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UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JOSEPH R. FRANCIS, Defendant.	No. CR 08-494-SJO GOVERNMENT'S TRIAL BRIEF Trial: August 17, 2009 The Honorable S. James Otero Courtroom: 880

Plaintiff, United States of America, by and through its counsel of record, the United States Attorney's Office for the Central District of California and the undersigned attorneys, respectfully submits its trial memorandum.

The government requests leave to file such additional memoranda as may become appropriate during the course of trial.

Dated: August 6, 2009

Respectfully submitted,

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/s/ Caryn D. Mark
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TRIAL MEMORANDUM

I. STATUS OF THE CASE

A. The trial for defendant Joseph R. Francis ("defendant") is scheduled to begin on August 17, 2009 at 9:00 a.m., before the Honorable S. James Otero, United States District Judge.

B. The government estimates its case-in-chief to last approximately seven to ten trial days. The estimated time for the entire trial is four weeks.

C. The defendant is currently released on bail.

D. The defendant has not waived trial by jury.

E. Defendant is represented by counsel. Lead counsel is Brad Brian of Munger, Tolles & Olson.

F. An interpreter will not be required for any of the witnesses.

G. The government expects to call approximately 18 witnesses in its case-in-chief, aside from custodians of records. At this time, the government has no indication whether the defendant will agree on stipulations concerning the admission of various records, including bank records. However, the government is prepared to proceed with its business records and other bank records by way of Federal Rule of Evidence 902(11) certifications, as well as foreign bank records pursuant to 18 United States Code, Section 3505. If the government has to proceed by calling record custodians to authenticate such documents, the government would call an additional 10 witnesses.

H. There are currently no government motions pending before the Court, and there are no hearings scheduled. The government has filed the following motions in limine:

(1) to Admit Jail Interview;
(2) to Preclude Cross-Examination of Government Witnesses Concerning Certain Internal Revenue Service Actions;
(3) to Permit Witness to Remain in Courtroom;
(4) to Admit Evidence of Prior Convictions for Impeachment Purposes

Pursuant to Federal Rule of Evidence 609(a)(1);
(5) to Allow Use of Demonstrative and Summary Charts During Opening Statement, Closing Argument, and Testimony of Summary Witness;
(6) to Exclude Evidence or Argument Supporting Claim of Selective or Vindictive Prosecution, Fostering Jury Nullification, or Alleging Prosecutorial Misconduct;
(7) to Exclude Defense Exhibits on Relevance, Prejudice, and Hearsay Grounds;
(8) to Admit Business Records Under Declaration and Public Records Pursuant to FRE 803(8); and
(9) to Preclude Hearsay Testimony Relating to Defendant's Alleged Intent to Comply With His Tax Obligations.

The defense opposes, at least in part, all of these motions, with one exception: it does not object to the Revenue Agent's presence in the courtroom. The defense has filed three motions in limine:

(1) to Exclude Certain Government Exhibits and Irrelevant or Speculative Testimony;
(2) to Permit Voir Dire Examination of George Beas, or, in the Alternative, to Exclude Certain Testimony of Mr. Beas: and
(3) to Exclude Evidence of Covenants, Conditions And Restrictions Related to Bel Air Property and Casa Aramara.

The government opposes those motions. The Court has scheduled a final conference at 10:00 a.m. on August 7, 2009.

II. THE INDICTMENT

The defendant, Joseph R. Francis, is charged with two counts of violating 26 U.S.C. § 7201 (tax evasion) for tax years 2002 and 2003. The Indictment alleges that the defendant attempted to evade the assessment of over $6 million in individual income tax by, among other acts, filing false and fraudulent personal and corporate income tax returns for 2002 and 2003.

III. APPLICABLE STATUTE

Title 26, United States Code, Section 7201 provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not

more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. § 7201.

IV. STATEMENT OF FACTS

A. THE GOVERNMENT'S CASE-IN-CHIEF

The government will prove at trial the following facts, among others:

The defendant was the founder, President, Chief Executive Officer and sole shareholder of two corporations, Mantra Films, Inc. ("Mantra"), and Sands Media, Inc. ("Sands"). Sands performs marketing, media buying and other promotional services on behalf of Mantra, which produces, markets, sells and distributes videos under the *Girls Gone Wild* brand name. During the years in question, both Mantra and Sands elected to be treated as S Corporations for tax purposes. As an S Corporation, neither entity paid income tax; instead, the net profit or loss from each company flowed through to its sole shareholder, the defendant, who was required to report the net income on his personal income tax returns.

The principal entity used by the defendant to commit tax evasion was Rothwell Limited ("Rothwell"), a Cayman Islands International Business Corporation administered in Turks and Caicos. Rothwell opened a bank account at Bermuda Commercial Bank Limited in Hamilton, Bermuda ("Rothwell Bermuda account") in 2001. Also in 2001, Rothwell opened an investment brokerage account with Morgan Stanley ("Rothwell Morgan Stanley account") at a branch office in Irvine, California. The defendant's ownership of these two accounts was concealed through the use of foreign nominees – primarily, Colin Chaffe, a British national. The defendant in fact owns both accounts.

Documents from the Bank of Bermuda reveal that the defendant is the beneficial owner of Rothwell. The defendant used the accounts to commit tax evasion, through several different schemes. Each scheme had in common the

following:

(1) transferring funds from Mantra and Sands tax-free to offshore entities;

(2) causing false entries on the corporate books and records to conceal the transfers as legitimate business expenses; and

(3) falsely deducting the transfers on the Mantra and Sands corporate tax returns, resulting in

(4) a falsely-reduced corporate net income that flowed through to the defendant's individual tax return, which accordingly reported false income and tax due and owing figures.

The several schemes are outlined below.

1. **False Consulting Services Expenses – Casablanca**

The defendant funded the Rothwell Bermuda account through the deduction of false consulting expenses by Sands. The defendant caused Sands to transfer $10.85 million to the Rothwell Bermuda account (which he owned) and caused its deduction as "consulting services" to Casablanca. The defendant provided wiring instructions for the transfers to Michael Barrett, who was the Controller and later Vice President of Finance, and who handled the books and records for Mantra and Sands. After receiving the instructions, Barrett set up the transfers on-line, and the defendant approved them. The defendant directed Barrett to post the checks and transfers as consulting expenses on Sands' books and records. Because the defendant was on both sides of this transaction, the payments were not bona fide expenses. Instead, they were a facade that allowed the defendant to transfer funds to himself tax-free.

