UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 9:16-cv-81735

Michael Presley, Cynthia Presley, BMP Family Limited Partnership, and Presley Law and Associates, P.A.
Petitioners

Vs.

United States of America
Respondent
____/

PETITION TO QUASH SUMMONSES

COMES NOW the Petitioners **MICHAEL PRESLEY, CYNTHIA PRESLEY, BMP FAMILY LIMITED PARTNERSHIP,** and **PRESLEY LAW AND ASSOCIATES, P.A.** by and through their undersigned counsel, and pursuant to 26 U.S.C.S. §7609, hereby file this Petition to Quash Summons, and state the following in support:

I. Basis for Court's Jurisdiction.

1. "[Any] person who is entitled to notice of a summons under subsection (a) shall have the right to begin a proceeding to quash such summons not later than the 20th day after the day such notice is given in the manner provided…." 26 U.S.C.S. §7609(b)(2)(a). Here, Petitioners Michael Presley, Cynthia Presley, BMP Family Limited Partnership, and Presley Law and Associates, P.A. (hereinafter "Petitioners"), as those entitled to notice, timely file their motion to quash the summonses directed to Bank of America N.A. A copy of the summonses to Bank of America regarding any and all accounts in which the Petitioners have signing authority on is attached hereto and identified herein as Exhibit A for identification. Based on the delivery date of each summonses, which are October 3 and October 10, 2016, the Petitioners have timely filed their petition to quash.

2. This Court possesses jurisdiction over this matter. “The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceeding brought under subsection (b)(2)….” 26 U.S.C.S. §7609(h). Although section 7609(h)(1) fails to define “found,” the Middle District of Florida adopts the understanding that “found” requires the “actual physical presence of the summonsed party within the district.” *Cayman Nat’l Bank, Ltd. V. United States*, No. 8:06-MC-50-T-24, 2007 U.S. Dist. LEXIS 13005, at *3 (M.D., Fla. Feb. 26, 2007) (unpublished). Other persuasive cases have confirmed this. *See e.g., Williams v. United States*, 2005 US. Dist. LEXIS 25673, at *2005-6749 (E.D. Tenn. July 29, 2005) (for the court to have jurisdiction under section 7609(h)(1), the summonsed party must maintain an actual physical presence in the district); *Berkowitz v. United States*, No. 8:09-651-HMH-BHH, 2009 U.S. Dist. LEXIS 95201, at *5 (D.S.C. Oct. 13, 2009) (physical presence by the summonsed party equates to being “found” in the district.). Here, at all material times, Bank of America, N.A. is a national banking association authorized to do business throughout the State of Florida, and has established numerous physical presences within this district in the form of banks to conduct, engage in, and carry on business to serve the residents Palm Beach County and the State of Florida, including but not limited to the City of West Palm Beach, Florida, the City of Boca Raton, Florida, and the Village of Wellington, Florida. With Bank of America, N.A. having a physical presence in this district, the Court possesses jurisdiction to hear and determine the outcome of this petition.
3. As a result of filing this motion to quash the summons, Bank of America, N.A. must refrain from producing any records sought under the summons until this Court has submitted its ruling. 26 U.S.C.S. §7609(d) (“No examination of any records required to be produced under a

summons…may be made…(2) where a proceeding under subsection (b)(2)(a) have been met, except in accordance with an order of the court having jurisdiction of such proceeding….”). If the Respondent, through its agency the Internal Revenue Service (hereinafter “IRS”), receive any response to the notice of summons, it is hereby required by required under section 25.5.6.2 of the Internal Revenue Manual to seal all documents immediately upon receipt.

4. Here, the Petitioners do not object the production of the records related to his or her personal accounts. In fact, the Petitioners have fully cooperated and turned over all personal accounts and business accounts other than their trust and escrow accounts as more fully described hereinafter.

5. While two personal accounts containing small amounts of money were missed, they too were voluntarily turned over upon discovery of this oversight by the Petitioners, and the Petitioners agree that the IRS should be allowed to confirm what was turned over by comparing those personal accounts against those personal accounts returned as part of the summonses.

