

**CASE NO. 17-16327**

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D. Ct. Case No. 2:14-mc-00088-MCE-KJN

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

NORA BRAYSHAW,

Appellant,

v.

UNITED STATES OF AMERICA

Appellee.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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**APPELLANT'S OPENING BRIEF**

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**I. JURISDICTIONAL STATEMENT**

This is an appeal from a final decision of the District Court compelling Ms. Brayshaw to sign a second Consent Directive so that the Internal Revenue Service (“IRS”) can obtain private banking information directly from Ms. Brayshaw’s foreign bank (UBS SFA). The District Court had jurisdiction over this action because it was brought by the United States to enforce an Internal Revenue Service Summons. *See* 26 U.S.C. §§ 7402(b); 26 U.S.C. § 7604(a); 28 U.S.C. § 1340; 28 U.S.C. § 1345.

On June 1, 2017, the District Court entered its Order directing Ms. Brayshaw to sign the second Consent Directive. CR 48; ER017.<sup>1</sup> Ms. Brayshaw timely filed her Notice of Appeal on June 26, 2017. CR 59; ER001-ER004; *see* Fed. R. App. 4(a)(1). The District Court’s decision is appealable pursuant to 28 U.S.C. § 1291, which gives this Court “jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.”

Pursuant to this Court’s July 13, 2017, Order (Dkt. No. 15), Ms. Brayshaw will discuss the jurisdictional basis for this appeal in her argument below.

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<sup>1</sup> Citations in this brief are as follows:

ER – Excerpts of Record (by Bates number).

CR – Clerk’s Record on Appeal (by docket number).

## **II. STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether the District Court's June 1, 2017, Order directing Ms. Brayshaw to sign a Consent Directive that had never previously been ordered by the District Court is a final decision of the District Court within the meaning of 28 U.S.C. § 1291.

2. Whether the District Court exceeded its authority under 26 U.S.C. § 7604(b) by Ordering Ms. Brayshaw to sign a Consent Directive that (1) was not required by the Summons, and (2) exceeded the relevant time period set forth in the Summons.

3. Whether the District Court abused its discretion in Ordering Ms. Brayshaw to sign a Consent Direct in a contempt proceeding when Ms. Brayshaw fully complied with all previous orders issued by the District Court.

## **III. STATEMENT OF THE CASE**

Ms. Brayshaw's husband, David Brayshaw, passed away on August 11, 2015. CR 17-1 ¶ 18. During their marriage, David Brayshaw was in charge of the couple's finances and was responsible for preparing the couple's taxes. *Id.* ¶¶ 1, 2. Appellant Nora Brayshaw knew nothing about Mr. Brayshaw's income and had no knowledge regarding their finances. *Id.* ¶¶ 1, 18. And, Ms. Brayshaw earned no income from any source other than social security for the years 2002 through 2012. *Id.* ¶ 3.

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**A. The IRS Summons and IRS's Failure to Show Up**

On May 29, 2013, Revenue Agent Crystal Langston issued an Internal Revenue Service (“IRS”) summons directing Ms. Brayshaw to appear before the Revenue Agent to testify on June 12, 2013, and to produce for examination certain books, records, and papers described in the Summons. CR 1; ER052-ER055. The Summons essentially directed Ms. Brayshaw to produce all records in her possession or control relating to all foreign and domestic bank accounts for the years ended December 31, 2002, through December 31, 2012. ER052-ER055.

On June 12, 2013, Ms. Brayshaw appeared at the IRS office in Redding, California as ordered by the Summons.<sup>2</sup> CR 17-1 ¶ 12. However, Agent Langston did not show up. *Id.*

Agent Langston subsequently scheduled two separate meetings for July 16, 2013 and August 5, 2013. *Id.* ¶¶ 14-15. On both occasions, Ms. Brayshaw showed up, but Agent Langston did not. *Id.*

Agent Langston scheduled a subsequent meeting to occur on April 24, 2015, for both Nora and David Brayshaw to appear. *Id.* ¶ 17. However, shortly before the meeting, Agent Langston cancelled. *Id.*

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<sup>2</sup> David Brayshaw was hospitalized on April 9, 2013, and was bedridden beginning April 23, 2013. CR 17-1 ¶ 8.

