No. 04-12789-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WARD DEAN, M.D.,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
THE HONORABLE M. CASEY RODGERS, JUDGE PRESIDING

BRIEF OF APPELLANT

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CERTIFICATE OF COMPLIANCE

Pursuant to the Local Rules for the Eleventh Circuit, it is hereby certified that the text in this brief is double spaced, (except for quotations more than two lines long, argument headings and footnotes, which are single-spaced), and the brief is printed in Times New Roman, a proportionately spaced typeface of no less than 14 points, and does not exceed 14,000 words. The brief was prepared with WordPerfect 6/7/8/9 for Windows, and the exact word count is 13,356, excluding the portions not included by the Local Rules.

DATED: July ____, 2004.

_____
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CERTIFICATE OF INTERESTED PERSONS

WARD DEAN, M.D.,

Plaintiff-Appellant,

v. No. 04-12789-B

UNITED STATES OF AMERICA,

Defendant-Appellee.
_____/

The undersigned certifies that the following listed persons have an interest in the outcome of this case.

1. Hon. M. Casey Rodgers, District Court Judge.

2. United States of America, Appellee.

3. Ward Dean, M.D., Appellant.

Respectfully submitted this ____ day of July, 2004.

_____
Ward Dean, M.D.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not appropriate in this appeal because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

DATED: July ____, 2004.

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STATEMENT OF JURISDICTION

On February 20, 2003, Ward Dean, M.D. (hereinafter ("Dean") filed a complaint for unauthorized disclosure of return information, pursuant to 26 U.S.C. § 7431.[1] (Doc. 1)

United States filed a motion for summary judgment. (Doc.'s 43, 44, 45) Dean filed in opposition to that motion. (Doc. 52)

On May 14, 2004, the Magistrate Judge issued his Report and Recommendation in favor of United States. Dean timely filed an objection to the R & R on May 25, 2004.

The very day Dean filed his objections to the R & R, the District Court purportedly did a *de novo* review of the record and affirmed the Magistrate Judge. The District Court's Judgment was entered on May 26, 2004.

On June 1, 2004, Dean filed his notice of appeal. This appeal is therefore timely pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure and Title 28, United States Code, Section 2107, which allows sixty (60) days to file an appeal when the United States or an officer or agency thereof is a party. Appellate jurisdiction is based upon 28 U.S.C. § 1291.

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1. Unless otherwise noted, all statutory references are to 26 U.S.C.

STATEMENT OF THE ISSUES

I. Whether the determination of a summary judgment motion was premature, since Dean was denied any discovery and his motion to compel same.

II. Whether the disclosure of the criminal nature of the investigation against Dean was necessary.

III. Whether the good faith, but erroneous, interpretation applies in this matter.

STATEMENT OF THE CASE

A. Proceedings Below

On February 20, 2003, Dean filed a complaint for unauthorized disclosure of return information, pursuant to 26 U.S.C. § 7431. (Doc. 1) Dean alleged that Special Agent Tanya Burgess disclosed to several third parties that the nature of the investigation against him was criminal.

Dean attempted to obtain discovery from United States, and he even filed a motion to compel, but the District Court denied any discovery whatsoever. Instead of staying the proceedings, the Court ruled on a summary judgment without affording Dean discovery. (Doc.'s 13, 14)

United States filed a motion for summary judgment. (Doc.'s 43, 44, 45) The Government argued that the return information was appropriately disclosed pursuant to 26 U.S.C. § 6103(k). Dean filed in opposition to that motion. (Doc. 52)

On May 14, 2004, the Magistrate Judge issued his Report and Recommendation in favor of United States. (Magistrate Judge's R & R ("R & R")) The Magistrate basically determined that the disclosures were necessary pursuant to § 6103(k).

Dean timely filed an objection to the R & R on May 25, 2004. Dean asserted that (1) the determination of a summary judgment motion was premature, since Dean

was denied all of his discovery and motion to compel same; (2) the disclosure of the criminal nature of the investigation against Dean was unnecessary; and (3) the good faith, but erroneous, interpretation does not apply in this matter, because disclosures can only be made in order to obtain the information the IRS is seeking.

The very day Dean filed his objections to the R & R, the District Court purportedly did a *de novo* review of the record and affirmed the Magistrate Judge. The Court held: "Having considered the report and recommendation and all objections thereto timely filed, I have determined that the report and recommendation should be adopted." The District Court's Judgment was entered on May 26, 2004.

Dean now appeals from that decision.

B. Statement of Facts

United States does not dispute that Special Agent Tanya Burgess ("Burgess"), as plainly testified to in her declaration (Decl. Burgess, para.'s 17 - 26), disclosed to third parties that the nature of the investigation against Dean was criminal. (Magistrate Judge's Report and Recommendation, pp. 1-2 ("R&R")) United States conceded that such disclosures constitute return information as defined by 26 U.S.C. Section 6103. (R&R p. 2)

Burgess testifies that she disclosed the criminal nature of the investigation against Dean on the face of summonses, return addresses on envelopes, letters,

telephone and personal contacts. (Decl. Burgess, para's 16-27). However, the number of summonses, letters, return addresses on envelopes, and contacts are unknown. (Id.)

C. Standard of Review

Lower court rulings on the interpretation and application of statutes are conclusions of law reviewed *de novo*. Ultimate questions of fact are treated as legal rather than factual determinations to be reviewed *de novo*. A grant of summary judgment is also reviewed *de novo*. Discovery issues are reviewed for abuse of discretion.

SUMMARY OF THE ARGUMENT

The District Court ruled on summary judgment pleadings without affording Dean any discovery whatsoever. The documents and other evidence Dean needed to respond in opposition to United States' summary judgment pleadings was exclusively within the Government's possession and control. It was therefore improper for the Court to rule on the issues without affording Dean discovery. In the alternative, the Court erred by failing to stay the civil proceedings pending the outcome of the criminal investigation.

Pre-existing case law makes clear that revealing the fact that a person is under "criminal investigation" during an IRS' investigation is prohibited by 26 U.S.C. §

6103, because the courts have ruled that it is unnecessary to disclose that the IRS is conducting a criminal investigation in order to obtain the information sought. This is not a factual issue, and United States concedes that the disclosures were made. The courts have determined, as a matter of law, that disclosing the nature of an investigation as criminal violates § 6103. United States has never been able to explain why such disclosures are necessary.

The disclosure of "Criminal Investigation" on the summonses is neither necessary nor a good faith, but erroneous, interpretation of the law. The disclosure of "Criminal Investigation" on the return address of envelopes and letters is also proscribed by the IRS' Disclosure Litigation Reference Book. Burgess was, therefore, expressly instructed in her own Special Agent's Handbook to only include "the necessary symbols" for a return address; i.e., "CID" or "CI" instead of the identifier "Criminal Investigation Division." Burgess blatantly violated her own Handbook provisions.

ARGUMENT

I. WHETHER THE DETERMINATION OF A SUMMARY JUDGMENT MOTION WAS PREMATURE, SINCE DEAN WAS DENIED ANY DISCOVERY AND HIS MOTION TO COMPEL SAME

The District Court ruled against Dean due to his inability to submit evidence in opposition to Special Agent Burgess' declaration. (R&R, p. 12; Doc. 56, Exh. 2;

R&R, p. 10) The evidence concerning Burgess' authority to issue the summonses was exclusively within the possession, custody and control of the IRS. All of the individuals to whom Burgess made oral disclosures, and the exact content of these disclosures, are within the control of United States. The number of written disclosures, and to whom they were made, are within the control of United States. There was also evidence that one oral disclosure was made to a James V. Kelly, disclosing that Burgess told him that she was conducting a criminal investigation against Dean. (R&R, p. 12) This alone raised a material issue of disputed fact, and Dean should have been permitted to pursue discovery.

The federal courts have interpreted Rule 56(f) of the Federal Rules of Civil Procedure to apply to similar facts at issue herein. Dean was seeking discovery and even filed a motion to compel same. Accordingly, the District Court erred by denying discovery and determining the merits of the summary judgment pleadings without affording Dean the opportunity to obtain evidence exclusively within the control of United States and use that evidence in opposition to the motion.

Generally, a party opposing a motion for summary judgment on the ground that further discovery is necessary must file a motion pursuant to Rule 56(f). See Brae Transp., Inc. v. Coopers & Lybrand, 790 F.2d 1439, 1443 (9th Cir. 1986); Foster v. Arcata Assocs., Inc., 772 F.2d 1453, 1467 (9th Cir. 1985). Failure formally to move

under Rule 56(f), however, is not fatal to a party's argument that summary judgment was premature. See, e.g., Garrett v. City and County of San Francisco, 818 F.2d 1515, 1518 (9th Cir. 1987) (pending motion to compel discovery sufficient to raise Rule 56(f) consideration). Rule 56(f) requires the party seeking postponement to "show how additional discovery would preclude summary judgment and why [it] cannot immediately provide 'specific facts' demonstrating a genuine issue of material fact." Mackey v. Pioneer Nat'l Bank, 867 F.2d 520, 523 (9th Cir. 1989).