6. However, accounts that the Petitioners have signature authority over include general and specific trust and escrow accounts setup to receive, hold, retain, and disburse the money of a law practice’s clients, and thus contain the financial records of various third parties not given notice to these proceedings. These trust and escrow accounts are held by Presley Law and Associates and by BMP Family Limited Partnership on behalf of the law practice, and as manager of the law practice. Both entities have common ownership.

7. The Petitioners, as licensed attorneys and as personnel working for attorneys, are under an ethical obligation according to the Florida Bar to protect the disclosure of the financial records of their clients on the basis of ethical obligations to protect the clients’ rights to confidentiality and to maintain their clients’ rights of privacy, which includes financial records, as well as to

maintain the attorney-client privilege, which includes the duty to maintain confidentiality for the clients. *See* THE FLORIDA BAR, Opinion 92-5 (1993). Thus, the Petitioners assert these claims of confidentiality and privilege on behalf of their clients.

8. Here, in the case at bar, the financial records of the Petitioner's clients are protected under the right of privacy under article I, section 23 of the Florida Constitution, *infra*. Thus, there exists a legitimate expectation of privacy that must be overcome by the Respondent before Bank of America, N.A. can be ordered to produce the financial documents of the Petitioners' clients, and this requires a showing of a compelling state interest and probable cause as further required under the Fourth Amendment prohibiting illegal seizure of items subject to the right of privacy.

II. <u>Memorandum of Law</u>

a. Standing exists to bring this petition on behalf of the Petitioners' Clients.

The Florida Bar discusses the ethical obligation placed upon an attorney, his practice, and all related entities concerning the disclosure of the financial records of a client in the face of an IRS investigation. As shown *infra*, because the Florida Constitution maintains the right of financial privacy, and makes confidential the financial records of its citizens, an attorney must take proactive steps to protect his Florida clients' confidentiality in the face of an IRS summons.

In its December 7, 1993 Advisory Opinion, the Florida Bar stated that "[it] seems clear that the information sought by the IRS on the 8300 form is information 'relating to the representation of a client' and ordinarily, pursuant to the attorney's ethical duty of confidentiality, should not be voluntarily disclosed absent client consent" in response to an audit form. THE FLORIDA BAR, Opinion 92-5 (1993). The attorney is under an obligation under Rule 4-1.6, Florida Rules of Court, "to invoke the privilege when it is applicable." Fla. Bar Reg. R. 4-1.6(a). "An attorney who is required [to produce financial documentation concerning a client] should initially decline to

provide the requested confidential and/or privileged information, absent client consent" when first asked. THE FLORIDA BAR, Opinion 92-5 (1993). If after that, the attorney receives notice of a summons, "the attorney must make a good faith attempt to determine whether the attorney-client or some other privilege might apply. … If the attorney determines that a privilege might possibly apply, the attorney should assert it on the client's behalf." Id.

Here, Florida makes confidential the financial records of all individuals under article I, section 23 of the Florida Constitution, *infra*, thus the Petitioners are under an ethical obligation to protect these records on the basis of confidentiality and the client's right to privacy. *See* THE FLORIDA BAR, Opinion 92-5 (1993). Therefore, the Petitioners assert the privilege of financial confidentiality on behalf of their clients. The Petitioners file this petition to quash the summons as it is overly broad to include the production of trust and escrow account documents containing the protected financial records of their clients. This is done as the Petitioners do not have the consent of their clients to make this disclosure. Further, because this matter does not concern the records of the taxpayer under investigation but rather the taxpayer's clients who are not under investigation, the right of privacy as conferred by article I, section 23 of the Florida Constitution applies as does the Fourth Amendment, *infra.*

b. In this instance, the Petitioners may challenge the action under the Fourth Amendment of the United States Constitution and article I, section 23 of the Florida Constitution.

While the Petitioners recognize that United States v. Powell, 379 U.S. 48, 57-58 (1964), sets forth the standard of quashing summonses, courts follow Powell only when the summons pertains to the records of the taxpayer who is under an investigation. *See* Powell, 379 U.S. 48. Here, however, this Honorable Court is faced with a case of first impression as the summons also targets records of others **not** under any investigation but held by the taxpayer.

