

## United States v. Beverly

United States District Court for the Central District of California

January 28, 2020, Decided; January 28, 2020, Filed

No. 2:19-cv-10068-GW-FFM

### Reporter

2020 U.S. Dist. LEXIS 89826 \*

UNITED STATES OF AMERICA, Petitioner, v.  
RUSSELL BEVERLY; DEBORAH BEVERLY,  
Respondents.

**Subsequent History:** Related proceeding at, Motion denied by United States v. Beverly, 2022 U.S. Dist. LEXIS 219719 (C.D. Cal., Sept. 23, 2022)

**Counsel:** 2020 U.S. Dist. LEXIS 89826 at 1 For United States of America, Petitioner: Jeremy L Burkhardt, ATTORNEY TO BE NOTICED, Office of US Attorney, Los Angeles, CA USA.

Russell Beverly, Respondent, Pro se, San Luis Obispo, CA USA.

Deborah Beverly, Respondent, Pro se, San Luis Obispo, CA USA.

**Judges:** FREDERICK F. MUMM, United States Magistrate Judge.

**Opinion by:** FREDERICK F. MUMM

## Opinion

### REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable George Wu, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

### I. PROCEEDINGS

On November 25, 2019, the United States of America filed a petition (the "Petition" or "Pet.") to enforce an administrative summons issued by the Internal Revenue Service (the "IRS") to Russell Beverly and Deborah

Beverly (together, the "Beverlys").

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The Court will henceforth refer to petitioner as the "IRS."

(Docket No. 1.) The Beverlys filed an opposition (the "Opposition" or "Oppo."), styled as a motion to dismiss the Petition, on December 23. (Docket No. 5.) The IRS filed a reply on January 6, 2020. (Docket No. 6.) On January 13, the Beverlys filed a surreply without first obtaining leave of the court. (Docket No. 8 at 3-9; see *generally* 2020 U.S. Dist. LEXIS 89826 at 2 Docket.) The Court held a hearing on the Petition on January 21. The IRS appeared in person and the Beverlys appeared telephonically.

The matter thus stands submitted. For the reasons that follow, the Court recommends that the Petition be granted in part and the Summons enforced as hereinafter provided.

### II. FACTS

IRS revenue agent Maureen Shirley is conducting an investigation into the Beverlys' federal tax liabilities for tax years 2009, 2010, 2011, 2012, 2013, and 2014. (Docket No. 1-1 ("Shirley Decl."), ¶ 5.) Agent Shirley is also investigating the Beverlys' foreign financial account reporting requirements for tax years 2013 and 2014. (*Id.*) Shirley declares that the investigation's purposes are:

- determining the Beverlys' correct federal tax liability;
- determining whether there are other parties who are liable for federal taxes and on whose behalf the Beverlys received income;
- determining potential disclosures required of the Beverlys on FinCen Form 114, Report of Foreign Financial Accounts ("FBAR").

(*Id.*, ¶ 6.) Shirley has not made any final determinations

with regard to the foregoing matters. (*Id.*)

On November 17, 2017, in furtherance of the investigation, Agent Shirley issued an **2020 U.S. Dist. LEXIS 89826 at 3** information document request letter ("IDR") to the Beverlys. (Shirley Decl., ¶ 8, Ex. 1.) The IDR included 83 requests for books, records, papers, and other data (hereinafter, "documents"). (*Id.*, Ex. 1.) On February 2, 2018, the Beverlys attended an in-person meeting with Shirley and other IRS agents. (Shirley Decl., ¶ 9; see Oppo. Ex. C.) The meeting was transcribed by a certified court reporter. (See Oppo., Ex. C.) During the meeting, the Beverlys provided Shirley with written responses to the IDR. (Shirley Decl., ¶ 9, Ex. 2; Oppo., Ex. C at 8:15-9:21.) In the written responses, the Beverlys objected to each of the IDR's requests and refused to provide any responsive documents. (Shirley Decl., Ex. 2.)