Alternatively, the District Court should have stayed the proceedings until the criminal investigation was resolved. This would have preserved Dean's absolute right to due process of law.

II. THE DISCLOSURE OF THE CRIMINAL NATURE OF THE INVESTIGATION AGAINST DEAN WAS UNNECESSARY

III. THE GOOD FAITH, BUT ERRONEOUS, INTERPRETATION DOES NOT APPLY IN THE INSTANT MATTER

Pre-existing case law makes clear that revealing the fact that a person is under "criminal investigation" during an IRS' investigation is prohibited by 26 U.S.C. § 6103. See, e.g., Diamond v. United States, 944 F.2d 431, 435 (8th Cir. 1991) (as a **matter of law**, IRS agent did not need to identify himself as a member of the Criminal Investigation Division to secure desired information). In short, this is not a factual issue, because the courts have determined, as a matter of law, that disclosing

the nature of an investigation as criminal violates § 6103.

The disclosure of "Criminal Investigation" on the summonses is neither necessary nor a good faith, but erroneous, interpretation of the law. See, e.g., U.S. v. Barrett, Jr., 837 F.2d 1341, 1356 (5th Cir. 1988); Gandy v. United States, 1999 U.S. Dist. LEXIS 1029, 99-1 U.S.T.C. P50,237 (E.D.Tx. 1999), aff'd, Gandy v. United States, 234 F.3d 281 (5th Cir. 2000).

The disclosure of "Criminal Investigation" on the return address of envelopes and letters is also proscribed by the IRS' Disclosure Litigation Reference Book. The Handbook for Special Agents, amended on June 12, 1992, provides that "neither the signature block nor the ancillary heading of the letter should contain the words 'Criminal Investigation Division.' ***The heading and return address may contain the necessary symbols*** for the letter to be returned to the special agent. It is difficult to accept [United States'] argument that the disclosure was therefore "necessary." Schachter v. United States, 866 F.Supp. 1273, 1276 (N.D. Calif. 1994).[2]

The IRS' Disclosure Litigation Reference Book also proscribes the disclosures at issue herein. It explains that the Handbook for Special Agents, IRM 9.3.1.3.3, contains the current guidance and proscribes the use of the words "criminal

2. Affirmed by Schachter v. United States, 77 F.3d 490, 1996 U.S. App. LEXIS 8899, 96-1 U.S. Tax Cas. (CCH) P50152 (9th Cir. 1996).

investigation division" in the ancillary heading (return address), text, or signature block of circular letters. "Although the text does not explicitly say so, by extension, the words should **not** be used on the return address of the envelope in which the letter is sent, nor on any return envelope which may be enclosed for the recipient's convenience in responding."

Burgess was, therefore, expressly instructed in her own Special Agent's Handbook to only include "the necessary symbols" for a return address; i.e., "CID" or "CI" instead of the identifier "Criminal Investigation Division" or "Criminal Investigation." Burgess blatantly violated her own Handbook provisions. These Handbook provisions are written to prevent the unauthorized disclosure of return information. See also Payne v. United States, 91 F. Supp.2d 1014 (S.D. Tex. 1999),[3] holding that oral and written disclosures that the nature of the investigation is criminal by using the identifier "Criminal Investigation Division" were unauthorized and awarding damages. The Payne Court provides an extremely detailed analysis of the IR Manual provisions, statutes, and regulations.

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3. Reversed and remanded to the district court to re-evaluate the good faith issue. Payne v. United States, 289 F.3d 377 (5th Cir. 2002). Good faith exception found on remand because the disclosures were made before the change to the Handbook for Special Agents. Payne v. United States, 290 F. Supp. 2d 742 (S.D. Tex. 2003).

Burgess makes bald assertions of reliance on IRS procedures in her declaration. A close examination of her testimony, however, discloses that she did not in fact rely upon the memorandums. The February 2, 2001, March 5, 2002, and December 3, 2002[4] memos pertain to Gandy v. United States, 234 F.3d 281 (5th Cir. 2000). The only reasonable reading of these memos is that they authorize the inclusion of the "CI" acronym for criminal investigation, and not as an authorization to announce to the world that someone is under "criminal investigation".

Any reasoning in the memos that since the IRS is permitted to display credentials and badges, then it is OK to include "criminal investigation" on summonses is unreasonable and disingenuous. This logic would also permit the IRS to include the phrase on any correspondence, envelopes, and circular letters. In sum, these memos can only be read in light of the case authority as authorizing the acronym "CI" to be used.

(A) Unauthorized disclosure law.

26 U.S.C. Section 7431 of the IR Code permits a taxpayer to bring a civil action against the United States if a federal employee or official violates that taxpayer's right under Section 6103. Section 7431(a)(1). Congress enacted Section

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4. Burgess could not have possibly relied upon this memorandum, because it was issued **after** she served the summonses at issue herein.

6103 of the IR Code to protect taxpayers' privacy and to prevent the misuse of the confidential information obtained in the course of collecting taxes. *See* S.Rep.No. 938, 94th Cong., 2d Sess. 19, 317-18 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3455, 3746-47. Section 6103(a)(1) provides, in relevant part:

> Returns and return information shall be confidential, and except as authorized by [the Internal Revenue Code,] no officer or employee of the United States ... shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section.

"Return information" is a term of art that includes, among other things, the taxpayer's identity, ***whether the IRS is investigating the taxpayer***, and any information the IRS obtains with respect to a return. Section 6103(b)(2)(A) defines "return information" in broad terms as follows:

> a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over assessments, or tax payments, ***whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing***, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense...

Section 6103(k)(6) permits the disclosure of "return information to the extent that such disclosure is ***necessary*** in obtaining information ... only in such situations and under such conditions as the Secretary may prescribe by regulation." The Code

of Federal Regulations has further implemented this disclosure provision by authorizing disclosure "only if the necessary information cannot, under the facts and circumstances of the particular case, otherwise reasonably be obtained...." 26 C.F.R. Section 301.6103(k)(6)-1.

> ... An officer or employee of the Internal Revenue Service ... is authorized to disclose taxpayer identity information (as defined in section 6103(b)(6)), the fact that the inquiry pertains to the performance of official duties, and the nature of the official duties in order to obtain necessary information relating to performance of such official duties or where necessary in order to properly accomplish any activity described in subparagraph (6) of paragraph (b) of this section.
>
> 26 C.F.R. Section 301.6103(k)(6)-1(a).

The "term 'taxpayer identity' means the name of a person with respect to whom a return is filed, his mailing address, his taxpayer identifying number (as described in section 6109), or a combination thereof." 26 U.S.C. Section 6103(b)(6).

26 C.F.R. Section 301.6103(k)(6)-1(b)(6) defines such activities as appropriate "... to ascertain the amount of any liability ... to be collected...." Such disclosures are permitted under the following restriction:

> ... only if necessary information cannot, under the facts and circumstances of the particular case, otherwise reasonably be obtained in accurate and sufficiently probative form ... or if such activities cannot otherwise properly be accomplished without making such disclosure.
>
> 26 C.F.R. 301.6103(k)(6)-1(a).

The statute and underlying regulations, therefore, state that an IRS agent may disclose return information during an investigation in order to obtain information, provided three requirements are met: (1) the information sought is "with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of the [Internal Revenue Code];" (2) the information sought is "not otherwise reasonably available;" and (3) it is ***necessary*** to make disclosures of return information **in order to obtain** the additional information sought.

This does not mean that all disclosures are authorized under 26 U.S.C. Section 6103(k)(6) in order to obtain necessary information during an investigation. Before the Government can rely on the Section 6103(k)(6) exception, it must show that the oral disclosures that Dean was under criminal investigation, and the written disclosures in the letters, summonses, return addresses, etc. that Dean is under a "criminal investigation" for his tax liability or by using the identifier "Criminal Investigation Division," were ***necessary*** to obtain the information sought. Because a Special Agent finds it necessary to contact third-parties, it does not then give him unlimited authority to disclose all return information to those third-parties. A clear reading of the statute limits Special Agent disclosures to that information which ***must*** be disclosed in order **to obtain the information** which they seek.

