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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN THE MATTER OF THE TAX LIABILITIES OF: JOHN DOES, United States taxpayers who, at any time during the years ended December 31, 2004, through December 31, 2012, directly or indirectly had interests in or signature or other authority (including authority to withdraw funds, trade or give instructions or receive account statements, confirmations or other information, advice or solicitations) with respect to any financial accounts maintained at, monitored by, or managed through CIBC FirstCaribbean International Bank Limited, its predecessors, subsidiaries, and affiliates (collectively, FCIB) and financial accounts maintained at, monitored by, or managed through other financial institutions that FCIB permitted to transact client business through its United States correspondent account at Wells Fargo Bank, N.A.	Civil Number: CV 13 1938 TEH **MEMORANDUM IN SUPPORT OF *EX PARTE* PETITION FOR LEAVE TO SERVE "JOHN DOE" SUMMONS**

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PRELIMINARY STATEMENT

The Internal Revenue Service has long been concerned with United States taxpayers who evade their United States tax obligations by concealing unreported taxable income in accounts in offshore tax havens or jurisdictions that provide for financial secrecy. One part of the world most widely known to permit such banking services is in the Caribbean.

CIBC FirstCaribbean International Bank ("FCIB"), a publicly traded financial services company based in Barbados, services U.S. taxpayer clients through a correspondent account it holds at Wells Fargo Bank, N.A. ("Wells Fargo") (the "Wells Fargo Correspondent Account"), that allows it to access the U.S. banking system. "A correspondent banking account is a deposit account maintained by one bank for another bank to accept deposits and make payments." Steven Mark Levy, *Federal Money Laundering Regulation: Banking, Corporate and Securities Compliance* § 15.01 Correspondent Banking and Money Laundering (2013). "When a foreign bank opens a correspondent account with a U.S. bank, not only the foreign bank but its customers can use the U.S. bank to move funds, exchange currencies, or carry out other financial transactions within the U.S. and throughout the world." *Id.*

Cheryl R. Kiger is an IRS Revenue Agent assigned as Technical Specialist in the Offshore Compliance Initiatives Program conducted by the IRS. *See* Declaration of Cheryl R. Kiger ("Kiger Decl."), ¶ 1. The Offshore Compliance Initiatives Program develops projects, methodologies, and techniques for identifying United States taxpayers who are involved in abusive offshore transactions and financial arrangements for tax avoidance purposes. *Id.* During the course of Revenue Agent Kiger's review of data received by the IRS relating to the clients of a large international trust and corporate service provider, she discovered information about a U.S. taxpayer ("Taxpayer 1") who had opened numerous bank accounts at FCIB and its predecessor Barclays Bank in a Caribbean jurisdiction in his own name and in the names of various shell companies he controlled. *Id.*, ¶ 14. These FCIB accounts were used, among other things, as conduits for transferring tens of millions of dollars in and out of the United States between various financial accounts controlled by Taxpayer 1. *Id.* Taxpayer 1 did not report any income arising from the transactions involving these accounts. *Id.* After discovering the transactions between Taxpayer 1 and FCIB and its predecessor Barclays Bank, Revenue Agent Kiger researched FCIB in the IRS's Offshore Voluntary Disclosure Program database and learned that at least

129 voluntary disclosures have been made by U.S. taxpayers holding undisclosed accounts at FCIB and its predecessors in the Caribbean. *Id.*, ¶ 15. Revenue Agent Kiger has reviewed all of those voluntary disclosure submissions and discovered that they all involve taxpayers who failed to report income related to undisclosed accounts at FCIB and its predecessors. *Id.* In addition, Revenue Agent Kiger personally interviewed six of the individuals making the voluntary disclosures about their involvement with FCIB. *Id.*, ¶¶ 15-21. In all six instances, the individuals held an account or accounts at FCIB but failed to report the income related to those accounts on their U.S. federal income tax returns.

The United States brings this *ex parte* proceeding under Sections 7609(f) and (h) of the Internal Revenue Code, 26 U.S.C. § 7609, for leave to serve an IRS "John Doe" summons upon Wells Fargo. The John Doe summons (the "Summons") seeks records of FCIB's United States correspondent account at Wells Fargo. This information will allow the United States to determine the identity of the U.S. taxpayers who directly or indirectly hold or held interests in financial accounts at FCIB and the other financial institutions that FCIB permitted to use its Wells Fargo Correspondent Account (the "Other Banks"). The issuance of the Summons is warranted here because (i) the Summons relates to an ascertainable group or class of persons comprised of U.S taxpayer-clients of FCIB and the Other Banks; (ii) there is a reasonable basis for believing these U.S. taxpayers failed to comply with internal revenue laws; and (iii) information sufficient to establish these U.S. taxpayers' identities is not readily available to the IRS from other sources.

BACKGROUND

I. U.S. Tax Laws Require Disclosing Foreign Financial Accounts and Paying Applicable U.S. Taxes

United States taxpayers with gross income in excess of a minimum threshold amount in any one calendar year are required to file a U.S. Individual Income Tax Return, IRS Form 1040, with the IRS that reports the taxpayer's income from all sources worldwide. *See* Kiger Decl., ¶ 31. U.S. taxpayers must also disclose on their Form 1040 direct or indirect financial interests in, or signature authority over, any foreign financial account and the country in which any such account was located. *Id*, ¶ 32. Further, U.S. taxpayers with any such foreign bank account that had an aggregate value of $10,000 or more at any time during a particular calendar year are required to file a Report of Foreign Bank and Financial

Accounts Form TD F 90-22.1 ("FBAR") with the Department of the Treasury. *Id.* ¶ 33. These FBARs require the U.S. taxpayer completing them to identify the financial institution that held the foreign account, the type of the account (either bank, securities, or other), the account number, and the maximum value of the account during the calendar year at issue. Foreign bank accounts that are not reported to the IRS are known as undisclosed offshore accounts.

