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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

| | | |
|---------------------------|---|---------------------------|
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Petitioner, |) | CIV 08-1016 PHX DGC |
| |) | |
| v. |) | REPORT AND RECOMMENDATION |
| |) | |
| DAVID H. GRIGGS, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

TO THE HONORABLE DAVID G. CAMPBELL:

On February 18, 2009, the undersigned Magistrate Judge was ordered to prepare a Report and Recommendation regarding Respondent's motion at Docket No. 27, which motion is titled "Supplemental Response to Petitioner's Motion for Contempt; and Motion to Dismiss Order Enforcing Summons."

Background

Petitioner, the Internal Revenue Service ("IRS") sues to enforce Respondent's compliance with an IRS summons issued on or about August 10, 2007. The summons required Mr. Griggs to appear, testify, and to produce "books, records, papers, and other data relating" to the investigation of his individual tax liability for the tax years ending December 31, 2001, December 31, 2002, December 31, 2005, and December 31, 2006. Docket No. 3, Attach. The summons stated another purpose as "inquiring into any offense connected with the administration or

1 enforcement of the internal revenue laws concerning the person
2 identified above..." Id. Although issued by an officer in the
3 "small business self-employed" department of the IRS, the
4 summons did not name any business or sole proprietorship owned
5 or operated by Mr. Griggs, nor did it require him to produce
6 journals, receipts, ledgers, work orders, etc.¹

7
8 ¹ The summons was directed to Mr. Griggs as an individual and
required him to produce:

9 the following books, records, papers, and other data
10 relating to the tax liability or the collection of the tax
11 liability or for the purpose of inquiring into any offense
connected with the administration or enforcement of the
12 internal revenue laws, concerning the person identified
above for the period shown.

13 All documents and records in your possession or control
reflecting the receipt of taxable income by you for the
14 years [2001, 2002, 2005, 2006] including but not limited
to: statement of wages for the years [2001, 2002, 2005,
15 2006], statements regarding interest or dividend income for
the years [2001, 2002, 2005, 2006], employee earnings
16 statements for the years [2001, 2002, 2005, 2006], records
of deposits to bank accounts during the years [2001, 2002,
17 2005, 2006], and any and all other books, records,
documents, and receipts regarding wages, salaries, tips,
18 fees, commissions, and any other compensation for services
(including gains from dealing in property, interest,
19 rental, royalty and dividend income, alimony, annuities,
income life insurance policies and endowment contracts,
20 pensions, income from the discharge of indebtedness,
distributive shares of partnership gross income, and income
from an estate or trust), so that Federal Income Tax
liability for the years [2001, 2002, 2005, 2006])for which
21 years no return have been made) may be determined.

Docket No. 3, Attach.

22 Compare the summons with the one at issue in United States v.
Schmidt, 816 F.2d 1477, 1479 n.1 (10th Cir. 1987), wherein the summons
23 sought:

24 [records] including but not limited to: employee earning
statements for the years 1981 through 1983; records of
25 deposits to bank accounts, cancelled checks, check
registers and bank statements for the years 1981 through
26 1983; savings account passbooks including money market
transactions for the years 1981 through 1983; and any and
all books, records, documents regarding wages, salaries,
27 tips, fees, commissions and any other compensation for
services (including the receipt of property other than
28 money), gains from dealings in property; interest, rental,
royalty, dividend income; alimony, annuities, income from

1 Mr. Griggs was required to appear as summonsed on
2 August 22, 2007. Mr. Griggs appeared but refused to produce
3 documents and he refused to testify. The government filed a
4 petition to enforce compliance with the summons on March 25,
5 2008. The Court granted the petition to enforce the summons on
6 June 2, 2008. See Docket No. 10.

7 The Court found the IRS had met the criteria specified
8 in United States v. Powell for enforcing the summons. Id. The
9 Court held that Mr. Griggs had failed to demonstrate an abuse of
10 process or improper purpose. The Court's order at Docket No. 10
11 required Mr. Griggs to produce the subpoenaed documents and
12 testimony within 45 days. Id.

13 Mr. Griggs appeared before the IRS on June 23, 2008,
14 but did not produce any documents. At that time Mr. Griggs
15 asserted a Fifth Amendment privilege to questions asked by
16 Petitioner.

17 On September 25, 2008, Petitioner IRS filed a motion
18 asking the Court to order Mr. Griggs to show cause why he should
19 not be held in civil contempt. See Docket No. 13. The Court

21 life insurance policies and endowment contracts, pensions,
22 income from the discharge of indebtedness (sic), distributive
23 shares of partnerships gross income, and income from an
24 estate of trust.

25 *All books and records, invoices, statements and other*
26 *documents pertaining to operation of Ralph W. Schmidt*
27 *Contractor Business for the period beginning January 1,*
28 *1981, and ending December 31, 1983, including but not*
limited to all journals including general journal, cash
receipts, and cash disbursements journals; general ledger
and all subsidiary ledgers; savings account passbooks
including money market transactions; bank statements,
including cancelled checks and deposit slips; loans and
notes ledgers and files; payroll records; depreciation
records and investment credit worksheets.
(emphasis added).

1 granted the motion and held a hearing on October 29, 2008,
2 requiring Mr. Griggs to show cause why he should not be held in
3 contempt. See Docket No. 17 & Docket No. 21. The Court
4 continued the show cause hearing until November 5, 2008. See
5 Docket No. 21 & Docket No. 22.

