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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

United States of America,

Plaintiff,

v.

James R. Parker,

Defendant.

CR 10-757–1-PHX-ROS

GOVERNMENT'S MOTION IN LIMINE REGARDING DEFENDANT'S ADVICE OF COUNSEL DEFENSE

I. Overview.

The defense has suggested on a number of occasions that defendant James Parker will assert an advice of counsel defense at trial. Defense counsel has further hinted that this advice of counsel defense would be presented only through the testimony of defendant Parker, and that no attorney is expected to testify about any legal advice purportedly given to Mr. Parker.[1] As such, it appears that Mr. Parker alone will take the stand and testify to the hearsay nature of the legal advice he was purportedly given by one or more lawyers, which advice will no doubt include that he was supposedly told by these lawyers that it would be legally okay for him to avoid his tax liabilities by shifting millions in personal income and assets to straw entities and bank accounts he still controlled.

[1] No documents have been produced by the defense that would corroborate the type of hearsay advice defendant is expected to now *orally* assert at trial from the witness stand.

If defendant still intends to assert an advice of counsel defense at trial, and the Court allows such hearsay evidence, defendant thereby waives the attorney/client privilege as to the nature and scope of the communications he had with his counsel. Since it is unknown what he will claim from the witness stand, the government would essentially be ambushed by this evidence at trial, and have insufficient time to contact counsel or review attorney files about the true nature of any communications defendant actually had with counsel.

Thus, to avoid any trial delays and comport with basic fairness, the government requests that this Court order defendant to: (1) disclose the names of those attorneys that defendant now claims provided him with the legal advice that he, "in good faith," relied upon, and the nature and substance of the specific advice; and (2) disclose all privileged documents and communications between defendant and any attorney with regards to any tax advice he sought, and permit the government to interview all attorneys who provided him with such advice. The government further requests that this disclosure be done in a timely manner in order to prevent any unnecessary delays or surprises at trial.[2]

II. Factual Background.

A. Indictment.

On June 8, 2010, a federal grand jury returned an indictment against James R. Parker ("**defendant**") and Jacqueline L. Parker ("**Jacqueline Parker**"). Defendant was charged with four counts of Tax Evasion in violation of 26 U.S.C.§ 7201, and four counts of making a False Statement in violation of 26 U.S.C.§ 7206(1). (CR 1.) In essence, defendants avoided the payment of several million dollars in taxes, interest and penalties to the IRS by initially shifting their income stream and major assets to nominee entities they still controlled, and later lying to the IRS about their net worth in several attempts to fraudulently settle their tax liabilities, all the

[2] The government has broached this issue with the defense, but as of this date, no specific agreement has been reached on this subject. It is expected the parties will continue to work on the issue in the hope of resolving the issue before the Court needs to be involved.

while living in luxurious homes in Arizona and Texas, and driving between these two homes in a $300,000 Rolls Royce.

B. Factual Background.

1. Early Tax History.

Defendant was the owner of Omega Construction, Inc., a Nevada corporation, and the owner and chief executive officer of Mackinnon Belize Land and Development Limited, a Belize corporation, which developed land for hotels on the Placencia Peninsula in Belize. The land defendant controlled in Belize was extremely valuable, and was the major source of the millions in income the defendants received over the years.

In 1997 and 1998, defendants filed joint U.S. Individual Income Tax Returns, which reported minimal income and tax liabilities of $2,089.00 and $7,967.00 respectively. These returns were audited by the IRS, which revealed that defendants failed to report substantial income for 1997 and 1998. For those years, defendants failed to report millions in income they earned from the sale and development of some of the property in Belize.

In May 2003, defendants, who were represented by legal counsel, entered into a stipulated agreement with the government in United States Tax Court as to their correct income tax liability for the years 1997 and 1998. Defendants stipulated to owing, collectively, approximately $1,035,479.00 in additional tax and $207,095.00 in penalties. Around that point in time defendants also were assessed approximately $465,860.00 in interest charges. Since that time neither defendant nor his wife have paid any of the approximately $1.7 million in additional taxes, penalties, and interest for those years, with interest continuing to accrue each year.

For 1999 and 2000, defendants failed to file their tax returns, and again the IRS audited defendants and assessed a substantial liability in excess of $1.0 million, which defendants have failed to pay. For the years 2001 and 2002, defendants filed their U.S. Individual Income Tax Returns, with tax liabilities of $13,924.00 and $12,331.00 respectively. They have failed to pay the taxes for these years as well.