II. Offshore Banking and the Use of Correspondent Accounts

Correspondent banking is the provision of banking services by one bank to another bank which allows banks to conduct business and provide services for their customers in countries where the banks have no physical presence. *Id.* ¶ 8; *see also* Levy, *supra*, at § 15.01. Accordingly, banks that are licensed in a foreign country and have no office in the United States can provide services in the United States to their customers by opening a correspondent account with an existing U.S. bank. *Id.* Correspondent accounts can also serve as a means of moving funds from the United States into the foreign respondent bank. Foreign banks with existing correspondent accounts may allow other foreign banks to use those accounts, allowing multiple foreign banks to gain access to U.S. dollar accounts, U.S. wire transfer systems, and other financial services available in the United States through a single correspondent account. *Id.* ¶ 9. Correspondent accounts through which foreign banks other than the account holder gain access to the U.S. market are known as "nested" correspondent accounts. *Id.*

III. FCIB and its Involvement with Undeclared Offshore Accounts for U.S. Taxpayers

A. FCIB's Wells Fargo Correspondent Account

FCIB is a publicly traded financial services company based in Barbados. *Id.*, ¶ 10. According to its website, FCIB was formed in 2002 when Barclays Bank PLC based in London, United Kingdom, and Canadian Imperial Bank of Commerce (CIBC) based in Toronto, Canada, combined their retail, corporate, and offshore Caribbean banking operations and launched FirstCaribbean International Bank. *Id.* In 2005, FCIB acquired ABN Amro's international banking and asset management business in Curaçao, Netherlands Antilles. *Id.* In December 2006, CIBC acquired Barclays' stake and became the majority shareholder in FCIB, holding 91.7 percent of its stock. *Id.* In 2011, FCIB acquired CIBC Bank & Trust (Cayman) Ltd. and CIBC Trust Company (Bahamas) Ltd. from an affiliate. *Id.* According to the 2011 Annual Report of CIBC, FCIB presently operates through eight subsidiaries, including CIBC

Bank and Trust Company (Cayman) Limited, CIBC Trust Company (Bahamas) Limited, FirstCaribbean International Bank (Bahamas) Limited, FirstCaribbean International Bank (Barbados) Limited, FirstCaribbean International Bank (Cayman) Limited, FirstCaribbean International Bank (Jamaica) Limited, FirstCaribbean International Bank (Trinidad and Tobago) Limited, and FirstCaribbean International Wealth Management Bank (Barbados) Limited. *Id.*, ¶ 11. FCIB has branches in 18 Caribbean countries. *Id*, ¶ 12. In addition to providing financial services to residents of the countries where it operates, FCIB provides offshore financial services to non-residents. *Id.*

From December 31, 2004, through December 31, 2012 (the "relevant time period"), FCIB (or its predecessors) accessed the U.S. financial market through a correspondent bank account held at Wells Fargo, SWIFT Code *******NNYC and ABA Code *****5092. *Id.*, ¶ 23. Wells Fargo, in turn, maintains its headquarters in San Francisco, California, which is in the Northern District of California. *Id.*[1] Through this correspondent banking relationship, FCIB could wire funds from the Caribbean to the Wells Fargo Correspondent Account in the United States and, in turn, wire funds from the Wells Fargo Correspondent Account to other accounts located in both the United States and overseas. *Id.* FCIB also had the ability to issue U.S. currency checks drawn on the Wells Fargo Correspondent Account. *Id.* The Wells Fargo Correspondent Bank also could be used to move funds into FCIB. *Id.* Based on the IRS's experience, the IRS reasonably believes that FCIB used the Wells Fargo Correspondent Account to provide offshore banking services to many U.S. taxpayers, who the IRS believes may have failed to report the existence of their foreign bank accounts and income to the IRS and the Department of the Treasury. *Id.* ¶¶ 12-26.

In addition, based on the IRS's experience, FCIB may have offered nested correspondent services to other foreign banks that also held undeclared accounts for U.S. taxpayer-clients. *Id.*, ¶ 9. In such situations, the other banks were able to have the foreign bank that had a correspondent account with a U.S. bank, here FCIB, to issue checks drawn on that foreign bank's account on their behalf. *Id.*, ¶ 8-9.

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[1] Under 26 U.S.C. § 7609(h)(1), jurisdiction for an action seeking court authorization for the issuance of a "John Doe" summons lies in the district in which the person or entity to be summoned "resides or is to be found."

