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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SUSAN B. LONG, et al.,)	
)	
Plaintiffs,)	No. C 74-724S
)	
v.)	DECLARATION OF SUSAN B.
)	LONG IN SUPPORT OF
UNITED STATES INTERNAL REVENUE)	MOTION TO ENFORCE THIS
SERVICE,)	COURT'S 2006 ORDERS AND
)	ITS 1976 CONSENT ORDER
Defendant.)	

1. My name is Susan B. Long. I submit this declaration in support of my Motion to Enforce this Court's 2006 Orders and its 1976 Consent Order.

2. Pertinent background information about me, my Freedom of Information Act (FOIA) requests, and this Court's 1976 Consent Order may be found in my declarations filed in this action on January 5, 2006 (Dkt. 9), January 30, 2006 (Dkt. 20), and June 19, 2006 (Dkt. 44), and in this Court's Orders of April 3, 2006 (Dkt. 21) and August 2, 2006 (Dkt. 54). This declaration will try not to repeat the information in those declarations and orders but will refer to them as needed to support particular factual statements.

1 **The IRS’s Initial Response to This Court’s April 3, 2006 Order**

2 3. Within two weeks of this Court’s Order of April 3, 2006, the IRS provided
3 me, through counsel, with CDs containing digital copies of what were represented to be the
4 AIMS Table 37 reports covering the period from the beginning of Fiscal Year 2002 through
5 March 2006, the most recent month for which Table 37 reports had then been run. The
6 reports were in a Microsoft Word format, unusual for compilations of large quantities of
7 data.

8 4. I reviewed the reports and noticed that they did not appear to be complete in
9 certain respects. Among other things, I noticed that it appeared that the reports included
10 only summary tables at the national level, rather than the breakdowns of statistics by IRS
11 division and area offices that I understood Table 37 to contain. In addition, the tables did
12 not appear to be complete because they did not break down audit information by taxpayer
13 income level as completely as the IRS has previously done in data that it provided me that
14 was derived from Table 37. More broadly, I noticed that they had page numbers indicating
15 that each monthly report was thousands of pages long, but, based on gaps in the numbers,
16 it was apparent that thousands—indeed most—of those pages had not been provided to me
17 for each month’s report.

18 5. In addition, I ascertained that the IRS had provided me with cumulative
19 monthly Table 37 reports for each of the first 11 months of each fiscal year (that is,
20 October through August), as well as a “final” year-end report run in November of each
21 fiscal year including data from October through September. The IRS, however, had not
22 provided copies of its first and second “preliminary” fiscal year-end runs of Table 37 for
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1 FYs 2002, 2003, 2004, and 2005. Based on the Internal Revenue Manual, I had learned
2 that the IRS generates three versions of the fiscal year-end report. The first is run shortly
3 after the end of the final month (that is, around the same time as the regular monthly
4 reports for the other 11 months of the fiscal year); the second is run in October; and the
5 final is run in November. According to the Manual, the three reports are run so that the
6 IRS can correct any errors in that data and make the final version “as accurate as possible.”
7 Only the November version of the year-end reports was included in the tables provided in
8 April 2006.

9 6. My counsel, Scott Nelson, raised these issues of the completeness of the
10 IRS’s Table 37 production in a letter to counsel for the IRS, Gerald Role of the United
11 States Department of Justice (DOJ) on April 26, 2006. A true and correct copy of Mr.
12 Nelson’s letter is attached as Exhibit 1.

13 **The IRS’s Abortive Appeal and the Negotiations That Followed**

14
15 7. Before the IRS responded to the April 26, 2006 letter, it filed a notice of
16 appeal in this case on June 2, 2006. At or around the time of that filing, DOJ informed me,
17 through counsel, that the notice of appeal was a “protective” one because the time for
18 appeal was about to expire, but DOJ had not yet obtained authority to pursue an appeal on
19 behalf of the IRS from the Solicitor General of the United States, who must approve all
20 such appeals.

