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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

United States of America, Plaintiff, v. Janice Sue Taylor, Defendant.	No. CR-10-0400-PHX-DGC **GOVERNMENT'S TRIAL BRIEF**

The United States, through undersigned counsel, through undersigned counsel, submits the attached trial brief covering factual and legal issues that may arise during trial.

Respectfully submitted this 13th day of April, 2011.

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I. CHARGED OFFENSES.

This is a criminal tax evasion case. The indictment alleges, among other things, that Defendant evaded taxes from 2003 through 2006 by (1) failing to submit personal income tax returns; (2) failing to report income received through her real estate brokerage, National Landbank LLC; (3) using cash, cashier's checks, and nominee entities to hide her income and assets; (4) concealing her ownership interests in and profits from real estate transactions through the use of sham trusts; and (5) hindering the efforts of bank employees, IRS agents, and others to discover her true income and assets. For each tax year between 2003 and 2006, the indictment charges one count of tax evasion in violation of 26 U.S.C. § 7201 and one count of failure to file a return in violation of 26 U.S.C. § 7203.

A. Evasion of Assessment, 26 U.S.C. § 7201.

In order for Defendant to be found guilty of counts one through four, Evasion of Assessment, the United States must prove each of the following elements beyond a reasonable doubt:

1. The defendant owed more federal income tax for the calendar years 2003-2006 than was declared due on the defendant's income tax return for that calendar year;

2. The defendant knew that more federal income tax was owed than was declared due on the defendant's income tax return;

3. The defendant made an affirmative attempt to evade or defeat such additional tax; and

4. In attempting to evade or defeat such additional tax, the defendant acted willfully.

See Ninth Cir. Jury Instr. 9.37; *see also United States v. Carlson*, 235 F.3d 466, 470-71 (9th Cir. 2000).

Section 7201 proscribes a single crime—attempted evasion of tax—that can be committed in two distinct manners: (a) the willful attempt to evade or defeat the assessment of a tax, and (b) the willful attempt to evade or defeat the payment of a tax. *See United States v. Mal*, 942 F.2d 682, 686-88 (9th Cir. 1991); *but see Sansone v. United States*, 380 U.S. 343, 354 (1965); *United States v. Hogan*, 861 F.2d 312, 315 (1st Cir.1988). A defendant attempting to evade

assessment generally attempts to prevent the government from determining the true tax liability. *See United States v. Mal*, 942 F.2d at 687. A defendant attempting to evade payment generally seeks to evade the payment of the true tax liability by hiding assets from the government. *See United States v. Hogan*, 861 F.2d at 315; *United States v. Dack*, 747 F.2d 1172, 1174 (7th Cir. 1984). Here, the United States has charged that Defendant is evading the assessment of her taxes.

B. Failure to File Return, 26 U.S.C. § 7203.

In order for the defendant to be found guilty of counts five through eight, the United States must prove each of the following elements beyond a reasonable doubt:

1. The defendant was required to file a return for the calendar years 2003 through 2006;

2. The defendant failed to file an income tax return by April 15 of the charged calendar year, as required by Title 26 of the United States Code; and

3. In failing to do so, the defendant acted willfully.

See Ninth Cir. Jury Instr. 9-38.

II. ANTICIPATED TRIAL EVIDENCE.

Some of the proof—especially the proof for counts five through eight, Failure to File Return—will be relatively straightforward. For example, the income level that triggers the requirement to file a tax return is statutory, and the IRS records show that Defendant did not file a tax return by the April deadline. An IRS witness will be available to testify to these matters. This trial brief will therefore only discuss the three areas in which the evidence may be contested: the existence of a tax loss, affirmative acts of evasion, and willfulness.

A. Tax Loss For 2003 Through 2006.

To prove counts one through four, Evasion of Assessment, the United States must show a tax deficiency. A deficiency is the amount by which the tax imposed by statute exceeds the sum of (1) the amount of tax shown on the return, (2) plus the amount of any previously assessed deficiency, (3) minus any rebate previously received. 26 U.S.C. § 6211; *United States v. Bishop*, 264 F.3d 535 (5th Cir. 2001). The deficiency does not need to be "substantial." *United States v. Marashi*, 913 F.2d 724, 735 (9th Cir. 1990).

Here, the United States will prove a tax deficiency through a summary witness, IRS Revenue Agent Cheryl Bradley. The United States has already notified Defendant that it intends to present Agent Bradley as an expert and summary witness to testify about 1) Defendant's income during the prosecution years and the federal income tax consequences thereof, 2) the sham or nominee nature of the various trusts and other entities created by or related to Defendant, and 3) the flow of funds between the various entities and third parties. The discovery contains draft charts and summaries regarding these matters.

The Fifth Circuit specifically approved the use of such testimony at trial where an IRS agent "merely stated his opinion as an accountant [regarding the tax consequences of a transaction], and did not attempt to assume the role of the court." *United States v. Fogg*, 652 F.2d 551, 556-57 (5th Cir. 1981); *see also United States v. Schafer*, 580 F.2d 774, 778 (5th Cir. 1978); *United States v. Milton*, 555 F.2d 1198, 1204 (5th Cir. 1977). This practice was cited with approval by the Eleventh Circuit in *United States v. Gold*, 743 F.2d 800, 817 (11th Cir. 1984).

