IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, Petitioner, v. MOORE, INGRAM, JOHNSON & STEELE, LLP, Respondent.	:	CIVIL ACTION NO. 1:20-cv-02413-LMM

ORDER

This case comes before the Court on the Magistrate Judge's Report and Recommendation ("R&R") [18] recommending that Petitioner United States of America's Petition to Enforce IRS Summons [1] be granted in part and denied in part, that a special master be appointed, and that the Court refrain at this time from allocating the cost of a special master between the parties; and on Petitioner United States of America's Motion to Strike [25]. After due consideration, the Court enters the following Order:

I. BACKGROUND

The Internal Revenue Service ("IRS") is conducting a civil investigation to determine whether Respondent Moore, Ingram, Johnson & Steele, LLP may be subject to penalties under several provisions of the Internal Revenue Code:

26 U.S.C. §§ 6694, 6695, 6700, and 6701. Dkt. No. [1-1] ¶ 2. The IRS's efforts focus on Respondent's establishment and management of "captive" insurance companies for its clients.[1] Dkt. No. [13] at 2.

On May 7, 2018, the IRS sent Respondent an Information Document Request that sought numerous categories of documents related to Respondent's captive insurance practice. Dkt. No. [9-7]. Respondent produced some of the requested documents, but the IRS considered Respondent's production insufficient. See Dkt. Nos. [12] at 3–4; [13] at 3; [9-7] at 5–11. On April 16, 2019, the IRS issued and served on Respondent a summons that asked for 27 categories of documents similar to those in the Information Document Request. Dkt. No. [1-2]. Respondent claims the summons encompasses "millions" of pages of documents, Dkt. No. [12] at 14, of which it has produced "hundreds of thousands of pages," id. at 6. The IRS was again unsatisfied; Petitioner then filed the instant Petition for an order enforcing the summons in full. Dkt. No. [1].

The Magistrate Judge issued an R&R recommending the Petition be granted in part and denied in part, that a special master be appointed to resolve

[1] In a captive insurance structure, a corporate taxpayer forms and controls a "captive" business that provides insurance coverage to the taxpayer. Dkt. No. [13] at 2–3; Dkt. No. [12-1] at 36–37. The captive, at the direction of its controller, elects under 26 U.S.C. § 831(b) to be taxed only on its investment income, and the taxpayer controlling the captive may deduct from its taxable income the premiums it pays to the captive. Dkt. No. [13] at 2–3; Dkt. No. [12-1] at 41–42. While captive insurance arrangements are lawful, parent companies may only claim deductions for bona fide premiums and captives must genuinely provide insurance in order to make the § 831(b) election. Dkt. No. [12-1] at 42.

discovery disputes, and that the Court postpone allocating the cost of a special master between the parties. Dkt. No. [18] at 24–25. The parties each filed objections. Dkt. Nos. [20], [22]. After Petitioner responded to Respondent's objections, Respondent submitted a reply to Petitioner's response.[2] Dkt. No. [24]. Petitioner moved to strike Respondent's reply as unpermitted by Federal Rule of Civil Procedure 72(b)(2) or Local Rule 72.1(B). Dkt. No. [25]. Respondent argued its reply was permitted, and in the alternative moved for leave to file the reply. Dkt. Nos. [27], [28]. Petitioner opposed Respondent's Motion for Leave. Dkt. No. [29].

II. LEGAL STANDARD

Under 28 U.S.C. § 636(b)(1), the Court reviews the Magistrate Judge's Report and Recommendation for clear error if no objections are filed. 28 U.S.C. § 636(b)(1). If a party files objections, the district court must review *de novo* any part of the Magistrate Judge's disposition that is the subject of a proper objection. Id. As the parties filed objections to the Magistrate Judge's findings, the Court reviews the challenged findings and recommendations on a *de novo* basis.