6 Mr. Griggs initially did not appear at the hearing on
7 November 5, 2008. Mr. Griggs was brought before the Court on
8 November 5 and again refused to comply with the summons,
9 asserting that he was entitled to invoke a Fifth Amendment
10 privilege with regard to production of the summonsed documents.
11 See Docket No. 29 & Docket No. 49. Mr. Griggs filed the pending
12 motion to dismiss the order enforcing the summons on the same
13 grounds the same day. See Docket No. 27.

14 The Court referred the matter to the undersigned for a
15 Report and Recommendation regarding Docket No. 27, i.e., Mr.
16 Griggs' motion to quash the summons, on February 18, 2009.

17 The Court found that the Government had not satisfied
18 the foregone conclusion rule with regard to work order forms,
19 the only class of document the IRS asserted satisfied the rule.
20 The Court stated:

21 The breadth of the summons, however, "far
22 exceeded the [G]overnment's knowledge about
23 the actual documents that [Griggs] created or
24 possessed' during the tax years at issue. In
25 re Grand Jury Subpoena, 383 F.3d at 910-11.
At the time the Government issued the
summons, "it had no reason to believe that
[Griggs] possessed the myriad of documents it
sought." Id.

26 Docket No. 49.

27 On March 10, 2009, Petitioner IRS filed a motion
28 seeking an evidentiary hearing prior to the issuance of the

1 Report and Recommendation. See Docket No. 55. Mr. Griggs filed
2 a pleading opposing Petitioner's motion on April 8, 2009. See
3 Docket No. 59. Mr. Griggs argued he could invoke his Fifth
4 Amendment privilege against self-incrimination and not produce
5 the summonsed documents and not testify regarding those
6 documents and that no hearing was needed. The Court granted
7 Petitioner's motion and scheduled an evidentiary hearing to
8 determine if the Fifth Amendment privilege was properly invoked.
9 See Docket No. 63.

10 The order setting the evidentiary hearing was docketed
11 on June 1, 2009. The order setting the hearing allowed Mr.
12 Griggs until June 26, 2009, to

13 file under seal with the Court the documents
14 in his possession or under his control and in
15 the possession of others sought by the IRS
16 and *specified in the summons approved by [the*
17 *Court]*. Specifically, Mr. Griggs shall
18 produce *all documents regarding the receipt*
19 *of income for the years 2001, 2002, 2005, and*
20 *2006, including but not limited to statements*
21 *of wages, including 1099 statements and W-2*
22 *statements, statements of interest or*
23 *dividend income, employee earnings*
24 *statements, and bank account statements*
showing deposits. Mr. Griggs shall Bates
stamp each document with a separate number.
Mr. Griggs shall file a pleading, under seal
with the Court, which references each Bates
stamped document separately by number and
indicate with regard to that specific
document why he believes he is entitled to
invoke the privilege. The undersigned will
conduct an in camera review of the documents
to determine if they are covered by the
privilege.

25 Docket No. 63 (emphasis added).

26 Mr. Griggs did not submit any records or other
27 documents to the Magistrate Judge for in camera review, nor did
28 Mr. Griggs file any pleading seeking guidance or clarification

1 of the order at Docket No. 63.

2 In the order setting the evidentiary hearing the
3 Magistrate Judge allowed the IRS until June 26, 2009, to file a
4 pleading indicating precisely what specific documents it wanted
5 Mr. Griggs to produce. The Magistrate Judge ordered the IRS to
6 brief the issue of whether those documents were covered by the
7 foregone conclusion rule. The Magistrate Judge also ordered the
8 IRS to aver whether this matter has been referred to the Justice
9 Department for criminal prosecution and whether Petitioner
10 intended to offer Mr. Griggs any form of immunity. See Docket
11 No. 63 at 11.

12 In response to the order, on June 19, 2009, the IRS
13 filed the requisite pleading. See Docket No. 64.

14 [T]he United States has been made aware of a
15 number of classes of records that are
16 responsive to the Court's enforcement Order.
17 The United States submits that such records
18 should be produced in their entirety for the
19 Court to review for potential Fifth Amendment
20 applicability. Further, the United States
21 submits that *only Mr. Griggs knows whether
22 additional documents exist that are
23 responsive to the Court's enforcement Order,*
24 and to the extent that such documents do
25 exist, Mr. Griggs should also produce those
26 records to the Court.

21 Service-Orders and IRS Forms 1099. Mr.
22 Griggs operates a heating/air-conditioning
23 business in the Phoenix metropolitan area.

23 Mr. Griggs operates his
24 heating/air-conditioning business under the
25 name "East Valley Air" (among other trade
26 names). In operating his
27 heating/air-conditioning business, Mr. Griggs
28 provides to his customers copies of
service-order forms in the ordinary course of
business. Further, Mr. Griggs has admitted to
maintaining these service-order forms. "I
have work orders ... I can provide the
records." Transcript from the October 29,
2008 Hearing These service-order forms

1 provide information such as the nature of the
2 services provided, a breakdown of the amount
3 billed to the customer ("Service Charge, Flat
4 Rate, Labor, Parts, Tax, Total"), and whether
5 payment has been remitted by the customer
6 ("PAID").

7 Additionally, it is believed that Mr. Griggs'
8 commercial customers provide IRS Forms 1099
9 to him stating the amount paid to Mr. Griggs
10 for his services. To the extent that these
11 Forms 1099 exist, Mr. Griggs should produce
12 all of them for review by the Court.

