No. 17-16327

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Petitioner - Appellee

v.

NORA BRAYSHAW,

Respondent - Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

DAVID A. HUBBERT
Deputy Assistant Attorney General

MICHAEL J. HAUNGS **(202) 514-4343**
ROBERT J. BRANMAN **(202) 307-6538**
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

Of Counsel:
PHILLIP A. TALBERT
United States Attorney

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Cases:

Cases (cont'd): **Page(s)**

Statutes:

Internal Revenue Code of 1986 (26 U.S.C.):

Statutes (cont'd): **Page(s)**

GLOSSARY

Acronym	Definition
IRS	Internal Revenue Service
UBS-AG	a Swiss bank where taxpayer has an account
UBS-SFA	UBS Swiss Financial Advisors, an entity related to UBS-AG

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-16327

UNITED STATES OF AMERICA,

Petitioner - Appellee

v.

NORA BRAYSHAW,

Respondent - Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

STATEMENT OF JURISDICTION

The United States instituted this proceeding by filing a petition to enforce an IRS administrative summons issued to Nora Brayshaw (Brayshaw or "taxpayer"). (ER 46).[1] The District Court had jurisdiction pursuant to Sections 7402(b) and 7604(a) of the Internal Revenue Code

[1] "ER" references are to the pages of the appellant's excerpts of record. "SER" references are to the pages of the appellee's supplemental excerpts of record.

of 1986 (26 U.S.C.) (the Code or I.R.C.) The District Court entered an order enforcing the summons. (ER 40-41.) Taxpayer did not appeal from the order enforcing the summons.

The United States subsequently instituted contempt proceedings. (ER 36.) The District Court had jurisdiction over the contempt proceedings pursuant to I.R.C. § 7604(b). The District Court did not find taxpayer in contempt, did not impose coercive sanctions, and did not modify the order enforcing the summons. This Court lacks jurisdiction because there is no appealable interlocutory order or final decision.

STATEMENT OF THE ISSUES

Pursuant to a prior order enforcing an IRS summons, the District Court warned taxpayer that she must sign a consent directive in order to avoid contempt sanctions. She heeded that warning and signed the consent directive, and no contempt sanctions were imposed.

The issues are:

1. Whether there is (i) an appealable interlocutory order modifying a prior injunction, or (ii) an appealable final order.

2. If the District Court is deemed to have issued an appealable order, whether taxpayer has shown any error in that order.

APPLICABLE STATUTES AND REGULATIONS

The pertinent statutes are 28 U.S.C. §§ 1291 and 1292(a)(1).

28 U.S.C. § 1291:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1292(a)(1):

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

STATEMENT OF THE CASE

The United States instituted this proceeding to enforce an IRS administrative summons issued to Nora Brayshaw. The District Court (Judge Morrison C. England, Jr.) ordered the summons enforced on September 15, 2014. (ER 40-41.) Taxpayer did not appeal from the order enforcing the summons. In further proceedings, the District Court ordered taxpayer to show cause why she should not be held in civil contempt for failure to comply with the order enforcing the summons. (SER 55-56.) Following a show-cause hearing, taxpayer signed a consent directive. The District Court did not find her in contempt, and did not impose contempt sanctions.

A. The summons

The Internal Revenue Service (IRS) is conducting an investigation into the federal income tax liabilities of Nora Brayshaw (taxpayer) for the years 2002-2012. (ER 49.) As part of its investigation, Revenue Agent (RA) Crystal Langston issued a summons to taxpayer on May 29, 2013. (ER 49.) The summons directed taxpayer to appear at the IRS office in Redding, California, on June 12, 2013, and to give testimony, and to produce for examination eight categories of records. (ER 50-55.)

One category sought records, without temporal limitation, relating to foreign bank accounts. (ER 54, ¶ 1.) Taxpayer did not appear as directed.[2] (ER 50.)