2. Hiding Income/Assets With Their Children.

In anticipation of a substantial tax liability resulting from the audit of defendants' 1997 and 1998 tax returns, and the Tax Court stipulation in May, 2003, defendants, as early as 2002, after they were notified in May 2002 by the IRS of a substantial deficiency for tax year 1997, began to hide assets and income sources. In August 2002, defendants transferred, for no consideration, ownership of defendants' luxurious Carefree, Arizona mansion to Sunlight Financial Limited Liability Partnership ("Sunlight"), a nominee entity purportedly managed by defendant's daughter, Rachael T. Parker Harris. Although ownership of the property was transferred, defendant and Jacqueline Parker maintained sole use and control over the residence. Sunlight has never filed a tax return.

Between 2004 and 2007, with still more income coming to them from Belize, defendants invested more than $1.2 million in a startup cattle operation on land both owned and leased in the State of Oklahoma. Defendants owned and operated the cattle operation using another nominee entity, Cimarron River Ranch, LLC ("Cimarron LLC"). To hide their true ownership and control of Cimarron LLC, defendants made their then 21-year old son, Samuel Parker, the straw owner of Cimarron LLC. Cimarron LLC also has never filed a tax return.

On or about June 7, 2004, defendant, as chief executive officer of Mackinnon Belize Land and Development Limited, agreed to sell 597 prime acres in Belize for approximately $6.0 million. The buyer of the property was an unrelated Illinois company. At the direction of defendant Parker, the Illinois company wired the sales proceeds into an account defendant controlled at Belize Bank, Limited, Belize.

The very next month, in July 2004, defendant Parker, using Cimarron LLC as the purported owner and Samuel Parker as the "straw buyer," purchased for defendant's personal use, a $306,695 Rolls Royce automobile from a California car dealership. The funds to pay for the car came directly from the bank in Belize where the land sale proceeds were deposited. The Rolls Royce was delivered to defendant's home in Carefree, Arizona, and the insurance policy

listed defendant as the primary driver. The insurance policy, not surprisingly, indicated the luxury vehicle would be used for "pleasure," and not a business purpose.

In August 2005, in order to further place his assets beyond the reach of the government, defendants obtained a $1.5 million hard-money, second mortgage against their Carefree, Arizona residence. Defendants then used approximately $1.0 million of the loan proceeds to purchase a 7,000 square foot residence in Amarillo, Texas. The Amarillo, Texas residence was placed into yet another nominee entity, RSJ Investments LLC. Again, defendant attempted to hide his ownership and control of RSJ Investments LLC by again making his son, Samuel Parker, the purported owner/member of this entity. RSJ Investments LLC also has never filed a tax return.

In January 2005, the Resorts Consulting Quorum LLP ("RCQ") bank account at Chase (formerly Bank One) was established. The only authorized signor on the account was an individual associated with a Phoenix, Arizona law firm, which at the time was representing the defendants with regard to the taxes they owed to the IRS. Approximately $112,000, in monthly installments of $7,000, was paid to defendant's Omega Construction Company from the RCQ account, and approximately $152,000 was paid from the RCQ account to make loan payments on the $1.5 million second mortgage on defendants' Carefree home. The funds going into the RCQ account came from the Belize bank account in which recent land sale proceeds had been deposited by the Illinois buyer, which defendant controlled.

After the sale of the above-described property in Belize in June 2004, between June 2004 and January 2008, wire transfers were made from Belize Bank Limited into several accounts in the United States. These transfers included transfers of $1,302,000 and $1,544,375 into two bank accounts associated with Cimarron River Ranch, a $223,500 transfer into a bank account associated with RCQ, a $306,000 transfer to purchase the Rolls Royce, and a $36,029 transfer to acquire a Ford truck.

3. <u>Continuing to Ignore Tax Reporting Requirements</u>.

Most of the $3,411,904 of repatriated funds from the Belize land sales were not reported on the defendants' tax returns. Their tax returns for the years 2004, 2005, and 2006 reflected

only the following taxable income: $13,320, $37,391, and $40,810 respectively, despite earning, controlling and using several million dollars during this time period.