21 8. As this Court is aware, the IRS filed a motion for stay in this Court shortly
22 after it filed its notice of appeal, in which it argued that it should be permitted to redact
23 from Table 37 any cells of data containing information concerning only one or two

1 taxpayers because, the IRS argued, provision of that data would violate 26 U.S.C. § 6103,
2 which prohibits the IRS from releasing taxpayer return information (but exempts from the
3 prohibition compilations of data that would not identify individual taxpayers).

4 9. My Supplemental Declaration in Opposition to Defendant's Motion for Stay
5 Pending Appeal, filed June 19, 2006 (Dkt. 44), explained how the IRS's position on
6 redaction was inconsistent with its prior release, as recently as 2004, of statistical data
7 containing cells with information on one or two taxpayers and with its current practice of
8 releasing "microdata files" containing information from individual tax returns with
9 identifying information deleted. I also explained that the information in Table 37 did not
10 provide any information that would allow someone reviewing the reports to identify the
11 individual taxpayers whose information was included in cells of one or two.

12 10. While the motion for a stay was pending before this Court, my attorneys
13 received notice from the United States Court of Appeals for the Ninth Circuit that the
14 IRS's appeal had been assigned to the court's appellate mediation program, and that
15 briefing would be deferred pending exploration of the possibility of settling the case
16 through the mediation program. As a result, Mr. Nelson began discussions with a DOJ
17 appellate lawyer, Terry Milton, about resolving issues posed by this case, including the
18 issues of compliance with this Court's orders that had been raised in Mr. Nelson's April
19 26, 2006, letter to Gerald Role.

20 11. On August 1, 2006, Ms. Milton sent my attorneys a letter informing them
21 that the IRS had "discovered" that Table 37 included many more tables than had been
22 provided to me in April, including Small Business and Self-Employed Division (SBSE)
23

1 area tables, and Large and Mid-Size Business Division (LMSB) industry tables. A true
2 and correct copy of Ms. Milton's letter (minus the DOJ logo, which did not transmit
3 correctly to my attorney's computer) is attached hereto as Exhibit 2. Within approximately
4 two weeks after Ms. Milton sent her letter, the IRS provided me, through counsel, with
5 CDs containing additional tables for the Table 37 reports it had produced in April.

6 12. Ms. Milton's letter (Exhibit 2) also stated for the first time that the IRS was
7 withholding the preliminary year-end reports for FYs 2002, 2003, 2004 and 2005 pursuant
8 to FOIA Exemption 5, on the ground that the "deliberative process privilege applies to the
9 preliminary and non-final AIMS reports."

10 13. This Court denied the IRS's stay motion in its Order of August 2, 2006.
11 The IRS did not thereafter seek a stay from the Ninth Circuit.

12 14. Because this Court's August 2 Order required the parties to meet and confer
13 concerning redaction of Table 37, and because the issue of the application of 26 U.S.C.
14 § 6103 was one of the issues that was part of the IRS's appeal, Mr. Nelson and counsel for
15 the IRS agreed that they would meet and confer regarding redaction as part of their broader
16 effort to resolve the issues on appeal through mediation.

17 15. Because the Court's April 3 Order required the IRS to produce Table 37 on
18 an ongoing basis "upon request," I have made regular requests for monthly Table 37
19 reports postdating March 2006, the first two of which were the April and May 2006
20 reports. Those regular requests have continued up to the present time. In late August
21 2006, shortly before a scheduled meeting between Mr. Nelson and DOJ and IRS attorneys
22 to discuss the redaction issue and the other issues posed by this case and the Consent
23

1 Order, the IRS provided me, through counsel, with electronic copies of some Table 37
2 reports for April and May 2006. Although this Court's August 2 Order prohibited the IRS
3 from redacting cells with data on one or two taxpayers until either the parties agreed to
4 redaction through the meet-and-confer process ordered by the Court or the Court modified
5 the 1976 Consent Order, the copies of the April and May Table 37 reports were
6 electronically redacted, with black bars appearing in the files where cells containing
7 information on one or two taxpayers were located.

8 16. On Friday, September 1, 2006, Mr. Nelson met at DOJ's main offices with
9 DOJ and IRS attorneys to discuss possible resolutions of the issues in this case. The
10 parties did not agree on any resolutions, but did agree to continue discussions (with
11 periodic reports to the Ninth Circuit mediator).