2. **False Consulting Services, Professional Services and Footage Expenses – Crescent Capital**

The defendant also committed tax evasion by using corporate funds to construct a personal residence in Punta Mita, Mexico, and falsely deducting the payments as legitimate business expenses. The defendant caused Sands to transfer $3.476 million, and Mantra to transfer $1.852 million, to Casablanca de Punta Mita SA de CV ("Casablanca"), a Mexican corporation established to allow the defendant

to purchase land and build a personal residence in Punta Mita, Mexico which was administered by Colin Chaffe, and to Crescent Capital and Hadid Development, companies owned and controlled by builder Mohamed Hadid. Hadid will confirm that all the payments from Mantra and Sands were for the construction of the Mexico residence, and that neither he nor Crescent Capital or Hadid Development was paid for any consulting or business-related services. The defendant's attorney at the time of the transactions, Brian Rayment, will also testify that the payments were for the construction of the Mexico residence. A search of Mantra and Sands' records for 2001 through 2003 revealed no source documents relating to consulting expenses paid to Crescent Capital, Hadid Development or Casablanca.

Nonetheless, the defendant directed Barrett to book the payments as "consulting services," "professional services," and "footage expenses" on the corporate books and records. Barrett only later learned that the payments were for the construction of a personal residence. The defendant openly referred to the property in Mexico as his personal residence, even on national television. Former employees will testify that the Mexico house served as the defendant's vacation residence and that no business activity took place there during 2002 and 2003. The house was neither listed on the corporate books as an asset nor depreciated on the corporate tax returns. Again, the payments were merely a way for the defendant to transfer funds to himself tax-free, in order to build a personal vacation home.

3. **False Insurance Expense – Asia Pacific**

The defendant committed tax evasion by making and then falsely deducting purported insurance premium payments to Asia Pacific Mutual Insurance Company ("Asia Pacific"), located in the Republic of Vanuatu. The defendant caused Mantra to purchase a $2 million, and Sands to purchase a $3 million, purported business insurance policy from Asia Pacific.

The defendant and attorney Rayment met with Morgan Liddell of Bright

Enterprises for lunch in Hawaii prior to the purchases of the Asia Pacific policies. Barrett will testify that he met with the defendant and Rayment in the defendant's office near the end of 2002. When the defendant inquired at the meeting what the net profit for Mantra would likely be at the end of the year, Barrett estimated $2 million. Immediately after discussing the year-end profit, the defendant directed Barrett to write a $2 million check to Asia Pacific and post it as an insurance expense. Rayment and the defendant advised Barrett that the payment was purportedly for "business insurance," and the purpose of it was to reduce taxes. The same occurred with Sands. After explaining that the insurance expenses had to be spread out over the life of the policy, Barrett posted them over 2002 and 2003, for both Mantra and Sands. Barrett did not discuss the policies' legitimacy with the defendant.

Bank records obtained by the government reflect transfers of $3 million from Sands[1], and $2 million from Mantra[2], to Asia Pacific. The Asia Pacific account at the Bank of Hawaii received the premium payments from both Mantra and Sands. The premium payments were quickly returned to the defendant through a series of transfers to accounts under the defendant's control. Within days of the transfers to Asia Pacific's account at the Bank of Hawaii, the funds were transferred to Schedule Company in Turks & Caicos, which was administered by Chaffe and shares a business address with Rothwell. Shortly thereafter, Schedule Company transferred the funds to the Rothwell Bermuda account, which the defendant owns. The false premium payments were deducted on the Mantra and Sands corporate tax returns, disguised as legitimate insurance expenses, when in fact the policies were purely a means for the defendant to transfer funds to himself tax-free.

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[1] These transactions occurred on January 28, February 4, February 10, February 18, March 17, March 31, May 5, June 11, June 12, June 13, June 16, and June 20, 2003.

[2] These transactions occurred on January 28, February 4, February 10, February 18, March 5, March 17, March 31, and April 21, 2003.

Near the end of 2003, Barrett again met with the defendant and Rayment. They asked Barrett whether, based on the possible net profit for that year, they needed to do another insurance policy. When Barrett explained that the profit for 2003 was significantly lower than it was for 2002, the defendant decided not to do another insurance policy.

4. **Various Other Schemes**

The defendant engaged in other acts constituting tax evasion but that did not involve dollar amounts as large as those in the schemes described above. First, the defendant used Blue Horse Trading, LLC ("Blue Horse"), a business entity reported on the defendant's Form 1040, Schedule C, to deduct the costs of maintaining his primary personal residence in Bel Air during the years 2002 and 2003. The defendant caused his company, Mantra, to make rent payments to Blue Horse for his personal residence and then falsely deduct the rent as a legitimate business expense. Second, the defendant caused Mantra to pay interior design expenses for his personal residences (including the houses in Bel Air, Mexico, Lake Tahoe and Pacific Palisades) and, again, falsely deduct the payments as business expenses. Third, the defendant caused Mantra to purchase a Porsche automobile that he gave to his personal friend as a gift, and caused Mantra to falsely deduct the payment as a promotion expense.

Finally, and arguably most straightforward, the defendant did not report on his tax returns the interest income earned in the Rothwell Morgan Stanley account (which he owned) during the years 2002 and 2003. The defendant failed to report interest income of $136,518 and $562,883 in 2002 and 2003, respectively.

5. **Use of the Funds**

The unreported income from several of the schemes made its way to the Rothwell Bermuda account. In 2002, $1.030 million was transferred from the Rothwell Bermuda account (which the defendant owned) to Casablanca, in order to

purchase the lot on which the defendant's Punta Mita residence was later constructed.

Between 2001 and 2003, the defendant also caused $16.148 million to be transferred from the Rothwell Bermuda account to the Rothwell Morgan Stanley account. John Welker was the broker on the Rothwell Morgan Stanley account, as well as the defendant's personal broker. Again, Chaffe was the nominee owner of the Rothwell Morgan Stanley account, as well as its sole signatory. It appears that Chaffe would approve transactions that Welker made for the Rothwell Morgan Stanley account.

Most compelling, however, is the demonstrated use of the funds in the Rothwell Morgan Stanley account. In 2005, $1.23 million was transferred from that account to Casablanca in order to purchase a lot adjacent to the defendant's personal residence in Punta Mita, Mexico. Rayment admitted that the defendant directed the purchase. The purchase of this second lot demonstrates that the assets in the Rothwell Morgan Stanley account, like the assets in the Rothwell Bermuda account, were at the defendant's personal disposal. Rothwell was simply a nominee, while its funds were actually the defendant's to do with as he pleased.

V. PERTINENT LAW

A. Tax Evasion (26 U.S.C. § 7201)

Tax evasion encompasses a single crime that can be committed in one of two ways: (1) evasion of assessment of taxes; or (2) evasion of payment of taxes. 26 U.S.C. § 7201 ("Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof. . . ."); United States v. Andra, 218 F.3d 1106, 1108 (9th Cir. 2000) (citing United States v. Mal, 942 F.2d 682, 686 (9th Cir. 1991)). "The filing of a return is not an element of the crime of tax evasion: the real character of the offense lies, not in the failure to file a return, or in the filing of a false return, but rather in the attempt to defraud the government by evading the tax." United States v. Robinson, 974 F.2d 575, 578 (5th Cir. 1992) (alteration and

quotation marks omitted) (quoting Gariepy v. United States, 220 F.2d 252, 259 (6th Cir.)).

