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 UNITED STATES OF AMERICA and  
 7 NAOEMI SALINAS, Revenue Agent,  
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 10 **UNITED STATES DISTRICT COURT**  
 11 **EASTERN DISTRICT OF CALIFORNIA**

12 UNITED STATES OF AMERICA and )	1:08-cv-00752-OWW-SMS
13 NAOEMI SALINAS, Revenue )	
14 Officer, Internal Revenue )	<b>CERTIFICATION OF FACTS</b>
15 Service, )	<b>CONCERNING PETITION RE CONTEMPT</b>
16 )	<b>OF ORDER FILED MARCH 11, 2009;</b>
17 )	<b>ORDER SETTING THE MATTER BEFORE</b>
18 )	<b>THE DISTRICT JUDGE FOR HEARING</b>
19 )	<b>AND JUDGMENT PURSUANT TO 28</b>
20 )	<b>U.S.C. § 636(e) (6) (B)</b>
21 )	
22 )	<b>Date: APRIL 19, 2010</b>
23 )	<b>Time: 10:00 a.m.</b>
24 )	<b>Judge: U.S. District Judge</b>
25 )	<b>Oliver W. Wanger</b>
26 )	<b>Courtroom #3</b>
27 )	
28 )	

22 I. INTRODUCTION

23 This is a civil action to enforce an Internal Revenue  
 24 Service summons. The matter has been referred to the Magistrate  
 25 Judge pursuant to 28 U.S.C. § 636(b) and Local Rules 302(c) (9) and  
 26 303.

27 Pending before the Court is the Petition Re Contempt of  
 28 Order Filed March 11, 2009, filed by petitioners United States of

1 America and Naoemi Salinas, Revenue Agent of the Internal Revenue  
2 Service. The Petition (Doc. 25) alleges contempt by Respondent,  
3 Katherine Melendez Lopez, of United States District Judge Oliver  
4 W. Wanger's Order Adopting Findings and Recommendations Regarding  
5 Tax Summons Enforcement (Doc. 17). Judge Wanger's Order, filed  
6 March 11, 2009, directed Respondent to obey an IRS summons  
7 requiring Respondent to provide testimony and to bring books,  
8 records, papers, and other data relating to an IRS investigation  
9 of Respondent's assessed tax liabilities for the tax years ending  
10 December 31, 2001; December 31, 2002; December 31, 2003; December  
11 31, 2004; December 31, 2005; and December 31, 2006.

12 Petitioners requested that the United States Magistrate  
13 Judge hold a hearing, certify the facts of the contempt to the  
14 District Judge, and set the matter before the District Judge for  
15 hearing and judgment pursuant to 28 U.S.C. § 636(e)(6)(B). The  
16 hearing before the undersigned was held on January 22, 2010.  
17 Benjamin E. Hall appeared on behalf of the Petitioners, along  
18 with Revenue Agent Naoemi Salinas. Respondent, Katherine  
19 Melendez Lopez, did not appear before the Court and filed no  
20 objection to the Petition.

21 II. BACKGROUND

22 Petitioners commenced this civil proceeding by filing their  
23 Petition to Enforce Internal Revenue Service Summons (Doc. 1) on  
24 May 29, 2008. The petition sought to enforce an IRS Summons  
25 issued December 6, 2007, which summoned Respondent to appear and  
26 give testimony and produce records relating to Respondent's tax  
27 liability for the tax years 2001 through 2006. (Doc. 1-2 at  
28 Exhibit "A"). An Order to Show Cause (Doc. 4) was issued by the

1 Court on June 26, 2008, requiring Respondent to appear and show  
2 cause why she should not be compelled to obey the IRS summons. A  
3 Proof of Service filed with the Court (Doc. 7) demonstrates that  
4 on July 26, 2008, Respondent was personally served at her  
5 business address, 3037 E. Belmont, Fresno, California, with the  
6 Petition, the supporting materials, and the Order to Show Cause.

7 The case came before the previously assigned Magistrate  
8 Judge on the Order to Show Cause on October 17, 2008. As the  
9 Court noted in its Findings and Recommendations Re: Tax Summons  
10 Enforcement (Doc. 11), Respondent did not file objections to the  
11 Petition and did not appear at the hearing. The Magistrate Judge  
12 recommended that the IRS summons be enforced and that Respondent  
13 be ordered "to appear at such time and place as may be fixed by  
14 Revenue Officer Salinas or any other proper Officer or employee  
15 of the IRS and to produce for examining and copying the books,  
16 checks, records, papers and other data demanded by the summons."  
17 By Order filed March 11, 2009 (Doc. 17), Judge Wanger adopted in  
18 full the Magistrate Judge's Findings and Recommendations and  
19 directed Respondent to appear at a time and place as may be fixed  
20 by the IRS to produce the records demanded by the summons.