12 17. Upon further review of the files that the IRS had provided in August 2006, I
13 again became concerned that the IRS had not provided me with all of Table 37. First, a
14 number of table series provided for April 2006 were not in the May copies, other table
15 series provided for May were missing from April's copies; and neither set contained other
16 table series that had been provided earlier for March 2006 and earlier months. Further, I
17 noted that none of the files contained data on examination of returns by the Wage and
18 Investment Income Division (W&I). The IRS later told me that (1) detailed breakdowns of
19 W&I audit data were not contained in AIMS Table 37, but (2) Table 37 did contain some
20 "inventory" tables for W&I audits.

21 18. I carefully reviewed the tables that the IRS had provided me and found no
22 "inventory" tables covering W&I audits. I also found hundreds of pages of gaps in the
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1 page numbers (Table 37 is continuously paginated) where tables appeared to be missing
2 from my copies.

3 19. Discussions between Mr. Nelson and the DOJ appellate lawyer, Ms. Milton,
4 continued into early December 2006 but did not result in any agreement. While those
5 discussions were ongoing, the IRS did not provide me with any Table 37 reports postdating
6 May 2006. In September 2006, the IRS did, however, provide me with a sample report
7 generated by its A-CIS system, which provided a small subset of the examination data
8 contained in Table 37, as well as certain additional data.

9
10 **The Dismissal of the Appeal and the End of Negotiations**

11 20. In December 2006, Ms. Milton informed Mr. Nelson that the Solicitor
12 General had decided not to authorize pursuit of the appeal in this case, that the appeal
13 would be dismissed by the IRS, and that Ms. Milton would no longer participate in
14 discussions aimed at resolving the case because it was no longer an appellate matter and no
15 longer subject to the Ninth Circuit mediation program.

16 21. On December 22, 2006, Mr. Nelson wrote a letter to Mr. Role and Ms.
17 Milton of DOJ inquiring whether the IRS wished to continue discussions of a possible
18 resolution of the case. A true and correct copy of the letter is attached hereto as Exhibit 3.
19 Mr. Nelson noted that the IRS seemed to have ceased its production of data, and stated that
20 I was not willing to continue discussions unless the IRS agreed by January 15, 2007 to
21 provide, at a minimum, updated data in the form of the sample A-CIS report it had
22 provided in September by the end of January, and on a monthly basis thereafter.

23 22. By January 15, 2007, the IRS had not agreed to provide the data described

1 in Mr. Nelson's December 22, 2006 letter, nor had it provided any further Table 37 reports.
2 However, on January 23, 2007, the IRS did send me a letter *denying* my request for
3 preliminary year-end Table 37 reports for FY 2006, invoking Exemption 5 and contending
4 that the reports were subject to the "deliberative process privilege." A true and correct
5 copy of the letter is attached hereto as Exhibit 4.

6 23. On January 25, 2007, having not received agreement from the IRS to
7 provide the data requested in the December 22, 2006 letter, Mr. Nelson sent Mr. Role a
8 letter stating that I was discontinuing discussions of a possible resolution of the case in
9 light of the IRS's failure to respond to the conditions expressed in the December 22, 2006,
10 letter. A true and correct copy of the January 25, 2007, letter is attached hereto as Exhibit
11 5. Unbeknownst to Mr. Nelson when he sent the letter, Mr. Role of DOJ had just sent him
12 a letter stating that the IRS wished to continue discussions and would provide the A-CIS
13 data by January 31, 2007. On receiving that information, Mr. Nelson retracted his letter of
14 January 25, and the IRS provided the A-CIS data by the end of January.

15 24. Thereafter, however, the IRS did not respond to Mr. Nelson's efforts to
16 resume discussions, nor did it provide updated A-CIS data in February or March. As a
17 result, on March 27, 2007, Mr. Nelson wrote another letter to Mr. Role of DOJ. A true and
18 correct copy of that letter is attached hereto as Exhibit 6. The letter concluded: "[I]t is our
19 position that the parties have more than satisfied Judge Pechman's requirement that they
20 meet and confer with respect to the issue of redaction of Table 37. They have been unable
21 to reach agreement on that issue, as they have also been unable to reach agreement on any
22 alternative to full compliance by the IRS with the orders in the Seattle litigation. It is now
23 up to the IRS to comply with the court's orders or to seek relief from the court if it wishes

1 to redact Table 37 or otherwise avoid the court's order that Table 37 be produced in its
2 entirety. Of course, Ms. Long reserves the right to seek additional relief from the court to
3 see that the IRS satisfies its obligations under the court's orders."

