TOMMY K. CRYER
7330 Fern Ave., Suite 1102
Shreveport, LA 71105
318 797-8949
318 797-8951 fax
CryerLaw@aol.com

Attorney for Defendants, James Leslie Reading, Clare L. Reading and Fox Group Trust

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,
Plaintiff

2:11-cv-00698-FJM

v.

JAMES LESLIE READING, CLARE L. READING, FOX GROUP TRUST, MIDFIRST BANK, CHASE, FINANCIAL LEGAL SERVICES, STATE OF ARIZONA
Defendants

MEMORANDUM IN SUPPORT OF READINGS' AND FOX GROUP TRUST'S MOTION TO COMPEL DISCOVERY
(ORAL ARGUMENT BY TELEPHONE REQUESTED)

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

This motion arises out of responses by plaintiff, United States of America, hereinafter referred to as "plaintiff", "government" or "the government" to eleven interrogatories and six requests for production of documents served upon it by defendants, James Leslie Reading, Clare L. Reading and Fox Group Trust, hereinafter collectively referred to as "Readings" or "the Readings".

Notwithstanding the government's indication that it was obtaining information sought and documents requested and in need of additional time to respond and notwithstanding the Readings reasonable forbearance in reliance of the government's having indicated it was assembling for

production the requested information and documentation, the government's response consisted of a singular, monolithic, mantra-like refusal to respond to a single discovery request, all for the identical objection that none of the information or documentation, including standard requests for identification of those providing the information and assisting in the responses, were relevant, material or could reasonably be expected to lead to the discovery of admissible evidence.

The Readings have, through undersigned counsel, gone through extensive efforts to induce and persuade the government to comply with their discovery, but the government has refused to provide even one answer to a single interrogatory nor will it produce even one document requested. (See Local Rule 37.1, rendering the mandated form of memorandum inapplicable in this instance.) Without any other recourse, the Readings are forced to bring this motion seeking an order compelling plaintiff to comply with their discovery requests.[1]

ARGUMENT AND LAW

The Government's Objections Are Patently Meritless

The Readings have only eight and a half (8½) pages remaining for this memorandum of authority to address the relevance of the information and documentation sought by twice as many interrogatories and requests for production of documents as well as additional remedies sought and, accordingly, the Readings prevail upon the indulgence of the court in permitting them to incorporate herein by reference Exhibits 2, 4 and 5 attached to Doc. 39, Second Joint Motion to Extend Dates. More particularly, Exhibit 4, which explains to the government the relevance and

[1] It may appear that more than ten days have been permitted to elapse since Counsel's abandonment of efforts to persuade the government to reconsider it's blanket refusal to participate in discovery, which could give the mistaken impression that the Readings have failed to mitigate the damage occasioned by the government's intransigence. That delay, however, is unavoidable due to counsel's severe personal illness. Counsel has been incapacitated by what has proven to be a brutal and particularly stubborn case of bilateral pneumonia which has been treated as aggressively as possible short of hospitalization. Although counsel is still under such treatment and not expected to be able to return to his offices before next week, this motion and it's supporting memorandum have been prepared and filed due to the time restraints and the likely need for follow-up discovery in an attempt to minimize the damage sustained by the Readings, counsel's personal illness notwithstanding.

appropriateness of many of the items sought in detail and Exhibit 5, Readings' response to the government's demanding legal authorities for relevance described in Exhibit 4, and providing ample statutory and jurisprudential authority. To assure complete coverage of the issues all interrogatories and requests for production will be recapitulated hereinbelow, but without the extensive repetition of legal authorities already shown in those exhibits.

The Causes of Action and Their Issues

Plaintiff is seeking, among other causes of action, relief under 26 U.S.C. § 7401, for reduction of assessments, both for taxes and penalties, to judgment and under 26 U.S.C. § 7403, for recognition and enforcement of an alleged lien interest in property owned by defendant, Fox Group Trust. It is to those two causes of action that the Readings' discovery is primarily directed.

