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8
9 UNITED STATES DISTRICT COURT
10 DISTRICT OF ARIZONA

11 United States of America,
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13 Plaintiff,
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15 v.
16 James R. Parker,
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18 Defendant.

CR-10-757-01-PHX-ROS

**JOINT PROPOSED JURY
INSTRUCTIONS**

17 Pursuant to this Court’s order, Part I below identifies all of the standard instructions that
18 the government and defendant propose should be given in this case if necessary. Part II
19 identifies the special instructions that the government and defendant proposing should be given
20 in this case. Finally, Part III is identified as a separate section, that contains disputed instructions
21 submitted by either the government or defendants. At the conclusion of each Part, the full text
22 of each requested instruction has been provided.¹

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24 _____
25 ¹ The Court’s standing order, entitled “Jury Instructions,” provides as follows: “There
26 shall be one/joint submission of the jury instructions. The submission is to include joint
27 instructions as well as any additional instructions not yet agreed upon by the parties. One side
28 shall be responsible for submitting all instructions in one email package. Unmodified Model
Jury Instructions are strongly encouraged and shall be used unless otherwise ordered by the
Court. The format is to be WP/Word compatible. All fonts and formatting are to be consistent
and in accordance with the local rules. . . . Instructions are to be e-mailed to chambers mailbox

(continued...)

1 It should be noted that, depending on the proof at trial and any defenses raised, additional
2 instructions and revisions to previously-submitted instructions may be necessary. If so, the
3 government and defendants will submit additional instructions as specified in the Court's
4 standing order.

5 Respectfully submitted this 11th day of May, 2012.

6 ANN BIRMINGHAM SCHEEL
7 Acting United States Attorney
8 District of Arizona

9 s/ Walter Perkel
10 PETER SEXTON
11 WALTER PERKEL
12 Assistant U.S. Attorneys

13 MICHAEL MINNS
14 ASHLEY ARNETT
15 MICHAEL KIMERER
16 JOHN McBEE

17 s/ Michael Minns
18 Attorneys for James R. Parker

19 **Certificate of Service**

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

24 s/ Magen Sweat

25 _____
26 ¹ (...continued)
27 at silver_chambers@azd.uscourts.gov”

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Section I: MODEL STIPULATED INSTRUCTIONS

The United States of America and defendants request that the Court give the following standard preliminary instructions from the Ninth Circuit Manual of Model Jury Instructions (2010 revision), as it appeared on March 9, 2011 on the official web site for the United States Courts for the Ninth Circuit (<http://www.ce9.uscourts.gov/courts.html>):

I. Preliminary Instructions

- §1.1 Duty of Jury
- §1.2 The Charge—Presumption of Innocence (as modified to fill in/omit bracketed text)
- §1.3 What is Evidence (as modified to include bracketed text)
- §1.4 What is Not Evidence
- §1.5 Direct and Circumstantial Evidence
- §1.6 Ruling on Objections
- §1.7 Credibility of Witnesses
- §1.8 Conduct of the Jury
- §1.9 No Transcript Available to the Jury
- §1.10 Taking Notes
- §1.11 Outline of Trial
- §1.13 Separate Consideration for Each Defendant

