No. 20-

IN THE

Supreme Court of the United States

NATALIO FRIDMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an individual retain his Fifth Amendment privilege in the face of the "foregone conclusion doctrine" when an IRS summons requires him, in effect, to provide testimony (akin to responses to interrogatories)?

2. Does an individual retain his Fifth Amendment privilege in the face of the "collective entity doctrine" when an IRS summons issued to him in his personal capacity seeks to compel production of documents of a corporation, but there is no evidence or no finding of fact that he is a custodian of the corporate records?

3. Can the Government compel an individual who asserts his Fifth Amendment privilege to disclose whether he is a custodian of records of a collective entity and then, in reliance on that compelled disclosure, demand that he produce the entity's records?

RELATED CASES

United States v. Fridman, No. 15-mc-64, U.S. District Court for the Southern District of New York. Judgment entered on November 25, 2015, and on November 14, 2018.

United States v. Fridman, No. 15-3969-cv, U.S. Court of Appeals for the Second Circuit. Judgment entered on December 13, 2016.

United States v. Fridman, No. 18-3530-cv, U.S. Court of Appeals for the Second Circuit. Judgment entered on September 9, 2020.

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JURISIDICTION

The Court of Appeals issued its opinion on September 9, 2020. (App. A.) The Court of Appeals denied Petitioner's petition for rehearing *en banc* on December 4, 2020 (App. E.). Pursuant to this Court's order of March 19, 2020, regarding filing deadlines during the COVID-19 pandemic, this petition is due 150 days after the date of the denial of Petitioner's petition for rehearing *en banc*. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that "[n]o person ... shall be compelled in any criminal case to be a witness against himself."

STATEMENT OF THE CASE

This case raises three important questions as to the scope of the Fifth Amendment privilege: (i) whether the "foregone conclusion doctrine" applies where the compelled self-

incrimination is styled as a demand for documents, but is, in substance, testimonial; (ii) whether an individual who is ordered to produce corporate documents in connection with an investigation of his personal income tax returns must prove he is not a custodian of records of the corporation, where the Government has not alleged, and no evidence has been introduced or finding of fact made to the effect that, he is such a custodian; and (iii) whether an individual can be compelled to disclose whether he is a custodian of records of a collective entity and then, in reliance on such compelled disclosure, be compelled to produce the entity's records under the collective entity doctrine.

A. Background and Procedural History

On December 19, 2013, the IRS issued two summonses to Petitioner in connection with an investigation into his personal income taxes for the year 2008. (CA JA 17-48.) One summons states that it is issued to Petitioner in his individual capacity. The other summons states that it is issued to Petitioner in his capacity as the Trustee of the David Marcelo Trust.[1] The document requests attached to each of the summonses are identical (*id.*), and consist of 21 separately numbered paragraphs, only nine of which are at issue in this Petition.[2] The summonses requested that Petitioner appear for an interview and produce the documents listed in the document request.

The summonses request that Petitioner (1) list the opening and closing date of all foreign accounts over which he had signatory authority since 1999 (Request #1); (2) produce 2006 and 2007 bank records for all his foreign accounts (Request #2); (3) produce enumerated bank documents relating to seven named corporations from "opening date to 1/31/2009"

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[1] Petitioner was a trustee of the trust. (CA JA 60.)

[2] Document Requests ## 4, 5, 6, 8, 9, 10, 11, 12, 14, 18, 19, and 21 are no longer at issue. All or a portion of the remaining document requests are at issue in this Petition.

(Request #3); (4) produce bank documents to show the flow of funds, the account numbers, and the account holders' names for several specifically identified transactions (Request #7); and (5) produce various documents for "any Trust [other than the David Marcelo Trust] for which Petitioner is a Trustee or Beneficiary" (Requests #13, #15, #16, #17, #20). (CA JA 29-32.)

Petitioner appeared before the IRS in response to the summonses. He asserted his Fifth Amendment privilege in response to oral questions and in response to the summonses' demand for documents. On March 11, 2015, the Government filed a petition in the District Court to enforce the summonses. In support of its petition, the Government asserted that the documents requested were relevant to show that Petitioner had failed to file income tax returns, had filed false income tax returns, and had failed to report his income. (CA JA 51-63.) The Government asserted that the "collective entity" doctrine and the "foregone conclusion" doctrine applied to negate Petitioner's Fifth Amendment privilege with respect to production of the documents listed in the requests.

In response, Petitioner argued that a number of the requests were not requests for documents, but rather were demands for testimony. He also argued that the neither the "foregone conclusion" doctrine nor the "collective entity" doctrine applied to deny him the protection of the Fifth Amendment privilege. In response to Petitioner's contention that Requests #1, #2, and # 7 are requests for testimony, the Government, with the District Court's approval, revised those requests. In place of Request #1, asking Petitioner to list opening and closing dates of all foreign accounts over which he had signature authority since 1999, Petitioner was required to produce existing documents to show the opening and closing dates of those foreign accounts, on a list of 24 specific accounts, over which he had signatory

authority. Request #7, which requests Petitioner to produce bank documents to show the flow funds, the account numbers, and the account holders' names for several specific transactions, was revised by the addition of the words "existing documents." No changes were made to Requests #2, which requests various bank documents, and to Requests #13, #15, #16, #17 and #20, which demand that Petitioner produce documents relating to the David Marcelo Trust and "any other trust for which [Petitioner] is a Trustee or a Beneficiary."

The District Court held a hearing on November 17, 2015; the hearing was not recorded, and no transcript was made. At the hearing, Petitioner objected that the revisions to the summonses did not cure the compelled testimonial aspects inherent in the requested responses, and asserted that he is protected from producing any documents by the Fifth Amendment. Petitioner also objected to the compelled production of documents relating to seven different corporations, on the grounds that the summonses were issued to Petitioner in his individual capacity in connection with an IRS investigation of his personal income taxes; they were not issued to any of the seven corporations nor to Petitioner as a custodian of any of the corporations. At the conclusion of the hearing, the District Court ruled from the bench granting the Government's petition to enforce the summonses.

Petitioner appealed. On December 13, 2016, the Second Circuit vacated the District Court's order and remanded to case to the District Court, on the grounds that the record was insufficiently developed to permit meaningful appellate review of the District Court's determination that the Fifth Amendment act of production privilege did not apply. (App. C.) On remand, and without holding an additional hearing, the District Court again granted the Government's petition to enforce the summonses in an opinion dated November 14, 2018. (App. B.)

Petitioner appealed the District Court's decision on the grounds that compliance with the document requests would require Petitioner to provide the Government with the equivalent of oral testimony, and that the District Court erred in holding that the "collective entity" doctrine and the "foregone conclusion" doctrine applied, because *inter alia*, the Government failed to demonstrate any custodial relationship between Petitioner and any of the seven corporations named in Request #3 at the time the summonses were issued.

On September 9, 2020, the Second Circuit affirmed the District Court's decision. (App. A.) Petitioner subsequently petitioned the Second Circuit for *en banc* review. The Second Circuit denied his petition on December 4, 2020. (App. E.)

B. The Fifth Amendment, the Act of Production Privilege, and the "Foregone Conclusion" Doctrine

The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Fifth Amendment privilege applies when a communication is testimonial, incriminating, and compelled. *Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177, 189 (2004). Fifth Amendment protection applies in civil proceedings, such as those involving an IRS summons, where there is a credible threat of criminal exposure. *See Mathis v. United States*, 391 U.S. 1 (1968). In this case, the Government's assertions that it needs, and seeks to compel the production of, the documents in issue because it believes that Petitioner has failed to file income tax returns, has filed false income tax returns, and has failed to report all his income raise such a credible threat. (CA JA 52-53.)[3] The questions presented in this Petition relate to the application of the Fifth Amendment privilege to the compelled production of documents.

[3] CA JA refers to the joint appendix filed below. CA Dkt. 33-1 – 33-2.

In *Fisher v. United States*, 425 U.S. 391 (1976), this Court held that the Fifth Amendment protects not only compelled oral testimony, but also the testimonial aspects implicit in the compelled "act of production" of documents in response to an IRS summons. The implicit testimonial aspects of such an "act of production" are that: "(i) documents responsive to a given subpoena exist; (ii) they are in the possession or control of the subpoenaed party; (iii) the documents provided in response to the subpoena are authentic; and (iv) the responding party believes that the documents produced are those described in the subpoena." *United States v. Hubbell*, 167 F. 3d 552, 567-68 (D.C. Cir. 1999), *aff'd*, 530 U.S. 27 (2000). Accordingly, the Government can overcome Fifth Amendment protection only by showing that, in light of information already in its possession, there are no implicit testimonial facts not already known that would be disclosed by the act of producing the documents demanded. *See Fisher*, 425 U.S. at 411-13.

On the particular facts in *Fisher*, this Court determined that there were no testimonial aspects to production of the documents protected by the Fifth Amendment that were not already known to the Government. *Id.* In describing this conclusion, the Court stated that "[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." 425 U.S. at 411. The Court in *Fisher* used the term "foregone conclusion" as a way of stating that there were no meaningful admissions of fact implicit in compelling the production of the documents requested by the summons, but these lower courts have overlooked the Court's focus in *Fisher* on the ***absence*** of testimonial aspects to the particular document production in issue. Rather, at the behest of the Government, many lower courts have mistakenly treated the term "foregone conclusion" as a separate test that permits the

Government to require the production of the documents based on information relating solely to the existence and location of the documents.

In *United States v. Hubbell*, 530 U.S. 27 (2000), the only case in which this Court considered applying *Fisher*'s "forgone conclusion" argument to a claim of Fifth Amendment privilege, this Court rejected the Government's effort to leap from the premise that the existence and possession of business records by Hubbell, a businessman, is a "foregone conclusion" to the conclusion this was sufficient to overcome the privilege that attached to the testimonial aspects of document production. The Court held that a subpoena required Hubbell to make use of the contents of his own mind to select documents responsive to the subpoena, thereby compelling him to be a witness against himself in violation of Fifth Amendment protection, and that such protection was effective whether or not the Government knew of the existence of the requested documents. 530 U.S. at 43-44.

Similarly, in this case, an "act of production" in compliance with the document requests at issue would compel Petitioner to make admissions of fact that may be used against him in violation of his Fifth Amendment privilege, apart from "foregone conclusions" regarding the existence, or his possession, of documents. The District Court and the Second Circuit, by limiting their "foregone conclusion" analyses to whether the Government had shown knowledge of the existence of the documents demanded and of their possession by Petitioner, ignored the purely testimonial aspects, not "foregone conclusions" at all, of producing documents in response to Requests 1, 2, 7, 13, 15, 16, 17, and 20.

C. The Fifth Amendment and the Collective Entity Doctrine

This Court has held for more than a century that the Fifth Amendment privilege is available only to individuals, and not to legal entities such as corporations and partnerships.

See, e.g., Braswell v. United States, 487 U.S. 99 (1988); *United States v. Doe*, 465 U.S. 605 (1984); *Curcio v. United States*, 354 U.S. 118 (1957); *United States v. White*, 322 U.S. 694 (1944); *Wilson v. United States*, 221 U.S. 361 (1911); *Hale v. Henkel*, 201 U.S. 43 (1906). This Court has also held that, just as a "collective entity" cannot assert the Fifth Amendment privilege as a bar to production of the entity's records, a "custodian" in possession of a collective entity's records may similarly not refuse to produce them. *See Braswell*, 487 U.S. at 104-05*; Bellis v. United States*, 417 U.S. 85 (1974). However, this "collective entity" doctrine has never been applied by this Court – or so far as Petitioner is aware by any federal court – to negate the Fifth Amendment privilege of an individual, absent a finding of fact or the presentation of evidence to the effect that the individual was, at the time of the Government's demand for records, such a "custodian," acting in a capacity such as employee, officer, director, or shareholder of the corporation.

Here, Request #3 demands that Petitioner produce an extensive list of documents pertaining to the banking relationships of seven corporations. The Government produced no evidence that any document demanded by Request #3 existed at the time the summonses were served, nor did it produce any evidence that Petitioner was in possession or control of any such documents. Indeed, the Government made no effort to show that Petitioner was an officer, director, employee, shareholder, or other "custodian" on behalf of any of the seven corporations. The Government did not allege that Petitioner held any such position, it offered to evidence to prove that he was, and neither the District Court nor the Second Circuit found as a fact that Petitioner held any such position at any of the seven corporations. Nevertheless, and notwithstanding that the summonses were issued to Petitioner in his individual capacity, in connection with an IRS investigation of his personal income tax returns, and notwithstanding

that there was neither any allegation by the Government or finding of fact that Petitioner was an officer, director, employee, or other custodian of any corporate records nor any evidence to show that he was such a person, the Second Circuit erroneously applied the "collective entity" doctrine to compel Petitioner to produce the documents demanded by Request #3.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning Fifth Amendment protection from the compelled production of documents. This Court has allowed only limited exceptions to an individual's Fifth Amendment protection, in order to ensure that it is broad enough to prevent compelled testimony implicit in production of documents. Although, in *Fisher,* the Court held that the contents of documents voluntarily prepared are not protected by the Fifth Amendment privilege, 425 U.S. at 408-11, and, in *Braswell*, the Court held that a custodian of corporate records does not have a Fifth Amendment privilege with respect to the production of corporate records, 487 U.S. 99, the act of producing documents still has implicit testimonial aspects that are protected by the Fifth Amendment. The Second Circuit in this case has misapplied the doctrines of both *Fisher* and *Braswell* in a way that significantly and improperly limits the scope of Petitioner's Fifth Amendment privilege.

Accordingly, Petitioner asks the Court to hold that the so-called "foregone conclusion doctrine" cannot be used to compel an individual to provide specific factual information, even when the compulsion is styled as a document request, instead of an order for oral testimony or a written interrogatory. The Second Circuit here erroneously used that doctrine to deprive Petitioner of his Fifth Amendment. The Second Circuit's decision not only conflicts with this Court's opinions in *Fisher* and *Hubbell*, it sets a dangerous precedent obliterating Fifth

Amendment protection by allowing the Government to structure requests for factual information as demands for documents.

Petitioner also asks the Court to make clear that an individual cannot be forced to prove a negative -- that he was ***not*** a custodian of records of a collective entity – in order to assert Fifth Amendment privilege against compelled production of documents relating to that entity. In this case, there was no finding of fact, evidence, or even allegation by the Government that Petitioner was a custodian of records of any of the seven corporations listed in the summonses, and there was also no evidence or finding that any of corporate documents existed or that they were in Petitioner's possession or control. Nevertheless, the District Court held that Petitioner must produce bank records of seven corporations, unless he proves that he is not a custodian of their records. Imposition of such an obligation on Petitioner compels him to relinquish his Fifth Amendment privilege and to testify regarding his relationship, *vel non*, to the corporations, dramatically expanding the limited scope of the collective entity doctrine outlined by this court in *Braswell*.