The specialized knowledge of the revenue agent means her testimony "can be extremely valuable and probative." *United States v. Duncan*, 42 F.3d 97 (2nd Cir. 1994); *see also United States v. Barnette*, 800 F.2d 1558, 1568-69 (11th Cir. 1986) (IRS expert auditor and accountant properly permitted to give his opinion of the "income tax implications" as applied to the defendant); *United States v. Mohney*, 949 F.2d 1397, 1406-07 (6th Cir. 1991) (IRS agent's expert testimony was critical as it created framework for the jury to properly understand the testimony of other witnesses). Thus, it is well established that "expert testimony by an IRS agent which expresses an opinion as to the proper tax consequences of a transaction is admissible evidence." *United States v. Windfelder*, 790 F.2d 576, 581 (7th Cir. 1986); *see also United States v. Townsend*, 31 F.3d 262, 270 (5th Cir. 1994); *United States v. Sabino*, 274 F.3d 1053, 1067 (6th Cir. 2001), amended on other grounds, 307 F.3d 446 (2002).

The principal limitation on this type of testimony is that the agent may not testify about the defendant's state of mind as to the transactions. *United States v. Mikutowicz*, 365 F.3d 65 (1st

Cir. 2004); *see also* Fed. R. Evid. 704(b) (expert may not testify to mental state of defendant where mental state is element of charged offense); *Sabino*, 274 F.3d at 1067 ("In a tax case, the summary witness is allowed to summarize and analyze the facts indicating willful tax evasion so long as the witness does not directly embrace the ultimate question of whether the defendant did in fact intend to evade income taxes." (internal quotations and citations omitted)). The United States certainly does not intend to have the revenue agent's testimony reach the issue of Defendant's mental state.

Because a summary witness's testimony is based on evidence admitted at trial, her presence in the courtroom throughout trial is permitted even when other witnesses are sequestered. *See* Fed. R. Evid. 615(2-3); *see also United States v. Lussier*, 929 F.2d 25, 30 (1st Cir. 1991; *United States v. Kosko*, 870 F.2d 162, 164 (4th Cir. 1989). Her presence would be in addition to the presence of a case agent, whose presence is permitted as a representative of the government under Rule 615(2). Fed. R. Evid. 615(2); *In re United States*, 584 F.2d 666, 667 (5th Cir. 1978) (granting petition for writ of mandamus to overturn district court's ruling excluding from the courtroom a federal agent who had been involved in preparation of the case). Agent Bradley is also a fact witness, in that she also conducted an audit of Defendant for tax years prior to those charged in the Indictment. The government requests that the Court permit Agent Bradley to remain in the courtroom during the course of trial so that she can discuss the tax consequences of any unanticipated trial evidence. In the alternative, the government requests that Agent Bradley be permitted to remain in the courtroom after she has testified as a fact witness and then be recalled in her role as expert witness.

B. Affirmative Acts of Evasion.

Counts one through four, Evasion of Assessment, also require proof of some affirmative conduct for the purpose of misleading the IRS or concealing tax liability or assets. There are any number of ways in which a taxpayer can attempt to evade or defeat taxes or the payment thereof, and Section 7201 expressly says "attempts in any manner" to evade or defeat any tax or the payment thereof. A common method used to attempt to evade or defeat assessment of a tax is

the filing of a false tax return that understates tax liability, either by omitting income, claiming deductions to which the taxpayer is not entitled, or both.

The means by which defendants can attempt to evade are virtually unlimited. As noted above, Section 7201 expressly prohibits attempts to evade tax "in any manner." In order to violate Section 7201, the taxpayer generally must take some affirmative action with an intent to evade tax. The general rule is that omissions to act will not satisfy the affirmative act requirement. For example, a mere failure to file a return, standing alone, cannot constitute an attempt to evade taxes. *See Spies v. United States*, 317 U.S. 492, 499 (1943); *United States v. Nelson*, 791 F.2d 336, 338 (5th Cir. 1986).

Generally, for tax evasion purposes, "any conduct, the likely effect of which would be to mislead or to conceal" constitutes an affirmative attempt to evade tax. *Spies*, 317 U.S. at 499; *see, e.g., United States v. Bishop*, 264 F.3d 535, 545 (5th Cir. 2001). Even an activity that would otherwise be legal can constitute an affirmative act supporting a Section 7201 conviction, so long as the defendant commits the act with the intent to evade tax. *See United States v. Voigt*, 89 F.3d 1050, 1090 (3d Cir. 1996); *United States v. Jungles*, 903 F.2d 468, 474 (7th Cir. 1990) (taxpayer's entry into an "independent contractor agreement," although a legal activity in and of itself, satisfied "affirmative act" element of Section 7201); *United States v. Conley*, 826 F.2d 551, 556-57 (7th Cir. 1987) (use of nominees and cash with intent to evade payment of taxes).