4 **The IRS's Eventual Production of Additional Table 37 Reports**

5 25. The IRS never answered Mr. Nelson's letter of March 25, 2007. Shortly
6 after the letter was sent, however, the IRS provided updated A-CIS data, and has been
7 providing some data on a monthly basis since then. In addition to the A-CIS report, the
8 IRS's monthly production has also included some additional statistical data on its
9 collection and enforcement efforts. The A-CIS report and the other data provided on a
10 monthly basis is not coextensive with Table 37: it is much less extensive and detailed than
11 Table 37, and at the same time contains some information not in Table 37. The IRS also
12 redacts the A-CIS report to avoid production of cells with data on one or two taxpayers.
13 Despite Mr. Nelson's letter, however, the IRS did not resume production of Table 37 in
14 March 2007, nor did it seek modification of this Court's orders requiring production of
15 Table 37.

16 26. Also soon after Mr. Nelson's letter, IRS officials contacted my colleague,
17 David Burnham, directly and asked if he and I would be interested in meeting with two
18 Deputy IRS Commissioners, Kevin Brown and Linda Stiff, to discuss the possibility of
19 resolving our differences with the agency over various FOIA matters. We agreed to meet
20 with the Deputy Commissioners, with the caveat that we would not discuss issues that
21 were directly involved in this litigation.
22

23 27. The meeting ultimately took place in June 2007, when Mr. Burnham and I

1 met with Mr. Brown (who by then had become Acting Commissioner of the agency) and
2 Ms. Stiff. The meeting did not result in any significant agreements. The IRS officials did
3 inform me that the IRS's willingness to continue to produce the abbreviated monthly A-
4 CIS reports and the other data accompanying them was not dependent on any
5 developments in this litigation and was not conditioned in any way on my giving up rights
6 under this Court's orders. During the meeting, Mr. Brown also referred to the IRS's
7 position that 26 U.S.C. § 6103 requires redaction of cells in statistical tables with data on
8 one or two taxpayers and stated that it was dictated by the IRS's Chief Counsel and that he
9 felt compelled to follow the Chief Counsel's advice.

10 28. After my meeting with the Acting Commissioner and Deputy
11 Commissioner, the IRS showed no further signs of compliance with this Court's order for
12 nearly two months. By mid-August 2007, I had received no additional Table 37 reports for
13 nearly a year, despite my regular requests for monthly and year-end Table 37 data. Then,
14 on August 20, 2007, the IRS sent me paper copies of Table 37 reports for June and July
15 2006; on September 28, 2006, it sent paper copies of Table 37 for October 2006, and on
16 October 1, 2007, it sent copies of the final year-end report for FY 2006 (that is, the
17 November 2006 final run of the September 2006 report). On November 13, 2007, we
18 received paper copies of Table 37 for August 2006 (sent under cover of a letter dated
19 October 31, 2007), which the earlier productions had skipped over. That production,
20 however, did not include any tables concerning SBSE examinations; the IRS explained that
21 its photocopier had broken down and the SBSE tables would be provided later. The IRS
22 did not provide the SBSE tables for August 2006 until January 11, 2008. With the most
23 recent release, the IRS is now over one year behind in its production of Table 37 reports;

1 that is, the most recent period covered by reports it has provided is October 2006, whereas
2 the Table 37 report for January 2008 should by now be available.

3 **Deficiencies in the IRS's Production of Table 37**

4 29. The paper copies of the June through October 2006 Table 37 reports, like
5 the electronic copies of the April and May reports supplied in August 2006, were redacted
6 to avoid provision of any cells in any table containing data on only one or two taxpayers.
7 Unlike the electronic copies, which were blacked out using some form of software, the
8 paper copies supplied this fall were manually redacted, apparently by marking over cells of
9 one or two with a marker pen, then photocopying the pages.

