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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

BERNICE K. CRANFORD,)	CV F 04-6025 AWI DLB
)	
Plaintiff,)	MEMORANDUM OPINION
)	AND ORDER GRANTING
v.)	MOTION TO DISMISS
)	
UNITED STATES OF AMERICA,)	
)	(Documents #5 & #6)
Defendant.)	

BACKGROUND

On July 28, 2004, Plaintiff Bernice K. Cranford filed a petition to quash summons pursuant to 26 U.S.C. § 7609(b)(2)(A). The petition alleges that on June 10, 2004, the United States, through the Commissioner of the Internal Revenue issued a summons addressed to American Express Travel Related Services (“American Express”) in the matter of taxpayer Leonard Lloyd Morris relating to tax periods 1987 through 1995. The petition alleges that the summons sought documents relating to a credit card issued to and used by Plaintiff, not the taxpayer. While Plaintiff was formerly married to the taxpayer, the petition alleges they had a prenuptial agreement and at the time of the taxpayer’s death, Plaintiff and the taxpayer were separated. The summons was not served on Plaintiff. The petition alleges that the IRS does not seek the American Express credit card records at issue in good faith or for a legitimate purpose, they are irrelevant to the deceased taxpayer’s tax obligations, and the summons invades

1 Plaintiff's privacy.

2 On November 16, 2004, Defendant United States filed a motion to dismiss the petition to
3 quash. The United States contends that the court lacks jurisdiction over the United States
4 because the United States was never properly served pursuant to Rule 4(i) of the Federal Rules of
5 Civil Procedure. The United States also contends that it has not waived its sovereign immunity
6 and jurisdiction regarding the petition because Plaintiff was not identified in the summons and
7 the summons was issued to aid in the collection of an already assessed tax liability.

8 Plaintiff did not file an opposition or otherwise oppose the United State's motion to
9 dismiss.

10 LEGAL STANDARDS

11 A. Service

12 "A federal court does not have jurisdiction over a defendant unless the defendant has
13 been served properly under Fed.R.Civ.P. 4." Direct Mail Specialists v. Eclat Computerized
14 Techs., Inc., 840 F.2d 685, 688 (9th Cir.1988). While Rule 4 is a flexible rule that should be
15 liberally construed so long as a party receives sufficient notice of the complaint, United Food &
16 Commercial Workers Union v. Alpha Beta Co., 736 F.2d 1371, 1382 (9th Cir.1984), "neither
17 actual notice nor simply naming the defendant in the complaint will provide personal
18 jurisdiction" absent substantial compliance with its requirements. Benny v. Pipes, 799 F.2d 489,
19 492 (9th Cir.1986). Both Rule 12(b)(4) and Rule 12(b)(5) of the Federal Rules of Civil
20 Procedure allow a motion to dismiss for insufficiency of process. Rule 12(b)(4) was designed to
21 challenge irregularities in the contents of a summons. Chilicky v. Schweiker, 796 F.2d 1131,
22 1136 (1986), *reversed on other grounds by* 487 U.S. 412 (1988). Rule 12(b)(5) permits a
23 defendant to challenge the method of service attempted by the plaintiff.

24 Where the validity of service is contested, the burden is on the party claiming proper
25 service has been effected to establish validity of service. Grand Entertainment Group, Ltd. v.
26 Star Media Sales, Inc., 988 F.2d 476, 488 (3d Cir. 1993). The court may weigh and determine

1 disputed issues of fact on a Rule 12(b)(5) motion. Rutter, Cal. Practice Guide: Fed.Civ.Pro.
2 Before Trial, § 9:152 (2004). Where service of process is insufficient, the court has broad
3 discretion to dismiss the action or to retain the case but quash the service that has been made on
4 defendant. Montalbano v. Easco Hand Tools, Inc. 766 F.2d 737, 740 (2nd Cir. 1985).