B. The judicial enforcement proceeding

On June 10, 2014, the United States petitioned the District Court to enforce the summons. (ER 46-55.) After initially denying proper service, taxpayer withdrew her service defense and stipulated to a "Consent Order Initiating Compliance with Internal Revenue Service Summons." (SER 1-3.) On August 22, 2014, Magistrate Judge Newman entered findings and recommended that the summons be

[2] Taxpayer asserts that she did appear, but that RA Langston did not. (Br. 3.) Since she ultimately consented to an order enforcing the summons, the details of this particular interaction are not material to any issue presented by this appeal. Nevertheless, we note that the United States responded to a similar assertion in the District Court as follows: Shortly before June 12, 2013, taxpayer and her spouse, David Brayshaw, through Robert West, their Power of Attorney, contacted RA Langston and sought a 60-day extension for medical reasons. RA Langston granted a shorter extension to July 16, 2013, and requested a doctor's note in order to grant a 60-day extension. On July 16, 2013, RA Langston received a voicemail message from someone purporting to be a friend of the Brayshaws, stating that they could not attend for medical reasons. RA Langston identified the telephone number of the voicemail message as coming from a hotel across the street from the IRS office in Redding. She telephoned the hotel and verified that taxpayer was staying at the hotel. (SER 22-23.)

enforced without modification. (ER 42-45.) Taxpayer did not object to the findings or recommendation, and the District Court ordered the summons enforced on September 15, 2014. (ER 40-41.) Taxpayer did not appeal from the order enforcing the summons.

C. The first contempt proceeding

The United States commenced contempt proceedings on March 21, 2016. (ER 36.) The petition asserted that RA Langston had communicated with taxpayer's attorney, Todd Luoma, on August 26, 2014, immediately before RA Langston began five months of maternity leave from August 28, 2014, through January 31, 2015. RA Langston and Mr. Luoma agreed that taxpayer would produce the documents, including documents from taxpayer's account at UBS, a Swiss bank, by February 1, 2015, and that she would be interviewed by February 28, 2015. (ER 38; SER 7.) Mr. Luoma provided some documents by email from February 2, 2015, through April 1, 2015, including Form 1099 summary information, but not the documents demanded by the summons. An interview was scheduled, but then canceled, because of taxpayer's refusal to produce the summoned documents. (ER 38.)

Meanwhile, taxpayer's spouse, David Bradshaw, died on August 11, 2015. (SER 30.)

On May 5, 2016, the District Court ordered taxpayer to show cause why she should not be held in contempt for failing to comply with the enforcement order. (SER 4-5.) The court held a hearing on June 16, 2016, and taxpayer submitted to direct questioning by the Court. The Court explained that it had been "a long time," that there "has to be more information," but that taxpayer had elected "not to be forthcoming with it." (SER 63-64.) Taxpayer's then-attorney, Mr. Luoma, explained that he had "directed her to write to UBS again and ask for all the account statements and everything that's associated with the account." (SER 64.) Ms. Brayshaw then stepped forward and stated that she had requested additional information from UBS "a while back," but did not retain a copy of the request. She further stated that, at her attorney's urging, she sent another request to UBS only one week before the hearing. (SER 69.) The Court accordingly allowed her 30 days, until July 16, 2016, to produce the requested information. The hearing was continued to October 20, 2016. (SER 25-28.)

Shortly before the hearing taxpayer's counsel produced a letter from UBS. The letter referred to taxpayer's letter dated September 9, 2016, and stated that its investigation into assets and safe deposit boxes held in her name had been unsuccessful. (SER 35.) The letter did not, however, indicate what specific records she had requested. RA Langston attempted to obtain from taxpayer either a copy of the September 9 request, or a consent directive permitting UBS to release documents directly to the United States, but taxpayer refused both requests. (SER 37.) In advance of the hearing, the United States indicated its concern that one relevant statute of limitations would soon expire, and that taxpayer was both causing extensive delays and also refusing to agree to extend the approaching deadline. (SER 38.)

The District Court canceled the hearing and ordered taxpayer to provide an executed consent directive and a consent to extend the relevant statute of limitations, or face immediate sanctions, including potential incarceration. (ER 33.) The order stated that the court's multiple admonishments "could not have been clearer" in letting taxpayer know of the consequences of continued obstruction. (ER 32.)