4. Fraudulent Attempts to Compromise With the IRS.

On or about July 30, 2004, defendants attempted to "compromise" with the IRS for their unpaid tax liabilities. Despite having access to millions from the land sale on June 4, 2004, they sought to eliminate the $1.7 million Tax Court judgment through a one-time payment of $130,000. In their submission to the IRS, defendants grossly misstated their net worth, and falsely claimed that they were borrowing the proposed sum of money from friends and a bank. This offer was not accepted by the IRS.

On or about November 16, 2004, defendants again attempted to "compromise" with the IRS through a one-time payment of $130,000. They submitted false information about their net worth and again claimed the money would be borrowed from friends and family. This offer was not accepted by the IRS.

On or about April 13, 2005, for the third time, defendants attempted to seek a "compromise" with the IRS for their unpaid tax liabilities. This time they sought to eliminate their collective $1.7 million obligation through a one-time payment of $450,000. Defendants again falsely claimed that they were borrowing the money from their family, and receiving collections from a purported note that Omega Construction supposedly held from Sunlight Financial. This offer was not accepted by the IRS.

After the IRS turned down the previous three offers of compromise, on or about August 5, 2005, defendants submitted a fourth set of false financial statements, which were signed under penalty of perjury. Defendants were now requesting that because they purportedly were in dire financial condition, they should be allowed to pay only a monthly $2,000 installment on their now approximately $2.7 million tax liability. This offer was again rejected by the IRS.

For the three offers of compromise and the one installment payment request, defendants submitted and signed, under penalty of perjury, various IRS documentation falsely reflecting that

the defendants had neither the income nor the assets to pay the IRS. The financial statements submitted by the defendants in connection with these settlement attempts failed to disclose the defendant's true ownership of a home worth more than $1 million, a Rolls Royce automobile, a million dollar cattle operation, and approximately $6 million in proceeds received from the sale of Belizian land. Defendants went so far as to claim that they were unable to pay their rent, were impoverished, and would be homeless if not for the kindness and support of their two children.

C. Advice of Counsel Defense.

Pursuant to communications with counsel for defendant and defendant's own court filings,[3] the government believes that defendant will claim that he never willfully attempted to evade the payment of tax, but instead relied upon the advice of counsel in his dealings with the IRS. These attorneys may include the following individuals:

1. Henry W. Tom. Henry Tom represented the defendants during the above-mentioned tax court litigation in U.S. Tax Court. Mr. Tom signed the U.S. Tax Court stipulations for both the 1997 and 1998 deficiencies. Mr. Tom died in March, 2011.

2. Gregory A. Robinson. Subsequent to the U.S. Tax Court stipulation, Gregory Robinson represented defendant during negotiations with the IRS regarding various collection issues. Mr. Robinson was specifically involved in filing the above-mentioned offers in compromise. Mr. Robinson is currently practicing law at the firm of Farley, Robinson & Larsen.

3. Ralph Robinson. Ralph Robinson, believed to be the brother of Greg Robinson, was the signor on the bank account for Resorts Consulting Quorum ("RCQ"), a nominee entity with the same address as Greg Robinson's law firm. As discussed above, the bank account for RCQ received money directly from Belize. Ralph Robinson signed checks on behalf of RCQ, making them out to defendant's Omega construction company. Ralph Robinson died in 2006.

[3] Defendant referred to the reliance defense in his proposed addition to the Joint Statement Of The Case, found in footnote 1 (CR 72), several disputed jury instructions (CR 73, pg. 57, 70-75), and in Defendant's Additional Proposed Voir Dire Questions. (CR 66.)

III. Relevant Law.

A. Tax Evasion.

Tax Evasion 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. ***United States v. Mal***, 942 F.2d 682, 686-88 (9th Cir. 1991) (citing ***Sansone v. United States***, 380 U.S. 343, 354 (U.S. 1965)); ***United States v. Voorhies***, 658 F.2d 710, 713 (9th Cir. Nev. 1981); ***Cohen v. United States***, 297 F.2d 760, 770 (9th Cir. 1962). The elements of either manner are the same. ***Sansone***, 380 U.S. at 343.