B. U.S. Taxpayers Used FCIB to Avoid Disclosing Their Foreign Accounts

Revenue Agent Kiger's experience is that U.S. taxpayers who hold undisclosed foreign accounts often do so in order to conceal their income from the IRS. *Id.* ¶ 34. Indeed, there is a direct correlation between unreported income and the lack of visibility of that income to the IRS. *Id.* ¶ 35. For example, when a third-party pays income to a taxpayer and does not report the taxpayer's income to the IRS, the taxpayer-recipient of that income is far less likely to report the income herself. *Id.*

This experience of Revenue Agent Kiger, and the IRS, is supported by the evidence Revenue Agent Kiger discovered about the use of FCIB accounts. After learning that Taxpayer 1 used FCIB accounts to divert tens of millions of dollars in and out of the United States and failed to report any resulting income, Revenue Agent Kiger researched FCIB in the IRS's Offshore Voluntary Disclosure Program database[2] and learned that at least 129 voluntary disclosures have been made by U.S. taxpayers holding undisclosed accounts at FCIB and its predecessors in the Caribbean. *Id.*, ¶ 15.[3] Revenue Agent Kiger reviewed all of those voluntary disclosure submissions and they all involved taxpayers who failed to report income related to undisclosed accounts at FCIB and its predecessors. *Id.*

Accordingly, the fact that John Doe taxpayers chose to hold undeclared accounts with FCIB and the Other Banks provides a reasonable basis to believe that they have failed to comply with internal revenue laws. *Id.*, ¶ 34. The information obtained by the IRS in its investigation to date, moreover, suggests that the U.S. taxpayer-clients of FCIB and the Other Banks may not have disclosed the existence of their FCIB accounts, nor reported the income earned on those accounts, to the IRS, relying

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[2] Almost all of the disclosures Revenue Agent Kiger reviewed were made as part of the IRS's Offshore Voluntary Disclosure Program. *Id.*, ¶ 15. The IRS's Offshore Voluntary Disclosure Program was a result of an increase in voluntary disclosures by U.S. taxpayers of their offshore accounts due to the IRS's increased enforcement efforts. In short, the Program enabled noncompliant taxpayers to resolve their tax liabilities and minimize their chances of criminal prosecution by disclosing foreign accounts and income that they had previously not disclosed to the IRS. *See* http://www.irs.gov/uac/2009-Offshore-Voluntary-Disclosure-Program.

[3] U.S. taxpayers making offshore voluntary disclosures were required to submit, among other things, amended tax returns reporting all of their previously unreported offshore income for the period, descriptions of their offshore activities, and detailed information about their offshore banks and service providers. Information about the IRS's Offshore Voluntary Disclosure programs and initiatives can be found at http://www.irs.gov/uac/2012-Offshore-Voluntary-Disclosure-Program.

instead on the lack of third party reporting to prevent the IRS from detecting those accounts or omitted income. *Id.*, ¶¶ 34-36.

In addition to discovering the 129 voluntary disclosure submissions described above, Revenue Agent Kiger personally interviewed six of the individuals making the voluntary disclosures. *Id.*, ¶¶ 16-21. Revenue Agent Kiger interviewed "Taxpayer 2," the owner of a U.S. taxicab company who was also the beneficial owner of a Cayman Islands shell corporation formed on his behalf by an offshore service provider in the Cayman Islands to hold and invest for him any portions of "premiums" he paid for offshore insurance that were not used to pay his claims. *Id.*, ¶ 16. The nominal owner of Taxpayer 2's company was another Cayman Islands corporation formed by the offshore service provider to serve in that capacity. *Id.* Taxpayer 2's Cayman Islands shell company opened an account at Barclays Bank, which later became FCIB, to hold the funds. *Id.* Taxpayer 2 did not have direct signature authority over the FCIB account, but he exercised actual authority through the nominal owner of his shell company, which followed his instructions with regard to the account. *Id.* Although Taxpayer 2 was the beneficial owner of the FCIB account, his name appeared nowhere on the documents related to the account, his shell company, or its nominal owner. *Id.* Although Taxpayer 2's taxicab business claimed tax deductions when the "premiums" were paid for the offshore insurance, Taxpayer 2 did not report the receipt of the excess "premiums" when they were paid over to his Cayman Island shell company, nor did he report earnings on the Cayman Islands shell company's investments. *Id.*

Revenue Agent Kiger interviewed "Taxpayer 3," the owner of a U.S. corporation that had bid on and won a contract to provide services to a large company in the Caribbean. *Id.*, ¶ 17. On the advice and with the assistance of a U.S. law firm, Taxpayer 3 engaged a management company in Aruba to set up a Curaçao company to be owned by an irrevocable trust of which Taxpayer 3's children would be beneficiaries. *Id.* This was done in order to avoid U.S. estate tax on funds generated by the Caribbean business transactions. *Id.* All payments for the services were wired into an account at ABM Amro (later FCIB) in Aruba. *Id.* Taxpayer 3 did not deal with the bank directly in setting up the accounts. *Id.* Those arrangements were made by the management company, which originally had sole signature authority over the bank account. *Id.* The U.S. law firm assured Taxpayer 3 that the money in the account was secure, and it was Taxpayer 3's understanding that keeping his name off the account was part of the plan to keep the funds in the account from being taxable. *Id.* However, Taxpayer 3 was uncomfortable with this and insisted on adding himself as a signatory on the account. *Id.* In addition, Taxpayer 3 was given a credit card tied to the bank account, and he was the only person authorized to use the credit card. *Id.* The income deposited to this account was not reported by Taxpayer 3 or his U.S. corporation until their voluntary disclosure was made in 2009. *Id.*

