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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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United States of America,

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No. CV-08-1016-PHX-DGC
(Lead Case)

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Petitioner,

)

11

vs.

)

No. MC-08-0103-PHX-DGC
(Consolidated Case)

12

David H. Griggs,

)

13

Respondent.

)

**ORDER REGARDING OBJECTIONS
TO R&R**

14

)

AND

15

David H. Griggs,

)

**RENEWED ORDER ENFORCING
SUMMONS**

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Petitioner,

)

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vs.

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United States of America; Internal
Revenue Service; and Jennifer Pardue,
Revenue Officer, IRS,

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Respondents.

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Pending before the Court is Respondent Griggs’s motion to dismiss the Court’s order enforcing an IRS summons (Dkt. #27) and Magistrate Judge Mark Aspey’s Report and Recommendation (“R&R”). Judge Aspey recommends that the Court deny Griggs’s motion. Dkt. #75. Griggs filed an objection to the R&R (Dkt. #76) and the Government filed a response (Dkt. #78). The Court will accept the recommendation of Judge Aspey, deny Griggs’s motion, and set forth the further proceedings that are to occur in this case.

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1 **I. Background.**

2 On March 25, 2008, the Government filed a petition to enforce an Internal Revenue
3 Service summons issued to David Griggs. Dkt. #1, CV-08-1016. On June 2, 2008, the Court
4 ordered Griggs to produce documents and testimony as required by the summons. Dkt. #10.
5 On June 23, 2008, Griggs appeared before the IRS, declined to provide documents, and
6 asserted a Fifth Amendment privilege in response to all questions. Dkt. #75 at 3.¹ On
7 September 30, 2008, the Court ordered Griggs to show cause why he should not be held in
8 contempt. Dkt. #17. Griggs appeared before the Court on November 5, 2008, refused to
9 comply with the summons, and filed the pending motion to dismiss. Dkt. #75 at 4. The
10 Court referred the matter to Judge Aspey for an R&R, asking for a recommendation on
11 whether Griggs has a Fifth Amendment privilege to refuse to submit to the summons and
12 whether the IRS satisfied the “foregone conclusion” test with regard to the summonsed
13 documents. *Id.* at 9. Judge Aspey provided Griggs an opportunity to produce documents for
14 *in camera* inspection, held an evidentiary hearing, and wrote a detailed and thoroughly
15 research R&R.

16 Griggs declined Judge Aspey’s invitation to submit documents for *in camera* review
17 so that Judge Aspey could determine whether Griggs had a valid Fifth Amendment objection.
18 As a result, Judge Aspey found that Griggs had failed to establish his Fifth Amendment
19 privilege. *Id.* at 14-15. Griggs does not object to this finding.²

20 Although the finding was not necessary in light of his conclusion that Griggs could
21 not assert a valid Fifth Amendment objection, Judge Aspey also found that the IRS did not
22 satisfy the “foregone conclusion” test. No objection has been made to this finding.

23 _____
24 ¹ Citations to pages in the parties’ filings will be to the page numbers applied by the
25 Court’s electronic docket at the top of each page.

26 ² In addition, Judge Aspey noted that Griggs expressly abandoned his Fifth
27 Amendment claim at the outset of the evidentiary hearing. *Id.* at 14. Griggs thereafter
28 asserted the Fifth Amendment in response to specific questions, but refused to explain the
basis for his Fifth Amendment objection when asked, and even declined Judge Aspey’s
invitation to provide the explanation in chambers to Judge Aspey alone. *Id.* at 8 n.2.

1 Finally, Judge Aspey found that Griggs likely destroyed documents after receiving his
2 summons, a fact that weighs in favor of a finding of contempt. *Id.* at 23. Griggs objects to
3 this finding.³

4 **II. R&R Review Standard.**

5 Because Griggs filed a timely objection to the R&R, the Court will undertake a de
6 novo review of those portions of the R&R to which he made specific objections. *See Fed.*
7 *R. Civ. P. 72(b)*; 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *United*
8 *States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). The Court may accept, reject,
9 or modify the findings or recommendations made by the magistrate judge. 28 U.S.C.
10 § 636(b)(1).