**B. The Petition to Enforce the Summons**

On June 10, 2014, the IRS filed a Petition to Enforce Internal Revenue Summons. CR 1. On August 6, 2014, the parties entered into a Consent Order Initiating Compliance with Internal Revenue Service Summons. CR 6. In that Consent Order, Ms. Brayshaw agreed to testify concerning the matters inquired into by the Summons. *Id.* However, the parties agreed that document production would be dealt with by future orders. *Id.*

Ms. Brayshaw's counsel subsequently agreed that Ms. Brayshaw would produce all documents she had in her possession and to which she had access to. CR 17-2 ¶ 2. As a result, on September 15, 2014, the District Court entered an Order enforcing the IRS summons. CR 11; ER040-ER041.

After the entry of the Order, Ms. Brayshaw agreed that she would endeavor to obtain documents from UBS in Switzerland to produce to the IRS. CR 17-1 ¶ 3. Ultimately, Ms. Brayshaw produced all the documents she received from UBS to Agent Langston. *Id.*

Ms. Brayshaw subsequently attempted to schedule an interview with Agent Langston. *Id.* ¶ 4-6, 9. However, Agent Langston declined to conduct the interview. *Id.* There was no further contact from the IRS for almost a year after Ms. Brayshaw offered to meet with Agent Langston. *Id.* ¶ 7.

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**C. The IRS Files its First Contempt Petition**

On March 21, 2016, the IRS filed a Petition Re: Contempt of Order Filed June 20, 2014 (the “First Contempt Petition”), which sought an order requiring Ms. Brayshaw to show cause why she should not be held in civil contempt, incarcerated, and subject to fines for allegedly failing to comply the Order enforcing the summons. CR 13. The Petition contained a declaration from Agent Langston that blatantly misrepresented to the Court that Ms. Brayshaw was refusing to produce documents. *See id.*, Decl. of C. Langston ¶ 10. In reality, Ms. Langston was informed that Ms. Brayshaw could not produce documents that she does not possess. CR 17-1 ¶ 5.

On June 16, 2016, the District Court held a show cause hearing. CR 21. After argument from the parties, the Court stayed the ruling on the Government request for detention of Ms. Brayshaw until July 16, 2016. *Id.*; CR 30. A further Order to Show Cause Hearing was set on July 28, 2016. *Id.* The Court subsequently approved two stipulated requests to continue the hearing. CR 30.

On October 18, 2016, Ms. Brayshaw filed a Status Report, which informed the Court that she had produced all available documents over which she had control. CR 27. Ms. Brayshaw further attached a letter from UBS Switzerland AG (“UBS AG”) stating that it was unable to find any further responsive documents. *Id.*

In response, the IRS filed a Declaration in which Agent Langston complained that the UBS AG letter did not indicate what records Ms. Brayshaw requested. CR 28 ¶ 4. Agent Langston further complained that Ms. Brayshaw allegedly would not produce the letter she sent to UBS AG or sign a Consent Directive, which would allow UBS AG to provide banking documents on behalf of Ms. Brayshaw. *Id.* ¶¶ 5-6. However, Agent Langston did not identify any facts to suggest any documents had not been produced. *See generally id.* Indeed, the government admits that Agent Langston simply “could not tell whether it entailed all applicable records.” CR 31 ¶ 7(a). Thus, the First Contempt Petition was entirely deficient from the outset.

Despite the fact that the IRS failed to produce any evidence of non-compliance with the District Court’s Order, the District Court issued an Order on October 10, 2016, requiring Ms. Brayshaw to sign a Consent Directive (the “First Consent Directive”) to UBS AG as requested by the IRS. CR 30; ER031-ER033 (first consent directive). The Court stated, in part, that should Ms. Brayshaw refuse the first Consent Directive, she “should expect to face immediate sanctions, including potential incarceration. . . .” *Id.* at 3. The Court entered this Order despite the fact that a Consent Directive was never requested in the Summons nor ordered by the Court in enforcing the Summons.