This case as charged involves the defendant's evasion of the assessment of his personal income taxes for tax years 2002 and 2003. "Evasion of assessment generally involves efforts to prevent or deter the government from determining tax liability prior to an assessment, for example by 'failing to file a return, filing a false return, failing to keep records, concealing income or other means.'" Mal, 942 F.2d at 687 (quoting Cohen v. United States, 297 F.2d 760, 770 (9th Cir.)).

B. Elements of Tax Evasion

In order to prove the offense of evasion of assessment, the government must prove the following elements:

(1) The defendant owed more federal income tax for the year than was declared on the defendant's income tax return;

(2) The defendant made an affirmative attempt to evade or defeat an income tax; and

(3) In attempting to evade or defeat such additional tax, the defendant acted willfully.

United States v. Kayser, 488 F.3d 1070, 1073 (9th Cir. 2007).[3]

1. **Income Tax Due and Owing**

Although the government must prove that a tax was due and owing as an element of tax evasion, the government need not prove the exact amount of the tax due and owing. United States v. Marashi, 913 F.2d 724, 736 (9th Cir. 1990) ("some tax deficiency"); United States v. Williams, 837 F.2d 1009, 1015 (11th Cir. 1988); accord United States v. Buckner, 610 F.2d 570, 573–74 (9th Cir. 1979). Moreover, the additional tax that is owed need not be substantial. Marashi, 913 F.2d at 735–36

[3] The instructions for the Ninth Circuit include four elements. See Ninth Circuit Criminal Jury Instruction 9.35 (2005) [Income Tax Evasion (26 U.S.C. § 7201)]. That instruction, however, was approved in February 2005, after which the Ninth Circuit has stated that tax evasion includes only three elements. See Kayser, 488 F.3d at 1073.

("The language of § 7201 does not contain a substantiality requirement").

To establish the defendant's income in this case, the United States will use the specific item method of proof. Based on the specific items analysis, Revenue Agent George Beas calculated the unreported taxable income figures and additional tax due and owing of approximately $6.356 million. Revenue Agent Beas will testify that, based on the defendant's failure to report approximately $20 million in income, the defendant owes over $6 million in income taxes, with a separate tax due and owing of approximately $4.359 million and $1.997 million for 2002 and 2003, respectively.

2. **Affirmative Act of Evasion**

"[A]ny conduct, the likely effect of which would be to mislead or to conceal," can constitute an affirmative act of tax evasion. Spies v. United States, 317 U.S. 492, 499 (1943), overruled on other grounds by United States v. Easterday, 564 F.3d 1004 (9th Cir. 2009). The government need not prove at trial all affirmative acts alleged in the indictment; one will suffice. United States v. Mackey, 571 F.2d 376, 387 (7th Cir. 1978).

The primary affirmative acts of evasion in this case are the two false individual (Form 1040) and four false corporate (Form 1120S) tax returns that defendant filed with the Internal Revenue Service ("IRS") for tax years 2002 and 2003, the defendant's causing entries to be recorded into the books and records of his two corporations, Mantra and Sands, and the defendant's causing millions of dollars to be sent from his corporations disguised as legitimate business expenses. Defendant committed additional misleading acts when he caused false books and records to be provided to his return preparers for preparation of his 2002 and 2003 corporate and individual tax returns, as well as his use of nominee entities and individuals to conceal his ownership of properties and other assets. See United States v. Stokes, 998 F.2d 279, 281 (5th Cir. 1993); United States v. Meyer, 808 F.2d 1304, 1306 (8th Cir. 1987). Each of these misrepresentations to the IRS, bookkeepers, and tax return

preparers constitutes an affirmative act of evasion. See United States v. Beacon Brass Co., 344 U.S. 43, 45-46 (1952) ("The language of § 145(b) [predecessor statute to 26 U.S.C. § 7201] which outlaws willful attempts to evade taxes 'in any manner' is clearly broad enough to include false statements made to Treasury representatives for the purpose of concealing unreported income") (citing Spies, 317 U.S. at 499; United States v. Bishop, 291 F.3d 1100, 1106–07 (9th Cir. 2002); United States v. Frank, 437 F.2d 452, 453 (9th Cir. 1971) (per curiam) (holding that submitting records that omitted substantial amounts of income to attorney who prepared tax returns was sufficient evidence of willfulness for tax evasion conviction); United States v. Neel, 547 F.2d 95, 96 (9th Cir. 1976) (noting as example of defendant's willfulness in tax evasion conviction that defendant "had made a false statement to an internal revenue agent").

3. **Willfulness**

To be guilty of tax evasion, the defendant must have acted willfully. In the criminal tax context, willfulness is the "voluntary, intentional violation of a known legal duty." Cheek v. United States, 498 U.S. 192, 201 (1991); United States v. Powell, 955 F.2d 1206, 1210 (9th Cir. 1992). The government may establish willfulness by showing that the defendant acted either with a "bad purpose" or "evil motive" or "voluntarily, intentionally violated a known legal duty." Powell, 955 F.2d at 1211.

The government will present a variety of facts that establish that the defendant's willfulness. First, the defendant's scheme itself—falsely deducting millions of dollars on his corporate tax returns as legitimate business expenses to reduce the net income he reported on his personal tax returns, Forms 1040 for 2002 and 2003—is circumstantial evidence that the defendant knew what he was doing was wrong. Additionally, the defendant misrepresented facts about those funds and his income to his in-house bookkeeper, his tax return preparer and the IRS. Specifically,

defendant told his bookkeepers to report certain personal expenses as legitimate business expenses, or in some instances fabricated business expenses, to make the transfer of funds to his nominee entity appear to be legitimate business expenses. Moreover, the government will elicit conversations that the defendant had with his bookeepers and other employees where they expressly told the defendant that he could not deduct personal expenses as business expenses. Last, the defendant caused false invoices to be created to substantiate transfers of monies as false business expenses.

VI. LEGAL AND EVIDENTIARY ISSUES

A. Summary and Expert Testimony by Revenue Agent George Beas

The government will elicit summary testimony from George Beas, a Revenue Agent with the IRS, who has reviewed IRS and bank records pertaining to this case. The introduction of summary witness testimony and summary schedules has been approved by the Ninth Circuit in tax cases. See United States v. Marchini, 797 F.2d 759, 756-66 (9th Cir. 1986); United States v. Greene, 698 F.2d 1364, 1367 (9th Cir. 1983); Barsky v. United States, 339 F.2d 180 (9th Cir. 1964). A summary witness may be used to help the jury organize and evaluate evidence which is factually complex and fragmentally revealed in the testimony of a multitude of witnesses. United States v. Baker, 10 F.3d 1374, 1411 (9th Cir. 1983), overruled on other grounds by United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000); United States v. L.M., 427 F. Supp. 2d 867 (N.D. Iowa 2006).