Taxpayer signed a consent directive authorizing UBS to release account records to herself and to her attorney, Mr. Luoma. (ER 24.) One phrase was altered on the preprinted from. The phrase denoting a time period "from the establishment of the account(s) to the present date" was crossed out and replaced with the phrase "years ended Dec. 31 2002 through 2012." (ER 24.) Ralph Levene, an attorney representing UBS, confirmed receipt of the consent directive and indicated by email on November 29, 2016, that the documents would be produced soon. (SER 52.)

On February 9, 2017, however, Levene indicated by email that the consent directive covered only one of taxpayer's two UBS accounts. Specifically, the consent directive was sufficient to release records of taxpayer's account at UBS-AG, but not for her separate account with a related entity, UBS-Swiss Financial Advisors (UBS-SFA), for which a separate consent directive would be required. Levene further stated that UBS-AG records had been sent to taxpayer's counsel, Mr. Luoma, under a December 8, 2016, cover letter. (SER 52.)

RA Langston thereafter contacted taxpayer's counsel in order to obtain the UBS-AG documents and get a second consent directive

specifically for UBS-SFA. Mr. Luoma stated that he had already contacted taxpayer, that she refused to sign a second directive, and that she had instructed Mr. Luoma to perform no further work and have no contact with the IRS. Accordingly, on February 16, 2017, Mr. Luoma told RA Langston that he would not turn over any UBS-AG records without a court order. (SER 52-53.)

D. The second contempt proceeding

On March 9, 2017, the United States filed a second petition seeking coercive contempt sanctions in order to obtain the long-sought records. (SER 44.) The District Court again ordered taxpayer to show cause why she should not be held in contempt. (SER 55.) Taxpayer responded through new counsel, J. Craig Demetras. (SER 57.) A hearing was held on June 1, 2017. (ER 5-16.)

At the hearing, counsel for the United States acknowledged receipt of the UBS-AG documents, but stated that it still needed taxpayer to sign a second consent authorizing UBS-SFA to turn over those documents. (ER 7.) Taxpayer's new counsel stated that taxpayer believed that she had already signed a consent directive for UBS-SFA during 2016, but that "she is now willing to sign another one." (ER 10.)

A moment later he repeated, "And as I just stated, she's willing to sign another consent directive." (ER 11.) And when taxpayer began to speak, her attorney asked her, "But you've agreed to sign a consent directive today, right?" Taxpayer answered, "Yes." (ER 12-13.)

With taxpayer's willingness to sign another consent directive established, the hearing turned to whether the directive should have UBS-SFA release documents to taxpayer's counsel or the IRS, and whether a notary was available in the courthouse. (ER 13-14.) The District Court summarized that "the proposal" was that after the hearing was concluded, taxpayer would proceed to the United States Attorney's Office to have the consent directive executed and notarized and, "[i]f, for some reason, there is an issue, you let me know, and I will reconvene court, if necessary, this afternoon to deal with that issue." (ER 15-16.) After the hearing concluded taxpayer executed the consent directive, and her signature was notarized. Taxpayer did not raise any issue at the hearing regarding the temporal limits of the consent directive, nor did she alert the District Court later that afternoon that she considered the lack of temporal limits on the prepared consent directive to be something that required the court's attention.

No written order followed the hearing. The clerk entered minutes of the hearing on the docket, reciting that "[a]fter hearing from parties and for reasons stated on the record, the Court ORDERED the Consent Directive be signed, executed, and notarized by defendant after the proceedings." (ER 17.)

SUMMARY OF ARGUMENT

This appeal should be dismissed because there is no appealable order. Review of the transcript of the contempt proceedings of June 1, 2017, reveals that the District Court did not order taxpayer to do anything, did not find her in contempt, and did not impose contempt sanctions. Rather, she and her attorney repeatedly stated her willingness to sign a second consent directive authorizing her bank, UBS-SFA, to turn documents over to the IRS. She then signed such a consent directive, and thereby avoided contempt sanctions.

The District Court's comments at the hearing, even if construed as an order to sign a consent directive, are not appealable as an order modifying a prior injunction. Taxpayer asserts that the comments modified the prior summons enforcement order by requiring her to sign a consent directive without temporal limits. In the first place, during

the hearing neither the District Court nor taxpayer referred to the temporal limits of the consent directive in any fashion. Therefore, the issue was not properly presented to the District Court. In any event, neither the summons, nor the summons enforcement order, contained any temporal limits with regard to the request for foreign bank records. Thus, even if the court had ordered her to sign a consent directive without temporal limits, such an order would not have modified the prior order enforcing the summons.