In the course of the February 2, 2018 meeting, the Beverlys reiterated their objections and again refused to produce documents. (Shirley Decl., ¶ 9; see Oppo., Ex. C, *passim.*) They brought several boxes that they claimed contained responsive documents, but refused to turn over the documents. (Shirley Decl., ¶ 10; see Oppo., Ex. C, *passim.*)

On that same day, Agent Shirley issued an IRS Form 2039 administrative summons (the "Summons") to the Beverlys. (Shirley Decl., ¶ 11.) The Summons **2020 U.S. Dist. LEXIS 89826 at 4** directed them to give testimony and produce documents for examination on February 23. (*Id.*) The Summons included the same 83 document requests that were in the IDR. (*Id.*, ¶ 11, Exs. 3, 5.) Shirley served the Summons on the Beverlys by handing them each a duplicate original of the Summons. (*Id.*, ¶¶ 12-13, Exs. 3-6.)

The Beverlys did not appear before the IRS on February 23, 2018, and they have not produced the documents requested in the Summons. (Shirley Decl., ¶ 14.) Nor have they otherwise provided the information sought by the Summons. (*Id.*) On March 7, an IRS attorney informed the Beverlys by letter that unless they provided the testimony and documents sought by the Summons, the IRS would commence legal proceedings against them. (*Id.*, ¶ 15, Ex. 7.) On April 13, the Beverlys appeared before the IRS but provided none of the documents requested in the Summons. They again brought boxes they claimed contained responsive documents, but refused to turn over the documents. (*Id.*, ¶ 16.)

To date, of the documents sought by the Summons, the

IRS possesses only those documents set forth in Exhibit 8 to Agent Shirley's declaration.

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The Court presumes that the IRS has copies of the federal tax returns filed by the Beverlys for the tax years 2009 through 2014. See discussion, *infra*.

(Shirley Decl., ¶ 17.) No recommendation for criminal prosecution **2020 U.S. Dist. LEXIS 89826 at 5** of the Beverlys has been made to the United States Department of Justice (the "DOJ"). (*Id.*, ¶ 20.) No DOJ referral is in effect with respect to the Beverlys.

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See 26 U.S.C. § 7602(d)(2) (setting forth circumstances under which DOJ referral is in effect).

(*Id.*) All administrative steps required by the Internal Revenue Code in connection with the issuance and service of Summons have been taken. (*Id.*, ¶ 18.) Shirley declares that the documents sought are necessary to the investigation. (*Id.*, ¶ 19.)

### III. DISCUSSION

#### A. Standard of review.

26 U.S.C. § 7602 ("Section 7602") authorizes the IRS to issue a summons "[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, [or] determining the liability of any person for any internal revenue tax . . . or collecting any such liability." 26 U.S.C. § 7602(a). The summons may request production of "any books, papers, records, or other data which may be relevant or material" to the IRS's inquiry. *Id.* at (a)(1). As well, the summons may command the taxpayer's appearance before the IRS to produce books, papers, records or other data and give testimony under oath "as may be relevant or material" to such inquiry. *Id.* at (a)(2). The IRS may issue a summons only for the purposes set out in Section 7602(a). *Crystal v. United States*, 172 F.3d 1141, 1143 (9th Cir. 1999).

Under 26 U.S.C. § 7604 ("Section 7604"), if a taxpayer summoned under Section 7602 "neglects **2020 U.S. Dist. LEXIS 89826 at 6** or refuses" to give testimony or produce documents as required, the IRS may seek enforcement of the summons in the district court in which the taxpayer resides. 26 U.S.C. § 7604(b). To enforce a summons, the IRS "need only demonstrate

