

1 BACKGROUND

2 On May 23, 2013, M. Fuchs, a Revenue Officer employed by the IRS, issued
3 an IRS summons to Respondent. [Declaration of Revenue Officer M. Fuchs in
4 Support of Petition, (“Fuchs Decl.”), ¶ 3.] The IRS is conducting an investigation
5 into Respondent’s unpaid tax liabilities for the 1997, 1998, 1999, 2000, 2001 and
6 2002 tax years. [Id. at ¶ 2.] The summons relates to the collection of these unpaid
7 assessed tax liabilities. [Id. at ¶ 3.] On June 7, 2013, the IRS personally served a
8 copy of the summons on Respondent. [Id. at ¶ 4.]

9 The summons ordered Respondent to appear before the IRS on June 25, 2013.
10 On June 25, 2013, Respondent appeared before Revenue Officer Fuchs and provided
11 his name and address but did not produce the summonsed information. [Id. at ¶ 6.]
12 In response to Revenue Officer Fuchs’s questions about his income, assets, liabilities
13 and ability to pay what he owes to the IRS, Respondent refused to answer and
14 invoked the Fifth Amendment. [Id.] To date, Respondent has not provided the IRS
15 with the testimony and documents requested by the summons. [Id. at ¶ 10.]

16 On January 30, 2014, the Government petitioned the Court to enforce the
17 summons. On February 24, 2014, the Court ordered Respondent to show cause why
18 he should not be compelled to comply with the IRS summons. The IRS served the
19 order to show cause on Respondent on March 12, 2014 and filed proof of service
20 with the Court on March 13, 2014. On March 27, 2014, Respondent filed an answer
21 in response to the amended order to show cause. Respondent attached a copy of a
22 transcript of the June 25, 2013 interview with Revenue Officer Fuchs. The
23 transcript documents that after providing his name and address, Respondent invoked
24 the Fifth Amendment privilege in response to all questions Revenue Officer Fuchs
25 asked him relating to the information sought in the IRS summons. On April 8, 2014,
26 the Government filed a reply.

27 The hearing was held on the Government’s petition on April 11, 2014, at 3:30
28 p.m. The Government was represented by Assistant United States Attorney Caroline

1 J. Clark. Respondent appeared and represented himself. The Court denied the
2 objections that Respondent made to enforcement of the IRS summons except for his
3 assertion of the Fifth Amendment. The hearing was continued until April 22, 2014,
4 2:00 p.m. to determine, through in camera review, if Respondent could establish a
5 real and appreciable hazard of self-incrimination to each question.

6 At the hearing on April 22, 2014, the Government was represented by
7 Assistant United States Attorney Caroline J. Clark and Respondent represented
8 himself. After in camera review of the questions and documents sought by the IRS
9 and Respondent's explanation of how his elicited responses risked self-
10 incrimination, the Court sustains Respondent's assertion of the Fifth Amendment as
11 to some questions and overrules it as to others.

12 DISCUSSION

13 Pursuant to 26 U.S.C. § 7602(a)(1), the Secretary of the Treasury may
14 "examine any books, papers, records, or other data which may be relevant of
15 material" in connection with "ascertaining the correctness of any return, making a
16 return where none has been made, determining the liability of any person for any
17 internal revenue . . . or collecting any such liability." Section 7602(a)(1) authorizes
18 the Secretary to issue summonses to compel persons in possession of such books,
19 papers, records, or other data to appear and produce the same and/or give testimony.

20 In order to obtain judicial enforcement of an IRS summons, the United States
21 "must first establish it's 'good faith' by showing that the summons: (1) is issued for
22 a legitimate purpose; (2) seeks information relevant to that purpose; (3) seeks
23 information that is not already within the IRS' possession; and (4) satisfies all
24 administrative steps required by the United States Code." Fortney v. United States,
25 59 F.3d 117, 119 (9th Cir. 1995) (citing United States v. Powell, 379 U.S. 48, 57-58
26 (1964)). "The government's burden is a 'slight one' and typically is satisfied by the
27 introduction by the sworn declaration of the revenue agent who issued the summons
28 that Powell requirements have been met." Id. at 120. Once the government has

1 made a prima facie showing that enforcement of the summons is appropriate, the
2 burden shifts to the respondent to show that enforcement of the summons would be
3 an abuse of the court's process. Powell, 379 U.S. at 58. The Supreme Court has
4 characterized the respondent's burden as a heavy one. Id.

5 The Government's petition and Revenue Officer Fuchs' supporting
6 declaration satisfy all four elements of the Powell standard. First, the IRS is
7 conducting an investigation with respect to the collection of Respondent's unpaid
8 assessed tax liabilities for the 1997, 1998, 1999, 2000, 2001 and 2002 tax years.
9 [Fuchs Decl., ¶ 2.] Such an investigation is expressly authorized by 26 U.S.C. §
10 7602(a). The Internal Revenue Code explicitly allows the issuance of a summons
11 for the purpose of determining "the liability of any person for any internal revenue
12 tax . . . or collecting any such liability . . ." 26 U.S.C. § 7602(a). Thus, the
13 summons was issued for a legitimate purpose. Second, Revenue Officer Fuchs has
14 declared in her affidavit that the information requested by the summons may be
15 relevant to the IRS determination of the collectibility of Respondent's assessed
16 income tax liability. [Id. at ¶ 13.] Third, the IRS does not already possess the
17 testimony, papers, records, and other data sought by the summons issued to
18 Respondent. [Id. ¶ 11.] Finally, the IRS has followed and exhausted all required
19 administrative steps, but Respondent has not complied with the summons.
20 [Id. at ¶ 12.] Thus, the Government has made a prima facie showing that it is
21 entitled to judicial enforcement of the summons.