Due to practices attributable to the 9th Circuit's current holdings in *Hughes v. United States*, 953 F.2d 531, 539-40 (9th Cir. 1992); and *Farr v. United States*, 990 F.2d 451, 454 (9th Cir. 1993), and cases following and the reasonable expectation that those practices will continue until *Hughes* and *Farr* are corrected, the government in 7401 and 7403 cases has been given a pass on proving its case, permitted to, instead, present the Court with a note from "Epstein's mother" assuring the court that it has a valid assessment and that it perfected a lien interest securing payment of such assessment, thus neither the Court nor the jury need be concerned with such mundane things as examination of evidence. That assurance or certification that "we have an assessment and a lien to back it up" appears as Form 4340, certification of assessment, a form completed not as a contemporaneous public record, but long after the fact and purely for purposes of "use in litigation". Opposing counsel has indicated to this writer that it is the government's intention to avail itself of that free pass by submitting its assurance in the form of

Forms 4340, and one can hardly blame any party for taking advantage of such a monumental forgiveness of burden of proof.

Based upon *Hughes* and *Farr*, the current practice is to accept the 4340's, bless them with a presumption of correctness and then shift the burden to the defendant to rebut that presumption of correctness. While no one has managed, to this writer's knowledge, to successfully demonstrate the incorrectness of those get out of burden of proof passes, it appears that fact is attributable primarily to the misperception caused by the limited scope of the 4340's which suggests to the casual observer that having an assessment "on the books" constitutes proof that the purported entry is, indeed, a *valid* assessment and that where an assessment is "on the books" it *always* enjoys the benefit of a lien interest.

Neither perception could be farther from correct. It would stand to reason, however, that if the 4340 was shown to be incorrect in its conclusion that the record sufficiently supports the claim of a valid assessment and the perfection of a lien interest, then, the presumption no longer applicable, *the burden to prove each and every requirement for the existence of a valid assessment and lien interest would be placed back on the government where it was prior to its having played it's get out of burden of proof certificate.*

The existence of a valid assessment is dependent upon the government's successful and proper completion and observance of the entire assessment process (see a partial description and the various prerequisites for lawful assessment in the Exhibit 5 to Doc. 39 referred to hereinabove). If the government's record (*which is purported to be the basis for the 4340 judicial assurance certificate*) fails to verify that all such prerequisites and formalities were properly met and observed, then the 4340 can no longer be held up as "presumptive proof" nor can it be "presumed correct". . . and nor can it be said to free plaintiff of its burden of proof.

The difficulty the defendant has in this regard, however, is that the assessment process is internal, very heavily secured internal, to the IRS. The defendant is not present nor is he given a record or accounting of the manner in which that process was (or, more importantly, was not) conducted. ***The only way a defendant can bear the burden imposed on him to rebut the presumption of correctness is to be provided access to the record that the 4340's are supposed to be representing and given an opportunity to scrutinize it for incorrect conclusions or unfounded assumptions, falsehoods or other deficiencies.*** To impose an almost insurmountable burden on a defendant and to then deny him the only means by which he can ever hope to rebut the correctness of the 4340's would in and of itself offend both mind and conscience as much as represent an abomination of due process.

In *United States v. Camejo*, 666 F.Supp 1542, 1545 (S.D.Fla. 1987), the court stated:

> "When the government seeks the aid of the Courts in enforcing an assessment, it opens the assessment to judicial scrutiny in all respects... Thus, in an action instituted by the Government to enforce its tax liens under [section] 7403, the merits of the claim are clearly open to challenge. *United States v. O'Connor*, 291 F.2d 520 (2nd Cir. 1961); *Quinn v. Hook*, 231 F. Supp. 718 (E.D.Penn. 1964)."

See also See *Murray's Lessee v. Hoboken Land & Improvement Co.*, 1855, 18 How. 272, 283-285, 15 L.Ed. 372.

So what is required for there to be a valid assessment?

The Relevance of Discovery To the Issues—What Are the Readings Asking?

First, for a tax assessment for a deficiency **there must be a deficiency** (26 U.S.C. §§ 6211, 6212); but **there can be no deficiency without a return**, since a deficiency is **the amount by which the tax due and owing exceeds the amount shown on the return.** (See § 6212 and the Secretary's Notice of Deficiency Form, lines 11, 12 and 14, showing how the Secretary reads that section.) But in this case the government refused to process defendants' returns, so **what return did it use? Show me. (<u>First set, request for production number 3</u>)** The only other

return is a return (not "substitute for return", "something like a return", or "sort of " return) **made, certified as such and filed pursuant to IRC § 6020(b)**. But § 6020(b) permits **only the Secretary or his delegate to make and file a valid § 6020(b) return**, so the record must show that the person who made and filed the § 6020(b) return was duly authorized. If it does not, the return is null and void and the 4340's have been rebutted. **Those duly delegated authority are identified in delegation orders by job title and G-level** (eg., G-11, G-13, G-7½) **Who made and filed the 6020(b) return? What is his job title and G-level? (First set, interrogatory number four)** Of course, that is relevant and material.