In prosecutions for tax evasion, "the fact of a tax due and owing may be established by documentary evidence of tax liability, accompanied by a summary by an expert." United States v. Voorhies, 658 F.2d 710, 715 (9th Cir. 1981) (citing United States v. Gardner, 611 F.2d 770, 775 (9th Cir. 1980)). "It is well established in several circuits that '[e]xpert testimony by an IRS agent which expresses an opinion as to the proper tax consequences of a transaction is admissible evidence.'"

United States v. Mikutowicz, 365 F.3d 65, 72 (1st Cir. 2004) (quoting United States v. Windfelder, 790 F.2d 576, 581 (7th Cir. 1986)); see also United States v. Sabino, 274 F.3d 1053, 1067 (6th Cir. 2001), amended on other grounds (2002); United States v. Monus, 128 F.3d 376, 386 (6th Cir. 1997); United States v. Townsend, 31 F.3d 262, 270 (5th Cir. 1994); United States v. Gold, 743 F.2d 800, 817 (11th Cir. 1984).

"As a summary witness, an IRS agent may testify as to the agent's analysis of the transaction which may necessarily stem from the testimony of other witnesses. The agent may also explain his analysis of the facts based on his special expertise." United States v. Pree, 408 F.3d 855, 870 (7th Cir. 2005) (quoting United States v. Moore, 997 F.2d 55, 58 (5th Cir. 1993)). "As an expert witness, an IRS agent's 'opinion as to the proper tax consequences of a transaction is admissible evidence.' 'Similarly, . . . an IRS expert's analysis of the transaction itself, which necessarily precedes his or her evaluation of the tax consequences, is also admissible.'" Id. (citing Windfelder, 790 F.2d at 581.)

Revenue Agent Beas' opinion concerning the tax consequences of the various transactions will necessarily have its basis in the Internal Revenue Code (IRC) and its accompanying regulations. His opinion will include his understanding of the relevant law and his application of the facts as he understands them. Revenue Agent Beas' testimony about the tax consequences of the defendant's transactions will aid the jury in understanding the facts in evidence.

Revenue Agent Beas also calculated income figures as to the defendant. Specifically, Revenue Agent Beas will testify that, based on the bank and other records introduced at trial, he conducted a specific item analysis that shows that both Mantra and Sands' income for 2002 and 2003 was under-reported because there were approximately $20 million in false business expenses on Mantra and Sands' corporate tax returns, Forms 1120S. Revenue Agent Beas will explain how the under-reported income on the defendant's Forms 1120 resulted in the defendant failing to report

significant income on his personal income tax return, Form 1040. Further, he will testify that he calculated that the defendant owes additional taxes for 2002 and 2003.

During the course of his testimony, the government anticipates that Revenue Agent Beas will use several charts and graphs that summarize the bank and other records, reported and unreported income, and tax due and owing. Federal Rule of Evidence 1006 provides that:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by the parties at [a] reasonable time and place. The court may order that they be produced in court.

Fed. R. Evid. 1006. A chart or summary may be admitted as evidence where the proponent establishes that the underlying documents are voluminous, admissible, and available for inspection. United States v. Meyers, 847 F.2d 1408, 1411–12 (9th Cir. 1988); United States v. Johnson, 594 F.2d 1253, 1255–57 (9th Cir. 1979). While the underlying documents must be admissible, they need not be admitted. Meyers, 847 F.2d at 1412; Johnson, 594 F.2d at 1257 n.6. Summary charts need not contain the defendant's version of the evidence and may be given to the jury while a government witness testifies concerning them. United States v. Radseck, 718 F.2d 233, 239 (7th Cir. 1983); Barsky, 339 F.2d at 181. Summaries, including the captions or headings of charts, may reflect the conclusions or assumptions that are supported by the evidence. United States v. Jennings, 724 F.2d 436, 442 (5th Cir. 1984).

A summary witness may rely on the analysis of others where she has sufficient experience to judge another person's work and incorporate it as her own. The use of other persons in the preparation of summary evidence goes to its weight, not its admissibility. United States v. Soulard, 730 F.2d 1292, 1299 (9th Cir. 1984); Diamond Shamrock Corp. v. Lumbermens Mut. Cas. Co., 466 F.2d 722, 727 (7th Cir. 1972) ("It is not necessary . . . that every person who assisted in the preparation of the original records or the summaries be brought to the witness stand").

The government has produced to the defense draft summary charts that are anticipated to form the basis for some of Revenue Agent Beas' testimony. The government will also seek the admission into evidence of those summary charts. The government will produce any additional draft charts about which Revenue Agent Beas will testify. Additionally, the government produced the summary of Revenue Agent Beas' opinions and conclusions to the defense and the underlying tax and bank records used to prepare the summary charts, tables and spreadsheets. (See Doc. # 201.) On July 10, 2009, the defense interviewed Revenue Agent Beas.

B. Public Records

Reports and data compilations from public offices or agencies are admissible under Rule 803(8)(B), if they set forth matters observed pursuant to a duty imposed by law, except observations by law enforcement in criminal cases. The government intends to introduce at trial the following categories of documents, which are properly admissible as public records.

1. **Internal Revenue Service Documents**

The Government will offer certified copies of income tax returns filed with the Internal Revenue Service admissible under Rules 803(6), 803(8) and 902 of the Federal Rules of Evidence, and 26 U.S.C. § 6064. Moore v. United States, 254 F.2d 213, 216 (5th Cir. 1958). Tax returns are public records that are admissible at trial. Holland v. United States, 209 F.2d 516 (10th Cir. 1954); Fed. R. Evid. 901(b)(7), 803(8); 26 U.S.C. § 6103. The tax returns are certified copies of certain IRS records. These certified records are self-authenticating and are admissible pursuant to Rules 902(1) and 902(4) of the Federal Rules of Evidence. Hughes v. United States, 953 F.2d 531, 540 (9th Cir. 1992) (Form 4340 self-authenticating under Rule 902(1)); Rossi v. United States, 755 F. Supp. 314, 316 (D. Or. 1990) (Form 4340 self-authenticating under Rule 902(4)).

2. **Domestic Public Records or Documents**

Domestic public documents under seal or certified copies of public records do not require extrinsic evidence of authenticity as a condition precedent to admissibility. Fed. R. Evid. 902. In this case, the government intends to offer into evidence certified state records, as well as other domestic public documents.

