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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT TACOMA

11 UNITED STATES OF AMERICA,

12 Petitioner,

13 v.

14 BRIAN BRUMBAUGH,

15 Respondent.  
16

CASE NO. MC09-5012RBL

REPORT AND CERTIFICATION  
FOR FURTHER CONTEMPT  
PROCEEDINGS

Noted for March 19, 2010

17 This matter, along with a related case, (U.S.A. v. Brian Brumbaugh, as sole member of  
18 Community Mortgage Assoc., LLC, MC09-5011RBL), has been referred to the undersigned  
19 magistrate judge. Both cases are before the court on petitioner's motions regarding contempt.  
20 After conducting an evidentiary hearing and considering the record, the undersigned submits  
21 separate reports for each case, certifying facts contained in the record for the district judge to  
22 consider finding contempt and appropriate sanctions against respondent.  
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24 **Procedural And Factual Background**

25 This matter concerns the government's attempt to collect taxes from respondent, Brian  
26 Brumbaugh. On May 9, 2008, the Internal Revenue Service ("IRS") issued an IRS summons  
directing the respondent to appear before a revenue officer on May 28, 2008, to testify and to

1 produce the books, records, and other certain documents related to respondent's federal tax  
2 responsibilities for 2005, 2006, and 2007. Plaintiff did not comply with the IRS summons,  
3 despite repeated administrative attempts to obtain the information.

4 On June 2, 2009, the United States of America, on behalf of the IRS, filed a petition with  
5 the court to seek enforcement of the IRS summons. Doc. 1. Despite being provided the  
6 opportunity to object or provide the court with argument opposing the petition, Mr. Brumbaugh  
7 did not appear. Mr. Brumbaugh has not filed any answer or other pleading in response to the  
8 underlying petition.

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10 On September 17, 2009, the Court issued an order, directing respondent to appear before  
11 investigating Revenue Officer Janelle Lourdeau, or any other proper agent, officer, or employee  
12 of the Internal Revenue Service, to testify and produce records as previously demanded. Doc.  
13 10. Revenue Officer Lourdeau testified in court that respondent failed to appear at the  
14 designated time and place. The undersigned notes that the Court's order was sent to respondent  
15 via certified mail, but it was returned by the U.S. Postal Service as unclaimed. Doc. 11. He was  
16 subsequently served with this order. Doc. 13.

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18 Petitioner now asks the court to consider holding respondent in contempt of court for his  
19 failure to comply with the Court's orders and directions. Doc. 12. On January 20, 2010, the  
20 undersigned reviewed the record and issued an order to provide respondent with actual notice  
21 and the opportunity to appear before the court on this date to address the issue of contempt.  
22 Respondent was specifically informed that his failure to appear would result in a warrant being  
23 issued for his arrest. Doc. 14.

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25 The court's order was personally served by the U.S. Marshal. Docs. 15-16. Pursuant to  
26 28 U.S.C. §636(e)(6), see discussion below, a hearing was conducted on this date to consider the

1 facts related to petitioner’s motion regarding contempt. The court took testimony from Revenue  
2 Officer Lourdeau. Respondent did not appear for the hearing, and an arrest warrant has been  
3 issued by this court for failure to appear at the hearing.

#### 4 Discussion

##### 5 *1) Magistrate Judge’s Authority and Role in Contempt Proceedings.*

6 A magistrate judge's contempt authority is spelled out in 28 U.S.C. § 636(e)(6). Absent  
7 action in the presence of the magistrate judge, in a civil consent action, or a criminal  
8 misdemeanor case, a magistrate judge must certify facts to the district court. The statute  
9 provides:

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

19 28 U.S.C. § 636(e)(6). Under the certification process, the magistrate judge may conduct a  
20 hearing. *See, e.g., Church v. Steller*, 35 F.Supp.2d 215, 217 (N.D.N.Y.1999), but the magistrate  
21 judge “functions only to ‘certify the facts’ ” and not to issue an order of contempt. *Church v.*  
22 *Steller*, 35 F.Supp.2d at 217 (*citing Litton Sys., Inc. v. AT & T*, 700 F.2d 785, 827 (2d Cir.1983),  
23 *cert. denied*, 464 U.S. 1073 (1984)). In certifying the facts under Section 636(e), the magistrate  
24 judge's role is “to determine whether the moving party can adduce sufficient evidence to  
25 establish a prima facie case of contempt.” *Church v. Steller*, 35 F.Supp.2d at 217 (*citing Proctor*  
26 *v. State Gov't of N.C.*, 830 F.2d 514, 521 (4th Cir.1987)).

