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October 6, 2008

Molly Dwyer, Esquire
Clerk, U. S. Court of Appeals
for the Ninth Circuit
Filed via CM/ECF

Re: *Susan B. Long v. United States Internal Revenue Service*
(9th Cir. No. 08-35672)

Dear Ms. Dwyer:

I am counsel of record for appellee Susan B. Long. By a letter to you dated October 3, 2008, appellant Internal Revenue Service has filed a request that the Court expedite consideration of the IRS's motion for a stay of the district court's order requiring production of IRS statistical records. The IRS seeks the stay pending the government's decision whether to pursue its appeal, and, if it decides to do so, pending the outcome of the appeal. The IRS's request for expedited consideration followed the district court's denial of the IRS's motion for a temporary stay pending this Court's consideration of the stay motion.

In response to the IRS's letter request to the Court for expedited consideration, Ms. Long wishes to call to the Court's attention two facts that may bear on the IRS's entitlement both to expedited consideration and to the stay it seeks.

First, in the IRS's reply in support of its stay motion, it represented to the Court that "it is beyond cavil that the IRS would be in violation of I.R.C. § 6103 if it were to black-out the identifying information on income tax returns, scan the returns, and post the images on its web site." Reply at 5. The IRS made this statement to support its argument by analogy that release of certain information in the statistical tables at issue here would similarly violate the statute. In fact, however, the IRS *does* publicly release individual tax returns with identifying information deleted, and it has done so for many years. The returns, called "microdata files," are offered to the public on the IRS's website at <http://www.irs.gov/taxstats/article/0,,id=169090,00.html>. The IRS's apparent misrepresentation of its own view of the legality of a practice that it has regularly engaged in for decades undermines both its arguments that it is likely to prevail on appeal and that taxpayers would be irreparably injured by public release of statistical information relating to anonymous individual taxpayers in the tables at issue.

Second, as the IRS has informed the Court, Judge Pechman last Wednesday denied its motion for a temporary stay pending this Court's consideration of its motion for stay pending appeal. In so doing, she ordered the IRS to comply immediately with her earlier orders, just as she did when denying its first motion for a stay. In its motion for a temporary stay, the IRS

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Page 2

represented to Judge Pechman that it could provide Ms. Long with the required records by September 16 if a stay were denied. Nonetheless, it has not yet provided them, nor has it responded to communications from Ms. Long's counsel requesting that it comply with Judge Pechman's orders.

Although its motion for a temporary stay in the district court implicitly acknowledged that it was obligated to comply with the district court's orders unless that court or this one relieved it of that obligation, the IRS is currently disobeying the district court's orders. It is behaving just as if Judge Pechman had *granted* the relief that she explicitly *denied*. That behavior is consistent with what Judge Pechman characterized in her latest order as the IRS's repeated defiance of the court's orders. The IRS's inequitable behavior should be considered by this Court in determining whether it is entitled to the extraordinary equitable relief of a stay pending appeal or to expedited consideration of its motion.

Respectfully submitted,

/s/ Scott L. Nelson

Scott L. Nelson

cc (via CM/ECF):
Anthony T. Sheehan (USDOJ)
Robert P. Brouillard (AUSA)
Eric M. Stahl

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2008, I electronically filed the foregoing letter with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users, and that service on the below-listed counsel will be accomplished by the appellate CM/ECF system.

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/s/ Eric M. Stahl
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