The next step is notification of the taxpayer that the government claims he owes a deficiency (sort of a due process thing). **IRC Code § 6212 permits only the Secretary or his delegate to issue and send a Notice of Deficiency (NOD), so who made and sent the NOD? What is his job title and G-level at the time he made it? (First set, interrogatory number 2)** The NOD must be **sent to the Taxpayer's last known address, was it? Show me your NOD's. (First set, request for production number 1) It must be sent by registered or certified mail.** The Post Office issues a Form 3800 to all who send certified or registered mail and the IRS keeps an internal record of ALL certified and registered mailings on its internal Form 3877. **Show me your Postal Form 3800's and IRS Form 3877's for all NOD's, and, where are your Postal Forms 3849's (green cards) for those? (First set, interrogatory number 3, request for production number 2)** Don't have them all? Don't have any? What kind of presumption does that create? See *United States v. Central Gulf Steamship Corporation*, 321 F. Supp. 945 (E.D.La. 1970); and *Interstate Circuit v. United States*, 306 U.S. 208, 226, 59 S.Ct. 467 (1939), where the Supreme Court clearly stated:

> "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. *Clifton* v. *United States*, 4 How. 242, 247. **Silence then becomes evidence of the most convincing character**. *Runkle* v. *Burnham*, 153 U.S. 216, 225; *Kirby* v. *Tallmadge*, 160 U.S.

> 379, 383; *Bilokumsky* v. *Tod*, 263 U.S. 149, 153, 154; *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 111, 112; *Mammoth Oil Co*. v. *United States*, 275 U.S. 13, 52; *Local 167* v. *United States*, 291 U.S. 293, 298." (emphasis added)

4340's "busted", go back to GO, strap your plaintiff's burden back on and prove your case. Does it get any more relevant and material than that? What does the government's silence regarding the entirety of the Readings' discovery evidence?

All calculations of tax due and owing, 6020(b) returns and calculation of deficiencies **must be based in fact and upon information obtained by or provided to the Secretary.** 26 U.S.C. §§ 6020, 6211. **What information did you base your calculations, returns and determination of deficiency on? Show me. (First set, interrogatory number 5, request for production number 4)** The IRS is just as prohibited from filing false or unsubstantiated returns as the rest of us are. See 26 U.S.C. §§ 6702 and 7206, which provide no exceptions for the IRS. **Did you follow the law and accurately and lawfully report income? How did you obey §§ 64, 1001 and 1011 relative to Mr. Reading's sale of his labor?** His property according to dozens of Supreme Court cases. **How did you do that? (First set, interrogatory number 6)**

Penalties are sometimes authorized by the Code, but were they in this case? **A frivolous filing penalty applies only to certain "specified submissions"**. See § 6702. **Were the frivolous penalties you imposed only for those "specified submissions"? Which specified submission was the basis for each frivolous filing penalty you took it upon yourself to impose? (First set, interrogatory number 7) Did you place the Readings on notice that their filing was frivolous? Explain why? Identify which position specified by the Secretary in the listing he is required to publish by § 6702(b)(2)(A)?** (Another due process thing) **(First set, interrogatory number 8) Did you observe penalty procedures? Notify the**

Readings of their appeal rights or other opportunities for redress? Show me how you did that. (First set, request for production number 5)

Have we seen any discovery request that is not relevant to whether the 4340's are correct and whether a tax or penalty was properly and lawfully assessed?

In order to have a lien, § 6321, or to exercise administrative collection procedures, § 6331, both of those sections require that for either lien or levy authority to arise there must first be a valid assessment and that the taxpayer be notified of the assessment and afforded a last opportunity to pay it, thereby precluding the perfection of any lien or the existence of administrative (extra-judicial) collection action authority. That notice of assessment and demand, set out in § 6303, is an essential due process requirement, since if the taxpayer is not on notice that failing to pay ***this*** demand (as opposed to we wanna money notice, will you consent to assessment notice, you owe some taxes or "notice of balance due") will put teeth in the IRS's mouth that were not there before. See *U.S. v. Berman*, 825 F.2d 1053 (6th Cir. 1987); *Bauer v. Foley*, 408 F.2d 1331, 1333 (2nd Cir. 1969). §§ 6321, 6331 and 6303 say **unless you send notice of assessment and demand for payment within sixty days of the assessment**, after which the taxpayer fails to pay, **and it must be addressed to the taxpayer's last known address**, **then and only then do you have a lien interest associated with the assessment. Did you do that? Show me. (<u>Second set, interrogatory number two, request for production number 1</u>).** If you did not or if you cannot produce such a notice and demand, then why does your 4340 say you have a lien interest? Your 4340 says that because it is not correct, is it? Go back to GO, strap your plaintiff's burden back on and prove your case. Relevant? Material? Of course it is. What presumption arises when you offer assurances when you cannot produce any such notice and demand perfecting a lien? *Central Gulf Steamship* and *Interstate Circuit* all over