It is undisputed that Ms. Brayshaw signed the First Consent Directive to UBS AG that was improperly ordered by the District Court. CR 31-1 ¶ 3. The IRS

further admitted that UBS's counsel informed Agent Langston that all documents related to the UBS AG account were delivered to Ms. Brayshaw's counsel and that documents related to the UBS Swiss Financial Advisors ("UBS SFA") account were previously provided to Ms. Brayshaw in response to her request "some time back." *Id.* ¶ 4.

**D. The IRS Files its Second Contempt Petition**

On March 9, 2017, the IRS filed a Second Petition Re: Contempt of Order Filed June 20, 2014. CR 31. The IRS now sought an order holding Ms. Brayshaw in contempt for not signing a second Consent Directive to UBS SFA that had never been requested in any previous court proceeding. *Id.* at 6.

The IRS admits that it did not even know that a separate Consent Directive would be needed to obtain documents from UBS SFA. CR 31 at 5 n.1. The IRS contended, through an inadmissible hearsay declaration, that Ms. Brayshaw refused to sign a second Consent Directive for UBS SFA.<sup>3</sup>

In response to the Second Contempt Petition, CR 31, Ms. Brayshaw presented unrefuted evidence that she produced all documents in her possession and control from UBS AG and UBS SFA. Specifically, Ms. Brayshaw demonstrated that she provided two disks to Agent Langston by letter dated April

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<sup>3</sup> Agent Langston claimed that she was told by Ms. Brayshaw's former counsel that Ms. Brayshaw would not sign the second Consent Directive. CR 31-1 ¶ 6. In reality, Ms. Brayshaw had terminated her prior counsel, was not in touch with him, and had never been requested to sign a second Consent Directive.

11, 2017. CR 39-1 at Exhibit B; ER022. One disk contained the UBS AG documents provided as a result of the first Consent Directive. *Id.* The other disk contained the UBS SFA Portfolio Valuation Statements that were previously provided to the IRS in July of 2016. *Id.* In addition, Ms. Brayshaw's counsel provided a letter that Ms. Brayshaw sent on June 17, 2016, to UBS SFA requesting all account names and numbers for her and her husband. *Id.* at Exhibit D.

The District Court held a hearing on June 1, 2017. ER005-ER016. At the hearing, the government admitted that Ms. Brayshaw signed the first Consent Directive the District Court previously ordered, but indicated that it wanted a new consent directive for UBS SFA. ER007 at 3:17-19. Nevertheless, the District Court had no interest in hearing about whether the documents at issue had already been produced. ER008 at 4:1-5:10. Indeed, Ms. Brayshaw's counsel attempted to explain to the District Court that Ms. Brayshaw had the understanding that everything had been turned over. *Id.* at 4:1-3. However, the District Court's only concern was whether Ms. Brayshaw did what the government asked, even though it was beyond the scope of the Summons. *See id.* at 4:16-22.

Upon being told that Ms. Brayshaw did not sign the second Consent Directive, the Court stated that if Ms. Brayshaw does not sign the second Consent Directive, "she's going to be in custody with a daily fine if she doesn't take care of it." *Id.* at 5:21-25. The Court further stated the following:

You don't make the decisions, Ms. Brayshaw. And I'll tell you how this is very - - it's upsetting to me, and you can see there's a court security officer right there, all right? That door right there goes to the jail cell. And I've prepared everyone to be ready because if you don't comply with the Court's orders, you know where you're going? Do you know?

*Id.* at 8:9-15. Ultimately, "the Court ORDERED the Consent Directive be signed, executed, and notarized by defendant after the proceedings." CR 48; ER017.

The District Court imposed these sanctions on Ms. Brayshaw despite the undisputed facts that the Summons never requested any Consent Directive, the District Court's Order enforcing the summons never ordered Ms. Brayshaw to sign a Consent Directive, and the government admitted that Ms. Brayshaw signed the first Consent Directive previously ordered by the District Court. To make matters worse, the second Consent Directive is grossly overbroad and expands the time frame at issue under the Summons by at least five years.

