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8 Special Appearance (*pro hac vice* application pending)

7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**

9)
10 FEDERAL TRADE)
11 COMMISSION,)
12) Case No. 2:18-cv-00183-GMN-CWH
13 Petitioner,)
14) Reply in Support of Motion to
15 v.) Dismiss for Lack of Personal
16) Jurisdiction, for Insufficient Service,
17 DONOR RELATIONS,) and for Insufficient Process Made
18 LLC, and COURTESY) by Special Appearance
19 CALL, INC.,)
20 Respondents.)
21)
22)
23)
24)
25)
26)

19 COME NOW purported Respondents Donor Relations, LLC and
20 Courtesy Call, Inc. (the “Purported Respondents”), who appear specially
21 through undersigned counsel *pro hac vice* (*pro hac vice* applications
22 pending), not as a general appearance but in a limited capacity to
23 maintain objections to personal jurisdiction, and hereby respectfully
24 files this reply in support of their motion to dismiss the Petition for lack
25 of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2), (4) and (5).
26

Argument

1
2 In its opposition, the FTC propagates the rather strange notion that
3 it is immune from bedrock civil procedure rules that control our federal
4 civil litigation process. To obscure the necessity of adhering to the
5 controlling procedural rules, let alone the fundamental tenets of Due
6 Process, the FTC's Opposition presents a plethora of factually and
7 procedurally distinguishable cases to support its tenuous position.

8 In these cases, appellants were mainly contesting discovery matters
9 and the good faith of the agency's administrative process. None
10 specifically address the situation at hand, where the summons itself
11 was never issued, much less served with the initial pleading, and thus
12 no personal jurisdiction exists. These cases do, however, speak to the
13 general proposition that the Rule 4 can be read more flexibly during
14 pre-Complaint, agency enforcement proceedings. This is not an open
15 invitation to dispense with the most basic tenets of service of process
16 when initiating a federal civil action in district court. As *Donaldson v.*
17 *United States*, 400 U.S. 517, 528 (1971) notes, the rights of the party
18 must still be preserved.

19 Crucially, the FTC's opposition inaccurately conflates an agency
20 summons with the summons required by Rule 4 to initiate a federal
21 civil action. The various agency "summonses" being analogized by the
22 FTC in its opposition paper are *not* summonses for the purpose of Rule
23 4, which accompany initial pleadings. Here, the enforcement petition
24 filed with the District Court requires proper service, including a
25 summons, to vest personal jurisdiction. In contrast, *United States v.*
26 *Hooper*, 76 F.3d 389 (9th Cir. 1995), cited by the FTC in opposition to

1 the Respondents' motion, refers to an initial IRS administrative
2 summons and subpoena, the equivalent here being the CID. The
3 issuance of an administrative summons, like a CID or IRS summons,
4 does not require adherence to Rule 4 when issued (nor do we argue
5 otherwise). This is a fine distinction with significant resultant
6 procedural implications.

7 In contrast to the FTC's position, the law in the Ninth Circuit
8 appears to firmly hold otherwise, that adherence to Rule 4 in this exact
9 situation is mandatory. "The district court acquires personal
10 jurisdiction over the taxpayer by service of the show cause order and
11 the petition for enforcement of the summons... *Service must be made in*
12 *compliance with Rule 4 of the Federal Rules of Civil Procedure.*" *United*
13 *States v. Gilleran*, 992 F.2d 232, 233 (9th Cir. 1993) (emphasis added)
14 (citing both *United States v. Bichara*, 826 F.2d 1037, 1039 (11th Cir.
15 1987) and *Donaldson v. United States*, 400 U.S. 517, 528-29 (1971)). In
16 turn, the Northern District of California relied on *Gilleran* to dismiss an
17 administrative summons enforcement petition for lack of personal
18 jurisdiction. *See Harris v. Abbas*, 2013 U.S. Dist. LEXIS 36384 (N.D.
19 Cal. 2013).

20 *Harris* is particularly apt to the instant case because in both *Harris*
21 and in this case, the Order to Show Cause required the Petitioner to
22 serve copies of the order, the petition, and supporting documents, but
23 yet the *Harris* court found that this order did *not* vitiate the need to
24 comply with Rule 4's issuance of a summons:

25 The district [court] has not implemented a local rule
26 addressing service of process in subpoena enforcement

1 actions. Nor did the court provide special instruction for
2 service when it issued the OSC, other than to order
3 Petitioner to “forwith serve copies of this Order to Show
4 Cause and a copy of the Petition and supporting documents
5 on Respondents.” Thus, Rule 81 [referring in particular to
6 Rule 81(a)(5)] mandates application of the general civil rules
7 governing initial service.

8 *Id.* at *5.

9 The district court then explained that a corporation “may be served ‘by
10 delivering a copy of the summons and of the complaint to an officer . . .”

11 *Id.* Because the Petitioner did not initiate service in compliance with
12 Rule 4, the *Harris* court held “the Petition is dismissed without
13 prejudice for lack of personal jurisdiction. *Id.* at * 9.

14 In this case, Respondent maintains that service of the show cause
15 order and the petition for the enforcement of the summons was never
16 properly effected per *Gilleran*, as no accompanying summons was ever
17 obtained or served. In accordance with this controlling authority, no
18 personal jurisdiction was obtained over either of the Respondents. This
19 is no mere technicality, nor does the FTC’s apparently unopposed
20 custom of ignoring this requirement render it acceptable to forgo it in
21 this instance. Permitting an agency to demand the appearance of a
22 party without complying with Rule 4’s summons requirement
23 endangers one’s Constitutionally afforded right of Due Process, as
24 forewarned in *Donaldson*.

25 **Conclusion**

26 Summarily, the authorities cited by the FTC in furtherance of the
argument that basic service requirements are optional are not

1 persuasive. Moreover, they are wholly rebutted by this Circuit's holding
2 in *United States v. Gilleran*, which unequivocally states that Rule 4 is
3 essential to the procurement of personal jurisdiction. By failing to
4 adhere to Rule 4's requirement that a summons be obtained and served
5 upon the Respondent with the order to show cause and the enforcement
6 petition, the court lacks personal jurisdiction over the Respondents and
7 the FTC's enforcement action is due to be dismissed.

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9 Respectfully submitted this 15th day of February, 2018.

10
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12 Attorneys for Donor Relations, LLC and
13 for Courtesy Call, Inc.

14 /s/ Robert G. Bernhoft

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27 The undersigned hereby certifies that this document was served via
28 the Court's ECF system and that opposing counsel is registered as an
29 ECF user with this Court.
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