APPENDIX Q

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2004

(Petition for Rehearing: March 2, 2005
Decided: June 29, 2005)

Docket No. 04-0196-cv

ROBERT L. SCHULZ,

Plaintiff-Appellant,

—v.—

INTERNAL REVENUE SERVICE
and ANTHONY ROUNDTREE,

Defendants-Appellees.

Before :

FEINBERG, STRAUB, and RAGGI, *Circuit Judges.*

(Filed Jun. 29, 2005)

The government has moved to amend a prior *per curiam* opinion, reported at *Schulz v. I.R.S.*, 395 F.3d 463 (2d Cir. 2005), affirming the judgment of the United States District Court for the Northern District of New York (David N. Hurd, *Judge*), dismissing for lack of subject matter jurisdiction appellant's motions

to quash administrative summonses served on him by the Internal Revenue Service. The motion is construed as a petition for rehearing and is granted to the extent necessary to clarify the prior panel decision. The prior opinion remains in force to the extent it is not inconsistent with this opinion.

In its motion the government argues that the prior *per curiam* opinion misconstrues the grounds for denial of jurisdiction over motions to quash IRS summonses and otherwise misunderstands the roles of 26 U.S.C. §§ 7210 and 7604 in the comprehensive statutory tax-enforcement scheme. In particular, the government claims that a taxpayer may be subjected to criminal prosecution under 26 U.S.C. § 7210 or contempt sanction under 26 U.S.C. § 7604(b) for disobedience of an IRS summons whether or not the summons is enforced by a federal court order and, if an order of enforcement is granted, regardless of the taxpayer's compliance with that order. The prior per *curiam* opinion rejected this view as contrary to due process. That holding is confirmed on rehearing. Consistent with the demands of constitutional due process, an indictment under 26 U.S.C. § 7210 shall not lie and contempt sanctions under 26 U.S.C. § 7604(b) shall not be levied based on disobedience of an IRS summons until that summons has been enforced by a federal court order and the summoned party, after having been given a reasonable opportunity to comply with the court's order, has refused. This holding does not prejudice the privilege of a court in which the government has sought enforcement of an IRS summons to issue,

consistent with the law of contempt, an order of attachment to ensure the presence of a party who has contumaciously refused to comply with a summons. The motion to extend time in which to file a petition for rehearing *en banc* is granted.

ROBERT L. SCHULZ, *pro se*, Queensbury, N.Y.

FRANK P. CIHLAR, Assistant United States Attorney, Tax Division, United States Department of Justice, Washington, D.C., *for Defendants-Appellees.*

STRAUB, *Circuit Judge*:

The government has moved to amend our per *curiam* opinion, reported at *Schulz v. I.R.S.*, 395 F.3d 463 (2d Cir. 2005) ("*Schulz I*"). In support of its motion, the government relies on arguments that it did not advance in the District Court or on the original appeal. In light of these new arguments, and because the proposed amendments, if accepted, would alter significantly our prior holding, we, at the government's suggestion, construe the motion to amend as a petition for panel rehearing. Having considered the arguments of the parties, we grant the petition to rehear for only the limited purpose and to the extent necessary to clarify our prior opinion and hold that: 1) absent an effort to seek enforcement through a federal court, IRS summonses "to appear, to testify, or to produce books, papers, records, or other data," 26 U.S.C. § 7604, issued "under the internal revenue laws," *id.*, apply no force

to the target, and no punitive consequences can befall a summoned party who refuses, ignores, or otherwise does not comply with an IRS summons until that summons is backed by a federal court order;[1] 2) if the IRS seeks enforcement of a summons through the federal courts, those subject to the proposed order must be given a reasonable opportunity to contest the government's request; 3) if a federal court grants a government request for an order of enforcement then any individual subject to that order must be given a reasonable opportunity to comply and cannot be held in contempt or subjected to indictment under 26 U.S.C. § 7210 for refusing to comply with the original, unenforced IRS summons, no matter the taxpayer's reasons

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[1] In our prior per *curiam* opinion we held that "no consequence whatever can befall a taxpayer who refuses, ignores, or otherwise does not comply with an IRS summons until that summons is backed by a federal court order." 395 F.3d at 465. Contrary to the government's view that § 7604(b) allows a court to "punish disobedience *of an IRS summons*" without providing an intervening opportunity to comply with a court order of enforcement, we maintain that "no punitive consequences can befall a summoned party who refuses, ignores, or otherwise does not comply with an IRS summons until that summons is backed by a federal court order," but we recognize that 26 U.S.C. § 7604(b) allows courts to issue attachments, consistent with the law of contempt, to ensure attendance at an enforcement hearing "[i]f the taxpayer has contumaciously refused to comply with the administrative summons and the Service fears he may flee the jurisdiction." *United States v. Powell*, 379 U.S. 48, 58 n.18 (1964). While such an attachment is not, consistent with due process and the law of contempts, "punitive," it is nonetheless a consequence.

or lack of reasons for so refusing.[2] Our prior opinion otherwise remains in effect to the extent that it is not inconsistent with this opinion. We grant the motion to extend time in which to file a petition for rehearing *en banc.*

BACKGROUND

The facts underlying the original appeal are set forth in our prior opinion, *Schulz I*, 395 F.3d at 464. For purposes of completeness and clarity, however, we repeat that work here.

The IRS served Schulz with a series of summonses in May and June of 2003, ordering Schulz to appear and provide testimony and documents in connection with an investigation of Schulz by that agency. Rather than comply with the summonses, Schulz filed a motion to quash in the United States District Court for the Northern District of New York. That motion was heard by Magistrate Judge David R. Homer and, on October 16, 2003, was dismissed for lack of subject matter jurisdiction. In his unpublished opinion the Magistrate Judge found that, because the IRS had not commenced a proceeding to enforce the summonses, no case or controversy existed, and if the IRS did attempt to compel compliance, the enforcement procedure described in § 7604 would provide Schulz with

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[2] Our conclusions here and in *Schulz I* are consistent with *dicta* in our recent decision in *Hudson Valley Black Press v. IRS*, No. 04-1949, 2005 WL 1253410, at *4 (2d Cir. May 27, 2005).

adequate opportunity to attack the summonses on their merits.

Schulz filed in the District Court an appeal from and objection to the Magistrate Judge's order. The District Court (David N. Hurd, *Judge*) denied those objections and dismissed the appeal on December 3, 2003, by an unpublished order. Schulz appealed to this Court. By our January 25, 2005, *per curiam* opinion, we affirmed. *See Schulz I*, 395 F.3d 463. The focus of that opinion was whether issuance of an IRS summons presents a case or controversy under Article Ill of the United States Constitution. *Id.* at 464. Relying on the Supreme Court's decisions in *Reisman v. Caplin*, 375 U.S. 440 (1964), and *United States v. Bisceglia*, 420 U.S. 141 (1975), and in view of our decisions in *Application of Colton*, 291 F.2d 487 (2d Cir. 1961), and *United States v. Kulukundis*, 329 F.2d 197 (2d Cir. 1964), we held that a taxpayer's motion to quash an IRS summons, in the absence of an effort by the agency to seek enforcement of that summons in a federal court, does not present an Article III case or controversy. *Schulz I*, 395 F.3d at 465. Because that holding entailed overruling, in part, our prior holding in *Colton*, we circulated *Schulz I* to all active members of the Court prior to filing. *Id.* at n.1.

After *Schulz I* was issued, the government filed the present "motion to amend or, in the alternative, to extend time to file a petition for rehearing *en banc*," which the government also invites us to view as a petition for panel rehearing. The government's principal concerns are that we misunderstand the nature of the

jurisdictional bar on motions to quash IRS summonses and "misapprehend[] the consequences that ensue from the issuance of an IRS administrative summons." As to the latter point, the government appears to argue alternatively, or in combination, that: 1) the government may use the federal courts to punish taxpayers who disobey an IRS summons even if the summons is never enforced by a court order; 2) if an IRS summons is enforced by a court order, the court may punish disobedience of the IRS summons before providing the taxpayer an opportunity to comply with the court's order; or 3) if an IRS summons is enforced by a court order, the court may punish disobedience of the IRS summons even if the taxpayer complies with the court's order. In our view, expressed in *Schulz I*, none of these proposals is consistent with the comprehensive tax-enforcement scheme in which 26 U.S.C. §§ 7210, 7604(a), and 7604(b) are situated, constitutional due process, or the relevant precedents of this Court and the United States Supreme Court. Therefore, while we grant the petition for panel rehearing, we do so to clarify rather than to amend substantially *Schulz I*, which remains in force to the extent it is not inconsistent with this opinion.

DISCUSSION

Because it was the focus of the parties, our discussion in *Schulz I* focused primarily on the doctrinal rules of jurisdiction that the Supreme Court has derived from the "Cases" and "Controversies" clauses of the United States Constitution, Article III, Section 2.

See Reisman, 375 U.S. at 443 (dismissing petition to quash "for want of equity"). Underlying our analysis there was the equally venerable line of Supreme Court doctrine limiting the protections afforded to administrative action by sovereign immunity based on the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. The "leading cases on this question are *Ex parte Young*, 209 U.S. 123 (1908), and *Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920)." *Reisman*, 375 U.S. at 446. In particular, our decision in *Schulz I* was informed by concerns, also stated in *Colton*, 291 F.2d at 489-90, and *Kulukundis*, 329 F.2d at 199, "that the penalties of contempt [or prosecution] risked by a refusal to comply with the summonses are so severe that the statutory procedure amounts to a denial of judicial review." *Reisman*, 375 U.S. at 446.

On its present motion, the government presses the claim that Congress has, in the statutory scheme that includes 26 U.S.C. §§ 7210 and 7604, exercised its right to immunize agents of the IRS from suits seeking prospective relief from the enforcement of administrative summonses. That this is so was settled in *Reisman*. However, the privilege of that immunity comes with certain costs demanded by due process. Our holding in *Schulz I* took account of those costs while providing clear guidance to the government as to the constitutional limitations on its authority, and to taxpayers as to how their due process rights are protected by the statutory scheme. We take the opportunity provided by this petition to further explicate our view.

At issue on the present petition is whether 26 U.S.C. §§ 7210 and 7604 may be read to allow the imposition of penal consequences for failure to comply with an IRS summons or if levying of punishment for disobedience under those sections requires review by a federal court of the merits of a summons and, where the merits are upheld, a reasonable opportunity to comply with a court order of enforcement before punitive or coercive sanctions may be imposed. Addressing a view of 26 U.S.C. §§ 7210 and 7604 similar to that advanced by the government on this petition, Judge Friendly, writing for this Court, pointed out that:

> If the statutory scheme were like that for enforcement of subpoenas of such agencies as the Interstate Commerce Commission, 49 U.S.C. § 12, or the Civil Aeronautics Board, 49 U.S.C. § 1484, there would be merit in the Government's position that courts ought not intervene at so early a stage; since disobedience to a subpoena under those statutes has no penal consequences until a judge has ordered its enforcement, there is no occasion for any preliminary resort to the courts. Here, however, at least the criminal penalty of § 7210 is incurred by disobedience, and it is not altogether plain that a contempt citation under § 7604(b) may not be. Under such circumstances the principle of *Ex parte Young*, 1908, 209 U.S. 123, 147, 28 S. Ct. 441, 52 L. Ed. 714 and *Oklahoma Operating Co. v. Love*, 1920, 252 U.S. 331, 336-337, 40 S. Ct. 338, 64 L. Ed. 596, comes into play; we see no reason why that principle should not be

> applicable to a summons, disobedience of which carries criminal penalties. . . . We are not unmindful of the potentialities of delay inherent in such an extra round -potentialities sufficiently serious without one, as illustrated, for example, by *Penfield Co. of Cal. v. S.E.C.*, 1947, 330 U.S. 585, 67 S. Ct. 918, 91 L. Ed. 1117; but the Government seems to be a victim of its own Draconianism. We hold the District Court had jurisdiction of the motion and thus reach the question of our appellate jurisdiction to review its denial.

