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9 UNITED STATES DISTRICT COURT  
10 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
11 WESTERN DIVISION

12 UNITED STATES OF AMERICA,  
13 Petitioner,  
14 v.  
15 [REDACTED],  
16 Respondent.

17 No. [REDACTED]  
18 Respondent [REDACTED]  
19 Opposition to  
Internal Revenue Service Summons  
  
Hearing Date: March 4, [REDACTED]  
Hearing Time: 9:00 a.m.  
Courtroom: 850  
Judge: Hon. Gary Klausner  
Location: Roybal Federal Building  
and United States Courthouse  
255 E. Temple Street  
Los Angeles, CA 90012

20 **RESPONDENT [REDACTED]'S OPPOSITION TO**  
21 **PETITION TO ENFORCE INTERNAL REVENUE SERVICE SUMMONS**

22 **I. Statement of Relevant Facts and Procedural History**

23 On February 8, [REDACTED], the Internal Revenue Service (IRS) served Respondent  
24 with a summons requesting that he appear, testify, and produce documents regarding  
25 his federal income tax liabilities for tax years [REDACTED] through [REDACTED]. (Pet., ECF Doc.  
26 1, Ex. 1). The summons requested, in particular, records relating to foreign financial  
27 institutions. *Id.* On September 12, [REDACTED], the United States filed a petition to enforce  
28 an IRS administrative summons claiming the Respondent had failed and has

1 continued to fail to comply with the summons. (Pet., ECF Doc. 1 at p.2). On  
2 October 25, [REDACTED], Respondent filed and amended his response to the petition without  
3 substantial changes. (Resp., ECF Doc. 10). Respondent explained that he had  
4 participated in a lengthy interview with four IRS Revenue Agents, provided Bank  
5 Leumi le-Israel B.M. (Bank Leumi) and First International Bank of Israel (FIBI)  
6 statements, and had been using his best efforts to obtain additional documents from  
7 the banks. (Resp., Respondent Decl., ECF Doc. 10-1 at p.2-4). On November 26,  
8 [REDACTED], the government filed its reply contending that (1) Respondent has not  
9 complied with the summons, (2) Respondent has not substantially complied with the  
10 summons, and (3) Respondent has not established that he does not possess or control  
11 the summonsed documents. (Reply, ECF Doc. 13).

## 12 **II. Argument**

### 13 **A. The Act of Producing the Documents Requested by the Summons is** 14 **Protected by Respondent’s Fifth Amendment Privilege**

#### 15 1. The act of producing summonsed documents is protected by the 16 Fifth Amendment privilege against self-incrimination

17 The Fifth Amendment states, “[n]o person . . . shall be compelled in any  
18 criminal case to be a witness against himself.” U.S. Const. Amend. V. “It can be  
19 asserted in any proceeding, civil or criminal, administrative or judicial, investigatory  
20 or adjudicatory.” *Kastigar v. United States*, 406 U.S. 441, 444 (1972).  
21 “Accordingly, a taxpayer may invoke this privilege in response to requests for  
22 information in an IRS investigation.” *United States v. Argomaniz*, 925 F.2d 1349,  
23 1353 (11th Cir. 1991). Furthermore, “[t]he Fifth Amendment protects individuals  
24 from having to disclose documents when the very act of production would constitute  
25 self-incrimination.” *United States v. Bright*, 596 F.3d 683, 688 (9th Cir. 2010). The  
26 act of document production may be testimonial, because “enforcement of the  
27 subpoena would compel [Respondent] to admit that the records exist, that they are  
28 in his possession, and that they are authentic.” *United States v. Doe*, 465 U.S. 605,

1 613 n.11 (quoting *In re Grand Jury Empanelled March 19, 1980*, 541 F.Supp. 1, 3  
2 (NJ 1981)). Therefore, Respondent may raise his Fifth Amendment privilege against  
3 the act of producing documents requested by the IRS summons.

4 2. Respondent has a real and substantial fear that production of the  
5 documents will lead to criminal indictment

6 “A claim of Fifth Amendment privilege may be asserted if there are  
7 substantial hazards of self-incrimination that are real and appreciable, not merely  
8 imaginary and unsubstantial, that information sought in an IRS summons might be  
9 used to establish criminal liability.” *Bright*, 596 F.3d at 690-691 (quoting *United*  
10 *States v. Drollinger*, 80 F.3d 389, 392 (9th Cir. 1996) (per curiam) (internal  
11 quotation marks omitted). The existence of a sufficient hazard of self-incrimination  
12 such that the Fifth Amendment protection applies “will depend on whether  
13 compliance with the summons would provide information incriminating to  
14 [Respondent], and, if so, whether the privilege was properly invoked.” *Argomaniz*,  
15 925 F.2d at 1356. “The information that would be revealed by direct answer need  
16 not be such as would itself support a criminal conviction, however, but must simply  
17 ‘furnish a link in the chain of evidence needed to prosecute the claimant for a federal  
18 crime.’” *United States v. Neff*, 615 F.2d 1235, 1239 (9th Cir. 1980) (quoting  
19 *Hoffman v. United States*, 341 U.S. 479, 486 (1951)).