Prior to the enactment of The Tax Reform Act of 1976, Section 7213 of the Internal Revenue Code prohibited disclosure "in any manner not provided by law." 26 U.S.C. Section 7213(a) (amended by P.L. 94-455, Sec. 1202(d), 90 Stat. 1686). This language permitted courts to find a waiver of the right to confidentiality of the tax returns and to permit disclosure even though the regulations had not been complied with. See e.g., United States v. Liebert, 519 F.2d 542, 546 (3rd Cir. 1975). The amended version of Section 7213 states that disclosure is prohibited "except as authorized in this title." 26 U.S.C. Section 7213 (1980). Thus, the statute, as amended, does not provide for disclosure beyond that specifically provided for in the "title," and ***it does not permit the court to create judicial exceptions*** to the general prohibition against disclosure. Olsen v. United States, 594 F.Supp. 644, 646-47 (S.D.N.Y. 1984); Sen.Rep. No. 938, 94th Cong., 2d Sess. 318, reprinted in 1976 U.S. Code Cong. & Ad. News at 3747 ("the committee felt that returns and return information should generally be treated as confidential and not subject to disclosure except in those limited situations delineated in the newly amended section 6103 where the committee decided that disclosure was warranted."). This prohibition against disclosure of the returns, except as provided by the statute, may not be circumvented even when the returns relate to a matter in issue during litigation.

The IRS also provides conduct guidelines for Special Agents during

investigations as follows:

> Tactful -- A special agent should be tactful in all investigations conducted. He/she must avoid making any remarks or acts during or following the investigation which are likely to be misinterpreted.
>
> Discreet -- A special agent should be discreet in all investigations conducted. He/she must not make statements or ask questions that will divulge information which would tend to jeopardize the successful conclusion of the investigation. He/she must not unnecessarily injure the reputation of the person being investigated.

Internal Revenue Manual - Administration, Investigative Procedures, 9382.1 (3) and (4).

> "Each agent must exercise particular care in every investigation. Examples of situations or conduct to be avoided are: (c) expressions of personal views as to the merits of the case."

Internal Revenue Manual - Administration, 9382.2.

As argued in more detail below, Dean contends that the oral and written disclosures that: (1) he is under criminal investigation by whatever means were unnecessary, and the Government can neither show a need to disclose any of this information nor that an investigation is criminal, rather than civil. These disclosures subject the Special Agents to potential discipline if it is determined that they violated applicable law and regulations in making unauthorized disclosures. In fact, the Special Agents are potentially subject to criminal prosecution if it is determined they made willful disclosures of return information. 26 U.S.C. Section 7213. It would

indeed be ironic that our form of government has devolved to a state where Special Agents of the Criminal Investigation Division of the IRS can commit potentially felonious offenses with impunity, while working as agents for an administrative agency, a Grand Jury, and the United States Attorney, when they are investigating potential tax offenses.

In U.S. v. Richey, 924 F.2d 857 (9th Cir. 1991), the Ninth Circuit ruled that the strong policy of keeping tax return information confidential outweighed a criminal defendant's right to free speech in upholding a criminal conviction for unlawful disclosure of return information. Certainly, those strong policy considerations regarding the confidentiality of tax return information are equally applicable here. And most importantly, years before the unauthorized disclosures in the instant matter occurred, the federal courts repeatedly found such disclosures unauthorized, and the IRS instructed these agents that they could not disclose the nature of the investigation as criminal.

(B) The disclosures were unauthorized.

The dispositive issues are: 1) whether the United States made unlawful disclosures, a question of law applied to what Burgess has done; 2) whether the exception of § 6103(k)(6) applies, as to the complained of violations, a question of law; and 3) whether the United States acted in good faith, a question of fact applying

a "reasonable man" standard to Burgress' conduct. It simply cannot be disputed that the disclosures that Dean is under criminal investigation were unlawful. The other issues go to civil and criminal liability.

Congress has made the willful disclosure of return or return information a felony. See, e.g., 26 U.S.C. Section 7213; United States v. Ely, 140 F.3d 1089 (5th Cir. 1998); United States v. Moore, 1995 U.S. App. LEXIS 522 (6th Cir. 1995); Ellison v. Buckley, 1991 U.S. App. LEXIS 23008 (4th Cir. 1991); United States v. Author Servs, 804 F.2d 1520 (9th Cir. 1986).

Section 6103 prohibits the disclosure of "return information" except as authorized by Title 26. Return information is "essentially all data associated or identified with a particular taxpayer" (Tierney v. Schweiker, 718 F.2d 449, 452 (D.C.Cir. 1983)), and includes the taxpayer's identity, the ***fact that the taxpayer is under investigation or subject to further investigation***, and data that the Internal Revenue Service has collected about a return. 26 U.S.C. 6103(a) & (b). Even the ***implication*** that a taxpayer ***is under investigation*** constitutes return information. Mid-South Music Corporation v. United States, 818 F.2d 536 (6th Cir. 1987); In re Grand Jury Investigation, 688 F.2d 1068 (6th Cir), reh. denied, 696 F.2d 449 (1982) ("A taxpayer's name and ***the fact that he is, was or will be subject to an investigation*** regarding title 26 obligations, does constitute 'return information' under section

6103(b)(2)(A).").

That Congress specifically had in mind disclosures in the course of investigation of an individual, civil or criminal, is reflected by Section 6103(k)(6). This was the clear congressional intent reflected by the Senate Report and in the strictly limited disclosure provisions. The Senate Report broadly defined the term return information:

> [T]o include the following data pertaining to a taxpayer: his identity, the nature, source or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments and tax payments. It also includes any particular of any data, received by, recorded by, prepared by, furnished to, or collected by the IRS with respect to a return filed by the taxpayer or **with respect to the determination of the existence, or possible existence**, of liability (including the amount of liability) for any tax, penalty, interest, fine, forfeiture, or other imposition, **or offense provided for under the code**.

Senate Report No. 94-938 Tax Reform Act of 1976 (hereinafter cited as "S.Rep."), reprinted in Internal Revenue Cumulative Bulletin, 1976-3 (hereinafter cited as "Bulletin"). S.Rep. p. 318, U.S. Code Cong. & Admin. News 1976, pp. 2897, 3748, Bulletin, p. 356.

Of special importance are the words which immediately followed the above: "Information as to whether a taxpayer's return was, is being, or will be examined or are subject to other ***investigation*** or processing ***is also to be considered return information***." S.Rep. p. 319, U.S. Code. Cong. & Admin.News 1976, p. 3748,

Bulletin, p. 357. The intent to strictly limit disclosure is reflected by the Senate Report:

> IRS officials and employees would be permitted, ***if no reasonable alternative exists***, to make limited disclosures of return information in connection with an audit or investigation **to the extent necessary** in arriving at a correct determination of tax, liability for tax, or the amount to be collected, or otherwise **in the enforcement of any provisions in the Code**.

S.Rep. pp. 341-42, U.S.Code Cong. & Admin. News 1976, p. 377, Bulletin, pp. 379-80.

The report continues:

> In certain instances, it may be necessary for IRS personnel, in obtaining information with respect to a taxpayer from a third party, to disclose the fact that the request for information is in connection with an audit or other tax investigation of the taxpayer. ***In rare and extraordinary cases***, it **may** also **be necessary** for IRS personnel **in obtaining information from a third party** to disclose additional return information, such as the manner in which the taxpayer treated on his return a transaction with a third party. Disclosures under this provision are to be made only in situations and under conditions specified in the regulations....

S.Rep. p. 342, U.S.Code Cong. & Admin.News 1976, p. 377, Bulletin, p. 380.

It should not be forgotten that the Tax Reform Act of 1976 brought about revolutionary changes, not the least of which was the positive declaration that returns and return information are confidential. Likewise, as noted above, the Act defines "return or return information" in the broadest way. Section 6103(b)(8) defines a "disclosure" equally broad, as "the **making known to any person in any manner**

whatever a return or return information."

The Fifth Circuit summarized the intent of Congress this way:

> Section 6103 is a ***regulation of the conduct*** of those who in the course of their duties as government employees or contractors glean information from tax returns. The regulation is prophylactic, ***proscribing disclosure*** by such an individual of any of such information so obtained by him. Plainly, Congress was not determining that all the information on a tax return would always be truly private and intimate or embarrassing. Rather, it was simply determining that since much of the information on tax returns does fall within that category, ***it was better to proscribe disclosure of all return information***, rather than rely on ad hoc determinations by those with official access to returns as to whether particular items were or were not private, intimate, or embarrassing. Because such determinations would inevitably sometimes err, ultimately a broad prophylactic proscription would result in less disclosure by return handlers of such sensitive matters than would a more precisely tailored enactment.

Johnson v. Sawyer, 47 F.3d 716, 735 (5th Cir. 1995).

In the final analysis, common sense dictates that letters and envelopes associated therewith, summonses, and oral disclosures directed at business associates, patients, and others, disclosing to them that Dean is under criminal investigation without a single explanation as to why the disclosures of that information were necessary in order to obtain information is improper under Section 6103. Common sense also dictates that no experienced IRS official would believe, in good faith, that such disclosures were authorized under Section 6103. And most importantly, starting almost a quarter of a century ago before the unauthorized disclosures in the instant matter occurred, the federal courts repeatedly found such disclosures unauthorized.