Revenue Agent Kiger interviewed "Taxpayer 4," a U.S. taxpayer who had an active business in the British Virgin Islands (BVI). *Id.*, ¶ 18. In addition to business bank accounts that had previously been opened at FCIB for his business by an agent, Taxpayer 4 and his wife opened personal accounts at FCIB in 2006, at which they maintained certificates of deposit. The certificates of deposit and their earnings were not reported on Taxpayer 4's U.S. income tax returns until he made his voluntary disclosure in 2009. *Id.*

Revenue Agent Kiger interviewed "Taxpayer 5" and learned he opened an account at FCIB in the name of a Cayman Islands corporation (Company 1 – Cayman) with the same name as a U.S. corporation (Company 1) he had created to self-insure transactions involving another U.S. corporation he owned (Company 2). *Id.*, ¶ 19. Taxpayer 5 moved funds, via wire transfer, in and out of the FCIB account between various countries and the United States. *Id.* The sources of funds transferred to the FCIB account included (1) excess insurance "premiums" received by Company 1 from Company 2 that were not needed to pay claims of Company 2; (2) rebates from a third party of portions of payments made by Company 2 to acquire product distribution rights, which Taxpayer 5 instructed the third party to wire directly to the FCIB account; (3) commission income owed to Company 2 by some of its customers, which Taxpayer 5 directed the customers to wire directly to the FCIB account; and (4) amounts collected by Taxpayer 5 from friends to be used as a pooled investment in another business. *Id.* Taxpayer 5 had beneficial ownership of and complete control over the funds in the FCIB account (except for amounts held on behalf of his friends for the pooled investment) but did not report the FCIB account or any income related to it on his U.S. income tax returns until he made his voluntary disclosure in 2009. *Id.*

Revenue Agent Kiger interviewed "Taxpayer 6" and learned he controlled three different business accounts and one personal account at FCIB in the Turks and Caicos Islands. *Id.*, ¶ 20. Some of the deposits into those accounts represented income earned by Taxpayer 6 for advisory services provided to third parties. *Id.* Taxpayer 6 failed to report this income on his U.S. income tax returns until Taxpayer 6 made his voluntary disclosure in 2009. *Id.*

Finally, Revenue Agent Kiger interviewed "Taxpayer 7," a U.S. permanent resident who was employed by a consulting firm in the United States. *Id.*, ¶ 21. In 2006, Taxpayer 7 used a Bahamian law firm to set up a Bahamian corporation to hold a bank account to receive commissions for consulting services Taxpayer 7 performed for third parties without the knowledge of his employer. *Id.* The Bahamian law firm referred him to FCIB to open the account. *Id.* When Taxpayer 7 opened the account, he was told by an FCIB employee that no bank information would be given to the United States without a legal request. *Id.* Taxpayer 7 used wire transfers to move funds in and out of the FCIB account. *Id.* Taxpayer 7 failed to report any of the commissions that were deposited into the FCIB account on his U.S. income tax returns until Taxpayer 7 made his voluntary disclosure in 2009. *Id.*

In addition to reviewing the voluntary disclosures and conducting the interviews discussed above, Revenue Agent Kiger also researched a number of criminal proceedings in the United States in which the defendants were proved or alleged to have used accounts at FCIB and its predecessors for tax evasion or as concealed repositories for the proceeds of a crime. *Id.*, ¶ 22. Through that research, Revenue Agent Kiger learned of the following such situations:

- Howell Woltz – In 2007, Howell Woltz pled guilty to conspiracy to defraud the IRS and conspiracy to commit money laundering. These crimes were part of a larger stock fraud, tax evasion, and money laundering operation. As part of his plea agreement, Mr. Woltz agreed to forfeit certain assets to the U.S. government, including a FirstCaribbean International Bank account held in the name of Sterling ACS Ltd. Sterling ACS, controlled by Mr. Woltz, was a Bahamian corporation in the business of incorporating offshore businesses and providing related financial services.
- John Cockerham – In 2008, former Army Major John Cockerham pled guilty to bribery, money-laundering, and conspiracy to commit bribery in a case involving the receipt of bribes and kickbacks in return for steering government contracts to companies providing goods and services to the U.S. Army in Iraq and Kuwait. Mr. Cockerham's wife and sister allegedly

travelled to Kuwait to collect the bribe money and initially placed it in safe deposit boxes. The funds were later moved to offshore bank accounts. According to an affidavit attached to the 2007 criminal complaint, as part of the criminal investigation, federal agents searched the Cockerhams' home and found, among other things, account application documents for a FirstCaribbean International Bank account in the name of John Cockerham and a 2005 letter from FCIB memorializing a visit by one of Mr. Cockerham's associates (a cooperating witness). Evidence produced at the sentencing in 2009 indicates that Mr. Cockerham actually opened an account with FCIB.