10 30. The IRS's redaction of Table 37 includes not only cells of one or two, but
11 also the totals in any column that contains a cell with information on one or two taxpayers.
12 The apparent purpose of redacting the totals is to prevent calculating the numbers in the
13 redacted cells by adding up the unredacted cells and subtracting them from the total. But
14 the IRS redacts totals even when there are two or more cells in a column that have been
15 redacted because they contain information on one or two taxpayers. Of course, in those
16 circumstances, it would be impossible to calculate the figures in the redacted cells even if
17 the totals were provided. Thus, even on its own theory, the IRS has substantially over-
18 redacted. A true and correct copy of an example of a Table 37 page containing such over-
19 redaction is attached hereto as Exhibit 7. This is not, however, an isolated instance.
20 Rather, the IRS's uniform practice appears to be to redact totals whenever one or more
21 cells in a column have been redacted.
22

23 31. I have also reviewed the recently produced copies of Table 37, as well as

1 the electronic copies produced in 2006, and concluded that the IRS has not produced all of
2 Table 37. Based on gaps in the page numbers that appear on each page of each report, it
3 appears that at least several hundred pages of each month's report have not been provided
4 to me by the IRS. For the copies received on paper, there were many more gaps in the
5 page numbers, so that over a thousand pages appear to be missing. Many table series
6 present in earlier months' Table 37 reports were not included in the paper shipments. I
7 have not located W&I inventory tables, which the IRS has admitted are part of Table 37, in
8 any report that has been provided to me. I do not know what other tables not present in
9 any releases may not have been provided to me, because the IRS has never been willing to
10 provide me with a complete listing of the component tables of Table 37.

11 32. Based on my review of the Table 37 reports that have been provided to me
12 between August 2006 and the present, I also continue to stand by what I said about Table
13 37 in my Supplemental Declaration in Opposition to Defendant's Motion for Stay Pending
14 Appeal (Dkt. 44) as to the impossibility of identifying individual taxpayers based on the
15 statistical data in Table 37. Although the IRS has produced many more of the tables that
16 Table 37 comprises than it had at the time of that declaration, the data in the additional
17 tables that the IRS has provided is still broken down into very broad geographic and
18 industrial categories and broad ranges of taxpayer income, such that even a cell with data
19 on only one taxpayer would pose no genuine risk of identifying that taxpayer.

20 33. The IRS's very recent decision to provide paper copies of the Table 37
21 reports rather than electronic files, as it did when it provided me with copies of Table 37 in
22 2006, has significantly impaired the usefulness of the data. Providing a print-out of
23 information in a database or a digitally structured set of tables does not provide the

1 requester the same information as an electronic copy of the database for a number of
2 different reasons. First, a database is “structured”—information about a specific attribute
3 is always stored in a set location (“field”), information is linked together, and information
4 both about the structure and the linkages is stored as part of the database. Because of the
5 structured way the information in a database is linked or joined together, a person using a
6 database can more readily locate specific data of interest because of the way the records
7 and fields are linked. The “structure” of the information is thus a very important part of a
8 database, and this structure is not transferable to paper. Thus, when an agency responds to
9 a request for a database by providing a print-out of information from the database, it is not
10 the same document or record because the “structure” and “linkages” in the database are not
11 transferable to paper.

12 34. In addition, databases are stored in a digital language. The values or
13 features of the digital language allow you to easily combine information, summarize
14 information, and search for information through the use of queries. Digital language,
15 however, cannot be copied onto paper, and when information is printed from a database a
16 different language is printed on paper. And this non-digital language on paper is nowhere
17 near as useful as the digital language. When an agency responds to a request for a database
18 by providing a print-out of information from the database, the agency is therefore not
19 providing the same document or record because the “digital language” of the electronic
20 database is not transferable to paper.

