

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Petitioner,

v.

BRIAN TORRANCE,

Respondent.

No. 2:18-cv-1631-JAM-EFB PS

ORDER AND FINDINGS AND
RECOMMENDATIONS

This case was before the court on April 1, 2020, for hearing on petitioner the United States’ motion to compel respondent Brian Torrance’s compliance with an Internal Revenue Service’s (“IRS”) summons. ECF No. 31. Assistant United States Attorney Steven Tennyson appeared on behalf of petitioner; respondent appeared pro se. Also pending is respondent’s motion to dismiss this case. ECF No. 34.

For the reasons stated on the record, and as discussed briefly below, petitioner’s motion to compel is granted. Further, it is recommended that respondent’s motion to dismiss be denied.

I. Motion to Compel

Revenue Agent David Palmer previously issued an IRS summons directing Torrance to appear before the agent on May 2, 2017, to give testimony and produce for examination books, papers, records or other data. *Id.* at ¶ 6. After Torrance failed to comply with the summons, the government filed a petition seeking enforcement. ECF No. 1. The court ordered enforcement of

1 the summons and directed Torrance to appear before Agent Palmer to provide testimony and
2 produce the documents requested by the summons. ECF Nos. 20 & 25. Torrance subsequently
3 appeared before Agent Palmer but refused to produce any documents. Palmer Decl. (ECF No.
4 31-2) ¶ 2. Instead, he claimed that all responsive information was privileged under the Fifth
5 Amendment since “any of the information surrendered could be used against [him] criminally.”¹
6 *Id.* ¶ 6. The government now seeks an order directing Torrance to provide the documents
7 demanded by the IRS’s summons.

8 The Fifth Amendment privilege against self-incrimination “protects a person only against
9 being incriminated by his own compelled testimonial communications.” *Doe v. United States*,
10 487 U.S. 201, 207 (1998) (“[T]he Fifth Amendment would not be violated by the fact alone that
11 [documents] on their face might incriminate the taxpayer . . .”). Accordingly, for a
12 communication to be privileged under the Fifth Amendment, it “must be testimonial,
13 incriminating, and compelled.” *Hiibel v. Sixth Judicial Dist. Ct. of Nevada, Humboldt Cnty.*, 542
14 U.S. 177, 189 (2004). A taxpayer may assert a claim of Fifth Amendment privilege where there
15 “are ‘substantial hazards of self-incrimination that are real and appreciable, not merely imaginary
16 and unsubstantial,’ that information sought in an IRS summons might be used to establish
17 criminal liability.” *United States v. Drollinger*, 80 F.3d 389, 392 (9th Cir. 1996) (quoting *United*
18 *States v. Rendahl*, 746 F.2d 553, 555 (9th Cir. 1984)). This requires the taxpayer to establish that
19 the privilege applies to each question and/or document, and “a blanket claim of privilege is
20 unacceptable.” *United States v. Christensen*, 828 F.3d 763, 803 (9th Cir. 2015); *see also Boday v.*
21 *United States*, 759 F.2d 1472, 1474 (9th Cir. 1985) (holding “[a]ppellants failed to meet their
22 burden because they offered no specific evidence . . . [and] merely suggested hypothetical
23 situations in which some of the Form 1040 questions might tend to incriminate the taxpayer.”).

24 ////

25
26 ¹ Torrance also refused to provide testimony based on an assertion of the Fifth
27 Amendment privilege against self-incrimination. The government indicated at the April 1 hearing
28 that it currently only seeks to compel Torrance to produce the document’s requested by the IRS
summons, not to compel his testimony. Accordingly, the court need not decide at this time
whether Torrance’s refusal to provide testimony was appropriate.

1 Here, Torrance has not demonstrated that any specific document contains information that
2 is privileged under the Fifth Amendment. Significantly, he has not produced a privileged log
3 identifying the specific documents he claims to contain privileged information. *United States v.*
4 *Bright*, 596 F.3d 683, 691 (9th Cir. 2010) (to allow for a reasoned assessment of a privilege
5 claim, taxpayer must “produce a privilege log or turn over any contested documents for in camera
6 review.”). Rather, he has simply made a blanket assertion of privilege without making any
7 particularized showing. *See* ECF No. 33. Consequently, he has failed to meet his burden of
8 showing that specific communications are privileged under the Fifth Amendment. Accordingly,
9 the government’s motion compel is granted.

10 II. Motion to Dismiss

11 Torrance’s motion to dismiss this case is premised on his contention that he cannot be
12 compelled to comply with the IRS’s summons because doing so would violate his Fifth
13 Amendment right against self-incrimination. *See* ECF No. 34. As just explained, Torrance has
14 failed to satisfy his burden of demonstrating that the documents sought by the IRS summons
15 contain privileged information. Accordingly, his motion to dismiss must be denied.

16 III. Conclusion

17 Accordingly, it is hereby ORDERED that:

- 18 1. Petitioner’s motion to compel respondent’s compliance with the IRS’s summons (ECF
19 No. 31) is granted;
- 20 2. Within 21 days of this order, Torrance shall produce for examination books, papers,
21 records or other data demanded by the summons; and
- 22 3. Should Torrance believe that any demanded documents contain privileged information,
23 Torrance shall produce, within 21 days of this order, a privilege log describing “the nature of the
24 documents . . . in a manner that, without revealing information itself privileged or protected,”
25 allows the government to assess his claim(s) of privilege. Fed. R. Civ. P. 26(b)(5). For each
26 document claimed to contain privileged information, Torrance shall identify the date, author and
27 recipient, if any, for each document, and some clarification for why the document meets the
28 requirements for being privileged.

1 Further, it is RECOMMENDED that respondent's motion to dismiss this case (ECF No.
2 34) be denied.

3 These findings and recommendations are submitted to the United States District Judge
4 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
5 after being served with these findings and recommendations, any party may file written
6 objections with the court and serve a copy on all parties. Such a document should be captioned
7 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
8 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
9 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

10 DATED: April 21, 2020.

11 
12 EDMUND F. BRENNAN
13 UNITED STATES MAGISTRATE JUDGE
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28