- West Virginia Healthcare Fraud Case – In 2003, Robert Burns, Ronald Halstead, William Filcheck, and Scott Taylor were indicted in the United States District Court for the Northern District of West Virginia for various charges related to health care insurance fraud and laundering of the proceeds of this activity. Messrs. Halstead, Filcheck, and Taylor were convicted of conspiracy and health care fraud. Mr. Halstead was also convicted of money laundering. Mr. Burns has successfully opposed extradition from Ireland and has not yet been tried. Mr. Halstead was sentenced to 121 months in prison; Messrs. Filcheck and Taylor were each sentenced to 24 months in prison. As part of the fraudulent scheme, the defendants transferred funds to an account with Barclays Bank in the British Virgin Islands (later FirstCaribbean International Bank) held in the name of Blackstone Financial Ltd. The United States has filed a complaint seeking to forfeit the criminal proceeds in the FCIB account.
- Terry Davis – In December 2009, Terry Davis pled guilty to tax evasion and currency structuring, and was sentenced in 2012 to over two years in prison. In his plea agreement, Mr. Davis admitted that he had transferred funds to a FirstCaribbean International Bank account in Nevis held in the name of Advanced Marketing Strategies. Mr. Davis was the owner of this entity and had sole signature authority over this account.
- Malchus Irvin BonCamper – In a February 2011 superseding indictment, Malchus BonCamper and five co-defendants were alleged to have conspired to sell fake and fraudulent insurance policies, including one to a company that operated a tour boat called the

Ethan Allen, which later sank on Lake George, New York, killing 20 elderly tourists. Among other things, the indictment claimed that the defendants used accounts at several banks to launder the proceeds of their allegedly fraudulent activity. One of the co-defendants, Edmond Hugh Benton, controlled an account with FirstCaribbean International Bank held in the name of Commercial General Capital Investments Ltd., which received funds from the arrangement. In October 2011, Benton pled guilty to one count of conspiracy to launder money in connection with the payments to his FCIB account.

- FBI Sting – In 2005, the FBI's Miami Division initiated an investigation into public corruption in South Florida. In an undercover operation, FBI agents posing as asset managers seeking to hide proceeds from an investment fraud that was sending out phony statements to investors sought assistance in hiding their money in the Caribbean. The investigation resulted in the money laundering convictions of Broward County Commissioner Josephus Eggelletion and two associates and the indictment of Bahamian lawyer Sidney Cambridge in 2009. In an Affidavit in Support of Request for Extradition of Sidney Cambridge filed with the United States District Court for the Southern District of Florida on October 12, 2010, an FBI Special Agent states that Mr. Cambridge assisted him in setting up an International Business Company (IBC) in Nassau and, after the paperwork was completed to set up the IBC, took the undercover agent to FCIB, where he introduced the undercover agent to an International Corporate Manager in the International Wealth Management office. According to the complaint, the manager assisted the undercover agent in setting up an account in the name of the IBC, which the agent then proceeded to use as a repository for funds that were allegedly the proceeds of the investment scheme.

Id. While some of these criminal cases do not involve tax charges, in Revenue Agent Kiger's experience, persons who use undisclosed foreign bank accounts to hold the proceeds of criminal activity also use the accounts to facilitate the concealment of the income from the IRS. *Id.*

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C. The IRS's Investigation

Based on its prior experience, and the Congressional committee reports regarding correspondent banking practices, the IRS has learned that U.S. taxpayers with accounts at FCIB and the Other Banks may have failed to report income from those accounts, and disclose the accounts themselves, as required by law. *Id.*, ¶¶ 3-9, 13-23, 25, 34. This is also borne out by the experience of the IRS that there is a direct correlation between unreported income and the lack of visibility of that income to the IRS. *Id.*, ¶ 35. That is, when the third-party payer of income to a taxpayer is not required to, or does not, report that income to the IRS, the taxpayer-recipient of that income is far less likely to report that income on her tax returns. *Id.*

Indeed, based on the IRS's experience, U.S. taxpayers have made use of offshore accounts such as the accounts maintained at FCIB and the Other Banks to evade the reporting and payment of income taxes. *See id.* ¶¶ 6, 13-25, 34-37. There have been at least 129 voluntary disclosures made by U.S. taxpayers holding undisclosed accounts at FCIB and its predecessors in the Caribbean where those taxpayers failed to report income related to those undisclosed accounts. *Id.*, ¶ 15. There have also been numerous criminal proceedings in the United States in which the defendants were proved or alleged to have used accounts at FCIB and its predecessors for tax evasion or as concealed repositories for the proceeds of the crime, and thus failed to report that concealed income. *Id.*, ¶ 22. The IRS, therefore, is currently investigating U.S. taxpayers who directly or indirectly hold or held interests in, or have signature or other authority over, undeclared financial accounts at FCIB and the Other Banks and who are not or may not be complying with U.S. internal revenue laws requiring the reporting of foreign financial accounts and income earned on those accounts. *Id.*, ¶ 24.

To further its pending investigation and the identification of U.S. taxpayers who failed to disclose private offshore accounts, the IRS through the Summons is seeking information that will allow it to identify U.S. taxpayer-clients of FCIB and the Other Banks who have not disclosed the existence of their offshore accounts, nor reported income earned on those accounts. The "John Doe" class, therefore, is described as follows:

> United States taxpayers who, at any time during the years ended December 31, 2004, through December 31, 2012, directly or indirectly had interests in or signature or other authority (including authority to withdraw

> funds, trade or give instructions or receive account statements, confirmations or other information, advice or solicitations) with respect to any financial accounts maintained at, monitored by, or managed through [FCIB] and financial accounts maintained at, monitored by, or managed through other financial institutions that [FCIB] permitted to transact client business through its [Wells Fargo Correspondent Account].

Summons, attached as Exhibit A to the Kiger Decl. As discussed below, the Summons and its "John Doe" class are authorized and appropriate under Sections 7609(f) and (h) of the Internal Revenue Code, 26 U.S.C. § 7609.