A. The Second Circuit's Decision Conflicts with this Court's Opinions and Ignores the Pure Testimonial Aspects of Compelled Compliance with Document Requests #1, #2, #7, #13, #15, #16, #17, and #20.

In *Fisher*, this Court established the principle that, although contents of existing documents are not protected by Fifth Amendment privilege, the act of producing documents "has communicative aspects of its own, wholly aside from the existence of the papers demanded and their possession or control by the taxpayer." 425 U.S. at 410. By complying with a demand for documents, an individual "tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer **…** *[as well as] the taxpayer's belief that the papers are those described in the subpoena.*" *Id.* (emphasis added). This Court

recognized that compelled production of documents described in a summons is, in effect, a compelled admission that the documents produced are the ones requested by the summons.

On the facts of *Fisher*, the Court held that compelled production of documents did not result in implicit, compelled testimony from the taxpayer, who was the target of the IRS investigation, because "the 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." 425 U.S. at 411. In its use of the phrase "foregone conclusion," the Court did not create an exception to Fifth Amendment protection against self-incrimination. Rather, it merely described its conclusion that, in a particular set of circumstances, there were no meaningful testimonial aspects to compelled production of documents. Unfortunately, many courts, including the District Court and the Second Circuit below, have misunderstood the phrase "foregone conclusion" and applied it in a manner that focused only on whether the Government has shown that the requested documents exist and are in the possession of Petitioner; such courts have ignored the testimony inherent in admitting that the documents produced are the ones demanded.

In *Hubbell*, this Court rejected the Government's effort to overcome the testimonial aspects of document production by applying a "forgone conclusion" argument—namely, that the existence and possession of business records by Hubbell, a businessman, is a "foregone conclusion." The Court ruled that, whether or not the Government knew of the existence and location of the requested documents, Hubbell was protected by the Fifth Amendment, because the subpoena required him to "make extensive use of the contents of his own mind in identifying the… documents responsive to the requests in the subpoena." *Hubbell*, 530 U.S. at 43 (internal quotation marks and citations omitted).

Here, the Second Circuit's focus on whether the documents demanded exist and are Petitioner's possession ignored the fact that producing the documents is the equivalent of oral testimony.[4] Request #1, which originally demanded that Petitioner provide a list of dates and identify accounts over which he had signatory authority, was modified to require Petitioner to provide existing documents sufficient to show the opening and closing dates of all foreign bank accounts listed on an exhibit "over which you have signatory authority since 1999" (CA JA 29). Request #1, as modified, still requires Petitioner to specifically identify for the Government foreign accounts over which he has signature authority, as well which accounts may have been open or closed at the time the Summonses were issued.

Identifying for the Government all foreign accounts over which Petitioner has signature authority is clearly the equivalent of oral testimony. Compelling Petitioner to provide documents which show that same information is no different. The Second Circuit's decision to compel Petitioner to produce documents in response to Request #1 by applying the foregone conclusion doctrine is contrary to *Fisher* and *Hubbell*.

The same issue of compelled testimony applies to Request #2, which demands Petitioner produce records for "all your foreign accounts during 2006 and 2007."

Request #7 also seeks to compel the equivalent of oral testimony from Petitioner. It originally asked him to explain the flow of funds in five specified transactions, and was modified to require him to produce bank documents that "show the flow of the funds" for those transactions. (CA JA 30.) This request does not merely demand that Petitioner produce customary bank records; it compels him to specifically identify for the Government documents

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[4] Petitioner below focused extensively on the testimony that the summonses seek to compel. CA Dkt. 34 at 18-24, 45-47; CA Dkt. 68 at 13-16, 25-27.

that show how funds moved from one account to another. This amounts to the Government's compelling Petitioner to provide it with "a catalog of existing documents" that fit within the document request to answer a specific question, which is prohibited by this Court's precedent. *See Hubbell*, 530 U.S. at 42.

Document Requests #13, #15, #16, #17 and #20 all require Petitioner to provide bank records, trust agreements, books and records and certain correspondence *for any trust [in addition to the David Marcelo trust] for which Petitioner is a trustee or a beneficiary* (CA JA 31-32), thus compelling Petitioner to disclose his connection to trusts, if any, heretofore unknown to the Government. The Second Circuit's ruling to compel Petitioner to provide documents with regard to such trusts compels him to identify all trusts of which he is a trustee or a beneficiary; this is the equivalent of testimony protected by Fifth Amendment privilege. No reasonable application of the "foregone conclusion" doctrine or interpretation of the Court's opinions in *Fisher* or in *Hubbell* supports the Second Circuit's ruling.

Nor does the "collective entity" doctrine apply to compel Petitioner to produce the documents demanded and thereby to identify trusts of which he is a trustee or a beneficiary, but which are unknown to the Government. A traditional trust may be a collective entity,[5] and, therefore, a trustee of a trust who is served with a summons to produce the trust's documents, as the custodian of the trust's records, may be unable to assert his personal Fifth Amendment "act of production" privilege with respect to producing the trust's documents. *See Braswell*, 487 U.S. 99. However, the custodian retains his personal Fifth Amendment privilege with respect to providing oral testimony. *Curcio*, 354 U.S. 118, 123-124.

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[5] Petitioner does not seek review of the Second Circuit's ruling on this issue.

The summonses were served on Petitioner in his individual capacity and in his capacity as trustee of the David Marcelo trust. Petitioner does not seek review of the demand for documents of the David Marcelo Trust in Requests #13, #15, #16, #17 and #20. He seeks review only with respect to documents of "any other trusts of which he is a trustee or a beneficiary." The first part of each request constitutes a demand for the disclosure of the names of all trusts of which Petitioner is a trustee or a beneficiary, and the second part is the compelled production of the documents themselves. The first disclosure is the equivalent of compelled oral testimony protected by the Fifth Amendment, because the Government is not aware of the identity of any other trusts of which Petitioner is a trustee or a beneficiary, and Petitioner should not be compelled to provide that information.

In *Braswell*, the Court ruled that the act of production privilege set forth in *Fisher* and *Hubbell* did not protect a custodian of corporate records from compelled production of the corporation's books and records. 487 U.S. 99. The Court, however, limited this holding in *Curcio*, which protects a custodian of a collective entity's records from compelled oral testimony, as distinguished from testimony implicit in producing documents. *Id*. at 114-15. As to the demand for the names of trusts of which Petitioner is a beneficiary, a beneficiary of a trust is not a custodian of the trust's records. Even if Petitioner is viewed as a custodian of records for a trust of which he is a trustee, these requests seek to compel the equivalent of oral testimony to identify such trusts, which is prohibited by the Court's decision in *Curcio*.

This Court should grant review to ensure that document requests are not used to compel the equivalent of oral testimony, thereby depriving individuals of the protection afforded by the Fifth Amendment and affirmed by this Court's decisions in *Fisher, Hubbell*, and *Curcio.*

B. The Second Circuit Erroneously Held that Petitioner Must Prove that He is Not a Custodian of the Records of Seven Corporations, Despite Absence of Any Finding of Fact, Evidence, or Allegation that He Was the Custodian.

Request #3 demands that Petitioner produce: "All bank statements and all account opening documents, including but not limited to, Know Your Customer Account information, including signature cards, opening deposit slips, passport copies, certificates of beneficial ownership, letters of reference, certificates of clean funds and/or other source of funds documentation for accounts held under the name of Consist Teleinformatica Argentine; Consist Consultoria Systemast Repre; Wanstst Systemar DE Computacao CTDA; Consist France; Consist Asia Pacific; Mak Data System; Consist International Inc. from opening date to 1/31/2009." (CA JA 29.)

The Government proffered no evidence to show that any of the requested documents existed on the date the summonses were issued, nor any evidence to show that Petitioner was in possession or control of any of the documents. As a result, the "existence and the location of the papers" is not a "foregone conclusion," and their production may well add much 'to the sum total of the Government's information,'" *In re Katz*, 623 F.2d 122,126 (2d Cir. 1980) (citing *Fisher*, 425 U.S. at 411). The Government appears to have conceded that the foregone conclusion doctrine did not apply to Request #3 (CA Dkt. 52 at 19), and neither the District Court nor the Second Circuit held that the foregone conclusion applied to Request #3 to deprive Petitioner of his Fifth Amendment privilege.[6] However, the District Court and the

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[6] In its brief below, the Government also concedes that the forgone conclusion doctrine does not apply to Requests #13 through #17 and #20, and instead relies only on the collective entity doctrine to require compelled disclosure. (CA Dkt. 52 at 38, n.10.)"

Second Circuit erroneously held that the collective entity doctrine applied to deny Fifth Amendment protection.

The summonses were issued to Petitioner in his individual capacity and in his capacity as trustee of the David Marcelo Trust. Declarations introduced by the Government in support of enforcement of the summonses make clear that the summonses were issued in connection with an examination of Petitioner's personal income tax liability for 2008, and not in connection with an examination of the returns of any corporations of the records of which Petitioner might be a custodian. (CA JA 55.) Indeed, no summons was issued to any of the seven corporations, and none of those corporations was being examined by the IRS. (*See id.*) The Government introduced no evidence to show that Petitioner was an officer, director, or employee of any of the corporations at the time the summonses were issued, or at any prior time, and neither the District Court nor the Second Circuit found that Petitioner held any of those positions, or that he was otherwise a custodian of the records of any of the seven corporations. Nevertheless, the Second Circuit required Petitioner to produce corporate records under the collective entity doctrine, because "[w]e adopt the D.C. Circuit's burden-shifting framework. *See, e.g., In re Sealed Case*, 877 F.2d 83, 87 (D.C. Cir. 1989). The Government need only show a reasonable basis to believe a defendant has the ability to produce records; once the Government has done so, the burden shifts to the defendant to explain or justify refusal. *See id.*" (App. A at 36.)

The Second Circuit's reliance on the D.C. Circuit's opinion in *In re Sealed Case* is misplaced and abandons the principle that the collective entity doctrine applies to an individual served with a summons or subpoena ***only if*** the individual is shown to be a custodian of the corporation's records. The respondent in *In re Sealed Case* was served with a subpoena as

custodian of records of Corporation A. Based on that individual's admission that he was the president, chief executive officer, and major shareholder of Corporation A, the D.C. Circuit held that he was a custodian, and the burden then shifted to him to prove that he could not produce the records demanded. 877 F.2d at 87. In the present case, in contrast, Petitioner was not served with a summons as custodian of records for any corporation, and there was no showing of any kind that he was an officer, director, employee, or shareholder of any of the corporations at or near the time the summonses were issued. To shift to Petitioner the burden of showing that he was not a custodian of any of the corporations denies him Fifth Amendment protection, by forcing him to relinquish his Fifth Amendment privilege in order to preserve that privilege, in the absence of any evidence or even allegation introduced by the Government.

The long-established basis for denying an individual Fifth Amendment protection from producing a corporation's documents is that an individual who is an officer, or director, or employee of the corporation, or was otherwise a custodian of its records, holds the documents in a representative capacity or as an agent of the corporation. Since the corporation has no Fifth Amendment privilege with respect to its records, neither does its agent. *See Braswell v. United States*, 487 U.S. 99 (1988).[7]

The implicit testimonial aspects of compelled document production recognized in *Fisher* protect Petitioner from having to produce any of the documents, unless Petitioner is a custodian of the corporate records.[8] The Second Circuit's opinion ignores all applicable precedents this Court and in the Courts of Appeals (including many of its own precedents),

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[7] Another rationale for denying Fifth Amendment protection to a custodian of corporate records has been that the individual, by assuming the role of custodian, waived Fifth Amendment protection. *See Wilson v. United States*, 221 U.S. 361 (1911).

[8] The Second Circuit ruled that the foregone conclusion doctrine applies only to Requests #1, #2, #4, and #7. (App. A at 29).

none of which applied the collective entity doctrine to an individual who was not an officer, director, employee, or shareholder of the corporation. *See, e.g., United States v. Doe*, 191 F.3d 173 (2d Cir. 1999); *In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 & June 22, 1983 (Saxon Industries)*, 722 F.2d 981 (2d Cir. 1983); *SEC v. Forster*, 147 F. Supp. 3d 223 (S.D.N.Y. 2015).

With no legal precedent to support its holding, the Second Circuit takes words out of context from a D.C. Circuit opinion whose facts in no way support the Second Circuit's decision. In in the absence of satisfying this Court's *Fisher* test that the documents requested exist and that they are in Petitioner's possession at the time the summonses were served, the Second Circuit simply ignores without any justification all legal precedents to deny petitioner Fifth Amendment protection. Petitioner is not aware of any decided case by any federal court that has applied the collective entity doctrine to deny Fifth Amendment protection in the absence of any evidence that an individual is a custodian of the corporate records under such facts.

The Second Circuit here improperly denied Petitioner his Fifth Amendment privilege by forcing him to prove that he cannot produce the corporations' records, even though there was no showing, or even allegation, that he could or that he had an agency relationship with any of the seven corporations at the time the summonses were issued. The Court should grant the Petition in order to clarify the application of the Fifth Amendment in these circumstances.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 3, 2021

APPENDIX A

18-3530-cv
United States v. Fridman

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2019

(Argued: December 17, 2019 Decided: September 9, 2020)

Docket No. 18-3530-cv

United States of America,

Appellee,

v.

Natalio Fridman,

Defendant-Appellant.

Before: POOLER, HALL, and LOHIER, *Circuit Judges*.

Appeal from the judgment of the United States District Court for the Southern District of New York (Victor Marrero, *J.*) granting on remand the Government's petition to enforce two Internal Revenue Service summonses, one

sent to Fridman in his personal capacity and one sent to him in his capacity as a trustee, based on the foregone conclusion and collective entity exceptions to the Fifth Amendment's self-incrimination clause. We agree with the district court that the Government has shown with reasonable particularity the documents' existence, Fridman's control of the documents, and an independent means of authenticating the documents such that the foregone conclusion doctrine applies. We also agree with the district court that, as a matter of first impression in our Circuit, a traditional trust is a collective entity subject to the collective entity doctrine. Accordingly, we affirm the grant of the Government's petition to enforce the summonses.

Affirmed.