13 Bank Statements, Deposit Receipts and
14 Cashier's Checks. Mr. Griggs admitted to
15 operating his heating/air-conditioning
16 business largely in cash. It appears that
17 instead of maintaining a business account
18 from which he could pay his business
19 expenses, Mr. Griggs regularly deposits large
20 sums of money, immediately draws cashier's
21 checks for the full amount of the deposit,
and then uses those cashier's checks to pay
his bills. Mr. Griggs should produce all of
the records (including but not limited to
cash deposit receipts, cashier's check copies
and receipts, bank statements, and cash
transaction report (CTR) statements) that
show when, where, and for how much each and
every cash deposit/conversion occurred...

Concerning the above-discussed service-order
forms and bank records, the United States
submits that the Fifth Amendment is
inapplicable to Mr. Griggs because of the
foregone conclusion exception to the Fifth
Amendment.... Because the Government already
knows with more than reasonable certainty
that service-order forms and cash deposit
records exist and that Mr. Griggs has control
over, and access to, these records, the
respondent has no right under the Fifth
Amendment to withhold any of these records.

22 Docket No. 64 (emphasis added). The IRS further averred the
23 matter had not been referred for criminal prosecution nor did
24 Petitioner intend to offer Mr. Griggs any type of immunity from
25 prosecution. Id.

26 On July 7, 2009, the date set for the ex parte hearing
27 for Mr. Griggs to establish his particularized Fifth Amendment
28 privilege to the summonsed documents, Mr. Griggs appeared and

1 asserted that he was not certain what specific documents the
2 government had been seeking and that he did not have the
3 specific documents the government had been seeking. Mr. Griggs
4 did not produce any documents for the Magistrate Judge's
5 inspection, but instead asked for leave to file a pleading
6 captioned as a "Declaration." See Docket No. 65.

7 In his declaration Mr. Griggs avers he does not have
8 "statements of wages" for the years in question and also states
9 that he does not have statements indicating dividend or interest
10 income for the years in question. Mr. Griggs further declares
11 that he was not an "employee" during the years in question and,
12 accordingly, that he does not have "employee earning statements"
13 for the years in question. Mr. Griggs also states he does not
14 have in his possession and does not maintain records of bank
15 deposits made during the years in question. Notably, Mr. Griggs
16 states that he does not "have" documents "pertaining to
17 'compensation for services...'" Id.

18 On July 8, 2009, the day after the ex parte hearing, an
19 evidentiary hearing was conducted. At the evidentiary hearing
20 Mr. Griggs answered some questions posed by counsel for the
21 United States and asserted a Fifth Amendment objection to some
22 questions.² At the conclusion of the hearing the Magistrate

23
24 ² Throughout the July 8 hearing, Mr. Griggs asserted his Fifth
25 Amendment privilege against testimonial incrimination in response to
26 a question posed by counsel for the IRS on 38 occasions. See Docket
27 No. 69 (Transcript of hearing conducted July 8, 2009) at 21, 22, 26,
28 43, 44, 45, 46, 50-51, 87, 88, 96, 97, 99, 100, 105, 107, 108, 110,
124, 125, 126-27, 128, 129, 130, 131, 132-33, 133, 141, 143. On
several occasions Mr. Griggs answered a question and then invoked his
privilege prior to being asked another question. See, e.g., id. at
43, 44, 46. Each time the Magistrate Judge asked Mr. Griggs if he
could or wanted to explain the basis for his assertion of the

1 Judge ordered the parties to submit supplemental briefing
2 regarding whether Mr. Griggs had carried his burden in
3 establishing that he validly invoked his Fifth Amendment right
4 against self-incrimination and whether Mr. Griggs' could rely on
5 a non-possession of records defense.

6 On July 29, 2009, Petitioner IRS filed a supplemental
7 brief as ordered by the Magistrate Judge. See Docket No. 71.
8 Mr. Griggs filed his supplemental brief on August 11, 2009. See
9 Docket No. 72. Petitioner IRS filed a "reply brief" to Mr.
10 Griggs' pleading on August 19, 2009. See Docket No. 73.

11 **Relevant law**

12 The Magistrate Judge has been asked to recommend the
13 disposition of Mr. Griggs' motion at Docket No. 27, asking the
14 summons be quashed and he not be held in contempt.
15 Specifically, the Magistrate Judge was asked to opine whether
16 Mr. Griggs may rightfully refuse to submit to the summons
17 because he has a Fifth Amendment right to be free of making
18 incriminating testimonial statements. The Magistrate Judge was
19 also asked to address whether Respondent has satisfied the
20 "foregone conclusion" test with regard to the summonsed
21 documents.

22 The Fifth Amendment declares that "[n]o
23 person ... shall be compelled in any criminal
24 case to be a witness against himself." U.S.
25 Const. amend. V. At one point in our
26 history, this declaration was taken to mean
27 that the government could not compel the

28 privilege Mr. Griggs declined to further explicate. See id., passim.
The Magistrate Judge also indicated to Mr. Griggs several times that
he could further explain his Fifth Amendment assertions to the
Magistrate Judge in chambers ex parte. Mr. Griggs declined to explain
his objections in an ex parte setting. Id. at 5, 9-10, 144.