good faith in issuing the summons." *United States v. Clarke*, 573 U.S. 248, 250, 134 S. Ct. 2361, 189 L. Ed. 2d 330 (2014). To demonstrate good faith, the IRS must establish the so-called "*Powell* requirements": (1) the investigation has a legitimate purpose; (2) the material being sought is relevant to that purpose; (3) the information sought is not already in the IRS's possession; and (4) the IRS complied with all the administrative steps required by the Internal Revenue Code. *Id.* (citing *United States v. Powell*, 379 U.S. 48, 57-58, 85 S. Ct. 248, 13 L. Ed. 2d 112 (1964)); *Crystal*, 172 F.3d at 1143-44. "The government's burden is a slight one, and may be satisfied by a declaration from the investigating agent that the *Powell* requirements have been met." *Crystal*, 172 F.3d at 1144; *Clarke*, 573 U.S. at 254 ( "[A]bsent contrary evidence, the IRS can satisfy [the 'good faith' standard] by submitting a simple affidavit from the investigating agent"). The burden is minimal "because the statute must be read broadly in order to ensure that the enforcement powers of the IRS are not unduly restricted." *Crystal*, 172 F.3d at 1144 (internal quotation marks omitted).

Once the government has established the *Powell* requirements, the taxpayer may challenge **2020 U.S. Dist. LEXIS 89826 at 7** the summons "on any appropriate ground . . . ." *Clarke*, 573 U.S. at 250. Appropriate grounds include, *inter alia*, failure to satisfy the *Powell* requirements or abuse of the court's process. *Crystal*, 172 F.3d at 1144. With regard to the latter ground, "[s]uch an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *Powell*, 379 U.S. at 58; *United States v. Richey*, 632 F.3d 559, 564 (9th Cir. 2011).

The taxpayer bears the burden of proving improper purpose or bad faith. *Crystal*, 172 F.3d at 1144; *Liberty Fin. Servs. v. United States*, 778 F.2d 1390, 1392 (9th Cir. 1985). "Without a doubt, this burden is a heavy one." *United States v. LaSalle Nat. Bank*, 437 U.S. 298, 316, 98 S. Ct. 2357, 57 L. Ed. 2d 221 (1978), *superseded in part on another ground by* Pub. L. No. 97-248, 96 Stat. 324; *Richey*, 632 F.3d at 564. "The taxpayer must allege specific facts and evidence to support his allegations of bad faith or improper purpose." *Crystal*, 172 F.3d at 1144 (internal quotation marks omitted); *Liberty Fin. Servs.*, 778 F.3d at 1392.

#### B. Improper purpose.

Here, the IRS presents a declaration from Agent Shirley asserting that each of the *Powell* requirements has been met. *Compare Powell*, 379 U.S. at 57-58 with Shirley Decl., ¶¶ 6, 17-19. The IRS has therefore met its initial burden of establishing a *prima facie* case to enforce the summons. *See Crystal*, 172 F.3d at 1144. The burden therefore shifts to the Beverlys to show that the investigation is in bad faith or lacks a proper purpose. **2020 U.S. Dist. LEXIS 89826 at 8** "Naked allegations of improper purpose are not enough: The taxpayer must offer some credible evidence supporting his charge." *Clarke*, 573 U.S. at 254. "[A]lthough bare assertion or conjecture is not enough, neither is a fleshed out case demanded: The taxpayer need only make a showing of facts that give rise to a plausible inference of improper motive." *Id.*

The Beverlys have not made such a showing. First, they assert, without irony, that they "cooperated" with the examination requests, "fully answered" each request, and "complied" with the Summons. (Oppo. at 2.) Therefore, they argue, the Summons and enforcement action are in bad faith. (*Id.*) The Court disagrees. The Beverlys' wholesale refusal to produce any responsive documents, substantive information, or substantive testimony is the exact opposite of "full answers," "cooperation," and "compliance." It is entirely proper for the IRS to avail itself of its Section 7602 powers after informal requests prove unfruitful. In turn, Section 7603 explicitly authorizes the IRS to commence enforcement proceedings where, as here, the taxpayer refuses to comply with a summons.

The Beverlys argue as well that the Summons is abusive because the requested documents have already been produced, are protected by the **2020 U.S. Dist. LEXIS 89826 at 9** Fifth Amendment, or are otherwise subject to the objections the Beverlys raised in response to the IDRs. (Oppo. at 4, 5.) However, virtually all of the Beverlys' objections lack support, *see* discussion, *infra*, and the IRS agents stated as much during the February 2018 meeting (*see generally* Oppo., Ex. C). It is not improper for an IRS agent to issue a summons where, as here, she reasonably believes the taxpayer has no grounds for refusing to provide the requested documents.