#### **IV. SUMMARY OF ARGUMENT**

This appeal arises from an IRS Summons enforcement proceeding in which the IRS summoned Ms. Brayshaw to produce all records in her possession and control relating to her foreign and domestic bank accounts for the time period of 2002 to 2012. Ms. Brayshaw has accounts with two foreign banks: UBS AG and UBS SFA. However, only UBS SFA is at issue in this appeal.

After the District Court issued an Order enforcing the Summons, the IRS filed two petitions for contempt. During a June 1, 2017, hearing on the second

petition for contempt, the District Court ordered Ms. Brayshaw to sign a Consent Directive that authorized UBS SFA to produce records directly to the IRS.<sup>4</sup>

Ms. Brayshaw filed this appeal to challenge the District Court's June 1, 2017 Order. The District Court's Order can be viewed in one of two ways. It is either (1) a final Order modifying the Court's prior order enforcing the Summons; or (2) it is an order imposing contempt sanctions on Ms. Brayshaw. Either way, the District Court erred and the decision should be reversed.

First, the District Court exceeded its authority in Ordering Ms. Brayshaw to sign the second Consent Directive to UBS SFA. In an IRS enforcement proceeding, the District Court's authority is limited to strictly enforcing or denying enforcement of the Summons. In this case, the Summons sought documents directly from Ms. Brayshaw and it was limited in scope to the years 2002 through 2012. Nevertheless, the District Court improperly ordered Ms. Brayshaw to sign a Consent Directive authorizing UBS SFA to send all account documents directly to the IRS without a limitation as to the relevant time period. Thus, the District Court exceeded its authority and improperly expanded the scope of the IRS Summons.

Second, to the extent the District Court's June 1, 2017, Order is viewed as an order of contempt, the Court abused its discretion in imposing conditional sanctions on Ms. Brayshaw. Specifically, the District Court ordered Ms. Brayshaw

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<sup>4</sup> The District Court had previously ordered Ms. Brayshaw to sign a Consent Directive directed at UBS AG.

to sign a document that was not required by the Summons and told Ms. Brayshaw she was be incarcerated if she did not comply. The District Court abused its discretion because Ms. Brayshaw had fully complied with all prior orders issued by the District Court.

## V. ARGUMENT

### A. Standard of Review

To the extent the Court views the June 1, 2017, Order as an order modifying a decision to enforce the IRS summons, the decision is reviewed for clear error. *See United States v. Saunders*, 951 F.2d 1065, 1066 (9th Cir. 1991) (citing *United States v. Abrahams*, 905 F.2d 1276, 1280 (9th Cir. 1990)). However, the decision is reviewed de novo to the extent it is based on issues of statutory construction. *Id.* (citing *Saratoga Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 879 F.2d 689, 691 (9th Cir. 1989)).

To the extent the June 1, 2017, Order is viewed as an order of contempt, it is reviewed for abuse of discretion. *Kelly v. Wengler*, 822 F.3d 1085, 1094 (9th Cir. 2016) (citing *FTC v. EDebitPay, LLC*, 695 F.3d 938, 943 (9th Cir. 2012)).

### B. This Court has Jurisdiction Over this Appeal

As a preliminary matter, this Court has jurisdiction over Ms. Brayshaw's appeal. The District Court's Order is appealable as a final order modifying its original Order enforcing the IRS Summons. Or, it is appealable as a final order of contempt requiring Ms. Brayshaw to sign the second Consent Directive to cure the

alleged contempt. Any decision that the Court lacks appellate jurisdiction would allow a district court to modify a final IRS summons enforcement order, but give a taxpayer no opportunity whatsoever to challenge the legality of such modification. Allowing the district court to make unreviewable substantive rulings is contrary to the purpose of § 1291, which must be given a “practical rather than a technical construction.” *See Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)).