5 **B. Jurisdiction**

6 Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a motion to dismiss for lack
7 of subject matter jurisdiction. It is a fundamental precept that federal courts are courts of limited
8 jurisdiction. Limits upon federal jurisdiction must not be disregarded or evaded. Owen Equip. &
9 Erection Co. v. Kroger, 437 U.S. 365, 374 (1978). The plaintiff has the burden to establish that
10 subject matter jurisdiction is proper. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377
11 (1994). This burden, at the pleading stage, must be met by pleading sufficient allegations to
12 show a proper basis for the court to assert subject matter jurisdiction over the action. McNutt v.
13 General Motors Acceptance Corp., 298 U.S. 178, 189 (1936); Fed. R. Civ. P. 8(a)(1). When a
14 defendant challenges jurisdiction “facially,” all material allegations in the complaint are assumed
15 true, and the question for the court is whether the lack of federal jurisdiction appears from the
16 face of the pleading itself. Thornhill Publ’g Co. v. General Tel. Elec., 594 F.2d 730, 733 (9th Cir.
17 1979); Mortensen v. First Fed. Sav. & Loan Ass’n, 549 F. 2d 884, 891 (3d Cir.1977); Cervantez
18 v. Sullivan, 719 F. Supp. 899, 903 (E.D. Cal.1989), *rev’d on other grounds*, 963 F. 2d 229 (9th
19 Cir.1992). A defendant may also attack the existence of subject matter jurisdiction apart from
20 the pleadings. Mortensen, 549 F. 2d at 891. In such a case, the court may rely on evidence
21 extrinsic to the pleadings and resolve factual disputes relating to jurisdiction. St. Clair v. City of
22 Chico, 880 F. 2d 199, 201 (9th Cir.1989); Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th
23 Cir.1987); Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir.1983).

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1 **DISCUSSION**

2 **A. Service**

3 Rule 12(b)(5) allows a defendant to move to dismiss an action where the service of
4 process of a summons and complaint is insufficient. Under Rule 4(i), a party seeking to serve
5 the United States must serve a copy of the summons and complaint (1) personally on the United
6 States Attorney for the district in which the action is brought and (2) by certified or registered
7 mail to the United States Attorney General. Fed.R.Civ.P. 4(i); McGuckin v. United States, 918
8 F.2d 811, 813 (9th Cir. 1990). If proper service is not accomplished within 120 days after the
9 complaint is filed and the party on whose behalf service was required cannot show good cause
10 why such service was not made, the action must be dismissed. Fed.R.Civ.P. 4(m); Hart v.
11 United States, 817 F.2d 78, 80-81 (9th Cir.1987). In the Ninth Circuit, dismissals due to
12 technical noncompliance with Rule 4(i) may be excused if (1) the party to be served personally
13 received notice, (2) the defendant would suffer no prejudice from the service defect, (3) there is
14 justifiable excuse or good cause for the failure to serve properly, and (4) the plaintiff would be
15 severely prejudiced if his complaint was dismissed. Borzeka v. Heckler, 739 F.2d 444, 447 (9th
16 Cir. 1984). If good cause is not shown, dismissal is required. See Wei v. Hawaii, 763 F.2d 370,
17 372 (9th Cir. 1985).

18 The United States moves to dismiss Plaintiff’s action for insufficiency of service of
19 process alleging that, although Plaintiff personally served IRS Officer Randy Reece with a copy
20 of her Petition, Plaintiff failed to serve either the United States Attorney for the Eastern District
21 of California or the United States Attorney General as required by Rule 4(i). Plaintiff has not
22 filed an opposition to the United States’ motion. As such, it is difficult to apply the Borzeka test
23 and determine if technical service should be excused. Plaintiff appears to meet parts 1 and 2 of
24 the Borzeka test because the United States did receive actual notice and it does not appear the
25 United States would suffer prejudice from the service defect. Given Plaintiff’s failure to file an
26 opposition, it is unclear if Plaintiff would be severely prejudiced if this action were dismissed; a
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1 showing that is required to meet part 4 of the Borzeka test. Regardless, Plaintiff has failed to
2 meet part 3 of the Borzeka test because Plaintiff has provided no excuse for her failure to comply
3 with Rule 4(i). Plaintiff's failure to serve properly or provide an explanation for her failure can
4 only be attributed to inadvertent error or ignorance of the governing rules, neither of which
5 constitute good cause. See Townsel v. County of Contra Costa, 820 F.2d 319, 320 (9th Cir.1987);
6 Wei, 763 F.2d at 372. Because Plaintiff failed to properly serve the United States Attorney for
7 the Eastern District of California and the United States Attorney General within the 120-day
8 period or to provide good cause for her failure, the court must dismiss Plaintiff's action.

9 **B. Standing**

10 The United States also challenges the court's jurisdiction by asserting that the United
11 States has not waived its sovereign immunity to be sued under 26 U.S.C. § 7609. "The United
12 States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its
13 consent to be sued in any court define that court's jurisdiction to entertain the suit.'" United
14 States v. Testan, 424 U.S. 392, 399 (1976), (quoting United States v. Sherwood, 312 U.S. 584,
15 586 (1941). A court cannot imply sovereign immunity by the United States and it must be
16 unequivocally expressed in statutory text. Lane v. Pena, 518 U.S. 187, 192 (1996) (citations
17 omitted). The Ninth Circuit has addressed the issue of whether a person has standing to
18 challenge an IRS summons as an issue of subject matter jurisdiction. See Ip v. United States
19 205 F.3d 1168, 1171 (9th Cir. 2000).