Moreover, there is no merit to taxpayer's contention that the original summons enforcement order was modified by the District Court's suggestion that she might be in contempt if she refused to sign a consent directive. A taxpayer who is ordered to comply with an IRS summons must take all reasonable steps to comply with the summons, including taking reasonable steps to obtain and turn over documents that are within her possession or control. Records that a bank will release with a taxpayer's permission are within her control. The District Court's expression of its view that signing one or two consent directives was a reasonable step was, at most, a clarification of the original summons enforcement order, not a modification.

Nor were the District Court's comments appealable as a final order of contempt because the court did not find taxpayer in contempt and did not impose sanctions. Taxpayer's reliance on this Court's discussions of "pragmatic concerns" regarding the finality of contempt orders in the context of complex institutional reform litigation are of little relevance in this relatively simple matter.

Finally, even if the District Court's comments are somehow construed as an appealable order, taxpayer has not shown any error in that purported order. An order to sign a consent directive without temporal limits would not have exceeded the District Court's authority to enforce its prior order through its contempt power.

ARGUMENT

I.

THE APPEAL SHOULD BE DISMISSED FOR LACK OF AN APPEALABLE ORDER

Standard of review

The Court determines its jurisdiction *de novo*. *Daas v. Holder*, 620 F.3d 1050, 1053 (9th Cir. 2010).

This appeal arises from a contempt hearing. Following a prior order enforcing an IRS administrative summons, the District Court cautioned taxpayer that she faced sanctions if she did not sign a consent directive authorizing her foreign bank to release records to the IRS, and taxpayer and her attorney stated that she was prepared to sign such a directive. (ER 5-16.) The District Court did not issue a written order following the hearing. Taxpayer cites to the clerk's minutes to support her assertion that "the District Court entered its Order directing Ms. Brayshaw to sign the second Consent Directive." (Br. 1, citing ER 17.) The clerk's minutes, however, are not an order. *Wood v. Coast Frame Supply, Inc.*, 779 F.2d 1441, 1442 (9th Cir.), amended, 791 F.2d 802 (9th Cir. 1986) (dismissing appeal because "a courtroom deputy clerk's

minute order evidencing the district court's oral decision is not a final appealable order.") Taxpayer's appeal, if viable, must arise from the District Court's statements during the short hearing. (ER 5-16.)

Taxpayer contends that the District Court's comments are appealable as either an order modifying the prior summons enforcement order, or as a final order of contempt. Neither contention is correct.

A. The District Court's comments are not appealable as a modification of the prior order enforcing the summons

Interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions" are immediately appealable. Thus, a court of appeals "may review an order that *modifies* a previously entered injunction," but "an order *clarifying* or *interpreting* an existing injunction is not appealable." *Mamma Mia's Trattoria, Inc. v. Original Brooklyn Water Bagel Co.*, 768 F.3d 1320, 1326 (11th Cir. 2014) (emphasis added). In determining whether there has been a modification or merely a clarification, "'a reviewing court must examine whether there was an underlying decree of an injunctive character, and if so, whether the ruling appealed from can fairly be said to have changed the underlying decree in a jurisdictionally significant

way.'" *Id.* (quoting *Sierra Club v. Marsh*, 907 F.2d 210, 212 (1st Cir.1990)). "[A]n order modifies, rather than clarifies, an existing injunction 'when it actually changes the legal relationship of the parties.'" *Id.* at 1327 (citations omitted). Courts "have refused to recognize an appealable modification unless the second order works an obvious change in the rights of the parties." *Id.* *Accord Gautreaux v. Chicago Hous. Auth.*, 178 F.3d 951, 957 (7th Cir. 1999) (modification "only occurs when a court substantially alters the pre-existing legal relationship of the parties."); *Pimentel & Sons Guitar Makers, Inc. v. Pimentel*, 477 F.3d 1151, 1154 (10th Cir. 2007) (an "interpretation or clarification does not alter the status of the parties," whereas "a modification either 'alters the legal relationship between the parties or substantially changes the terms and force of the injunction.'") (quoting *Mikel v. Gourley*, 951 F.2d 166, 168-69 (8th Cir. 1991)).