This Court has jurisdiction over all final decisions of the District Court. 28 U.S.C. § 1291. “A disposition is final if it contains a complete act of adjudication, that is, a full adjudication of the issues at bar, and clearly evidences the judge’s intention that it be the court’s final act in the matter.” *In re Brown*, 484 F.3d 1116, 1120 (9th Cir. 2007) (internal quotations and citations omitted).

In *United States v. Kao*, this Court exercised jurisdiction to consider a consolidated district court order enforcing four summons served by the IRS and compelling taxpayers to execute consent directives. 81 F.3d 114, 115 (9th Cir. 1996). Here, Ms. Brayshaw is seeking to appeal a final district court order in which the District Court Ordered Ms. Brayshaw, for the first time, to sign the second Consent Directive. Thus, the Order is appealable in the same manner as the order at issue in *Kao*.

Indeed, the District Court’s June 1, 2017, Order results in substantive modifications to its original Order enforcing the IRS Summons. Specifically, it is



undisputed that the IRS Summons did not require Ms. Brayshaw to sign any consent directive; it only required Ms. Brayshaw to produce documents herself. In addition, the Summons and enforcement order only require Ms. Brayshaw to produce documents related to the time period 2002 to 2012. CR 1; ER052-ER055; CR 11; ER040-ER041.

In contrast, the second Consent Directive ordered by the District Court requires UBS SFA to produce documents directly to the government. More importantly, the second Consent Directive greatly exceeds the scope of the IRS Summons as it is not limited in scope to the years 2002 to 2012. ER018-ER019. It requires all documents for all years to be produced. *Id.* In other words, the second Consent Directive effectively results in modifying the Order enforcing the IRS Summons, which is indisputably a final order. *See id.* Thus, this Court has jurisdiction to consider substantive modifications made to a final district court order.

In the alternative, the District Court's June 1, 2017, Order can be viewed as a final post-judgment order of contempt. In general, a contempt order against a party to a pending proceeding is not considered final under 28 U.S.C. § 1291. *Stone v. City & Cty. of San Francisco*, 968 F.2d 850, 854 (9th Cir. 1992), *as amended on denial of reh'g* (Aug. 25, 1992) (citations omitted). However, a post-judgment contempt order imposing sanctions is a final order for purposes of § 1291. *Id.*

Here, the District Court entered an Order enforcing the Summons on September 15, 2015. CR 11. Because the June 1, 2017, Order was issued after the Order enforcing the Summons, it is an appealable post-judgment contempt order. *See United States v. Gonzales*, 531 F.3d 1198, 1202 (10th Cir. 2008).

In previous briefing, the government contended that the June 1, 2017, Order is not appealable because the District Court merely directed Ms. Brayshaw as to what she must do to avoid a contempt sanctions. (Appellee's Opp'n to Mot. for Stay at 5, on file herein.) A review of the District Court's Order demonstrates the government is incorrect.

The District Court's Order is a final order of contempt because it imposed adverse consequences on Ms. Brayshaw. *See Gates v. Shinn*, 98 F.3d 463, 467 (9th Cir. 1996). “[N]either the undetermined total amount of sanctions, nor the fact that the sanctions are conditional, defeats finality of a post-judgment contempt order.” *Id.*

This Court's decision in *Gates* is illustrative as to why the Court has jurisdiction over this appeal. In *Gates*, prison officials were held in contempt for failing to obey a consent decree. *Id.* at 464. The underlying issue was whether a consent decree requiring “appropriate” psychiatric care was specific enough to find contempt for failure to do so. *Id.* In that case, the prisoners had moved to hold the prison officials in contempt for failing to provide adequate care and failing to meet deadlines set by the mediator. *Id.* at 465.