again. You can't prove your case? Don't have the essential evidence of valid lien perfection? Is that the definition, the essence, of relevant and material?

The Appropriate Remedy

When one looks at how richly bad behavior was rewarded in the *Gabel* case described in the motion, one can hardly blame the IRS for returning to the kill to feed again. But temptation does not justify wrongdoing. The Readings' discovery is palpably relevant, immensely material and goes straight into the essence of the real issues presented by this case, while the government's objections are frivolous, without any diversity or use of imagination, much less any basis in fact or law. The Readings have been injured beyond delay in obtaining responses. As indicated in the exhibits, cleanup discovery and depositions were anticipated to reinforce the gleanings from the initial discovery wave, but the Readings will have to proceed in this case without the benefit of much of that.

The government is deposing them in spite of the fact that its first step in conducting discovery was three months after the Readings commenced their efforts. But then, the events that give the government's case weight or expose its case as smoke and illusion (albeit certified smoke) did not happen at the Readings' house. They all happened in the heavily shrouded and secured back rooms of the IRS. The Readings, not the government are suffering due to the extended one month's delay in filing its boilerplate, frivolous objections, and they are now forced to prosecute this motion when what our process would anticipate is that they would be sorting through their discovery and preparing pretrial evidentiary and/or dispositive motions, but they cannot do that, now. By the time this motion is heard at least another three weeks will have elapsed, taking us within days of both discovery and dispositive motion deadlines.

The Readings respectfully contend that to merely order the government to do that which it should have already done by the end of the first week of February is inadequate in that it fails to permit the Readings an opportunity to test and verify the information provided. The only way the harm can be undone would be to delay the trial and start the schedule order over, but the Readings would then be subjected to additional months of the pall of this suit hanging over them and preoccupying their thoughts when grandparents should be engaging in other, more rewarding interests. For them it is lose one way or lose the other and, perhaps, even lose the roof that shelters them.

It is respectfully suggested that the only fair and just remedy in this matter is to

a) Require the government to respond completely to the Readings' discovery as quickly as is possible (any government that can put men on the moon in 9 years should be able to answer a handful of interrogatories and request for documents it should already have at the ready as part of their case file in as many days);

b) Deny the government the benefit of its irreversible compromising of the Readings' ability to rebut any presumption of correctness on the part of its From 4340's by refusing to bless the same with that presumption, thereby retaining the burden of proof with the plaintiff; and

c) Grant to the Readings leave to file dispositive motions on or before May 26, 2012, affording them at least 15 days after their discovery deadline in order that they, like the government, will have an opportunity to apply gleaned evidence and information toward their orderly defense.

Dated this 29th day of March, 2012.

Respectfully submitted,

/s/ Tommy K. Cryer

Tommy K. Cryer, La. Bar 4634
Atty for Defendants, James Leslie Reading, Clare L. Reading and Fox Group Trust
7330 Fern Ave., Suite 1102
Shreveport, LA 71105
318 797-8949
318 797-8951 fax

CERTIFICATE OF SERVICE

I hereby certify that I have on this date electronically filed the foregoing Memorandum In Support of Motion to Compel Discovery pursuant to FRCP 37 with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following counsel for the parties:

DENNIS K. BURKE, U.S. Attorney
Two Renaissance Square
40 North Central Ave. Suite 1200
Phoenix, AZ 85004

CHARLES M. DUFFY
U.S. Department of Justice, Tax Div.
PO Box 683
Ben Franklin Station
Washington, DC 20044

ROBERT P. VENTRELLA
Asst. Attorney General
1275 West Washington St.
Phoenix, AZ 85007

PAUL M. LEVINE
LAKSHMI JAGANNATH
McCarthy, Holthus, Levine Law Firm
8502 E. Via de Ventura, Suite 200
Scottsdale, AZ 85258

Shreveport, Louisiana, this 29th day of March, 2012.

/s/ Tommy K. Cryer