Taxpayer contends that the District Court's comments at the show cause hearing of June 1, 2017, resulted in "substantive modifications" to its original order of September 15, 2014, enforcing the summons. (Br. 12-13.) Specifically, taxpayer contends that Court's comments modified the summons enforcement order because the temporal scope of the

summons was expanded (Br. 13), and because the summons did not explicitly call for taxpayer to sign a consent directive. (Br. 12-13.) The transcript of the hearing indicates that the court did not order taxpayer to sign a consent directive. Rather, the court questioned taxpayer about why she had not signed a second consent directive as to UBS-SFA. She indicated that she believed she did not need to sign a second consent directive because she had complied with the court's order to sign the first consent directive. But she then agreed to sign a second consent directive. (ER 10-13.) At all events, even if the District Court's comments are construed as an order to sign a consent directive without temporal limits, such an order would not be separately appealable as an interlocutory order because it would not have changed the legal relationship between the parties.

1. The absence of temporal limits in the second consent directive did not expand the scope of the summons enforcement order

Even if the District Court is regarded as having ordered taxpayer to sign a consent directive lacking temporal limits, that would not have modified the enforcement order. As a threshold matter, the Court need not address this issue because taxpayer failed to properly raise it before

the District Court. Significantly, she had demonstrated in signing the first consent directive that she was capable of crossing out preprinted language and inserting specific time limits. (ER 24.) But she raised no objections regarding temporal limits during the show cause hearing that concerned the second consent directive. The District Court did not make any reference to whether or not the consent directive had temporal limits. At the end of the hearing the District Court stated that "[i]f, for some reason, there is an issue, you let me know, and I will reconvene court, if necessary, this afternoon to deal with that issue." (ER 16.) Despite this explicit invitation to return in case of a problem, taxpayer chose not to challenge the lack of temporal limits on the preprinted consent form until after she signed it. The Court should not address this issue that taxpayer failed to properly raise in the District Court. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

In any event, there is no merit to taxpayer's argument that what transpired at the June 1, 2017, hearing somehow expanded the scope of the summons enforcement order. The summons did not contain temporal limits in its request for records of foreign bank accounts. (ER 54, ¶ 1.) The Magistrate Judge recommended that the summons be

enforced without modification (ER 44-45), and the order enforcing the summons did not include any temporal limits (ER 41). Accordingly, even if the Court is considered to have ordered taxpayer to sign a consent directive without temporal limits, such an order would not have expanded the scope of the order enforcing the summons.

2. The requirement to sign a consent directive did not modify the enforcement order

The Court's insistence that taxpayer sign a consent directive also did not expand or modify taxpayer's obligations under the enforcement order. The summons sought, *inter alia*, "all records in your possession or under your control relating to all foreign and domestic bank accounts." (ER 54.) If a taxpayer can obtain documents from a foreign bank by executing a release, then those documents are within her control. An alleged contemnor must demonstrate that she performed "'all reasonable steps within their power to insure compliance'" with the court's orders. *Stone v. San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992) (quoting *Sekaquaptewa v. MacDonald*, 544 F.2d 396, 404 (9th Cir.1976)). *Accord*, *United States v. Liddell*, 327 F. App'x 721, 722 (9th Cir. 2009) (IRS summons); *United States v. Darwin Const. Co., Inc.*, 873 F.2d 750, 754 (4th Cir. 1989) ("[t]o avoid a finding of contempt, Darwin

had 'to make in good faith all reasonable efforts to comply with'" the summons, *quoting United States v. Ryan*, 402 U.S. 530, 534 (1971)).

Taxpayer cites no authority for her assertion (Br. 12-13) that because the summons did not explicitly request that she sign a consent directive, the District Court's insistence that she sign one effected a modification of the enforcement order. The enforcement order required taxpayer to take all reasonable steps to ensure compliance. The District Court's view – whether it is regarded as an order or not – that signing a consent directive was one such reasonable step, merely clarified or interpreted its prior order. Consequently, the District Court's comments, even if construed as an order, are not separately appealable as an interlocutory order.