According to United States v. Beacon Fed. Sav. & Loan, 718 F.2d 49, 53 (2d Cir. 1983), the IRS must obey the Fourth Amendment of the United States Constitution. While compliance with Powell is necessary, the IRS must also satisfy the conditions of the Fourth Amendment. The Second Circuit explains that a summons issued from an illegal search and seizure may be challenged under the Fourth Amendment in addition to Powell. Id. at 54. Thus, Beacon recognizes that a summons may be challenged on Fourth Amendment grounds in certain cases. Id. Here is a situation based on first impression that should allow the Petitioners to challenge on behalf of their clients the summonses on Fourth Amendment grounds, as well as under article I, section 23 of the Florida Constitution.

Here, the Petitioners are the taxpayers under investigation. They are not contesting the production of their own personal and business records, and have previously produced them. However, unlike Powell and Beacon, the summonses issued seek the records of the Petitioners' and thus taxpayers', clients as these records are held within trust and escrow accounts that the Petitioners have signature authority over. Thus, the Petitioners, on behalf of their clients, seek to quash the attached summonses that—if left to stand—provide the IRS with the financial records of individuals who are **(1)** **not** under any investigation—be it a criminal investigation or a tax

investigation; **(2)** **not** notified of the summons that seeks their records; and **(3)** possessing a reasonable expectation of privacy based on article I, section 23 of the Florida Constitution to have their records remain confidential.

Thus, Powell should not apply to the case at bar as the facts of this case deal with the records of individuals not under any investigation, and who were not given any warning that their records are about to be seized. As such, the applicable standard is to determine whether there is an infringement upon the rights conferred by article I, section 23 of the Florida Constitution, and additionally whether there is an infringement upon the rights conferred by the Fourth Amendment of the United States Constitution which equally applies to determine the outcome of this petition. A summons seeking compelled production of financial records of others is akin to governmental action arbitrarily accessing and seizing each client's financial information without probable cause and without a court issued warrant.

c. Florida recognizes the Right of Privacy, and requires a showing of a compelling interest if the state seeks to infringe upon it.

"In formulating privacy interests, the [United States Supreme Court] has given much of the responsibility to the individual states." Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation, 477 So. 2d 544, 547 (Fla. 1985) (citing Katz v. United States, 389 U.S. 347, 350-51 (1967)). Thus, Florida, on November 4, 1980, added article I, section 23 to the Florida Constitution which added a new privacy provision that states:

> Right of Privacy.—Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law. Art. I. § 23, Fla. Con.

While the U.S. Supreme Court in United States v. Miller, 425 U.S. 435 (1976), held that financial records, subpoenaed by the government without notice to a depositor under investigation, do not

fall within the protected zone of privacy of the Fourth Amendment and are not private papers by the U.S. Constitution, the United States Supreme Court has made it "absolutely clear that the states, not the federal government, are responsible for the protection of personal privacy: 'the protection of a person's general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.'" Winfield, 477 So. 2d at 547 (quoting Katz, 389 U.S. at 350-351). Florida "accepted that responsibility of protecting the privacy interests of Florida citizens when [Florida's Supreme Court] stated that 'the citizens of Florida, through their state constitution, may provide themselves with more protection from governmental intrusion than that afforded by the United States Constitution.'" Winfield, 477 So. 2d at 548 (quoting State v. Sarmiento, 397 So. 2d 643, 645 (1981)).

As a result, anything within the ambit of article I, section 23 of the Florida Constitution is considered confidential, and creates a privacy right. *See* State v. Johnson, 814, So. 2d 390, 393 (Fla. 2002) ("A patient's medical records enjoy a confidential status by virtue of the right to privacy contained in [article I, section 23 of] the Florida Constitution…."). Thus, there is no preemption, and so long as Florida recognizes a right to privacy for a person's financial records, the financial records should be prohibited from disclosure absent a compelling state interest.

i. Florida's Right of Privacy Extends to Financial Records.