The government "need not prove each affirmative act alleged." *United States v. Mackey*, 571 F.2d 376, 387 (7th Cir. 1978); *Conley*, 826 F.2d at 558-59; *cf. United States v. Miller*, 471 U.S. 130, 145 (1985) (government's proof of only one of two fraudulent acts alleged in mail fraud indictment was not fatal variance since indictment would still make out crime of mail fraud even without the second alleged act); *Turner v. United States*, 396 U.S. 398, 420 (1970) ("[W]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged").

Although filing a false return is a common method of attempting to evade the assessment of a tax, the requirement of an affirmative attempt to evade can be met by proof of any affirmative act undertaken with a tax evasion motive. The Supreme Court "by way of illustration, and not by way of limitation," set out examples of what can constitute an "affirmative willful attempt" to evade, in *Spies v. United States*, 317 U.S. 492, 499 (1943):

> keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal.

Failing to file a return, coupled with an affirmative act of evasion and a tax due and owing, has come to be known as *Spies*-evasion.

The courts of appeals have recognized that various types of affirmative conduct can constitute affirmative attempts to evade tax. *See, e.g.*, *United States v. Beall*, 970 F.2d 343, 346-47 (7th Cir. 1992) (using a warehouse bank and instructing an employer to pay one's income to a warehouse bank constitutes an affirmative act of evasion); *United States v. Carlson*, 235 F.3d 466, 469 (9th Cir. 2000) (opening and using bank accounts with false social security numbers and incorrect dates and places of birth could easily have misled or concealed information from the IRS); *United States v. Valenti*, 121 F.3d 327, 333 (7th Cir. 1997) (use of cash, not keeping business records, paying employees in cash and not reporting their wages to the IRS, advising employees they did not have to pay taxes)*; United States v. Jungles*, 903 F.2d 468, 472- 74 (7th Cir. 1990) (employee's use of "independent contractor" agreement to eliminate withholding and warehouse bank to evade income tax were affirmative acts).

C. Willfulness.

Finally, all eight counts require proof that Defendant acted willfully. The term "willfully" as used in the context of a criminal tax prosecution means an intentional violation of a known legal duty. *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *see also* Ninth Cir. Jury Instr. 9.42 ("In order to prove that the defendant acted 'willfully,' the government must prove beyond

a reasonable doubt that the defendant knew federal tax law imposed a duty on [him] [her], and the defendant intentionally and voluntarily violated that duty."). Therefore, in order to establish willfulness, the government must establish that the defendant was aware of his or her obligations under the tax laws. *See United States v. Conforte*, 624 F.2d 869, 875 (9th Cir. 1980). Because the government has the burden of proving willfulness, such evidence may be introduced before the defendants have asserted a defense. *See United States v Hogan*, 861 F.2d 312, 316 (1st Cir. 1988) (explaining that in a tax evasion case, evidence of defendant's state of mind need not wait until the defendant has testified). In determining whether a defendant acted willfully, the jury is "free to consider any admissible evidence from any source showing that [the defendant] was aware of his duty . . . ." *Cheek v. United States*, 498 U.S. 192, 202 (1991). [1/] Willfulness is rarely subject to direct proof and must generally be inferred from the defendant's acts or conduct. *See United States v. Marchini*, 797 F.2d 759, 766 (9th Cir. 1986); *United States v. Marabelles*, 724 F.2d 1374, 1379 (9th Cir. 1984). Once the evidence establishes that a tax evasion motive played any role in a taxpayer's conduct, willfulness can be inferred from that conduct, even if the conduct also served another purpose, such as concealment of another crime or concealment of assets from, for example, one's spouse, employer, or creditors. *See Spies v. United States*, 317 U.S. 492, 499 (1943)*; United States v. DeTar*, 832 F.2d 1110, 1114 n.3 (9th Cir. 1987).

As stated earlier in this memorandum, the Supreme Court in *Spies v. United States*, provides examples "[b]y way of illustration, and not by way of limitation," of conduct from which an "affirmative willful attempt" may be inferred. *See* 317 U.S. at 499. Other evidence of willfulness includes:

[1/] The Second Circuit has declared that "trial courts should follow a liberal policy in admitting evidence directed towards establishing the defendant's state of mind. No evidence which bears on this issue should be excluded unless it interjects tangential and confusing elements which clearly outweigh its relevance." *United States v. Collorafi*, 876 F.2d 303, 305 (2nd Cir. 1989).