1 production of private papers. See Boyd v.
2 United States, 116 U.S. 616, 634-35, []
3 (1886). In 1976, the Supreme Court changed
4 course, and it is now a "settled proposition
5 that a person may be required to produce
6 specific documents even though they contain
7 incriminating assertions of fact or belief
8 because the creation of those documents was
9 not 'compelled' within the meaning of the
10 privilege." Hubbell, 530 U.S. at 35-36, 120
11 S. Ct. 2037 (summarizing Fisher, 425 U.S.
12 391, 96 S. Ct. 1569 []). "[T]he act of
13 producing documents in response to a
14 subpoena," however, "may have a compelled
15 testimonial aspect" in that the act "may
16 implicitly communicate 'statements of fact,'"
17 such as the witness's admission "that the
18 papers existed, were in his possession or
19 control, and were authentic." Id. at 36 &
20 n.19 [] (quoting United States v. Doe, 465
21 U.S. 605, 613 & n.11 [] (1984)). Whether the
22 act of producing evidence in response to a
23 subpoena is sufficiently testimonial that the
24 Fifth Amendment applies "depend [s] on the
25 facts and circumstances of particular cases."
26 Fisher, 425 U.S. at 410, 96 S. Ct. 1569.

27 United States v. Ponds, 454 F.3d 313, 319 (D.C. Cir. 2006). See
28 also In re Grand Jury Subpoena, Dated Apr. 18, 2003, 383 F.3d
905, 909 (9th Cir. 2003).

The federal courts have referred to the refusal to
produce summonsed documents as asserting an "act of production"
privilege, recognized by the United States Supreme Court in
United States v. Doe, 465 U.S. 605, 612-13, 104 S. Ct. 1237,
1242-43 (1984). See, e.g., United States v. Grable, 98 F.3d
251, 253 (6th Cir. 1996).

In Doe, the Supreme Court held that while
the Fifth Amendment privilege against
self-incrimination does not extend to
corporate documents, personal documents do
merit at least partial protection. In
particular, while the contents of personal
records are not privileged, the physical act
of producing the documents may be privileged.
Id. This distinction rests on the observation

1 that "[a] government subpoena compels the
2 holder of the document to perform an act that
3 may have testimonial aspects and an
4 incriminating effect." Id.

5 Grable, 98 F.3d at 253.

6 The Fifth Amendment only protects a person from
7 "compelled ... Testimonial Communication that is incriminating."
8 Fisher v. United States, 425 U.S. 391, 408, 96 S. Ct. 1569, 1579
9 (1976). Accordingly, the Fifth Amendment is limited to
10 protecting a person from being compelled to produce documents
11 under circumstances where such production amounts to a
12 testimonial communication in a proceeding wherein their legal
13 jeopardy is at stake. See, e.g., id., 425 U.S. at 409-10, 96 S.
14 Ct. at 1580.³ However, even when documents themselves are not
15 privileged, the "act of production" of the non-privileged
16 documents may be sufficiently testimonial in nature as to make
17 the privilege applicable to their production by an individual.
18 Doe, 465 U.S. at 610-12, 104 S. Ct. at 1241-42. The
19 circumstances may be such that, by selecting and producing the
20 documents themselves, the individual is admitting the papers
21 existed, that they were in his possession or control, and that
22 they were authentic, all of these admissions providing elements
23 of a case against the individual. See United States v. Hubbell,
24 530 U.S. 27, 36-38, 120 S. Ct. 2037, 2043-44 (2000).

25 ³ In this matter the summons sought documents from Mr. Griggs as
26 an individual, not as a keeper of business documents, and as noted
27 *supra* called for "the production of, among numerous other items, Forms
28 W-2 (wages) and 1099 (interest and dividend income). These are
quintessentially personal documents, the production of which by a
taxpayer may be protected by the Fifth Amendment privilege." United
States v. Grable, 98 F.3d 251, 256 (6th Cir. 1996), quoting Smith v.
Richert, 35 F.3d 300, 304 (7th Cir. 1994).

1 Additionally, the Fifth Amendment privilege applies to the
2 business records of a sole proprietor. United States v. B & D
3 Vending, Inc., 398 F.3d 728, 733 (6th Cir. 2004), quoting Bellis
4 v. United States, 417 U.S. 85, 87, 94 S. Ct. 2179, 2182 (1974);
5 United States v. G & G Adver. Co., 762 F.2d 632, 634 (8th Cir.
6 1985).

7 It is the taxpayer's burden to establish their
8 entitlement to invoke the privilege. See, e.g., United States
9 v. Baker, 721 F.2d 647, 650 (8th Cir. 1983). The bald assertion
10 of privilege does not immunize the individual; the Court must
11 determine whether his refusal is justified. See Hoffman v.
12 United States, 341 U.S. 479, 486-87, 71 S. Ct. 814, 818 (1951).
13 A taxpayer cannot "draw a conjurer's circle around the whole
14 matter by his own declaration that to write any word upon the
15 government blank would bring him into danger of the law."
16 United States v. Sullivan, 274 U.S. 259, 264, 47 S. Ct. 607, 608
17 (1927). Accordingly, if the individual makes no proffer that
18 specific summonsed documents are subject to the privilege, they
19 have not met their burden of establishing their entitlement to
20 the privilege. See United States v. Brown, 918 F.2d 82, 84 (9th
21 Cir. 1990).⁴ See also United States v. Allee, 888 F.2d 208, 212