11 **III. Analysis.**

12 Judge Aspey stated that “a finding of contempt would be appropriate notwithstanding
13 Mr. Griggs’ assertion that he does not now possess any documents responsive to the
14 summons” because, among other reasons, “Griggs has admitted that, after being served with
15 the summons, he destroyed some documents which were responsive to the summons.”
16 Dkt. #75 at 23. Griggs contends that the record does not show that he destroyed documents.
17 At the July 8, 2009 evidentiary hearing, however, the parties discussed Griggs’ practice of
18 destroying records. Griggs provided this testimony:

19 Q. So to the extent you had records after August 20, 2007 [the date the IRS
20 summons was served on Griggs] relating to warranty work you did at the end
of 2006, your practice would have been to destroy those records?

21 A. Yes.

22 Q. . . . So what I’m also asking, then, is when you got this summons at the end of
23 August 2007, you made no effort to identify records that were covered and
preserve them; is that correct?

25 ³ In the final paragraph of his objection, Griggs asserts that Judge Aspey erred by
26 stating that Griggs “has not met his burden of establishing a present inability to comply with
27 the summons.” Dkt. #76 at 4. Griggs, however, does not address Judge Aspey’s ruling or
28 provide any case law or analysis indicating why Judge Aspey is incorrect. The Court will
not review this generalized objection. *See Tindall v. Schriro*, 2006 WL 2361721, at *2
(D.Ariz. June 5, 2006) (court need not review general, non-specific objections to R&R).

1 A. That's probably correct.

2 Q. Do you have any reason for not doing so?

3 A. No. I don't think so.

4 Dkt. #78 at 2. This testimony supports Judge Aspey's conclusion that Griggs likely
5 destroyed records responsive to the summons.

6 Griggs further argues that it would have been improper for him to discard records only
7 after the Court ordered him to comply with the IRS summons. Dkt. #76 at 3. This
8 contention is contrary to well-settled law. "An IRS summons imposes a duty to retain
9 possession of summoned documents pending a judicial determination of the enforceability
10 of the summons." *United States v. Asay*, 614 F.2d 655, 660 (9th Cir. 1980). The Court will
11 deny Griggs's objection to the R&R.

12 **IV. Further Proceedings.**

13 For purposes of further proceedings, the Court reaches several conclusions.

14 First, Griggs cannot assert a Fifth Amendment objection to the IRS summons for
15 documents. Judge Aspey correctly found that Griggs has failed to establish his right to assert
16 the Fifth Amendment, and Griggs has not objected to this conclusion.

17 Second, Judge Aspey correctly found that Griggs failed to preserve warranty
18 documents after receipt of the IRS summons. The extent of that failure, and whether Griggs
19 should be held in civil contempt for destruction of documents, must be addressed in further
20 proceedings.

21 Third, because Griggs cannot assert a valid Fifth Amendment objection to the
22 production of documents, the Court will order Griggs to comply with the Order Enforcing
23 Summons (Dkt. #10) by January 15, 2010. A copy of that Order is attached to this Order as
24 Exhibit A. So there is no ambiguity about Griggs's obligation, the Order Enforcing
25 Summons requires Griggs to produce all documents he "possesses or controls." Dkt. #10 at
26 2. Griggs therefore must make all reasonable efforts to secure the documents called for in
27 the Order Enforcing Summons, including obtaining the documents from banks and credit
28 card companies. If Griggs fails to comply with this Order, the Court will entertain a motion

1 to hold him in civil contempt.

2 Fourth, Griggs raised for the first time before Judge Aspey a lack of possession
3 defense to the production of documents. To assert such a defense, Griggs must produce
4 credible evidence establishing his present inability to comply with the summons. *United*
5 *States v. Rylander*, 460 U.S. 752, 757 (1983); *United States v. Rue*, 819 F.2d 1488, 1494-95
6 (8th Cir. 1987); *Bagley v. Santacroce*, 800 F.2d 33, 36-37 (2d Cir. 1986). Griggs cannot
7 meet this burden “simply by alleging nonpossession of the summoned documents and
8 thereafter standing mute and asserting a Fifth Amendment privilege.” *Rue*, 819 F.2d at 1495
9 (citing *Rylander*, 460 U.S. at 758-61). Rather, he must actively produce evidence showing
10 that he has made all reasonable efforts to comply. *United States v. Hayes*, 722 F.2d 723, 725
11 (11th Cir. 1984); see *Sidney v. MacDonald*, 536 F. Supp. 420, 424 (D. Ariz. 1982). Those
12 efforts include obtaining the responsive documents from banks and credit card companies.⁴