II. Instructions in the Course of Trial

- §2.1 Cautionary Instruction—First Recess

- 1 §2.2 Bench Conferences and Recesses
- 2 §2.4 Stipulations of Fact (if necessary)
- 3 §2.10 Other Crimes, Wrongs or Acts of Defendant (if necessary)
- 4 §2.11 Evidence for Limited Purpose (if necessary)
- 5
- 6 III. Standard Instructions at End of Case
- 7 §3.1 Duties of Jury to Find Facts and Follow Law
- 8 §3.2 Charge Against Defendant Not Evidence—Presumption of Innocence
- 9 §3.3 Defendant’s Decision Not to Testify **or**
- 10 §3.4 Defendant’s Decision to Testify
- 11 §3.5 Reasonable Doubt—Defined
- 12 §3.6 What is Evidence (as modified to include bracketed text)
- 13 §3.7 What is Not Evidence
- 14 §3.8 Direct and Circumstantial Evidence
- 15 §3.9 Credibility of Witnesses
- 16 §3.10 Activities Not Charged
- 17 §3.12 Separate Consideration of Single Count- Multiple Defendants
- 18 §3.13 Separate Consideration of Multiple Counts—Multiple Defendants (if
- 19 necessary)
- 20 §3.16 Intent to Defraud—Defined (if necessary)
- 21 §4.1 Statement of Defendant (if necessary)
- 22 §4.3 Other Crimes, Wrongs, or Acts of Defendant (if necessary)
- 23 §4.6 Impeachment, Prior Conviction of Defendant (if necessary)
- 24 §4.8 Impeachment Evidence—Witness (if necessary)
- 25 §4.9 Testimony of Witness Involving Special Circumstances—Immunity,
- 26 Benefits, Accomplice, Plea (if necessary)
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1	§4.14	Opinion Evidence, Expert Witness
2	§4.15	Summaries Not Received in Evidence
3	§4.16	Charts and Summaries in Evidence
4	§5.7	Deliberate Ignorance (if necessary)
5	§7.1	Duty to Deliberate
6	§7.2	Consideration of Evidence
7	§7.3	Use of Notes
8	§7.4	Jury Consideration of Punishment
9	§7.5	Verdict Form
10	§7.6	Communication with Court

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The full text of these instructions is included below.

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Requested Instruction §1.1 - Duty of Jury

Jurors: You now are the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some preliminary instructions. At the end of the trial I will give you more detailed [written] instructions that will control your deliberations. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. Please do not take anything I may say or do during the trial as indicating what I think of the evidence or what your verdict should be—that is entirely up to you.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 1.1

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Requested Instruction §1.2 - The Charge - Presumption of Innocence

This is a criminal case brought by the United States government. The government charges defendant James R. Parker with four counts of Tax Evasion in violation of Title 26, United States Code, Section 7201, and Title 18 United States Code Section 2. The government further charges defendant James R. Parker with four counts, and defendant Jacqueline Parker with two counts, of making False Statements, in violation of Title 26, United States Code, Section 7206(1) and Title 18 United States Code Section 2.

The charges against the defendants are contained in the Indictment. The Indictment is simply the description of the charges made by the government against the defendants. The Indictment is not evidence and does not prove anything.

The defendants have pleaded not guilty to the charges, and are presumed innocent unless and until the government proves the defendants' guilt beyond a reasonable doubt. In addition, the defendants have the right to remain silent and never have to prove innocence or present any evidence.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 1.2

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Requested Instruction §1.3 - What is Evidence

The evidence you are to consider in deciding what the facts are consists of:

- (1) the sworn testimony of any witness;
- (2) the exhibits which are received in evidence; and
- (3) any facts to which the parties agree.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 1.3

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Requested Instruction §1.4 - What is Not Evidence

The following things are not evidence, and you must not consider them as evidence in deciding the facts of this case:

- (1) statements and arguments of the attorneys;
- (2) questions and objections of the attorneys;
- (3) testimony that I instruct you to disregard; and
- (4) anything you may see or hear when the court is not in session even if what you see

or hear is done or said by one of the parties or by one of the witnesses.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 1.4

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Requested Instruction §1.5 - Direct and Circumstantial Evidence

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 1.5

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Requested Instruction §1.6 - Ruling on Objections

There are rules of evidence that control what can be received in evidence. When a lawyer asks a question or offers an exhibit in evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered or the exhibit received. If I sustain the objection, the question cannot be answered, or the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer would have been.