Yet, after almost 25 years, the majority of Courts have continued to allow the IRS agents illegal and criminal conduct to go unpunished by finding "good faith".[5]

How can a disclosure that the courts have stated is unlawful for 25 years, even overlooking the plain language of the statutes, possibly be made in good faith. As discussed above and below, the IRS itself has expressly instructed Special Agents that they cannot indirectly disclose that the nature of an investigation is criminal by including the identifier "Criminal Investigation Division", much less "Criminal Investigation". It is absurd to even attempt to rationalize that not placing such identifier on the correspondence, but, instead, placing it on a summons is authorized, or placing it somewhere else such as the envelope containing the summons, letter, or a certified mail return receipt, etc.

The issue herein is not whether the disclosures by Burgess were necessary to conduct an effective investigation. This simply is not relevant to unauthorized disclosures proscribed by 26 U.S.C. Section 6103. "The questions are whether the disclosures are 'necessary' to ***obtain the information*** sought and whether the

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5. The truth is that the federal courts have allowed government officials to be unleashed on American citizens to be punished for some perceived violation of over 2,000,000 federal statutes, regulations, and rules that either have a criminal or civil sanction attached thereto, while government officials' criminal conduct is effectively sanctioned. The vast majority of these laws are patently unconstitutional, and some of them are anti-constitutional.

information sought is 'otherwise reasonably available.'" Barrett v. United States, 795 F.2d 446, 451 (5th Cir. 1986). To the extent that third-party communications were necessary, Burgess was required to abstain from improper disclosures. Burgess did not need to disclose any more than Dean's name, arguably his occupation, and the request. How could the disclosures of a criminal investigation be necessary to obtain information?

Every court addressing whether the disclosures at issue herein are necessary has held that it is not necessary in order to obtain the information. In the instant matter, Burgess repeatedly disclosed that Dean is under criminal investigation.

Certainly, the signature block, heading on letters, return envelopes and addresses, summonses, oral disclosures, and other disclosures should be considered in determining whether unauthorized disclosures have been made. For example, a request for information about a Mr. John Doe, and signed by, or otherwise stating "John Smith, Chairman of the Committee Investigating Carriers of the AIDS Virus," would be no less libelous than a letter or other disclosure which blatantly stated that John Smith suspected John Doe of carrying the AIDS virus. The IRS could not avoid the Section 6103 disclosure rules by creating thousands of specialized audit units, so the letters, summonses, return addresses, etc. could state: "Jim Jones, Revenue Agent, Unit to Examine Taxpayers with Gross Income in Excess of $100,000,

Itemized Deductions in Excess of $30,000, Five Dependents, Interest Income in Excess of $5,000, Wages of Under $50,000.00, and Tax Sheltered Investments."

Even by assuming, arguendo, that the phrase "Criminal Investigation Division" or merely and arguably "Criminal Investigation" were not developed with an eye toward making an otherwise illegal disclosure, and not used with the specific intention of disclosing that the undersigned was under criminal investigation, the simple fact remains that it does disclose that Dean is under criminal investigation, and such disclosures are prohibited under the law. Of course, Dean contends that such a proposition is absurd.

In Schachter v. United States, 866 F.Supp. 1273 (N.D.Calif. 1994), the Court held:

> [United States] asserts that the disclosure was "necessary" under 26 U.S.C. 6103. [United States] suggests that the phrase "necessary" does not mean it was absolutely required, only that it would be appropriate or helpful, inter alia, in delivery of the mail, identification of the agent, and in encouraging forthrightness by the agent and respondent. The [United States] notes that in personal interviews, the special agent would have been required to identify himself, including the division for which he worked.
>
> However, [United States'] position is not convincing. Lavin sent the letters assertedly in an attempt to determine the nature of checks deposited in a bank account. ... The government offers no reason why the disclosure was necessary to determine whether the checks were in fact sales revenues of Cal-Ben. Id. [United States'] arguments regarding promotion of forthrightness and proper mail delivery appear to be post hoc rationalizations that lack merit. For instance, the self-address return envelopes were marked simply "CID",

> apparently sufficient identification to allow the mail to be returned to the proper person. ... Further, the new Handbook for Special Agents, amended on June 12, 1992, provides that "neither the signature block nor the ancillary heading of the letter should contain the words 'Criminal Investigation Division.' ***The heading and return address may contain the necessary symbols*** for the letter to be returned to the special agent." It is difficult to accept [United States'] argument that the disclosure was therefore "necessary."
>
> This conclusion is similar to determinations in other courts. In ***Calhoun v. Wells***, the court found: "The information sought by said letters could have been obtained equally well and with far less damage to the plaintiff if the recipients of those letters had been simply been (sic) advised that the Internal Revenue Service was conducting an investigation of the plaintiff's income tax liabilities for the years 1974, 1975, and 1976." 80-2 U.S. Tax Cases 9643 (DC SC 1980).

Schachter, 866 F.Supp. at 1276.

Burgess was, therefore, expressly instructed in her own Special Agent's Handbook to only include "the necessary symbols" for a return address; i.e., "CID" instead of the identifier "Criminal Investigation Division" or "CI" for "Criminal Investigation". Burgess simply violated her own Handbook provisions. These Handbook provisions are written to prevent the unauthorized disclosure of return information that occurred herein.

In the case of Calhoun v. Wells, 80-2 U.S.T.C. 9643 (D.S.C. 1980), a complaint was filed by an individual alleging that the Internal Revenue Service, through its agents, had violated Section 6103 by mailing letters to clients informing them that the taxpayer was being investigated for possible violations of criminal provisions of the

Internal Revenue Code. The Calhoun Court found that there was no need to state in the letters that the plaintiff was under criminal investigation by the IRS, and that such disclosures were in violation of 26 U.S.C. Section 6103. Calhoun, 80-2 U.S.T.C. at 85,140. Calhoun was, however, denied recovery due to good faith considerations. Id. At footnote 15 of the Calhoun case, the court noted:

> Throughout the trial of this case, the defendant Internal Revenue Service argued that paragraph 247.2 of the Special Agent's Handbook ... requires that the recipient of a circular letter, such as the ones sent in this case, be at least indirectly informed that the person about whom the information sought therein was under criminal investigation, because it requires all such letters to be sent in the name of the Chief, Criminal Investigation Division. No useful purpose could be accomplished by addressing that point. Suffice it to say that the manual provision in question does not have the force and effect of law, and is in no way binding on this court. Further, if interpreted as the defendant Internal Revenue Service argues, this court concludes that the manual provision referred to would require an unnecessary disclosure of return information in violation of 26 U.S.C. Section 6103.

It is certain that the Calhoun Court found that requiring correspondence to be sent in the name of the Chief, Criminal Investigation Division would "require an unnecessary disclosure of return information in violation of 26 U.S.C. Section 6103. Thus, the IRS has been put on notice for a quarter century that the inclusion of an identifier, such as "Criminal Investigation Division" or “Criminal Investigation”, is unnecessary and an unauthorized disclosure of return information.

Copies of Section 347 as it read before and after the "Calhoun amendment"[6] were attached to the pleadings filed in the case of Diamond v. U.S., 944 F.2d 431 (8th Cir. 1991). There were two primary changes in Section 347 of the ***Handbook for Special Agents***. First, Section 347.2 contained suggested wording that "the Internal Revenue Service is conducting an investigation of...". Second, the letters before Calhoun were to be sent in the name of the Chief, Criminal Investigation Division, while after Calhoun the letters are to be signed by the special agent with prior approval of the Chief, Criminal Investigation Division, and the special agent was specifically directed to include the title "Special Agent" and "Criminal Investigation Division" in the signature block. As discussed below, this was amended after the Diamond case, and instructs Special Agents not to include said identifier.

It should be immediately apparent that the amendments to Section 347.2 did not result from a good faith but erroneous interpretation of Section 6103. Rather, the directive that the special agent include the identifier "Criminal Investigation Division" was a blatant maneuver by the IRS, the same as it is continuing to maneuver today, to continue to knowingly disclose that the taxpayer is the subject of

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6. The IRS specifically amended Section 347 Handbook for Special Agents in response to the decision of the District Court in Calhoun. In Diamond v. U.S., 944 F.2d 431 (8th Cir. 1991), in the Government's Answer to Request for Admission #7, also attached to Appellant's Petition for Rehearing as Exhibit B, Appeal No. 90-2890SID, is where this admission is on public record.

criminal investigation despite the Calhoun Court's findings that such disclosures were unnecessary and unlawful. Most importantly, the IRS specifically argued in the Calhoun case that the identifier "Criminal Investigation Division" indirectly discloses that the taxpayer was under criminal investigation. Calhoun, 80-2 U.S.T.C. at 85,138 (Footnote 15). The Calhoun Court noted that if the IRS' interpretation of the signature block requirement was correct, the Manual would be requiring an unnecessary disclosure of return information in violation of 26 U.S.C. Section 6103. Id.