Upon certification of the facts supporting a finding of contempt, the district court judge is  
then required to conduct a de novo hearing at which issues of fact and credibility determinations

1 are to be made. *See* Taberer v. Armstrong World Indus., Inc., 954 F.2d 888, 907-08 (3d  
2 Cir.1992) (holding that it was error for the district court not to conduct a de novo hearing after  
3 the magistrate judge issued a certification of contempt). Where, however, the magistrate judge  
4 declines to certify the conduct to the district court for a determination of contempt, the “district  
5 court may not proceed further on a motion for contempt where the conduct at issue occurred  
6 before a magistrate judge.” Church v. Steller, 35 F.Supp.2d at 217 (*citing* In re Nova Biomedical  
7 Corp. v. i-STAT Corp., 182 F.R.D. 419, 423-24 (S.D.N.Y.1998)); *see also* In re Kitterman, 696  
8 F.Supp. 1366, 1370 (D.Nev.1988) (noting that magistrate's decision not to certify to district court  
9 “dispos[es] of the matter”).  
10

11 Here, as noted above, the undersigned conducted a hearing on this date. Mr. Brumbaugh  
12 did not appear, and an arrest warrant has been issued. In the interests of justice, the court also  
13 took testimony from the IRS officer to update the record regarding Mr. Brumbaugh’s continued  
14 failure to comply with the underlying IRS summons. Below, the court discusses whether or not  
15 the facts in this warrant further contempt proceedings by the district judge.  
16

## 17 **2 Standards for Contempt**

18 It is well established that the power to punish for contempt is inherent in all courts.  
19 Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991). The underlying concern is “disobedience to  
20 the orders of the [j]udiciary,” not “merely the disruption of court proceedings.” Id. at 44  
21 (*quoting* Young v. United States, 481 U.S. 787, 798 (1987)). An individual who fails to obey a  
22 valid order of the court may be subject to both civil and criminal penalties for his actions.  
23 United States v. Petito, 671 F.2d 68, 72 (2d Cir. 1981)(*citing* Yates v. United States, 355 U.S. 66,  
24 74 (1957)), *cert. denied*, 459 U.S. 824 (1982).  
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1 An order of civil contempt may issue pursuant to Title 18, United States Code, Section  
2 401, which authorizes a federal court to punish “by fine or imprisonment, or both, at its  
3 discretion” any contempt of the court's authority, such as “[m]isbehavior of any person in [the  
4 court's] presence or so near thereto as to obstruct the administration of justice” or  
5 “[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command.” 18  
6 U.S.C. § 401 (2002). The court also “has the inherent power to hold a party in civil contempt in  
7 order ‘to enforce compliance with an order of the court or to compensate for losses or  
8 damages.’” McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949).

10 The moving party has the burden of showing by clear and convincing evidence that the  
11 contemnors violated a specific and definite order of the court. Balla v. Idaho St. Bd. of  
12 Corrections, 869 F.2d 461, 466 (9th Cir.1989). The burden then shifts to the contemnors to  
13 demonstrate why they were unable to comply. Donovan v. Mazzola, 716 F.2d 1226, 1240 (9th  
14 Cir.1983), *cert. denied*, 464 U.S. 1040 (1984). Contempt is not appropriate if the action “appears  
15 to be based on a good faith and reasonable interpretation of the [court's order].” In re Dual Deck  
16 Video Cassette Recorder Antitrust Litigation, 10 F.3d 693, 695 (9th Cir.1993)(citation omitted).  
17 The court also held that “substantial compliance” with the court order is a defense to civil  
18 contempt, and is not vitiated by “a few technical violations” where every reasonable effort has  
19 been made to comply. Id. The district court “has wide latitude in determining whether there has  
20 been contemptuous defiance of its order.” Gifford v. Heckler, 741 F.2d 263, 266 (9th Cir.1984).

23 This court hereby certifies the following facts for consideration by the District Court:

- 24 1. On September 17, 2009, the Court entered an Order of Enforcement of Summons.  
25 That Order directed the respondent, Brian Brumbaugh, to appear before the IRS  
26 officer assigned to this matter, or any other proper agent, officer, or employee of

1 the Internal Revenue Service, and to testify and produce records as demanded in  
2 the Internal Revenue Service summons, no later than twenty (20) workdays  
3 following the entry of the Order. The respondent had until October 16, 2009, to  
4 comply with this Court's order. The Order was sent by the Court Clerk to Mr.  
5 Brumbaugh by certified mail, but he did not claim the letter and it was returned.  
6 Mr. Brumbaugh was then personally served with the previous court orders, Doc.  
7 13.

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9 2. Mr. Brumbaugh continues to evade the original IRS summons served on or about  
10 May 9, 2008. The government presented uncontradicted testimony of the IRS  
11 officer to update the record, confirming that respondent has not complied with the  
12 IRS summons through the date of the hearing.

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14 3. Mr. Brumbaugh again was personally served with an order to show cause as to  
15 why a contempt order should not be entered, Doc. 15, and he failed to appear for  
16 the court hearing, which has resulted in a warrant for his arrest.

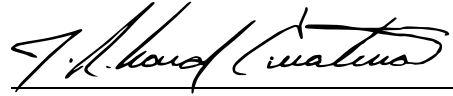
### 17 **Conclusion**

18 The court record presents sufficient facts, discussed above, to certify further  
19 consideration of contempt by the district judge. Upon respondent's arrest or appearance in this  
20 matter, the Court should hold a hearing to consider a finding of contempt and appropriate  
21 sanctions.

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23 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil  
24 Procedure, the parties shall have fourteen (14) days from service of this Report to file written  
25 objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those  
26 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the

1 time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on  
2 March 19, 2010, as noted in the caption.

3 DATED this 25th day of February, 2010.  
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6 J. Richard Creatura  
7 United States Magistrate Judge  
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