- Use of nominees, i.e., placing property or a business in the name of another, *United States v. Woodner*, 317 F.2d 649, 651 (2d Cir. 1963); *United States v. Daniel*, 956 F.2d 540 (6th Cir. 1992); *United States v. Peterson*, 338 F.2d 595, 597 (7th Cir. 1964); *Banks v. United States*, 204 F.2d 666, 672 (8th Cir. 1953).
- Business experience, *see United States v. Smith*, 890 F.2d 711, 715 (5th Cir. 1989) (defendant's experience as an entrepreneur pointed to willfulness rather than honest error); *United States v. Mohney*, 949 F.2d 1397 (6th Cir. 1991) (active role in business operations relevant); *United States v. Segal*, 867 F.2d 1173, 1179 (8th Cir. 1989) (defendant was a successful and sophisticated businessman).
- Defendant's attitude toward the IRS, *see Hogan*, 861 F.2d at 316.
- Defendant's personal philosophy and activity as a tax protestor, *United States v. Turano*, 802 F.2d 10, 12 (1st Cir. 1986); *United States v. Reed*, 670 F.2d 622, 623 (5th Cir. 1982); *see also United States v Brown*, 591 F.2d 307, 311 (5th Cir. 1979); *United States v. Booher*, 641 F.2d 218 (5th Cir. 1981); *United States v. Grosshans*, 821 F.2d 1247, 1253 (6th Cir. 1987) (use of tax protest materials in correspondence with IRS may be considered when determining willfulness); *United States v. Upton*, 799 F.2d 432, 434 (8th Cir. 1986) (finding that evidence of submission of tax protest material to IRS is probative of willfulness).
- Background and experience of defendant. General educational background and experience of defendant can be considered as bearing on defendant's ability to form willful intent. *United States v. Guidry*, 199 F.3d 1150, 1157-58 (10th Cir.1999) (willfulness inferred from defendant's expertise in accounting via her business degree and her work experience as comptroller of a company); *United States v. Klausner*, 80 F.3d 55, 63 (2d Cir. 1996) (defendant's background as a CPA and extensive business experience including that as a professional tax preparer); *United States v. Smith*, 890 F.2d 711, 715 (5th Cir. 1989) (defendant's background as an entrepreneur probative of willfulness); *United States v. Segal*,

867 F.2d 1173, 1179 (8th Cir. 1989) (defendant was a successful and sophisticated businessman); *United States v. Rischard*, 471 F.2d 105, 108 (8th Cir. 1973); *see also United States v. Diamond*, 788 F.2d 1025, 1026, 1230 (4th Cir. 1986); *United States v. MacKenzie*, 777 F.2d 811, 818 (2d Cir. 1985) (willfulness inferred from the fact that each defendant had a college degree, one in economics and the other in business).

- Pattern of filing tax returns followed by failure to file, *see United States v. Middleton*, 246 F.3d 825, 836-37 (6th Cir. 2001); *United States v. Fingado*, 934 F.2d 1163, 1168 (10th Cir. 1991); *see also United States v. Barnett*, 945 F.2d 1296, 1299 (5th Cir. 1991) (quoting district court instruction permitting jury to consider pattern of non-filing).
- Notice from the IRS to file correct tax returns, pay taxes, stop advancing frivolous positions, etc., *see United States v. Middleton*, 246 F.3d 825, 836-37 (6th Cir. 2001); *United States v. Wade*, 585 F.2d 573, 574 (5th Cir. 1978) (opining that prior filing of returns, coupled with notice from the IRS of potential criminal sanctions for failing to file proper return, supported a finding that the defendant "knew the law required him to file returns and that he intentionally failed to file without justifiable excuse"). [2/]
- Hiding, destroying, throwing away, or "losing" books and records. *United States v. Bishop*, 264 F.3d 535, 550 (5th Cir. 2001); *United States v. Chesson*, 933 F.2d 298, 304-05 (5th Cir. 1991) (taxpayers condoned the alteration and destruction of invoices after undergoing a civil audit for underreporting income); *United States*

[2/] The Court may need to issue a limiting instruction following the introduction of evidence showing notice from the IRS to the defendants to make clear that the only purpose for which the jury may consider it is on the issue of the defendant's state of mind. *See Worsham v. A.H. Robins Co.*, 734 F.2d 676 (11th Cir. 1984) (upholding trial court's admission of prior adverse reaction reports because the reports went to the issue of notice and were properly admitted into evidence as proof of the defendant's state of mind and, therefore, did not constitute hearsay).

v. Holovachka, 314 F.2d 345, 357-58 (7th Cir. 1963); *Gariepy v. United States*, 189 F.2d 459, 463 (6th Cir. 1951); *see also United States v. Walker*, 896 F.2d 295, 300 (8th Cir. 1990) (taxpayers hid assets "in an attempt to conceal them from the IRS").

- Spending large amounts of cash which could not be reconciled with the amount of income reported, *United States v. Bishop*, 264 F.3d 535, 550 (5th Cir. 2001); *United States v. Simonelli*, 237 F.3d 19, 30 (1st Cir. 2001); *United States v. Olbres*, 61 F.3d 967, 971 (1st Cir. 1995); *United States v. Kim*, 884 F.2d 189, 192 (5th Cir. 1989), or engaging in surreptitious cash transactions, *United States v. Skalicky*, 615 F.2d 1117, 1120 (5th Cir. 1980); *see also United States v. Holladay*, 566 F.2d 1018, 1020 (5th Cir. 1978); *United States v. Mortimer*, 343 F.2d 500, 503 (7th Cir. 1965) (purchasing money orders).
- Use of bank accounts held under fictitious names. *United States v. Ratner*, 464 F.2d 101, 105 (9th Cir. 1972); *Elwert v. United States*, 231 F.2d 928, 935-36 (9th Cir. 1956); *cf. United States v. White*, 417 F.2d 89, 92 (2d Cir. 1969) (separate personal bank account into which large amounts of cash from unidentified sources was deposited properly offered as evidence of willfulness).