Sometimes I may order that evidence be stricken from the record and that you disregard or ignore the evidence. That means that when you are deciding the case, you must not consider the evidence that I told you to disregard.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 1.6

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Requested Instruction §1.7 - Credibility of Witnesses

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

- (1) the witness's opportunity and ability to see or hear or know the things testified to;
- (2) the witness's memory;
- (3) the witness's manner while testifying;
- (4) the witness's interest in the outcome of the case, if any;
- (5) the witness's bias or prejudice, if any;
- (6) whether other evidence contradicted the witness's testimony;
- (7) the reasonableness of the witness's testimony in light of all the evidence; and
- (8) any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 1.7

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Requested Instruction §1.8 - Conduct of the Jury

I will now say a few words about your conduct as jurors.

First, keep an open mind throughout the trial, and do not decide what the verdict should be until you and your fellow jurors have completed your deliberations at the end of the case.

Second, because you must decide this case based only on the evidence received in the case and on my instructions as to the law that applies, you must not be exposed to any other information about the case or to the issues it involves during the course of your jury duty. Thus, until the end of the case or unless I tell you otherwise:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, text messaging, or any Internet chat room, blog, website or other feature. This applies to communicating with your fellow jurors until I give you the case for deliberation, and it applies to communicating with everyone else including your family members, your employer, the media or press, and the people involved in the trial, although you may notify your family and your employer that you have been seated as a juror in the case. But, if you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Because you will receive all the evidence and legal instruction you properly may consider to return a verdict: do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet or using other

1 reference materials; and do not make any investigation or in any other way try to
2 learn about the case on your own.

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4 The law requires these restrictions to ensure the parties have a fair trial based on the same
5 evidence that each party has had an opportunity to address. A juror who violates these
6 restrictions jeopardizes the fairness of these proceedings[, and a mistrial could result that would
7 require the entire trial process to start over]. If any juror is exposed to any outside information,
8 please notify the court immediately.

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10 Authority: Manual of Model Criminal Jury Instructions
11 for the Ninth Circuit (2010 ed.), Instruction 1.8

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Requested Instruction §1.9 - No Transcript Available to the Jury

At the end of the trial you will have to make your decision based on what you recall of the evidence. You will not have a written transcript of the trial. I urge you to pay close attention to the testimony as it is given.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 1.9

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Requested Instruction §1.10 - Taking Notes

If you wish, you may take notes to help you remember the evidence. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. Do not let note-taking distract you from being attentive. When you leave court for recesses, your notes should be left in the [courtroom] [jury room] [envelope in the jury room]. No one will read your notes.

Whether or not you take notes, you should rely on your own memory of the evidence. Notes are only to assist your memory. You should not be overly influenced by your notes or those of your fellow jurors.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 1.10

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Requested Instruction §1.11 - Outline of Trial

The next phase of the trial will now begin. First, each side may make an opening statement. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. A party is not required to make an opening statement.

The government will then present evidence and counsel for the defendant may cross-examine. Then, if the defendant chooses to offer evidence, counsel for the government may cross-examine.

After the evidence has been presented, [I will instruct you on the law that applies to the case and the attorneys will make closing arguments] [the attorneys will make closing arguments and I will instruct you on the law that applies to the case].

After that, you will go to the jury room to deliberate on your verdict.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 1.11

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Requested Instruction §1.13 - Separate Consideration for Each Defendant

Although the defendants are being tried together, you must give separate consideration to each defendant. In doing so, you must determine which evidence in the case applies to each defendant, disregarding any evidence admitted solely against some other defendant[s]. The fact that you may find one of the defendants guilty or not guilty should not control your verdict as to any other defendant[s].

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 1.13

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Requested Instruction §2.1 - Cautionary Instruction - First Recess

We are about to take our first break. Remember, until the trial is over, do not discuss this case with anyone, including your fellow jurors, members of your family, people involved in the trial, or anyone else, and do not allow others to discuss the case with you. This includes discussing the case in Internet chat rooms or through Internet blogs, Internet bulletin boards, emails or text messaging. If anyone tries to communicate with you about the case, please let me know about it immediately. Do not read, watch, or listen to any news reports or other accounts about the trial or anyone associated with it, including any online information. Do not do any research, such as consulting dictionaries, searching the Internet or using other reference materials, and do not make any investigation about the case on your own. Finally, keep an open mind until all the evidence has been presented and you have heard the arguments of counsel, my instructions on the law, and the views of your fellow jurors.