Under article I, section 23 of Florida's Constitution—which is not preempted by Federal Law in this area, *supra*—exists the right to privacy, and that right "protects the financial information of persons if there is no relevant or compelling reason to compel disclosure." Rowe v. Rodriguez-Schmidt, 89 So. 3d 1101, 1103 (Fla. Dist. Ct. App. 2012) (quoting Borck v. Borck, 906 So. 2d 1209, 1211 (Fla. Dist. Ct. App. 2005). "This is because 'personal finances are among

those private matters kept secret by most people.'" Id. (quoting Woodward v. Berkery, 714 So. 2d 1027, 1035 (Fla. Dist. Ct. 1998)).

Financial records, such as those of the Petitioners' clients being requested by the Respondent in this instance, are protected by virtue of being under Florida's constitutional right to privacy. Id. Therefore, there is a legitimate expectation of privacy concerning such information that makes these documents confidential by virtue of the right to privacy. As a result of this legitimate expectation of privacy, the Respondent must show, after an evidentiary hearing, a compelling reason for such documentation, Id., and show the requisite probable cause to satisfy the Fourth Amendment's prohibition against illegal search and seizure. *Infra.*

ii. This Honorable Court must quash the summons under article I, section 23.

Since financial records, like medical records, are protected by article I, section 23 of the Florida Constitution, they are confidential by virtue of their inclusion within the right to privacy. Because the Petitioners' clients are not under an IRS audit, the summonses must be examined under this ground as it is their records being sought by the summonses for the Petitioners' audit.

"[A]ny attempt on the part of the government to obtain such records must first meet constitutional muster.… Therefore, in reviewing a claim of unconstitutional governmental intrusion, the compelling state interest standard is the appropriate standard of review." Johnson, 814 So. 2d at 393. This compelling state interest must rise to the level of a criminal investigation. *See* Shaktman v. State, 553 So. 2d 148, 152 (Fla. 1989). The Florida Supreme Court states that "a legitimate, ongoing, criminal investigation satisfies the compelling state interest test when it demonstrates a clear connection between the illegal activity and the person whose privacy would be invaded." Id.

Here, the person, or persons, whose privacy is invaded is not the Petitioners, but the Petitioners' clients. The need to acquire financial records stems from an audit of the Petitioners by the IRS. An audit is not a legitimate, ongoing criminal investigation.

Regardless, the Petitioners' clients are not under an audit or criminal investigation, but it is their records that the IRS is trying to obtain by virtue of the IRS seeking out all accounts in which the Petitioners have signature authority, which would include the trust and escrow accounts of the law practice that contain the financial records of the Petitioners' clients. As a result, the Respondents cannot show a connection between any criminal activity and the Petitioners' clients, as it is the Petitioners' clients' privacy which is being invaded by the overly broad summons. Therefore, there is no compelling state interest in acquiring the confidential financial records of the clients.

As further argument for why the financial records of the Petitioner's clients should not be disclosed, it is best to compare the facts here against those found in United States v. Miller, *supra*. Doing so will show why the financial documents should not be disclosed, thus resulting in a different outcome from Miller.

First, Miller dealt solely with the issue as to whether there was a legitimate expectation of privacy for financial records by examining if the United States Constitution afforded any protection to financial records, and the Miller court determined that the United States Constitution afforded none so the production was made. *See* 425 U.S. 435 (1976). Unlike Miller, here exists a completely different fact situation because Florida's Constitution, as authorized and distinguished under Winfield, does afford privacy protection to financial records under its grant of privacy under article I, section 23, which is not preempted under the U.S. Constitution as the states have the responsibility for formulating its own privacy interests, *supra*.

Therefore, the Respondent must now show a compelling state interest for wanting to obtain the financial records held by the Petitioner that concern his clients, including, *inter alia*, all payments made for the payment of fees and costs, and all retainers paid for that purpose, along with any of the clients' funds that were or are held by the attorney for payment or for potential payment to other individuals or entities. Conducting an audit on the Petitioners is not a compelling state interest that would allow the IRS and the Respondent to obtain article I, section 23 confidential financial records of those not under an investigation.