III. ANTICIPATED EVIDENTIARY ISSUES.

A. Admissibility of Documentary Evidence.

The United States intends to introduce documentary evidence at trial, including IRS records, bank records, paperwork relating to real estate transactions obtained from escrow offices, and business records related to the sham trusts and other entities used by Defendant to evade taxes.

1. Authentication.

Documentary evidence must be authentic, which means the proponent must provide "evidence sufficient to support a finding that the matter in question is what its proponent

claims." Fed. R. Evid. 901(a); *see also United States v. Tank*, 200 F.3d 627, 630 (9th Cir. 2000). Many of the records the United States intends to introduce will be certified records, which are self-authenticating under Federal Rule of Evidence 902. Authenticity of a document may also be shown by circumstantial evidence. *See United States v. Pang*, 362 F.3d. 1187, 1193 (9th Cir. 2004). The sufficiency of the showing of authenticity of a document is a matter within the sound discretion of the trial judge. *United States v. King*, 472 F.2d 1, 7 (9th Cir. 1973).

2. IRS Records.

The United States intends to offer numerous tax documents into evidence. The United States will offer documents obtained from the IRS through one or more witnesses and/or certifications. These documents will include: (1) income tax returns, which are admissible under Fed. R. Evid. 803(8), and 902, and 26 U.S.C. § 6064; and (2) transcripts and certificates of assessments and payments, which are admissible under Federal Rule of Evidence 803(8) and 902. *See United States v. Blackwood*, 878 F.2d 1200, 1202 (9th Cir. 1989) (tax returns are public records); *Hughes v. United States*, 953 F.2d 531, 539-40 (9th Cir. 1992) (certificates of assessments and payments admissible as public records). The United States also has IRS certificates to show the non-existence of records—for example, the defendants' failure to file income tax returns for particular years. In *Melendez-Diaz v. Massachusetts*, however, the Supreme Court questioned the admissibility of such certificates, so the United States intends to present live testimony from an IRS witness to show the non-existence of IRS records instead. *See* 129 S. Ct. 2527, 2539 & n.9 (2009).

3. Business Records.

Federal Rule of Evidence 803(6) specifically provides a hearsay exception for business records:

> (6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11),

> Rule 902(12), or a statute permitting certification unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

"The district court has wide discretion to determine whether a business record meets the trustworthiness standard of the business records exception to the rule against hearsay." *United States v. Fuchs*, 218 F.3d 957, 965 (9th Cir. 2000).

As the Ninth Circuit explained in *United States v. Licavoli*, the business records exception is based on the idea that records created and relied upon by businesses are inherently reliable:

> The focus of the business records exception to the hearsay rule is on the requirements that the record be made in the course of and as a regular practice of a regularly conducted business activity. There are circumstantial guarantees of trustworthiness in a record contemporaneously prepared by one who acts under a business duty of care accuracy, particularly when the business entity for which the record is made relies on it.

United States v. Licavoli, 604 F.2d 613, 622 (9th Cir. 1979) (citations omitted); *see also United States v. Scholl*, 166 F.3d 964, 978 (9th Cir. 1994) (quoting *Licavoli*). To the extent the records do contain inaccuracies, ambiguities, or omissions, they affect the weight but not the admissibility. *Scholl*, 166 F.3d at 978; *see also Miller v. Fairchild Indus.*, 885 F.2d 498, 514 (9th Cir. 1989) ("[O]bjections, relating to the identity or competency of the actual preparer, may [be] relevant to the evidentiary weight or credibility of the documents, but [do] not [affect] their admissibility.") (alterations in original).

"[T]here is no requirement that the records be created by the business having custody of them." *United States v. Duncan*, 919 F.2d 981, 986 (5th Cir. 1990) (holding that medical records obtained from hospitals and then maintained by insurance company were properly admitted as business records of insurance company). Documents relied upon and kept in the regular course of business are admissible as business records, even if another entity created the records. *See United States v. Childs*, 5 F.3d 1328, 1333 (9th Cir. 1993) (holding that documents maintained by auto dealer but created by others, such as title certificates and purchase orders, were properly admitted as business records).

In offering a document as a business record, the United States is not required to prove who created the document or precisely when it was made. *See United States v. Ray*, 930 F.2d 1368, 1370 (9th Cir. 1990). Nor is the United States required to show that the testifying witness personally generated the document or verified the underlying information. *Id.* The term "qualified witness," as used in Rule 803(6), is construed broadly, and can be anyone who understands the record-keeping system. *Id*. A government agent may provide a foundation where the agent is familiar with the record-keeping system. *See United States v. Franco*, 874 F.2d 1136, 1140 (7th Cir. 1989); *United States v. Hathaway*, 798 F.2d 902, 906 (6th Cir. 1986). Furthermore, under the Federal Rule of Evidence 1003, a duplicate, such as a photocopy, has the same status as an original unless (1) there is a genuine question as to the authenticity of the original, or (2) it would be unfair to admit the duplicate in lieu of the original.

B. Defendant's Prior Statements And Writings Are Admissible If Offered By The United States, But Not If Offered By Defendant.