Since the Calhoun Court decision, the IRS and Special Agents have known that they could not disclose that a taxpayer is under criminal investigation and, in fact, the IRS claimed to have revised the ***Handbook for Special Agents*** to avoid such disclosures in the **text** of letters. The IRS and Burgess knew, or should have known, as early as 1980, that the use of the identifier "Criminal Investigation Division" by whatever means it is used is an indirect disclosure that a taxpayer was under criminal investigation. The IRS and Burgess knew, or should have known, that the Calhoun Court believed that the use of the identifier "Criminal Investigation Division" in the signature block of a circular letter was an unnecessary disclosure of return information in violation of 26 U.S.C. Section 6103. And, the IRS was aware that disclosures could be either direct or indirect. Section 384.2(4) ***Handbook for Special***

Agents.

In Barrett v. United States, 100 F.3d 35 (5th Cir. 1996), Dr. Barrett had considerable litigation involving his attempts to enjoin the IRS from disclosing that he was under criminal investigation with additional mailings. In the decision in U.S. v. Barrett, Jr., 837 F.2d 1341, 1356 (5th Cir. 1988), the majority ruled that a district court cannot conditionally enforce an IRS summons to insure that the IRS will not violate the non-disclosure of return information provisions contained in 26 U.S.C. Section 6103. Judge Brown, joined by three other judges, wrote a separate opinion concurring in part and dissenting in part with the majority. In arguing that the district court did have the power to conditionally enforce an IRS summons, Judge Brown opined that: (1) revealing that a taxpayer is under criminal investigation is a disclosure of return information, and (2) the disclosure that the taxpayer is under criminal investigation was not necessary. Judge Brown's comments regarding the disclosure of the criminal investigation as not being unnecessary are particularly applicable to the disclosures at issue herein:

> With a stringent code of confidentiality, excused only by similarly stringent exceptions, we come then finally to whether the disclosure of criminal investigation was necessary in obtaining information, which would not otherwise [be] available.' See Section 6103(k)(6).
>
> I would add to the cumulative literature of Barrett I, II and III, only that to this day there has been no statement, either from on high in the solicitor's office or

> the Department of Justice, or on the lower rungs of the IRS field agents, concerning why it was reasonably necessary to inform the patient interviewees that Dr. Barrett was under criminal investigation. ***All that the IRS could conceivably want from their inquiry was (I) the amount which the doctor charged the patient for the reconstructive plastic surgery, (iia) the amount that the patient paid, (iib) whether paid in cash or check, and (iii) the amount, if any, paid by an insurer***. The fact that Dr. Barrett was facing criminal prosecution and punishment would have nothing to do with those inquiries. In any event, as a revelation was not necessary to obtain information, there is no need to question whether the information was not otherwise available. The requirements of Section 6103(k)(6) were not met. The disclosure not being exempt, there was an explicit violation of Section 6103 demand for confidentiality.
>
> Here the taxpayer is branded as a criminal suspect, with no criminal charge yet filed much less tried. The statement of criminal investigation was a disclosure of return information. The disclosure was not authorized. It was a violation of statutorily imposed confidentiality.
>
> Even more than litigious frustration, the damage remedy -- no matter how extravagant the damage award -- cannot undo the harm wrought by the illegal disclosure. Here, revealing that the Doctor is under criminal investigation is of irreparable damage to his personal and professional reputation. Congress, in furtherance of its goal of strengthening the rights of taxpayers, intended that taxpayers should not be exposed to such damning, untried, unproved accusations.

Barrett, 837 F.2d at 1356.

The decision by four Appellate Justices through Judge Brown with regard to the Barrett disclosures hold true in this case. There is no conceivable reason why it would be necessary to inform Dean's associates, patients, or others that he is under criminal investigation. The return envelopes, associated correspondence, and

summonses could have been signed and/or provided a return address to simply the Special Agent, without the additional language being added informing these third-parties that the Special Agents were part of the Criminal Investigation Division of the Internal Revenue Service. Clearly, the summonses stating "Criminal Investigation," as well as the return addresses on envelopes and on letterheads are as blatant of a disclosure as any can be, unauthorized by law, and a criminal violation of the law. See also Heller v. Plave, 657 F.Supp. 95 (S.D.Fla. 1987); Heller v. Plave, 66 AFTR2d 90-5746, 90-5748 (S.D.Fla. 1990); Diamond v. U.S., 944 F.2d 431, 434 (8th Cir. 1991); Marre v. U.S., 70 AFTR2d 92-5159 (S.D.Tex. 1992); Mallas v. United States, 993 F.2d 1111 (4th Cir. 1993); Marre v. United States, 38 F.3d 823 (5th Cir. 1994); Barrett v. U.S., 51 F.3d 475 (5th Cir. 1995); Miller v. U.S., 66 F.3d 220, 223 (9th Cir. 1995); Jones v. United States, 97 F.3d 1121, 1124-25 (8th Cir. 1996); Gandy v. United States, 1999 U.S. Dist. LEXIS 1029, 99-1 U.S.T.C. P50,237 (E.D.Tx. 1999), aff'd, Gandy v. United States, 234 F.3d 281 (5th Cir. 2000).

The Court should not continue to stand idly by while the IRS subjects Dean to the ridicule and humiliation of being labeled as a criminal tax evader in the eyes of his fellows by the damning disclosures that he is the subject of a criminal investigation. This case presents a perfect illustration of the harm which has been brought as a result of the courts protecting IRS' agents criminal conduct. Despite the

instruction in the IRS Manual that "caution must be exercised not [to] damage the reputation of the taxpayer by making [mailings, oral disclosures, business cards etc.] either offensive or suggestive of any wrongdoing by the taxpayer." 5 CCH, Internal Revenue Manual, para. 9781 ch. 347 at 26,891, this is exactly what Burgess did and will continue to do until sanctioned.

The IRS has branded Dean as a criminal suspect, with no criminal charge yet filed, much less tried. The disclosures of a criminal investigation were disclosures of return information. The disclosures were not authorized. They are violations of statutorily imposed confidentiality. The remedy for violation of the Tax Reform Act of 1976 is possible criminal prosecution of the offending Special Agents or a damage suit against the United States. The instant action is the damage suit, but the Magistrate Judge and Federal Judge have expressly allowed the IRS to continue violating the Act and committing felonies with absolute impunity. The lower Court could have ended the illegal disclosures, *sua sponte*, at any time, but it has chosen not to do so. The only way the IRS, its employees and agents, could violate the law and commit multitudes of felonies for the last quarter of a century is the outright license by the courts through their refusal to enforce the law.

It is patently obvious that the damage remedy affords no real protection to Dean. The damage suit remedy is fruitless. Prospective criminal penalties lie in the

almost limitless discretion of the prosecutor. Considering that the Department of Justice and U.S. Attorney's Office are the principal advocates against Dean, and they are working with Burgess, there is no realistic likelihood that criminal prosecution would ever be initiated against her.

Even more than litigious frustration, the damage remedy -- no matter how extravagant the damage award -- cannot undo the harm wrought by the illegal disclosures. Here, revealing that Dean is under criminal investigation is of irreparable damage to his personal and professional reputation. Congress, in furtherance of its goal of strengthening the rights of individuals, intended that they should not be exposed to such damning, untried, unproved accusations.

The President must comply with Section 6103. The Congress and its committees must comply with Section 6103. The Department of Justice and all other executive departments or agencies must comply with Section 6103.[7] But obviously IRS Special Agent Burgess need not.

Historically, only about one-half of the cases receiving a full scale investigation by a special agent are recommended for prosecution. H. Balter, Tax Fraud and Evasion, sec. 3.04[4] (5th ed. 1983); 1 R. Fink, Tax Fraud, sec. 6.02[1]

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7. Section 6103 takes precedence over even the Freedom of Information Act. See, e.g., Church of Scientology v. Internal Revenue Service, 484 U.S. 9, 108 S. Ct. 271, 98 L. Ed. 2d 228 (1987).

(1990). Prosecution on some of the cases recommended for prosecution by a special agent are declined after further review by the IRS District Counsel's office and/or Justice Department review. Additionally, investigations for each tax year are independent. The grand jury might not indict for the years being currently investigated. Yet, the lower court has to the present date expressly authorized Burgess' illegal conduct by delaying justice and failing to remedy the illegal conduct.

In Heller v. Plave, 657 F.Supp. 95, 98-99 (S.D.Fla. 1987), cited favorably by the Eighth Circuit in Diamond, the court ruled as follows:

> Congress enacted [Section] 6103 to protect taxpayers' reasonable expectation that information submitted to the IRS would remain confidential. Johnson v. Sawyer, 640 F.Supp. 1126, 1132 (S.D.Tex. 1986). In the Johnson case, the IRS issued a press release with information about the taxpayer under investigation. The Southern District of Texas found that disclosing the taxpayer's age, address, and the suspicion that he had altered documents and claimed false business deductions on his tax returns, were improper under [Section] 6103. In the case at bar, Defendant disclosed the same type of information to many of Plaintiff's clients.