III. DISCUSSION

The Internal Revenue Code authorizes the IRS to issue summonses to obtain "books, papers, records, or other data which may be relevant" to an

[2] The clerk construed Petitioner's response [23] as a "Reply," and Respondent's reply [24] as a "Response." To remain consistent with the verbiage of Federal Rule of Civil Procedure 72(b)(2) and the parties' designations of their own filings, this Order refers to Dkt. No. [23] as a "response" and Dkt. No. [24] as a "reply."

investigation of a taxpayer's liability under the Code. 26 U.S.C. § 7602(a)–(1). To judicially enforce a summons, the IRS "must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the [IRS]'s possession, and that the administrative steps required by the Code have been followed . . . ." United States v. Powell, 379 U.S. 48, 57–58 (1964). "The IRS can satisfy its burden merely by presenting the sworn affidavit of the agent who issued the summons attesting to these facts." United States v. Leventhal, 961 F.2d 936, 939 (11th Cir. 1992) (alterations omitted) (quoting La Mura v. United States, 765 F.2d 974, 979 (11th Cir. 1985)). If the IRS does so, "the party contesting the summons" must "disprove one of the four elements of the government's prima facie showing or convince the court that enforcement of the summons would constitute an abuse of the court's process." Id. at 939–40 (quoting La Mura, 965 F.2d at 979). Shouldering this burden "requir[es] allegation of specific facts and introduction of evidence." Id. at 940.

The Magistrate Judge, rejecting each argument raised in Respondent's briefing, found that Petitioner made its prima facie showing under Powell and that Respondent failed to carry its corresponding burden. Dkt. No. [18] at 4–24. The Magistrate Judge recommended that the Petition be granted as to all documents Respondent has not yet produced, and that a special master be appointed to adjudicate potential discovery disputes. Id. at 24–25. Neither party objected to the Magistrate Judge's conclusion that Petitioner satisfied its initial

burden under Powell. Respondent raises essentially three objections to the R&R: (1) the IRS already has the information it seeks, (2) the summons is overbroad and compliance would be unduly burdensome, and (3) Respondent is barred by the attorney-client privilege and professional confidentiality obligations from producing the summonsed documents. Dkt. No. [12] at 9–25. Petitioner objects that the appointment of a special master would at this date be premature "because no documents or privilege log have yet been produced . . . ." Dkt. No. [20] at 2.

A. Whether the IRS Possesses the Information Sought by the Summons

The Magistrate Judge concluded that the IRS does not already possess many of the documents sought by the summons, and that even some documents Respondent has produced are incomplete. Dkt. No. [18] at 5–7. Respondent objects that it has supplied the IRS with "all responsive non-privileged or confidential documentation," and avers that third parties have already provided documents "related to the formation and management of approximately 40%" of Respondent's captive insurance clients.[3] Dkt. No. [22] at 8–9. Respondent argues that these third-party-provided documents show that "the management

[3] During its hearing before the Magistrate Judge, Respondent stated these documents were provided by two entities: a co-manager, with Respondent, of 76 of Respondent's captive insurance clients; and an actuarial firm, which gave the IRS feasibility studies and email communications pertaining to a similar number of clients. Dkt. No. [16] at 28–29. In its initial briefing, Respondent stated that another actuarial firm, Milliman, Inc., has also produced documents. Dkt. No. [12] at 7, 12.

processes, procedures, and correspondence of all" of Respondent's captive insurance clients "are categorically identical." Id. at 9.

But as the Magistrate Judge noted, Respondent has supplied a complete set of documents "with respect to only 4.5%" of its captive insurance clients. Dkt. No. [18] at 7; see also Dkt. No. [12] at 12. Likewise, Respondent admits that the third parties' production only relates to a minority of Respondent's clients. Dkt. No. [22] at 8–9. It is therefore undisputed that the IRS does not possess a great deal of the information within the summons's scope.