22
23 ⁴
24 Appellant refused to make any showing that the documents or
25 testimony sought met the required standards. His conduct is
26 thus distinguishable from that of the defendants in
27 Rendahl, who made in camera offers of proof to support
28 their claims. 746 F.2d at 554. Instead, it parallels the
fact pattern in Rylander, in which the defendant refused to
comply with a district court enforcement order requiring
him to produce documents. 460 U.S. at 754, 103 S. Ct. at
1551. "[W]hile the assertion of the Fifth Amendment
privilege against compulsory self-incrimination may be a
valid ground upon which a witness ... declines to answer

1 (1st Cir. 1989) (finding the assertion of the privilege was not
2 ripe at the stage the taxpayer appealed an order of
3 enforcement); United States v. Schmidt, 816 F.2d 1477, 1482
4 (10th Cir. 1987); United States v. Clark, 574 F. Supp. 2d 262,
5 267-68 (D. Conn. 2008); United States v. Rinehart, 539 F. Supp.
6 2d 1334, 1337-39 (W.D. Okla. 2008); Muratore v. Department of
7 Treasury, 315 F. Supp. 2d 305, 310 (W.D.N.Y. 2004).

8 If the party refuses to produce the documents
9 at this point, he or she will have waived the
10 claimed privilege. If the party produces the
11 documents to the court in an in camera
12 proceeding, however, the court must give the
13 party an opportunity to assert the claim of
14 privilege as to each document, and must then
15 rule on the validity of the claim as to each.
A failure to turn over to the IRS any
document as to which the court finds no valid
claim of privilege will support a finding of
contempt. As to any documents for which the
court finds a valid claim of privilege, the
party will be required to produce the
documents only if granted use immunity.

16 Grable, 98 F.3d at 257.

17 **Analysis**

18 Mr. Griggs did not produce any summonsed records for in
19 camera review, but instead argued at the time set for the in
20 camera inspection of records that he had not understood exactly
21 what records were summonsed and that he did not possess such
22 records. The Magistrate Judge does not find Mr. Griggs'

23
24 _____
25 questions, it has never been thought to be in itself a
26 substitute for evidence that would assist in meeting a
27 burden of production." Id. at 758, 103 S. Ct. at 1553. The
28 privilege does not shield appellant from meeting his burden
of proof. See id.
United States v. Brown, 918 F.2d 82, 84 (9th Cir. 1990).

1 statements credible; *inter alia*, Mr. Griggs stated at the in
2 camera hearing that he had previously had no record of the
3 summons and that the summons was not in the record in this
4 matter. The summons is found at Docket No. 3, as an attachment
5 to that pleading, and Mr. Griggs did not argue at the
6 enforcement stage that he did not have a copy of the summons.

7 Mr. Griggs stated at the onset of the evidentiary
8 hearing before the Magistrate Judge that he was abandoning his
9 Fifth Amendment objection to production of the summonsed
10 documents.⁵ Mr. Griggs has since declared that he is still
11 asserting a Fifth Amendment privilege and he now also asserts
12 that he is not in possession of any documents which would be
13 responsive to the summons.

14 Because the Magistrate Judge was asked to render an
15 opinion as to the validity of Mr. Griggs' assertion of the
16 privilege and Petitioner's assertion that the documents sought
17 were a foregone conclusion, these issues will be addressed
18 notwithstanding Mr. Griggs' apparent waiver of the Fifth
19 Amendment privilege at the onset of the hearing on July 8, 2009.

20 The individual invoking the Fifth Amendment as a basis
21 for withholding testimony and documents bears the burden of
22 establishing their entitlement to the protections of this
23 amendment. See, e.g., Brown, 918 F.2d at 84. To be afforded
24 these protections, Mr. Griggs was required, and ordered, to

25

26 ⁵ The Magistrate Judge, addressing Mr. Griggs directly,
27 queried "... But the long and short of it is that it appears that for
28 Fifth Amendment purposes and any objection based on the Fifth
Amendment you're now abandoning that position ...". Mr. Griggs
responded: "In general, yes, sir." Docket No. 69 (Transcript) at 8.

1 produce the summonsed records for in camera review. His failure
2 to produce any summonsed records vitiates his claim to the Fifth
3 Amendment privilege. See, e.g., Grable, 98 F.3d at 255-57;
4 Allee, 888 F.2d at 212 ("A district court (and this court, upon
5 review) simply cannot make a determination as to the legitimacy
6 of the interposition of the Fifth Amendment privilege, with
7 respect to particular questions and documents, in advance.").
8 Accordingly, without addressing any other issue before the
9 Court, the Court may conclude that Mr. Griggs is not entitled to
10 assert the Fifth Amendment privilege to any class of documents
11 responsive to the summons.

12 **Foregone conclusion rule**

13 Records the existence of which are a foregone
14 conclusion are not protected by the Fifth Amendment. See United
15 States v. Norwood, 420 F.3d 888, 895 (8th Cir. 2005). "When the
16 existence of documents is a foregone conclusion, the taxpayer's
17 concession that he has the documents would add little or nothing
18 to the government's information, and the the question is not of
19 testimony but of surrender." Fisher, 425 U.S. at 411, 96 S. Ct.
20 at 1581 (internal citations and quotations omitted), quoted in
21 Norwood, 420 F.3d at 895. The "foregone conclusion" rule does
22 not require the IRS "to have actual knowledge of the existence
23 and location of each and every responsive document...." In re
24 Grand Jury Subpoena Dated Apr. 18, 2003, 383 F.3d at 910.
25 However, the IRS must "establish *the existence* of the documents
26 sought and [*the respondent's*] possession of them with
27 'reasonable particularity.'" Id. (emphasis added).