Second, unlike Miller, which concerned the disclosure of financial records of the taxpayer under investigation, this matter concerns multiple accounts of multiple individuals **not** under any form of investigation by either the IRS or the Respondent. As stated *supra*, the Petitioners have signature authority over several trust and escrow accounts that contain the financial information of their clients. The clients have not received any notification from the Respondent that their records are subject to seizure, and those clients are not under any form of investigation. As a result, the Court must consider the Petitioners' clients' rights to privacy under article I, section 23 of the Florida Constitution, and, absent a compelling state interest, deny the production. *See* Winfield, 477 So. 2d at 548. As the Petitioners do not have the consent of their clients to produce these documents, the Respondent must adhere to the clients' right to privacy as provided by the State of Florida through its Constitution which is not preempted but is recognized under Winfield, *supra*. This means the IRS must make the requisite showings as set forth herein.

Both of these differences necessitate a different outcome from Miller. Because of the legitimate privacy interest, the IRS and Respondent must now show a compelling state interest to have access to the Petitioner's law office trust accounts, and must provide notice to the Petitioner's clients. As these are absent, due process was not afforded, and the confidentiality of these records

under article I, section 23 cannot be infringed upon. Thus, the Court must quash the summons directed at Bank of America, N.A. The enforcement of the various summons results in a clear abuse of process as its enforcement is not done in good faith since it failed to provide due process to those clients of the Petitioners whose finances are found within the Petitioners' trust and escrow accounts.

Therefore, the Petitioners request that this Honorable Court grant the motion to quash as due process has not been afforded to those clients since the requisite showings have not been made. The Respondent cannot show a compelling state interest in obtaining the financial records of the Petitioners' clients as the clients not under any investigation—either criminal investigation or tax investigation—have not been given notice of the proceedings, and as the clients have both a reasonable expectation of privacy under article I, section 23 of the Florida Constitution and are protected from unreasonable search and seizures under the Fourth Amendment of the United States Constitution, *infra.*

d. The Fourth Amendment protects against unreasonable searches and seizures.

The Fourth Amendment protects people "against unreasonable searches and seizures" which "shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." USCS Const. Amend. 4. As the Petitioners' clients possess a reasonable expectation of privacy as their financial records held by banking institution are covered by article I, section 23 of the Florida Constitution, a Fourth Amendment interest is created in these records, and the summonses must be examined under Fourth Amendment grounds since the Petitioners' clients are not under an IRS audit.

Here, as stated *supra*, the Petitioners' clients are not under any type of criminal or tax investigation, did not receive notice that their documents are sought, and possess a reasonable expectation of privacy. By virtue of the fact that the Petitioners' clients are not subject to any on-going investigation of any type, *supra*, the Respondent must show probable cause before it intrude on this zone of privacy. Satisfying the elements of Powell is not sufficient. Here, there has been no evidence of any showing of probable cause, and this summons should be quashed as a result for this additional reason.

III. Conclusion and Relief Requested.

WHEREFORE, the Respondents respectfully request that this Honorable Court quash the attached summons for the reasons set forth herein.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that, on October 13, 2016, the foregoing was electronically filed and uploaded with the Clerk of Court using the CM/ECF System.

WE HEREBY CERTIFY that, on October 13, 2016, the foregoing was mailed by United States Postal Services by certified mail and to be served by a process server to **Tammy Fiedler**, Internal Revenue Agent 17-15171 at 4210 Metro Parkway Suite 115, Mail Stop 4107 TEF, Ft. Myers, Florida 33916 **Bank of America N.A.** at Legal Order Processing, PO Box 15047, Wilmington, Delaware 19850-5047 and Legal Order Processing, 800 Samoset Drive, Newark, Delaware 19713.

Dated: October 13, 2016
Respectfully Submitted,
/s/ Robert M. Presley

Robert M. Presley, Esq.
Florida Bar No. 70324
Steven M. Presley, Esq.
Florida Bar No. 91594
Presley and Presley, P.A.
1045 South State Road 7, Suite 100
Wellington, Florida 33414
Tel. 561.623.8300
Fax. 866.922.0875
Email: ctnotice@plaa-pa.com.