21 In support of their current Petition, Petitioners submitted  
22 the declaration of Ms. Salinas (Doc. 27) regarding the efforts of  
23 the IRS to obtain Respondent's compliance with the Court's Order.  
24 Ms. Salinas' declaration establishes that on March 12, 2009, she  
25 sent an appointment letter to Respondent at 3037 E. Belmont,  
26 Fresno, California, enclosing a copy of the March 11, 2009 Order,  
27 but the letter was returned with the notation "Attempted Not  
28 Known" on March 19, 2009. (Doc. 27 at ¶ 3 and Exhibit "A".) On

1 March 30, 2009, Ms. Salinas made a field call to 3037 E. Belmont,  
2 Fresno, California, where she learned that Respondent's offices  
3 were closed. Ms. Salinas then inquired at a business next door  
4 and was informed that Respondent had relocated her offices to 431  
5 N. 1st Street, Fresno, California. (Doc. 27 at ¶ 4.)

6 On March 30, 2009, Ms. Salinas prepared a second appointment  
7 letter and mailed it to Respondent at 431 N. 1st Street, Fresno,  
8 California, by regular U.S. Mail and Certified Mail. The letters  
9 were returned with the notation "Attempted Not Known." (Doc. 27  
10 at ¶ 5 and Exhibits "B" and "C".) On May 1, 2009, Ms. Salinas  
11 prepared two IRS Postal Tracers (Form 4759) inquiring about the  
12 status and validity of Respondent's 431 N. 1st Street, Fresno,  
13 California address. On May 14, 2009, Ms. Salinas received  
14 confirmation from the United States Postal Service that mail is  
15 delivered both to Respondent and to her business, Margarita's and  
16 Katarina's Taxes, at 431 N. 1st Street, Fresno, California.  
17 (Doc. 27 at ¶ 6 and Exhibits "D" and "E".)

18 On July 20, 2009, Ms. Salinas sent a third appointment  
19 letter enclosing a copy of the March 11, 2009 Order to Respondent  
20 at 431 N. 1st Street, Fresno, California. Respondent was  
21 requested to appear at 9:00 a.m. on July 31, 2009, at the IRS  
22 offices located at 2525 Capitol Street, Suite 203, Fresno,  
23 California. This letter was not returned, but Respondent did not  
24 appear at the appointed time and has not complied with the Order  
25 directing her to obey the summons. (Doc. 27 at ¶¶ 7-8 and  
26 Exhibit "F".)

27 On October 5, 2009, this Court issued an Order to Show Cause  
28 (Doc. 30) requiring Respondent to appear before the undersigned

1 on December 11, 2009, at 9:30 a.m., to show cause why she should  
2 not be held in civil contempt of the Court, incarcerated, and  
3 ordered to pay a daily fine until she complies with the Order  
4 dated March 11, 2009. The Order to Show Cause further directed  
5 Respondent to file a written response to the contempt petition  
6 within thirty days of service of the Order. Due to a calendar  
7 conflict, the Court continued the December 11, 2009 hearing to  
8 January 22, 2010. Petitioners served Respondent with a Notice of  
9 Continuance (Doc. 33) of the Order to Show Cause hearing,  
10 providing notice of the new hearing date. Respondent filed no  
11 response to the Petition and failed to appear before the Court to  
12 show cause why she should not be held in contempt of the Court.

### 13 III. JURISDICTION

14 The Court has subject matter jurisdiction pursuant to 26  
15 U.S.C. §§ 7402(a)-(b), 7604(a), and 28 U.S.C. §§ 1340, 1345. The  
16 Court has the inherent power to impose sanctions for contempt in  
17 order to provide a fair, effective, and orderly judicial process.  
18 See United States v. Asay, 614 F.2d 655, 658-59 (9th Cir. 1980).

### 19 IV. LEGAL STANDARDS

#### 20 A. Participation by a Magistrate Judge

21 Title 28 U.S.C. § 636(e) (6) provides:

22 **(6) Certification of other contempts to the district**  
23 **court.** -- Upon the commission of any such act -

24 (A) in any case in which a United States magistrate  
25 judge presides with the consent of the parties under  
26 subsection (c) of this section, or in any misdemeanor  
27 case proceeding before a magistrate judge under section  
28 3401 of title 18, that may, in the opinion of the  
magistrate judge, constitute a serious criminal  
contempt punishable by penalties exceeding those set  
forth in paragraph (5) of this subsection, or

(B) in any other case or proceeding under subsection  
(a) or (b) of this section, or any other statute, where

1 -

2 (i) the act committed in the magistrate  
3 judge's presence may, in the opinion of the  
4 magistrate judge, constitute a serious  
5 criminal contempt punishable by penalties  
6 exceeding those set forth in paragraph (5) of  
7 this subsection,