If you need to speak with me about anything, simply give a signed note to the [marshal] [bailiff] [clerk] to give to me.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 2.1

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Requested Instruction §2.2 - Bench Conferences and Recesses

From time to time during the trial, it may become necessary for me to take up legal matters with the attorneys privately, either by having a conference at the bench or, when necessary, by calling a recess.

We will do what we can to keep the number and length of these conferences to a minimum. I may not always grant an attorney's request for a conference.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 2.2

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Requested Instruction §2.4 - Stipulations of Fact

The parties have agreed to certain facts that have been stated to you. You should therefore treat these facts as having been proved.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 2.4

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Requested Instruction §2.10 -Other Crimes, Wrongs, or Acts of Defendant

You are about to hear evidence that the defendant committed other [crimes] [wrongs] [acts] not charged here. You may consider this evidence only for its bearing, if any, on the question of the defendant's [intent] [motive] [opportunity] [preparation] [plan] [knowledge] [identity] [absence of mistake] [absence of accident] and for no other purpose. [You may not consider this evidence as evidence of guilt of the crime for which the defendant is now on trial.]

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 2.10

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Requested Instruction §2.11 - Evidence for Limited Purpose

You are about to hear evidence that [describe evidence to be received for limited purpose]. I instruct you that this evidence is admitted only for the limited purpose of [describe purpose] and, therefore, you must consider it only for that limited purpose and not for any other purpose.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 2.11

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Requested Instruction §3.1 - Duties of Jury to Find Facts and Follow Law

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law that applies to this case. A copy of these instructions will be available in the jury room for you to consult.

It is your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. It is also your duty to apply the law as I give it to you to the facts as you find them, whether you agree with the law or not. You must decide the case solely on the evidence and the law and must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. You will recall that you took an oath promising to do so at the beginning of the case.

You must follow all these instructions and not single out some and ignore others; they are all important. Please do not read into these instructions or into anything I may have said or done any suggestion as to what verdict you should return—that is a matter entirely up to you.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 3.1

GIVEN: _____
REFUSED: _____
MODIFIED: _____

Requested Instruction §3.2 - Charge Against Defendant not Evidence - Presumption of Innocence - Burden of Proof

The indictment is not evidence. The defendant has pleaded not guilty to the charge[s].
The defendant is presumed to be innocent unless and until the government proves the defendant guilty beyond a reasonable doubt. In addition, the defendant does not have to testify or present any evidence to prove innocence. The government has the burden of proving every element of the charge[s] beyond a reasonable doubt.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 3.2

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Requested Instruction §3.3 - Defendant's Decision Not to Testify

A defendant in a criminal case has a constitutional right not to testify. You may not draw any inference of any kind from the fact that the defendant did not testify.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 3.3

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Requested Instruction §3.4 - Defendant's Decision to Testify

The defendant has testified. You should treat this testimony just as you would the testimony of any other witness.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 3.4

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Requested Instruction §3.5 - Reasonable Doubt Defined

Proof beyond a reasonable doubt is proof that leaves you firmly convinced the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt.

A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.

If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 3.5

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Requested Instruction §3.6 - What is Evidence

The evidence you are to consider in deciding what the facts are consists of:

- (1) the sworn testimony of any witness;
- (2) the exhibits received in evidence; and
- (3) any facts to which the parties have agreed.

Authority: Manual of Model Criminal Jury Instructions
for the Ninth Circuit (2010 ed.), Instruction 3.6

GIVEN: _____
REFUSED: _____
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Requested Instruction §3.7 - What is Not Evidence

In reaching your verdict you may consider only the testimony and exhibits received in evidence. The following things are not evidence and you may not consider them in deciding what the facts are:

1. Questions, statements, objections, and arguments by the lawyers are not evidence. The lawyers are not witnesses. Although you must consider a lawyer's questions to understand the answers of a witness, the lawyer's questions are not evidence. Similarly, what the lawyers have said in their opening statements, [will say in their] closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers state them, your memory of them controls.