1 We wish to emphasize that the burdens of
2 production and proof on the questions of the
3 existence, possession, and authenticity of
4 the summoned documents are on the Government,
5 not the taxpayer. That the burdens rest
6 initially with the Government is conceded by
7 the IRS in this case and is necessarily
8 implied, if not expressly stated, in Doe.
9 See 465 U.S. at 614 n.13, 104 S. Ct. at 1243
10 n.13 ("This is not to say that the Government
11 was foreclosed from rebutting [the taxpayer's
12 Fifth Amendment] claim by producing evidence
13 that possession, existence, and
14 authentication were a 'foregone conclusion.'
15 In this case, however, the Government failed
16 to make such a showing.")...

17 United States v. Rue, 819 F.2d 1488, 1494 n.4 (8th Cir. 1987)
18 (emphasis added). See also In re Grand Jury Subpoena, Dated
19 Apr. 18, 2003, 383 F.3d at 910.

20 The Supreme Court has emphasized that the applicability
21 of the Fifth Amendment turns on the level of the IRS' prior
22 knowledge of the existence and location of the summonsed
23 documents. See Hubbell, 530 U.S. at 44-45, 120 S. Ct. at 2047-
24 48. See also In re Grand Jury Subpoena, Dated Apr. 18, 2003,
25 383 F.3d at 910. When deciding whether the government has met
26 its burdens of production and proof, the Court must look to the
27 "quantum of information possessed by the government before it
28 issued the relevant subpoena." United States v. Hubbell, 167
F.3d 552, 569 (D.C. Cir. 1999) (emphasis added), aff'd, 530 U.S.
27 (2000). See also Rue, 819 F.2d at 1493 ("The relevant date
on which existence and possession of the documents must be shown
is the date on which the [subpoena] is served, for it is at that
time that the rights and obligations of the parties become
fixed").

1 The undersigned notes that, at the time it issued the
2 summons, Petitioner IRS did not apparently know of the existence
3 of the work orders or cashier's check receipts, or that these
4 "classes" of documents were in Mr. Griggs' possession. At the
5 time the summons was issued and at the time it was ordered
6 enforced, the IRS could not independently confirm the existence
7 and authenticity of these classes of documents, and Mr. Griggs'
8 possession thereof, without Mr. Griggs.

9 At the time the summons was issued and at the time it
10 was ordered enforced, the IRS apparently did not know that Mr.
11 Griggs did business as "East Valley Air."⁶ Although Mr. Griggs
12 subsequently informed the IRS that he did at least at one time
13 have the work orders, the existence of the work orders for all
14 of the years in question, or at all, was certainly not a
15 "foregone conclusion" at the time the summons was issued. See
16 Ponds, 454 F.3d at 320-21 ("Whether an act of production is
17 sufficiently testimonial to implicate the Fifth Amendment,
18 therefore, depends on the government's knowledge regarding the
19 documents *before they are produced.*").

20 Accordingly, Petitioner IRS has not met the
21 requirements of the "foregone conclusion" test with regard to
22 the sought-after work orders for East Valley Air and cashier's

23
24 ⁶ The affidavit of the IRS officer investigating Mr. Griggs' tax
25 liability does not indicate when, i.e., a date or year, she became
26 aware that Mr. Griggs operated an air-conditioning repair business and
27 when she became aware Mr. Griggs used service orders in the course of
28 operating this business. See Docket No. 41, Exh. 1. The Corporation
Commission report for East Valley Air attached to the affidavit was
apparently generated on or about October 8, 2008. Id., Exh. 2. As
noted supra, the summons did not seek documents related to a business
named East Valley Air. The work orders obtained by the IRS are all
dated 2008. Id., Exh. 3.

1 checks receipts and stubs. See In re Grand Jury Subpoena, Dated
2 Apr. 18, 2003, 383 F.3d at 910.

3 In United States v. Norwood, 420 F.3d 888 (8th Cir.
4 2005), the IRS petitioned for the enforcement of a summons which
5 requested that taxpayer produce, *inter alia*, bank records and
6 credit card statements. The taxpayer refused to produce the
7 documents, invoking his Fifth Amendment privilege against
8 self-incrimination. See 420 F.3d at 890. The Eighth Circuit
9 concluded that, because the IRS already knew of the existence of
10 the two credit cards and the corresponding accounts, the
11 existence of related documents, i.e., account applications,
12 periodic account statements, and charge receipts, was a foregone
13 conclusion. Id., 420 F.3d at 895.

14 This case is clearly distinguishable because, in this
15 matter, the IRS did not know with any particularity prior to
16 Mr. Griggs' testimony on October 29, 2008, November 5, 2008, and
17 on July 8, 2009, that Mr. Griggs had checking accounts at two
18 different banks. Nor did the IRS know at the time it issued the
19 summons that Mr. Griggs has been issued at least two credit
20 cards. At the time the summons was issued and at the time it
21 was ordered enforced, the IRS could not independently confirm
22 the existence and authenticity of these classes of documents,
23 and Mr. Griggs' possession thereof, without Mr. Griggs. See
24 Hubbell, 530 U.S. at 45, 120 S. Ct. at 2048 (stating that the
25 presumption that a business or individual will have a bank
26 account or credit card account is insufficient to satisfy the
27 foregone conclusion test).