B. The proceedings of June 1, 2017, are not appealable as a final order of contempt

The district courts may enforce compliance with summons enforcement orders through contempt. *See United States v. Rylander*, 460 U.S. 752, 757 (1983); *United States v. Bright*, 596 F.3d 683, 690 (9th Cir. 2010). Orders pursuant to post-judgment contempt proceedings are not appealable as a final decision until the district court has both found a party in contempt and imposed a sanction. *United States v. Gonzales*,

531 F.3d 1198, 1202 (10th Cir. 2008) (collecting cases); *SEC v. Hickey*, 322 F.3d 1123, 1127 (9th Cir.) (dismissing appeal where court imposed no sanction and party appealed before end of period during which he could purge contempt, because "an adjudication of civil contempt is not appealable until sanctions have been imposed " (quotation and emphasis omitted)), *amended on other grounds*, 335 F.3d 834 (9th Cir. 2003).

The District Court did not make a finding that taxpayer was in contempt, and did not impose a sanction. Therefore, the court's comments at the hearing do not constitute an appealable final order of contempt. The court's warning that coercive sanctions would follow if taxpayer did not sign the consent directive did not impose a sanction. *Cf. Kelly v. Wengler*, 822 F.3d 1085, 1097 (9th Cir. 2016) (informing a contemnor of a prospective fine schedule was not itself a sanction).

Taxpayer's reliance on *Gates v. Shinn*, 98 F.3d 463 (9th Cir. 1996), and *Stone v. City and County of San Francisco*, 968 F.2d 850 (9th Cir. 1992), is misplaced. (Br. 13-18.) Both *Gates* and *Stone* arose from contempt orders in complex institutional reform litigation, and after district courts had spent years overseeing consent decrees. For

example, the district judge in *Stone* had overseen the implementation of a consent decree for almost a decade. 968 F.2d at 856. One provision of the consent decree concerned population limits in San Francisco jails. The City had been in and out of compliance, and the district court eventually found the City in contempt for prison overcrowding because it had not taken "all reasonable steps" to comply with the population limits. It imposed sanctions of $300 per day per inmate for each day the population limits were exceeded. The fines were to be placed in a fund to be administered and controlled by the City and used for programs to reduce population levels at one of the chronically overcrowded jails. *Id.* at 853-54.

On the City's appeal from the contempt sanction, the plaintiffs argued that the contempt order was not final because the sanctions were conditional. This Court rejected that argument and held that the fact that the exact amount was undetermined and ongoing did not defeat the order's finality. 968 F.2d at 855. After rejecting plaintiffs' argument, the Court added that "[f]inally, pragmatic concerns cut in favor of finding the contempt order to be final." *Id.* at 855. The Court observed that it "belie[d] common sense" to require the City to accrue

fines, pay them into the City-administered fund, and then comply with the population limits to make the amount of the fines certain, before permitting appeal. *Id.* And it noted that its holding "comports with the realities of prison reform litigation," which "frequently requires that jurisdiction be retained long after the basic determination of liability," and where "appeal should be available . . . from a finding of contempt when circumstances make it uncertain whether any further orders will be required." *Id.* (citation omitted).

The Court reached a similar result in *Gates*, another case in which a district court adjudged prison officials in contempt for violation of a consent decree. In *Gates*, a daily monetary fine was imposed, but stayed so long as the prison officials complied with a special master's directives and deadlines for implementation of a plan to modify the outpatient psychiatric program for the California state prison system. 98 F.3d at 466. Relying on *Stone*, the Court held that the contempt order was final, notwithstanding that payment had been stayed, because the district court both adjudicated the prison officials in contempt and required them to make changes required by the special

master. *Id.* at 467. Thus, the conditional, undetermined nature of the sanctions did not defeat finality. *Id.* at 467.