A statement offered against a party that is "the party's own statement, in either an individual or a representative capacity," is not hearsay. *See* Fed. R. Evid. 801(d)(2)(A). That is only the case, however, if the United States—the opposing party—offers the statements into evidence. Defendant cannot offer her own statements into evidence because they would be hearsay and would not fall within any of the exceptions to the hearsay rule. *See* Fed. R. Evid. 801; *United States v. Dorrell*, 758 F.2d 427, 434 (9th Cir. 1985); *United States v. Jackson*, 780 F.2d 1305, 1314-16 (7th Cir. 1986).

The United States also intends to introduce some of Defendant's statements to Revenue Agent Cheryl Bradley during a February 12, 2004, civil examination. Defendant has already been provided a transcript of the interview, which is numbered 398-435 in discovery. Defendant gave misleading and evasive answers to Ms. Bradley's questions before ultimately stating that she was "taking the 5th." This was a non-custodial interview and Defendant was not compelled to answer any questions, so the Fifth Amendment privilege against self-incrimination is inapplicable. *See, e.g., Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985) ("The Fifth Amendment

prohibits use by the prosecution in its case in chief only of *compelled* testimony."). Nevertheless, the United States only intends to introduce Defendant's misleading statements, evasive responses, and affirmative refusals to provide information, and does not intend to introduce Defendant's attempted invocation of the Fifth Amendment privilege. This does not violate the privilege against self-incrimination. *See United States v. Davenport*, 929 F.2d 1169, 1174-75 (7th Cir. 1991) (Posner, J.) (holding that admission of evasive statements and refusals to answer certain questions from IRS criminal investigator did not violate privilege against self-incrimination); *United States v. Harrold*, 796 F.2d 1275, 1279 (10th Cir. 1986) (stating that comment on silence in the face of questioning from IRS civil investigator did not violate privilege because "a comment on a defendant's silence is error only when the defendant remained silent in reliance on government action, *i.e.*, a *Miranda* warning"); *see also United States v. Thompson*, 82 F.3d 849, 855 (9th Cir. 1996) (expressing no opinion on admissibility of pre-arrest, pre-*Miranda* silence in the face of law enforcement questioning but finding no plain error in light of circuit split).

C. Tax Protester Arguments and Tax Protestor Materials.

The United States expects that during the course of this trial, Defendant may seek to testify about, refer to, present evidence to show, or argue the following *misstatements* of established law:

- Individuals are not liable for income taxes;
- Wages are not income;
- The Sixteenth Amendment was not properly ratified;
- Filing income tax returns is voluntary;
- The defendant is not a "Person" or "Citizen" within the meaning of the Internal Revenue Code;
- Federal Income Tax laws are unconstitutional;
- State or Commonwealth Citizenship exempts a person from Federal Income Tax requirements; or

- A person is justified in not paying or filing taxes if he or she disagrees with government spending policies.

1. Evidence or Argument Relating To Interpretations Of Law Is Inadmissible Absent A Proper Foundation.

Generally, evidence or testimony about the law—including disputes about the constitutionality or meaning of the laws and regulations relating to income tax—is inadmissible. "The law is given to the jury by the court and not introduced as evidence . . . . Obviously, it would be most confusing to a jury to have legal material introduced as evidence and then argued as to what the law is or ought to be . . . . Juries only decide facts, to which they apply the law given to them by the judge." *United States v. Willie*, 941 F.2d 1384, 1396 (10th Cir. 1991) (quoting numerous cases, including *Cooley v. United States*, 501 F.2d 1249, 1253-54 (9th Cir. 1974)) (internal citations omitted). Moreover, "it is within the sole province of the court 'to determine the applicable law and to instruct the jury as to that law.'" *United States v. Hill*, 167 F.3d 1055, 1069 (6th Cir. 1999) (*quoting In re Air Crash Disaster*, 86 F.3d 498, 523 (6th Cir. 1996); *see also United States v. Mann*, 884 F.2d 532, 538 (10th Cir. 1989) ("It is the district court's peculiar province to instruct the jury on the law . . . .").

In a criminal tax case, however, certain legal materials may be admissible to show that a defendant did not understand the income tax laws and therefore did not act willfully:

> Although a district court may exclude evidence of what the law *is* or *should be*, it ordinarily cannot exclude evidence relevant to the jury's determination of what a defendant *thought the law was* in § 7203 cases because willfulness is an element of the offense. In § 7203 prosecutions, statutes or case law upon which the defendant claims to have *actually relied* are admissible to disprove that element if the defendant lays a proper foundation which demonstrates such reliance. Legal materials upon which the defendant does not claim to have relied, however, can be excluded as irrelevant and unnecessarily confusing because only the defendant's subjective belief is at issue: the court remains the jury's sole source of the law.

United States v. Powell, 955 F.2d 1206, 1214 (9th Cir. 1992) (citations omitted). As the Ninth Circuit explained in *Powell*, the exception only extends to evidence that the defendant actually relied on. A legal interpretation that the defendant was not exposed to prior to the offense has no relevance. *See United States v. Harris*, 942 F.2d 1125, 1132 n.6 (7th Cir. 1991) ("Case law

on which the defendant did not in fact rely is irrelevant because only the defendant's subjective belief is at issue."). Thus, Defendant may not present evidence about her interpretation of the law unless a proper foundation is laid, establishing that 1) the evidence was seen prior to the Defendant forming his or her views (as opposed to after the views were already formed), 2) an explanation of how such evidence helped form his or her views in order to prove such information was relied upon by the Defendant and was instrumental in forming his or her views, and 3) the evidence is not self-serving hearsay which the Defendant helped create in support of his or her already existing views.