Furthermore, Respondent may not avoid full compliance with the summons by declaring that the documents it has produced are representative of those it has not. See Dkt. No. [22] at 9. First, each captive insurance client and tax year potentially constitute separate bases for liability. See 26 U.S.C. § 6701; Dkt. No. [18] at 9. Second, and as the Magistrate Judge noted, there is no basis for the Court to infer that the IRS has enough information to conclude its investigation. Respondent essentially asks the Court to trust that the IRS has all it needs, despite Respondent's conceded failure to produce all the documentation the IRS requested. Dkt. No. [18] at 9, 13. Nothing in the record supports this argument, and neither Powell nor any other precedent enables the Court to make such a judgment. Cf. United States v. Davis, 636 F.2d 1028, 1037 (5th Cir. 1981) (construing Powell's "'already possessed' principle . . . as a gloss on [§] 7605(b)'s prohibition of 'unnecessary' summonses, rather than an absolute prohibition

against the enforcement of any summons to the extent that it requests the production of information already in the possession of the IRS").[4]

Nor is Respondent absolved of its obligation to produce certain documents simply because third parties have already provided them. "Some redundancy between the documents" the IRS possesses and the documents it seeks "does not bar the enforcement of an IRS summons." United States v. Clower, 666 F. App'x 869, 875 (11th Cir. 2016). Respondent objects that its production of documents given to the IRS by third parties would be *totally* redundant. Dkt. No. [22] at 9. But a party must still produce documents that have been provided by a third party when those documents are only a portion of those summonsed. See Azis v. United States Internal Revenue Serv., 522 F. App'x 770, 775–76 (11th Cir. 2013) (upholding grant of petition to enforce summonses where "at least some of the information requested in the summonses was not already in the possession of the IRS"); United States v. Ins. Consultants of Knox, Inc., 187 F.2d 755, 761 (7th Cir. 1999) (upholding grant of petition where "the IRS requested a great deal more information which was not necessarily included in the records which defendants allege the IRS already possesses"). Here, documents provided by third parties concern only a fraction of the subjects and clients covered by the summons. The Court thus agrees with the Magistrate Judge that "the bulk of the materials

[4] In Bonner v. City of Prichard, the Eleventh Circuit adopted as binding precedent all decisions handed down by the Fifth Circuit prior to the close of business on September 30, 1981. 661 F.2d 1206, 1207 (11th Cir. 1981).

summoned are not demonstrably in the possession of the IRS." Dkt. No. [18] at 8 (alterations omitted) (quoting Davis, 636 F.2d at 1038). Respondent's objection that the IRS already possesses the documents it seeks is **OVERRULED**.

B. Whether the Summons is Overbroad and Unduly Burdensome

Respondent next objects that the summons is overbroad and responding in full would be unduly burdensome. Respondent argues the Magistrate Judge's contrary determination rested on an improper interpretation of the law that "effectively eliminat[es] any limitation on the IRS' summons authority . . . ." Dkt. No. [22] at 13. Here, Respondent states, the IRS asks for information not relevant to determining Respondent's liability under the relevant portions of the Internal Revenue Code. Id. at 14–15. Respondent also claims it cannot feasibly produce every responsive document created over the period covered by the summons. Id. at 10–11.

The summons lists 27 categories of information and covers an eleven-year period. Its categories span a variety of subjects related to Respondent's promotion, organization, and management of captive insurance companies, and a complete response plausibly consists of many documents. Locating those documents may require an effortful search. However, a summons is not overbroad simply because a complete response would be voluminous and difficult. See United States v. Judicial Watch, Inc., 371 F.2d 824, 832 (D.C. Cir. 2004) (citation and quotation marks omitted) ("That the records sought are extensive is not material so long as the records are relevant to the matters at issue

in the audit."); Adamowicz v. United States, 531 F.3d 151, 158 (2d Cir. 2008). The summons need only provide "sufficient specificity to permit [Respondent] to respond adequately to the summons." United States v. Medlin, 986 F.2d 463, 467 (11th Cir. 1993) (quoting United States v. Wyatt, 637 F.2d 293, 302 n.16 (5th Cir. 1981)). As in Medlin, the instant summons "specifie[s] the subject matter of the documents requested, the source of those documents and the limited time period from which the documents [are] to be drawn." Id. The summons is limited to documents "in [Respondent's] possession, custody or control." Dkt. No. [1-2] at 3. It lists numerous forms of documentation related to Respondent's captive insurance practice. Id. at 7–9. And it specifically defines several important terms that cabin the scope of its document requests. Id. at 5–6. Consequently, the Court agrees with the Magistrate Judge that the IRS has adequately specified the documents it seeks.