In addition, because correspondent accounts by their nature are more susceptible to being used for money laundering, the U.S.A. Patriot Act and related regulations imposed obligations on U.S. financial institutions housing correspondent accounts for foreign banks to implement certain policies, procedures and controls, including conducting a periodic review of the correspondent account activity sufficient to determine consistency with information obtained about the type, purpose and anticipated activity in the account. *See* Kiger Decl., ¶ 27. Therefore, the IRS, through the Summons, also is seeking these records from Wells Fargo. *See* Summons, p. 1.

ARGUMENT

The Summons Meets the Requirements for an IRS "John Doe" Summons

One of the primary functions of the IRS is to review and audit tax returns submitted by U.S. taxpayers to ensure that all applicable taxes have been paid. Accordingly, Section 7601 of the Internal Revenue Code requires the Secretary of the Treasury to "cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax." 26 U.S.C. § 7601. To aid the IRS in carrying out this function, Section 7602 authorizes the Secretary to summons records and testimony that may be relevant or material to an investigation. 26 U.S.C. § 7602. Specifically, Section 7602, from which the IRS derives its principal information-gathering powers, authorizes the IRS:

> [f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, [or] determining the liability of any person for any internal revenue tax . . . [t]o summon . . . any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax . . ., or any other person the

> Secretary may deem proper, to appear . . . and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry.

In passing Section 7602, Congress intended "to provide the Secretary with broad latitude to adopt enforcement techniques helpful in the performance of his tax collection and assessment responsibilities." *United States v. Euge*, 444 U.S. 707, 715 n.9 (1980). Indeed, the Supreme Court has noted that section 7602 forms the "centerpiece" of the IRS's "expansive information-gathering authority." *United States v. Arthur Young & Co.*, 465 U.S. 805, 816 (1984). "Under 26 U.S.C. § 7602, the IRS has wide latitude to issue a summons for investigatory purposes." *Reiserer v. United States*, 479 F.3d 1160 1166 (9th Cir. 2007) (*citing United States v. Jose*, 131 F.3d 1325, 1327 (9th Cir. 1997) (en banc)). "'To establish a need for judicial enforcement, this showing need only be minimal . . . . [T]he statute must be read broadly in order to ensure that the enforcement powers of the IRS are not unduly restricted.'" *Jose*, 131 F.3d at 1327-28 (*quoting Liberty Fin. Servs. v. United States*, 778 F.2d 1390, 1392 (9th Cir. 1985)); *see also Arthur Young*, 465 U.S. at 816 ("the very language of § 7602 reflects ... a congressional policy choice *in favor of disclosure* of all information relevant to a legitimate IRS inquiry. In light of this explicit statement by the Legislative Branch, courts should be chary in recognizing exceptions to the broad summons authority of the IRS.")

The IRS's authority to issue "John Doe" summonses to banks or other depositories to discover the identity of individuals who may have failed to disclose all of their income was expressly recognized by the Supreme Court in *United States. v. Bisceglia*, 520 U.S. 141 (1975), and later codified in Section 7609(f), which provides:

> Any summons . . . which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that –
>
> (1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,
> (2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and
> (3) the information sought to be obtained from the examination of the records or testimony (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

26 U.S.C. § 7609(f). The Court's determination as to whether the IRS has met the requirements under Section 7609(f) for the issuance of a "John Doe" summons "shall be made *ex parte* and shall be made solely on the petition and supporting affidavits." 26 U.S.C. § 7609(h)(2).

Here, the Court should authorize the issuance of the Summons because all three statutory prerequisites have been met. First, the Summons relates to the investigation of an ascertainable group or class of persons, namely U.S. taxpayers who hold an interest in accounts at FCIB, as well as other banks that FCIB may have permitted to use its U.S. correspondent account at Wells Fargo. Second, there is a reasonable basis for believing that U.S. taxpayers who held an interest in any such account failed to declare the account and/or the income related to it to the IRS, thereby violating one or more provisions of the internal revenue laws. Third, the information sought is not readily available to the IRS from other sources.

I. The Investigation Concerns an Ascertainable Class

The Summons here clearly relates to an investigation of an ascertainable group of people, which the Summons defines as follows:

> United States taxpayers who, at any time during the years ended December 31, 2004, through December 31, 2012, directly or indirectly had interests in or signature or other authority (including authority to withdraw funds, trade or give instructions or receive account statements, confirmations or other information, advice or solicitations) with respect to any financial accounts maintained at, monitored by, or managed through [FCIB] and financial accounts maintained at, monitored by, or managed through other financial institutions that [FCIB] permitted to transact client business through its [Wells Fargo Correspondent Account].

Summons, p. 1. In other words, the Summons relates to the IRS's investigation of U.S. taxpayers with accounts at FCIB and the Other Banks between 2004 and 2012. This is sufficient to establish that the Summons relates to an ascertainable group of persons.