8 (ii) the act that constitutes a criminal  
9 contempt occurs outside the presence of the  
10 magistrate judge, or

11 (iii) the act constitutes a civil contempt,

12 the magistrate judge shall forthwith certify the facts  
13 to a district judge and may serve or cause to be  
14 served, upon any person whose behavior is brought into  
15 question under this paragraph, an order requiring such  
16 person to appear before a district judge upon a day  
17 certain to show cause why that person should not be  
18 adjudged in contempt by reason of the facts so  
19 certified. The district judge shall thereupon hear the  
20 evidence as to the act or conduct complained of and, if  
21 it is such as to warrant punishment, punish such person  
22 in the same manner and to the same extent as for a  
23 contempt committed before a district judge.

24 B. Civil Contempt

25 Petitioners seek a judgment of civil contempt. The civil  
26 nature of the proceeding is based on the character and purpose of  
27 the relief sought. Where the relief sought involves not punitive  
28 or criminal contempt but rather compulsory and compensatory  
sanctions, including conditional confinement employed to compel  
compliance, then the proceeding is for civil contempt. See Asay,  
614 F.2d at 659; Shillitani v. United States, 384 U.S. 364,  
369-70 (1966).

The elements required to be shown in order to adjudge a  
party in civil contempt include a specific and definite court  
order and a failure to take all the reasonable steps within one's  
power to insure compliance with the order. Balla v. Idaho State  
Bd. of Corrections, 869 F.2d 461, 465 (9th Cir. 1989).

1 Wilfulness is not a required element of civil contempt, and the  
2 absence of wilfulness does not relieve one from a civil contempt.  
3 McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949); Asay,  
4 614 F.2d at 661. A petitioner for contempt has the burden of  
5 proving a prima facie case by clear and convincing proof, which  
6 is higher than a preponderance of the evidence but less than  
7 beyond a reasonable doubt. Balla, 869 F.2d at 466.

8 Legal defenses to civil contempt include substantial  
9 compliance with the order, defined as having taken all reasonable  
10 steps to comply with the court order. Balla, 869 F. 2d at 466.  
11 However, at the present stage of the proceedings, Respondent may  
12 not assert error in the order with which she failed to comply.  
13 United States v. Rylander, 460 U.S. 752, 756-57 (1983). A  
14 contempt proceeding does not open to reconsideration the legal or  
15 factual basis of the order alleged to have been disobeyed; it  
16 does not permit a retrial of the original controversy or an  
17 assertion of lack of possession at the time the order was made.  
18 Id. This is because the initial proceeding to enforce the  
19 summons was an adversary proceeding in which the Respondent might  
20 contest the summons on any appropriate ground, including lack of  
21 possession or control; thus, such issues may not be raised for  
22 the first time in a contempt proceeding. Id. at 757.

23 V. CERTIFICATION AND RECOMMENDATION

24 The Court finds that the Order of March 11, 2009, in which  
25 the Court compelled compliance with the summons, was in existence  
26 and specific. The terms of the summons were not in dispute.  
27 Accordingly, the undersigned FINDS AND CERTIFIES that a definite,  
28 specific order existed that required Respondent to appear before

1 Petitioner Salinas, answer questions, and produce documents; and  
2 that Respondent, who was subject to the order, failed to appear,  
3 failed to produce documents pertaining to the investigation of  
4 her tax liabilities, and failed to do all that she could  
5 reasonably do to comply with the Order.

6 The Magistrate Judge therefore FINDS AND CERTIFIES pursuant  
7 to 28 U.S.C. § 636(e) (6) (B) that it is appropriate for Respondent  
8 Katherine Melendez Lopez to appear before the District Judge upon  
9 a day certain to show cause why Respondent should not be adjudged  
10 in contempt by reason of the facts so certified.

11 The undersigned therefore SETS THE MATTER BEFORE THE  
12 DISTRICT JUDGE FOR HEARING AND JUDGMENT pursuant to 28 U.S.C. §  
13 636(e) (6) (B), and DIRECTS SERVICE UPON RESPONDENT OF THIS ORDER  
14 REQUIRING RESPONDENT TO **APPEAR BEFORE DISTRICT JUDGE OLIVER W.**  
15 **WANGER ON APRIL 19, 2010, AT 10:00 A.M., IN COURTROOM #3 OF THE**  
16 **ROBERT E. COYLE UNITED STATES COURTHOUSE, 2500 TULARE STREET,**  
17 **FRESNO, CALIFORNIA,** and SHOW CAUSE why Respondent should not be  
18 adjudged in contempt by reason of the facts so certified.

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21  
22 IT IS SO ORDERED.

23 Dated: March 1, 2010

/s/ Sandra M. Snyder  
UNITED STATES MAGISTRATE JUDGE