Those documents are relevant to the IRS's investigation of Respondent's liability under 26 U.S.C. §§ 6694, 6695, 6700, and 6701. Respondent objects that information cannot be relevant if it is unrelated to Respondent's preparation of tax returns, Respondent's advice regarding the preparation of tax returns, Respondent's knowledge of tax benefits, or if the information consists of Respondent's correspondence with potential clients. Dkt. No. [22] at 16. However, the IRS may use a summons "to obtain items of even *potential* relevance to an ongoing investigation . . . ." United States v. Arthur Young & Co., 465 U.S. 805, 814 (1984); see also La Mura, 765 F.2d at 981 (quoting Wyatt, 637

F.2d at 300–01) ("Courts have explained this standard as requiring the IRS to demonstrate that it has a 'realistic expectation rather than an idle hope that something might be discovered.'"). The summons requests information relating to Respondent's promotion, organization, and administration of captive insurance companies. Given the broad sweep of some of the Code provisions at issue, none of the summons's enumerated categories lack potential relevance. See 26 U.S.C. §§ 6700, 6701 (creating liability for even assisting in the understatement of tax liability). The Court thus **OVERRULES** Respondent's objection that the summons is overbroad and unduly burdensome.

C. Whether the Attorney-Client Privilege and Professional Confidentiality Obligations Prevent Respondent from Disclosing Further Documents

Respondent argues it is barred from responding further to the summons by the attorney-client privilege and its professional obligation to keep clients' information confidential. Dkt. No. [22] at 17–24. The Court addresses each argument in turn.

i. Attorney-Client Privilege

In two cases in Kentucky, district judges upheld magistrates' determinations that emails between Respondent's attorneys and certain clients of Respondent were privileged. Dkt. No. [9-15] at 4, 13. In its original briefing, Respondent pointed to these cases as evidence that the documents it is withholding from the IRS are protected by the attorney-client privilege. Dkt. No. [12] at 20–22. The Magistrate Judge rejected this argument, concluding that the

Kentucky cases involved a vastly smaller number of documents and that Respondent had not demonstrated privilege with respect to all documents presently withheld. Dkt. No. [18] at 20–22. Respondent objects to the Magistrate Judge's analysis of the Kentucky cases, and argues that those courts' findings of privilege give rise to collateral estoppel with respect to every document Respondent now refuses to produce. Dkt. No. [22] at 17–21.

The Court agrees with the Magistrate Judge that the Kentucky cases' findings of privilege are largely inapposite here. Whereas those cases involved only a few of Respondent's clients, Respondent presently seeks to withhold hundreds of thousands or millions of pages of documents relating to 95.5% of its 202 captive insurance clients. Because the summons clearly asks for many more, and more varied, documents than those at issue in the Kentucky cases, Respondent cannot avoid compliance on the ground that "the email communications now sought by the [s]ummons are categorically identical to the communications deemed privileged" in Kentucky.[5] Id. at 20.

[5] Because Respondent did not submit its collateral estoppel argument to the Magistrate Judge, the Court need not consider it here. Williams v. McNeil, 557 F.3d 1287, 1292 (11th Cir. 2009). Nonetheless, the fact that Respondent's claim of privilege is considerably broader than the claims lodged by the Kentucky respondents demonstrates that "the issue[s] at stake" in these cases are not identical. Pleming v. Universal-Rundle Corp., 142 F.3d 1354, 1359 (11th Cir. 1998).

Respondent next objects that the "last link" doctrine presents a further justification for treating withheld documents as privileged. Id. at 22–24. As the Eleventh Circuit has explained:

> [T]he last link doctrine extends the protection of the attorney-client privilege to nonprivileged information—the identity of the client—when "disclosure of that identity would disclose other, privileged communications (e.g., motive or strategy) and when the incriminating nature of the privileged communications has created in the client a reasonable expectation that the information would be kept confidential."