RICHARD A. LEVINE (Nancy Chassman, *on the brief*), Roberts & Holland LLP, New York, NY, *for Defendant-Appellant*.

TALIA KRAEMER, Assistant United States Attorney (Rebecca S. Tinio, Assistant United States Attorney, *on the brief*), *for* Audrey Strauss, Acting United States Attorney for the Southern District of New York, New York, NY, *for Appellee*.

POOLER, *Circuit Judge*:

Natalio Fridman appeals from the judgment of the United States District Court for the Southern District of New York (Victor Marrero, *J.*) granting on remand the Government's petition to enforce two Internal Revenue Service ("IRS") summonses, one sent to Fridman in his personal capacity and one sent to him in his capacity as a trustee, based on the foregone conclusion and collective entity exceptions to the Fifth Amendment's self-incrimination clause. We agree with the district court that the Government has shown with reasonable particularity the documents' existence, Fridman's control of the documents, and an independent means of authenticating the documents such that the foregone conclusion doctrine applies. We also agree with the district court that, as a matter of first impression in our Circuit, a traditional trust is a collective entity subject to the collective entity doctrine. Accordingly, we affirm the grant of the Government's petition to enforce the summonses.

BACKGROUND

The IRS has long been investigating the use of offshore bank accounts to improperly conceal federally taxable income. As part of these efforts, the IRS sought to investigate Fridman for the 2008 tax year. While Fridman reported only

three foreign financial accounts maintained in a personal capacity for the 2008 tax year, the IRS became aware of at least five additional personal accounts: a UBS account in Switzerland; a Credit Suisse account in Switzerland; a Bank Leumi account in Switzerland; a Bank Leumi account in Israel; and a Bank Safra account in Luxembourg (collectively, the "Personal Accounts"). The IRS learned of these accounts in 2012 when Fridman's representative provided the IRS with these accounts' statements or other bank records pertaining to the 2008 tax year. From these documents, the IRS identified the account numbers and other information related to the Personal Accounts.

Besides the Personal Accounts, the IRS became aware of seven companies affiliated with or controlled by Fridman that maintained foreign bank accounts. The IRS has identified seventeen such corporate foreign bank accounts (collectively, the "Corporate Accounts").[1] The IRS learned of these accounts

[1] Four accounts relate to a company called Consist Teleinformatica Argentine; two accounts relate to a company called Consist Consultoria Systemast Repre; one account relates to a company called Wanstat Systemar DE Computacao CTDA; two accounts relate to a company called Consist France; one account relates to a company called Consist Asia Pacific; six accounts relate to a company called Mak Data System; and one account relates to a company called Consist International Inc.

through Fridman's filing of Foreign Bank and Financial Accounts ("FBARs"). A person or entity is required to file an FBAR if they have "a financial interest in, or signature or other authority over" a foreign financial account. 31 C.F.R. § 1010.350(a). In 1991, Fridman filed FBARs for the Consist Teleinformatica Argentine, Consist Consultoria Systemast Repre, and Wanstat Systemar DE Computacao CTDA accounts. In 1998, he filed FBARs for the Consist France and the Consist Asia Pacific accounts. Fridman filed FBARs for one Mak Data System account in 1998 and from 2000-2004, and for a second Mak Data System account in 1998 and from 2000-2005. For four other Mak Data System accounts, he filed FBARs in 2004 and 2005. For the Consist International Inc. account, Fridman filed FBARs from 2000-2003.

Finally, the IRS learned that Fridman controls a number of trusts, including at least one domestic trust that has a foreign financial account. This trust is the David Marcelo Trust, named for Fridman's son, of which Fridman is both a trustee and beneficiary. Fridman's sister is a second trustee, and Fridman's son is a second beneficiary. Though Fridman has not filed a tax return for the David Marcelo Trust, the IRS learned that the David Marcelo Trust has an HSBC account in Switzerland (the "HSBC Account"). The IRS came to know of

this account after Fridman's representative provided some bank statements and records related to the account in 2012 and 2013. One record shows a transfer of $2.4 million from the HSBC Account into a domestic Citibank account belonging to Fridman's wife and son.

In 2013, the IRS issued the two summonses ("the Summonses") that are central to this case. One summons was sent to Fridman in his personal capacity, and the other was sent to him in his capacity as Trustee of the David Marcelo Trust. The documents sought (the "Requests") were the same, and they largely pertain to the Personal Accounts, Corporate Accounts, and HSBC Account (collectively, the "Known Accounts"). The relevant Requests, as revised during the proceeding below, are:

> **Request 1:** For all of the foreign bank accounts listed on "Exhibit B" [a list of 24 accounts][2] over which you have signatory authority since 1999, please provide existing documents sufficient to show the opening date and closing date of each.
>
> **Request 2:** Please provide the 2006 and 2007 bank statements for all your foreign bank accounts listed on "Exhibit B."
>
> **Request 3:** All bank statements and all the account opening documents, including but not limited to, Know Your Customer

[2] Exhibit B contains the name of the account holder, the bank, the country, and the account number provided in redacted form.

Account information including signature cards, opening deposit slips, passport copies, certificates of beneficial ownership, letters of reference, certificates of clean funds and/or other source of funds documentation for accounts held under the name of Consist Teleinformatica Argentine; Consist Consultoria Systemast Repre; Wanstst Systemar DE Computacao CTDA; Consist France; Consist Asia Pacific; Mak Data System; Consist International Inc. from opening date to 1/31/2009.

Request 4: All bank statements and account opening documents, including but not limited to, Know Your Customer Account information including signature cards, opening deposit slips, passport copies, certificates of beneficial ownership, letters of reference, certificates of clean funds and/or other source of funds documentation for the following accounts from opening date to 1/31/2009: UBS 29, Credit Suisse 3, Leumi Bank 49, Leumi Bank 02, Safra 37, HSBC 15, Republic National Bank of New York (Suisse) S.A.

Request 7: Existing bank documents including but not limited to cancelled checks, wire transfer instructions, wire transfer slips, deposit slips that show the flow of the following funds, the account numbers and account holders' names for the Citibank accounts and any other bank accounts, sufficient to show the flow of funds in five transactions transferring funds between the HSBC account and an unknown New York-based Citibank account on 7/26/2004, 8/30/2004, 9/28/2004, 1/31/2008, and 2/28/2010.

Request 11: Please refer to the Trust Agreement dated April 30th, 1990 – "the Grantor hereby transfers to the Trustees the property described in the annexed Schedule A, which transfers the Trustees

hereby confirm." *See* App'x at 81. Provide existing documents that explain how the funds were transferred. For example:

a. Provide existing documents to show whether Fridman was added to the existing account as trustee.

b. Provide existing documents relating to a redacted request concerning the transfer of funds.

Provide existing documents sufficient to show the transfer of property described in Schedule A of the Trust Agreement.

Request 12: All bank records for HSBC Private Bank (Suisse) SA [redacted account number] from 1999 to 2002.

Request 13: All bank records for any account held under the name of any trust for which Fridman is a Trustee or Beneficiary since the inception of such trusts.

Request 14: In reference to first clause of Trust Agreement dated 04/30/1990, the Trust Agreement states "The Grantor wishes to record that she intends by this Trust Agreement to create two separate trusts . . ." See App'x at 81.

a. Please provide existing documents that show the name of the trusts and all bank records for any account holding assets from the inception of the trusts.

Request 15: Trust Agreement for any Trust for which Fridman is a Trustee or Beneficiary.

Request 16: All books and records for the Trusts referenced in Clause 1 of the Trust Agreement dated 04/30/1990 and any other Trusts for

> which Fridman is a Trustee or Beneficiary, including but not limited to David Marcelo Trust.
>
> **Request 17:** All records pertaining to property in which David Marcelo Trust and/or any other trust have an interest.
>
> **Request 20:** All correspondence between Fridman and any other trustees, trustors, beneficiaries, and any other persons involved with the trust(s) for which Fridman is a Trustee or Beneficiary related to such a trust, its property and/or its administration.

Fridman asserted his Fifth Amendment privilege and refused to produce the requested documents. On March 11, 2015, the Government filed a petition to enforce the summonses. *United States v. Fridman*, 337 F. Supp. 3d 259, 262 (S.D.N.Y. 2018). On November 25, 2015, the district court granted the petition on the grounds that the documents were relevant and certain exceptions to the Fifth Amendment act-of-production privilege applied. *Id*. Fridman appealed, and a panel of this Circuit vacated and remanded by summary order. *United States v. Fridman*, 665 F. App'x 94, 94 (2d Cir. 2016). While we affirmed the determination on relevance, we remanded on the Fifth Amendment issue because the record was insufficiently developed. *Id*. at 96-97. In a footnote, we directed the district court to look to an intervening decision from our Circuit, *United States v.*

Greenfield, 831 F.3d 106 (2d Cir. 2016), with respect to its analysis of the foregone conclusion doctrine. *Fridman*, 665 F. App'x at 96 n.1.

On remand, the district court again granted the petition. *Fridman*, 337 F. Supp. 3d at 264. The district court applied the foregone conclusion doctrine to Requests 1, 2 (limited to the Known Accounts only), 4, and 7. *Id*. at 268-71. Because the Government "has provided the name of the account holder, the bank, the country, and the account number for each of the Known Accounts," the district court was satisfied that the Government knew of the existence, location, and authenticity of the requested documents, as required by *Greenfield*. *Id*. at 268-71. The district court also held that so-called "traditional trusts" were collective entities for purposes of the collective entity rule, and therefore that Requests 1-4, 7, 11-17, and 20 were excepted as to all trust-related documents. *Id*. at 270-72. The district court applied the collective entity rule to Request 3 as well because the entities listed are collective. *Id*. at 272-74. Rejecting Fridman's argument that the Summonses were not served on him in his capacity as representative for any of those entities, the district court reasoned that "[r]egardless of the capacity in which Fridman was served, the result is the

same: [he] is required to produce documents responsive to Document Request No. 3 to the extent he possesses such documents in his individual capacity or his capacity as the custodian of a collective entity, including the corporations listed in the Document Request." *Id*. at 273.

Fridman timely appealed.

DISCUSSION

"We review *de novo* the District Court's determination of questions of law as to the Fifth Amendment privilege. But [we] will overturn the District Court's determination as to whether the act of producing the documents would involve testimonial self-incrimination only where such a finding has no support in the record." *Greenfield*, 831 F.3d at 114 (internal quotation marks and citations omitted).

The Fifth Amendment provides that no person shall be compelled in a criminal case to be a witness against himself. U.S. Const. amend. V. In *Fisher v. United States*, 425 U.S. 391, 409-11 (1976), the Supreme Court defined the contours of the Fifth Amendment as it applies to document requests. The Court held that documents voluntarily prepared prior to the issuance of a summons were not compelled testimony, so there was no Fifth Amendment protection for the

contents of these records. *Id*. at 410-11. At the same time, however, the Court recognized a narrow privilege against the *act* of production. Because producing documents "tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer . . . [as well as] the taxpayer's belief that the papers are those described in the subpoena," the Court concluded that the act of production could, in some cases, communicate incriminatory statements and thus may fall under the Fifth Amendment's protection against self-incrimination; but the Court hinted that such a determination would be conditioned on the "facts and circumstances of particular cases." *Id*. at 410-11. Similarly, when a defendant must "make extensive use of the contents of his own mind in identifying the hundreds of documents responsive to the requests in the subpoena," he or she contributes to a "link in the chain" of their prosecution in violation of the Fifth Amendment privilege. *United States v. Hubbell*, 530 U.S. 27, 42-43 (2000) (internal quotation marks and citations omitted).

The act-of-production privilege is not an absolute one. Fridman challenges the district court's ruling that two exceptions to the act-of-production privilege permitted enforcement of the requests at issue in this case.

I. The Foregone Conclusion Doctrine

Under one exception, when "[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," production does not run afoul of the Fifth Amendment. *Fisher*, 425 U.S. at 411. This principle has been aptly called the foregone conclusion doctrine.

As referenced above, our Circuit most recently addressed the foregone conclusion doctrine in *United States v. Greenfield*, 831 F.3d 106, 110 (2d Cir. 2016). There too, we dealt with a summons related to tax evasion. *Id.* at 110. In *Greenfield*, we explained that for the foregone conclusion exception to apply, the Government must establish "with reasonable particularity" its knowledge as to "(1) existence of the documents, (2) the taxpayer's possession or control of the documents and (3) the authenticity of the documents." *Id.* at 115; *see also id.* at 119.[3]

[3] We acknowledged that "both our court and our sister circuits have struggled with the extent of Government knowledge necessary for a foregone-conclusion rationale to apply." *Greenfield*, 831 F.3d at 116. Indeed, in *Greenfield*, we wrestled with enunciating the requisite level of knowledge of each specific responsive document covered by the Summons. On the other hand, the Government must *know*, and not merely *infer*, that the sought documents exist, that they are under

To meet the existence requirement, the "Government is not required to have actual knowledge of the existence and location of each and every responsive document." *Id.* at 116. When a summons seeks "customary account documents related to financial accounts that [the Government] knew existed," the documents' existence is a foregone conclusion. *Id.* at 118.

Although we did not explicitly define "control" in the context of the foregone conclusion doctrine in *Greenfield*, we start from the premise that a taxpayer's "*possession or control* of the [requested] documents" is one of the "communicative elements" protected by the Fifth Amendment. *Id.* at 115 (emphasis added); *see also Fisher*, 425 U.S. at 409-11. The Government may therefore satisfy the control requirement by establishing its knowledge of the physical possession of the requested documents by the subpoenaed individual, *see Fisher*, 425 U.S. at 411-12, or the subpoenaed individual's control over the requested documents, *see Greenfield*, 831 F.3d at 119 (explaining that an

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the control of defendant, and that they are authentic." *Id.* (citation omitted). The "sweet spot" for the Government's level of knowledge is somewhere between "perfect knowledge" and a "mere inference." Determining whether the foregone conclusion doctrine applies requires a fact-intensive, case-by-case analysis. *Id.* at 119-28.

individual's ability or authority to receive the requested documents is an essential part of being able to control the documents); *id*. at 199 n.10 ("[B]oth a general power of attorney and the power to give instructions would suffice to provide [the individual] with control over [the requested] documents."); *see also Matter of Marc Rich & Co., A.G.*, 707 F.2d 663, 667 (2d Cir. 1983) ("The test for the production of documents is control, not location); *Control*, Black's Law Dictionary (11th ed. 2019) (defining "control" as "[t]o exercise power or influence over"). Thus, if the Government can prove it knows that an individual controls the disposition of assets in an account, it follows that that individual controls the requested documents associated with that account—given the Government has satisfied the existence requirement.