C. Business Records

The government will seek to introduce certain business records of the IRS and third-party entities. Records of this kind are admissible as business records under Rule 803(6) of the Federal Rules of Evidence. United States v. Johnson, 297 F.3d 845, 862–63 (9th Cir. 2002); United States v. Childs, 5 F.3d 1328, 1333–34 (9th Cir. 1993); Fed. R. Evid. 803(6). A document is admissible under Rule 803(6) if two foundational facts are established: (a) the document was made or transmitted by a person with knowledge at or near the time of the incident recorded, and (b) the document was kept in the course of a regularly-conducted business activity. United States v. Ray, 920 F.2d 562, 565 (9th Cir. 1990); Kennedy v. Los Angeles Police Dep't, 901 F.2d 702, 717 (9th Cir. 1989). In determining if these foundational facts have been established, the court may consider hearsay and other evidence not admissible at trial. "There is no requirement that the government establish when and by whom the documents were prepared." Ray, 930 F.2d at 1370; Childs, 5 F.3d at 1333 (records of an entity are admissible, when when that entity was not the maker of those records, so long as the requirements of 803(6) are met and the circumstances indicate the records are trustworthy); United States v. Huber, 772 F.2d 585, 591 (9th Cir. 1985) ("there is no requirement that the government show precisely when the [record] was compiled"); United States v. Basey, 613 F.2d 198, 201 n.1 (9th Cir. 1979) (college records properly admitted to establish defendant's address even though the custodian did not record the information and did not know who did). Fed. R. Evid. 104(a), 1101(d)(1); see also Bourjaily v. United States, 483 U.S. 171, 178–79 (1987). Challenges to the accuracy or completeness of business records

concern the weight, rather than the admissibility, of the evidence. La Porte v. United States, 300 F.2d 878, 880 (9th Cir. 1962).

Title 18, United States Code, Section 3505 provides for admission of foreign bank records. "Under § 3505, a foreign certification services to authenticate the foreign records, and thus 'dispenses with the necessity of calling a live witness to establish authenticity.'" United States v. Hagege, 437 F.3d 943, 957 (9th Cir. 2006) (citing United States v. Sturman, 951 F.2d 1466, 1489 (6th Cir. 1991)); 18 U.S.C. § 3505(a)(2). If the foreign certification complies with the requirements of § 3505(a)(1), the foreign records cannot be excluded as hearsay. Id. The business records in this case include, among other things, bank records**,** title company records**,** videos of aired television programs, videos of the defendant's interviews, and records of personal expenditures such as a car purchase.

Many statements within the business records are admissible on the independent ground that they are not offered for the truth of the matter asserted, and are therefore not hearsay. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Documents offered for purposes other than to prove the truth of the matter are not hearsay. Kassel v. United States, 319 Fed.Appx. 558, 561, 2009 WL 632898, *2 (9th Cir. 2009); Holmes v. Helling, 252 Fed.Appx. 839, 841, 2007 WL 3226675, *2 (9th Cir. 2007); Calmat Co. v. U.S. Dept. of Labor, 364 F.3d 1117, 1124 (9th Cir. 2004) ("[i]f the significance of an out-of-court statement lies in the fact that the statement was made and not in the truth of the matter asserted, then the statement is not hearsay.")

Federal Rule of Evidence 801(d)(2)(D) provides that a statement is not hearsay if it is offered against a party and is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Fed. R. Evid. 801(d)(2)(D); see Abatti v. C. I. R., 644

F.2d 1385, 1390 (9th Cir. 1981) (documents compiled by agent of taxpayer were admissible nonhearsay). This rule "requires the proffering party to lay a foundation to show that an otherwise excludable statement relates to a matter within the scope of the agent's employment." Sea-Land Service, Inc. v. Lozen Intern., LLC., 285 F.3d 808, 821 (9th Cir. 2002); Harris v. Itzhaki, 183 F.3d 1043, 1054 (9th Cir. 1999). When a court is evaluating whether such a foundation has been established, "[t]he contents of the statement shall be considered but are not alone sufficient to establish ... the agency or employment relationship and scope thereof." Sea-Land Service, Inc., 285 F.3d at 821; Fed. R. Evid. 801(d)(2).

D. Demonstrative Charts

The government intends to introduce various demonstrative or pedagogical summaries and charts as testimonial aids during the testimony of several witnesses, as well as during its opening statement and closing argument. The records upon which the Government's charts are based are voluminous and, based on the discussion above, may be admitted pursuant to Rule 1006 or Rule 611(a).

The proposed charts include, for example, a flow chart of the money flowing from the defendant's companies to the nominee companies and bank accounts. The government does not intend to offer these charts into evidence.[4] Under Federal Rule of Evidence 611(a), charts may be used in opening statements where they do no more than assist the jury in understanding the nature of the proof they are about to hear. See United States v. De Peri, 778 F.2d 963, 978–79 (3d Cir. 1985); United States v. Churchill, 483 F.2d 268, 274 (1st Cir. 1973).

Courts have repeatedly allowed the use of charts similar to the ones the United States intends to use in this case. See, e.g., United States v. Scales, 594 F.2d 558,

[4] Some of the proposed demonstrative charts are variations on the summaries about which Revenue Agent George Beas will be testifying. The government will offer Revenue Agent Beas' charts into evidence pursuant to Rule 1006.

561-562 (6th Cir. 1979) (summary of indictment); Jennings, 724 F.2d at 441–43 (compilation of 200 pages of material involving substantial amount of mathematical calculations), cert. denied, 467 U.S. 1227 (1984); United States v. Stephens, 779 F.2d 232, 238 (5th Cir. 1985) (simple flow charts tracing the defendant's use of loan proceeds); United States v. Zielie, 734 F.2d 1447, 1455 (11th Cir. 1984).

The Ninth Circuit has determined that three precautionary measures should be taken when demonstrative charts are used. First, the court should carefully examine the charts, out of the presence of the jury, to determine that everything contained in them is supported by proof. Soulard, 730 F.2d at 1300; United States v. Abbas, 504 F.2d 123, 125 (9th Cir. 1974). Second, the court should allow the charts to be used as a testimonial aid for witnesses and as a visual aid for counsel in argument, but should not admit the charts in evidence or allow their use during jury deliberation. Id. Third, the Court should instruct the jury that the charts are an explanation of other evidence and not proof per se. The jury should be told that the charts were presented as a matter of convenience and to the extent the jury finds that they are not in truth summaries of facts and figures shown by the evidence in the case, the jury should disregard them entirely. Id.

E. Refreshing Recollection/Past Recollection Recorded

Some of the government's witnesses may not remember details of events that occurred six or more years ago. Witnesses experiencing difficulty in recalling information may have their recollection refreshed by any material; however, such materials are not themselves normally admitted into evidence. Fed. R. Evid. 612. Additionally, a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly, is admissible as an exception to the hearsay rule. Fed. R. Evid. 803(5). Such record may

be read into evidence but may not itself be received into evidence. Id.