28

1 Because the existence of the records sought in the
2 summonses relating to Mr. Griggs' bank accounts and credit cards
3 was not a foregone conclusion, any valid invocation of the Fifth
4 Amendment would protect production of these documents.
5 Petitioner IRS has not satisfied the foregone conclusion test
6 with regard to Mr. Griggs' bank account statements and credit
7 card statements. This same reasoning applies to the IRS'
8 declaration that it "believes" Mr. Griggs received 1099
9 statements. The IRS' belief, apparently formed on the basis of
10 after-acquired information, that this class of documents exists,
11 is insufficient to sustain its burden of establishing that it
12 knew at the time it issued the summons that this class of
13 documents existed.

14 **Fifth Amendment privilege regarding documents properly**
15 **protected by the privilege**

16 In the circumstance that the material summonsed is
17 information subject to protection by the privilege, determining
18 whether Mr. Griggs could invoke his Fifth Amendment privilege
19 against self-incrimination requires a two pronged analysis.
20 First, the undersigned must determine whether the summonsed
21 information is incriminating in nature, either on its face or in
22 the context of the circumstances that the information is
23 requested. See Hoffman, 341 U.S. at 486-87, 71 S. Ct. at 818.
24 If the information is found to be incriminating, then the
25 undersigned must determine whether Mr. Griggs' asserted
26 apprehension of criminal prosecution is reasonable under the
27 circumstances. See United States v. Argomaniz, 925 F.2d 1349,
28 1353 (11th Cir. 1991).

1 As noted supra, Mr. Griggs has not met his burden of
2 establishing the information is incriminating because he has not
3 produced information for in camera review. The failure to do so
4 precludes the assertion of the privilege.

5 A taxpayer's explained belief that information
6 concerning their income or assets might be used to establish
7 criminal failure to file a tax return may serve as a basis for
8 invoking the Fifth Amendment privilege if that belief is not
9 trifling or imaginary but instead is reasonable. See United
10 States v. Bodwell, 66 F.3d 1000, 1001 (9th Cir. 1995); United
11 States v. Rendahl, 746 F.2d 553, 555-56 (9th Cir. 1984)
12 (concluding that a risk of incrimination had been shown by
13 taxpayers who established that questions asked them would
14 require answers concerning income that could be used to help
15 prove that they had received sufficient income to be required to
16 file a return). Mr. Griggs is not "required to prove the hazard
17 [of incrimination] in the sense in which a claim is usually
18 required to be established in court" Hoffman, 341 U.S. at
19 486, 71 S. Ct. at 818.

20 Absent clear evidence of an absolute bar to
21 prosecution, the possibility of prosecution for failure to
22 report income or to file a tax return is enough to establish the
23 reasonableness of a belief of hazard. United States v. Sharp,
24 920 F.2d 1167, 1171 (4th Cir. 1990). Only when the possibility
25 of prosecution is extremely remote, such as when the statute of
26 limitations has expired, is a claim of Fifth Amendment privilege
27 not well taken. See, e.g., United States v. Nipper, 210 F.
28 Supp. 2d 1259, 1261-62 (N.D. Okla. 2002). If the IRS has

1 offered the taxpayer immunity, which has not occurred in this
2 matter, then the finding of apprehension of criminal prosecution
3 is not warranted. See, e.g., Sharp, 920 F.2d at 1170-72; United
4 States v. Aeilts, 855 F. Supp. 1114, 1119 (C.D. Cal. 1994).

5 **Lack of possession defense**

6 The Magistrate Judge was not asked to opine as to
7 whether Mr. Griggs should be held in contempt for failure to
8 comply with the summons. However, in the interests of
9 expediency, the issue will be addressed.

10 Mr. Griggs is now raising a lack of possession defense
11 to the finding of contempt, which defense he did not raise
12 during the summons enforcement stage, i.e., at the Powell
13 hearing regarding the legitimacy of the summons. Because Mr.
14 Griggs has not produced the summonsed records and because he has
15 not established he is entitled to raise a Fifth Amendment
16 privilege to the production of those documents, he faces the
17 entry of contempt if the Court finds he is not entitled to raise
18 the privilege. Mr. Griggs' pending motion was filed in response
19 to the order to show cause why Mr. Griggs should not be held in
20 contempt.

21 An individual's current "lack of possession or control
22 of records" is an appropriate ground to challenge a summons.
23 See United States v. Rylander, 460 U.S. 752, 757, 103 S. Ct.
24 1548, 1553 (1983). See also United States v. Drollinger, 80
25 F.3d 389, 393 (9th Cir. 1996); United States v. Sorrells, 877
26 F.2d 346, 348-49 (5th Cir. 1989) ("Once an enforcement order is
27 issued, a defendant cannot contend in a contempt proceeding that
28 he lacked possession or control of the requested documents; he

1 may only argue that he presently is unable to comply with the
2 order-in other words, that he now lacks possession or control of
3 documents of the type requested in the summons"); Rue, 819 F.2d
4 at 1494-95.