With respect to the authenticity requirement, documents may be "implicitly" authenticated if an individual complies with a summons demanding production of documents, and the Government establishes that "th[ose] documents are in fact what they purport to be" and "the taxpayer [was] not . . . forced to use his discretion in selecting . . . the responsive documents." *Greenfield*, 831 F.3d at 118 (internal quotation marks and citation omitted). Additionally, the Government can "independently establish[]" authenticity in several ways: "a)

through the testimony of third parties familiar with that type of document, b) by comparison to a prior version of the document, or c) by comparison to other related documents." *Id.* (citations omitted).

There is a critical temporal requirement as well. The Government must prove its knowledge at the time the summons was issued. *Id*. at 119. "Relevant" to this inquiry is whether "the Government can demonstrate that the documents *ever* existed." *Id*. at 119. "[I]n many circumstances, the Government's ability to establish existence and control as of an earlier date *does permit* an inference of existence and control as of the date of the Summons." *Id.* at 125 (emphasis added). When considering whether such an inference of continued existence and control is available,[4] we have borrowed and applied a balancing test from the Eighth Circuit that examines: "(1) the nature of the documents, (2) the nature of the business to which the documents pertained, (3) the absence of any indication that the documents were transferred to someone else or were destroyed, and (4) the relatively short time period . . . between the date as of which possession was

[4] We stress that this inference of continued existence and control is different than the "inference" forbidden in *Greenfield*. The inference *allowed* in *Greenfield* is one of continued existence and control, not of knowledge itself.

shown and the date of the ensuing IRS summons."[5] *Id*. at 125-26 (internal quotation marks and citation omitted).

Greenfield provides a bifurcated approach to the foregone conclusion analysis when the "inference" of continued existence and control is at play. First, we examine "whether the Government can establish the existence, control, and authenticity of each category of sought documents" at some point prior to the issuance of the summons. *Id.* at 119. For those documents for which the Government's evidence suffices, we then examine "whether it is a foregone conclusion that these documents remained in [the individual's] control through the issuance of the Summons . . . . Only if that retention is a foregone conclusion will the issuance of the Summons not violate [the] Fifth Amendment privilege." *Id.* at 123.[6]

In this case, Fridman challenges the district court's determination that the foregone conclusion doctrine allows enforcement of Requests 1, 2, 4, and 7. He

[5] We read "possession" here as synonymous with "control" in the context of the foregone conclusion doctrine analysis.

[6] We note that the Government does not need to prove authentication at an earlier date so long as it can authenticate the documents as of the issuance of the summons.

makes two primary arguments. First, he claims that the district court misapplied our decision in *Greenfield*. Second, he asserts that enforcing these Requests would require him to provide testimonial information because the Government has failed to establish its knowledge of the relevant documents with reasonable particularity. We are not persuaded by either argument.

1. Existence

There is no doubt that the Government knows that the Known Accounts existed prior to the issuance of the Summonses. Exhibit B, which lists the Known Accounts, specifies the account holder, account number, the bank, and the location (by country) for each account. Based on filings from Fridman or his representative, the Government also knows the following about the listed accounts: (1) the Personal Accounts existed in 2008; (2) the HSBC Account existed in the years 2003-2010; (3) the Consist Consultoria Systemast Repre Corporate Accounts and Wanstat Systemar Corporate Account existed in 1991; (4) the Consist France Corporate Accounts existed in 1998; (5) the Consist Asia Pacific Corporate Account existed in 1998; and (6) two of the Mak Data System Corporate Accounts existed in 1998 and in the years 2000-2004 while four others existed in 2004 and 2005.

Requests 1, 2, 4, and 7 seek "customary account documents" from the Known Accounts: (1) records sufficient to show the opening and closing dates of the Known Accounts (listed in Exhibit B)[7]; (2) bank statements for the Known Accounts for 2006 and 2007; (3) bank statements and account opening documents for certain Personal Accounts and the HSBC Account, from the account opening date through to January 31, 2009; and (4) bank records for transactions that the Government knows occurred between the HSBC Account and an unknown Citibank account. These requested documents—bank statements, account opening documents, transaction records, and account closing documents—are all quintessential customary account documents. Because of this, and because these documents pertain to "financial accounts that [the Government] knew existed," their existence is a foregone conclusion. *Greenfield*, 831 F.3d at 118.

Fridman offers a number of unavailing counterarguments. First, Fridman argues that the Government has not proven that it knows the specific requested documents existed. But it was not required to do so. *Greenfield* makes clear that

[7] The Government no longer seeks records under the foregone conclusion doctrine for the four Argentina-based Corporate Accounts. Moreover, although not a foreign account, the Government also does not seek records under the foregone conclusion doctrine for the U.S. Citibank account.

even if "the Government does not have specific knowledge of every document that is responsive to the Summons, such specific knowledge exceeds what is required under a 'reasonable particularity' standard." *Id*. at 119. And when dealing with customary account documents, proof of the account's existence is sufficient to show knowledge of the account documents with a reasonable particularity. *Id*. Therefore, because the Government knows of the accounts' existence, it has met its burden.

Fridman's argument has the most traction with respect to Requests 1 and 2. As to the account closing documents sought in Request 1, it is true that the Government does not know for certain that any of the Known Accounts, other than the HSBC Account, have been closed. And unlike account opening documents, which must necessarily exist for all the Known Accounts, account closing documents will only exist for those accounts that have been closed. Therefore, it is not as obvious whether knowledge of closing documents can be predicated on knowledge of the accounts' existence. Similarly, although Request 2 seeks bank documents for 2006 and 2007, the Government does not know for a fact that the Personal or Corporate Accounts existed in those years; the IRS has documents showing the Personal Accounts existed in 2008, and it knows the

FBAR filings for the relevant Corporate Accounts were made at various points from 1991 to 2005.

But the Government does not need specific knowledge that the accounts had been closed or that the accounts existed in 2006 and 2007. Such a requirement does not square with our decision in *Greenfield*. In *Greenfield*, the summons called for, inter alia, all documents in Greenfield's possession for a certain account. *Id.* at 112-13. There, we held that the Government had sufficiently proven its knowledge of the existence of those documents because of its knowledge of the account's existence in 2001 and because the documents sought were customary account documents. *Id*. at 119. It was no matter that the category of documents sought—"all documents in [Greenfield's] possession" pertaining to the account—was sweeping and significantly broader than Requests 1 and 2 here. *See id*. at 113. Thus, even though the Government in this case does not have "specific knowledge of every document that is responsive to the Summons," such a heightened standard is not required under our "reasonable particularity" standard, nor does it align with our analysis in *Greenfield*. *Id.*

Fridman also contends that the Government does not have specific knowledge of the facts contained in the documents soughtBut in arguing that the Government must know of the facts contained in the documents, Fridman conflates the documents' *contents* with their *existence*. The distinction is a consequential one: the contents of documents are not covered by the Fifth Amendment privilege. *Fisher*, 425 U.S. at 409-10. Therefore, the Government need not prove its knowledge of the documents' contents. Further, *In re Katz*, 623 F.2d 122, 126 (2d Cir. 1980), is not to the contrary. In *In re Katz*, the Government sought "all documents relating to any dealings or business with . . . any company owned, operated or controlled" by an individual named Benjamin Jamil. *Id*. at 123. We denied enforcement of the subpoena as written because the Government did not know the identity of the corporations, Jamil's relationship with them, or whether some documents may be protected by attorney-client privilege. *Id.* at 126-27. We remanded to the district court to either conduct in camera review or limit enforcement of the subpoena to public documents related to known entities. *Id*. But here, the Government knows the accounts whose records are sought and their connection to Fridman.

Because the Government knew the accounts existed and requested only customary account documents, we conclude that there is sufficient evidence in the record to support the Government's knowledge as to the documents' existence for Requests 1, 2, 4, and 7.

2. Prior Control

The record establishes that Fridman's representative provided account statements or other bank records to the IRS in 2012 for the Personal and HSBC Accounts. Moreover, Fridman held the Personal Accounts individually in his name, and the HSBC Account was held in the name of the David Marcelo Trust, for which Fridman serves as Trustee. This is sufficient to establish the Government knew Fridman had control over the Personal and HSBC Accounts. *See id.* at 119-20.

With respect to the relevant Corporate Accounts, Fridman made FBAR filings at various points from 1991 to 2005. An individual must file an FBAR if he has "a financial interest in, or signature or other authority over" a foreign financial account. 31 C.F.R. § 1010.350(a). By filing FBARs for the Corporate Accounts, Fridman indicated that he had control over those accounts' records as of the years of those corresponding filings. *See id.* § 1010.350(a), (e)-(f).

Although Fridman argues that certain requested documents would be in the possession of offshore banks, not the account owner, this argument is inapposite. We first note that the Government was not required to establish that Fridman possessed the documents; rather, it was required to prove possession *or control* of the documents. *See Fisher*, 425 U.S. at 410; *see also Greenfield*, 831 F.3d at 119-21 . Moreover, we have previously explained that "[t]he test for the production of documents is control, not location." *Matter of March Rich & Co., A.G.*, 7070 F.2d at 667 (holding that a witness cannot resist the production of documents on the ground that the documents are located abroad).

Because Fridman or his representative filed FBARs and copies of documents pertaining to the Known Accounts, there is sufficient evidence in the record to establish the Government's knowledge of Fridman's control over the requested documents.

3. Inference of Continued Existence and Control

Having concluded that the Government has met its burden of showing that the documents existed and were in Fridman's control at one point, we now turn to the question of existence and control at the time the Summonses were issued in 2013. *See Greenfield*, 831 F.3d at 123. In doing so, we are permitted to

infer existence and control if the four factors from the *Greenfield* balancing test weigh in favor of such an inference. *Id.* at 125-26.

After considering these factors, we conclude that the record permits an inference of continued existence and control in the present case. The first three factors support an inference of continued existence and control. First, as we explained in *Greenfield*, "bank documents are more likely to be retained long term as compared to documents like receipts or prosaic emails." *Id.* Second, banks "tend to maintain consumer records." *Id.* Third, unlike in *Greenfield*, here there is no "significant intervening event[] that might well have resulted in transfer or destructions of the sought documents." *Id.* Although Fridman suggests that the absence of continued FBAR filings for the Corporate Accounts indicates that he ceased having an interest in those accounts, we are not convinced. This absence could be a product of Fridman's failure to make requisite filings consistently.[8] His suggestion that he lost control of his Corporate Accounts during certain years is just that—a suggestion. It does not amount to evidence of intervening factors like those encountered in *Greenfield*. *Id.* at 126-27.

[8] The record supports that Fridman failed to consistently file FBARs for other foreign accounts.

The final factor is less clear-cut. We have little difficulty agreeing with the Government that the time period between the last date of possession for the Personal and HSBC Accounts and the date of the Summonses was relatively short. Fridman's representative provided the IRS with documents relating to the Personal Accounts in May 2012. The same representative last provided the IRS with records relating to the HSBC Account in November 2012. Thus, only nineteen and thirteen months, respectively, eslaped between this evidence of control and the date of the Summonses (December 2013). Both lengths of time are relatively short. *See United States v. Rylander*, 460 U.S. 752, 761 n.3 (1983) (concluding that an "inference of continuing possession" over twenty-one months was reasonable).

The same cannot be said for the Corporate Accounts. The last known date of control for some of these accounts was more than a decade before the issuance of the Summonses. The most recent last-known date of control was 2005, approximately eight years prior to the Summonses' date. This factor is not dispositive, however, for we weigh all four factors in determining if an inference of existence and control is acceptable. The Summonses seek "customary account documents," the requested documents are related to financial accounts, and

there is no evidence suggesting that the documents were transferred or destroyed.[9] Here, while the time lapse for the Corporate Accounts is significant, considering all the factors together, the inference is still applicable.

4. Authentication

We are also satisfied that the Government could independently authenticate the documents it seeks without relying on Fridman's act of production. It could do so through the testimony of third parties familiar with records, by comparisons to other bank records it already possesses, or by comparisons to similar bank documents. *Greenfield*, 831 F.3d at 118. For the Personal and HSBC Accounts, the Government possesses copies of statements and other account documents that Fridman's representative produced to it, and the Government can use those as comparators for authentication purposes. Although *Greenfield* did not reach the issue of whether such comparisons can sufficiently authenticate documents, we so hold here.

[9] We note that Fridman is a sophisticated businessman who is likely to retain corporate records. Additionally, multinational banks tend to hold onto records of their accounts, even those accounts that have been closed. A former client of a bank is still entitled to seek records of a closed account (i.e., he has control over them). For these reasons, we put less weight on the fourth factor of the balancing test in this situation.

As to the relevant Corporate Accounts, the Government argues that it can use bilateral tax treaties to authenticate the documents. It points to a declaration from an IRS employee noting that through certain treaties, the United States can request authenticated records from Switzerland, Israel, Brazil, France, Spain, the Philippines, and Germany—countries where the relevant Corporate Accounts are located. Through those treaties, the Government may also obtain sworn testimony or statements of authentication from bank officials to authenticate bank records.[10] In our view, these tax treaties provide the Government with a sufficient independent method of authentication.

Although in *Greenfield* we said that authentication through use of the Hague Evidence Convention was insufficient, we emphasized that this was "in light of the controversy surrounding the source of the documents" and the Government's failure to provide anything beyond "a conclusory statement" that authentication was likely to occur. 831 F.3d at 120. Because whether treaties can be used to authenticate documents depends on the facts and circumstances of a

[10] This second method of authentication is not available for accounts located in Switzerland and France, per those countries' respective treaties with the United States.

particular case, and because the record before us presents neither the unusual circumstances existing in *Greenfield* nor any other indication that the bilateral tax treaties to be used here are too complicated or ineffective to permit authentication, we conclude that the Government has sufficiently established that it can authenticate the Corporate Account documents.

In sum, we are satisfied that the Government has met its burden of proving knowledge of the existence of the documents, knowledge of Fridman's control over the documents, and an independent means of authenticating of the documents as required by *Greenfield*. Therefore, the district court's decision that the foregone conclusion doctrine applies to Requests 1, 2, 4, and 7 for documents relating to the relevant Known Accounts is affirmed.