F. Routine Practice

Evidence of the routine practice of an organization, whether corroborated or not, and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the organization on a particular occasion was in conformity with that routine practice. Fed. R. Evid. 406.

G. Prior Consistent Statements

The government may need to rehabilitate certain witnesses with prior consistent statements. Rule 801(d)(1)(B) of the Federal Rules of Evidence provides that: "A statement is not hearsay if . . . the declarant testifies at the trial and is subject to cross-examination concerning the statement, and the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . . ." It is left to the court's discretion to admit prior consistent statements to rebut charges of recent fabrication. United States v. Smith, 893 F.2d 1573, 1582 (9th Cir. 1990); Medina v. Multaler, Inc., 547 F. Supp. 2d 1099, 1114 n.56 (C.D. Cal. 2007).

H. Non Hearsay

Statements are not hearsay if they are introduced to show the effect of a listener's conduct, or establish knowledge on the part of a listener. United States v. Roberts, 676 F.2d 1185, 1187-88 (8th Cir. 1982); United States v. Rubin, 591 F.2d 278, 283 (5th Cir. 1979); United States v. Abascal, 564 F.2d 821, 830 (9th Cir. 1977).

I. Lay Witnesses Opinions

Opinion testimony of lay witnesses is admissible if it is rationally based on the perception of the witness and helpful to a clear understanding of his testimony or to the determination of a fact in issue. Fed. R. Evid. 701; United States v. Langford, 802 F.2d 1176, 1179 (9th Cir. 1986).

J. Participants in a Conversation

A participant in a conversation may properly testify regarding his understanding of statements made to him by the declarant. United States v. Brooks, 473 F.2d 817, 818 (9th Cir. 1973).

K. Authentication and Identification

Federal Rule of Evidence 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Under Rule 901(a), evidence should be admitted, despite any challenge, once the government makes a *prima facie* showing of authenticity or identification so "that a reasonable juror could find in favor of authenticity or identification . . . [because] the probative force of the evidence offered is, ultimately, an issue for the jury." United States v. Chu Kong Yin, 935 F.2d 990, 996 (9th Cir. 1991) (citations and internal quotation marks omitted); United States v. Black, 767 F.2d 1334, 1342 (9th Cir. 1985). The authenticity of documents and their connection to a defendant may be proved by circumstantial evidence. United States v. Natale, 526 F.2d 1160, 1173 (2d Cir. 1975); United States v. King, 472 F.2d 1, 9–11 (9th Cir. 1973). To be admissible, the documents need not have been signed by the defendant nor examined by a handwriting expert. The prosecution need only prove a rational basis from which the jury may conclude that the exhibits did, in fact, belong to the defendant. Fed. R. Evid. 901(a); United States v. Blackwell, 694 F.2d 1325, 1330–31 (D.C. Cir. 1982).

A duplicate is admissible to the same extent as the original, unless there is a genuine question as to the authenticity of the original or it would be unfair under the circumstances to admit the duplicate in lieu of the original. Fed. R. Evid. 1003; Smith, 893 F.2d at 1579. Even a photocopy bearing extraneous handwriting not connected to the defendant is admissible. United States v. Skillman, 922 F.2d 1370, 1375 (9th Cir. 1990).

L. Statements and Admissions of the Defendant

A defendant's prior statement is admissible only if offered against him; a defendant may not elicit his own prior statements, either through defense witnesses or by cross-examination of government witnesses. See Fed. R. Evid. 801(d)(2). To permit otherwise would place a defendant's statements "before the jury without subjecting himself to cross-examination, precisely what the hearsay rule forbids." United States v. Ortega, 203 F.3d 675, 682 (9th Cir. 2000) (district court properly granted the government's motion in limine to exclude introducing defendant's post-arrest statements through cross-examination of INS agent) (quoting United States v. Fernandez, 839 F.2d 639, 640 (9th Cir. 1988)).

This does not mean, of course, that the defendant is prevented from introducing evidence necessary to put on his defense. If, for instance, he wishes to offer evidence regarding his state of mind during the relevant time period, he can offer such evidence by simply testifying as to his state of mind. What he cannot do, however, is elicit from a witness on direct or cross-examination any of his prior statements regarding his state of mind. See Fed. R. Evid. 801(c); Ortega, 203 F.3d at 682; Fernandez, 839 F.2d at 640.

In this regard, the rule of completeness is inapposite. Evidence that is inadmissible is not made admissible by recitation of the rule of completeness. See United States v. Collicott, 92 F.3d 973, 983 (9th Cir. 1996) (hearsay not admitted regardless of Rule 106). As the Ninth Circuit noted in Ortega, 203 F.3d at 682, a defendant's exculpatory statements are inadmissible hearsay even if they were made contemporaneously with other inculpatory statements. Any incriminating statements offered by the government here are admissions by a party-opponent under Rule 801(d)(2) and are, therefore, not hearsay. If offered by the defendant, however, any prior exculpatory statements are inadmissible hearsay. See Ortega, 203 F.3d at 682.

Documents which have been signed by a defendant constitute admissions or

adoptive admissions of the defendant under Federal Rule of Evidence 801(d)(2)(A) and (B) and are admissible on that basis. United States v. Moran, 759 F.2d 777, 786 (9th Cir. 1985); United States v. Smith, 609 F.2d 1294, 1301 n.7 (9th Cir. 1979); Pillsbury Co. v. Cleaver-Brooks, 646 F.2d 1216, 1218 (9th Cir. 1981).

The government anticipates introducing statements made by the defendant including public oral statements made on television programs and during interviews, statements made to witnesses, and written and signed materials, such as statements made in bank documents.

M. Defendant's Statements Through Agents

Under Federal Rule of Evidence 801(d)(2)(C) and (d)(2)(D), certain third party statements are not defined as hearsay when they are made by an agent of a party opponent. According to Rule 801(d)(2)(C), statements offered against a party are not hearsay when made "by a person authorized by the party to make a statement concerning the subject." See United States v. Martin, 773 F.2d 579, 583 (4th Cir. 1985) (attorney was agent of defendant where he dealt with IRS auditors as defendant's representative). The government intends to introduce statements of the defendant made by an agent, including statements made by Michael Barrett to outside accountants, statements made by Brian Rayment to third-parties in his capacity as the defendant's attorney, and statements made by nominees on behalf of the defendant.