In an almost identical situation, the Southern District of New York very recently granted the United States' *ex parte* petition for leave to serve a "John Doe" summons on UBS AG. *See In re Tax Liabilities of John Does (UBS AG)*, Order Granting *Ex Parte* Petition for Leave to Serve "John Doe" Summons dated January 25, 2013, Case No. 13-mc-21 (S.D.N.Y. 2013) ("*In re Wegelin & Co.*).[4] In that

[4] A true and correct copy of this Order is attached as Exhibit B to the Kiger Decl.

identical case, the Court granted the United States leave to serve a "John Doe" summons on UBS AG, a bank located in the United States, seeking copies of canceled checks and wire transfers (among other documents) for a class of persons identified as U.S. taxpayers who directly or indirectly had interests in or signatory or other authority with respect to any financial accounts maintained, monitored by, or managed through Swiss bank Wegelin & Co. and financial accounts maintained, monitored by, or managed through other Swiss financial institutions that Wegelin & Co. permitted to transact client business through its United States correspondent account at UBS AG.

Further, in *In re Tax Liabilities of John Does Who from December 31, 2002 through December 21, 2010 had Interests in Financial Accounts Managed through HSBC India*, this Court also held that a substantially similar group or class of individuals was "ascertainable" within the meaning of 26 U.S.C. §7609(f). *See* Order Granting *Ex Parte* Petition for Leave to Serve "John Doe" Summons, Docket No. 10, Case No. 11-CV-1686 (LB) (N.D. Cal. Apr. 7, 2011). In that case, the United States sought court authorization to issue a "John Doe" summons on HSBC Bank USA, N.A. seeking documents establishing the identity of U.S. taxpayers "who at any time during the years ended December 31, 2002 through December 31, 2010, directly or indirectly had interests in or signature or other authority ... with respect to any financial accounts maintained at, monitored by, or managed through [HSBC India]." *Id.*; *see also In re Tax Liabilities of John Does Who from January 1, 2005 through December 31, 2010, Transferred Real Property in the State of California*, 2011 WL 6302284, at *2, Case No. 2:10-mc-00130 (E.D. Cal. Dec. 15, 2011) (holding that IRS investigation related to an ascertainable group of people where the summons "squarely particularize[d] the individuals sought from the general public" by identifying the class as California residents who between 2005 and 2010 were involved in certain real property transfers for little or no consideration); *In re Tax Liabilities of John Does*, 2003 WL 22953182, at * 1, Case No. 03-22793-CIV (S.D. Fla. Oct. 30, 2003) (holding that IRS investigation related to an ascertainable group of people where summons identified class as U.S. taxpayers who between 1997 and 2003 sold credit insurance policies where the policies were reinsured with entities in the Turks and Caicos Islands). Here, similarly, the IRS has established that the investigation underlying the Summons relates to an "ascertainable group or class of persons." 26 U.S.C. § 7609(f).

II. There is a Reasonable Basis to Believe that the Unknown Persons May Fail, or May Have Failed, to Comply with the Internal Revenue Laws

The IRS has a reasonable basis to believe that the unknown individuals who comprise the group of persons set forth in the Summons failed or may have failed to comply with provisions of the internal revenue laws. When enacting Section 7609(f), Congress did "not intend to impose an undue burden on the [IRS] in connection with obtaining a court authorization to serve this type of summons." H. Rep. No. 940658, 94th Cong., 1st Sess., at 311. Accordingly, to meet the "reasonable basis" prong, the IRS need only show that a transaction has occurred that is "of such a nature as to be reasonably suggestive of the possibility that the correct tax liability with respect to that transaction may not have been reported." *Id.* Courts, therefore, have interpreted this requirement narrowly as intended only "to prevent the Service from exercising its summons power in an arbitrary or quixotic manner." *In re Tax Liabilities of John Does, Members of the Columbus Trade Exchange in the Years 1977 and 1978*, 671 F.2d 977, 980 (6th Cir. 1982).

Here, based on the IRS's experience, U.S. taxpayers have made use of offshore accounts such as the accounts maintained at FCIB and the Other Banks to evade the reporting and payment of income taxes. *See* Kiger Decl., ¶¶ 6, 13-25, 34-37. There have been at least 129 voluntary disclosures made by U.S. taxpayers holding undisclosed accounts at FCIB and its predecessors in the Caribbean where those taxpayers failed to report income related to those undisclosed accounts. *Id.*, ¶ 15. There have also been numerous criminal proceedings in the United States in which the defendants were proved or alleged to have used accounts at FCIB and its predecessors for tax evasion or as concealed repositories for the proceeds of the crime, and thus failed to report that concealed income. *Id.*, ¶ 22.

These facts plus the IRS's experience with similar banking situations shows that U.S. taxpayers with accounts at FCIB and the Other Banks may have failed to disclose those accounts, and report income related to them, as required by law. *See id.*, ¶¶ 15, 23, 33-37. The IRS's experience, moreover, demonstrates that there is a direct correlation between unreported income and the lack of visibility of that income to the IRS. *Id.*, ¶ 35. Based on the IRS's experience, U.S. taxpayers have made use of offshore accounts such as the accounts maintained at FCIB through the Wells Fargo Correspondent Account specifically to evade the reporting and payment of income taxes. *Id.*, ¶¶ 6, 13-25, 34-37. This information also establishes that FCIB, or various offshore entities and businesses who assist FCIB, implemented client and account management procedures intended to obscure the clients' identities from detection by the IRS. *See id*, ¶¶ 13-22.