In Johnson v. Sawyer, the suit was filed seeking damages for the unlawful disclosure of tax return information, among other causes of action. Johnson claimed that a Press Release disclosed five items in violation of Section 6103: (1) his age, (2) his address, (3) the suspicion that he had altered documents and claimed false business deductions concerning his 1974 and 1975 returns, (4) his position at American National being executive vice-president, and (5) his being required to pay

back taxes, penalties, and interest. The Johnson Court found:

> Those five items constituted part of the data received, recorded, or collected by the IRS with respect to Johnson's return and the determination of his liability for an offense. His residential address was part of his "identity". 26 U.S.C. Section 6103(b)(6). ...Given observations such as those, this Court must conclude that the Release contained "return information" under Section 6103.
>
> The term "disclosure" means "the making known to any person in any manner whatever a return or return information." 26 U.S.C. Section 6103(b)(8). Given that expansive definition, this Court must hold that the Release "disclosed" the return information.
>
> Issuing the Release therefore violated Section 6103 unless some exception to the general rule against disclosure applies. 26 U.S.C. Section 6103(a). *Unable to find a statutory exception, the defendants ask this Court to, in essence, create a judicial one.*

Johnson, 640 F.Supp. at 1131.

The same elements are apparent herein: (1) the fact that an individual is under criminal investigation is undisputably return information, (2) the Special Agent disclosed this return information, and (3) no exception to the rule against disclosure applies. Thus, the Special Agent violated Section 6103 and Dean is entitled to damages for each unauthorized disclosure. United States did not argue below that the disclosure of the nature of the investigation was a good faith, but erroneous, interpretation of the law. In fact, the lower Court explicitly or at least implicitly determined that it was a correct interpretation of the law.

The Johnson Court thoroughly reviewed the legislative history[8] underlying Congress' intent, and it found that:

> "Congress made the language of Section 6103 quite clear: any disclosure of return information is illegal 'except as authorized by this title.' 26 U.S.C. Section 6103(a)." ... In light of that explicit statutory language and legislative history, this Court concludes that it cannot judicially carve any additional exceptions to Section 6103's general ban against disclosures. See also Rodgers v. Hyatt, 697 F.2d 899 (10th Cir. 1983); Olsen v. Egger, 594 F.Supp. 644, 647 (S.D.N.Y. 1984); Dowd [v. Calabrese, 101 F.R.D. [427] at 428-29 [D.D.C. 1984]."

Johnson, supra at 1132-33.

The final trial court decision in the Johnson case was issued in 1991. See Johnson v. Sawyer, 760 F.Supp. 1216 (S.D.Tex. 1991) ("We have already held that the issuance of the release violated Section 6103 and that 'a reasonably competent IRS official should have known that that disclosure was illegal.'"). Johnson v. Sawyer, 640 F. Supp. at 1134).[9] The Government appealed the 1986 and 1991

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8. For example, see House Conference Report No. 94-1515, reprinted in 1976 U.S. Code Cong. & Ad. News 4118, 4180 ("The Senate amendment provides that returns and return information are ... not subject to disclosure except as specifically provided by statute") and 4186 (conference agreement to follow that Senate amendment after modifying those specific statutory exceptions).

9. At the time of the events complained of, actions for violations of Section 6103 were governed by 26 U.S.C. Section 7217, which permitted suit only against the individual violator, not against the United States. Johnson v. Sawyer, 640 F. Supp. at 1137. Section 7217 was repealed effective September 3, 1982 and replaced by 26 U.S.C. Section 7431, which authorizes suit against the United States, but not against the individual violator. Mid-South Music Corp. v. Kolak, 756 F.2d 23, 25 (6th Cir.

decisions to the Fifth Circuit, and the trial court's opinion, relevant to this appeal, was affirmed. Johnson v. Sawyer, 980 F.2d 1490 (5th Cir. 1992).

> The threshold question here is whether a violation of Section 6103 occurred at all. Johnson asserts that by releasing the protected information about him, the IRS agents clearly violated Section 6103. Some of the information released about Johnson had been discussed in his tax evasion proceeding, but other information about him was neither discussed in that proceeding nor otherwise appeared in the record of the court. Although provisions of Section 6103 exempt certain disclosures, ***no provision specifically exempts disclosures such as those made in the instant case***.
>
> ... Although we make no rule selection, we nevertheless observe that even if we were to follow the Ninth Circuit's rule as typified in its Lampert decision (which we do not), the disclosures made by the IRS agents in the instant case would still ***constitute a violation of Section 6103***.
>
> ... But several other items contained in those releases (Johnson's middle initial..., his age, ***his home address***, ...) were not discussed at his arraignment or sentencing or placed in any public record. The government concedes that additional information about Johnson had been taken from his confidential taxpayer file or from the IRS investigation of Johnson, and inserted in the press release.

United States' Motion for Rehearing En Banc was granted on October 14, 1993, and a Supplemental and Amending Panel Opinion was entered the same date. Johnson v. Sawyer, 4 F.3d 369 (5th Cir. 1993). The Supplemental and Amending Panel Opinion again affirmed that the five items in the Press Release, including the disclosure of Johnson's residential address, violated Section 6103.

1984).

> Section 6103 embodies a congressional determination that return information is confidential. Congress did not seek to protect solely the financial aspect of return information but the personal aspect as well, expressly prohibiting inter alia the release of the taxpayer's identity. That Congress statutorily recognized the magnitude of this privacy interest is strong evidence that a reasonable person would indeed be highly offended by the publication of his return information.

Johnson v. Sawyer, supra at p. 374

> We find inescapable the conclusion that the IRS agents' violations of the standard of behavior established in Section 6103 amounted to negligence under Texas tort law -- if not to either reckless disregard or deliberate violation of that standard. Even under the relaxed Lampert rule, which again we neither adopt nor reject, the IRS agents' activities actionably violated Section 6103's standard.

Id. at p. 381.

As found by the Johnson Court, "Congress did not seek to protect solely the financial aspect of return information but the personal aspect as well, ***expressly prohibiting*** inter alia the release of the taxpayer's identity." Johnson, supra at p. 374. A taxpayer's identity includes his mailing address: "the term 'taxpayer identity' means ... his mailing address... ." 26 U.S.C. 6103(b)(6).

On March 16, 1995, the *en banc* opinion was rendered. See Johnson v. Sawyer, 47 F.3d 716 (5th Cir. 1995). The Section 6103 violations were not reviewed by the *en banc* opinion, or not included in United States' petition for rehearing *en banc*, thereby conceding the issue that disclosure of Johnson's home address violated

Section 6103. The Court reversed the FTCA claim and remanded for dismissal.

If these actions were sanctionable, surely the disclosures of a criminal investigation are violations of Section 6103. 26 U.S.C. Section 6103(b)(2)(A) provides that return information includes "whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing ... or with respect to the determination of the existence, or possible existence, of liability... ." It cannot be disputed that this return information was disclosed. And the trial court's reasoning misses the statutory and regulatory exceptions governing disclosures. The Code of Federal Regulations authorizes disclosure "only if the necessary information cannot, under the facts and circumstances of the particular case, otherwise reasonably be obtained." 26 C.F.R. Section 301.6103(k)(6)-1.

The summonses have fairly severe penalties attached for the noncompliance therewith. With these penalties in mind, why did Burgess state "criminal investigation" on the summonses? How was it necessary to obtain the information she was seeking? Nowhere is it explained that the disclosures of "criminal investigation" were necessary to obtain the information the IRS was seeking. Nor has the Government ever been able to explain why such disclosure is absolutely necessary to obtain any information it is seeking.

There is no conceivable reason why it would be necessary to inform Dean's

associates, customers, clients and patients that he was under criminal investigation. The summonses, letters, headings on letters, and envelopes associated therewith at issue herein could have been signed and/or provided a return address to simply the Special Agent, without the additional language being added informing these third-parties that the Special Agent was part of the Criminal Investigation Division of the Internal Revenue Service; thereby broadly telling whoever saw the summonses that she was conducting a criminal investigation against Dean.

In another case similar to Dean's, a taxpayer was awarded damages for several letters mailed to the taxpayer's clients which contained statements by the IRS agents that "he was a Special Agent in the Criminal Investigation Division of the IRS conducting a criminal tax investigation of" the taxpayer. Heller v. Plave, 657 F. Supp. 95 (S.D.Fla. 1987). In that case the court found that those disclosures, and others, depicted a lack of integrity on the part of the Government. Id. at 99. Agent Plave was ultimately held liable for thirteen (13) disclosures regarding the status and nature of the investigation of Mr. Heller. Id. at 99. "On December 31, 1987, the parties settled this action for $21,816.41 and Plave dismissed his appeal with prejudice." Heller v. Plave, 66 AFTR2d 90-5746, 90-5748 (S.D.Fla. 1990).