Stone and *Gates* do not, therefore, support taxpayer's assertion that the District Court's comments here resulted in a final order. In each, a district court adjudged a party in contempt, and also imposed a conditional monetary sanction. Nothing like that occurred here. This Court's discussion of "pragmatic concerns" in the context of complex institutional reform litigation, involving consent decrees and conditional sanctions, did not change the general rule that in post-judgment contempt proceedings, an order is not appealable unless a party is both found in contempt and the court has imposed a sanction.

II.

IF THE DISTRICT COURT IS DEEMED TO HAVE ISSUED AN APPEALABLE ORDER, TAXPAYER HAS NOT SHOWN ANY ERROR IN SUCH ORDER

Standard of review

Whether the District Court exceeded its authority in enforcing a summons is a legal question reviewed de novo. The District Court's factual findings underlying contempt are reviewed for clear error. *United States v. Bright*, 596 F.3d at 694.

Even if the District Court's comments constituted an appealable order, taxpayer has shown no error in that order. Taxpayer contends that the court either exceeded its authority by ordering her to sign a consent directive without temporal limits (Br. 18-21), or clearly erred in finding her in contempt (Br. 21-23). Both arguments are without merit.

Taxpayer contends (Br. 18-19) that ordering her to sign a consent directive exceeded the court's authority. Taxpayer's reliance on *United States v. Jose*, 131 F.3d 1325 (9th Cir. 1997) (en banc), is misplaced. In that case the IRS petitioned to enforce a civil investigative summons. The taxpayer did not dispute the validity of the summons for civil investigative purposes, but expressed concern that the documents could be used for criminal prosecution purposes. Responding to the taxpayer's concern, the district court enforced the summons but ordered the IRS to notify the taxpayer five days prior to transferring the summoned documents to any other division of the IRS, including the Criminal Investigation Division. *Id.* at 1327. In reversing, this Court held that the district court could not impose conditions upon the IRS's

use of summoned documents. *Id*. at 1329. *Jose* is inapplicable here because the district court did not impose conditions upon the IRS's use of the summoned information. *Jose* does not support taxpayer's assertion that a district court may not, pursuant to its contempt authority, find that signing a consent directive permitting a foreign bank to release account records is a "reasonable step" that a taxpayer must take in order to avoid a finding of contempt.

Taxpayer next argues that the IRS should have specified in the summons that it required a consent directive. (Br. 20.) But there is no reason to believe that the IRS knew such a directive would be needed. And taxpayer cites no authority for the proposition that a court may not require a consent directive even if not specified in the summons, where a bank requires such a directive.

Taxpayer further contends that it is "egregious" that the summons sought information only with respect to the taxable years 2002-2012, while the order to sign a consent directive was not time limited. (Br. 20-21.) As already set forth above (I.A.1), taxpayer did not properly raise this issue in the District Court, and it lacks merit in any event. Although the summons itself, and RA Langton, describe an

investigation into taxpayer's income tax liabilities for taxable years 2002-2012 (ER 49 at ¶ 2, 52), the summons itself does not limit the period for which it requests foreign bank records (ER 54, ¶ 1). The order enforcing the summons (from which taxpayer did not appeal) did not modify this request to impose time limits. (ER 40-41.) Accordingly, an order to sign a consent directive without temporal limits would not have exceeded the scope of the order enforcing the summons.

Taxpayer finally contends that she submitted unrefuted evidence that she turned over all responsive documents in her possession, and that the United States did not attempt to show otherwise, and that she was therefore not in contempt. (Br. 19-20, 21-23.) But since she agreed to sign a second consent directive, it was unnecessary for the District Court to decide whether she was in contempt. The court simply did not make any finding that she was or was not in contempt.

CONCLUSION

The appeal should be dismissed.

Respectfully submitted,

DAVID A. HUBBERT
Deputy Assistant Attorney General

/s/ Robert J. Branman

MICHAEL J. HAUNGS (202) 514-4343
ROBERT J. BRANMAN (202) 307-6538
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

Of Counsel:
PHILLIP A. TALBERT
United States Attorney

DECEMBER 2017

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the United States respectfully inform the Court that they are not aware of any cases related to the instant appeal that are pending in this Court.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-16327

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is [5,359] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: /s/ Robert J. Branman

Date: Dec 12, 2017

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 12, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Robert J. Branman
ROBERT J. BRANMAN
Attorney