

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 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**

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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)
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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
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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 **The Dismissal of the Appeal and the End of Negotiations**

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

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

22 22. By January 15, 2007, the IRS had not agreed to provide the data described
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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.
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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.
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23 31. I have also reviewed the recently produced copies of Table 37, as well as