II. The Collective Entity Doctrine

Because the Fifth Amendment privilege protects only natural persons, collective entities such as corporations or partnerships may not invoke it to evade document requests. *See, e.g.*, *Braswell v. United States*, 487 U.S. 99, 102, 104-08 (1988); *Bellis v. United States*, 417 U.S. 85, 88-89, 93-101 (1974). Nor may an individual custodian holding a collective entity's records in a representative

capacity refuse to produce documents. *Braswell*, 487 U.S. at 108-12; *In re Grand Jury Subpoena Issued June 18, 2009*, 593 F.3d 155, 158 (2d Cir. 2010).

"The critical issue [for determining what is a collective entity] is whether the organization had an institutional identity separate from that of its individual members." *In re Two Grand Jury Subpoenae Duces Tecum Dated Aug. 21, 1985*, 793 F.2d 69, 72 (2d Cir. 1986); *see also Bellis*, 417 U.S. at 94-95. Pursuant to this rule, we have held that sole proprietorships are covered by the Fifth Amendment's privilege against compulsory self-incrimination, because "a sole proprietorship has no legal existence apart from its owner." *United States v. Fox*, 721 F.2d 32, 36 (2d Cir. 1983); *see also Braswell*, 487 U.S. at 104. We have been strict in limiting the privilege to only sole proprietorships and even holding that one-person corporations are collective entities. *In re Grand Jury Subpoena Issued June 18, 2009*, 593 F.3d at 158-59. Our conclusion was motivated in part by the desire to "avoid[] creating a category of organizations effectively immune from regulation by virtue of being beyond the reach of the Government's subpoena power." *Id*. at 159.

Fridman first challenges the district court's holding that trusts are collective entities and that Fridman is therefore required to produce all trust-

related documents contemplated by Requests 1-4, 7, 11-17, and 20. Fridman also challenges the district court's conclusion that he is required to produce documents responsive to Request 3 that he possesses in his capacity as custodian of certain collective entities.

A. The collective entity rule applies to trusts, including traditional common law trusts, like the David Marcelo Trust.

Whether a trust is a collective entity for purposes of the Fifth Amendment is an issue of first impression for our Circuit. Every other circuit to address the issue has answered in the affirmative. *See In re Grand Jury Subpoena*, 973 F.2d 45, 48 (1st Cir. 1992); *Watson v. Comm'r of Internal Revenue*, 690 F.2d 429, 431 (5th Cir. 1982); *United States v. Harrison*, 653 F.2d 359, 361-62 (8th Cir. 1981); *In re Grand Jury Proceedings*, 633 F.2d 754, 757 (9th Cir. 1980). Our sister circuits have focused on facts like the circumscribed discretionary authority of trustees, formal status of the trust, and that a defendant may not be the sole beneficiary, *In re Grand Jury Subpoena*, 973 F.2d at 48-51; that trusts are artificial entities, *Watson*, 690 F.2d at 431; that a trust is formally organized and legally distinct from the trustees, *Harrison*, 653 F.2d at 361-62; and that a trust has independent functions even when it is grantor-controlled, *In re Grand Jury Proceedings*, 633 F.2d at 757.

We join these circuits and hold that a trust is a collective entity. We conclude so for a number of reasons. Notably, a trust, including a traditional common law trust like the David Marcelo trust,[11] has a separate legal existence from the trustee, which is the critical hallmark of a collective entity. *See Aug. 21, 1985*, 793 F.2d at 72; *see also Harrison*, 653 F.2d at 361-62; *In re Grand Jury Proceedings*, 633 F.2d at 757. Unlike a sole proprietorship, which cannot survive without the owner or creator, when a trustee resigns or is removed, the trust may still continue under New York law. *Cf.* 106 N.Y. Jur. 2d Trusts §§ 294, 298, 303. This could not be so if the trust and trustee were one and the same.

In addition, a trust "represent[s] a formal institutional arrangement." *Cf. Bellis*, 417 U.S. at 95. A trust is "relatively well organized and structured," much like the other collective entities previously recognized by Supreme Court precedent on the collective entity exception. *See id*. at 92-93; *see also Braswell*, 487 U.S. at 104-12 (detailing the collective entity rule's "lengthy and distinguished

[11] Traditional common law trusts are those that "create[] fiduciary relationships for purposes of estate planning" and "cannot sue or be sued in [their] own right," in accordance with the common law of trusts. *Raymond Loubier Irrevocable Tr. v. Loubier*, 858 F.3d 719, 729 (2d Cir. 2017); *see also* Restatement (Second) of Trusts §§ 177 cmt. a (1959) (summarizing a trustee's duty to enforce and defend against claims on behalf of the trust).

pedigree"). One example is that a trustee's discretion is limited by the governing document and the principle that a trustee must act in the beneficiaries' best interest. *See* 106 N.Y. Jur. 2d Trusts §§ 347, 360; *see also In re Grand Jury Subpoena*, 973 F.2d at 48-50. This clearly distinguishes a trust from an entity that "embodies little more than [a] personal [venture]." *See Bellis*, 417 U.S. at 94-95. Another example is that a trust's records are "distinct from the personal books and records of" the trustee. *Id*. at 93; 106 N.Y. Jur. 2d Trusts § 373.

Finally, our holding that trusts are collective entities recognizes that the decision to create a trust "is freely made and generates benefits, such as limited liability, and burdens, such as the need to respond to subpoenas" for records. *See In re Grand Jury Subpoena Issued June 18, 2009*, 593 F.3d at 159. As the Eighth Circuit has said, "those who form a separate business entity [and] hold that entity out as distinct and apart from the individuals involved . . . are estopped from denying the existence and viability of that entity for Fifth Amendment purposes." *Harrison*, 653 F.2d at 361-62. We agree that it would be inequitable to allow individuals to create a separate entity like a trust for favorable treatment while simultaneously denying that entity's separate existence for subpoena purposes.

Fridman's arguments to the contrary are meritless. He first argues that because a trustee can be held personally liable, a trust is more akin to a sole proprietorship. Although a trustee is personally liable "in the first instance" when acting on behalf of the trust, the trustee may be "entitled to be reimbursed or indemnified . . . from [trust] assets." 106 N.Y. Jur. 2d Trusts § 356. Fridman next argues that because a trust cannot take legal action on its own behalf, and because recent case law establishes that a trustee's individual citizenship governs jurisdiction in diversity suits, a trust and trustee are one and the same. *See Americold Realty Tr. v. ConAgra Foods, Inc.*, 136 S. Ct. 1012, 1016 (2016); *Raymond Loubier Irrevocable Tr. v. Loubier*, 858 F.3d 719, 731 (2d Cir. 2017). But that "state and federal law do not treat [trusts] as distinct entities for all purposes" does not alter the conclusion that a trust is a collective entity because trusts "bear enough of the indicia of legal entities to be treated as such for the purpose of our analysis of the Fifth Amendment issue presented in this case" for the reasons discussed. *See Bellis*, 417 U.S. at 97 n.7.

We hold that trusts, including a traditional common law trust like the David Marcelo Trust, are collective entities for purposes of the Fifth Amendment. As such, we affirm the district court's grant of the petition to enforce the

Summonses with respect to any documents Fridman retains in his capacity as a trustee in response to Requests 1-4, 7, 11-17, and 20.[12]

B. Fridman must also produce responsive corporate documents he retains in a representative capacity.

Fridman also challenges the district court's ruling that if he possesses or controls records of any of the entities listed in Request 3 in a representative capacity, he must produce these records under the collective entity doctrine.

[12] The parties seem to dispute whether, with respect to Request 4, the district court limited its enforcement order solely to records of the Known Accounts. If the district court had in fact limited its order in such a manner, then Fridman need not produce records relating to the Republic National Bank of New York account belonging to the David Marcelo Trust. Our review indicates, however, that the district court ordered Fridman to produce "all trust-related documents contemplated by Document Request Nos. 1-4, 7, 10-17, and 20," which by its terms covers the Republic National Bank of New York documents. *See Fridman*, 337 F. Supp. 3d at 272. The district court limited enforcement of Request 4 to the Known Accounts only with respect to its analysis under the foregone conclusion doctrine.

Additionally, Fridman has abandoned any other challenge to the scope of the district court's order to produce all trust-related documents that he possesses in a representative capacity by failing to raise any such argument on appeal and conceding that—at least with respect to Requests 13, 15, 17, and 20—the order encompasses documents held in connection with known and unknown trusts other than the David Marcelo Trust.

Fridman argues that it is the Government's burden to prove a custodial relationship exists between him and the corporations.

While our Circuit has not articulated a specific framework for establishing a custodial relationship, we adopt the D.C. Circuit's burden-shifting framework. *See, e.g.*, *In re Sealed Case*, 877 F.2d 83, 87 (D.C. Cir. 1989). The Government need only show a reasonable basis to believe a defendant has the ability to produce records; once the Government has done so, the burden shifts to the defendant to explain or justify refusal. *See id.*

In the case at hand, the Government has established Fridman's control over the records for the Corporate Accounts, as we discussed in our analysis of the foregone conclusion doctrine. This control provides a reasonable basis for believing that Fridman has the ability to produce these records, and the burden has thus shifted to Fridman to prove otherwise. *See id.*

Fridman fails to meet his burden. He cites to two cases from our Circuit, *In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 & June 22, 1983*, 722 F.2d 981, 986-87 (2d Cir. 1983), and *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d 173, 181 (2d Cir. 1999), for the proposition that former employees possess records only in an individual, not representative, capacity.

But Fridman's reliance is misplaced. It is clear that former employees could not serve in a custodial capacity and therefore would hold records only in a personal capacity. *See In re Three Grand Jury Subpoenas Duces Tecum Dated January 29*, 1999, 191 F.3d at 181. However, Fridman has not shown that he is no longer affiliated with any of the corporate entities at issue here. Therefore, these cases are inapposite.

We accordingly affirm the district court's ruling that Fridman must produce the corporate documents he holds in a representative capacity.

CONCLUSION

For the reasons given above, we affirm the district court's grant of the petition to enforce the Summonses.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Petitioner,	15 Misc. 64
- against -	**DECISION AND ORDER**
NATALIO FRIDMAN, Respondent.	

VICTOR MARRERO, United States District Judge.

I. BACKGROUND

On March 11, 2015, Petitioner the United States of America ("Petitioner" or the "United States") filed a petition to enforce two Internal Revenue Service ("IRS") summonses (the "Summonses") against Respondent Natalio Fridman ("Respondent" or "Fridman"). (See "Petition," Dkt. No. 1.) The Summonses request various records and documents (the "Document Requests"), and were issued in connection with an IRS investigation into Fridman's tax liabilities for the tax year 2008. One of the Summonses was issued against Fridman in his individual capacity, and the other was issued against Fridman in his capacity as trustee of the David Marcelo Trust.

On November 25, 2015, the Court granted the Petition. (See "November 25 Order," Dkt. No. 28.) The Court determined that (1) Respondent's blanket invocation of the Fifth Amendment privilege against self-incrimination was

insufficient to establish his entitlement to that protection; (2) even if Respondent's invocation of the Fifth Amendment had been sufficient, Respondent would have been required to produce the documents requested by the Summonses because of certain exceptions to the Fifth Amendment act-of-production privilege; and (3) the United States satisfied its burden and demonstrated that it was entitled to enforcement of the Summonses. (See id. at 3-4.) The Court therefore ordered Respondent to "produce all documents in his possession, custody, or control that are responsive to the Summonses' document requests" and to "appear for an interview . . . to provide testimony identifying and/or authenticating documents produced by Respondent in his capacity as a representative of a trust." (Id. at 4.)

Fridman appealed, and on December 13, 2016, the Court of Appeals for the Second Circuit issued a summary order vacating and remanding the November 25 Order. (See "Appellate Order," Dkt. No. 33.) While the Second Circuit found that the Court did not err in determining that the United States satisfied its burden of showing the relevance of the requested documents (see id. at 3), the appellate court concluded that the record was insufficiently developed for it to review the Court's determination regarding the applicability of the Fifth

Amendment act-of-production privilege (see id. at 4). The Second Circuit directed the Court to "(1) provide a record sufficient for appellate review in determining whether Fridman properly invoked his Fifth Amendment act of production privilege; and (2) identify any applicable exceptions to the act of production privilege for each document request and determine the period of time for which the exception applies." (Id. at 5.)

On April 28, 2017, Fridman filed a brief on remand objecting to enforcement of the Summonses. (See "Respondent Brief," Dkt. No. 39.) He asserts his Fifth Amendment privilege as the basis for his objection to the Document Requests that remain open, namely, Document Request Nos. 1-4, 7-17, and 20. (See id. at 2, 8.) Fridman argues that no exception to the Fifth Amendment act-of-production privilege -- i.e., the required records doctrine, the foregone conclusion doctrine, and the collective entity doctrine -- applies to these Document Requests, thus meaning that he cannot be compelled to produce the documents. (See id. at 8-20.) Additionally, Fridman argues that he does not possess or have control of documents responsive to Document Request Nos. 3, 8, 9, and 10. (See id. at 21-23.) Finally, Fridman argues that in camera review of responsive documents, as contemplated by the Second

Circuit, would be inappropriate and unnecessary. (See id. at 24-25.)

On June 23, 2017, the United States filed a brief on remand in support of its petition to enforce the Summonses and requesting oral argument. (See "Petitioner Brief," Dkt. No. 42.) Petitioner asserts that Respondent has conceded that the required records exception applies to certain Document Requests, and that Fridman has produced documents responsive to Document Request Nos. 4 and 13 that fall within that exception. (See id. at 7 n.5.) Petitioner argues that the Fifth Amendment act-of-production privilege does not protect Fridman from producing documents and providing testimony in response to the other Document Requests because one or both of the other exceptions -- the collective entity doctrine and/or the foregone conclusion doctrine -- apply to the requests. (See id. at 7-24.) In support of its arguments, Petitioner filed the declarations of Theresa Alvarez[1]

[1] Ms. Alvarez is an IRS Revenue Agent who is conducting an investigation concerning Fridman's tax liabilities for the tax year 2008. (See Dkt. No. 43 ¶ 2.) Ms. Alvarez explains that the IRS knew -- at the time the IRS issued the Summonses -- of the existence of a number of accounts at various banks that Fridman controlled. (See id. ¶¶ 6-9.)

("Alvarez Declaration," Dkt. No. 43), Tina B. Masuda[2] (Dkt. No. 44), and John M. Gillies[3] (Dkt. No. 45).