22 As to Respondent's assertion of the Fifth Amendment, a taxpayer is only
23 entitled to the Fifth Amendment privilege if he can establish a "real and appreciable"
24 risk of incrimination. United States v. Rendahl, 746 F.2d 553, 554 (9th Cir. 1984)
25 (citing United States v. Neff, 615 F.2d 1235, 1239 (9th Cir. 1980); United States v.
26 Strauss, No. 12-cv-1594-BTM, 2012 WL 5354905, at *2 (S.D. Cal. Oct. 29, 2012).
27 The taxpayer bears the burden of showing that testimony or documents are
28 privileged. United States v. Brown, 918 F.2d 82, 84 (9th Cir. 1990). As to certain

1 questions outlined below, Respondent has established a real and appreciable risk of
2 incrimination and the Court sustains his assertion of the Fifth Amendment as to
3 those questions.

4 The IRS Summons requested “all documents and records” Respondent
5 possesses or controls regarding “assets, liabilities, or accounts” in his name or for his
6 benefit. The requested records included but were not limited to bank statements,
7 checkbooks, canceled checks, saving account passbooks, records or certificates of
8 deposit, current vehicle registration certificates, deeds or contracts regarding real
9 property, stocks and bonds, accounts, notes and judgments receivable, trust
10 documents and schedule assets, health and life insurance, and all life or health
11 insurance policies. See Docket No. 1 at 11. After in camera review, the Court
12 sustains Respondent’s assertion of the Fifth Amendment as to all documents
13 requested in the IRS Summons finding that the production of the requested
14 documents could present a real risk of incrimination.

15 The Court sustains Respondent’s assertions of the Fifth Amendment privilege
16 to the following questions, cited by transcript page number (1-21) and line number
17 from the transcript found at Docket No. 8, pages 14-36:

18 Page 7, line 22; Page 8, line 6; Page 9, lines 2, 14, 24; Page 10, lines 2, 8, 24;
19 Page 11, line 5; Page 14, lines 16, 22; Page 15, lines 4, 9, 21, 24; Page 16, line 2;
20 Page 17, lines 10, 15; Page 18, lines 7, 11, 14, 17, 20, 23; and Page 19, lines 3, 6, 9,
21 17.

22 The Court overrules Respondent’s assertions of the Fifth Amendment
23 privilege to the following questions:

24 Page 6, line 21; Page 7, lines 10, 13, 16, 19, 25; Page 8, lines 3, 10, 13, 16, 19,
25 23; Page 9, lines 6, 9, 18; Page 10, lines 12, 17, 20, Page 14, lines 1, 5, 9, 12; Page
26 15, lines 1, 14, 18; Page 16, lines 5, 10, 13, 16, 20, 25; Page 17, lines 3, 6, 18, 23;
27 Page 18, line 2; and Page 19, lines 20, 25.

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1 CONCLUSION

2 For the reasons set forth herein, the Government's petition to enforce the IRS
3 summons is GRANTED, in part, as to the questions that the Court has overruled
4 Respondent's assertion of the Fifth Amendment privilege. Respondent, Dann
5 McCreary, is directed to appear before IRS Revenue Officer M. Fuchs or a designee,
6 on May 29, 2014, at 10:30 a.m., or at such a date and time stipulated by the parties
7 in writing, at the offices of the Internal Revenue Service located at 333 West
8 Broadway, Suite 914, San Diego, California, and to give testimony as to those
9 questions as directed by this Order. To the extent that Respondent's answers to
10 those questions generate follow-up questions by the IRS Revenue Officer that
11 Respondent refuses to answer based on the Fifth Amendment, the IRS may contact
12 chambers to obtain subsequent rulings.

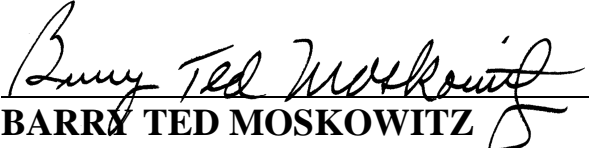
13 The Government's petition to enforce is DENIED in part as to the questions
14 and requests for documents that the Court has determined present a real and
15 appreciable risk of incrimination to Respondent and is otherwise GRANTED in part.

16 The Government shall serve a copy of this Order upon Respondent in
17 accordance with Fed. R. Civ. P. 5, within 7 days of the date that this Order is served
18 upon counsel for the Government, or as soon thereafter as possible. Proof of such
19 service shall be filed with the Clerk of Court as soon as practicable.

20 Respondent is hereby notified that failure to comply with this Order may
21 subject him to sanctions for contempt of court.

22
23 **IT IS SO ORDERED.**

24
25 **DATED: May 13, 2014**

26 
27 **BARRY TED MOSKOWITZ**
28 **Chief Judge**
United States District Court