13 **IT IS ORDERED:**

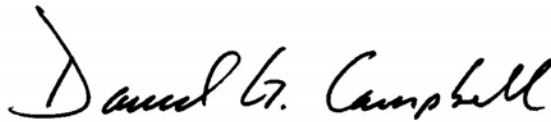
- 14 1. Respondent’s objection (Dkt. #76) to the R&R is **denied**.
- 15 2. Magistrate Judge Mark E. Aspey’s R&R (Dkt. #75) is **accepted**.
- 16 3. Respondent’s motion to dismiss (Dkt. #27) is **denied**.
- 17 4. Respondent David Griggs is ordered to comply with the Order Enforcing
18 Summons (Dkt. #10) by January 15, 2010. A copy of the Order Enforcing
19 Summons is attached to this Order as Exhibit A. Respondent must produce all
20 documents called for in the Order Enforcing Summons that he “possesses or
21 controls.” Dkt. #10 at 2. Respondent Griggs therefore must make all
22 reasonable efforts to secure the documents called for in the Order Enforcing
23 Summons, including obtaining the documents from banks and credit card
24

25 ⁴ The IRS asserts that this obligation includes obtaining documents from customers.
26 Because it is not clear that Griggs possesses or controls documents held by customers, the
27 Court cannot at this stage conclude that he has an obligation to obtain them. To the extent
28 the IRS later argues that Griggs should be held in contempt for failing to obtain documents
from customers, the Court will require the IRS to show that he possesses or controls such
documents.

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companies. The documents shall be produced on January 15, 2010, at the place identified in the Order Enforcing Summons.

Dated this 24th day of November, 2009.



David G. Campbell
United States District Judge

EXHIBIT A

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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

United States of America,)	
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Petitioner,)	
)	MC-08-00029-PHX-DGC
v.)	
David H. Griggs,)	
)	ORDER ENFORCING SUMMONS
Respondent.)	
_____)	

Based upon the Petition filed by the United States, the pleadings with respect thereto, the appearances of the parties before the Court and good cause appearing,

IT IS HEREBY ORDERED that enforcement of Petitioner's Summons issued to Respondent David H. Griggs is hereby granted based upon Petitioner having met the United States v. Powell, 379 U.S. 48 (1964), criteria for Summons enforcement and Respondent having failed to demonstrate that such enforcement would constitute an abuse of the Court's process or that the Summons was issued by the Internal Revenue Service for an improper purpose; and

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2 IT IS FURTHER ORDERED that Respondent David H. Griggs shall produce
3 documents and testimony required in the Summons within forty-five (45) days of the date
4 of this Order Enforcing Summons to Revenue Officer Jennifer Pardue, at the Small
5 Business/Self-Employed Division – Western Area of the Office of the Area Director of
6 the Internal Revenue Service at 40 West Baseline Road, Suite 212, MS 5102, Tempe,
7 Arizona 85283, or Respondent shall contact Revenue Officer Jennifer Pardue at (602)
8 207-8589 to arrange the time and place to produce documents and testimony required in
9 the Summons within the forty-five (45) days of the date of this Order;

10 IT IS FURTHER ORDERED that Respondent may comply within this Order by
11 providing the testimony, and all documents and records Respondent David H. Griggs
12 possesses or controls regarding income Respondent received for the years ending
13 December 31, 2001, December 31, 2002, December 31, 2005 and December 31, 2006, to
14 include but not limited to the following:

15 (1) All statements of wages, statements for interest
16 and dividend income, employee earnings statements, and
17 records of deposit to banks accounts for the years 2001, 2002,
18 2005 and 2006; and

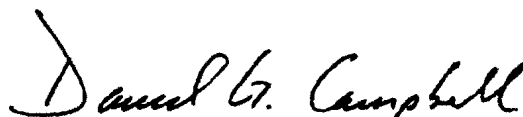
19 (2) Any and all other books, records, documents, and
20 receipts regarding wages, salaries, tips, fees, commissions,
21 and any other compensation for services (including gains
22 from dealings in property, interest, rentals, royalties and
23 dividend income, alimony, annuities, income from life
24 insurance policies and endowment contracts, pensions,
25 income from discharge of indebtedness, distributive shares of

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partnership gross income, income from an estate or trust) for
the years 2001, 2002, 2005 and 2006.

IT IS FURTHER ORDERED that Respondent's non-compliance with the terms
and conditions of this Order may serve as grounds for a finding of civil contempt against
him.

DATED this 30th day of May, 2008.



David G. Campbell
United States District Judge