On July 28, 2017, Respondent filed a reply memorandum. ("Respondent Reply," Dkt. No. 51.) In addition to reasserting his Fifth Amendment privilege against self-incrimination, Respondent argues that the United States cannot expand the scope of the Summonses to cover documents held by Respondent as custodian of any corporation or as trustee of any trust other than the David Marcelo Trust. (See id. at 1-3.) On August 18, 2017, Petitioner filed a sur-reply memorandum. ("Petitioner Sur-Reply," Dkt. No. 53.) Petitioner not only counters Respondent's objections relating to the foregone conclusion doctrine and the collective entity doctrine, but also argues that the scope of the Summonses is not limited by the capacity in which Fridman was served. (See id. at 1-5.)

On September 25, 2018, the United States sent the Court a letter informing it of a recent decision in another case in this district -- United States v. Glaister, et al., No. 18-mc-213 -- regarding enforcement of IRS summonses. (See

[2] Ms. Masuda is an IRS Exchange of Information Program Manager. (See Dkt. No. 44 ¶ 1.) Ms. Masuda's declaration explains the various methods used by the United States to authenticate bank records from foreign countries. (See id. ¶¶ 3-40.)

[3] Mr. Gillies is an Associate Director with the Office of International Affairs in the Criminal Division of the U.S. Department of Justice. (See Dkt. No. 45 ¶ 1.) Mr. Gillies's declaration explains how the United States can authenticate documents under the Mutual Legal Assistance Treaty between the United States and Argentina. (See id. ¶¶ 8-12.)

"September 25 Letter," Dkt. No. 56.) On October 3, 2018, Fridman responded to the September 25 Letter, arguing that Glaister is inapposite to the present case because it involved "business entities," not "domestic trusts" like the David Marcelo Trust at issue in this case. (See "October 3 Letter," Dkt. No. 59.) On October 15, 2018, the United States responded to the October 3 Letter, arguing that the collective entity doctrine does not distinguish between domestic and business trusts. (See "October 15 Letter," Dkt. No. 61.)

The Court previously determined that the United States has made a sufficient showing that the documents sought by the Summonses are relevant to the IRS investigation:

> The Government satisfied its burden under United States v. Powell, 379 U.S. 48 (1964), by demonstrating that it is entitled to enforcement of its Summonses with regard to its document requests as modified and/or clarified . . . and with regard to testimony . . . identifying and/or authenticating documents produced by Respondent in his capacity as a representative of a trust.

(November 25 Order at 4.) Because the Second Circuit found no error in the Court's prior determination that the United States satisfied its burden of showing the relevance of the requested documents (see Appellate Order at 3), the Court now considers only the questions of whether Respondent properly invoked his Fifth Amendment privilege and, if so, whether any doctrine applies such that Respondent is nevertheless required to respond to the Summonses.

For the following reasons, the Petition to Enforce the Summonses is GRANTED.

II. LEGAL STANDARD

The Fifth Amendment provides that "[n]o person . . . shall be [c]ompelled in any criminal case to be a [w]itness against himself." U.S. Const. Amend. V. The privilege against self-incrimination is not absolute: "the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a [t]estimonial [c]ommunication that is incriminating." Fisher v. United States, 425 U.S. 391, 408 (1976).

The Supreme Court has recognized, however, that "[t]he act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced." Id. at 410; see also United States v. Doe, 465 U.S. 605, 612 (1984) ("A government subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect."). Document production can communicate that (1) "documents responsive to a given subpoena exist," (2) "they are in the possession or control of the subpoenaed party," (3) "the documents provided in response to the

subpoena are authentic," and (4) "the responding party believes that the documents produced are those described in the subpoena." United States v. Hubbell, 167 F.3d 552, 567-68 (D.C. Cir. 1999), aff'd, 530 U.S. 27 (2000); see also United States v. Greenfield, No. 14 MC 350, 2015 WL 11622481, at *2 (S.D.N.Y. Feb. 11, 2015). But there are exceptions to the act-of-production privilege, including the three exceptions raised by the parties here: the required records doctrine, the foregone conclusion doctrine, and the collective entity doctrine.

Under the required records doctrine, the act-of-production privilege cannot be invoked to shield from production "records required by law to be kept." Shapiro v. United States, 335 U.S. 1, 17 (1948). "[A] person whose records are required to be kept by law has no Fifth Amendment protection against self-incrimination when these records are directed to be produced." In re Doe, 711 F.2d 1187, 1191 (2d Cir. 1983). The Second Circuit has specifically held that the required records exception applies to records required to be kept under the Bank Secrecy Act 1970 ("BSA"), 31 U.S.C. §§ 5311-5332. See In re Grand Jury Subpoena Dated Feb. 2, 2012, 741 F.3d 339, 347, 352-53 (2d Cir. 2013) ("The BSA's requirements at issue here are 'essentially regulatory,' the

subpoenaed records are 'customarily kept,' and the records have 'public aspects' sufficient to render the [required records] exception applicable.").

A second exception to the act-of-production privilege is the foregone conclusion doctrine. The Supreme Court has held that the Fifth Amendment privilege cannot be invoked when "[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." Fisher, 425 U.S. at 411. In order for the foregone conclusion doctrine to apply, the United States must "demonstrate with reasonable particularity that it knows of the existence and location of subpoenaed documents." In re Grand Jury Subpoena Duces Tecum Dated Oct. 29, 1992, 1 F.3d 87, 93 (2d Cir. 1993). To satisfy this standard, "the Government need not demonstrate perfect knowledge of each specific responsive document covered by the Summons," but it "must know, and not merely infer, that the sought documents exist, that they are under the control of defendant, and that they are authentic." United States v. Greenfield, 831 F.3d 106, 116-17 (2d Cir. 2016). In other words, "the 'reasonable particularity' standard does not reduce the level of certainty with which the Government must establish knowledge,

but rather the extent to which that certainty relates to each document responsive to the summons." Id. at 117. In regards to timing, the "appropriate moment for the foregone-conclusion analysis is when the relevant summons was issued." Id. at 124. If the Government can demonstrate knowledge at the time the summons was issued, a court should consider four factors in determining whether it is "appropriate to infer defendant's continued possession of certain records": "(1) 'the nature of the documents,' (2) 'the nature of the business to which the documents pertained,' (3) 'the absence of any indication that the documents were transferred to someone else or were destroyed,' and (4) 'the . . . time period . . . between the date as of which possession was shown and the date of the ensuing IRS summons.'" Id. at 125-26 (quoting United States v. Rue, 819 F.2d 1488 (8th Cir. 1987)).

The third and final exception addressed by the parties is the collective entity doctrine. Under this doctrine, "an individual cannot rely upon the [Fifth Amendment] privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally." Bellis v. United States, 417 U.S. 85, 88 (1974); accord Braswell v. United States, 487 U.S. 99, 110 (1988) ("[T]he custodian's

act of production is not deemed a personal act, but rather an act of the corporation. Any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation -- which of course possesses no such privilege."); In re Grand Jury Subpoena Issued June 18, 2009, 593 F.3d 155, 158 (2d Cir. 2010) ("[T]he custodian of corporate records, who acts as a representative of the corporation, cannot refuse to produce corporate records on Fifth Amendment grounds."). A collective entity is "an organization which is recognized as an independent entity apart from its individual members." Bellis, 417 U.S. at 92; see also Subpoena Issued June 18, 2009, 593 F.3d at 157-59. The applicability of the collective entity doctrine to the instant case therefore hinges on whether a trust is a collective entity. While many circuits have held that trusts are collective entities,[4] both Respondent and Petitioner acknowledge that it is an open question in the Second Circuit. (See Respondent Brief at 5; Petitioner Brief at 9.)

However, a recent case out of the United States District Court for the Southern District of New York also held that

[4] As both Respondent and Petitioner point out, the following circuits have held that trusts are collective entities: In re Grand Jury Subpoena, 973 F.2d 45 (1st Cir. 1992); Watson v. Comm'r, 690 F.2d 429 (5th Cir. 1982); United States v. Harrison, 653 F.2d 359 (8th Cir. 1981); In re Grand Jury Proceedings (Hutchinson), 633 F.2d 754 (9th Cir. 1980).

trusts are collective entities. In United States v. Glaister, the Honorable Paul A. Engelmayer considered a petition by the IRS to enforce summonses issued to Sarah and John Glaister (the "Glaisters"). Applying the collective entity rule, Judge Engelmayer overruled the Glaisters' assertion of their Fifth Amendment privilege over records concerning "foreign business entities or trusts that Respondents hold in their representative capacities as custodians for foreign business entities or trusts." United States v. Glaister, No. 18-mc-213, Order at 3 (S.D.N.Y. July 11, 2018) (ECF No. 18).

The collective entity doctrine is limited to documents, not oral testimony. Thus, even if a person is required to produce the records of a collective entity, he "cannot lawfully be compelled . . . to condemn himself by his own oral testimony." Braswell, 487 U.S. at 114. This limitation does not mean that a custodian of a collective entity's records is shielded from all questioning. Rather, "[r]equiring the custodian to identify or authenticate the documents for admission in evidence merely makes explicit what is implicit in the production itself," and is therefore permissible. Id.; accord Curcio v. United States, 354 U.S. 118, 123-125 (1957).

III. DISCUSSION

A. The Fifth Amendment Privilege Against Self-Incrimination

The Court originally determined that "Respondent's blanket invocation of the Fifth Amendment protection against self-incrimination" was "insufficient to establish entitlement to that protection." (November 25 Order at 3.) The Second Circuit, however, concluded that the record was insufficiently developed for appellate review, and therefore directed the Court to "provide a record sufficient for appellate review in determining whether Fridman properly invoked his Fifth Amendment act of production privilege." (Appellate Order at 5.)

On remand, Respondent objects to the production of documents responsive to the open Document Requests. Fridman specifically asserts his Fifth Amendment privilege in response to each of the contested Document Requests. (See Respondent Brief at 8, Exhibit A.) Respondent makes the following objections:

1. Respondent invokes his Fifth Amendment privilege with respect to the non-trust-related documents contemplated by Document Request Nos. 1, 2, 4, and 7 (see id. at 9-14);

2. Respondent invokes his Fifth Amendment privilege with respect to the trust-related documents contemplated by Document Request Nos. 4, 11, 12, 13, 14, 15, 16, 17, and 20, and argues that the collective entity exception is inapplicable to trusts (see id. at 14-20);

3. Respondent invokes his Fifth Amendment privilege with respect to any documents he holds as trustee of any trusts other than the David Marcelo Trust (see id. at 20); and

4. Respondent contends that he does not have possession or control over the documents contemplated by Document Requests Nos. 3, 8, 9, and 10 (see id. at 21-23).

On remand, the United States does not contest the fact that Respondent appropriately invoked his Fifth Amendment act-of-production privilege. (Petitioner Brief at 2.) But the United States argues that Fridman's invocation of the Fifth Amendment fails because the collective entity and/or foregone conclusion doctrines apply to the Document Requests. (See id. at 8.) Specifically, Petitioner argues that Respondent must produce the corporate and trust-related documents contemplated by Document Request Nos. 3, 4, 7, 10-17, and 20 because the collective entity exception is applicable. (See

id. at 9-14.) Moreover, Petitioner argues that Respondent must produce the documents contemplated by Document Request Nos. 1-4, 7-9, and 12 because the foregone conclusion doctrine forecloses his invocation of the Fifth Amendment privilege. (See id. at 16-17.)

B. Required Records Doctrine

For each of the Document Requests for which Fridman invokes his Fifth Amendment privilege against self-incrimination, Respondent argues either that the required records doctrine is inapplicable or that he has already provided responsive documents to the extent required by the doctrine. (See Respondent Brief at 9-20.) In opposition, the United States does not rely on the required records exception in its arguments for enforcing any of the Document Requests. Instead, the United States notes that "Fridman has conceded that this exception applies and has represented that he has produced all documents responsive to the [Document Requests] in his possession or control that fall within the exception." (Petitioner Brief at 7 n.5.) Since there is no live controversy regarding the applicability of the required records doctrine, the Court does not consider it at this stage.

C. Foregone Conclusion Doctrine

The Second Circuit directed the Court on remand to "evaluate whether the foregone conclusion exception applies in light of [the] decision in United States v. Greenfield, 831 F.3d 106 (2d Cir. 2016)." (Appellate Order at 5 n.1.) In response to Document Request Nos. 1, 2, 4, and 7, Fridman invokes his Fifth Amendment privilege against self-incrimination and argues that the foregone conclusion doctrine is inapplicable. (See Respondent Brief at 9-20.) Specifically, Respondent argues that the foregone conclusion doctrine is inapplicable because the United States "has not identified with reasonable particularity that it knows of the existence and location of the summoned documents" (id. at 11) and/or the United States has not identified with reasonable particularity the accounts for which it seeks information (see id. at 9-14). In opposition, Petitioner argues that Fridman must produce documents covered by the foregone conclusion doctrine because the United States knows with "reasonable particularity" of the existence and location of the requested documents. (See Petitioner Brief at 14-24.) The Court considers each Document Request in turn.

1. Document Request No. 1

Document Request No. 1 seeks the following information: "For all of the foreign bank account[s] over which you have signatory authority since 1999, please list the opening date and closing date of each." The United States has modified this Document Request to mean "existing documents sufficient to show" the opening and closing dates for "each of the Known Accounts" that are listed in Exhibit B. (Petitioner Brief at Exhibits A & B.) For each of the Known Accounts, the United States has identified the name of the account holder, the bank, the country, and the account number (provided to the Court in redacted form). (See id. at Exhibit B.)

Respondent asserts his Fifth Amendment privilege against self-incrimination, arguing that producing the documents contemplated by Document Request No. 1 would "go[] beyond the normal implicit testimonial aspects of the act of production, by communicating to the IRS that the produced documents comprise the relevant list." (Respondent Brief at 10.) This argument ignores Petitioner's modification to the request. As modified, Document Request No. 1 seeks existing documents sufficient to show the opening and closing dates for each of the Known Accounts. Since the United States has identified the accounts for which it seeks documents (i.e., "the relevant

list"), Respondent will not be forced "to use his discretion in selecting . . . the responsive documents," and he will therefore not "tacitly provid[e] identifying information." Greenfield, 831 F.3d at 118 (internal quotation marks omitted).

Respondent further argues that the foregone conclusion doctrine is inapplicable to Document Request No. 1 "because the government has not identified with reasonable particularity that it knows of the existence and location of the summoned documents." (Respondent Brief at 11.) The Court is not persuaded by this argument. The United States has provided the name of the account holder, the bank, the country, and the account number for each of the Known Accounts. The United States knew of the existence of these bank accounts at the time it served the Summonses. (See Alvarez Declaration ¶ 5.) Because the "appropriate moment for the foregone-conclusion analysis is when the relevant summons was issued," the Court is satisfied that the United States knew of the existence, location, and authenticity of the requested documents at the relevant time, as required by the foregone conclusion doctrine. Greenfield, 831 F.3d at 124.