Finally, the Beverlys contend that, having previously accepted their tax returns without question, the IRS is precluded from investigating their tax liability for the years at issue. (Surreply at 4, 7.) They argue that the investigation is an improper "asset search" and a "fishing expedition to try to find something wrong against [the Beverlys]," including possible criminal violations of

federal tax statutes. (Oppo. at 3.) These arguments lack merit. First, the IRS's investigatory powers include the power to determine the "correctness of any return." See 26 U.S.C. § 7602(b). Second, Congress has granted the IRS a "broad mandate to investigate all persons who may be liable for any internal revenue tax" and "broad discretion" in determining necessary or helpful methods in collecting taxes. *United States v. Little*, 753 F.2d 1420, 1436 (9th Cir. 1984) (citing **2020 U.S. Dist. LEXIS 89826 at 10** 26 U.S.C. §§ 7601, 6302(b)). Thus, "the claim the Government is engaged in a fishing expedition is without merit. [Section 7602] authorizes the Secretary [of the Treasury] or his delegate to fish." *United States v. Luther*, 481 F.2d 429, 432 (9th Cir. 1973) (internal quotation marks omitted).

Third, Section 7602 "necessarily permits the use of the summons for examination of suspected tax fraud . . . ." *LaSalle*, 437 U.S. at 308; see also 26 C.F.R. § 301.7602-1(b)(1) ("This summons power may be used in an investigation of either civil or criminal tax-related liability"). Thus, a summons may be upheld even though it may uncover fraudulent conduct that carries the potential of criminal liability. *LaSalle*, 437 U.S. at 308-09. In fact, as long as no criminal investigation or prosecution is pending, and the IRS has not already recommended prosecution to the DOJ, an IRS summons may be enforced, even if it was issued "solely for the purpose of investigating whether criminal conduct has occurred . . . ." *United States v. Stuckey*, 646 F.2d 1369, 1384 (9th Cir. 1981); *LaSalle*, 437 U.S. at 308-09.

In any case, Agent Shirley declares that there is no ongoing investigation or prosecution of the Beverlys, and prosecution has not been recommended to the DOJ. The Beverlys produce no evidence to the contrary. Furthermore, they point to no evidence, other than their own speculation, that Agent Shirley issued the Summons for any purpose other than investigating the matters **2020 U.S. Dist. LEXIS 89826 at 11** outlined in her declaration. Therefore, the possibility that the investigation might uncover fraudulent conduct does not demonstrate improper purpose.

For the foregoing reasons, the Court finds that the Summons was not issued in bad faith or for an improper purpose.

### C. Relevance.

"As the language of § 7602 clearly indicates, an IRS summons is not to be judged by the relevance

standards used in deciding whether to admit evidence in federal court." *United States v. Arthur Young & Co.*, 465 U.S. 805, 814, 104 S. Ct. 1495, 79 L. Ed. 2d 826 (1984). The phrase "may be," 26 U.S.C. § 7602(a), "reflects Congress' express intention to allow the IRS to obtain items of even potential relevance to an ongoing investigation, without reference to its admissibility." *Arthur Young*, 465 U.S. at 814. "Records that illuminate any aspect of the return . . . are therefore highly relevant to legitimate IRS inquiry." *Id.* at 815. Stated another way, requested material is relevant under Section 7602 if it "might throw light upon the correctness of the taxpayer's return." *David H. Tedder & Assocs., Inc. v. United States*, 77 F.3d 1166, 1169 (9th Cir. 1996).

The Beverlys argue that "much of information sought" by the Summons is not relevant to a legitimate investigation purpose. (Oppo. at 2.) The Court disagrees. The Summons's 83 requests seek documents relating to the following topics: bank accounts; brokerage accounts, mutual funds, and security accounts; credit, debit, and **2020 U.S. Dist. LEXIS 89826 at 12** charge cards; ownership of entities and structures; capital losses; Form 5471; "personal ownership" (e.g., real property, personal property, and income); foreign life insurance accounts; non-taxable sources of income; professionals (e.g., lawyers, accountants, and other advisors); professional affiliations; travel; and "tax information" (e.g., complete copies of tax returns and forms, filed and unfilled). (Shirley Decl., Exs. 3, 5.) On their face, these requests seek material that "might throw light upon the correctness" of a taxpayer's returns.