In order for defendant to be found guilty of willfully attempting to evade or defeat the "payment" of a tax, the government must prove that: (1) defendant owed more federal income tax for the specific calendar year than was paid by him for any income tax return filed for that year; (2) defendant knew he owed more federal income tax than was paid by him for any tax return defendant filed for that specific year; (3) defendant made an affirmative attempt to evade or did an affirmative act to defeat the payment of income tax for that year; and (4), in attempting to evade or defeat the payment of this income tax, defendant acted willfully. ***Title 26, United States Code, Section 7201***; ***Ninth Circuit Manual of Model Criminal Jury Instructions, § 9.37***.

Willfulness requires the government to prove that "the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." ***Cheek v. United States***, 498 U.S. 192, 201 (1991).

B. Good Faith Reliance On A Tax Professional.

In order to prove its case, the government may be obligated to disprove "a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws." ***Id***. at 202 ("This is so because one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist."). Good faith reliance on a qualified tax professional, including an attorney, can be a defense to willfulness

in cases of tax fraud and evasion. ***United States v. Bishop***, 291 F.3d 1100, 1106-07 (9th Cir. 2002) (internal citations omitted).

A defendant who is claiming a good faith reliance on the advice of a tax professional must have: (1) acted in good faith; (2) made full disclosure of all relevant information to the professional; and (3) received the attorney's advice as to the specific course of conduct that was followed. ***Bishop***, 291 F.3d at 1106-07 ("There was no evidence to support their claim that they relied on professional advice after full disclosure of relevant facts); ***United States v. Kenney***, 911 F.2d 315, 322 (9th Cir. 1990) ("In order to qualify for an advice of counsel instruction the appellant must show that there was full disclosure to the attorney of all material facts, and that he relied in good faith on the attorney's recommended course of conduct."); ***Pattern Jury Instructions, Eleventh Circuit (2010), SI 18; see also United States v. Ibarra-Alcarez***, 830 F.2d 968, 973 (9th Cir. 1987).

C. Hearsay.

As a preliminary matter, any assertions by defendant James Parker, as to what his counsel purportedly told him, would be hearsay. This issue is further complicted by the fact that defendant is not having one of his lawyers testify about what advice he was given. Instead, without the benefit of any written corroboration, or any records whatsoever, defendant is seeking carte blanche to get on the stand and testify about whatever "facts" he purportedly told his lawyers, and whatever "legal advice" they supposedly gave to him. It doesn't take much imagination to see how the Rules of Evidence could be twisted and abused in this situation.

Defendant will no doubt urge that the hearsay statements are not being offered for the truth of the matter asserted, but merely to show the effect of the statement on defendant's state of mind. ***Fed. R. Evid. 801(c)***; ***see also Stevens v. Moore Business Forms, Inc.***, 18 F.3d 1443, 1449 (9th Cir. 1994) (statements introduced to show witness had knowledge of records); ***United States v. Moody***, 376 F.2d 525, 530 (9th Cir. 1967) (assertions by declarant admissible to show defendant was aware of unlawful practices of business enterprise); ***United States v. Norwood***, 798 F.2d 1094, 1097 (7th Cir. 1986) ("When it is proved that D made a statement to X, with the

purpose of showing the probable state of mind thereby induced in X, . . . the evidence is not subject to attack as hearsay.") (internal quotations omitted).[4]

Generally speaking, a defendant has "the right to tell the court his own version of the tax advice on which he claim[s] to have relied." ***United States v. Moran***, 482 F.3d 1101, 1110 (9th Cir. 2007) ("Not only is testimony about the reliance on qualified experts relevant to establishing this defense, but the defendant has the right to tell the court his own version of the tax advice on which he claims to have relied. Such testimony does not constitute hearsay when not offered for the truth of the matter stated") (internal citations and quotations omitted.); ***Bishop***, 291 F.3d at 1111 ("Cardenaz had the right to tell the court his own version of the tax advice on which he claimed to have relied."); ***United States v. Fitzgerald***, 2007 U.S. Dist. LEXIS 42076 (S.D. Cal. 2007) ("Nevertheless, the Court notes for purposes of retrial that testimony about the defendant's reliance on qualified experts, and the specific advice upon which the defendant claims to have relied, does not constitute hearsay when not offered for the truth of the matter asserted."). [5] Moreover, the advice relied upon by the defendant must be specific enough to determine whether there was an effect on the listener's state of mind. ***Bishop,*** 291 F.3d at 1110 ("Defendants did not testify about the advice Lambrose had given them, nor did they testify that they had turned over all relevant information to Lambrose about payments received by them.").