Accordingly, this information is sufficient to establish that the IRS has a reasonable basis for investigating the group of unknown persons included in the Summons. *See, e.g., United States v. Kersting*, 891 F.2d 1407 (9th Cir. 1989) ("John Doe" summons enforced after district court found "the existence of at least one case in which a Tax Court found some of Kersting's programs to be abusive of the tax code." 891 F.2d at 1409. The Ninth Circuit affirmed: "There was ample basis for believing that the persons about whom records were sought had not complied with the tax law." 891 F.2d at 1412); *United States v. Pittsburgh Trade Exchange, Inc.*, 644 F.2d 302, 306 (3d Cir. 1981) (IRS agent's testimony that transactions of the type the summoned party arranged for its clients were "inherently susceptible ... to tax error" sufficient to meet "reasonable basis" prong); *United States v. Ritchie*, 15 F. 3d 592, 601 (6th Cir. 1994) (clients' payment for legal services with large amounts of cash provided a reasonable basis to issue a "John Doe" summons). Here, as Revenue Agent Kiger's Declaration demonstrates, the IRS has not only has a suspicion that the John Doe class includes U.S. taxpayers who are not complying with the law; it knows that the class very likely includes such violators.

III. The Information Sought About the "John Doe" Class Is Not Readily Available from Other Sources

Finally, the information the IRS is seeking through the Summons is not readily available to it from any other sources. The identities of individuals is information that is not readily available to the IRS when those identities are known to third parties who "are not required to identify" them to the IRS. *United States v. Liebman*, 742 F.2d 807, 808 (3d Cir. 1984). In *Liebman*, the Third Circuit held that the IRS could not readily access the names of all clients of a law firm who deducted from their taxes legal fees paid in connection with the acquisition of certain tax shelters from any source other than the law firm itself, including the IRS's own tax records, because "taxpayers who deduct legal fees are not required to identify the recipients." *Id.* Here, the very need for the "John Doe" summons is premised on the fact that U.S. taxpayer-clients of FCIB and the Other Banks– although required to do so – failed to disclose the identity of their offshore bank accounts to the IRS and, therefore, remain unknown to the IRS.

The fact that the IRS was alerted to the existence of a class of persons reasonably likely to be violating internal revenue laws from one source does not establish that the identities of the individuals in that class are readily available to the IRS from that same source, as the Court found in *In re Tax Liabilities of John Does Who Sold Credit Insurance Policies*, 2003 WL 22953182, at *1. In that case, an informant had alerted the IRS "to the existence of a class of persons engaged in transactions as subsidiaries of [American Bankers Insurance Group, Inc. ("ABIG")] that are violative of internal revenue law." *Id.* The court noted, however, that despite having been alerted to the existence of the class, the identity of the members of that class was "not readily available through a means other than from [ABIG] itself". *Id.* Here, similarly, although the United States knows that a group of U.S. taxpayer-clients of FCIB and the Other Banks who are in violation of internal revenue laws exists, the IRS cannot readily establish the identity of the members of that group of individuals from any source other than Wells Fargo.

Indeed, courts have routinely recognized that the identities of U.S. taxpayers whom the IRS reasonably believed were using foreign financial and credit card accounts to avoid complying with the internal revenue laws are not readily available from sources other than the financial institutions involved. For example, on October 30, 2000, the Southern District of Florida in *In re Tax Liabilities of John Does Who During the Years Ended December 31, 1998 and 1999, Had Signatory Authority Over American Express or Master Card Credit, Charge or Debit Cards*, Case No. 00-cv-3919 (S.D. Fla. Oct. 39, 2000), issued an order authorizing the service of "John Doe" summonses upon American Express and MasterCard International, Inc. In that case, the IRS sought authorization to issue "John Doe" summonses on American Express Travel Related Services Co. ("AmEx") and MasterCard International ("MasterCard") seeking account records establishing the identity of U.S. taxpayers who held an interest in AmEx or MasterCard credit, charge or debit cards issued by or through, or for which payment was received from, banks or other financial institutions in Antigua, Barbuda, the Bahamas or the Cayman Islands. *Id.* The Court held that the identities of the relevant U.S. taxpayers was not "readily available" from any sources other than AmEx and MasterCard, including the issuing offshore banks. *Id.*; *see also*

In re Tax Liabilities of John Does Who During the Years Ended December 31, 1999 through December 31, 2001, Had Signature Authority Over Visa Cards, Case No. 02-mc-00049 (N.D. Cal. Mar. 25, 2002) (authorizing service of a "John Doe" summons seeking the identity of U.S. taxpayers who held certain credit card accounts with ties to foreign banks upon Visa International); *In re Tax Liabilities of John Does Who During the Years Ended December 31, 1999 through December 31, 2001, Had Signature Authority Over MasterCard Payment Cards*, Case No. 02-22404 (S.D. Fla. Aug. 20, 2002) (authorizing service of a "John Doe" summons seeking the identity of U.S. taxpayers who held certain credit card accounts with ties to foreign banks upon MasterCard International); *see also In re HSBC India*, Case No. 11-CV-1686 (N.D. Cal. Apr. 7, 2011) (authorizing the issuance of a "John Doe" summons on HSBC India seeking financial account records establishing the identities of U.S. taxpayers with Indian bank accounts).

CONCLUSION

The United States has shown that the IRS has met the requirements of 26 U.S.C. § 7609(f) in order to be allowed to serve its "John Doe" summons. Accordingly, the United States' Petition should be granted.

Respectfully submitted this 29th day of April, 2013.

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