On or about the same time the Heller case was being litigated, the IRS was sued again in the Southern District of Iowa. Diamond v. United States, Civil No. 87-86-D-

1 (S.D.Iowa). Dr. Diamond filed a complaint alleging that Special Agent Jay, during a criminal investigation on behalf of the Internal Revenue Service, unlawfully included in circulated letters reference in the signature block to "Criminal Investigation Division."

The trial court concluded that a reasonable IRS agent in Special Agent Jay's situation would have known of the right provided to Dr. Diamond by Section 6103 and 7431, as clarified by applicable IRS regulations and other IRS interpretations. Thus, the trial court narrowed the issue to the pivotal question of whether Special Agent Jay's conduct violated clearly established statutory standards found therein.

The trial court found that Special Agent Jay followed the instructions in the ***Handbook for Special Agents***, which provided at the time at Section 347.2 that: "When mailing circularizations, all such letters will be signed by the special agent with prior approval of the Chief... . The title "Special Agent" and Criminal Investigation Division will be included in the signature block." Since Special Agent Jay blindly followed this Manual provision, the trial court concluded that any disclosures in the form letters resulted from a good faith, but erroneous, interpretation of the statute, the clarifying regulations, and the IRS internal rules and interpretations. The court further concluded that it was not a clearly established unlawful disclosure at that time to include "Criminal Investigation Division" in the signature block.

Notwithstanding the trial court's ruling, the IRS did not amend its Manual after this decision, which instructed special agents to include the identifier. Dr. Diamond appealed the decision.

The Eighth Circuit confirmed the trial court's finding that although the disclosures were unauthorized, the IRS' Manual was an erroneous, but good faith interpretation of Section 6103. Diamond v. U.S., 944 F.2d 431, 434 (8th Cir. 1991).

> In our society, even without an actual conviction, the suggestion of criminal activity can transform and devastate an individual's life; in Diamond's case, it might destroy the confidence of his patients in their doctor, leaving him without a practice. Congress passed section 6103 to prevent such damage. Indeed, one of the four proclaimed purposes of the Tax Reform Act of 1976, from which section 6103 emerged, was to 'strengthen the rights of taxpayers.' H.R.Rep. No. 658, 94th Cong., 1st Sess. 7 (1975), ***reprinted in*** 1976 U.S.Code Cong. & Admin.News 2897, 2902. Commenting on this subject, the Senate Committee on Finance explained:
>
> > The most significant administrative purposes are those which strengthen taxpayers' rights.
> >
> > The committee amendment provides definitive rules relating to the confidentiality of tax returns, an area where there has been much abuse in the past. It strictly limits disclosure from tax returns.
>
> In our opinion, Agent Jay did not need to identify himself as a member of the Criminal Investigation Division to secure the desired information. In follow-up letters to many of the canvassed patients, Agent Jay identified himself only as "Special Agent" and did not mention his affiliation with the Criminal Investigation Division. Similarly, in the summonses prepared to gather information on Diamond's financial transactions, Agent Jay did not mention that he was with the Criminal Investigation Division. Moreover, other agents operating in the same state as Agent Jay have issued circular letters without the

> Criminal Investigation Division identification. ... Indeed, Agent Jay's failure to reiterate his affiliation with the Criminal Investigation Division in his follow-up letters demonstrates that such identification was not necessary to obtain the requested information.[10]

Diamond, 944 F.2d at 434.

The Diamond Court expressly limited its decision concerning the good faith defense advanced by the United States therein to the issue of the IR Manual's requirement that this specific identifier be included in the signature block of a circular letter. The Diamond Court found that even including this identifier was an unauthorized disclosure, thereby affirming the trial court. Such decision concerning the IRS' good faith interpretation, however, was based upon numerous factors as detailed in the majority opinion, not remotely involved herein, and the concurring opinion of Circuit Judge MaGill.

> I also wish to emphasize that the *Internal Revenue Manual's* requirement that the specific identifier be included in the signature block of a circular letter was a ***good faith*** interpretation of 26 U.S.C. Section 6103. The ***Internal Revenue Manual*** specifically warns that "unnecessary embarrassment to the taxpayer should be avoided." Internal Revenue Service, ***Internal Revenue Manual***, Part 9 (Investigations), Section 9324.2(2)(c) at 9-94.1. The IRS also instituted and followed procedures designed to prevent wrongful disclosures. The IRS's failure to recognize that the identifier in the signature block would be a wrongful disclosure is understandable. The use of such an identifier is a common business practice that is improper only in rare circumstances such as when it unnecessarily discloses the nature of an IRS investigation.

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10. Of course Dean was prohibited from any discovery whatsoever in order for him to obtain and submit similar evidence.

Diamond, 944 F.2d at 438.

> An agent, before sending a circular letter such as the one used by Agent Jay, ***must get approval*** from the agent's supervisor to send a circular letter ***and get approval of the contents of the letter***. Internal Revenue Service, ***Internal Revenue Manual, Handbook for Special Agents***, Section 347.2 at 9781-111. Agent Jay stated that ***a circular letter INDICATING the investigation was criminal in the body of the letter would not be approved*** by a supervisor. Deposition of Roger J. Jay at 92-93.

Diamond, 944 F.2d at 438 n. 3. [Emphasis added].

Following the Eighth Circuit's ruling in the Diamond case, the Internal Revenue Service belatedly amended the ***Handbook for Special Agents*** a year later, which had instructed special agents to include the identifier "Criminal Investigation Division" at the bottom of its correspondence for over a decade. The Diamond decision was published September 12, 1991, and rehearing was denied on October 30, 1991.

Another case addressing unauthorized disclosures in correspondence is Marre v. U.S., 70 AFTR2d 92-5159 (S.D.Tex. 1992). The disclosures at issue were that Marre was under investigation by the Criminal Investigation Division of the IRS.

> Early in 1985 IRS Special Agent Lindell Parrish began a criminal investigation of Marre and Agritech. Parrish mailed out a large number of circular letters to Agritech investors. Plaintiffs Exhibit 1. The letters stated that Plaintiffs were under investigation by the Criminal Investigation Division of the IRS for allegedly aiding and assisting in the false tax returns in violation of 26 U.S.C. section 7206(2), and that in the view of the IRS, any tax return that showed deductions or credits in connection with the Agritech tax shelter was false and

> fraudulent. The letter assured its recipients that they were not targets of the investigation, but rather potential witnesses. Attached to each circular letter was a questionnaire to be returned to Parrish.
>
> Other communications, not quite so withering in tone but clearly revealing that Plaintiffs were the object of the unwelcome attention of the Criminal Investigation Division were sent to various Agritech employees, to some of Agritech's suppliers, to some of the financial planners, and to other investors. Parrish also conducted several face-to-face interviews.
>
> Parrish's testimony showed that he had not thought it necessary to review or keep abreast of the regulations. His actions cut a wide swathe through them, as even a cursory reading of them makes clear. Chapter 347 of the Manual's "Handbook for Special Agents" deals with the subject of circular letters; it stresses the embarrassment that may result, both to the taxpayer and the IRS, if circular letters are improperly used, requires the approval of the Chief of the Criminal Investigation Division before the letters are sent out (including approval of the letters to be sent out) and cautions the agent against, among other things, "making the letter ... suggestive of any wrongdoing by the taxpayer." Parrish obtained no such approval, and the letters he sent out could hardly have been more suggestive of wrongdoing by Plaintiffs; we would be hard-pressed to imagine a more flagrant violation of Chapter 347. Parrish also ran seriously afoul of Chapter 348, which deals with the disclosure of return information, cautions the agent that "return information" is defined very broadly, ***to include, for example, the fact that a person is under investigation***, and allows disclosure of return information only to the extent necessary to gather data that may be relevant to a tax investigation. The Court finds that the disclosures made by Parrish were not necessary, and that they were indeed impermissible disclosures of Marre's return information.

Marre v. U.S., 70 AFTR2d at 92-5159-60.

The Marre case was appealed to the Fifth Circuit, and United States filed a cross-appeal. Marre v. United States, 38 F.3d 823 (5th Cir. 1994). Following the bench trial, the district court found that Agent Parrish had made 215 unauthorized

disclosures. These included: 88 disclosures via circular letters to the investors, 23 disclosures to Agritech suppliers, 10 disclosures to promoters, and 94 "other" disclosures. Neither party challenged these findings on appeal. The appeal only concerned punitive damages and other issues not relevant herein.

On April 20, 1995, the Fifth Circuit rendered its decision in the case of Barrett v. U.S., 51 F.3d 475 (5th Cir. 1995), which is precisely on point with the facts and law in the instant matter. The Fifth Circuit reversed the judgment in favor of the United States and remanded for a determination of Dr. Barrett's damages. Although these disclosures occurred during the early 1980's, the Fifth Circuit did not apply a good faith, but erroneous standard, even though the same Manual directed special agents to use the identifier "Criminal Investigation Division."