5 The United States Supreme Court has stated:

6 *In a civil contempt proceeding such as this,*
7 *of course, a defendant may assert a present*
8 *inability to comply with the order in*
9 *question. Maggio v. Zeitz, 333 U.S., at*
10 *75-76, 68 S. Ct. at 411-412 []. While the*
11 *court is bound by the enforcement order, it*
12 *will not be blind to evidence that compliance*
13 *is now factually impossible. Where compliance*
14 *is impossible, neither the moving party nor*
15 *the court has any reason to proceed with the*
16 *civil contempt action. It is settled,*
17 *however, that in raising this defense, the*
18 *defendant has a burden of production.*
19 *McPhaul v. United States, 364 U.S. 372, 379,*
20 *81 S. Ct. 138, 142, [] (1960)[]. Thus while*
21 *Rylander could not attack the enforcement*
22 *order on the ground that he lacked possession*
23 *or control of the records at the time the*
24 *order was issued, he could defend the*
25 *contempt charge on the ground that he was*
26 *then unable to comply because he lacked*
27 *possession or control.*

28 Rylander, 460 U.S. at 757, 103 S. Ct. at 1552 (some internal
citations omitted and emphasis added).

However, to assert this defense, Mr. Griggs bears the
burden of producing credible evidence establishing his present
inability to comply with the Court's order enforcing the
summons. See id., 460 U.S. at 757, 103 S. Ct. at 1552; Rue, 819
F.2d at 1494-95; Badgley v. Santacroce, 800 F.2d 33, 36-37 (2d
Cir. 1986). Mr. Griggs may not meet this burden "simply by
alleging nonpossession of the summoned documents and thereafter
standing mute and asserting a Fifth Amendment privilege." Rue,
819 F.2d at 1495, citing Rylander, 460 U.S. at 758-61, 103 S.

1 Ct. at 1553-54. Accordingly, a finding of contempt would be
2 appropriate notwithstanding Mr. Griggs' assertion that he does
3 not now possess any documents responsive to the summons. This
4 conclusion is supported by the fact that Mr. Griggs has admitted
5 that, after being served with the summons, he destroyed some
6 documents which were responsive to the summons. See United
7 States v. Asay, 614 F.2d 655, 660 (9th Cir. 1980) ("Self-induced
8 inability is not a defense to a contempt proceeding.").

9 Therefore, Mr. Griggs is legally able to defend the
10 contempt charge on the ground that he is now unable to comply
11 because he now lacks possession or control, however a self-
12 induced inability to produce the summonsed documents weighs in
13 favor of the finding of contempt. Mr. Griggs merely alleges
14 non-possession and stands mute, which does not meet his burden
15 of producing credible evidence establishing his present
16 inability to comply with the Court's order enforcing the
17 summons. See Rue, 819 F.2d at 1495; United States v. Rose, 437
18 F. Supp. 2d 1166, 1173-74 (S.D. Calif. 2006).

19 **Conclusion**

20 An individual waives any Fifth Amendment privilege in
21 the act of production context by failing to present documents
22 they assert are covered by the privilege for the Court's in
23 camera review. Therefore, Mr. Griggs waived any legitimate
24 Fifth Amendment privilege against being forced to produce
25 documents in response to the summons by failing to produce any
26 documents for the Magistrate Judge's in camera review.

27 Petitioner IRS has failed to meet its burden to
28 establish that, at the time it issued the summons in this

1 matter, it knew with reasonable particularity that Mr. Griggs
2 maintained a checking account or credit card account, that he
3 had been issued 1099s, or that he operated a business which
4 issued work orders in acknowledgment of payment by customers.
5 Petitioner IRS has indicated that it learned of the existence of
6 these classes of documents through testimony after the summons
7 was issued.

8 Mr. Griggs has not met his burden of establishing a
9 present inability to comply with the summons.

10 Accordingly,

11 **IT IS RECOMMENDED that** Mr. Griggs' motion at Docket No.
12 27, which motion is titled "Supplemental Response to
13 Petitioner's Motion for Contempt; and Motion to Dismiss Order
14 Enforcing Summons," be **denied**.

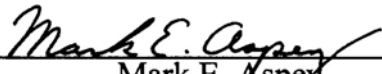
15
16 This recommendation is not an order that is immediately
17 appealable to the Ninth Circuit Court of Appeals. Any notice of
18 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
19 Procedure, should not be filed until entry of the district
20 court's judgment.

21 Pursuant to Rule 72(b), Federal Rules of Civil
22 Procedure, the parties shall have ten (10) days from the date of
23 service of a copy of this recommendation within which to file
24 specific written objections with the Court. Thereafter, the
25 parties have ten (10) days within which to file a response to
26 the objections. Pursuant to Rule 7.2, Local Rules of Civil
27 Procedure for the United States District Court for the District
28 of Arizona, objections to the Report and Recommendation may not

1 exceed seventeen (17) pages in length.

2 Failure to timely file objections to any factual or
3 legal determinations of the Magistrate Judge will be considered
4 a waiver of a party's right to de novo appellate consideration
5 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,
6 1121 (9th Cir. 2003) (en banc). Failure to timely file
7 objections to any factual or legal determinations of the
8 Magistrate Judge will constitute a waiver of a party's right to
9 appellate review of the findings of fact and conclusions of law
10 in an order or judgment entered pursuant to the recommendation
11 of the Magistrate Judge.

12 DATED this 6th day of October, 2009.

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16 _____
17 Mark E. Aspey
18 United States Magistrate Judge
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