20 The IRS has broad investigatory powers under the Internal Revenue Code. See 26 U.S.C.
21 §§ 7601-7613. Under section 7602(a)(1), the IRS is empowered to issue a summons to compel
22 examination of "books, papers, records or other data which may be relevant or material" to an
23 inquiry for purpose of "ascertaining the correctness of any return, making a return where none
24 has been made" and "determining" and "collecting" tax liability. Section 7609(a) requires that
25 the IRS serve notice to the individuals whose records they have summoned in a third-party
26 summons. 26 U.S.C. § 7609(b)(2); Ponsford v. United States, 771 F.2d 1305, 1309 (9th

1 Cir.1985). Those individuals are then entitled to petition the court to quash the summons. 26
2 U.S.C. § 7609(b)(2). However, the IRS need not serve such notice where the third-party
3 summons is issued in aid of the collection of "an assessment made or judgment rendered against
4 the person with respect to whose liability the summons is issued." 26 U.S.C. § 7609(c)(2)(D)(i);
5 Ip, 205 F.3d at 1172-73.

6 Notice pursuant to Section 7609(b)(2) grants standing to the person entitled to notice so
7 that he or she may challenge the summons in district court. Ip, 205 F.3d at 1172. "[I]f a person
8 is not entitled to notice . . . , he or she has no standing to initiate an action to quash the
9 summons." Ip, 205 F.3d at 1170, n. 3.¹

10 In this case, the United States contends that Plaintiff does not have standing to quash the
11 summons. At issue is a summons issued on June 10, 2004 to American Express seeking
12 documents relating to a credit card issued to and used by Plaintiff. The summons references
13 taxpayer Leonard Lloyd Morris. Despite the fact the summons concerned Plaintiff's credit card,
14 Plaintiff was not given notice. The United States contends that Plaintiff was not entitled to
15 notice, and thus does not have standing to challenge the summons, because she was not identified
16 in the summons and the summons was issued to aid in the collection of assessed tax liabilities.

17 The Ninth Circuit in Ip v. United States, 205 F.3d 1168 (9th Cir. 2000) addressed when an
18 individual has standing to challenge an IRS summons concerning their own records in connection
19 with collecting a tax assessment from another individual or entity. In Ip, the Ninth Circuit was
20 asked to decide "whether notice is required under 26 U.S.C. § 7609(a) when the Internal Revenue
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22 ¹ To obtain enforcement of a summons in a properly filed action, the IRS must first
23 establish its "good faith" by showing that the summons: (1) is issued for a legitimate purpose; (2)
24 seeks information relevant to that purpose; (3) seeks information that is not already within the
25 IRS' possession; and (4) satisfies all administrative steps required by the United States Code.
26 United States v. Powell, 379 U.S. 48, 57-58 (1964); Fortney v. United States, 59 F.3d 117, 119-
27 20 (9th Cir. 1995). The IRS's burden is slight and typically is satisfied by the introduction of the
sworn declaration of the revenue agent who issued the summons that the requirements have been
met. Fortney, 59 F.3d at 119-20; United States v. Dynavac, Inc., 6 F.3d 1407, 1414 (9th Cir.
1993); United States v. Gilleran, 992 F.2d 232, 233 (9th Cir.1993). "Once a prima facie case is
made a 'heavy' burden is placed on the taxpayer to show an 'abuse of process' or 'the lack of
institutional good faith.'" Fortney, 59 F.3d at 119-20; Dynavac, 6 F.3d at 1414.

1 Service summons a third-party record-keeper to produce financial records of a person who has no
2 outstanding tax liability and who has no legal relationship with any person against whom a tax
3 assessment has been made.” Ip, 205 F.3d at 1169. The petitioner in Ip had bank accounts in her
4 own name at Cathay Bank and the Bank of America. Id. at 1170-71. Under the authority of 26
5 U.S.C. § 7602(a), the IRS summonsed her bank records, without notice to her, to produce her
6 accounts to aid in its investigation of Diamond Trade Ltd., a Hong Kong corporation for which
7 the petitioner’s fiancé was an agent. Id. The petitioner was not given notice. The Ninth Circuit
8 determined that in some circumstances an individual with no tax liability and who was never
9 under IRS investigation is entitled to notice when summonses are issued for personal bank
10 account records to aid the IRS’s investigation into a corporation and collection of its tax liability.
11 Id. at 75-77. The Ninth Circuit concluded that notice is not required if the assessed taxpayer has
12 a recognizable legal interest in the records summoned. Id. at 1176. The Ninth Circuit noted that
13 under the facts before it, the IRS had not presented evidence that the corporate assessed taxpayer
14 had a legal interest in the petitioner’s personal bank account. Id. Accordingly, the petitioner
15 was entitled to section 7609(a) notice and had section 7609(b)(2) standing to challenge the
16 summonses. Id. at 1177.