N. Cross-Examination of Defendant

A defendant who testifies at trial waives his right against self-incrimination and subjects himself to cross-examination concerning all matters reasonably related to the subject matter of his testimony. The scope of defendant's waiver is coextensive with the scope of relevant cross-examination. United States v. Cuozzo, 962 F.2d 945, 948 (9th Cir. 1992); Black, 767 F.2d at 1341 ("[w]hat the defendant actually discusses on direct does not determine the extent of permissible cross-examination or his waiver. Rather, the inquiry is whether 'the government's questions are reasonably related' to

the subjects covered by the defendant's testimony"). A defendant has no right to avoid cross examination on matters which call into question his claim of innocence. United States v. Mehrmanesh, 682 F.2d 1303, 1309–10 (9th Cir. 1982); United States v. Miranda-Uriarte, 649 F.2d 1345, 1353-54 (9th Cir. 1981). Additionally, Rule 404(b) does not proscribe the use of other act evidence as an impeachment tool during cross-examination. United States v. Gay, 967 F.2d 322 (9th Cir. 1992).

O. Defendant's Character Witnesses

Should defendant present character witnesses, the government is entitled to cross-examine those witnesses about specific instances of conduct, that is, conduct involving past crimes and or wrongful acts. Fed. R. Evid. 608(b); Michelson v. United States, 335 U.S. 469, 477 (1948)(character witnesses can be cross-examined about other acts even if those acts did not result in convictions); United States v. Scholl, 166 F.3d 964, 974–75 (9th Cir. 1999); United States v. Jackson, 882 F.2d 1444, 1445 (9th Cir. 1989) (cross-examination of misappropriation of client funds 14 years earlier deemed probative of character for truthfulness); Fed. R. Evid. 405.

However, as a general rule, character witnesses called by the defendant may not testify about specific acts demonstrating a particular trait or other information acquired only by personal observation and interaction with the defendant; the witness must summarize the reputation of the defendant as known in the community. Michelson, 335 U.S. at 477. The court has discretion to limit the number of character witnesses. Id. at 480.

P. The Scope of Cross Examination

The government believes that a sharp focus on the issues raised in each phase of the trial will result in a more streamlined and comprehensible presentation. This approach is consistent with Federal Rule of Evidence 611(b), which states: "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of

discretion, permit inquiry into additional matters as if on direct examination." Rigorous application of Rule 611(b) also is particularly warranted in this case because most of the witnesses are local and have some affiliation with both the government and the defendant.

Q. Impeachment and Examination of Government Witnesses

Some of the witnesses that the government intends to call in its case-in-chief have closer ties to the defendant than they do to the government (e.g., the defendant's employees, former employees, attorney and accountant). Accordingly, it may develop that the examination of these witnesses is more akin to cross-examination than the direct examination of a friendly witness. Federal Rule of Evidence 607 states that the credibility of a witness may be attacked by any party, including the party calling the witness. In questioning credibility, questions regarding bias are never collateral and are not subject to the restrictions contained in Federal Rule of Evidence 608. United States v. Abel, 469 U.S. 45 (1984) (gang membership relevant to prove bias). Federal Rule of Evidence 611(c) permits leading questions on direct examination if the witness is hostile, an adverse party, or identified with an adverse party.

R. Reciprocal Discovery

Beginning in late June, early July 2009, the defendant for the first time produced reciprocal discovery, to which the government is entitled under Rules 16(b) and 26.2 of the Federal Rules of Criminal Procedure or pursuant to the Court's Trial Order. To the extent the defendant may attempt to introduce or use any documents at trial that he has not produced, the government reserves the right to object and to seek to have such documents precluded. Additionally, the defendant first provided the government with its notice of an intent to call an expert witness on July 17, 2009, only after the government made Revenue Agent Beas available for an in person

interview.[5] Furthermore, the defendant has continued to provide the government with discovery, even after the Motions filing cutoff. On August 6, 2009, the defendant notified the government that it may call another expert, but that it would let us know.

S. Evidence Related to Defenses

The defendant has not given notice of any intent to rely on an alibi defense, an insanity defense, or a defense regarding mental condition, as required by the Federal Rules of Criminal Procedure or this Court's Trial Order. Fed. R. Crim. P. 12.1, 12.2. Therefore, defendant should be precluded from presenting evidence of any such defenses. United States v. Barron, 575 F.2d 752, 756 (9th Cir. 1978) (holding that alibi witnesses not timely disclosed were properly excluded at trial).

1. Reliance

It is well-established that a defendant waives the attorney-client privilege once the defendant asserts a reliance upon advice of counsel defense. See United States v. Mendelsohn, 896 F.2d 1183, 1188–89 (9th Cir. 1990) (maintaining that a client's disclosure of advice he received from his lawyer waived his right to assert the attorney-client privilege to later prevent his lawyer from testifying as a witness for the government as to the actual advice given); Nguyen v. Excel Corp., 197 F.3d 200 (5th Cir. 1999). Specifically, courts have held that a waiver may be implied in circumstances where it is called for in the interests of fairness. "[F]airness considerations arise when the party attempts to use the privilege both as 'a shield and a sword.'" In re Grand Jury Proceedings, 219 F.3d 175, 182 (2d Cir. 2000) (quoting United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir.), cert. denied, 502 U.S. 813 (1991). "The quintessential example is the defendant who asserts an advice-of-counsel defense and is thereby deemed to have waived his [attorney-client] privilege

[5] The government would note that the individual who the defendant has noticed as their expert witness, Darrell Hallett, was present at the interview with Revenue Agent Beas. At no time during that interview did the defense identify Mr. Hallett as their proposed expert witness.

with respect to the advice that he received." In re Grand Jury, 219 F.3d at 182–83 (internal quotation marks omitted). Or the holder of the privilege may "assert[ ] a claim that in fairness requires examination of protected communications." Bilzerian, 926 F.2d at 1292; see also United States v. Nobles, 422 U.S. 225, 239–40 (1975) (litigant may not both present the trial testimony of an investigator as to statements he obtained from witnesses and refuse, on the ground of work-product privilege, to produce relevant portions of the investigator's report for use in cross-examining him); United States v. Workman, 138 F.3d 1261, 1263 (8th Cir. 1998) (holding that defendant could not "selectively assert privilege to block the introduction of information harmful to his case after introducing other aspects of his conversations with [his attorney] for his own benefit"). "In other words, a party cannot partially disclose privileged communications or affirmatively rely on privileged communications to support its claim or defense and then shield the underlying communications from scrutiny by the opposing party." In re Grand Jury, 219 F.3d at 182 (emphasis added).

To hold to the contrary would allow the defendant to use the privilege as both a sword and a shield, something that courts have consistently decried as unfair. See United States v. Ortland, 109 F.3d 539, 543 (9th Cir. 1997); Chevron Corp. v. Penzoil Co., 974 F.2d 1156, 1162 (9th Cir. 1992); Bilzerian, 926 F.2d at 1292. Instead, when a defendant asserts advice of counsel, courts have repeatedly held that the opposing party is entitled to the information pertaining to that counsel's representation of the defendant. Specifically, here, the defendant "cannot invoke the attorney-client privilege to deny . . . [the government] access to the very information that . . . [it] must refute in order to demonstrate" that the defendant possessed the requisite mental state required to commit the crimes charged. Chevron, 974 F.2d at 1163.