20 While the IRS’ investigation here is to determine Respondent’s civil tax  
21 liability, “there can exist a legitimate fear of criminal prosecution while an IRS  
22 investigation remains in the civil stage, before formal transfer to the criminal  
23 division.” *Id.* at 1353. “[T]ax investigations frequently lead to criminal  
24 prosecutions.” *Id.* at 1354 (quoting *Mathis v. United States*, 391 U.S. 1, 4 (1968))  
25 (internal quotations omitted). Respondent has, thus far, produced some responsive  
26 documents and is withholding others, because they could “provide a lead or clue to  
27 evidence having a tendency to incriminate.” *Neff*, 615 F.2d at 1239. For instance,  
28 production of the documents relating to any certificates of deposit or equivalent

1 account may lead to a criminal prosecution of Respondent for the willful attempt to  
2 evade an assessment of taxes under 26 U.S.C. § 7201 or for the willful failure to  
3 supply information required by law under 26 U.S.C. § 7203. Thus, Respondent has  
4 a real and substantial fear of criminal indictment if he produces the documents  
5 requested in the IRS summons.

### 6 **B. The Summons Is Substantially Overbroad**

7 While “the Commissioner need not meet any standard of probable cause to  
8 obtain enforcement of his summons,” *United States v. Powell*, 379 U.S. 48, 57  
9 (1964), “a summons will be deemed unreasonable and unenforceable if it is  
10 overbroad and disproportionate to the end sought.” *United States v. Theodore*, 479  
11 F.2d 749, 754 (4th Cir. 1973). The IRS summons must be “no broader than  
12 necessary to achieve its purpose.” *United States v. Bisceglia*, 420 U.S. 141, 146  
13 (1975).

14 The IRS is examining Respondent to determine his federal tax liabilities for  
15 calendar years ending December 31, [REDACTED] through December 31, [REDACTED]. (Pet. ECF  
16 Doc. 1 at p.10) The summons, however, requests documents pertaining to calendar  
17 years that occurred decades before calendar year [REDACTED]. For example, the summons  
18 states, “[f]or each bank account, in any name, over which the taxpayer had signature  
19 or other authority and/or over which the taxpayer exercised control *since inception*,  
20 produce *all* documents in the taxpayer’s possession, custody, [or] control.” (Pet.,  
21 ECF Doc. 1, Ex. 1 at p.15-16) (emphasis added).<sup>1</sup> Respondent opened the account  
22 at Bank Leumi in the 1970s, about fifteen years before Respondent moved to the  
23 U.S. (Reply, ECF Doc. 13, Ex. 2 at p.3). Respondent opened the FIBI bank account  
24 around nineteen years ago. (Reply, ECF Doc. 13, Ex. 2 at p.4). Respondent  
25 provided Bank Leumi statements for calendar years [REDACTED] through [REDACTED] (closing),

26 <sup>1</sup> In addition, the summons requests production of Know Your Customer Account  
27 information and documents showing all transfers between all bank and financial  
28 accounts for any and all foreign bank accounts over which Respondent had  
signature authority or control since inception. (Pet. Doc. 1 at p.16).

1 and FIBI statements for calendar years [REDACTED] through [REDACTED] (closing). Nevertheless,  
2 the IRS insists that Respondent produce bank statements regarding “pre-[REDACTED] for the  
3 Bank Leumi-Israel and pre-[REDACTED] for the FIBI account[s].” (Decl. of [REDACTED],  
4 ECF Doc. 10-3, at p.16 ¶ 20).

5 The government states there is no prohibition to fishing expeditions through  
6 the use of summonses. (Reply, Doc. 13 at p.6). However, several courts disagree.  
7 *See United States v. Dauphin Deposit Trust Company*, 385 F.2d 129, 131 (3d Cir.  
8 1967) (stating “[t]he Government is not entitled to go on a fishing expedition through  
9 appellant’s records.”); *United States v. Theodore*, 479 F.2d 749, 754 (4th Cir. 1973).  
10 For its contention that fishing expeditions are allowed, the government cites *United*  
11 *States v. Luther*, 481 F.2d 429 (9th Cir. 1973). *Luther* involved a summons that  
12 “sought only records that reflected financial transactions and covered only the years  
13 1965-1969, which corresponded with the years of the returns of Burpo, the taxpayer,  
14 then under examination.” *Id.* at 433-434. The *Luther* Court stated that it was “not  
15 prepared to hold that the summons . . . w[as] overly broad.” *Id.* This enforcement  
16 proceeding involves a summons that requests production of documents that were  
17 created decades ago. The scope of the summons issued here is not proportionate to  
18 the end sought, which is determining Respondent’s federal tax liability for tax years  
19 [REDACTED] through [REDACTED].

### 20 III. Conclusion

21 For the reasons set forth above, Respondent has a valid Fifth Amendment  
22 privilege against the production of the documents requested in the IRS summons.  
23 Because production of the documents may lead to criminal prosecution of  
24 Respondent, the Court should not compel production of the documents.  
25 Additionally, the Court should not compel production of the summonsed documents,  
26 because the scope of the summons is broader than necessary to determine  
27 Respondent’s federal income tax liability for tax years [REDACTED] through [REDACTED].  
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Dated: February 15, [REDACTED]

Respectfully submitted,  
PEDRAM BEN-COHEN  
Attorney for Respondent

/s/ Pedram Ben-Cohen  
PEDRAM BEN-COHEN

[REDACTED]