under subsection (b)(2) to bring a proceeding to quash the summons.

(2) Sufficiency of notice. – Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603 (relating to service of summons) upon the person entitled to notice, or is mailed by certified or registered mail to the last known address of such person, or, in the absence of a last known address, is left with the person summoned. If such notice is mailed, it shall be sufficient if mailed to the last known address of the person entitled to notice or, in the case of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, to the last known address of the

fiduciary of such person, even if such person or fiduciary is then deceased, under a legal disability, or no longer in existence.

(3) Nature of summons. – Any summons to which this subsection applies (and any summons in aid of collection described in subsection (c)(2)(D)) shall identify the taxpayer to whom the summons relates or the other person to whom the records pertain and shall provide such other information as will enable the person summoned to locate the records required under the summons.

(b) Right to intervene; right to proceeding to quash. –

(1) Intervention. – Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

(2) Proceeding to quash. –

(A) In general. – Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to begin a proceeding to quash such summons not later than the 20th day after the day such notice is given in the manner provided in subsection (a)(2). In any such proceeding, the Secretary may seek to compel compliance with the summons.

(B) Requirement of notice to person summoned and to Secretary. – If any person begins a proceeding under subparagraph (A) with respect to any summons, not later than the close of the 20-day period referred to in subparagraph (A) such person shall mail by registered or certified mail a copy of the petition to the person summoned and to such office as the Secretary may direct in the notice referred to in subsection (a)(1).

(C) Intervention; etc. – Notwithstanding any other law or rule of law, the person summoned shall have the right to intervene in any proceeding under subparagraph (A). Such person shall be bound by the decision in such proceeding (whether or not the person intervenes in such proceeding).

(c) Summons to which section applies. –

(1) In general. – Except as provided in paragraph (2), this section shall apply to any summons issued under paragraph (2) of section 7602(a) or under section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7612.

(2) Exceptions. – This section shall not apply to any summons –

(A) served on the person with respect to whose liability the summons is issued, or any officer or employee of such person;

(B) issued to determine whether or not records of the business transactions or affairs of an identified person have been made or kept;

(C) issued solely to determine the identity of any person having a numbered account (or similar arrangement) with a bank or other institution described in section 7603(b)(2)(A);

(D) issued in aid of the collection of –

(i) an assessment made or judgment rendered against the person with respect to whose liability the summons is issued; or

(ii) the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (i); or

(E) (i) issued by a criminal investigator of the Internal Revenue Service in connection with the investigation of an offense connected with the administration or enforcement of the internal revenue laws; and

(ii) served on any person who is not a third-party recordkeeper (as defined in section 7603(b)).

(3) John Doe and certain other summonses. – Subsection (a) shall not apply to any summons described in subsection (f) or (g).

(4) Records. – For purposes of this section, the term "records" includes books, papers, and other data.

(d) Restriction on examination of records. – No examination of any records required to be produced under a summons as to which notice is required under subsection (a) may be made –

(1) before the close of the 23rd day after the day notice with respect to the summons is given in the manner provided in subsection (a)(2), or

(2) where a proceeding under subsection (b)(2)(A) was begun within the 20-day period referred to in such subsection and the requirements of subsection (b)(2)(B) have been met, except in accordance with an order of the court having jurisdiction of such proceeding or with the consent of the person beginning the proceeding to quash.

(e) Suspension of statute of limitations. –

(1) Subsection (b) action. – If any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations under section 6501 (relating to the assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

(2) Suspension after 6 months of service of summons. – In the absence of the resolution of the summoned party's response to the summons, the running of any period of limitations under section 6501 or under section 6531 with respect to any person with respect to whose liability the summons is issued (other than a person taking action as provided in subsection (b)) shall be suspended for the period –

(A) beginning on the date which is 6 months after the service of such summons, and

(B) ending with the final resolution of such response.

(f) Additional requirement in the case of a John Doe summons. – Any summons described in subsection (c)(1) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that –

(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,

(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

(3) the information sought to be obtained from the examination of the records or testimony (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

The Secretary shall not issue any summons described in the preceding sentence unless the information sought to be obtained is narrowly tailored to information that pertains to the failure (or potential failure) of the person or group or class of persons referred to in paragraph (2) to comply with one or more provisions of the internal revenue law which have been identified for purposes of such paragraph.

(g) Special exception for certain summonses. – A summons is described in this subsection if, upon petition by the Secretary, the court determines, on the basis of the facts and circumstances alleged, that there is reasonable cause to believe the giving of notice may lead to attempts to conceal, destroy, or alter records relevant to the examination, to prevent the communication of information from other persons through intimidation, bribery, or collusion, or to flee to avoid prosecution, testifying, or production of records.

(h) Jurisdiction of district court; etc. –

(1) Jurisdiction. – The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceeding brought under subsection (b)(2), (f), or (g). An order denying the petition shall be deemed a final order which may be appealed.

(2) Special rule for proceedings under subsections (f) and (g). – The determinations required to be made under subsections (f) and (g) shall be made ex parte and shall be made solely on the petition and supporting affidavits.

(i) Duty of summoned party. –

(1) Recordkeeper must assemble records and be prepared to produce records. – On receipt of a summons to which this section applies for the production of records, the summoned party shall proceed to assemble the records requested, or such portion thereof as the Secretary may prescribe, and shall be prepared to produce

the records pursuant to the summons on the day on which the records are to be examined.

(2) Secretary may give summoned party certificate. – The Secretary may issue a certificate to the summoned party that the period prescribed for beginning a proceeding to quash a summons has expired and that no such proceeding began within such period, or that the taxpayer consents to the examination.

(3) Protection for summoned party who discloses. – Any summoned party, or agent or employee thereof, making a disclosure of records or testimony pursuant to this section in good faith reliance on the certificate of the Secretary or an order of a court requiring production of records or the giving of such testimony shall not be liable to any customer or other person for such disclosure.

(4) Notice of suspension of statute of limitations in the case of a John Doe summons. – In the case of a summons described in subsection (f) with respect to which any period of limitations has been suspended under subsection (e)(2), the summoned party shall provide notice of such suspension to any person described in subsection (f).

(j) Use of summons not required. – Nothing in this section shall be construed to limit the Secretary's ability to obtain information, other than by summons, through formal or informal procedures authorized by sections 7601 and 7602.