In accordance with the consent decree, the district court had appointed a mediator to develop institutional reforms in consultation with other interested parties. *Id.* The mediator reviewed a revised plan for an outpatient psychiatric program submitted by the defendants and suggested thirteen modifications. *Id.* The mediator then recommended that the prison officials be held in contempt when they rejected the thirteen modifications. *Id.*

The district court agreed and found the prison officials in contempt. *Id.* The court required the prison officials to comply with the mediator's thirteen proposed recommendations as an exercise of the court's remedial powers to cure the contempt. *Id.* at 466. In addition, the prison officials were sanctioned \$10,000 per day for every day they were not in compliance. *Id.* However, the district court stayed the monetary sanctions so long as the prison officials complied with the mediator's directives for implementation of the modified outpatient plan. *Id.* The mediator was to report any failures by the prison officials "to do what he said, when he said" and any failure would result in an order to show cause why sanctions should not become immediately due. *Id.*

On appeal, the prison officials argued that this Court had no appellate jurisdiction because there was no final order. *Id.* at 466-67. This Court disagreed and concluded the order was final under 28 U.S.C. § 1291. *Id.* at 467.

This Court reasoned that although the \$10,000 per day monetary sanction was stayed, the district court imposed two adverse consequences on the prison

officials. *Id.* First, the district court held them in contempt. *Id.* Second, they were required to make the changes recommended by the special master as a remedy for their contempt. *Id.* This Court concluded that “neither the undetermined total amount of sanctions, nor the fact that sanctions are conditional, defeats finality of a post-judgment contempt order.” *Id.* (citing *Stone v. City and County of San Francisco*, 968 F.2d 850 (9th Cir. 1992)).

Like *Gates*, the IRS in this case filed a motion to hold Ms. Brayshaw in contempt for not signing the second Consent Directive. And, like *Gates*, the District Court imposed adverse consequences upon Ms. Brayshaw. First, the District Court ordered Ms. Brayshaw to sign the second Consent Directive, CR 47, even though no previous District Court order required her to do so. *See* CR 8; ER042-ER045; CR 11; ER040-ER041.

Second, the District Court imposed conditional sanctions upon Ms. Brayshaw. The District Court expressly determined that Ms. Brayshaw would be incarcerated in the event she did not immediately sign the second Consent Directive. ER009 at 5:15-25 (stating that if Ms. Brayshaw does not sign the second Consent Directive, “she’s going to be in custody with a daily fine. . .”). Thus, the Court had conditionally set Ms. Brayshaw’s penalty as incarceration if she did not comply with the Court’s order to sign a second Consent Directive that had never been previously ordered by the Court. This is analogous to the district court’s

decision in *Gates* ordering the prison officials to comply with the thirteen modifications that were not part of the original consent decree.

Although the District Court did not use the magic word “contempt” in its June 1, 2017, Order, it effectively granted the government’s Second Petition for Contempt (CR 31) by modifying the Order enforcing the IRS Summons (CR 11) to require Ms. Brayshaw to sign the second Consent Directive. The Court explicitly ordered that the sanction for non-compliance would be incarceration and effectively stayed that order in the event Ms. Brayshaw complied. Indeed, at the end of the hearing, the District Court informed the parties that it would reconvene court “[i]f, for some reason, there is an issue. . . .” ER016 at 12:1-3. Thus, the order at issue in this case is very similar to the contempt order at issue in *Gates* and this Court has jurisdiction to consider the appeal.

Furthermore, absent an appeal, the District Court’s decision imposing new requirements on Ms. Brayshaw would be incapable of review. Ms. Brayshaw did not appeal the District Court’s Order enforcing the IRS Summons. *See* CR 11. However, as discussed above, the District Court’s June 1, 2017, Order greatly expanded the requirements of the Order enforcing the IRS Summons and the Summons itself by, among other things, requiring the production of documents beyond the years specified in the Summons.

In considering appellate jurisdiction over a contempt order, this Court has previously noted the following:

Requiring the City to accrue large sums in sanctions before appealing the order, as the plaintiffs argue, belies common sense. The plaintiffs' rule would require the City to violate the order, pay the fines into the fund, and then comply with the decree's population limits to make the amount of fines certain before the City could appeal the contempt order. Under these circumstances, "both policy and common sense would dictate that we assume jurisdiction under the rule of *Gillespie*...." *Smith v. Eggar*, 655 F.2d 181, 184–85 (9th Cir.1981).

*Stone*, 968 F.2d at 855.