2. Any testimony that I have excluded, stricken, or instructed you to disregard is not evidence. [In addition, some evidence was received only for a limited purpose; when I have instructed you to consider certain evidence in a limited way, you must do so.]

3. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 3.7

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REFUSED: _____
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Requested Instruction §3.8 - Direct and Circumstantial Evidence

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which you can find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 3.8

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Requested Instruction §3.9 - Credibility of Witnesses

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

- (1) the witness's opportunity and ability to see or hear or know the things testified to;
- (2) the witness's memory;
- (3) the witness's manner while testifying;
- (4) the witness's interest in the outcome of the case, if any;
- (5) the witness's bias or prejudice, if any;
- (6) whether other evidence contradicted the witness's testimony;
- (7) the reasonableness of the witness's testimony in light of all the evidence; and
- (8) any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 3.9

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Requested Instruction §3.10 - Activities Not Charged

You are here only to determine whether the defendant is guilty or not guilty of the charge[s] in the indictment. The defendant is not on trial for any conduct or offense not charged in the indictment.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 3.10

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Requested Instruction §3.12 - Separate Consideration of Single Count—Multiple Defendants

A separate crime is charged against each defendant. The charges have been joined for trial. You must consider and decide the case of each defendant separately. Your verdict as to one defendant should not control your verdict as to any other defendant.

All the instructions apply to each defendant [unless a specific instruction states that it applies to only a specific defendant].

Authority: Manual of Model Criminal Jury Instructions
for the Ninth Circuit (2010 ed.), Instruction 3.12

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Requested Instruction §3.13 - Separate Consideration of Multiple Counts—Multiple Defendants

A separate crime is charged against one or more of the defendants in each count. The charges have been joined for trial. You must decide the case of each defendant on each crime charged against that defendant separately. Your verdict on any count as to any defendant should not control your verdict on any other count or as to any other defendant.

All the instructions apply to each defendant and to each count [unless a specific instruction states that it applies only to a specific [defendant] [count]].

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 3.13

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Requested Instruction §3.16 - Intent to Defraud—Defined

An intent to defraud is an intent to deceive or cheat.

Authority: Manual of Model Criminal Jury Instructions
for the Ninth Circuit (2010 ed.), Instruction 3.16

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Requested Instruction §4.1 - Statement of Defendant

You have heard testimony that the defendant made a statement. It is for you to decide (1) whether the defendant made the statement, and (2) if so, how much weight to give to it. In making those decisions, you should consider all the evidence about the statement, including the circumstances under which the defendant may have made it.

Authority: Manual of Model Criminal Jury Instructions
for the Ninth Circuit (2010 ed.), Instruction 4.1

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Requested Instruction §4.3 - Other Crimes, Wrongs, or Acts of Defendant

You have heard evidence that the defendant committed other [crimes] [wrongs] [acts] not charged here. You may consider this evidence only for its bearing, if any, on the question of the defendant's [intent] [motive] [opportunity] [preparation] [plan] [knowledge] [identity] [absence of mistake] [absence of accident] and for no other purpose. [You may not consider this evidence as evidence of guilt of the crime for which the defendant is now on trial.]

Authority: Manual of Model Criminal Jury Instructions
for the Ninth Circuit (2010 ed.), Instruction 4.3

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REFUSED: _____
MODIFIED: _____

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Requested Instruction §4.6 - Impeachment, Prior Conviction of Defendant

You have heard evidence that the defendant has previously been convicted of a crime.
You may consider that evidence only as it may affect the defendant's believability as a witness.
You may not consider a prior conviction as evidence of guilt of the crime for which the defendant
is now on trial.