In this case, since it is unknown what advice, if any, defendant was given, or in what context or setting any such advice was supposedly conveyed, it remains to be determined by this Court whether defendant's uncorroborated hearsay assertions, of what he was purportedly told

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[4] In addition, an out of court statement that is probative of the declarant's "motive, intent, or plan" to perform a future act is sometimes admissible as "state of mind" testimony under Rule 803(3). ***Bishop***, 291 F.3d at 1110. However, statements of memory to prove a fact remembered are excluded from the "state of mind" exception in Rule 803(3). ***Id***. at 1109.

[5] However, such testimony cannot be "statements of memory" used to prove merely that advice was in fact given. ***Bishop***, 291 F.3d at 1110 ("We hold that the district court properly excluded as hearsay Guskey's testimony about what Lambrose told him regarding the advice Lambrose gave the defendants. Contrary to appellants' claim, such testimony was offered to prove the truth of the matter asserted: Lambrose gave defendants certain advice, and they relied on that advice. No one cares what Lambrose told Guskey *except* if it were true that Lambrose gave the defendants certain advice.").

by one or more lawyers, should even be admitted at trial in this case. Moreover, because two of the lawyers are deceased, and no records have been produced regarding any representation by them, the government would ask the Court to look very closely at the evidentiary and foundational prerequisites for such assertions, especially when a declarant is deceased and unavailable. Until defendant reveals the nature and source of any legal advice, it is difficult at this time to more fully articulate and delineate each and every hearsay and foundational concern. At a minimum, this pleading is filed, in part, to alert the Court to this looming issue.

D. Attorney-Client Privilege & Good Faith Reliance.

By asserting a good faith reliance defense, defendant implicitly waives his attorney-client privilege with regards to any communications associated with that defense. ***United States v. Ortland***, 109 F.3d 539, 543 (9th Cir. 1997) ("As we have said: The privilege which protects attorney-client communications may not be used both as a sword and a shield. Where a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived.") (internal citations omitted); ***Chevron Corp. v. Pennzoil Co.***, 974 F.2d 1156, 1162 (9th Cir. 1992) ("As this court has held, the disclosure of information resulting in the waiver of the attorney-client privilege constitutes waiver only as to communications about the matter actually disclosed.") (internal quotations and citations omitted)***; United States v. Bilzerian***, 926 F.2d 1285, 1292 (2d Cir. 1991) ("A defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes. Thus, the privilege may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications.") (internal citations omitted). That waiver forms the basis for the government's in limine request in this case.

IV. Defendant Should be Required to Timely Disclose the Substance and Supporting Records for Legal Advice Defendant Purportedly Relied Upon.

In light of the foregoing, the government requests that this Court order defendant to disclose: (1) the names of any attorneys he now claims gave him legal advice that he, "in good faith," relied upon, (2) the nature and substance of that legal advice, and (3) all privileged

records and communications between defendant and any attorney with regards to the tax advice in question. The United States also seeks permission to interview any attorney who purportedly gave this tax advice. The privileged information is necessary to determine whether defendant actually gave full disclosure to any attorney, actually received the claimed legal advice, and actually relied in good faith on that advice. ***See United States v. Kenney***, 911 F.2d at 322 (" In order to qualify for an advice of counsel instruction the appellant must show that there was full disclosure to the attorney of all material facts, and that he relied in good faith on the attorney's recommended course of conduct.") (internal citation omitted). Without being able to explore the veracity of what actually occurred in this case, defendant would be able to selectively pick the "advice" he received, and/or possibly "invent" advice to further excuse his conduct in this matter.

The government also requests that defendant disclose all privileged communications and materials in a timely manner. ***Bilzerian***, 926 F.2d at 1293 ("[C]ourts cannot sanction the use of the privilege to prevent effective cross-examination on matters reasonably related to those introduced in direct examination.") (internal citation omitted); ***Bishop***, 291 F.3d at 1111("[H]e would, of course, be subject to cross-examination on the nature of the information that he gave to Lambrose."). Late disclosure in this case would be fundamentally unfair, and could result in delays during the trial of this matter.

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VI. Conclusion.

For the foregoing reasons, the government respectfully requests that this Court grant the government's motion in limine.

Respectfully submitted this 20th day of April, 2012.

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I hereby certify that on this date, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants: Michael Minns, Ashley Arnett, John McBee, and Joy Bertrand