Colton, 291 F.2d at 490.

Our view of the constitutional issues implicated in these sections of the tax enforcement scheme and the conflicts posed by the government's "Draconianism" is the same now is it was then. Reading 26 U.S.C. §§ 7210 and 7604 to allow the imposition of penal consequences for failure to comply with an IRS summons renders the sections unconstitutional unless the summoned taxpayer has an opportunity to seek judicial review of the summons *before* placing the taxpayer at risk of punishment. In *Colton* we held that taxpayers could seek such a review by filing a preliminary motion to quash an IRS summons before deciding whether to comply. That saving condition was excluded by the Supreme Court in *Reisman*. 375 U.S. at 445; *see also Kulukundis*, 329 F.2d at 199. In our view, that leaves only the remedy excluded in *Colton* – that "disobedience to [an IRS summons] has no penal consequences [under either 26 U.S.C. §§ 7210 or 7604] until a judge has ordered its enforcement," 291 F.2d at 490 – to keep the scheme

consistent with due process. *Reisman* advances this view. 375 U.S. at 450 ("[W]e remit the parties to the comprehensive procedure of the Code, which provides full opportunity for judicial review before any coercive sanctions may be imposed."); *see also Bisceglia*, 420 U.S. at 151 ("Congress has provided protection from arbitrary or capricious action by placing the federal courts between the Government and the person summoned [by the IRS]."). *Schulz I* provided our first opportunity to conform the law of this Circuit to that view.

Absent the protections afforded by *Colton*, the "Draconian" view of the statutory scheme advanced by the government in *Colton*, and on this petition, would render the scheme itself unconstitutional. In *Schulz I* we found that *Reisman* and *Bisceglia* provide guidance on how 26 U.S.C. §§ 7210 and 7604 must be read so as to preserve agency immunity from preliminary suit while avoiding the *Ex parte Young* concerns that we identified in *Colton*. In light of this guidance, we held that, before punishment for disobedience of an IRS summons may be levied, the agency must seek enforcement through a federal court in an adversarial proceeding through which the taxpayer can test the validity of the summons. *See United States v. Euge*, 444 U.S. 707, 719 (1980) ("[T]he summoned party is entitled to challenge the issuance of the summons in an adversary proceeding in federal court *prior to enforcement*, and may assert appropriate defenses." (emphasis added)); *Donaldson v. United States*, 400 U.S. 517, 525 (1971) ("Thus the [IRS] summons is administratively

issued but its enforcement is only by federal court authority in an adversary proceeding affording the opportunity for challenge and *complete protection* to the witness." (internal quotations marks omitted, emphasis added));[3] *see also United States v. LaSalle Nat. Bank*, 437 U.S. 298, 302 (1978) (§ 7604(a) procedure commenced by petition followed by an adversarial hearing); *United States v. Edgerton*, 734 F.2d 913, 915-917 (2d Cir. 1984) (describing complete and properly pursued § 7604(b) procedure leading to provision of a coercive contempt penalty); *United States v. Noall*, 587 F.2d 123, 124-26 (2d Cir. 1978) (§ 7604(a) procedure commenced by petition followed by an order to show cause, submission of opposing affidavits, and argument). We further held in *Schulz I* that, if the summons is not enforced, then no contempt sanction may be levied against the summoned party and no prosecution under 26 U.S.C. § 7210 may lie; and, in the alternative, if the summons is enforced by the court, then the summoned party must have a reasonable opportunity to comply with the court's order and only upon refusal to obey the court order may contempt sanctions be imposed or an indictment under 26 U.S.C. § 7210 pursued.[4] *See Donaldson*, 400 U.S. at 525; *Reisman*, 375

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[3] The holding in *Donaldson* that third parties do not have an absolute right to intervene in enforcement proceedings is not to the contrary – that holding was, of course, superceded by 26 § 7609.

[4] We rejected this interpretation of 26 U.S.C. § 7210 in *Colton*. 291 F.2d at 489. That holding was constitutionally tenable only in view of our determination that summoned witnesses would have an earlier chance to test the merits of a summons in a motion to quash. Informed by intervening decisions of this Court

U.S. at 450. Any lesser protections would be constitutionally insufficient and, with respect to 26 U.S.C. § 7604(b), would also be inconsistent with the law of contempts. *See* Fed. R. Crim. P., Rule 42; *Bloom v. Illinois*, 391 U.S. 194, 201-208 (1968); *United States v. Rizzo*, 539 F.2d 458, 463-65 (5th Cir. 1976).

The rule of due process upon which we relied in *Schulz I*, and upon which we rely now, can be stated thus: any legislative scheme that denies subjects an opportunity to seek judicial review of administrative orders except by refusing to comply, and so put themselves in immediate jeopardy of possible penalties "so heavy as to prohibit resort to that remedy," *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 333 (1920), runs afoul of the due process requirements of the Fifth and Fourteenth Amendments. This is so even if "in the proceedings for contempt the validity of the original order may be assailed." *Id.* at 335; *see also Reisman*, 375 U.S. at 446; *Ex parte Young*, 209 U.S. 123, 147-48 (1908).

According to the government's present view of 26 U.S.C. §§ 7210 and 7604, the agency may summon a taxpayer and the taxpayer must choose either to comply or, if not, put herself directly at jeopardy of sanction without an intervening opportunity to seek judicial

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and the Supreme Court, we reversed our *Colton* holding in *Schulz I*. Having considered the government's arguments on this appeal, we see no reason to change our view again, particularly in view of the fact that § 7210 provides for prosecutions only against those "*duly summoned* ... under sections 6420(e)(2), 6421(g)(2), 6427(j)(2), 7602, 7603, and 7604(b)." 26 U.S.C. § 7210 (emphasis added).

review of the summons. In *Colton* we rejected that view as contrary to due process. The remedy we proposed there, consistent with *Ex parte Young*, was a prospective suit in the form of a motion to quash. The Supreme Court in *Reisman* rejected that solution and instead held that the agency has no power or authority to compel compliance with a summons and must pursue enforcement in an adversarial proceeding before a federal judge. *Reisman*, 375 U.S. at 445-46. The Court further held that "[i]n such a proceeding only a refusal to comply with an order of the district judge subjects the witness to contempt proceedings," *id.* at 446, and that attempts to quash IRS summonses are "subject to dismissal for want of equity," *id.* at 443. Addressing directly *Ex parte Young* issues, the Court recognized that prosecution under 26 U.S.C. § 7210 and attachment under 26 U.S.C. § 7604(b) may present sufficient threat to trigger due process concerns. *Id.* at 446-50. However, noting the lack of administrative enforcement and the limited applicability of both § 7210 and § 7604(b) to "default" or a "contumacious refusal to honor a summons," *id.* at 449, the Court held that "in any of these procedures . . . the witness may challenge the summons on any appropriate ground," *id.* In light of these holdings, the Court concluded that the procedure for challenging IRS summonses "specified by Congress works no injustice and suffers no constitutional invalidity" because it "provides full opportunity for judicial review before any coercive sanctions may be imposed." *Id.* at 450.

In our view, this provides a reasonable, non-Draconian, solution to the problem we noted in *Colton* by requiring both judicial review of an IRS summons and an intervening opportunity to comply with a court order of enforcement prior to the imposition of coercive or punitive sanctions. *See Kulukindis*, 329 F.2d at 199. *Schulz I* made clear that view. Nothing in the government's petition inspires us to withdraw except insofar as *Schulz I* may be read to prohibit pre-hearing attachments of those summoned by the IRS who have wholly defaulted or contumaciously refused to comply in order to ensure their presence at a promptly held enforcement hearing. Such attachments are meant solely to ensure the presence of an obstinate taxpayer at an enforcement hearing. Because indefinitely detaining a taxpayer whose summons has yet to be enforced by a court would violate the taxpayer's due process rights, the enforcement hearing must be held as soon after the taxpayer's arrest as possible. *See* 26 U.S.C. § 7604(b) (allowing attachment "as for contempt," and, if appropriate after "a hearing of the case," issuance of orders "not inconsistent with the law for the punishment of contempts"); *United States v. Hefti*, 879 F.2d 311, 312 n.2 (8th Cir. 1989) ("Judicial enforcement of orders under 26 U.S.C. § 7602 is governed by 26 U.S.C. § 7604(b). Only a refusal to comply with an order of the District Court subjects the witness to contempt proceedings." (citing *Reisman*)); *see also United States v. Powell*, 379 U.S. 48, 58, n.18 (1964) (pointing out that summons enforcement "proceedings are instituted by filing a complaint, followed by answer and hearing. If the taxpayer has contumaciously refused to comply with the

administrative summons *and* the Service fears he may flee the jurisdiction, *application* for the sanctions available under § 7604(b) might be made simultaneously with the filing of the complaint." (emphasis added)); *Reisman*, 375 U.S. at 446-50. Neither this opinion nor *Schulz I* prohibits the issuance of pre-hearing attachments consistent with due process and the law of contempts. *See* 26 U.S.C. § 7604(b).

CONCLUSION

For the foregoing reasons the petition for rehearing is GRANTED for the limited purpose of providing clarification to *Schulz I* contained in this opinion. *Schulz I* shall remain in force to the extent that it is not inconsistent with this opinion. The motion to extend the time for filing of a petition for rehearing *en bane* is GRANTED. Either party may file such a motion within 45 days of the filing of this opinion.

APPENDIX R

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2004

(Argued: December 13, 2004
Decided: January 25, 2005)

Docket No. 04-0196-cv

ROBERT L. SCHULZ,

Plaintiff-Appellant,

—v.—

INTERNAL REVENUE SERVICE
and ANTHONY ROUNDTREE,

Defendants-Appellees.

Before :

FEINBERG, STRAUB, and RAGGI, *Circuit Judges.*

(Filed Jan. 25, 2005)

Appeal from a judgment in the United States District Court for the Northern District of New York (David N. Hurd, *Judge*), dismissing for lack of subject matter jurisdiction appellant's motions to quash administrative summonses served upon him by the Internal Revenue Service.

AFFIRMED.

ROBERT L. SCHULZ, *pro se*, Queensbury, N.Y.

ROBERT P. STORCH, Assistant United States Attorney for the Northern District of New York (Glenn T. Suddaby, United States Attorney, on the brief), Albany, N.Y., *for Defendants-Appellees.*

PER CURIAM:

In May and June 2003 defendant-appellee, the Internal Revenue Service ("IRS"), served plaintiff-appellant, Robert L. Schulz, with a series of administrative summonses seeking testimony and documents in connection with an IRS investigation of Schulz. Schulz filed in the United States District Court for the Northern District of New York motions to quash those summonses. In an order dated October 16, 2003, Magistrate Judge David R. Homer dismissed Schulz's motions for lack of subject matter jurisdiction, finding that, because the IRS had not commenced a proceeding to enforce the summonses, a procedure described in 26 U.S.C. §7604, Schulz was under no threat of consequence for refusal to comply and, until such time as the IRS chose to pursue compulsion in a United States district court, no case or controversy existed. Magistrate Judge Homer further found that if the IRS did attempt to compel Schulz to produce testimony and documents named in the summonses, the enforcement procedure

described in §7604 would provide Schulz with adequate opportunity to contest the requests.

Schulz filed an appeal and objection in the District Court. By order dated December 3, 2003, the District Court denied those objections and dismissed the appeal. Schulz now appeals from that final decision of the District Court. We assert jurisdiction pursuant to 28 U.S.C. §1291 and affirm.

It is well-established that "Article III of the Constitution confines the jurisdiction of the federal courts to actual 'Cases' and 'Controversies.'" *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (citations omitted). To demonstrate the standing necessary to invoke the jurisdiction of the federal courts Schulz must "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). This injury may not be speculative or abstract, but must be distinct and definite. *Id.*

In its present posture, Schulz's motion does not satisfy this requirement. As the Supreme Court pointed out in *United States v. Bisceglia*, IRS summonses have no force or effect unless the Service seeks to enforce them through a §7604 proceeding. 420 U.S. 141, 146 (1975), *partially superseded by* 26 U.S.C. §7609, as stated in *In re Does*, 688 F.2d 144, 148 (2d Cir. 1982). The IRS has not initiated any enforcement procedure against Schulz and, therefore, what amount to requests do not threaten any injury to Schulz. Of course, if the IRS should, at a later time, seek to enforce these

summonses, then the procedures set forth in §7604(b) will afford Schulz ample opportunity to seek protection from the federal courts. *See Bisceglia*, 420 U.S. at 146; *see also Reisman v. Caplin*, 375 U.S. 440, 447-50 (1964) (denying injunctive relief from IRS summonses because §7604(b) "provides full opportunity for judicial review before any coercive sanctions may be imposed"); *United States v. Tiffany Fine Arts, Inc.*, 718 F.2d 7, 11 (2d Cir. 1983) ("[*Bisceglia*] reasoned that by creating the enforcement proceeding mechanism Congress had intended to place the federal courts between the IRS and the person summoned, and that the courts could contain [the threat of IRS overreaching] by narrowing the scope of or refusing to enforce abusive summonses.").

We realize that our holding today stands in direct contradiction to our previous decisions in *Application of Colton*, 291 F.2d 487, 491 (2d Cir. 1961), and *In re Turner*, 309 F.2d 69, 71 (2d Cir. 1962). While reversal of our prior precedent is never a matter we regard lightly, we take no small solace in Judge Friendly's discussion of *Colton* and *Turner* in *United States v. Kulukundis*, 329 F.2d 197 (2d Cir. 1964). There, Judge Friendly, who authored both *Colton* and *Turner*, points out that *Reisman* "seems to destroy the basis underlying decisions of this court which authorized applications to vacate [an IRS] summons (and appeals from their denial) in advance of any judicial proceeding by the Government for their enforcement." *Id.* at 199. In light of this, we view ourselves today as completing a task begun forty years ago and hold that,

absent an effort to seek enforcement through a federal court, IRS summonses apply no force to taxpayers, and no consequence whatever can befall a taxpayer who refuses, ignores, or otherwise does not comply with an IRS summons until that summons is backed by a federal court order. In addition, we hold that if the IRS seeks enforcement of a summons through the courts, those subject to the proposed order must be given a reasonable opportunity to contest the government's request. If a court grants a government request for an order of enforcement then we hold, consistent with 26 U.S.C. §7604 and *Reisman*, that any individual subject to that order must be given a reasonable opportunity to comply and cannot be held in contempt, arrested, detained, or otherwise punished for refusing to comply with the original IRS summons, no matter the taxpayer's reasons or lack of reasons for so refusing. *See Reisman*, 375 U.S. at 446 ("[O]nly a refusal to comply with an order of the district judge subjects the witness to contempt proceedings."). Any lesser protections would expose taxpayers to consequences derived directly from IRS summonses, raising an immediate controversy upon their issuance. Holding as we have, however, allows us to hold further that issuance of an IRS summons creates no Article III controversy and, therefore, federal courts do not have jurisdiction over motions to quash IRS summonses in the absence of some effort by the IRS to seek court enforcement of the summons.

Consistent with these holdings, we find that, on the facts before us, no force has been applied to Schulz and his request for action is premature. Thedecision of the District Court dismissing Schulz's motions for want of subject matter jurisdiction is AFFIRMED.[1]

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[1] This opinion has been circulated to the active members of this Court prior to filing.

APPENDIX S

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ

Plaintiff,

vs

UNITED STATES; INTERNAL REVENUE SERVICE; and ANTHONY ROUNDTREE,

03-MC-71

Defendants.

APPEARANCES: OF COUNSEL:

ROBERT L. SCHULZ
Plaintiff, Pro Se
2458 Ridge Road
Queensbury, NY 12804

DAVID N. HURD
United States District Judge

ORDER

(Filed Dec. 3, 2003)

On October 16, 2003, Magistrate Judge David R. Homer filed a Memorandum-Decision and Order which dismissed plaintiff's motion to squash IRS summons. (Docket No. 7). Plaintiff filed an appeal and objection to the Magistrate Judge's decision (Docket Nos. 8, 9, 10, 12, 13, 14, and 15). The appeal was taken on submit on November 28, 2003.

Upon a de novo review of the decision and all submissions, it is

ORDERED, that the objections to the decision are DENIED and the appeal is DISMISSED.

IT IS SO ORDERED.

/s/ David N. Hurd
United States District Judge

Dated: December 3, 2003
Utica, New York.

APPENDIX T

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ,

Plaintiff,

V.

UNITED STATES, INTERNAL REVENUE SERVICE and ANTHONY ROUNDTREE,

Defendants.

No. 03-MC-71 (DNH/DRH)

APPEARANCES: **OF COUNSEL:**

ROBERT L. SCHULZ
Plaintiff Pro Se
2458 Ridge Road.
Queensbury, New York 12804

DAVID R. HOMER
U.S. MAGISTRATE JUDGE

MEMORANDUM-DECISION AND ORDER

(Filed Oct. 16, 2003)

Presently pending is a motion by plaintiff Robert L. Schulz ("Schulz" to quash a summons issued by defendant Internal Revenue Service (IRS). Docket No. 1. For the reasons which follow, that motion is dismissed.

I. Background

The following facts appear from the motion papers, with exhibits, filed by Schulz.

On August 15, 2003, Schulz was served with an administrative summons by defendant Anthony Roundtree, an IRS Revenue Agent. Mot. (Docket No. 1) at ¶ 19. Schulz filed a motion to quash this summons on September 12, 2003. Docket No. 1. In his motion, Schulz alleges that the summons should be quashed for lack of jurisdiction, bad faith, defects in the issuance of the summonses, and related grounds. It does not appear that the IRS has yet commenced a proceeding to enforce the summons as permitted by 26 U.S.C. § 7604.[1]

II. Discussion

It appears that the motion was served on defendant Roundtree. Docket No. 6 (affidavit of service). However, none of the defendants have responded to the motion or other wise appeared in this matter. "The fact that there has been no response to a . . . motion does not, of course, mean that the motion is to be granted automatically." Champion v. Artuz, 76 F.3d 483, 486 (2d Cir. 1996). Even in the absence of a response, a moving party is entitled to prevail only if the material facts demonstrate entitlement to prevail as a matter of law. Id. Because the IRS has not responded, however, the

[1] Schulz has filed two other motions to quash summonses which are part of a separate case. see Schulz v. IRS, No. 03-MC-50 (DNH/DRH) (N.D.N.Y. filed June 19, 2003).

facts as set forth in Schulz's papers are accepted as true. Adirondack Cycle & Marine, Inc. v. American Honda Motor Co., Inc., No. 00-CV-1619; 2002 WL 449757, at *1 (N.D.N.Y. Mar. 18, 2002) (McAvoy, J.) (citing Lopez v. Reynolds, 998 F. Supp. 252, 256 (W.D.N.Y, 1997)).

Accepting the facts asserted by Schulz as true for purposes of this motion, however, Schulz's motion remains fatally defective. It appears well settled that a taxpayer may not seek a court order quashing an IRS summons for at least two reasons. First, until the IRS commences a proceeding to enforce compliance with a summons pursuant to 26 U.S.C. § 7604, the taxpayer is under no compulsion to disclose information or records. Second, proceedings commenced by the IRS under § 7604 afford a taxpayer an adequate method of asserting any defenses the taxpayer may have to compelled compliance with a summons. See Gutierrez v. United States, No. CS-95-599-RHW, 1996 WL 751342, at *2 (E.D. Wash. July 31, 1996); Radio v. Commissioner, 138 F.R.D. 341, 344 (D.R.I.1991) (holding that a summons recipient cannot petition a district court to quash a summons but must raise his challenge in a district court enforcement action filed by the IRS); Ramos v. United States, 375 F. Supp. 154, 155 (E.D. Pa. 1974) (holding that a remedy at law exists through intervention of the taxpayer in judicial proceedings brought by the IRS to enforce compliance with a summons).

Here, the IRS has not yet commenced an enforcement action as to the summons at issue here as is required for a court to consider the contentions raised by

Schulz on this motion. Accordingly, this Court lacks jurisdiction to entertain these motion and the motion must be dismissed.

III. Conclusion

For the reasons stated above, it is hereby

ORDERED that Schulz's motions to quash IRS summonses (Docket No. 1) is **DISMISSED** and the Clerk shall close the above captioned matter.

IT IS SO ORDERED.

DATED: October 16, 2003
Albany, New York

/s/ David R. Homer
UNITED STATES
MAGISTRATE JUDGE

APPENDIX U

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ, Plaintiff v. UNITED STATES, et al Defendants	)	CASE No. 1:15-cv-1299 BKS/CFH

STATEMENT OF MATERIAL FACTS AS TO WHICH ROBERT L. SCHULZ CONTENDS THERE IS NO GENUINE ISSUE FOR TRIAL

(Filed Jan. 2, 2018)

In support of his motion for Summary Judgment and pursuant to Federal Rules of Civil Procedure 56 and Local Rule of Practice 7.1(a)(3), Plaintiff ("Schulz") submits the following material facts set forth below as to which he contends there is no genuine dispute.

Factual Background and Procedural History

1. From 1979 to the present, Robert L. Schulz has been claiming and exercising his First Amendment Right of Free Speech and his Right to Petition Government for Redress of Grievances, principally by petitioning the Judiciary, while encouraging other people to do the same, all for the purpose holding public officials accountable to their State and Federal Constitutions, and the laws pursuant

thereto. (Dkt. No. 136, Attachment 1, affidavit in support of motion to quash subpoenas, para. 5).

2. To assist Schulz in his endeavor to hold government accountable: in 1979, Schulz created the Tri-County Taxpayers Association ("TCTA") as a non-partisan, not-for-profit 501(0(4) corporation to serve the civic education and social welfare/liberty interests of the people in New York State's Warren, Washington and Saratoga Counties; in 1990, Schulz collapsed TCTA and created the All-County Taxpayers Association ("ACTA") as a non-partisan, not-for-profit, 501(0(4) corporation to serve the civic education and social welfare/liberty interests of the people throughout New York State's 62 counties; in 1997, Schulz collapsed ACTA and created We The People Foundation for Constitutional Education ("WTPF") as a non-partisan, not-for-profit 501(c)(3) corporation and We The People Congress ("WTPC") as a non-partisan, not-for-profit 501(c)(4) corporation, together We The People organization ("WTP") to serve the civic educational and social welfare/liberty interests of the People of the United States of America; in 2011, Schulz created We The People of New York, Inc. ("WTP-NY") as a 501(c)(4), non-partisan, not-for-profit, independent "affiliate" of WTP. (Dkt. No. 136, attachment #1, affidavit in support of motion to quash subpoena, para. 6).

3. From 1979 to the present, Schulz did not request nor did he ever receive any earned income from TCTA, ACTA, WTPF, WTPC or WTP-NY; with respect to his out-of-pocket expenses incurred on behalf of the organizations, Schulz's practice has always been to invoice the organization(s) and to

be reimbursed if and when the organization(s) was able to do so. (Dkt. No. 136, attachment #1, affidavit in support of motion to quash subpoenas, para. 7).

4. In 1988, at age 49, Schulz fully retired from his first career, choosing to devote the rest of his life to helping people understand the history, meaning, effect and significance of the provisions of the Declaration of Independence and their State and Federal constitutions and how to legally hold their public officials accountable to the rule of law pursuant to the First Amendment's Petition Clause. (Dkt. No. 136, attachment #1, affidavit in support of motion to quash subpoenas, para. 8).

5. Since 1988, in order to pay his property taxes and meet his family and household expenses, Schulz has sold off thirteen parcels of land from his homestead, surrendered his three life insurance policies and received gifts from family and friends. (Dkt. No. 136, attachment #1, affidavit in support of motion to quash subpoenas, para. 9 and Exhibit W attached thereto, "DOCUMENT 36: Land Sales 2003-Present," Exhibit X attached thereto, "DOCUMENT 38: Schulz's Surrender of His Life Insurance Policies," Exhibit Y attached thereto, "DOCUMENT 37: Gifts Deposited in Schulz's Personal Account 2003-Present") and Exhibit Z attached thereto which contains copies of deeds of land known as "Lot 7" and "Lot 8" purchased from Schulz by John and Kathy Salvador in 1988 and sold by the Salvadors to We The People Foundation for Constitutional Education, Inc. in 1999- the only parcels of land ever owned to WTP.

6. From July of 1999 through November of 2002, pursuant to the First Amendment, WTP repeatedly petitioned Defendant United States to respond to Petitions for Redress of Grievances related to alleged violations by the United States of:

    a) the Constitution's war powers clauses (via the Iraq Resolution); and

    b) the Constitution's money clauses (via the Federal Reserve System); and

    c) the Constitution's privacy clauses (via the U.S.A. Patriot Act); and

    d) the Constitution's tax clauses (via the direct, un-apportioned tax on labor).

    (Dkt. No. 136, attachment 1, affidavit in support of motion to quash subpoenas, para. 10 and Exhibit N(a) attached thereto, "WTP's 1st Amendment Petition regarding the Iraq Resolution," Exhibit N(b) attached thereto, "WTP's Petition for Redress regarding the Federal Reserve System," Exhibit N(c) attached thereto, "WTP's 1st Amendment Petition regarding the U.S.A Patriot Act, and Exhibit N(d) attached thereto, "WTP's Petition regarding the direct, un-apportioned tax on labor").

7. On March 15, 2003, WTP petitioned Defendant United States for redress of grievances related to alleged violations by the United States of:

    e) 26 CFR Sections 301.3402 (p)-1., 301.3402 (p)-1 (b)(2), 301.6109-1(c), 301.7701-16, 1441-1446, 31 CFR Section 215.6, 8 USC 1324(a)(3)(A), 26 USC Sections 3402(p)(3)(A), 3504, 26

USC 7701(a)16, (via the federal policy of forcing companies to withhold taxes from the paychecks of workers long before those taxes were due to be paid by the workers); and

f) the People's Right of enforcement of their First Amendment Right to Petition the Government for Redress of Grievances (via the federal policy of forcing companies to withhold taxes from the paychecks of workers long before those taxes were due to be paid by the workers).

(Dkt. No. 136, attachment #1, affidavit in support of motion to quash subpoenas, para. 12 and Exhibit A "copy of March 15, 2003 letter" annexed to Schulz Affidavit of even date).

8. The written Petition for Redress of Grievances regarding tax withholding (paragraphs 7 above) was included in a Blue Folder labeled, "Legal Termination of Tax Withholding for Companies, Workers and Independent Contractors." (Dkt. No. 136, attachment #1, affidavit in support of motion to quash subpoenas, para. 13).

9. The Blue Folder encouraged companies, workers and independent contractors to submit the content of the Blue Folder to their corporate lawyers and CPAs for a "rigorous review" of its accuracy with the goal of obtaining answers to common questions and legally ending tax withholding. (Dkt. No. 136, attachment 1, affidavit in support of motion to quash subpoenas, para. 13 and Exhibit B annexed to Schulz Affidavit of even date).

10. In its March 15, 2003 letter transmitting the Blue Folder to Defendant United States, WTP respectfully put Defendant on notice that should Defendant not respond to the Petition. WTP would make the contents of the Petition freely available **at no cost to the public**. (Dkt. No. 136, attachment 1, affidavit in support of motion to quash subpoenas, para. 14 and Exhibit A "copy of March 15, 2003 letter" annexed to Schulz Affidavit of even date).

11. Because Defendant did not respond WTP posted the entire content of the Blue Folder on its website, there to be anonymously downloaded by any interested person **free of any charge or fee.** (Dkt. No. 136, attachment #1, affidavit in support of motion to quash subpoenas, para. 15).

12. WTP posted an article on its website entitled, "IRS & Dal Put On Notice: National Campaign To Stop Withholding" with links to said March 15, 2003 letter and to all the contents of the Blue Folder. In the article, WTP instructed people to download and print those documents, free of charge. For those who for any reason could not download and print the documents WTP said it would mail them a copy whether or not they were able to send WTP a nominal donation of $20 to cover its printing and mailing costs. WTP said that if anyone did not have the $20 WTP would send the material free of charge anyway. Exhibit C, "WTP Chairman's Reports: 2003, page 191"

13. WTP also made copies of the Blue Folder available for pick up, anonymously, **free of any charge or fee**, at meetings WTP had previously scheduled across the county in the spring of 2003 for the

purpose of discussing WTP's overall program regarding the First Amendment Right to Petition and WTP's upcoming, first impression lawsuit against the United States for a determination of the Rights of the People and the obligations of the government under the Petition Clause of the First Amendment. (Dkt. No. 136, attachment #1, affidavit in support of motion to quash subpoenas, para. 16).

14. WTP also posted a message on its website that while it preferred not to have to mail any hard copies of the Blue Folder, it would do so for anyone interested in reading the contents of the Withholding Petition for Redress but who could not download the contents from WTP's website and could not attend one of the scheduled meetings. (Dkt. No. 136. attachment #1. affidavit in support of motion to quash subpoenas, para. 17).

15. While WTP requested a voluntary donation of $20 to cover its cost of duplicating and mailing the Blue Folder by Priority Mail, WTP said it would waive the $20 cost for those people who inform WTP that they would like to receive the Blue Folder by mail but did not have $20 to cover the printing and mailing costs. (Dkt. No. 136, attachment #1, affidavit in support of motion to quash subpoenas, para. 17 and Exhibit T annexed thereto).

16. The March 15, 2003 letter requested that the Government let WTP know if any of the material was "faulty or misleading." Exhibit A "copy of March 15, 2003 letter" annexed to Schulz Affidavit of even date).

17. The letter specifically stated, "The We The People organization was not in the business of selling any goods or services. The information we are providing for companies is **free of charge**." Exhibit A "copy of March 15, 2003 letter" annexed to Schulz Affidavit of even date).

18. On March 21, 2003 WTP posted an article about Operation Stop Withholding on its website entitled, "IRS Put on Notice Again: Show Us Where We're Wrong" with a link to WTP's March 21, 2003 letter to Frank Nixon, the area IRS Director, in which WTP let him know of the time and location of the Operation Stop Withholding meeting scheduled for Irvine CA on March 23, 2003 and requesting that experts from his office and that of the U.S. attorney attend to let WTP know if it was saying anything that was false or misleading. The article included a link for people to freely download the full contents of the Blue Folder. Exhibit C, "Chairman's Reports: 2003," page 157, Schulz Affidavit of even date."

19. On April 3, 2003, WTP posted another article about Operation Stop Withholding on its website entitled, "Operation Stop Withholding Underway: No Objections by IRS or DOJ" announcing a full schedule of meetings and letting people know that the meetings were free and open to the public and that the "package of instructional materials and forms will be distributed **for free**." The article included a link for people to freely download the full contents of the Blue Folder. Exhibit C "Chairman's Reports: 2003, page 171," Schulz Affidavit of even date.

20. Beginning on April 5, 2003, and for the next 37 days, WTP made approximately three thousand, five hundred (3,500) copies of the Blue Folder available for pick up, **free of charge** and anonymously, from a side table during meetings previously arranged by WTP for the purpose of educating the general public on the history, meaning, significance and effect of the First Amendment Right to Petition as follows. A day or two before each of the 37 meetings, WTP faxed a formal notice to the local IRS Director, to let him/her know the date, time and location of the next meeting and to respectfully request, one or more of their most knowledgeable people attend the meeting, along with one or more knowledgeable people from the office of [the U.S. Attorney] to observe and listen to what WTP would be doing and saying.

Nashua, New Hampshire	April 5, 2003
Ashville, North Carolina	April 8, 2003
Atlanta, Georgia	April 9, 2003
Tampa, Florida	April 10, 2003
Houston. Texas	April 12, 2003
Dallas, Texas	April 13, 2003
Austin, Texas	April 14, 2003
San Antonio, Texas	April 15, 2003
El Paso, Texas	April 16, 2003
Albuquerque, New Mexico	April 17, 2003
Tucson, Arizona	April 18, 2003
Phoenix, Arizona	April 19, 2003
Irvine, California	April 26, 2003
Las Vegas, Nevada	April 27, 2003
Bakersfield, California	April 29, 2003
Fresno, California	April 30, 2003
Sacramento, California	May 1, 2003
Santa Cruz, California	May 2, 2003

San Jose, California	May 3, 2003
Reno, Nevada	May 4, 2003
Medford, Oregon	May 6, 2003
Bend, Oregon	May 7, 2003
Eugene, Oregon	May 8, 2003
Corvalis, Oregon	May 9, 2003
Portland, Oregon	May 10, 2003
Seattle, Washington	May 11, 2003
Spokane, Washington	May 13, 2003
Salt Lake City, Utah	May 15, 2003
Denver, Colorado	May 17, 2003
Colorado Springs, Colorado	May 18, 2003
Kansas City, Missouri	May 20, 2003
Des Moines, Iowa	May 21, 2003
Minneapolis, Minneapolis	May 22, 2003
Milwaukee, Wisconsin	May 23, 2003
Chicago, Illinois	May 24, 2003
Columbus, Ohio	May 25, 2003
Harrisburg, Pennsylvania	May 27, 2003

21. On April 13, 2003 WTP posted a fourth article about Operation Stop Withholding on its website. The article included a link for people to **freely download the full contents of the Blue Folder**. Exhibit C "Chairman's Reports: 2003, page 187," Schulz Affidavit of even date.

22. On May 5, 2003, WTP posted a fifth article about Operation Stop Withholding on its website with a link for people to **freely download the full contents of the Blue Folder**.[1] Exhibit C

[1] In his Memorandum dated November 14, 2014 (Exhibit ___ annexed to Schulz affidavit of even date), IRS Agent David Gordon says, in error, that the visitor to the WTP website had to enter a password before he/she could access the Forms that were included in the Blue Folder. Exhibit ___ annexed to Schulz Affidavit

"Chairman's Reports: 2003, page 203," Schulz Affidavit of even date.

23. On May 16, 2003, WTP posted a sixth article about Operation Stop Withholding on its website identifying the operation as part of WTP's on-going Right to Petition process and including the link for people to freely download the full contents of the Blue Folder, again reminding the reader that for those who for any reason could not download and print the documents WTP said it would mail them a copy, suggesting a nominal donation of $20 to discourage people from asking WTP to mail them a copy and to cover WTP's cost of the folder and the cost of printing and mailing, and reminding people that it was WTP's policy that if anyone not have $20 to cover WTP's costs, WTP would send the material free of charge anyway. Exhibit C "Chairman's Reports: 2003, page 206," Schulz Affidavit of even date.

24. The Tax Withholding Petition for Redress (the "Blue Folder") was never for sale nor ever "sold" to anyone; a total of 225 copies of the Blue Folder were mailed to people, some of whom volunteered to send $20 to cover the cost of printing and mailing; WTP did not send invoices to any of these individuals and did not require any payment or donation to be made prior to mailing the Blue Folder. (Dkt. No. 136, attachment #1, affidavit in support of motion to quash subpoenas, para. 18).

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of even date. The Blue Folder, in its entirety, Forms and all, was available for free download until prohibited by McAvoy Court on August 9, 2007.

25. In April of 2003, the IRS summoned the books and records of Schulz and WTP as part of what it called an investigation under 26 U.S.C. Section 6700 (prohibits abusive tax shelters); this was the beginning of an extraordinary interruption by Defendant United States of WTP's normal business activities undertaken in pursuit of its mission and purpose, **as clearly expressed in WTP's articles of incorporation and in its IRS Form 1023** – to help People to become better informed about: a) their Rights as guaranteed by their State and Federal Constitutions; b) whether those in government have stepped outside the boundaries drawn around their power; and c) how to intelligently and rationally hold the government accountable by claiming and exercising Rights guaranteed by the First Amendment's Petition Clause. (Dkt. No. 136, attachment 1, affidavit in support of motion to quash subpoenas, para. 19) (For a copy of WTP's articles of incorporation and IRS Form 1023 see Exhibit D. "WTPF Corporate Records" annexed to Schulz's Affidavit of even date, pages 3 and 230), and Exhibit F, "WTPC Corporate Record" annexed to Schulz's Affidavit of even date, at pages 1 and 55.

26. Since those initial summonses in 2003, Schulz has had to devote an extraordinary number of man-hours to an extraordinary number of enforcement actions between WTP and Defendant United States, preventing Schulz from providing the level of leadership essential to WTP's educational and social welfare mission; with that unavoidable distraction and without that leadership, without "making things happen and getting things done" the organization has fractured. (Dkt. No. 136,

attachment 1, affidavit in support of motion to quash subpoenas, para. 19, and Exhibit P annexed thereto, "Listing of the legal cases, the number of significant decisions in each case, and their time frame").

27. In 2003 Schulz sued the United States seeking a court order to quash the summonses on the ground that WTP's activity did not equate to an "abusive tax shelter," and that the United States was merely retaliating against Schulz and WTP because of their repeated First Amendment petitions for redress of grievances relating to alleged violations by Defendant United States of the war, money, privacy and tax clauses of the Constitution and laws pursuant thereto. *Schulz v IRS*, 395 F.3d 297 (January 25, 2005) and 413 F.3d 297 (June 29, 2005) (***"Schulz I"***). (Dkt. No. 136, attachment #1, affidavit in support of motion to quash subpoenas, para. 20)

28. **In 2003 itself, WTP's Blue Folder-related activities took up an insignificant amount of WTP's time and resources, small and unimportant in view of WTP's overall activities, total revenues and total expenses.** Exhibit C, annexed to Schulz Affidavit of even date is a copy of approximately 55 updates, posted in 2003 on WTP's website and written by Schulz in his capacity as Chairman of WTP, **reporting on the plethora of WTP's active, non-Blue Folder related activities**, all in keeping with WTP's tax-exempt status.

29. WTP's cost ($4,500) of duplicating and mailing 225 copies of the Blue Folder at $20 each represented

.82% of WTP's Total Expense. WTP's gross revenue from 225 donations of $20 would represent **.84% of WTP's Gross Revenue**. (Dkt. # 136, Attachment #1, affidavit in support of motion to quash, Exhibits R and S attached thereto are copies of WTP's tax returns for 2003, showing a combined total revenue of $529,704, and combined total expenses of $546,193).

30. In 2003, while ***Schulz 1*** was working its way through the Northern District of New York and the 2nd Circuit, WTP announced that it was seeking donations for two upcoming activities: a) WTP would be hiring an attorney to bring an action in 2004 against the United States in the federal court in the District of Columbia for a declaration of the Rights of the People and the obligations of the government under the last ten words of the First Amendment – that is, the "petition clause"; and b) WTP would be sponsoring a Give Me Liberty national conference in January of 2004, in Washington D.C. at a major Hotel, which conference would focus on the Right to Petition the Government for Redress of Grievances regarding alleged violations by the government of the Rule of Law. (Dkt. No. 136, attachment #1, affidavit in support of motion to quash subpoenas, para. 21),

31. In January, 2004, as planned and at great expense, WTP sponsored the Give Me Liberty 2004 national conference at the Crystal City Marriot; expenses were met by donations from the public **in 2003**; the conference was free and open to the public; there was no charge or fee to attend. (Dkt. No. 136, attachment 1, affidavit in support of motion to

quash subpoenas, para. 22 and Exhibit O annexed thereto, "List of WTP's principal activities).

32. In July of 2004, as planned and at great expense, including $287,000 for its attorney, from donations by the public beginning **in 2003**, WTP sued Defendant United States for a declaratory judgment – a declaration of the Rights of the People and the obligations of the Government under the First Amendment's petition clause. *We The People, Schulz, et al., v. United States*, 485 F.3d 140 (D.C. Circuit, May 8, 2007). ("***Schulz 2***"). (Dkt. No. 136, attachment #1, affidavit in support of motion to quash subpoenas, para. 23).

33. In July of 2004, as planned and at great expense, including $287,000 for its attorney from donations by the public beginning **in 2003**, 1450 individuals from across the country. including Schulz, joined WTP as plaintiffs to ask the Court to answer two questions: first, whether Defendant United States was obligated to respond to WTP's First Amendment Petitions for Redress of Grievances regarding the alleged violations by Defendant United States of the Constitution's war, money, privacy and tax provisions; and second, if the People had the right to impose economic sanctions on Defendant United States if Defendant United States first ignored the Constitution and then ignored the people's First Amendment Petitions for Redress. *We The People, Schulz, et al., v. United States*, 485 F.3d 140 (D.C. Circuit, May 8, 2007). ("***Schulz 2***"). (Dkt. No. 136, attachment #1, affidavit in support of motion to quash subpoenas, para. 23).

34. In 2005, the 2nd circuit held in ***Schulz 1*** that in the interest of his due process Rights, Schulz (and WTP) did not have to respond to Defendant IRS's administrative summonses issued in 2003. *Schulz v IRS*, 395 F.3d 297 (January 25, 2005) and 413 F.3d 297 (June 29, 2005).

35. On December 7, 2005, IRS Agent David Gordon became the Agent in charge of the 6700 investigation of Schulz. Exhibit F annexed to the Schulz Affidavit of even date.

36. In response to its defeat in ***Schulz 1*** and the filing of ***Schulz 2***, the IRS initiated a ten-part enforcement strategy against Schulz and WTP, resulting in a year-long, comprehensive audit of WTP in 2006, an all but unnoticed provision inserted in a voluminous, very popular act passed by Congress in late December 2006, a Treasury Notice and additional actions between Schulz, WTP and the United States as follows:

    I. In 2005, the IRS summoned PayPal in Nebraska and California to produce its records related to Schulz and WTP; in separate actions, Schulz moved the District and Circuit Courts in Nebraska and California to quash the PayPal summonses; these cases were dismissed and the IRS obtained all PayPal records relating to Schulz and WTP. *Schulz v IRS* (California, 9th Circuit, 230 Fed. Appx. 709) (***"Schulz 3"***) and *Schulz v IRS* (Nebraska, 8th Circuit, 240 Fed. Appx. 167) (***"Schulz 4"***).

    II. In 2006, the IRS summoned Schulz's personal bank in Glens Falls, New York to

produce its records of Schulz's deposits and withdrawals; Schulz sued to quash the bank summons on the grounds of retaliation, harassment and privacy; the IRS agent who sent the summons to the bank (Elsie Addington I.D. Number 33-08360) told the court the IRS had evidence PayPal had transferred money to Schulz's personal account at the bank; however, given IRS's concurrent audit of the books and records of WTP which showed no money had passed from WTP to Schulz (except compensation for out of pocket expenses), and given IRS's access to WTP's PayPal records which showed no money had ever been transferred from PayPal to Schulz's bank, Agent Addington's version of the facts was clearly distorted; Schulz obtained an order restraining the bank from complying with the IRS's summons. *Schulz 1, IRS*, 205 U.S. Dist LEXIS 40161. (***"Schulz 5"***).

III. In February of 2006, IRS's Tax Exempt Organizations Division under the leadership of Lois Lerner initiated an audit of the books and records of WTP for the year 2003; the audit was held at the offices of WTP's accounting firm in Albany New York; throughout 2006, Defendant IRS's Agent Michael Sciame audited the books and records of WTP; by mid-November, however, Sciame found the financial and organizational records of WTP to be detailed and professional and that Schulz derived no income from WTP, much less from the distribution of the Blue Folder. (Dkt. No. 136, attachment #1, affidavit in support of

motion to quash subpoenas, para. 25-III, Exhibit F annexed thereto, "Sciame's Individual Document Request Forms." and Exhibit G annexed thereto, "Affidavit by WTP's Accountant Judith Dievendorf").[2]

IV. In December of 2006, Defendant United States had a provision added to a statute that was on its way to near unanimous approval in Congress; the provision authorized the Treasury Secretary to prescribe a list of "specified frivolous positions" and to fine anyone $5,000 who uses a specified frivolous position in any proceeding involving the IRS; in March of 2007, the Treasury Secretary followed through by publishing a list of "specified frivolous positions" that included "The Right to Petition the Government for a Redress of Grievances.". (Dkt. No. 136, attachment #1, affidavit in support of motion to quash subpoenas, para. 25-IV, and Exhibit L annexed thereto, "Tax Relief and Health Care Reform Act of 2006, Division A, Part IV, Section 407", and Exhibit M annexed thereto, "Treasury Notice 2007-30, page 6").

V. In April of 2007. the United States sued Schulz and WTP pursuant to IRC 7804 and 6700 to permanently enjoin "the activity" – i.e., the distribution of WTP's Tax Withholding Petition for Redress of Grievances (the

[2] On July 10, 2017, retired Agent Michael Sciame confirmed his findings and the accuracy of Dievendorf's Affidavit in a very positive way. See Exhibit G annexed to Schulz's Affidavit of even date.

"Blue Folder"). *United States v Schulz, et al.*, 529 F. Supp. 2d 341(N.D.N.Y. 2007) aff'd 517 F.3d 606, (2d Cir. 2008) enforcement granted, No. 1:07-cv-352, 2008 WL 2626567, 2008 U.S. Dist. LEXIS 57948 (N.D. N.Y. Apr. 28, 2008) ("***Schutz 6***"); because of the results of Sciame's audit of WTP in 2006 and IRS's review of its PayPal's records that proved Schulz derived zero income from WTP and the activity, the Court did not impose a financial penalty against Schulz or WTP pursuant to the penalty statute, 26 USC 6700(a)(1)[3]; the lawsuit was filed one week after WTP sponsored a demonstration on March 30, 2007 in front of the White House to protest the overall refusal of the United States to respond to WTP's five First Amendment Petitions for Redress of Grievances; the demonstration also followed the publication of numerous full page messages by WTP in some of America's most popular newspapers (N.Y. Times, USA TODAY, Washington Times, etc.) protesting the refusal of the United States to answer the questions presented in WTP's Petitions for Redress of Grievances. (Dkt. No. 136, attachment M., affidavit in support of motion to quash subpoenas, para. 25-V and

[3] Judge McAvoy noted, [a]lthough there are some questions of fact concerning whether Defendants sold their materials." the United States did not have to make such a showing to obtain an injunction, because Defendants "clearly 'organized' the materials for presentation." *Id* at 348. Judge McAvoy ordered Schulz and WTP to turn over to Dal the identities of all those provided a copy of the Blue Folder; Judge McAvoy decisions and orders never referred to those recipients as "customers." *Id.*

Exhibit U annexed thereto, "Agitating For The First Amendment" Washington Post, March 31, 2007, and Exhibit V annexed thereto, "IRS & Department of Justice: Why Won't You Answer Our Questions," New York Times, February 10, 2002).

VI. On May 8, 2007, seven months after oral argument at the D.C. Circuit in ***Schulz 2***, and after said "specified frivolous positions" activity by Congress (Division A, Part IV, Section 407 of the Tax Relief and Health Care Reform Act of 2006) and the Treasury Department (Treasury Notice 2007-30), the United States Court of Appeals for the D.C. Circuit issued its decision in ***Schulz 2***; relying on two irrelevant cases involving public employees with on-the-job, employment-related grievances, rather than citizens with constitution-related grievances, the Court declared that the United States did not have to listen or respond to WTP's First Amendment Petitions for Redress of Grievances regarding violations of the Constitution by the Government, and as that was the case, the People did not have the Right to impose economic sanctions on the United States by retaining their money until their grievances were redressed. (*We The People v. United States*, 485 F.3d 140) (***Schulz 2***)

VII. On May 15, 2007, the IRS asked Schulz to agree in writing, by signing two copies of Form 872, to extend Sciame's audit that got underway in February of 2006 to December 31, 2008 – that is, for an additional sixteen

months beyond the 36 month statute of limitations; on July 3, 2007, IRS's auditor Sciame followed up his 5/15/07 letters by verbally telling Schulz it would not go well for him if he did not sign the 872s; completely unaware of what turned out to be an inextricably intertwined strategy connection between IRS's request for the 16 month extension in the audit of WTP, the Tax Relief and Health Care Reform Act of 2006, Treasury Notice 2007-30, the decision in ***Schulz 2*** and the case that had just gotten underway to enjoin the further distribution of the Blue Folder (***Schulz 6***), Schulz agreed to extend the audit period, **but on the condition that he receive, before the expiration of the 36 month statute of limitations (i.e., by August 15, 2007), a copy of each Form 872, cosigned by the IRS, as official notification that the period of examination had been legally and properly extended beyond August 15, 2007, so as to be ready and prepared to act on whatever the results of the examination**; as affirmed by the IRS in 2009 (IRS Agent Conley in his Case Activity Report), in violation of the agreement, neither Mr. Sciame nor anyone else in the IRS had ever returned a cosigned copy of either Form 872 to Schulz, to alert Schulz that the examination was on-going, giving rise to the question of whether the examination ended on August 15, 2007 without a final report by IRS. (Dkt. No. 136, attachment #1, affidavit in support of motion to quash subpoenas, para. 25-VII, including

footnote, and Exhibit H annexed thereto, "May 15, 2007 letters", and Exhibit I annexed thereto, "affidavit by WTP Accountant Judith Dievendorf", and Exhibit J annexed thereto, "Agent Conley's Case Activity Report," and Exhibit K annexed thereto, "copies of the 872s sent to Schulz by Conley on August 26, 2010, signed by Lois Lerner allegedly on Jul) 10, 2007."

VIII. On June 18, 2007, Defendant United States moved for summary judgment supported by its Statement of 21 Material Facts. (***Schulz 6***, Dkt 14); on July 16, 2007, supported by extensive documentary evidence provided under penalty of perjury, Schulz denied *each* of the Defendant United States' 21 material facts, and added 40 additional material facts in support of his motion to dismiss and in opposition to the United States' summary judgment motion (***Schulz 6***, Dkts 21, 22, 23, 24); on July 20, 2007, Defendant United States responded to Schulz's additional statement of material facts (***Schulz 6***, Dkt 26), bringing the number of material facts in genuine dispute to 62; however, on **August 9, 2007**, without an evidentiary hearing or discovery, the Court granted the United States' motion for summary judgment against *pro se* Schulz and WTP, directing Schulz and WTP to cease the distribution of the Blue Folder and to provide the United States with the names of those to whom WTP mailed a copy of the Blue Folder, never referring to them as customers"; under duress, Schulz provided the United States with the name and address of

the 225 people who were mailed a copy of the Blue Folder; *United States v. Schulz, et al.*, (529 F. Supp. 2d 341, August 9, 2007, N.D.N.Y., Case No. 07-cv-352). By October, 2008, ***Schulz 6*** had been affirmed by the Court of Appeals (517 F.3d 606 (2d Cir. 2008) and Certiorari had been denied. (Dkt. No. 136, attachment #1, affidavit in support of motion to quash subpoenas, para. 25-VIII).

IX. On December 29, 2008, IRS completed its "872 extended" audit/examination of WTP for 2003; based entirely on the results of ***Schulz 6***, Agent Sciame revoked the tax-exempt status of WTP retroactive to 2003 and penalized WTP by applying the maximum corporate tax rate of 34% to WTP's total gross revenue for 2003 while ignoring WTP's expenses for 2003.[4] (Dkt. No. 136, attachment 1, affidavit in support of motion to quash subpoenas, para. 25-IX, and Exhibit Q annexed thereto, "Notice of Deficiency and Explanation for WTPF and WTPC", and Exhibit R annexed thereto, the 990 tax return for 2003 for WTPF", and Exhibit S annexed thereto. "the 990 tax return for WTPC").

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[4] On July 10, 2017, during his deposition, Sciame admitted his revocation of WTP's tax exempt status was **not based on WTP's financial and organizational records, which he found to be detailed, accurate and professional, with no *evidence* of inurement to Schulz or anyone else** but, instead, was based on IRS's perception that WTP's activities were "political and legislative" not "constitutional." See Sciame deposition transcript, Exhibit G annexed to Schulz affidavit of even date.

X. In sum, on December 29, 2008 (notwithstanding the fact that the IRS had violated WTP's conditional agreement to the 16-month extension of the period of time for the completion of its audit by not returning a co-signed copy of the Form 872, auditor Michael Sciame declared he had completed the audit of WTPF and WTPC that he began two and one-half years earlier in February of 2006, and **that on the based solely on the courts' decision in *Schulz 6*** he had revoked the tax exempt status of WTP, retroactive to 2003 and imposed a penalty retroactive to 2003, with interest, based on WTP's gross revenue in 2003, with no recognition of WTP's expenses in 2003; notwithstanding the fact that IRS's appeals unit (Agent Thomas Conley) was aware that IRS failed to send Schulz and WTP any notice that it had extended the period of examination by co-signing the Form 872 as mandated by the IRS's Internal Revenue Manuel, and that WTP had not received the IRS's Notice of Deficiency because WTP's office was closed on December 24, 2008 for an extended period of time while Schulz and his wife spent the holidays with their son in Texas and proceeded from there on an extended speaking tour to 88 cities in 50 states, the Appeals Unit simply determined WTP failed to timely appeal from the Notice of Deficiency and that WTP had to pay the penalty with interest; the Tax Court affirmed Conley's decision saying WTP was in "constructive receipt" of the Notice of Deficiency; WTP appealed to

the 2d Circuit; Schulz, who could legally represent WTP before the Appeals Unit (Conley) and in Tax Court and assumed he could. therefore, represent WTP on appeal from the Tax Court decision, was prevented from representing WTP at the 2d Circuit whose rules prohibited corporations from being represented by non-attorneys; the 2d Circuit dismissed the appeal because the Notice of Appeal from the Tax Court's determination was not signed by an attorney. See *Schulz v IRS* (Tax Court) (***Schulz 7***). (Dkt. No. 136, attachment #1, affidavit in support of motion to quash subpoenas, para. 25-IX)

37. On November 24, 2014, IRS Revenue Agent David Gordon sent Schulz a letter under the subject, "Notification of Determination" saying:

> "I have determined that the penalty under Internal Revenue Code Section 6700 is applicable based on the permanent injunction entered against you by the federal court on August 9, 2007. The enclosed documents explain the reasons for that determination and the computation of the penalty amount(s) totaling $225,000 ($1,000 x225) for year 2003. You will receive a separate notice when the amount(s) are assessed."

(Dkt. No. 136, attachment #1, affidavit in support of motion to quash subpoenas, para. 26 and Exhibit D annexed thereto)

38. There was no computation worksheet attached to Gordon's letter; instead, Gordon attached a copy of

said August 9, 2007 decision and order (***Schulz 6***), and a copy of a Declaration filed by Schulz in that case that listed 225 people to whom WTP mailed the Blue Folder. (Dkt. No. 136, attachment #1, affidavit in support of motion to quash subpoenas, para. 27 and Exhibit D annexed thereto)

39. On December 16, 2014, Schulz and his attorney Samuel Lambert spoke by phone with Gordon; Lambert explained to Gordon that IRC Section 6700 discusses the computation of a penalty saying that the penalty is zero if the income derived from the activity is zero and accordingly, the penalty against Schulz should be zero because the gross income earned by Schulz from the prohibited activity was zero; Gordon said he had closed out the case and Schulz could challenge the upcoming assessment; Lambert told Gordon he wanted to speak to Gordon's manager. (DU. No. 136, attachment #1, affidavit in support of motion to quash subpoenas, para. 28) (See also Exhibit H, transcript of 12/16/14 phone conversation between Schulz. Lambert and Gordon, annexed to Schulz's Affidavit of even date.)

40. On December 19, 2014, Schulz and his attorney, Samuel Lambert spoke by phone with Gordon and Christopher Delacazada, Gordon's acting group manager; attorney Lambert said being in violation of 6700 or 6701 does not determine the amount of the penalty, the penalty is zero if the gross income derived from the activity is zero; Gordon said the case is closed and had been sent to another state for the assessment; Lambert asked Gordon and his Supervisor to keep an open mind and to retrieve the file from the assessment unit because

according to IRC 6700, Schulz is not liable for any penalty because he earned no income from the activity and it was wrong to put Schulz through an appeal/assessment process; **Gordon's manager said he would try to retrieve the file**. (Dkt. No. 136, attachment #1. affidavit in support of motion to gnash subpoenas, para. 29 and Exhibit I, Affidavit of Samuel Lambert, annexed to Schulz's Affidavit of even date).

41. On March 5, 2015, Schulz received from IRS's assessment unit a CP15, Notice of Penalty Charge, dated March 9, 2015, "for promoting an abusive tax shelter," assessing Schulz $225,000. (Dkt. No. 136, attachment #1, affidavit in support of motion to quash subpoenas, para. 30 and Exhibit E annexed thereto).

42. On April 3, 2015, Schulz mailed $1,000 to the IRS with a notice that a claim for refund was being filed with the IRS in Andover, Mass. (Dkt. No. 136, attachment 1, affidavit in support of motion to quash subpoenas, para. 31).

43. On April 6, 2015, Schulz's attorney, Samuel Lambert timely filed an administrative appeal (Dkt # 1) enclosing:

    - a completed Form 6118 (Claim for Refund),
    - an attachment to Form 6118,
    - a Form 2848 (Power of Attorney),
    - a copy of the IRS Notice CP15, and
    - an Affidavit of Robert L. Schulz with accompanying exhibits.

44. **The IRS did not respond to Schulz's administrative appeal papers**; Schulz re-filed the administrative appeal (Dkt # 1); **again, the IRS did not respond.** (Dkt. No. 136, attachment 1, affidavit in support of motion to quash subpoenas, para. 33).

45. On November 2, 2015, in light of the statutory requirements of IRC Section 6703(c)(2) – that is, that if the IRS did not resolve Schulz's Form 6118 appeal in six months, Schulz had 30 days to file a case in District Court for a determination of his liability under 6700, or lose his protection against IRS's collection of the penalty, Schulz filed his original Complaint in this matter, which Complaint **included extensive documentation evidencing the fact that he derived zero gross income from WTP much less from the activity**.(Dkt #1).

46. On November 24, 2015, a Notice of Federal Tax Lien against Schulz was prepared and signed in Manhattan, NY by Cheryl Cordero for HOLLY NICHOLSON, and filed in the Warren County Clerk's Office, covering the 6700 tax assessed of March 9, 2015 in the amount of $224,000.[5] (Dkt. No. 136, attachment 1, affidavit in support of motion to quash subpoenas, para. 35).

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[5] The record shows the only source of income for Schulz and his wife, both 78 years of age, has been from social security payments and from the occasional sale of parcels of their homestead. Schulz would be neglectful and irresponsible if he did not report here that as the lien has prevented the sale of any additional parcels of their land for more than two years, Schulz and his wife have been subjected to severe hardship and stress.

47. On May 16, 2017, during the discovery period, Schulz provided Defendant's attorney Michael Pahl with **conclusive evidence** that rather than deriving any income from WTP, much less from the Blue Folder activity in question, **there were $110, 231 in WTP-related expenses paid for by Schulz between 2000 and 2008 for which Schulz has not been reimbursed**. (Dkt. No. 102).

48. Defendant did not respond much less refute Schulz's May 16, 2017 **conclusive evidence**. (Dkt. No. 136, attachment #1, affidavit in support of motion to quash subpoenas, para. 37).

49. However, in the wake of his receipt of Schulz's **conclusive evidence** (confirmed as it was in the reams of other documents produced during the course of discovery in this case by Schulz and WTP's accountant, Judith Dievendorf), Mr. Pahl suddenly chose to pursue an "alter ego" theory. (Dkt. No. 136, attachment #1, affidavit in support of motion to quash subpoenas, para. 38).

50. On June 19, 2017, **two months after being provided with said conclusive evidence**, Mr. Pahl declared during a telephone conference call scheduled by Judge Hummel on June 19, 2017 that he (Pahl) believes that if the Government can prove Schulz was WTP's alter ego, all of WTP's income can be imputed to Schulz. (Dkt. No. 136, attachment 1, affidavit in support of motion to quash subpoenas, para. 39).

51. On July 7, 2017, Schulz filed a Motion to Compel Discovery; a complete copy of Schulz's May 16, 2017 **conclusive evidence that he earned zero**

income from WTP and the activity was included as **EXHIBIT L** annexed to Schulz's Affidavit of July 7, 2017 which was filed in support of a Motion to Compel Discovery. (Dkt # 126).

52. During Schulz's July 10, 2017 deposition of Michael Sciame, the IRS Revenue Agent who conducted the audit in 2006 of WTP's books and records for the year ended December 31. 2003, Sciame **clearly and unequivocally stated WTP's financial and organizational records for 2003 were detailed and professional, that Schulz did not derive any income from WTP and there was no inurement.** (Exhibit G annexed to Schulz Affidavit of even date, Deposition Transcript of Michael Sciame.).

53. In addition, during his deposition, Sciame **confirmed the accuracy of the Affidavit of WTP's Accountant, Judith Dievendorf.** Exhibit G annexed to Schulz affidavit of even date, deposition transcript of Michael Sciame).

54. During his July 14, 2017 deposition, Agent David Gordon made no attempt to answer almost all of Schulz's questions, including but not limited to:

    1. Whether Gordon's Supervisor had approved Gordon's November 24, 2014 penalty determination of the $225,000, in writing, **as required by IRC section 6751**,[6] and

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[6] Gordon would only say that Hans Famularo had approved the penalty assessment. Hans Famularo was a local IRS Counsel working out of Laguna Niguel. Section 6751 required the approval of Gordon's supervisor, not IRS counsel. Exhibit J, Gordon deposition transcript.

2. Whether Gordon had computed Schulz's gross income for 2003, **as required by IRC section 6700(a)(1) and IRC section 6751.**

3. Why Gordon multiplied $1,000 times the 225 when IRC 6700 sets the penalty at $1,000 or 100 percent of the gross income derived by Schulz from the activity.

(Exhibit J annexed to Schulz affidavit of even date, 7/14/17 deposition transcript of David Gordon).

No ("Alter Ego") Income Was Imputed To Schulz

55. WTP was not Schulz's alter ego – for instance there have never been any WTP "shareholders" much less loans from shareholders to WTP, nor any tax return reporting same that was signed by an officer of WTP.

56. WTP was not Schulz's alter ego – for instance, the percentage of WTPF's Financial Support that came from the public averaged 99.9% for the years 2000 through 2003. Exhibit K, "WTPF's Tax Return for 2004, Schedule A, page 3, line 27 g," annexed to Schulz Affidavit of even date.

57. On November 21, 2017, Schulz filed a Reply (Dkt #173) to Defendant's 11-page, Supplemental Response to Schulz's Second Set of Interrogatories, dated October 6, 2017. In effect, Defendant's Supplemental Response detailed Defendant's alter ego claims. Schulz's 11/21/17 reply (Dkt #173) refuted each of those claims. Exhibit A annexed to Schulz's 11/21/17 reply letter is a clean copy of Defendant's 11-page Supplemental Response. Exhibit B

annexed to Schulz's 11/21/17 reply letter includes each of Schulz's rebuttals, **embedded in Defendant's 11-page Supplemental Response.** Exhibit L annexed to Schulz's Affidavit of even date is a complete copy of Schulz's 11/21/17 reply (Dkt #173).

58. On November 22, 2017, and again on November 24, 2017 and again on December 19, 2017, Schulz attempted by email to get Mr. Pahl to answer two questions about his alter ego claims: 1) if there were any other alter ego claims other than those identified in Defendant's 10/6/17 Supplemental Response to the Court's 10/2/17 Order; and 2) if Schulz's 11/21/17 reply has effectively refuted and therefore eliminated each of the alter ego claims already identified by Defendant. Mr. Pahl did not respond, responsively. Exhibit M is a copy of the 11/22/17-12/19/17 email exchange between Schulz and Pahl.

No Income Was Derived By Schulz Directly From WTP Or From The Activity

59. On April 18, 2017, Plaintiff served a discovery demand that included interrogatory number 1 that read, "Set forth how much gross income was earned by Schulz personally each year from 2003 through 2016 directly from the distribution of the Tax Withholding Petition for Redress (the "Blue Folder")." (Dkt #175, transcript of 11/21/17 court conference, page 25, lines 21-25).

60. On November 21, 2017, in response to said interrogatory number 1, Defendant admitted they had seen no evidence of direct payments to Plaintiff

Schulz that would be considered income. (Dkt #175, transcript of 11/21/17 court conference, page 28, line 10 through page 30, line 16).

61. In *United States v Schulz, et al.*, 529 F. Supp. 2d 341(N.D.N.Y. 2007) aff'd 517 F.3d 606, (2d Cir. 2008) enforcement granted, No. 1:07-cv-352, 2008 WL 2626567, 2008 U.S. Dist. LEXIS 57948 (N.D. N.Y. Apr. 28, 2008) (***"Schulz 6"***); Judge McAvoy referred to the lack of evidence showing the Blue Folder was sold. Judge McAvoy noted, "[a]lthough there are some questions of fact concerning whether Defendants sold their materials," the United States did not have to make such a showing to obtain an injunction, because Defendants "clearly 'organized' the materials for presentation," *Id* at 348. Judge McAvoy ordered Schulz and WTP to turn over to DOJ the identities of all those provided a copy of the Blue Folder; Judge McAvoy decisions and orders never referred to those recipients as "customers." *Id.*

62. Defendant has admitted that, "in assessing the penalty against Schulz, the only document the IRS used to compute the amount of the penalty was the list of the 225 individuals to whom the [Blue Folder] was sent in 2003." (Dkt # 186, Defendants' letter, page 2, paragraph 4); in effect, therefore, **Defendant has admitted the IRS made no effort to determine if any copies of the Blue Folder were sold and what gross income was derived from the sale(s)** and that IRS arrived at a penalty amount by simply multiplying $1,000 by the number of copies of the Blue Folder (225) that were freely provided to the public. (Dkt # 186. Defendants' letter, page 2, paragraph 4).

63. Again, for emphasis, on July 7, 2017, Schulz's filed a motion to compel discovery, supported by a Memorandum of Law and an Affidavit by Schulz (Dkt 126). The motion to compel discovery consisted of a request for the production of documents and two interrogatories. Annexed to the Affidavit was Exhibit L. Included in Exhibit L was a copy of a letter from Schulz to Defendant dated 5/16/17. Annexed to the letter were copies of DOCUMENTS 41 through 48 consisting of **conclusive documentary evidence** that proves that for the period 2000-2008, Schulz derived zero income from WTP, including the activity in question (organization and distribution of the Blue Folder) and that for the period 2000 through 2008, Schulz's expense vouchers show he had not been reimbursed for $110,231 in WTP-related expenses he personally paid for.

64. David Gordon. the Agent in charge of the 6700 penalty investigation of Schulz did not prepare a **penalty computation** and he did not obtain the written approval of his **penalty determination** by his supervisor or higher official designated by the Treasury Secretary before issuing his penalty letter to Schulz on November 24, 2014. (Dkt #146. Schulz Affidavit, partial transcript, page 25, 45-58 of the 7/14/17 deposition of Agent Gordon)

Agent Gordon's. Fraudulent Execution of Penalty Against Schulz

65. IRS Agent David Gordon's 6700 penalty investigation of Schulz and WTP in 2006 paralleled IRS Agent Michael Sciame's audit of WTP in 2006. Exhibit J annexed to Schulz affidavit of even date.

66. IRS Agent David Gordon interacted frequently with an IRS auditor Michael Sciame in 2006 sharing information about their respective investigations/ examinations. Exhibit .1 annexed to Schulz affidavit of even date.

67. In 2006, Agent Gordon was aware of the fact that by November of 2006, after spending nine months at the offices of WTP's accountant, Sciame had found WTP's **financial and organizational** records to be complete, accurate and professional and that there was no "inurement" to Schulz or anyone else. Exhibit J annexed to Schulz affidavit of even date.

68. In 2007. Agent Gordon was aware of the fact that in the Blue Folder case:: a) Judge McAvoy did note there was a lack of evidence proving "the activity" consisted of the "organization. promotion **and selling**" of the Blue Folder – that is, that the Blue Folders were actually sold: and b) judge McAvoy did not refer to the people to whom WTP gave the Folders as "customers." (Dkt. No. 136, Attachment #1, affidavit in support of motion to quash subpoenas, Exhibit D annexed thereto, including Gordon's 11/24/14 letter with its attachment – Judge McAvoy's letter).

69. David Gordon made no attempt to determine if copies of the Blue Folder were sold in 2003 or later. (Dkt # 186, Defendants' letter, page 2, paragraph 4).

70. David Gordon has made no attempt to compute Schulz's income. directly or imputed, that may have been derived from any sales of the Blue

Folder. (Dkt # 186, Defendants' letter, page 2, paragraph 4).

71. David Gordon has made no attempt to compute a percentage of Schulz's gross income derived in 2003 or later from the distribution of the Blue Folder. (Dkt # 186, Defendants' letter, page 2, paragraph 4).

72. David Gordon made no attempt to determine if WTP was Schulz's alter ego. (Dkt # 186, Defendants' letter, page 2, paragraph 4)..

73. David Gordon has never provided Schulz with a separate detailed penalty calculation worksheet as called for in LRC Section 6751. (Dkt # 186, Defendants' letter, page 2, paragraph 4).

74. David Gordon never attempted to meet and confer with Schulz before assessing the penalty. (Dkt # 186, Defendants' letter, page 2, paragraph 4).

75. David Gordon obtained an undergraduate degree in psychology. Exhibit J annexed to Schulz's affidavit of even date, Gordon's 7/14/17 deposition transcript.

76. **David Gordon authored a psychological analysis of anti-government tax protestors "a few years ago."** Exhibit N annexed to Schulz Affidavit of even date, Gordon 7/14/17 deposition transcript).

77. Wikipedia has a page on Schulz and a separate page on WTP, both controlled by a person(s) with the code name "Famspcar" and both filled with misrepresentations and inaccuracies that give an overall biased and prejudicial account of the

nature and work of Schulz and WTP, prejudicial to Schulz and WTP. Exhibit O annexed to Schulz Affidavit of even date, selected pages from Wikipedia.

78. Famspcar's bio, with a table of contents, appears "behind" the page on Schulz and again "behind" the page on WTP. Exhibit O annexed to Schulz Affidavit of even date, pages 1-5.

79. **Famspear's bio includes a psychological analysis of anti-government tax protestors, written "a few years ago."** Exhibit O annexed to Schulz Affidavit of even date, page 4-5.

80. Famspear is David Gordon alone or in combination with Hans Famularo, the IRS Counsel who approved Gordon's 11/24/14 penalty assessment against Schulz and who operates out of IRS's office in Laguna Niguel. Exhibit ___ annexed to Schulz affidavit of even date

81. Famspear has removed all attempts by Schulz ("Freedomstriumph") to edit. the Famspear controlled pages on Schulz and WTP in order to make them more accurate and less prejudicial and defamatory. Exhibit O annexed to Schulz Affidavit of even date, page 13-36.

82. David Gordon did not obtain the written approval of his penalty determination by his supervisor or higher official designated by the Treasury Secretary before issuing his penalty letter to Schulz on November 24, 2014. (Dkt 4146, and Schulz Affidavit, partial transcript. page 25. 45-58 of the 7/14/17 deposition of Agent Gordon).

83. On November 21, 2017, the Court directed, "that within ten days of today's date, today being the 21st day of November, that by December 1st, the government provide any additional documents in their possession which have not been provided to Mr. Schulz which were used in determining the penalty which was – has been assessed to him in this matter. To the extent there are no additional documents, an affirmative representation of that fact is to be provided by someone by the Internal Revenue Service." (Dkt # 175, Attachment #1, transcript of proceeding of November 21, 2017, page 55, line 16 to page 56, line 1).

84. Plaintiff filed a copy of the documents that he received from Defendant in response to the Court's November 21, 2017 Order. (Dkt # 190, 252 pages Bates numbered PENPROD 000001 through PENPROD 000252).

85. In seeking IRS approval of his penalty assessment, Gordon added fictitious details to the McAvoy Court's final Decision and Order, saying for instance that the penalty assessment against Schulz was for "organizing, promoting and selling" the material that was the object of the McAvoy Court's Decision and Order (the "Blue Folder"), and that Schulz was ordered to turn over his "customer list" by May 5, 2008 that pertains to the injunction granted by the Federal Court, and that said "customer list" included the names and addresses of 225 individuals to whom the material was sold. (Dkt # 190, 252 pages Bates numbered PENPROD 000001 through PENPROD 000252, at PENPROD-000084.

86. Gordon excluded from his all-important "Penalty Case File Closing Documents" Judge McAvoy's acknowledgement that," there are some questions of fact concerning whether Defendants sold their materials." (Dkt # 190, 252 pages Bates numbered PENPROD 000001 through PENPROD 000252) at PENPROD- 000150-179, copy of Gordon's 11/24/14 email to "LDC" transmitting his case closing documents. In attaching "Judge McAvoy's Decision and Order" (PENPROD – 000154-157, Gordon chose not to include Judge McAvoy's acknowledgement that contradicted his fictitious assertion that the material was sold. In the email, Gordon says he did not include the full Decision and Order "due to the number of pages that would have to be emailed."

87. Gordon included in his "Penalty Case File Closing Documents" a falsified Form 8278, Assessment and Abatement of Miscellaneous Civil Penalties" signed by Gordon on 11/18/14. (Dkt # 190, 252 pages Bates numbered PENPROD 000001 through PENPROD 000252) at PENPROD-000175; the Form 8278 did not include a separate "detailed calculation sheet as required by IRC 6751; the Form indicates Gordon, not his manager, entered the electronic signature of the manager on 11/18/14, notwithstanding the requirement of IRC 6751 that the manager has to sign the Form and that the manager's signature has to be "in writing"; in addition, the Form 8278 states plainly that the penalty of $225,000 was based on the returns of Sally-Ann Monk, October Pawlick and Gerald Post even though there were no returns on which the penalty was based; Gordon simply sent to IRS's "Nancy Kunard" the list of 225 individuals who

were provided with a copy of the Blue Folder and asked Kunard to "pull 3 of them and obtain the current SSNs." (Dkt # 190. 252 pages Bates numbered PENPROD 000001 through PENPROD 000252) at PENPROD-000081. See also PENPROD-000176-179.

88. Defendant disclosed said Form 8278 to Schulz on or about 11/11/17, after the discovery period had closed; on 11/14/17, Schulz notified Defendant and the Court of the Form's apparent fraudulent nature [Dkt 170]; during a court conference on 11/21/17, Schulz called out Form 8278 as a fraud because: 1) rather than a written approval by his manager as required by IRC 6751, it appeared Agent Gordon had applied the digital signature of his acting manager; and 2) it falsely stated the penalty was assessed based on the tax returns of three individuals; and 3) there was no separate "detailed computation sheet" as required by IRC 6751.

89. In response and in an apparent attempt to cover-up the fraud, Gordon prepared a new Form 8278 that only added to the fraud. (Dkt # 190, 252 pages Bates numbered PENPROD 000001 through PENPROD 000252) at PENPROD-000180; the new Form 8278 is a severely altered version of the original; adding to the fraud, this "cover up" version of Form 8278: 1) changes the date the Form 8278 was allegedly "signed" from 11/18/14 to 11/18/04, which is more than one year before Agent Gordon became involved in the 6700 investigation of Schulz and nearly three years before Judge McAvoy issued his injunction against the further distribution of the Blue Folder; 2) changes

the number of tax returns on which the penalty was based from three to zero; 3) changes the tax year in question from the year ending December 31, 2003 to the year ending December 31, 2004, even though the Form is signed six weeks before the end of the 2004 tax year; and 4) does not identify the name the Manager who allegedly signed the Form and whose alleged signature is indecipherable.

90. Gordon's CASE FILE regarding his penalty investigation of Schulz shows Gordon did not comply with IRS's CASE PROCESSING PROCEDURES. (Dkt # 190, 252 pages Bates numbered PENPROD 000001 through PENPROD 000252) at PENPROD-000005; the FILE and the record of this case is devoid of any indication for instance: a) that Gordon computed a penalty based in whole or in part on Schulz's income derived from the activity, if any b) that Gordon made any attempt to schedule a closing conference with Schulz; c) that Gordon prepared an RAR and case for his Area Counsel Approval; or d) that Gordon prepared a memorandum from his Area Director for Approval of the Penalty.

91. As another example of Gordon's illegal execution of the penalty, the Court's attention is respectfully invited to IRS's Promoter Penalty Case Closing Job Aid, Completed Investigation with an Injunction and/or penalties. Exhibit P annexed to Schulz's Affidavit of even date, items 1-21; there is no evidence in Gordon's Case File or in the record of this case: a) that in accordance with item 4, Gordon obtained the "concurrence from all stakeholders, (Counsel, CI, Analysts, Group Manager, etc.) to the

decisions"; or b) that in accordance with item 8, Gordon "secured the approval of the group manager to assess the penalties"; or c) that in accordance with item 9, Gordon provided Schulz with "an explanation of the determination of the investigation and an explanation of the penalty assessment"; or d) that in accordance with item 14, Gordon held a "closing conference to discuss report and penalty explanation" with Schulz; or e) that in accordance with item 15, Gordon prepared "a cover letter for the report and penalty explanation" using Letter 5390; or f) that in accordance with item 16, Gordon sent the "cover letter, report and penalty explanation" to Schulz.

92. In yet another example of the illegal execution of the penalty, Gordon misled attorneys in IRS's Office of Chief Counsel Shawna Early (New York City) and Hans Famularo (Laguna Niguel, CA); before closing out the case with "LDC," Gordon was required to send Schulz a copy of his Report and penalty explanation with IRS's standard cover Letter 5390. For a copy of Letter 5390, see Exhibit P annexed to Schulz's Affidavit of even date. However:

    - Gordon knew that if he used the Standard Letter 5390 he would have to attach Form 886-A, *Explanation of Items, and Computation of Penalty*, and the Letter would give Schulz an opportunity to submit a written rebuttal.
    - Gordon knew from his interaction with Michael Sciame during Sciame's thorough audit/examination of WTP's 2003 financial and organizational records (See

Exhibit J,transcript of Sciame's 7/10/17 deposition) that Sciame found WTP's records detailed and professional and that there was no inurement to Schulz or any other private party.

- Gordon also knew that Judge McAvoy found a lack of evidence that the material subject to the injunction had been sold and that Judge McAvoy had never said Schulz or WTP had a "customer list." *Schulz*.
- Gordon also knew that as the Agent in charge of the 6700 investigation of Schulz and WTP, he had made no effort since the date of Judge McAvoy's decision (August 9, 2007) to determine if any of the Blue Folders had been sold.
- Gordon also knew that he had made no effort to determine if Schulz had derived any gross income, directly or indirectly, from the mailing of the 225 Blue Folders.

93. In other words, Gordon knew that if he used the Standard Letter 5390, his illegal execution of the penalty would be revealed. Therefore, he sought IRS Counsel's approval to send Schulz a "modified" letter that would not have Form 886-A, *Explanation of Items, and Computation of Penally* attached and which would not offer Schulz the opportunity to provide a written rebuttal. (Dkt # 190, 252 pages Bates numbered PENPROD 000001 through PENPROD 000252 at PENPROD-000063,64 for a copy of Gordon's email exchange with Shawna Early and Hans Famularo, in which Gordon argues for the modified letter and against

using Standard Letter 5390 on the absurd ground that Schulz will not cooperate," whatever that means. For three days, Shawna Early did not respond to Gordon's email. However, like Camus, Hans Famularo **accepted the absurd** and approved Gordon's use of the modified letter.

Alter Ego

94. Defendants have not denied that they obtained from the organization's professional bookkeeper during the audit, a full accounting of all funds conceivably related to the Activity. including copies of all WTP expense and income vouchers and all hank statements for 2003, the year in question. Neither have Defendants denied the accuracy of the financial data given to them along with the Complaint herein – an actual copy of what the IRS received during its audit of WTP in 2006-2007.

95. In addition, the United States has already obtained copies of the all relevant records from the Financial institutions listed in the United States' Initial Disclosures. Defendants have not denied that as a result of the United States' summons in 2005. the United States obtained copies of the record of all payments ever received by PayPal, the organizations' online payment company. and copies of the record of each and every transfer of that money out of PayPal, showing no money moved from the organizations' PayPal accounts to Schulz or to the only bank account Schulz has had since moving into his present home in 1969.

Dated: January 2, 2017

/s/ Robert L. Schulz
ROBERT L. SCHULZ
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