Authority: Manual of Model Criminal Jury Instructions
for the Ninth Circuit (2010 ed.), Instruction 4.6

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REFUSED: _____
MODIFIED: _____

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Requested Instruction §4.8 - Impeachment Evidence—Witness

You have heard evidence that [name of witness], a witness, [specify basis for impeachment]. You may consider this evidence in deciding whether or not to believe this witness and how much weight to give to the testimony of this witness.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 4.8

GIVEN: _____
REFUSED: _____
MODIFIED: _____

Requested Instruction §4.9 - Testimony of Witness Involving Special Circumstances—Immunity, Benefits, Accomplice, Plea

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You have heard testimony from [name of witness], a witness who [received immunity. That testimony was given in exchange for a promise by the government that [the witness will not be prosecuted] [the testimony will not be used in any case against the witness]];

[received [benefits] [compensation] [favored treatment] from the government in connection with this case];

[[admitted being] [was alleged to be] an accomplice to the crime charged. An accomplice is one who voluntarily and intentionally joins with another person in committing a crime];

[pleaded guilty to a crime arising out of the same events for which the defendant is on trial. This guilty plea is not evidence against the defendant, and you may consider it only in determining this witness's believability].

For [this] [these] reason[s], in evaluating the testimony of [name of witness], you should consider the extent to which or whether [his] [her] testimony may have been influenced by [this] [any of these] factor[s]. In addition, you should examine the testimony of [name of witness] with greater caution than that of other witnesses.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 4.9

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Requested Instruction §4.14 - Opinion Evidence, Expert Witness

You have heard testimony from persons who, because of education or experience, were permitted to state opinions and the reasons for their opinions.

Such opinion testimony should be judged like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 4.14

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Requested Instruction §4.15 - Summaries Not Received in Evidence

During the trial, certain charts and summaries were shown to you in order to help explain the evidence in the case. These charts and summaries were not admitted in evidence and will not go into the jury room with you. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the underlying evidence.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 4.15

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Requested Instruction §4.16 - Charts and Summaries in Evidence

Certain charts and summaries have been admitted in evidence. Charts and summaries are only as good as the underlying supporting material. You should, therefore, give them only such weight as you think the underlying material deserves.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 4.16

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REFUSED: _____
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Requested Instruction §5.7 - Deliberate Ignorance

You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant:

1. was aware of a high probability that [e.g., drugs were in the defendant's automobile], and
2. deliberately avoided learning the truth.

You may not find such knowledge, however, if you find that the defendant actually believed that [e.g. no drugs were in the defendant's automobile], or if you find that the defendant was simply careless.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 5.7

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REFUSED: _____
MODIFIED: _____

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Requested Instruction §7.1 - Duty to Deliberate

When you begin your deliberations, elect one member of the jury as your [presiding juror] [foreperson] who will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict, whether guilty or not guilty, must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 7.1

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Requested Instruction §7.2 - Consideration of Evidence

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, text messaging, or any Internet chat room, blog, website or other feature. This applies to communicating with your family members, your employer, the media or press, and the people involved in the trial. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own.

The law requires these restrictions to ensure the parties have a fair trial based on the same evidence that each party has had an opportunity to address. A juror who violates these restrictions jeopardizes the fairness of these proceedings[, and a mistrial could result that would require the entire trial process to start over]. If any juror is exposed to any outside information, please notify the court immediately.