The Beverlys' specific objections (Oppo. at 2-3) lack merit. Business cards for "professionals," as defined, and lists of civic or charitable organizations in which the Beverlys are involved may lead to witnesses to the Beverlys' treatment of their assets and liabilities. Copies of their passports and drivers licenses may reveal their use of other names (if any) and their foreign travel history. Applications for credit cards, bank accounts, and loans may shed light on their liabilities. And contrary to the Beverlys' assertion at the hearing, each request is limited to the years 2009-2015. (See generally Shirley Decl. Exs. 3, 5.)

The Beverlys do not specifically **2020 U.S. Dist. LEXIS 89826 at 13** object to any other requests (see generally Oppo., Surreply), and the record reveals no grounds for concluding that the material sought is irrelevant with respect to the Beverlys. Accordingly, the Court concludes that the Summons seeks relevant material.

*C. Other grounds for challenging the Summons.*

*(1) Fifth Amendment.*

*(a) Principles.*

The Fifth Amendment to the United States Constitution states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const., amend. V. "A claim of Fifth Amendment privilege may be asserted if there are substantial hazards of self-incrimination that are real and appreciable, not merely imaginary and unsubstantial, that information sought in an IRS summons might be used to establish criminal liability." *United States v. Bright*, 596 F.3d 683, 690-91 (9th Cir. 2010) (internal quotation marks omitted). The taxpayer has the burden of demonstrating that the Fifth Amendment privilege applies to the material sought. *Id.* at 691.

This burden is not easily overcome. A subpoena that demands the production of documents "does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought." *Fisher v. United States*, 425 U.S. 391, 409, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976); *United States v. Doe*, 465 U.S. 605, 610-11, 104 S. Ct. 1237, 79 L. Ed. 2d 552 (1984). "Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege **2020 U.S. Dist. LEXIS 89826 at 14** protects a person only against being incriminated by his own compelled testimonial communications." *Fisher*, 425 U.S. at 409; *Doe*, 465 U.S. at 610-11. Thus, it is a "settled principle" that where documents were voluntarily created and kept prior to the subpoena's issuance, compelling their disclosure does not, in itself, implicate the privilege against self-incrimination. *United States v. Hubbell*, 530 U.S. 27, 36, 120 S. Ct. 2037, 147 L. Ed. 2d 24 (2000); *In re M.H.*, 648 F.3d 1067, 1071 (9th Cir. 2011).

As relevant, the foregoing principle is circumscribed by a corollary and an exception, which are themselves subject to exceptions. First, where documents sought by subpoena "are required to be kept and then produced, they are arguably compelled," and thus may be protected by the Fifth Amendment. *In re M.H.*, 648 F.3d at 1071 (emphasis in original); see *Doe*, 465 U.S. at 611-12. However, under the "required records" doctrine, "the privilege does not extend to records required to be

kept as a result of an individual's voluntary participation in a regulated activity." *In re M.H.* at 1071-72 (citing, *inter alia*, *Shapiro v. United States*, 335 U.S. 1, 17, 68 S. Ct. 1375, 92 L. Ed. 1787 (1948)).

Second, the Supreme Court has recognized that the act of producing documents in response to a summons has "communicative aspects of its own, wholly aside from the content of the papers produced." *Bright*, 596 F.3d at 692 (quoting *Fisher v. United States*, 425 U.S. 391, 410, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976)). That is, by producing documents in compliance with a subpoena, "the witness admits that the documents exist, are in his possession or **2020 U.S. Dist. LEXIS 89826 at 15** control, and are authentic." *In re Grand Jury Subpoena, Dated Apr. 18, 2003*, 383 F.3d 905, 909 (9th Cir. 2004). "These types of admissions implicitly communicate statements of fact that may lead to incriminating evidence." *Id.* Thus, where the act of producing documents would be "both testimonial and incriminating," the Fifth Amendment prohibits the government from compelling production by the taxpayer. *Fisher*, 425 U.S. at 401 (emphasis added); see also *In re Grand Jury Subpoena*, 383 F.3d at 909-10, 913 (finding that production of documents by grand jury subpoena target would be testimonial, but remanding to district court for determination of whether it would be incriminating).

That said, "where '[t]he existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers [,] . . . enforcement of the summons does not touch upon constitutional rights.'" *Bright*, 596 F.3d at 692 (quoting *Fisher*, 425 U.S. at 411). For the "foregone conclusion" exception to apply, the government must establish its independent knowledge of three elements: (1) the documents' existence; (2) the documents' authenticity; and (3) the respondent's possession or control of the documents. *Bright*, 596 F.3d at 692.

*(b) Application.*

Here, the Beverlys contend that the documents sought **2020 U.S. Dist. LEXIS 89826 at 16** may incriminate them, and their possession thereof is not a "foregone conclusion" such that they may be compelled to produce the documents.

Amendment, but on a right against self-incrimination that pre-dates written law. (See Oppo. at 3.) In their surreply, they go so far as to claim that the Fifth Amendment is "immaterial," and they "do not have exemptions or rights under the United States Constitution," which does not "apply to the audit or above captioned matter." (Docket No. 8 at 4.) This argument is frivolous. In American federal jurisprudence, the Fifth Amendment is the recognized source of the right against self-incrimination. See discussion, *supra*. And in fact, the Beverlys rely on Fifth Amendment precedents in challenging the Summons. (See Oppo. at 4-5.) The Court is thus left with the distinct impression that the Beverlys believe — incorrectly — that they can opt out of federal law whenever they choose. This proclivity lends weight to the IRS's assertion, at the hearing, that the Beverlys appear to be tax protesters rather than taxpayers challenging an audit in good faith.

(Oppo. at 3, 4.) As the IRS contends (Reply at 4), the Fifth Amendment privilege does not apply to documents that must be maintained under the Bank Secrecy Act of 1970 (the "BSA"), 31 U.S.C. § 5311 *et seq.*, and the regulations thereunder. The Ninth Circuit has squarely held that such documents, although involuntarily created and maintained, fall under the "required records" doctrine. *In re M.H.*, 648 F.3d at 1071-79. As such documents "are outside the scope of the privilege," a taxpayer cannot invoke the Fifth Amendment to resist producing them. *Id.* at 1079 (internal quotation marks omitted); see also *Fed. Sav. & Loan Ins. Corp. v. Rodrigues*, 717 F. Supp. 1424, 1427 (N.D. Cal. 1988) (noting that because "required records" exception to privilege against self-incrimination applied, it was unnecessary to consider whether "act of production" would be testimonial and incriminating).

As to the remaining documents, the Beverlys do not show how the contents thereof would pose a "real and appreciable" hazard of self-incrimination. (See *generally* Oppo., Surreply.) In any case, the Fifth Amendment would not shield the contents of most such records, because the Beverlys do not show the element of compulsion with regard to the contents. See discussion, **2020 U.S. Dist. LEXIS 89826 at 17** *supra*; see also *Doe*, 465 U.S. at 607 n.1, 611-12. And although they argue that the "foregone conclusion" exception does not avail the IRS, they do not show, *a priori*, that the producing the documents would be both testimonial and incriminating, such that the "act of production" doctrine applies. Instead, the Beverlys contend, in very general

terms, that the investigation might uncover evidence the IRS could use to charge them with crimes.

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In their surreply, the Beverlys contend that the federal statutes governing money laundering are designed to scapegoat innocent individuals for crimes committed on a global scale by, *inter alia*, large banks, the United States military, and members of Congress. As such, the Beverlys suggest, their prosecution is virtually guaranteed. (Surreply at 6.) The Court rejects these arguments as delusional.

If accepted, this argument would gut the IRS's investigative authority and render Section 7602 a dead letter. If courts assumed a "real and appreciable" risk of prosecution from every IRS investigation, every taxpayer would have automatic grounds for refusing to give testimony. And if the taxpayer could demonstrate a testimonial aspect to the act of production itself (which the Beverlys appear to presume), the taxpayer would also have automatic grounds for refusing to produce documents. The Court therefore rejects the Beverlys' argument.

In sum, the Beverlys have not met their burden of demonstrating that the Fifth Amendment privilege applies to any of the documents sought.

## (2) Attorney-client privilege; work-product doctrine.

The attorney-client privilege protects confidential communications between **2020 U.S. Dist. LEXIS 89826 at 18** attorneys and clients, which are made for the purpose of giving legal advice. *Richey*, 632 F.3d at 566 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)). The work-product doctrine protects from discovery "documents and tangible things prepared by a party or his representative in anticipation of litigation." *Richey*, 632 F.3d at 567. The party claiming the attorney-client privilege or work product protection has the burden of establishing that the doctrine applies. *Id.* at 566; *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 634 (D. Nev. 2013).

In their objections to the Summons, the Beverlys asserted that some of the documents sought were protected by the attorney-client privilege and the work-product doctrine. (See Shirley Decl., Ex. 2.) The Beverlys did not append a privilege log or describe the documents with any specificity. Nor did they detail the circumstances under which the documents were

created. (See *id.*) Moreover, they do not address the protections in their briefs (see *generally* Oppo., Surreply), and they did not raise the issue at the hearing. On the record, therefore, the Court has no basis for concluding that the protections apply to any document. See *Richey*, 632 F.3d at 567 (finding that documents in attorney's file were not protected by attorney-client privilege where, *inter alia*, attorney challenging IRS summons "did not make a specific proffer" of which2020 U.S. Dist. LEXIS 89826 at 19 communications were proper subject of privilege); see also *United States v. Osborn*, 561 F.2d 1334, 1339 (9th Cir. 1977) ("A party claiming the privilege must identify specific communications and the grounds supporting the privilege as to each piece of evidence over which privilege is asserted").

(4) *Burdensomeness; possession.*

The Beverlys object to the Summons on the ground that the IRS already possesses the documents needed to assess their tax liability, or can more readily obtain the documents from third parties. (Oppo. at 4.) The Beverlys point to no authority for the proposition that the IRS must obtain documents from third parties before seeking such documents from taxpayers. As to the documents already in the IRS's possession, the Beverlys' allegations are speculative — with one exception. As the Beverlys have asserted (see Shirley Decl., Ex. 2), the IRS presumably retained copies of the federal tax returns the Beverlys filed for the tax years 2009 through 2014. The IRS has not shown that there is reason to believe the Beverlys' copies of those returns might be different from those submitted to the IRS. Therefore, the Court recommends that the Beverlys not be ordered to produce copies of those returns.

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However, the Beverlys should be required to produce any unfiled and/or draft versions of those returns, as requested in the Summons.

See *United States v. Goldman*, 637 F.2d 664, 668 (9th Cir. 1980).

Finally, the Beverlys assert that they2020 U.S. Dist. LEXIS 89826 at 20 do not possess many of the requested documents. (Oppo. at 4.) The Beverlys may state which of the requested documents they do not possess in their written response to the Summons.

For the foregoing reasons, the Court recommends that the Petition be granted as follows:

- (1) The Beverlys should be ordered to produce the books, records, papers, and other data ("documents") that are requested in the Summons and that are within their possession, custody, or control, with the exception of (a) the documents listed as being in the IRS's possession in Exhibit 8 to Agent Shirley's declaration; and (b) the filed versions of their federal tax returns for the tax years 2009 through 2014;
- (2) the Beverlys should be ordered to provide, along with the responsive documents, a written response without objections, except that the Beverlys must specify which responsive documents are not within their possession, custody, or control; and
- (3) such compliance should take place within 10 days of the date an order is issued approving and accepting this Report and Recommendation.

DATED: January 28, 2020

/s/ Frederick F. Mumm

FREDERICK F. MUMM

United States Magistrate Judge

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#### IV. RECOMMENDATION