This rule does not extend, however, to allegations that some or all of the tax code is unconstitutional or otherwise invalid. As the Supreme Court explained in *Cheek*, this evidence does not bear on the issue of willfulness, and therefore need not be heard by the jury:

> Claims that some of the provisions of the tax code are unconstitutional are submissions of a different order. They do not arise from innocent mistakes caused by the complexity of the Internal Revenue Code. Rather, they reveal full knowledge of the provisions at issue and a studied conclusion, however wrong, that those provisions are invalid and unenforceable.

Id. at 205. The constitutionality of the tax laws is to be litigated by taxpayers in other ways established by Congress. *Cheek*, 498 U.S. at 206; *see also United States v. Bonneau*, 970 F.2d 929, 931-32 (1st Cir. 1992) (trial judge's redaction of constitutionality arguments from defendant's exhibits did not unfairly prejudice the defense).

Furthermore, Defendant is not permitted to blur the line between factual evidence about her state of mind and the actual law. If Defendant interjects into the proceedings her disagreement with the law, the United States will seek a limiting instruction, such as the following instruction based on the Supreme Court decision in *Cheek*:

> A person's opinion or belief that the tax laws are invalid or violate her constitutional rights is not a defense to the crime charged in this case. Mere disagreement with the law does not constitute a good faith misunderstanding of the requirements of the law, because it is the duty of all persons to obey the law whether or not they agree with it. Any evidence that you have heard to the contrary in this regard is irrelevant and should be ignored.

See Cheek, 498 U.S. 192, 202-206.

2. Opinion Testimony From Lay Witnesses About Defendant's Beliefs Is Inadmissible.

Defendant may seek to introduce testimony of two types of lay witnesses: those who know Defendant personally, and those who share Defendant's views of the tax system. It is not permissible for witnesses of the first type to express opinions as to what Defendant purportedly believed, as this calls for speculation regarding the true contents of a defendant's mind. The issue of whether a defendant truly believed, albeit mistakenly, that he or she was not required to file tax returns or pay income taxes is an ultimate issue of fact for the jury alone to decide. *See United States v. Hauert*, 40 F.3d 197, 201-202 (7th Cir. 1994) ("by the nature of a tax protestor case, defendant's beliefs about the propriety of his filing returns and paying taxes, which are closely related to defendant's knowledge about tax laws and defendant's state of mind in protesting his taxpayer status, are ordinarily not a proper subject for lay witness opinion testimony absent careful groundwork and special circumstances . . . "); *United States v. Rea*, 958 F.2d 1206, 1216 (2d Cir. 1992) (witness testimony regarding a defendant's observations, what the defendant was told, and what the defendant said or did "will often not be 'helpful' within the meaning of Rule 701 because the jury will be in as good a position as the witness to draw the inference as to whether or not the defendant knew."); *United States v. Phillips*, 600 F.2d 535, 538-539 (5th Cir. 1979) (opinion of lay witness that defendant indicated he "understood" what he was doing gave no objective basis for jury to determine defendant's state of mind).

Witnesses of the second type should be precluded from testifying as to their own subjective beliefs as this is irrelevant to Defendant's subjective beliefs. Only the Defendant's subjective beliefs are at issue. The jury will not be asked to determine whether other individuals in good faith believed that Defendants' purported views are were held in good faith. This is not to say that the jury may not use its common sense in assessing the reasonableness of the 861 argument for the purpose of determining whether the Defendant actually believed what he purports to believe. *See Cheek v. United States*, 498 U.S. 192, 206 (1991).

3. Tax Protestor Materials Created By Defendant Are Inadmissible.

Materials created by a defendant are inadmissible as lacking evidentiary foundation and are self-serving hearsay. See Fed. R. Evid. 801(c); *see also United States v. Bond*, 87 F.3d 695, 699-700 (5th Cir. 1996) (defendant's self-recorded tape was self-serving hearsay and inadmissable); *United States v. Faust*, 850 F.2d 575, 586 (9th Cir. 1988) (defendant's letter was self-serving hearsay and inadmissible). In the instant case, Defendant may have purchased books from tax shysters who supplied them with form documents to send to the IRS. As such, these materials are self-serving hearsay and are not reliance materials as they were created in support of Defendant's already existing views. They also present an incorrect statement of the law to the jury which invades the province of the Court. Should Defendant testify, the documents remain hearsay and, moreover, are inferior to her own testimony. Regardless of whether a defendant testifies, admission of the documents into evidence would be unduly prejudicial, as they would contain incorrect interpretations of the law.

In addition to being self-serving hearsay, such materials do not address the issue of willfulness. "A normative belief that the law *should not* apply to him leaves [the defendant] fully aware of his legal obligations and simply amounts to a disagreement with his known legal duty and 'a studied conclusion . . . that [the law is] invalid and unenforceable.'" *Willie*, 941 F.2d at 1392. As such, documents created by the defendant are irrelevant.