Similar to *Stone*, in this case, it belies common sense to require Ms. Brayshaw to refuse to sign the second Consent Directive such that she would be incarcerated and fined before she would be allowed to challenge the District Court's June 1, 2017, Order imposing new requirements on her. Such a rule would impose a Hobson's choice: a litigant can either comply with a district court's unlawful order and be left without the ability to appeal, or the litigant could refuse to comply and be incarcerated. This rule would also encourage the government to expand the scope of an IRS Summons through an improper contempt petition, leaving taxpayers with no ability to challenge such abhorrent government abuse.

**C. The District Court's June 1, 2017, Order, Improperly Exceeded the Scope of the IRS Summons**

Section 7602 of the Internal Revenue Code grants the IRS wide latitude to summons information necessary for investigative purposes. 26 U.S.C. § 7602; *United States v. Jose*, 131 F.3d 1325, 1327 (9th Cir. 1997). If the person summoned refuses to provide the information requested, the IRS may apply to a federal district court to enforce an IRS summons. 26 U.S.C. § 7604.

In such proceedings, the district court “shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.” 26 U.S.C. § 7604(b). This Court has previously held that “the district court is strictly limited to enforcing or denying IRS summonses.” *United States v. Jose*, 131 F.3d 1325, 1329 (9th Cir. 1997).

In this case, to the extent the District Court modified its enforcement order to require Ms. Brayshaw to sign the second Consent Directive, the decision was clearly erroneous because the June 1, 2017, Order exceeded the scope of the IRS Summons. Thus, the district Court failed to strictly limit its decision to enforcing or denying the IRS summons.

The IRS Summons sought documents directly from Ms. Brayshaw. ER052-ER055. It did not request that Ms. Brayshaw sign a Consent Directive so that the IRS could obtain documents directly from a third-party foreign bank. *Id.* Because the Summons in this case was limited to seeking documents directly from Ms. Brayshaw, the District Court erred in ordering Ms. Brayshaw to sign the second Consent Directive and exceeded the scope of its authority under 26 U.S.C. § 7604(b) and this Court’s decision in *Jose*.

In response to the government’s Second Contempt Petition, Ms. Brayshaw submitted unrefuted evidence that she provided all documents in her possession and control to the IRS. Indeed, the undisputed evidence presented to the District

Court showed that Ms. Brayshaw provided all documents to the IRS that she had received from UBS AG and UBS SFA. ER020-ER030 [[Resp. to Second Order to Show Cause at Exhibit B]]. Specifically, Ms. Brayshaw provided two disks to Agent Langston. CR 39-1 at Exhibit B; ER022. One disk contained the UBS AG documents provided as a result of the first Consent Directive. *Id.* The other disk contained the UBS SFA Portfolio Valuation Statements. *Id.* The government made no attempt to refute Ms. Brayshaw's evidence. Indeed, it provided no evidence tending to demonstrate that any documents were not produced. Instead, the government merely demanded that Ms. Brayshaw sign the second Consent Directive.

If the IRS had wanted Ms. Brayshaw to execute a Consent Directive as part of its investigation, it could have issued a summons requiring Ms. Brayshaw to execute such a document. *See U.S. v. Kao*, 81 F.3d 114, 116 (9th Cir. 1996). In *Kao*, the IRS specifically issued a summons to the taxpayers in that case "ordering each person to appear and sign an attached consent directive." *Id.* In this case, because the IRS never sought a consent directive in its Summons, the District Court exceeded the scope of the Summons by ordering Ms. Brayshaw to sign the document under threat of incarceration.

Even more egregious, the IRS Summons was limited in time to the years ending December 31, 2002, to December 31, 2012. ER052-ER055. Indeed, the IRS previously admitted that the Summons only seeks information for the years 2002 to



2012. ER035 at 3:20-21. Nevertheless, the second Consent Directive the District Court ordered Ms. Brayshaw to sign at the government's request is not limited in scope to the proper time period. ER018-ER019.