In re Grand Jury Proceedings 88-9 (MIA), 899 F.2d 1039, 1043 (11th Cir. 1990) (quoting Rabin v. United States, 896 F.2d 1267, 1273 (11th Cir. 1990)). Respondent argues that responding to the summons would require the disclosure of clients' "names, addresses, EINs and tax return information," which would reveal the participation of Respondent's clients in a captive insurance scheme and thus expose them to harassment by the IRS. Dkt. No. [22] at 22–23.

Respondent has not substantiated its claim that the mere potential of an IRS investigation triggers the last link doctrine. The doctrine applies when a identifying a client would expose the client to federal criminal liability, In re Grand Jury Proceedings 88-9 (MIA), 899 F.2d at 1043, but the IRS is presently conducting a civil investigation and Respondent has not identified any applicable criminal statutes, nor any privileged information with which its clients' identities would link. Absent such showings, all that is at stake is information Respondent's clients pay prefer to keep private. However, when the IRS "seeks information relevant to a legitimate investigation of a particular taxpayer . . . any incidental

effect on the privacy rights of unnamed taxpayers is justified by the IRS's interest in enforcing the tax laws." Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 321 (1985). Likewise, the last link doctrine does not apply to clients who consulted with Respondent but who Respondent ultimately did not represent. See Leventhal, 961 F.2d at 941 ("[T]he mere fact that Leventhal's clients had sought his legal assistance obviously does not constitute an admission of guilt . . . .").

Respondent must shoulder "the burden of proving that an attorney-client relationship existed and that the particular communications" it is withholding "were confidential." United States v. Schaltenbrand, 930 F.2d 1554, 1562 (11th Cir. 1991). That means "show[ing] that 'the communication was made to [Respondent] confidentially, in [Respondent's] professional capacity, for the purpose of securing legal advice or assistance.'" Id. (quoting United States v. Ponder, 475 F.2d 37, 39 (5th Cir. 1973)). Respondent has instead asserted a blanket privilege claim with respect to every document it has withheld. After correctly rejecting this claim, the Magistrate Judge concluded that a categorical privilege log would be inappropriate in this case. Dkt. No. [18] at 24. Respondent objected that a log listing each privileged document would simply duplicate its privilege logs in the Kentucky cases, and would require inordinate effort due to the volume of documents at issue. Id. at 25.

The Court again agrees with the Magistrate Judge. First, because the scope of the production required by the summons is considerably broader than the

documents deemed privileged in the Kentucky cases, Respondent's effort would largely not be duplicative. Second, it is not clear that preparing a standard privilege log will necessitate an extraordinary effort because Respondent has not identified with particularity any documents that might be privileged. Respondent provided the IRS with an outline of the responsive documents withheld on privilege grounds, see Dkt. No. [9-12], but that alone does not demonstrate the quantity of allegedly privileged documents. Accordingly, the Court **OVERRULES** Respondent's objections with respect to the applicability of the attorney-client privilege and the appropriateness of a categorical privilege log.

The Magistrate Judge also recommended that the Court appoint a special master to "resolve discovery disputes between the parties," including disputes about the applicability of the attorney-client privilege. Dkt. No. [18] at 25. Petitioner objects that the appointment of a special master would be premature before Respondent actually asserts privilege with respect to some number of documents. Dkt. No. [20] at 1. The Court **SUSTAINS** this objection. As the Magistrate Judge noted, the universe of documents that may be subject to an assertion of privilege appears to be large. Dkt. No. [18] at 25. But until Respondent identifies privileged documents and Petitioner disputes particular privilege claims, it is not apparent that privilege issues "cannot be effectively and timely addressed by an available district judge or magistrate judge" of this Court. Fed. R. Civ. P. 53(a)(1)(C). The Court therefore declines to adopt the Magistrate

Judge's recommendations that the Court appoint a special master and refrain from presently allocating the cost of a special master between the parties.