The investigation of Dr. Barrett was initiated as a civil one, but subsequently transferred to the criminal division. Special Agent Hanson, Criminal Investigation Division, was in charge of the criminal investigation, and determined that it would be necessary to find out from Dr. Barrett's patients the amount each had paid and whether any part was paid in cash. Barrett, 51 F.3d at 476-77.

Special Agent Hanson sent summonses to the hospitals where Dr. Barrett practiced, and they supplied him with 386 names and addresses of Dr. Barrett's patients. Nine months later during 1983, Special Agent Hanson sent a "circular

letter" to each of the 386 patients, informing them that Dr. Barrett was being investigated by the Criminal Investigation Division, and requesting information regarding the nature and amount of the fees paid to Dr. Barrett. Barrett, 51 F.3d at 477.

On November 29, 1983, Dr. Barrett filed an action against the Internal Revenue Service, alleging violations of 26 U.S.C. Section 6103 and Section 7431. The thrust of Dr. Barrett's suit was that the IRS' circular letters unnecessarily informed his patients that he was under investigation by the Criminal Investigation Division. "It is undisputed that this particular disclosure to Dr. Barrett's patients constitutes the disclosure of 'tax return information.'" Barrett, 51 F.3d at 477.

After five appeals to the Fifth Circuit, Dr. Barrett's case was remanded at last for trial to determine whether it was necessary for Special Agent Hanson to disclose that Dr. Barrett was under criminal investigation to each, or any, of his patients and, if so, whether the disclosure might have been avoided. The Fifth Circuit panel emphasized that the question was not whether the information sought was necessary; rather, the question was ***whether the disclosure was necessary*** to obtain the information and, if it was, whether the information sought was "otherwise reasonably available." Barrett, 51 F.3d at 477-78. The most recent Fifth Circuit panel applied the clearly erroneous standard of review when it determined whether the district court

erred when it found that "the disclosure in Agent Hanson's circular letter did not violate 26 U.S.C. [Section] 6103 and 26 U.S.C. [Section] 7431." Id. at 478. The Barrett Court ruled that:

> The IRS offered no evidence that disclosing the fact that a taxpayer is under criminal investigation is necessary to obtain the information sought by sending the letters. ***Cf. Diamond v. United States***, 944 F.2d 431, 435 (8th Cir. 1991) (as a matter of law, IRS agent did not need to identify himself in circular letters as a member of the Criminal Investigation Division to secure the desired information). ... As further evidence that the disclosure was unnecessary, ***the formal IRS summonses*** for information sent out by Agent Hanson before the circular letters ***did not disclose*** that Dr. Barrett was under criminal investigation.
>
> Aside from the uncontradicted evidence presented through Mr. Twardowicz at trial, we note that there are several statutes that make it unlawful for third parties to give knowingly false information to an agent of the Internal Revenue Service, whether the investigation is civil or criminal. (Cites omitted). Certainly, the existence of these criminal penalties sufficiently encourages third parties to exercise appropriate care in responding to inquiries from an employee of the Internal Revenue Service.
>
> Here, there is no evidence to support a finding that it was necessary to state in the body of the letter that Dr. Barrett was currently under investigation by the Criminal Investigation Division of the Internal Revenue Service. ... Consequently, we hold that the district court's conclusion that such disclosure was necessary is clearly erroneous and must be reversed.

Barrett, 51 F.3d at 478-79.

The Barrett Court then addressed the United States issue of good faith. First, the Court repeated the often held determination that a reasonable IRS agent can be expected to know statutory provisions governing disclosure, as interpreted and

reflected in IRS regulations and manuals. Barrett, 51 F.3d at 479.

Next, the Court addressed Chapter 347.2 of the IRS "Handbook for Special Agents," also at issue in the instant matter.

> Of ***paramount importance***, however, the Chief of the Criminal Investigation Division had not approved the content of the circular letters as required by Chapter 347.2 of the IRS "Handbook for Special Agents." (Quote omitted). Agent Hanson testified that he was aware of this Chapter at the time that he mailed the letters. Curiously, however, Agent Hanson further testified that he did not recall any specifics of Chapter 347.2 when he prepared and mailed out the letters.[11] As of the date of trial, Agent Hanson had worked as a special agent in the Criminal Investigation Division of the IRS for 19 years. Yet, he provided no explanation for his complete failure to follow the ***mandates*** of Chapter 347.2. *See* ***Diamond***, 944 F.2d at 438 n. 3 (IRS agent stated that a circular letter indicating in the body of the letter that the investigation was criminal would not be approved by a supervisor under Chapter 347.2). Finally, we note that the investigation that was being conducted by Agent Hanson was for the tax years 1977 and 1978. Nonetheless, Agent Hanson sent letters to patients who were treated by Dr. Barrett in 1976, 1979, and 1980. No work or investigation whatsoever had been performed for these years.
>
> Applying an objective good-faith test to the uncontroverted facts, can lead us to only one conclusion: that a reasonable IRS agent would not have violated the express provisions contained in Chapter 347.2 of the IRS manual. Agent Hanson did not act in good faith. We reverse the judgment of the district court; the IRS is liable to Dr. Barrett under 26 U.S.C. [Section] 6103.

Barrett, 51 F.3d at 479-80.

A special agent of the Internal Revenue Service is expected to be familiar with 26 U.S.C. Sections 6103 and 7431, and the agent is expected to be familiar with the

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11. Again, Dean was stopped by the trial court from obtaining any discovery whatsoever in the instant matter.

IRS regulations that elucidate them. Huckaby v. United States Dept. of Treasury, 794 F.2d 1041, 1049 (5th Cir. 1986), reh'g denied, 804 F.2d 297 (5th Cir. 1986).

The disclosures of return information at issue herein have been found unauthorized by the federal courts for almost 2 ½ decades. The Diamond Court expressly found that the law was clearly established, but the IRS' Manual provided a good faith, but erroneous, interpretation relied upon by the agent in that case. That case was thirteen (13) ago, and the law was clearly established then.

Accordingly, following Diamond, Barrett v. United States, 51 F.3d 475 (5th Cir. 1995), and the plethora of appellate and federal district court decisions cited herein, Dean is entitled to an order finding that the disclosures were unauthorized. The number of disclosures and the amount of damages to be determined on remand after adequate discovery is finally provided to Dean.

This type of conduct by special agents has repeatedly been found to be intolerable. "The testimony did not demonstrate the need for disclosing any more than Defendant's name, occupation and request. All statements by Plave, ranging from his conducting a 'criminal investigation of Daniel Neal Heller' to characterizing Plaintiff as 'unscrupulous,' were unnecessary and improper under [Section] 6103." Heller v. Plave, 657 F.Supp. at 98-99; Johnson v. Sawyer, 640 F.Supp. at 1132.

Congress intended to protect the privacy of taxpayers in enacting Section 6103,

creating ***narrow exceptions*** to that prohibition against revealing taxpayer return information. See 26 U.S.C. Sections 6103(c)-(o) (1996). "The most effective means of preventing a disruption in government operations resulting from claims against the government is for agents handling tax return information to abide by the regulations Congress set forth to protect taxpayer privacy. A taxpayer who is able to prove the elements required by section 7431(a)(1) to show an improper disclosure of return information can hardly be said to bring an 'insubstantial claim.'" Jones v. United States, 97 F.3d 1121, 1124-25 (8th Cir. 1996). See also Miller v. U.S., 66 F.3d 220, 223 (9th Cir. 1995); Mallas v. United States, 993 F.2d 1111 (4th Cir. 1993).

Further, United States did not even argue below why the disclosures were necessary or a "good faith, but erroneous, interpretation" of the statute by the IRS or an individual agent. The Eighth Circuit has determined that "a failure to act in accordance with statutory provisions governing disclosure place[s] the burden on the government to show a 'good faith, but erroneous interpretation' of the statute by the IRS or an individual agent." Jones v. United States, 97 F.3d at 1125; Rorex v. Traynor, 771 F.2d 383, 387 (8th Cir. 1985) (the burden of pleading and proving good faith under section 7431 rests with the government). It was improper for the trial court, ***sua sponte***, to argue on behalf of the Government why these disclosures were necessary and otherwise attempt to meet the good faith, but erroneous, interpretation

burden for the United States. This alone should require reversal and remand of this case.

CONCLUSION

For each and every reason stated above, Dean prays the Court reverse the decision below and remand with instructions for the lower court to determine the number of disclosures and reward him damages thereon after he is afforded due process by obtaining discovery.

Respectfully submitted this ____ day of July 2004.

_____
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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that two true and correct copies of the foregoing BRIEF OF APPELLANT was deposited with the United States Postal Service, first-class postage prepaid, on this the ____ day of July 2004, and addressed as follows:

Gary Allen
Attorney, Appellate Section
U.S. Department of Justice
Post Office Box 502
Washington, D.C. 20044

_____
Ward Dean, M.D.