By ordering Ms. Brayshaw to sign the second Consent Directive and failing to limit the time period to the scope of the Summons, the District Court failed to limit its decision to enforcing or denying the summons. *See Jose*, 131 F.3d at 1329. Thus, the District Court clearly erred in exceeding the scope of its authority under 26 U.S.C. § 7604 and *Jose*.

**D. The District Court Abused Its Discretion to The Extent it Issued an Order of Contempt**

Finally, to the extent the District Court's June 1, 2017, Order is viewed as an Order of contempt, the IRS failed to show Ms. Brayshaw violated any District Court Order by clear and convincing evidence.

“Civil contempt ... consists of a party's disobedience to a specific and definite court order by failure to take all reasonable steps within the party's power to comply.” *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 945 (9th Cir. 2014) (quoting *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993)). A party should not be held in contempt “if his action ‘appears to be based on a good faith and reasonable interpretation of the [court's order].’” *In re Dual-Deck Video Cassette Recorder*

*Antitrust Litig.*, 10 F.3d at 695 (9th Cir. 1999) (*Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889 (9th Cir. 1982)).

In this case, Ms. Brayshaw fully complied with all orders issued by the District Court. As such, the District Court abused its discretion in ordering Ms. Brayshaw to sign the second Consent Directive under threat of incarceration.

First, Ms. Brayshaw fully complied with the District Court's Order enforcing the Summons by producing all documents regarding UBS AG and UBS SFA that were in her possession or control. As discussed above, the IRS never attempted to refute Ms. Brayshaw's showing that she provided all documents she could obtain regarding UBS AG and UBS SFA. *See* CR 39-1 at Exhibit B; ER022. And, the IRS Summons never required Ms. Brayshaw to sign any Consent Directive. Because the unrefuted evidence shows that Ms. Brayshaw provided all documents she obtained from UBS AG and UBS SFA, there was no basis whatsoever for the District Court to Order Ms. Brayshaw to sign the second Consent Directive.

Second, Ms. Brayshaw fully complied with the District Court's October 10, 2016, Order requiring Ms. Brayshaw to provide the first Consent Directive as requested by the government. CR 30; ER031-ER033. Indeed, the IRS admits that Ms. Brayshaw signed the first Consent Directive which was presented to her pursuant to the Court's October 20, 2016, Order. CR 30; ER007 at 17-19.

Even more egregious is the fact that the IRS admits that it did not even know that a separate Consent Directive would be needed to obtain documents from UBS SFA. CR 31 at 5 n.1. Obviously, Ms. Brayshaw could not be in violation of a previous Order issued by the District Court when the IRS admits it had no previous knowledge that it wanted this second Consent Directive. If the IRS had no knowledge, it obviously never sought this document in the Summons or in any previous Court filing.

In light of the above, the District Court abused its discretion in ordering Ms. Brayshaw to sign the second Consent Directive. The IRS Summons did not request a Consent Directive. The IRS failed to make any showing that the documents produced by Ms. Brayshaw were incomplete. The IRS failed to justify expanding the scope of its summons beyond the years 2002 through 2012 as it did with the second Consent Directive. And, the IRS failed to demonstrate that the District Court had ever ordered Ms. Brayshaw to sign the second Consent Directive.

## **VI. CONCLUSION**

Based on all the foregoing, Ms. Brayshaw respectfully requests that the Court reverse the District Court's June 1, 2017, Order and Order the IRS to destroy all documents it received based on the second Consent Directive. *See Church of Scientology of California v. United States*, 506 U.S. 9, 15, 113 S. Ct. 447, 451, 121 L. Ed. 2d 313 (1992) (stating that "if the summons were improperly issued or

enforced a court could order that the IRS' copies of the tapes be either returned or destroyed.'").

**VII. STATEMENT OF RELATED CASES**

Ms. Brayshaw is not aware of any related cases pending in this Court. *See* Ninth Circuit Rule 28-2.6.

DATED this 3rd day of November, 2017.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 3rd, 2017, pursuant to Federal Rule of Appellate Procedure 25(c), I caused to be filed and served **APPELLANT'S OPENING BRIEF** through the CM/ECF system of the United States Court of Appeals for the Ninth Circuit on the following individuals:

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