17 Based on Ip, Plaintiff was entitled to notice, and has standing to challenge the summons,
18 if the taxpayer had no legal interest in the American Express credit card account. The Plaintiff in
19 this case is the wife of the taxpayer against whom the tax liability was assessed, implying a legal
20 interest by the taxpayer. However, in her complaint, Plaintiff maintains that before she married
21 the taxpayer on February 14, 1987, they entered into a written prenuptial agreement that provided
22 they would have no community property and that each spouse’s current and subsequent assets
23 would be separate property. Plaintiff also states that on September 30, 1999, she and the
24 taxpayer separated. Finally, Plaintiff states that she filed a petition for legal separation on
25 October 5, 1999 and she and the taxpayer never reconciled before the taxpayer’s death on April
26 13, 2001. While Plaintiff has not opposed the United States’s motion to dismiss, it appears from
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1 her petition that she is attempting to show that the taxpayer did not have a legal interest in her
2 credit card account.

3 In their motion, the United States provides more information. The United States
4 provides evidence that the IRS has made an assessment against the taxpayer for the years 1987,
5 1988, 1990, 1991, 1992, 1993, 1994, and 1995. The taxpayer was convicted on February 26,
6 1993 for failure to file income tax returns. The United States provides evidence that the
7 taxpayer was required to file tax returns and provide financial information as a condition of
8 probation, but he refused to do so. The United States provides evidence that on March 3, 1993,
9 the taxpayer recorded a certificate of Limited Partnership with the California Office of the
10 Secretary of State and formed Crossroads Dental Limited Partnership (“Crossroads”). The
11 United States provides evidence that its investigation shows that Plaintiff was employed as a
12 manager of Crossroads and had signatory authority to sign checks on Crossroads’ behalf. The
13 United States provides evidence that some of these checks were paid to American Express for the
14 credit card at issue in this action. The United States provides evidence that the summons was
15 issued to gather relevant information and documents regarding the taxpayer’s possible use of
16 Crossroads to shield income generated from the taxpayer’s dental practice and personal assets
17 from the IRS. The United States provides evidence that its on-going investigation reveals that
18 Plaintiff diverted assets formerly held by Crossroads and the Taxpayer’s estate to herself to
19 further shield these assets from the IRS. The United States believes that documents gained from
20 the summons may assist the IRS in locating assets held by Crossroads, or any other entity or
21 person, as the nominee/alter ego and/or transferee of the taxpayer.

22 Based on the allegations and evidence currently before the court, the court cannot find
23 that Plaintiff has standing to challenge the summons. Given the relationship between Plaintiff
24 and the taxpayer, Plaintiff does not fall under Ip. Not only was Plaintiff legally married to the
25 taxpayer at the time of his death, Plaintiff had authority to write checks on behalf of Crossroads,
26 the taxpayer’s limited partnership, and some of these checks appear to have been used to pay for

1 the credit card at issue. Plaintiff has failed to file an opposition or otherwise refute the United
2 State's evidence. Given Plaintiff's burden of proof, the court cannot find an absence of a legal
3 relationship between Plaintiff and the taxpayer. See Northwest Env'tl. Defense Ctr. v. Bonneville
4 Power Admin., 117 F.3d 1520, 1528 (9th Cir.1997) (burden of proof on plaintiff to prove
5 standing); Snake River Farmers' Ass'n, Inc. v. Department of Labor, 9 F.3d 792, 795 (9th Cir.
6 1993)(party invoking federal jurisdiction bears the burden of establishing standing). Because the
7 evidence currently before the court shows a legal relationship, Ip does not apply and this action is
8 governed by Section 7609(c)(2)(D)(i). As such, notice did not need to be given when the
9 summons was issued because it was issued to aid in the collection of a tax assessment. Thus,
10 Plaintiff has no standing to challenge the summons because she was not entitled to notice.

11 **ORDER**

12 Accordingly, based on the above memorandum opinion, the court ORDERS that:

- 13 1. The United States's motion to dismiss is GRANTED; and
14 2. This action is DISMISSED without prejudice.

15
16 IT IS SO ORDERED.

17 **Dated:** January 14, 2005

/s/ Anthony W. Ishii
UNITED STATES DISTRICT JUDGE