21 35. There are many practical consequences when an agency provides a
22 requester a print-out of information from a database, rather than an electronic copy of the
23 database containing the “structured” information in a “digital language.” For example, the

1 speed of access to the information is much greater in an electronic copy of a database
2 rather than a print-out of information from the database. This is because having structured
3 information in a digital language allows a computer to perform functions that a human
4 would otherwise have to perform. For example, a user of Table 37 could total examination
5 hours provided in different sub-tables in a matter of minutes or even seconds. In contrast,
6 if someone had to go through thousands of pages to manually calculate this sum it would
7 take much longer and therefore cost more to perform the same function.

8 36. In addition to the speed of access to information, the structure and digital
9 language of databases also results in more reliable information. For example, a user who
10 was able to perform calculations on Table 37 data electronically would receive an answer
11 that is more reliable than if a person performed this calculation. And this is because there
12 is a much greater chance of a human error in performing the calculation (adding figures
13 line by line for hundreds of pages) versus a computer performing the function. Thus, in
14 addition to having speedier access to the information, the structure and digital language of
15 a database also results in information that is more reliable. In addition, while digital
16 information is precise as to the numbers recorded, the numbers on paper printouts may be
17 fuzzy or unclear so that many numbers cannot be accurately read with certainty.
18 Furnishing copies of the printouts often compounds the problem of legibility. This further
19 source of unreliability was a problem in the printouts of Table 37 we received.

20 37. The structure and digital language of a database, and the corresponding
21 speed of access to the information and reliability, results not only in greater access to the
22 information, but also significant cost-savings due to the ability for computers to perform
23 the work that persons would otherwise have to perform.

1 38. Due to the reliability of the information, the ability to access and analyze
2 information, the speed at which these tasks can be performed on a computer, and the
3 corresponding cost-savings, it is now unusual for government agencies to store information
4 on paper. We thus live increasingly in a digital age. And one of the benefits of this digital
5 age is that this electronic information provides the means for public oversight, to see what
6 the government is doing, in ways which were not economical to do before. For example,
7 the information TRAC has obtained from various government agencies consists of more
8 than a terabyte of data, which is the equivalent of about 500 million printed pages. With
9 this large body of data and the use of computers, TRAC has efficiently analyzed the
10 information and issued reports on such topics as whether the IRS audits poor people at a
11 greater rate than rich people, whether there is a large judge-by-judge disparity in the
12 decisions on requests for asylum, whether a doubling of border patrol staff results in
13 increased apprehensions, whether charges involving domestic terrorism are increasing or
14 decreasing, and many more topics. If TRAC had to do its analyses on paper, with paper
15 records rather than electronic databases, the services TRAC provides could not be done
16 because there would be nowhere near enough resources to perform the analyses.

17 39. Accordingly, it is important that individuals, the news media, and
18 organizations receive the same information government agencies maintain and use so that
19 they can independently analyze and assess how the agencies are performing. Public access
20 to electronic records is therefore vital to ensure the oversight and effectiveness of
21 government.

22 40. The only apparent excuse for the IRS's decision to produce the Table 37
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1 reports on paper is the claimed need to redact cells in the tables that contain data on one or
2 two taxpayers. Even leaving aside the question whether the redaction is appropriate (or
3 permissible), however, redaction does not in any way necessitate providing the records in
4 paper form. As the IRS's production of electronic files with redacted Table 37 data for
5 April and May 2006 demonstrates, the agency is capable of redacting electronic copies of
6 Table 37.

7 41. Indeed, for many of the same reasons that electronic records are more useful
8 than paper records, redaction of electronic records is also much easier, more accurate, and
9 less time-consuming and costly than redacting paper records. When an electronic file is
10 redacted, the person performing the task can easily, precisely, and accurately search for
11 and find the exact cells of data to be redacted, and then use electronic means to remove or
12 efface them from the file with the click of a mouse or a simple keystroke. Most readily
13 available software packages permit such search and replace operations. By contrast, the
14 type of manual redaction performed by the IRS on the paper copies of Table 37 that it has
15 produced over the past six months is a tedious, labor-intensive process that requires, first, a
16 complete printout of the report; then an exhausting, and potentially inaccurate, manual
17 review of thousands of pages to identify the cells to be redacted; then, the crude marking
18 out of the cells to be redacted with a pen; and, finally, the recopying of the entire report so
19 that the recipient will be unable to read the redacted numbers through the ink or by
20 examining the back of the paper. As the example of the alleged photocopier breakdown
21 that led to over two months of delay in providing me copies of the SBSE tables for October
22 2006 makes clear, the necessity of photocopying thousands of pages not only needlessly
23 wastes paper but can, by itself, significantly slow the process.