The Court therefore finds that the foregone conclusion exception is applicable to Document Request No. 1, and

Respondent must produce the documents contemplated by this request (as modified).

2. Document Request No. 2

Document Request No. 2 seeks "the 2006 & 2007 bank statements for all your foreign bank accounts." Respondent argues that the foregone conclusion doctrine does not apply to Document Request No. 2 "[b]ecause the IRS has not even identified the accounts for which it seeks information." (Respondent Brief at 12.) In opposition, the United States seems to imply that Document Request No. 2 seeks "all 2006 and 2007 statements for each foreign account" included in the list of "the Known Accounts." (Petitioner Brief at 16-17.) Indeed, Petitioner's Exhibit A describes this request as one for "[a]ll responsive documents for each of the Known Accounts." (Id. at Exhibit A.)

To the extent that Document Request No. 2 seeks records for accounts that the United States has not identified, the Court agrees with Respondent that the foregone conclusion doctrine does not apply to the request. However, to the extent that Document Request No. 2 seeks records for those foreign bank accounts included in the list of Known Accounts, the Court finds -- for the same reasons described supra Part III.C.1 -- that the foregone conclusion exception is

applicable to Document Request No. 2. Respondent must therefore produce the documents contemplated by this Request.

3. Document Request No. 4

Document Request No. 4 seeks the following information: "All bank statements and account opening documents, including but not limited to, Know Your Customer Account information including signature cards, opening deposit slips, passport copies, certificate of beneficial ownership, letters of reference, certificate of clean funds and/or other source of funds documentation for the following accounts from opening date to 1/31/2009: UBS 29, Credit Suisse 3, Leumi Bank 49, Leumi Bank 02, Safra 37, HSBC 15, Republic National Bank of New York (Suisse) S.A." Respondent argues that the foregone conclusion doctrine is inapplicable to Document Request No. 4 because "the Summons does not identify with reasonable particularity the documents it seeks" and "the [G]overnment has failed to show with reasonable particularity that it can establish Respondent's current possession or control of the requested documents." (Respondent Brief at 13.)

The Court disagrees. As noted by Petitioner, the documents contemplated by Document Request No. 4 are the types of documents "possessed by the owners of financial accounts as a matter of course." Greenfield, 831 F.3d at 121; see also

United States v. Norwood, 420 F.3d 888, 895 (8th Cir. 2005) ("The summons seeks records such as account applications, periodic account statements, and charge receipts, all of which are possessed by the owners of financial accounts as a matter of course."). In fact, Document Request No. 4 -- which provides examples of the types of records it seeks -- is more specific than the request at issue in Greenfield, which "required Greenfield to produce 'all documents' in his possession for each bank account." 831 F.3d at 112-13.

Moreover, the case to which Respondent points in support of his argument, United States v. Shadley, 106 A.F.T.R.2d 2010-5440 (E.D. Cal. 2010), is inapposite. This non-binding case conflicts with controlling precedent in the Second Circuit. The Shadley Court determined that the respondent was not required to produce requested documents because "petitioners have not shown that they were aware of the existence or contents of respondent's checkbook deposit slips or the authenticity of those slips." 106 A.F.T.R.2d 2010-5440. But the Second Circuit in Greenfield applied the "reasonably particularity" standard, and cited with approval the Eighth Circuit's Norwood decision. Greenfield, 831 F.3d at 119-121 ("Though the Government does not have specific knowledge of every document that is responsive to the Summons,

such specific knowledge exceeds what is required under a 'reasonable particularity' standard."). The Court's approach now is guided by that Second Circuit precedent.

As described supra Part III.C.1, the United States has demonstrated that it knew of the existence, location, and authenticity of the requested documents for the Known Accounts at the relevant time, as required by the foregone conclusion doctrine. The Court therefore finds that the foregone conclusion exception is applicable to Document Request No. 4, and Respondent must produce the documents contemplated by this Request as modified.

4. Document Request No. 7

Document Request No. 7 seeks the following information: "Bank documents including but not limited to cancelled checks, wire transfer instructions, wire transfer slips, deposit slips to show the flow of the following funds, the account numbers and account holders' names for the Citibank accounts and any other bank accounts: [transactions on 7/26/04, 8/30/03, 9/28/13, 1/31/08, 2/28/10 moving money from HSBC Acct 10066115 to Citibank-NY or 'Unknown']." This request has been modified to reflect that "2003" and "2013" should be read as "2004." (See Petitioner Brief at Exhibit A.) Respondent argues that the foregone conclusion doctrine

is inapplicable to Document Request No. 7 because "the government has made no showing that it knows with reasonable particularity the question it asks." (Respondent Brief at 13-14.) In its brief, the United States clarifies that Document Request No. 7 seeks "records sufficient to show several known transfers of funds between the HSBC account and an unknown Citibank account on particular dates in 2004, 2008, and 2010." (Petitioner Brief at 17, 19-20.)

For the same reasons as discussed supra Part III.C.1, the Court is persuaded that the United States knew of the existence, location, and authenticity of the requested documents at the relevant time, as required by the foregone conclusion doctrine. The Court therefore finds that the foregone conclusion exception is applicable to Document Request No. 7, and Respondent must produce the documents contemplated by this Request as modified.

D. Collective Entity Doctrine

Petitioner argues that Respondent is obligated to produce all trust-related documents contemplated by the Document Requests because trusts are collective entities, thereby making the collective entity doctrine applicable in this case. Respondent concedes that "if the David Marcelo Trust is a collective entity, he must produce the Document

Requests to the extent that such requests are for documents belonging to the David Marcelo Trust, because while individuals have a Fifth Amendment privilege, a collective entity does not." (Respondent Brief at 5.) Respondent argues, however, that "the David Marcelo Trust, a traditional trust governed by New York law, is not a collective entity, and Respondent, as a trustee of the trust, is not the custodian of an entity." (Id. at 6.)

The Court is persuaded by the reasoning of the various courts of appeals that have concluded that trusts are collective entities. See In re Grand Jury Subpoena, 973 F.2d 45, 47-50 (1st Cir. 1992) (finding that a Massachusetts nominee trust "has a sufficiently 'established institutional identity independent of its individual [constituents]' to fall within the definition of collective entity") (internal citation omitted); Watson v. Comm'r, 690 F.2d 429, 431 (5th Cir. 1982) ("The [F]ifth [A]mendment privilege is purely personal. . . . It does not extend to the documents of an artificial entity, such as a trust, held by an individual in a representative capacity."); United States v. Harrison, 653 F.2d 359, 361-62 (8th Cir. 1981) ("The Trust is a formally organized entity, legally distinct from its trustees . . . . In our view, those who form a separate business entity, hold

that entity out as distinct and apart from the individuals involved, and file separate tax returns on behalf of the entity, are estopped from denying the existence and viability of that entity for Fifth Amendment purposes."); In re Grand Jury Proceedings (Hutchinson), 633 F.2d 754, 756-57 (9th Cir. 1980) ("The trust may possess certain characteristics that affect the way it is treated for federal tax purposes, but its treatment for tax purposes is largely irrelevant to the determination of whether it is an organization separate and apart from its creator.").

The David Marcelo Trust is similar to the trusts at issue in these cases in that the David Marcelo Trust has an "established institutional identity independent of its individual [constituents]." Bellis, 417 U.S. at 95. The David Marcelo Trust is similar to the nominee trust at issue in In re Grand Jury Subpoena because "it cannot be doubted in general that" both trusts are "held out to the world as being separate and apart from [their] beneficiaries." 973 F.2d at 50. Similarly, the David Marcelo Trust (see Petitioner Brief at 13), like the trust in Harrison, "is a formally organized entity, legally distinct from its trustees." 653 F.2d at 361. And like the trust at issue in Hutchinson, the David Marcelo Trust has other trustees (see Petitioner Brief at 13), "all

of whom had fiduciary duties to the trust and its beneficiaries." Hutchinson, 633 F.2d at 757. Furthermore, the David Marcelo Trust (see Petitioner Brief at 13), again like the trust in Hutchinson, has "independent functions" separate from its trustees and beneficiaries. 633 F.2d at 757.

The Court's conclusion is further informed by the reasoning of Judge Engelmayer in United States v. Glaister. Judge Engelmayer determined that, "[i]nsofar as the subpoena seeks information from the Glaisters in their representative capacities as custodians for corporate entities, the Court . . . orders that those records be produced and finds no viable Fifth Amendment privilege that attaches to the Glaisters individually." Transcript at 51:10-17, 55:10-15, United States v. Glaister (S.D.N.Y. June 18, 2018) (No. 18-mc-213) ("This order applies only, of course, to business entities, which the Glaisters were representatives of at the time of the subpoena's service."); see also United States v. Glaister, No. 18-mc-213, Order at 3 (S.D.N.Y. July 11, 2018) (ECF No. 18) (overruling Respondents' invocation of the Fifth Amendment privilege with respect to "any records concerning foreign business entities or trusts that Respondents hold in their representative capacities as custodians for foreign business entities or trusts").

The Court therefore finds that the David Marcelo Trust is a collective entity. As a result, Respondent must produce all trust-related documents contemplated by Document Request Nos. 1-4, 7, 10-17, and 20.

E. Oral Testimony

Petitioner requests that the Court order Respondent to appear for an interview with the IRS to provide oral testimony identifying and/or authenticating any documents produced by Respondent in his capacity as a representative of a collective entity. (See Petition ¶ 5.) In the event the Court agrees with Petitioner, Respondent argues that the United States should be precluded from using Respondent's oral testimony against him. (See Respondent Brief at 23-24.) Specifically, Respondent requests that the Court "include a limitation protecting Respondent's Fifth Amendment rights by preventing the United States from using any oral testimony by Respondent in any criminal proceeding against Respondent." (Id.) Petitioner counters that "there is no need for this Court to prematurely address this potential future issue in its decision in this case." (Petitioner Brief at 24-25.)

The law clearly requires the custodian of the records of a collective entity to provide oral testimony identifying and/or authenticating any documents produced in such a

capacity. See Braswell, 487 U.S. at 114; Curcio, 354 U.S. at 123-125. Since the Court has determined that Respondent must produce the documents he holds as trustee of the David Marcelo Trust, the Court also finds that he must appear for an interview to provide oral testimony identifying and/or authenticating any such documents. Furthermore, the Court declines as premature Respondent's request for a limiting instruction.

F. Respondent's Lack of Possession or Control (and the Scope of the Summonses)

The final dispute between the parties relates to Document Request Nos. 3, 8, 9, and 10. For each of these requests, Respondent argues that he lacks possession or control of the requested documents. The Court considers each Document Request in turn.

1. Document Request No. 3

Document Request No. 3 seeks the following information: "All bank statements and all the account opening documents, including but not limited to, Know Your Customer Account information including signature cards, opening deposit slips, passport copies, certificate of beneficial ownership, letters of reference, certificate of clean funds and/or other source of funds documentation for accounts held under the name of

the [listed] Entities from opening date to 1/31/2009."[5] Respondent contends that he "does not have possession and control of any documents responsive to Document Request No. 3" in either his individual capacity or his capacity as trustee of the David Marcelo Trust. (Respondent Brief at 21-22.) While Respondent concedes that the entities listed in Document Request No. 3 "appear to be collective entities," he notes that "[n]either of the Summonses served were served on Respondent in his capacity as custodian of records for any of these entities." (Id.) According to Respondent, the United States must therefore subpoena either the entities listed in the Document Request or Fridman in his capacity as custodian of the entities. Respondent further develops this argument in his reply brief, arguing that the United States inappropriately seeks to expand the scope of the Summonses to cover documents held by Respondent "in his capacity as custodian of certain listed corporations." (Respondent Reply at 1, 5-7.)

Petitioner objects to this characterization of the Summonses, arguing that the capacity in which Respondent was served does not affect the scope of the Summonses. (See

[5] The entities are listed as Consist Teleinformatica Argentine, Consist Consultoria Systemast Repre Wanstst Systemar DE, Computacao CTDA, Consist France, Consist Asia Pacific, Mak Data System, and Consist International Inc.

Petitioner Sur-Reply at 1-4.) Petitioner further contends that the IRS was not required to serve Fridman with separate summonses. (See id. at 2.)

In support of his argument, Respondent relies principally on Securities and Exchange Commission v. Forster, 147 F. Supp. 3d 223 (S.D.N.Y. 2015). In that case, the Securities and Exchange Commission ("SEC") sought enforcement of a subpoena served on an individual "in his personal capacity and not as the custodian [of] records for the listed companies" -- a distinction that the court found to be "significant." Id. at 231. Based on this distinction, the court found that "the SEC cannot compel [the individual] in his personal capacity to produce any documents simply because they relate to the four named companies." Id. However, a later case -- In re Cinque Terre Financial Group Ltd., No. 16 CV 4774-LTS, 2016 WL 6952349 (S.D.N.Y. Nov. 28, 2016) -- calls into question the scope of Forster. In that case, the Honorable Laura Taylor Swain noted that "[t]he Forster Court did not . . . specifically hold that a subpoena served on an individual who may be in possession of material in multiple capacities is void unless it specifies each such capacity." In re Cinque Terre, 2016 WL 6952349, at *4.

The Court agrees with Judge Swain that "a subpoena addressed to the individual" is not "invalid insofar as it may seek information the individual holds as a custodian rather than as an individual." Id. Here, Respondent's argument regarding the manner in which the Summonses were served emphasizes form over substance. Regardless of the capacity in which Fridman was served, the result is the same: Respondent is required to produce documents responsive to Document Request No. 3 to the extent that he possesses such documents in his individual capacity or his capacity as the custodian of a collective entity, including the corporations listed in the Document Request. Requiring the IRS to issue additional summonses to Fridman in his capacity as custodian of the listed corporations would add duplicative administrative steps to this process. The Court declines to do so here.

Thus, to the extent that Respondent possesses -- either in his individual capacity or his capacity as custodian of a collective entity -- any of the records contemplated by Document Request No. 3, he must produce them.