2. Good Faith

When determining whether a defendant has acted willfully, the jury must apply

a subjective standard; thus a defendant asserting a good faith defense is not required to have been objectively reasonable in his misunderstanding of his legal duties or belief that he was in compliance with the law. Cheek, 498 U.S. at 202-03; United States v. Powell, 955 F.2d 1206, 1211-12 (9th Cir. 1992); United States v. Regan, 937 F.2d 823, 826 (2d Cir. 1991), amended by, 946 F.2d 188 (2d Cir. 1992); United States v. Whiteside, 810 F.2d 1306, 1311 (5th Cir. 1987). The jury must therefore focus its inquiry on the knowledge of the defendant, not on the knowledge of a reasonable person. The jury may, however, "consider the reasonableness of the defendant's asserted beliefs in determining whether the belief was honestly or genuinely held." United States v. Grunewald, 987 F.2d 531, 536 (8th Cir. 1993); United States v. Middleton, 246 F.3d 825, 837 (6th Cir. 2001).

In United States v. Powell, 955 F.2d 1206 (9th Cir. 1992), the Court held that"[t]he premise of Cheek is that a person cannot be convicted of willful failure to file a tax return if he subjectively believes in good faith that the tax laws do not apply to him. The test does not focus on the knowledge of the reasonable person, but rather on the knowledge of the defendant. As the Supreme Court explained: "In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable.'" Id. at 1211, citing, Cheek, 498 U.S. at 202.

3. Criminal Prosecution is Inappropriate when the Law is Vague or Highly Debatable

"It is not the purpose of the [criminal tax] law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care." United States v. Bishop, 412 U.S. 346, 360-61 (1973) (quoting Spies, 317 U.S. at 496. In highly unusual cases, criminal willfulness is difficult or impossible to establish. "It

is settled that when the law is vague or highly debatable, a defendant...lacks the requisite intent to violate it." United States v. Critzer, 498 F.2d 1160, 1162 (4th Cir. 1974)(reversing conviction for failure to report income from business on Indian reservation). See also United States v. Harris, 942 F.2d 1125 (7th Cir. 1991)(payments from wealthy widower to twin sister mistresses properly gifts, not income); United States v. Dahlstrom, 713 F.2d 1423, 1428 (9th Cir. 1983)(legality of tax shelters was "completely unsettled"), cert. denied 466 U.S. 980 (1984); United States v. Garber, 607 F.2d 92 (5th Cir. 1979)(taxability of sale of rare blood when no court or agency had issued opinion as to taxability); but see United States v. Burton, 737 F.2d 439, 444 (5th Cir. 1984)(describing Garber as being based on "unique, indeed near bizarre, facts"); United States v. Curtis, 782 F.2d 593, 599-600 (6th Cir, 1986)(rejecting Garber's holding that uncertainty in the law negates willfulness). See also United States v. Vreeken, 803 F.2d 1085 (10th Cir. 1986)(distinguishing Garber in Utah prosecution for aiding and assisting the preparation of false income tax returns).

Care should be taken to distinguish the average criminal tax case from a case such as Garber, which was based on "unique, indeed near bizarre, facts." Burton, 737 F.2d at 444; see also United States v. Daly, 756 F.2d 1076, 1083-84 (5th Cir. 1985). In Burton, the Fifth Circuit explained and limited its opinion in Garber. The court stated that "apart from those few cases where the legal duty pointed to is so uncertain as to approach the level of vagueness, the abstract question of legal uncertainty of which a defendant was unaware is of marginal relevance," explaining that "[e]vidence of legal uncertainty, except as it relates to defendant's effort to show the source of his state of mind, need not be received, at least where . . . the claimed uncertainty does not approach vagueness and is neither widely recognized nor related to a novel or unusual application of the law." 737 F.2d at 444. And, in Curtis,, the Sixth Circuit rejected Garber on the following grounds: (1) Garber allows juries to find that

uncertainty in the law negates willfulness even if the defendant was unaware of the uncertainty; (2) it distorts the expert's role and intrudes upon the judge's duty to inform the jury about the law; and, (3) it requires the jury to assume the judge's "responsibility to rule on questions of law." 782 F.2d at 598-600.

In those few courts that have recognized uncertainty in the law as a potential defense, the court looks to see whether the law clearly prohibited the defendant's alleged conduct. See United States v. Solomon, 825 F.2d 1292, 1297 (9th Cir. 1987) (explaining that application of decision in Dahlstrom, 713 F.2d at 1428, is limited to mere advocacy of tax shelter program). In Dahlstrom, the court reversed the convictions of the defendants, who had advocated the creation of tax shelters to investors, because the legality of the shelters was "completely unsettled." 713 F.2d at 1423, 1425, 1428. Taxpayers have fair notice of a scheme's illegality if it is clear that it is illegal under established principles of tax law, regardless of whether an appellate court has so ruled. See United States v. Krall, 835 F.2d 711, 714 (8th Cir. 1987). Compare United States v. Mallas, 762 F.2d 361, 361-365 (4th Cir. 1985) (coal mining tax shelter providing deductions of advance minimum royalty payments raised novel questions of tax law so vague that defendant lacked requisite specific intent) with Krall, 835 F.2d at 711, 713, 714 ("[a]lthough precise 'foreign trust' arrangement used by Krall had not yet been declared illegal, there is no doubt the scheme violated well-established principles of tax law"; thus defendant could not claim that his conviction violated due process); United States v. Tranakos, 911 F.2d 1422, 1431 (10th Cir. 1990) (illegality of sham transactions to avoid tax liabilities is well-settled); United States v. Schulman, 817 F.2d 1355, 1359-60 (9th Cir. 1987) (tax shelters based on sham transactions clearly illegal); and United States v. Crooks, 804 F.2d 1441, 1449 (9th Cir. 1986) ("The doctrine of substance versus form is well ensconced in tax law.")

The present prosecution does not involve an unsettled area of the law.

4. Jury Nullification

The Court should also preclude the defendants from presenting testimony, evidence, or argument regarding the jury's power of nullification, that is, to decide the case according to its own judgment and conscience, notwithstanding the law. In United States v. Trujillo, 714 F.2d 102, 105 (11th Cir. 1983), the court of appeals upheld the district court's refusal to allow defendant's attorney to argue jury nullification in his closing statement. The court explained its holding as follows: "[defendant's] jury nullification argument would have encouraged the jurors to ignore the court's instruction and apply the law at their own caprice." Id. at 106; see also Powell, 955 F.2d at 1206, 1213 (noting that Ninth Circuit "precedent indicates that the [defendants] are not entitled to jury nullification instructions").

VII. CONCLUSION

The government hereby seeks leave to file supplemental trial memoranda during the course of the trial as may be necessary.

Dated: August 6, 2009

Respectfully submitted,

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