1 42. In a conversation with an IRS FOIA officer assigned to handle my FOIA
2 requests, I was informed that the reason the reports I was provided this year were manually
3 redacted while the ones provided last year were redacted electronically was that the Chief
4 Counsel's Office, which handled the production of the reports last year, has software for
5 electronic redaction, while IRS disclosure offices, which handle FOIA requests and have
6 been assigned the task of producing the reports this year, do not.

7 **The IRS's Refusal to Provide Other Reports Covered by the Consent Order**

8
9 43. As the Court is aware, the 1976 Consent Order provides that statistical
10 reports containing data similar to that in the listed reports are to be made available to me
11 upon proper request, and statistical data on IRS examination of tax returns falls within the
12 scope of the Consent Order. AIMS Table 37 is not, of course, the only IRS statistical
13 report that contains such information. However, both before and after this Court issued its
14 2006 Orders concerning Table 37, my requests for other regularly generated IRS statistical
15 reports have continued to meet resistance from the agency.

16 44. At the same time as my initial request for Table 37, I identified and
17 requested another AIMS statistical table, AIMS Table 38. Based on information in the
18 Internal Revenue Manual, I concluded that AIMS Table 38 contained examination
19 information comparable to that in AIMS Table 37 for examinations carried out by
20 personnel at the former IRS service centers, which have now been replaced by regional
21 "campuses." My understanding is that Table 38 includes information on correspondence
22 audits and W&I examination activities that is not found in Table 37. A true and correct
23 copy of my November 8, 2004, letter requesting AIMS Table 38 (as well as AIMS Table

1 37) is attached hereto as Exhibit 8.

2 45. Although I was initially uncertain whether Table 38 continued to be
3 produced in light of the elimination of IRS service centers, the IRS has subsequently
4 confirmed its continued existence and my understanding that it contains examination
5 information comparable to but not found in Table 37. Specifically, in response to my
6 inquiries contesting IRS's closure of my FOIA requests for comprehensive audit statistics,
7 the IRS stated in a letter dated November 30, 2006, that detail on W&I examinations is
8 provided in Table 38. A true and correct copy of the November 30, 2006, letter is attached
9 hereto as Exhibit 9.

10 46. I have made regular monthly requests for Table 38 since November 2004.
11 The IRS has never responded to any of my requests for Table 38.

12 47. I similarly identified two other AIMS reports, Tables 35 and 36, which,
13 according to the Internal Revenue Manual, provide concise analytical information
14 concerning examination of returns and are generated on a monthly basis at regional IRS
15 locations (formerly at service centers). Again, these reports, as described by the IRS,
16 contain data similar in nature to that in Table 37 and hence should also fall within the
17 scope of the Consent Order. Beginning in November 2004, I have made regular monthly
18 requests for monthly Table 35 and 36 data. A true and correct copy of the first of these
19 requests is attached hereto as Exhibit 10.

20 48. The IRS has never responded to any of my requests for Tables 35 and 36.

21 49. The IRS has, on a number of occasions but most notably in a letter dated
22 December 10, 2004, informed me that statistical reports on examinations are generated by
23

1 a number of its systems, in addition to the AIMS system. The agency's Internal Revenue
2 Manual refers to additional data systems that appear to generate relevant statistical reports
3 as well. In addition, according to the December 10, 2004, letter, the IRS uses a software
4 package called A-CIS to generate various preformatted reports on examination activities
5 from the AIMS database. A true and correct copy of the December 10, 2004, letter is
6 attached hereto as Exhibit 11. In addition, as that letter makes clear, the IRS has
7 specifically informed me that AIMS Table 37 does *not* comprehensively cover these areas.
8 However, the IRS has not identified specific designations of the statistical reports from its
9 other systems that provide examination results. Thus, in addition to regular monthly
10 requests for Tables 35, 36, 37, and 38, I have, since July of 2004, made regular monthly
11 requests for reports containing examination data that do not specify particular reports, but
12 identify the type of data sought. In the beginning these requests focused on audits of
13 individual and corporate returns. More recently, I have sought such information for all
14 examination return classes. True and correct copies of three representative examples of
15 those generic monthly requests for examination data is attached hereto as Exhibits 12, 13
16 and 14.