2. Document Request Nos. 8 and 9

Document Request No. 8 seeks "[a]ll account opening documents, including but not limited to Customer Profile and

signature card for Citibank Account 50." Document Request No. 9 seeks "[t]he bank statements for Acct 50 from 12/1/03 to 1/31/09." In its brief, the United States describes these requests as seeking "the U.S. Citibank Account's opening documents and statements from December 1, 2003, to January 31, 2009." (Petitioner Brief at 17.) Respondent argues that he is "not in possession or control of these documents" because the referenced account belongs to third party. (Respondent Brief at 23.) Nevertheless, and "[a]lthough this account is in the name of Fridman's son and wife," Petitioner argues that "the IRS reasonably believes that Fridman has control over its records." (Petitioner Brief at 21.)

As discussed supra Part III.D, Respondent must produce any responsive documents that he holds as trustee of the David Marcelo Trust. Thus, to the extent that Respondent possesses as trustee of the David Marcelo Trust any of the records contemplated by Document Request Nos. 8 and 9, he must produce them.

3. Document Request No. 10

Document Request No. 10 seeks a "[b]ank statement that shows Ms. Golda Kipersmit's interest in the Bank of NY as mentioned in Schedule A of the 1990 Trust Agreement." Respondent argues that he is "not in possession or control of

these documents" because the referenced account belongs to a third party. (Respondent Brief at 23.) Petitioner argues that Respondent must produce the documents requested because the documents constitute the records of the David Marcelo Trust, a collective entity.

As discussed supra Part III.D, Respondent must produce any responsive documents that he holds as trustee of the David Marcelo Trust. Thus, to the extent that Respondent possesses any trust-related records that are responsive to Document Request No. 10, he must produce them.

IV. ORDER

Accordingly, it is hereby

ORDERED that the Petition of the United States to Enforce Internal Revenue Service ("IRS") Summonses (Dkt. No. 1) seeking documents and records (the "Document Requests") is **GRANTED**.

It is further **ORDERED** that Respondent Natalio Fridman's invocation of the Fifth Amendment protection against self-incrimination in response to the Summonses does not justify failing to produce the documents requested by the Summonses because producing the documents falls under the foregone conclusion doctrine and/or the collective entity doctrine exceptions to the Fifth Amendment privilege.

It is furthered **ORDERED** that Respondent must produce all documents in his possession, custody, or control that are responsive to the outstanding Document Requests in the Summonses as modified and/or clarified above, and it is further

ORDERED that Respondent must appear for an interview to be scheduled by the IRS to provide testimony identifying and/or authenticating documents produced by Respondent in his capacity as a representative of a trust.

SO ORDERED.

Dated: New York, New York
14 November 2018

Victor Marrero
U.S.D.J.

APPENDIX C

15-3969-cv
United States v. Fridman

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of December, two thousand sixteen.

PRESENT: AMALYA L. KEARSE,
RAYMOND J. LOHIER, JR.,
CHRISTOPHER F. DRONEY,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. No. 15-3969-cv

NATALIO FRIDMAN,

Defendant-Appellant.

FOR PLAINTIFF-APPELLEE:	JENNIFER JUDE, Assistant United States Attorney, (Benjamin H. Torrance, Assistant United States Attorney, *on the brief*), *for* Preet Bharara, United States Attorney for the Southern District of New York, New York, NY.
FOR DEFENDANT-APPELLANT:	RICHARD A. LEVINE, (Vivek A. Chandrasekhar, *on the brief*), Roberts & Holland LLP, New York, NY.

Appeal from an order of the United States District Court for the Southern District of New York (Victor Marrero, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the District Court is **VACATED AND REMANDED**.

Defendant-appellant Natalio Fridman appeals from the order of the United States District Court for the Southern District of New York (Marrero, J.) entered on November 25, 2015, granting an Internal Revenue Service ("IRS") petition to enforce summonses pursuant to the Internal Revenue Code, 26 U.S.C. §§ 7602 and 7604(a). As part of an investigation into Fridman's 2008 tax liability, the IRS issued two identical summonses (the "Summonses") seeking records related to Fridman's foreign financial accounts. One summons was served on Fridman in his capacity as

trustee of a domestic trust (the "David Marcelo Trust") and the other was served on Fridman in his individual capacity. On appeal, Fridman asserts that the District Court erred in concluding: (1) that the Government satisfied its burden under United States v. Powell, 379 U.S. 48 (1964), to show that the Summonses seek documents that are relevant to the IRS's investigation; (2) that Fridman's invocation of his Fifth Amendment "act of production" privilege against self-incrimination was a blanket invocation insufficient to establish his entitlement to the privilege; (3) that, in any event, the requested documents were subject to the foregone conclusion doctrine, the required records doctrine, and the collective entity doctrine; and (4) that Fridman must appear for an interview by the IRS to provide testimony regarding documents produced in his representative capacity as trustee of the David Marcelo Trust. We assume the parties' familiarity with the facts and record of the prior proceedings, to which we refer only as necessary to explain our decision to vacate and remand.

We conclude that the District Court did not err in determining that the Government satisfied its burden to show that the requested documents are relevant. To obtain enforcement of a summons, the IRS must establish that the inquiry "may be relevant to the purpose" of the agency's investigation. United States v. Clarke, 134 S. Ct. 2361, 2365 (2014) (quotation marks omitted). Under United States v.

Powell, 379 U.S. 48 (1964), the standard for showing relevance is "very low," Adamowicz v. United States, 531 F.3d 151, 158-59 (2d Cir. 2008), and the Government's burden is "minimal," United States v. White, 853 F.2d 107, 111 (2d Cir. 1988). The IRS may satisfy this burden by submitting a "simple affidavit" from an investigating agent. Clarke, 134 S. Ct at 2367. Here, the declaration submitted by Agent Kobayashi adequately supports the District Court's conclusion that the requested documents are relevant to the Government's investigation of whether Fridman accurately reported his income in 2008.

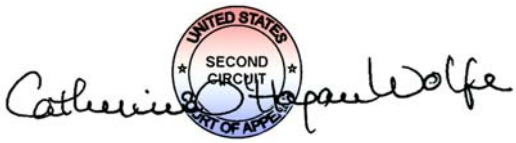
But we also conclude that the record is insufficiently developed to permit meaningful appellate review of the District Court's determination that the Fifth Amendment act of production privilege does not apply. There is, for example, no transcript of the proceeding held before the District Court during which Fridman asserted the act of production privilege. We are therefore unable to evaluate with confidence the accuracy of the District Court's description of that assertion as a "blanket" invocation. In the alternative, the District Court determined that "producing the documents responsive to the Summonses falls under the foregone conclusion doctrine, the collective entity doctrine, and/or the required records exceptions to the Fifth Amendment's protection." Joint App'x 107. But the District Court did not identify which of these exceptions apply to which document requests

or accounts. Nor did it determine whether any of these exceptions might apply for time periods narrower than the periods covered by the Summonses. See, e.g., In re Grand Jury Subpoena Dated Feb. 2, 2012, 741 F.3d 339, 342 (2d Cir. 2013) (applying the required records doctrine to documents covered by the Bank Secrecy Act under 31 C.F.R. § 1010.420, which requires foreign bank records to be held for only a period of five years).

On remand, through in camera review of documents if necessary, the District Court should: (1) provide a record sufficient for appellate review in determining whether Fridman properly invoked his Fifth Amendment act of production privilege; and (2) identify any applicable exceptions to the act of production privilege for each document request and determine the period of time for which the exception applies.[1]

For the foregoing reasons, the judgment of the District Court is **VACATED AND REMANDED** for further proceedings consistent with this order.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



[1] The District Court should evaluate whether the foregone conclusion exception applies in light of our decision in United States v. Greenfield, 831 F.3d 106 (2d Cir. 2016).

APPENDIX D

Marcelo, v. Fridman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Petitioner,

v.

NATALIO FRIDMAN,

Respondent.

15 Misc. 64 (P1)

ORDER

WHEREAS, on December 19, 2013, the Internal Revenue Service (the "IRS") issued two administrative summonses on Natalio Fridman ("Respondent" or "Fridman") in connection with the IRS's investigation into Fridman's tax liabilities for the tax year 2008;

WHEREAS, one summons was directed to Fridman in his capacity as a trustee of a domestic trust (named for his son, David Marcelo, and known as the "David Marcelo Trust") and the other summons was directed to Fridman in his individual capacity (collectively, the "Summonses");

WHEREAS, the Summonses required Fridman to appear and provide testimony before the IRS and to produce documents responsive to 21 document requests;

WHEREAS, the IRS served the Summonses on Fridman on January 28, 2014;

WHEREAS, on February 26, 2014, Fridman appeared at the scheduled interview, but refused to answer most questions asked by the IRS agent and refused to produce any records, citing the Fifth Amendment's protection against self-incrimination;

WHEREAS, on March 11, 2015, the United States of America ("Petitioner" or the "Government") initiated this action by filing a Petition to Enforce Internal Revenue Service Summonses pursuant to sections 7602 and 7604(a) of the Internal Revenue Code, 26 U.S.C. §§

7602 and 7604(a), along with a Memorandum of Law, Order to Show Cause, and exhibits, including the Declaration of Ning Li, an IRS revenue agent (Docs. 1-3);

WHEREAS, on March 26, 2015, Respondent filed an Objection to Petition to Enforce Internal Revenue Service Summons and a Memorandum of Law (Docs. 6-7);

WHEREAS, on July 2, 2015, the Government filed its Reply Memorandum of Law in Further Support of Petition to Enforce Internal Revenue Service Summons (Doc. 17), and the Declaration of Hiroaki Kobayashi ("Kobayashi Declaration"), an IRS revenue agent, with exhibits (Doc. 18);

WHEREAS, in its Reply Memorandum, the Government withdrew its request for oral testimony from Respondent in his individual capacity (*see* Doc. 17 at 12), stated that it does not seek duplicates of any of the records already in the Government's possession (all of which are listed in a chart appended as Exhibit 1 to the Kobayashi Declaration) (*see id.* at 2 n.1), and withdrew Document Request No. 18 in order to address Respondent's assertion of attorney-client privilege with respect to this request in his Memorandum of Law (*see* Doc. 7 at 7-8; Doc. 17 at 2 n.1).

WHEREAS, on October 22, 2015, Respondent filed a Reply Memorandum in Support of Objection to Petition to Enforce Internal Revenue Service Summons (Doc. 26);

WHEREAS, on November 13, 2015, the Government submitted a letter to the Court stating that "the Government continues to seek all the documents requested in the Summonses, but is limiting its request for oral testimony set forth in the Summonses to testimony by Respondent to identify and authenticate the documents that he possesses or controls in his capacity as a representative of a collective entity";

WHEREAS, the Government's November 13, 2015 letter also clarified that in response to Document Request Nos. 1, 7, 11, and 14, each of which Respondent contends contain requests for testimony (*see* Doc. 26 at 3-5), "Respondent need only produce *existing* responsive documents and need not create new ones" (emphasis in original);

WHEREAS, on November 17, 2015, the Court held a hearing in this matter and heard oral argument;

WHEREAS, during oral argument, counsel for the Government stated that the Government would limit its request for enforcement of Document Request No. 20, which seeks "[a]ll correspondence between Mr. Natalio Fridman and any other trustees, trustors, beneficiaries, and any other persons involved with the trust(s) for which Mr. Natalio Fridman is a Trustee or Beneficiary," to all such correspondence related to such a trust, its property and/or its administration; and further stated that the Government would withdraw Document Request No. 5, which seeks "[t]he Original Trust Agreement [of the David Marcelo Trust] dated 04/30/1990," based on Respondent's representation in his reply brief (*see* Doc. 26 at 6 n.2) that the version of that agreement that the IRS possesses is a full and complete copy; and

WHEREAS, the above-described modifications to Document Request Nos. 1, 7, 11, 14, and 20, and the above-described withdrawals of Document Request Nos. 5 and 18, shall be collectively referred to herein as the "Modifications;"

IT IS HEREBY ORDERED THAT:

1. Respondent's blanket invocation of the Fifth Amendment protection against self-incrimination in response to the document requests in the Summonses is insufficient to establish entitlement to that protection.

2. Respondent's invocation of the Fifth Amendment protection against self-incrimination in response to the document requests in the Summonses, even if it had been properly asserted, does not justify failing to produce the documents requested by the Summonses because producing the documents responsive to the Summonses falls under the foregone conclusion doctrine, the collective entity doctrine, and/or the required records exceptions to the Fifth Amendment's protection.

3. The Government satisfied its burden under *United States v. Powell*, 379 U.S. 48 (1964), by demonstrating that it is entitled to enforcement of its Summonses with regard to its document requests as modified and/or clarified by the Modifications, and with regard to testimony as set forth in paragraph 5 below.

4. Respondent must produce all documents in his possession, custody, or control that are responsive to the Summonses' document requests as modified and/or clarified by the Modifications, except for the documents already in the Government's possession, all of which are listed in Exhibit 1 to the Kobayashi Declaration.

5. Respondent must appear for an interview to be scheduled by the IRS to provide testimony identifying and/or authenticating documents produced by Respondent in his capacity as a representative of a trust.

HON. VICTOR MARRERO
United States District Judge

Dated: New York, New York
25 November, 2015

U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

November 25, 2015

BY FACSIMILE
Honorable Victor Marrero
United States District Judge
United States District Court
500 Pearl Street
New York, NY 10007

Re: *United States of America v. Natalio Fridman*,
15 Misc. 00064 (P1)

Dear Judge Marrero:

This Office represents the United States in the above-referenced Internal Revenue Service summons enforcement action. As directed by the Court, the Government has prepared the enclosed proposed order reflecting the Court's ruling at the conclusion of the November 17, 2015 hearing in this matter. Pursuant to the ECF Rules and Filing Instructions, a Word version of the proposed order has been submitted to the Orders and Judgments Clerk by e-mail. The Government provided an advance copy of a draft of the proposed order to Respondent for comments and the enclosed version incorporates many of Respondent's suggestions but does not incorporate several that the Government believes contradict the Court's findings or go beyond them.

Respectfully,

PREET BHARARA
United States Attorney for the
Southern District of New York

by: */s/ Jennifer Jude*
JENNIFER JUDE
Assistant United States Attorney
86 Chambers Street, 3rd floor
New York, NY 10007
Tel: (212) 637-2663
Fax: (212) 637-2686

Enclosure
cc: Counsel for Respondent (by e-mail)
Manhattan Orders and Judgments Clerk (by e-mail)

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th day of December, two thousand twenty.

United States of America,

Plaintiff - Appellee,

v.

Natalio Fridman,

Defendant - Appellant.

ORDER

Docket No: 18-3530

Appellant, Natalio Fridman, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk