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8 **IN THE UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**

10
11 UNITED STATES OF AMERICA,
12
13 Petitioner,
14 v.
15 MICHAEL A. KELLY,
16
17 Respondent.

No. 2:17-cv-01022-WBS-DB

**FINDINGS AND RECOMMENDATIONS
AND ORDER RE: I.R.S. SUMMONS
ENFORCEMENT**

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19 This matter came on before the undersigned on May 26, 2017, under the Order to Show
20 Cause filed March 30, 2017. (ECF No. 3.) The order, with the verified petition filed March 21,
21 2017, (ECF No. 1), and its supporting memorandum, (ECF No. 2-1), was personally served on
22 Respondent, on April 5, 2017, at his place of business, at 6108 Watt Avenue, N. Highlands,
23 California. (ECF 4.) Respondent did not file opposition or non-opposition to the verified
24 petition as provided for in the Order to Show Cause. At the hearing, Bobbie J. Montoya,
25 Assistant United States Attorney, appeared for Petitioner, and investigating Revenue Officer
26 Kim Ulring also was present in the courtroom. Respondent appeared at the hearing on his own
27 behalf.¹

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¹ Respondent informed the court that he had difficulty locating some records. Petitioner

1 The Verified Petition to Enforce I.R.S. Summons initiating this proceeding seeks to
2 enforce an administrative summons issued June 17, 2016. See Exhibit A to the Petition, ECF 1-
3 2. The summons is part of an investigation of the respondent to secure information related to the
4 tax liability or the collection of the tax liability for assessed federal income tax (Form 1040) for
5 the tax periods ending December 31, 2010, December 31, 2011, December 31, 2012,
6 December 31, 2013, December 31, 2014, and December 31, 2015.

7 Subject matter jurisdiction is invoked under 28 U.S.C. §§ 1340 and 1345, and is found to
8 be proper. I.R.C. §§ 7402(b) and 7604(a) (26 U.S.C.) authorize the government to bring the
9 action. The Order to Show Cause shifted to respondent the burden of rebutting any of the four
10 requirements of United States v. Powell, 379 U.S. 48, 57-58 (1964).

11 The undersigned has reviewed the petition and documents in support. Based on the
12 uncontroverted petition verified by Revenue Officer Uling, and the entire record, I make the
13 following findings:

14 (1) The summons (Exhibit A to the Petition, ECF 1-2) issued by Revenue Officer Kim
15 Uling on June 17, 2016 and served upon Respondent on June 17, 2017, seeking testimony and
16 production of documents and records in Respondent's possession, was issued in good faith and
17 for a legitimate purpose under I.R.C. § 7602, that is, to secure information related to the tax
18 liability or the collection of the tax liability for assessed federal income tax (Form 1040) for the
19 tax periods ending December 31, 2010, December 31, 2011, December 31, 2012, December 31,
20 2013, December 31, 2014, and December 31, 2015.

21 (2) The information sought is relevant to that purpose.

22 (3) The information sought is not already in the possession of the Internal Revenue
23 Service.

24 (4) The administrative steps required by the Internal Revenue Code have been
25 followed.

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27
28 informed the court that respondent had produced some records prior to the May 26, 2017 hearing.

1 (5) There is no evidence of referral of this case by the Internal Revenue Service to the
2 Department of Justice for criminal prosecution.

3 (6) The verified petition and its exhibits made a *prima facie* showing of satisfaction of
4 the requirements of United States v. Powell, 379 U.S. 48, 57-58 (1964).

5 (7) The burden shifted to respondent, Michael A. Kelly, to rebut that *prima facie*
6 showing.

7 (8) Respondent presented no argument or evidence to rebut the *prima facie* showing.

8 CONCLUSION

9 Accordingly, IT IS HEREBY RECOMMENDED that the I.R.S. summons served upon
10 Respondent, Michael A. Kelly, be enforced and that Respondent be ordered to appear at the
11 I.R.S. offices at 4330 Watt Avenue, MS 5041/3327, Sacramento, California, before Revenue
12 Officer Kim Ulring or her designated representative, on or before June 26, 2017, as agreed to by
13 Revenue Officer Ulring and Respondent Michael A. Kelly at the show cause hearing, then and
14 there to be sworn, to give testimony, and to produce for examining and copying the books,
15 checks, records, papers and other data demanded by the summons, the examination to continue
16 from day to day until completed, unless compliance with the summons is fully achieved prior to
17 that date and time. Should the foregoing appointment date need to be continued or rescheduled,
18 the Respondent is to be notified in writing of a later date by Revenue Officer Ulring. I further
19 recommend that if it enforces the summons, the Court retain jurisdiction to enforce its order by
20 its contempt power.

21 These findings and recommendations are submitted to the United States District Judge
22 assigned to the case, under 28 U.S.C. § 636(b)(1)(B) and (C) and Rule 304 of the Local Rules of
23 the United States District Court for the Eastern District of California. Within fourteen (14) days
24 after being served with these findings and recommendations, any party may file written
25 objections with the court and serve a copy on all parties. Such a document should be titled
26 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the
27 objections shall be served and filed within fourteen (14) days after service of the objections.
28 The District Judge will then review these findings and recommendations pursuant to 28 U.S.C.

1 § 636(b)(1). The parties are advised that failure to file objections within the specified time may
2 waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir.
3 1991).

4 IT IS ALSO HEREBY ORDERED that:

5 THE CLERK SHALL SERVE this and further orders by mail to:

6 Michael A. Kelly
7 6108 Watt Avenue
8 N. Highlands, CA 95660

8 Dated: June 6, 2017

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11 _____
12 DEBORAH BARNES
13 UNITED STATES MAGISTRATE JUDGE
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22 DLB:6
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