17 50. The IRS has neither denied my generic monthly requests for examination
18 data nor provided information in response to them. Instead, it has purported to "close"
19 them in letters stating that its response to my requests for Table 37 constitutes its response
20 to my generic requests for examination data as well—despite the IRS's own
21 acknowledgment that Table 37 does not contain all the data the agency generates on
22 examination results. True and correct copies of examples of IRS letters purporting to close
23 out my requests for examination data are attached hereto as Exhibits 15 and 16. Moreover,

1 in its letter to me of November 30, 2006 (Exhibit 9), the IRS contended that its response to
2 my requests for Tables 35, 36, 37 and 38 (as well as for “IRPCA” reports and “CAR”
3 reports) encompassed all information responsive to the generic requests. The IRS’s
4 assertion that it is responding to these requests by responding to my requests for Tables 35,
5 36, 37 and 38 is particularly ironic given that the IRS has never in fact responded to the
6 requests for Tables 35, 36, and 38, and there was a nearly one-year hiatus even in its
7 production of Table 37 as ordered by this Court.

8 51. In order to assist the IRS by defining my requests more specifically and
9 limiting them to the types of data most useful to me, as well as to identify reports that fall
10 within the scope of the Consent Order, I have repeatedly requested that the IRS provide me
11 with samples of reports from the systems it has identified as containing the examination
12 data I have requested. For example, in response to the IRS’s letter of December 10, 2004
13 (Exhibit 11), I sent the IRS a letter on December 15, 2004, that, among other things,
14 specifically requested that the IRS provide me with samples of the preformatted reports
15 generated using the IRS’s A-CIS software package, which the agency’s December 10 letter
16 had identified as particularly likely to contain the information I seek. A true and correct
17 copy of my December 15, 2004, letter is attached hereto as Exhibit 17. (The A-CIS
18 software package is the source of the monthly reports the IRS has been providing me since
19 earlier this year. Those reports, according to the IRS, have been “customized” to provide
20 certain data elements I requested. My strong preference, however, is to obtain reports
21 actually generated and used by the agency in the course of its operations, both because I
22 have no entitlement to receive specially created reports under this Court’s Consent Order
23 or under FOIA, and also because I am interested in obtaining access to statistical data in

1 the same form in which it is obtained and used by the IRS itself, so that TRAC's
2 compilations and analyses of the data can be directly compared with the figures the IRS
3 periodically releases to the public about its activities.)

4 52. The IRS has never responded to my request for samples of the preformatted
5 A-CIS reports.

6 **THE IRS'S PROPOSAL TO MODIFY THE CONSENT DECREE**

7
8 53. In October 2007, the IRS's DOJ attorney Gerald Role contacted my
9 counsel, Mr. Nelson, and told him that the IRS wanted to propose a revision in the Consent
10 Order. Mr. Role inquired whether we would consider such a revision. Mr. Nelson
11 responded that we would review any proposal the IRS wished to make but would be
12 unlikely to agree to a proposal that would significantly limit my ability to obtain IRS
13 records. Mr. Nelson suggested that Mr. Role fax him a proposal in writing, and Mr. Role
14 indicated that he would do so. Mr. Nelson did not, however, receive a fax from Mr. Role
15 at that time.

16 54. In December 2007, while I was on a four-week visit to China, Mr. Role
17 contacted Mr. Nelson and inquired whether we had any response to the IRS's proposal.
18 Mr. Nelson informed Mr. Role that we had never received a proposal and had assumed that
19 the IRS had had second thoughts about making one. Mr. Role stated that he had faxed the
20 proposal in October. Because the fax had evidently gone astray, Mr. Role resent it. A true
21 and correct copy of Mr. Role's fax setting forth the IRS's proposal to amend the Consent
22 Order is attached hereto as Exhibit 18.

23 55. The IRS's proposed amended order states that unspecified changes in the