4. Tax Protestor Materials Are More Prejudicial Than Probative.

Even if certain evidence is relevant, the Court may exclude the evidence if its "probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. Absent abuse of discretion, a district court's ruling under Rule 403 is final. *See United States v. Burton*, 737 F.2d 439, 443 (5th Cir. 1984).

Defendant may offer into evidence tax protestor material that includes current and obsolete case law, Internal Revenue Code sections, and corresponding regulations. These materials should be excluded as confusing to the jury and invasive of the Court's province.

United States v. Simkanin, 420 F.3d 397, 404 (5th Cir. 2005) ("[T]he district court must be permitted to prevent the defendant's alleged view of the law from confusing the jury as to the actual state of the law. . ."). Juries may not decide what the law is and should not be given the opportunity to do so. *Hill*, 167 F.3d at 1069. Admission of written copies of court opinions, statutes, and regulations amounts to legal instruction and only serves to confuse the jury as to the law and invites disagreement with the Court's final instructions. *See United States v. Flitcraft*, 803 F.2d 184, 186 (5th Cir. 1986) (holding that case law and other documents offered by the defendant as evidence of reliance were properly excluded as they suggested to the jury that the law was unsettled and that the jury should resolve the legal uncertainty); *see also Simkanin*, 420 F.3d at 412 (*quoting Flitcraft*). *But see United States v. Powell*, 955 F.2d 1206, 1214 (9th Cir. 1992) ("statutes or case law upon which the defendant claims to have *actually relied* are admissible to disprove that element if the defendant lays a proper foundation which demonstrates such reliance").

A defendant may, of course, testify as to how he or she interpreted a particular code section or regulation and how such interpretation formed his or her purported beliefs. A defendant may, in addition, read portions of "reliance materials" into the record, with proper foundation and a limiting instruction from the court.[3/] *See United States v. Gaumer*, 972 F.2d 723, 724-25 (6th Cir. 1992) (opining that defendant should be permitted to read relevant excerpts of reliance materials into the record). As with the official source material, however, it is not necessary for the Court to allow publication of legal authorities to the jury or offer them into evidence to rebut the government's evidence that he was willful. *See Simkanin*, 420 F.3d at 412

[3/] The danger of confusing the jury with excerpts of official legal source material quoted out of context is especially great, as the source itself is authoritative and the average juror will have no idea how to interpret the quoted language within the context of relevant case law, statutes, and underlying regulations. Moreover, if the Defendant were permitted to quote legal authorities in support of a legal argument, the government would be obliged to rebut the Defendant's misstatements of the law with other legal authority. To avoid confusing the jury and wasting time, the Court exclusively should provide legal instruction to the jury. If the Court is inclined to allow the Defendant to quote from official source materials, the government respectfully requests that the Court provide a limiting instruction or provide the jury with a correct statement of the law *vis a vis* the quoted excerpt.

(quoting *Flitcraft*, 803 F.2d at 185-86 (holding that introduction of cases and documents are cumulative in light of defendant's own testimony)); *see also United States v. Nash*, 175 F.3d 429, 436 (6th Cir. 1999) (affirming district courts refusal to physically admit certain reliance materials, where defendant was permitted to mention and quote from them); *Gaumer*, 972 F.2d at 725 (opining that trial court need not physically admit hundreds of pages of tax protest documents); *Willie*, 941 F.2d at 1395; *United States v. Hairston*, 819 F.2d 971, 973 (10th Cir. 1987) (holding that defendant's testimony, which included reading portions of tax protest materials, was more probative than the materials themselves). Moreover, although a jury may consider any evidence in determining whether the Defendant truly believed that what he or she was doing was legal, the court need not admit every piece of evidence the Defendant offers. *See Willie*, 941 F.2d at 1394-95.

5. Defendant May Not Solicit Legal Opinions On Cross-Examination.

Defendants' cross-examination must be limited to the facts of the case. Defendant should be prohibited from asking questions to fact witnesses as a method of confusing the jury as to the state of the law. *See United States v. Middleton*, 246 F.3d 825, 838 (6th Cir. 2001). Such questioning would also go beyond the scope of direct examination. Such prohibition should include questioning IRS employees about constitutional and legal interpretations of the law (which invades the province of the Court). The Court has the power to limit such confusing questions. *See Delaware v. Van Arsdall*, 475 U.S. 673, 679-80 (1986) (holding that the Confrontation Clause is not absolute and it is within a court's discretion to limit inappropriate questioning); *Kittelson v. Dretke*, 426 F.3d 306, 319 (5th Cir. 2005); *Norris v. Schotten*, 146 F.3d 314, 329 (6th Cir. 1998). "[A] defendant's views about the validity of the tax statutes are irrelevant to the issue of willfulness and need not be heard by the jury, and, if they are, an instruction to disregard them would be proper." *Cheek*, 498 U.S. at 206.

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IV. CONCLUSION.

The foregoing is a summary of some of the points that the Government anticipates are likely to arise at trial. Should any legal issues arise that are not covered in this trial brief, the Government respectfully requests leave to submit further memoranda as necessary to assist the court.

Respectfully submitted this 13th day of April, 2011.

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