However, the Court reminds both parties that they are potentially subject to sanction if they attempt to frivolously litigate privilege issues. Respondent should only assert privilege when it has a good faith basis for doing so and with the understanding that the Court may ultimately review its privilege claims. After Respondent produces a privilege log, Petitioner may request that the Court inspect certain documents *in camera*. If bona fide privilege disputes ultimately arise, the Court may at that time resolve them or appoint a special master. This finding does not mean that this Court would not find a special master appropriate if it later appears that a burdensome *in camera* review of documents is necessary or that future discovery issues are voluminous. Instead, the Court determines that a special master is not yet inevitable based on the current record.

ii. Confidentiality

Respondent argued before the Magistrate Judge that Georgia Rule of Professional Conduct 1.6(a) presents another bar to production because withheld documents contain confidential client information. Dkt. No. [12] at 22–23. The Magistrate Judge disagreed, concluding that a court order trumps a professional obligation not to disclose confidential client information. Dkt. No. [18] at 22 (citing Ga. R. Pro. Conduct 1.6(a)). In its objection, Respondent concedes this point but argues that disclosure would require notifying "each client and prospect

to give them an opportunity . . . to seek to quash, or modify the [s]ummons to protect their rights." Dkt. No. [22] at 22.

Respondent does not explain why any obligation to notify clients should prevent enforcement of the summons. Moreover, Rule 1.6(a) necessarily yields to applicable law. See Ga. R. Pro. Conduct 1.6(d). Here, the IRS's summons authority under 26 U.S.C. § 7602 provides a legitimate basis for Respondent's disclosure of non-privileged information obtained from clients in confidence. See Tiffany Fine Arts Inc., 469 U.S. at 321; cf. United States v. Bisceglia, 420 U.S. 141, 146 (1975) ("Although [IRS] investigations unquestionably involve some invasion of privacy, they are essential to our self-reporting system . . . ."). In any event, Respondent has not shown that every document it has declined to produce contains confidential client information. Respondent may list in its privilege log any documents rendered confidential by the attorney-client privilege, but the Court disagrees with Respondent's blanket assertion of confidentiality and **OVERRULES** Respondent's objection on this point.

D. Petitioner's Motion to Strike and Respondent's Motion for Leave to File Reply

After Respondent submitted its objections to the Magistrate Judge's R&R, Petitioner filed a response. Dkt. No. [23]. Respondent then replied. Dkt. No. [24]. Petitioner argues this reply is unpermitted by Federal Rule of Civil Procedure 72(b)(2) and Local Rule 72.1(B). Dkt. No. [25] at 1. The Court agrees that Rule 72(b)(2) does not "provide for the filing of a reply brief." Kemp v. Gen. Growth Servs., Inc., No. 1:15-CV-01180-SCJ, 2017 WL 8217632, at *4 (N.D. Ga. Mar. 6,

2017). Nonetheless, the Court has considered Respondent's reply brief, the arguments of which are substantially similar to those in Respondent's objections. As Respondent's reply brief does not alter the Court's decision, Petitioner's Motion to Strike is **DENIED** and Respondent's Motion for Leave is **DENIED AS MOOT**.

IV. CONCLUSION

In light of the foregoing, the Court **ADOPTS IN PART** the Magistrate Judge's Report and Recommendation [18] as the opinion of this Court. Specifically, the Court **ADOPTS** the Magistrate Judge's recommendation that the Petition to Enforce IRS Summons be granted, except as to the specific documents that Respondent itself has already produced. The Court **DECLINES TO ADOPT** the Magistrate Judge's recommendations that a special master be appointed and that the Court refrain from allocating the cost of a special master between the parties. Petitioner's objection is **SUSTAINED**, and Respondent's objections are **OVERRULED**. The Court finds a special master premature at this time but will reconsider this issue if it appears that future discovery disputes will be voluminous.

Petitioner's Petition to Enforce IRS Summons [1] is **GRANTED IN PART and DENIED IN PART**. It is **DENIED** as to the specific documents that Respondent itself has already produced, but otherwise **GRANTED**.

Petitioner's Motion to Strike [25] is **DENIED** and Respondent's Motion for Leave to File Reply [28] is **DENIED AS MOOT**.

IT IS SO ORDERED this 7th day of December, 2020.

Leigh Martin May
United States District Judge