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Authority: Manual of Model Criminal Jury Instructions
for the Ninth Circuit (2010 ed.), Instruction 7.2

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Requested Instruction §7.3 - Use of Notes

Some of you have taken notes during the trial. Whether or not you took notes, you should rely on your own memory of what was said. Notes are only to assist your memory. You should not be overly influenced by your notes or those of your fellow jurors.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 7.3

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Requested Instruction §7.4 - Jury Consideration of Punishment

The punishment provided by law for this crime is for the court to decide. You may not consider punishment in deciding whether the government has proved its case against the defendant beyond a reasonable doubt.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 7.4

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Requested Instruction §7.5 - Verdict Form

A verdict form has been prepared for you. [Explain verdict form as needed.] After you have reached unanimous agreement on a verdict, your [presiding juror] [foreperson] should complete the verdict form according to your deliberations, sign and date it, and advise the [clerk] [bailiff] that you are ready to return to the courtroom.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 7.5

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Requested Instruction §7.6 - Communication with Court

If it becomes necessary during your deliberations to communicate with me, you may send a note through the [clerk] [bailiff], signed by any one or more of you. No member of the jury should ever attempt to communicate with me except by a signed writing, and I will respond to the jury concerning the case only in writing or here in open court. If you send out a question, I will consult with the lawyers before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including me—how the jury stands, numerically or otherwise, on any question submitted to you, including the question of the guilt of the defendant, until after you have reached a unanimous verdict or have been discharged.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 7.6

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Section II: NON-MODEL STIPULATED INSTRUCTIONS

Government and defendants requests that the Court give the following non-model instructions:

1. Modified 9.37 - Attempt to Evade and Defeat "Payment" of Tax
2. False Statement - Statute
3. Modified 9.39 - False Statements - Elements

The text of these instructions follows below:

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1. Modified 9.37 - Attempt to Evade and Defeat "Payment" of Tax

Defendant James R. Parker is charged in counts one through four of the Indictment with attempting to evade and defeat the payment of income tax, interest and penalties for calendar years 1997, 1998, 2001, and 2002, in violation of Section 7201 of Title 26 of the United States Code.

In order for the defendant to be found guilty of these charges, the government must prove each of the following elements beyond a reasonable doubt with respect to each count:

First, the defendant owed more federal income tax for the calendar years 1997, 1998, 2001, and 2002 than was paid by him for any income tax returns filed for those years;

Second, the defendant knew he owed more federal income tax than was paid by him for any tax returns defendant filed for those years;

Third, the defendant made an affirmative attempt to evade or did an affirmative act to defeat the payment of income tax for any of those years; and

Fourth, in attempting to evade or defeat the payment of this income tax, the defendant acted willfully.

Authority: *Sansone v. United States*, 380 U.S. 343, 351 (1965); *United States v. Boulware*, 384 F.3d 794, 810 (9th Cir. 2004); *United States v. Marashi*, 913 F.2d 724, 735-36 (9th Cir. 1990); *United States v. Marabelles*, 724 F.2d 1374, 1377 (9th Cir. 1984).

Ninth Circuit Manual of Model Criminal Jury Instructions (2010 revision) 9.37 (as modified), and as it appeared on March 9, 2011 on the official web site for the United States Courts for the Ninth Circuit (<http://www.ce9.uscourts.gov/courts.html>).

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2. False Statement - Statute

Title 26, United States Code, Section 7206(1) provides in part, that:

Any person who ... [w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . [shall be guilty of an offense against the United States].

Authority: 26 U.S.C. § 7206(1)

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3. Modified 9.39 - False Statements - Elements

Defendant James R. Parker, in counts five through eight of the Indictment, and defendant Jacqueline L. Parker, in counts seven and eight of the Indictment, are charged with the crime of False Statement, in violation of Title 26, United States Code, Section 7206(1) and Title 18 United States Code Section 2.

In order for the defendant(s) to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendants made and signed tax documents that the defendants knew contained false information as to a material matter;

Second, the tax documents contained a written declaration that it was being signed subject to the penalties of perjury; and

Third, in submitting the tax documents, the defendants acted willfully.

A matter is material if it had a natural tendency to influence, or was capable of influencing, the decisions or activities of the Internal Revenue Service.

Authority: 26 U.S.C. § 7206(1)

Ninth Circuit Manual of Model Criminal Jury Instructions (2010 revision) 9.39 (as modified), and as it appeared on March 9, 2011 on the official web site for the United States Courts for the Ninth Circuit

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Section III: INSTRUCTIONS AS TO WHICH THE PARTIES DISAGREE

I. Government’s Requested Instructions (defendant objects)

- 1. “On or About”
- 2. Instruction §5.1- Aiding and Abetting
- 3. Tax Evasion - Statute
- 4. Existence of a Tax Deficiency
- 5. Affirmative Act - Defined
- 6. Substance over Form
- 7. Income Defined
- 8. Good Faith - Defined
- 9. Instruction 9.42 - Willfully Defined
- 10. §5.6 Knowingly—Defined

II. Defendants’ Requested Instructions (government objects)

- 11. Willfully Instruction No. 1
- 12. Good Faith Instruction No. 1
- 13. Good Faith Instruction No. 2
- 14. Good Faith Instruction No. 3
- 15. Good Faith Instruction No. 4
- 16. Good Faith Instruction No. 5 and Unlawful Intent to Defraud
- 17. Good Faith Instruction No. 6
- 18. Willfully Instruction No. 2
- 19. Instruction §5.5
- 20. Criminal v. Civil Tax Trial
- 21. Good Faith Instruction No. 7
- 22. Willfully Instruction No. 3

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1. "On or About"

The Indictment charges that the offenses were committed "on or about" certain dates. Although it is necessary for the United States to prove beyond a reasonable doubt that the offenses were committed on dates reasonably near the dates alleged in the Indictment, it is not necessary for the United States to prove that the offenses were committed precisely on the dates charged.

Authority: Kevin F. O'Malley et al., 1A Federal Jury Practice and Instructions § 13.05 (5th ed. 2004) (as modified)

Defendants' objection: The alleged violations are covered by the Statute of Limitations. The charges in the indictment are exact dates. This is not a case where and "on or about" instruction is applicable. Unnecessary.

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2. Instruction §5.1 - Aiding and Abetting

A defendant may be found guilty of the crimes of Conspiracy, Mail Fraud, Wire Fraud, and Transactional Money Laundering, even if the defendant personally did not commit the act or acts constituting the crime but aided and abetted in its commission. To prove a defendant guilty of aiding and abetting, the government must prove beyond a reasonable doubt:

First, the specified crime was committed by someone;

Second, the defendant knowingly and intentionally aided, counseled, commanded, induced or procured that person to commit each element of the specified crime; and

Third, the defendant acted before the crime was completed. It is not enough that the defendant merely associated with the person committing the crime, or unknowingly or unintentionally did things that were helpful to that person, or was present at the scene of the crime. The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping that person commit the specified crime.

The government is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 5.1

Defendants' objection: Objection to instruction not applicable.

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REFUSED: _____

MODIFIED: _____

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3. Tax Evasion - Statute

Title 26, United States Code, Section 7201 provides in part, that:

Any person who willfully attempts in any manner to evade or defeat any income tax . . . [shall be guilty of an offense against the United States].

Authority: 26 U.S.C. § 7201

Defendants' objection: Objection to rewording of 26 USC 7201. The statute specifically states "shall be guilty of a felony" not "of an offense".

GIVEN: _____
REFUSED: _____
MODIFIED: _____

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4. Existence of a Tax Deficiency

A tax due and owing may be ascertained in three ways: by the taxpayer reporting the amount of tax due and owing; by the IRS examining the taxpayer and assessing the tax; or if the taxpayer fails to file a return, and the government can prove a tax deficiency, the deficiency arises on the date the return was due.

If the IRS did a tax examination of the defendant taxpayer, and assessed additional tax, a certificate of assessment and payment is “adequate evidence” of a tax liability.

The government need not prove the specific amount of tax due for each calendar year alleged in the Indictment. It makes no difference if the actual tax deficiency is more or less than the amount charged as unreported in the Indictment. The government need only show that the defendant willfully attempted to evade any tax during the years in question.

Authority: *United States v. Marashi*, 913 F.2d 724, 735-36 (9th Cir. 1990); *United States v. Voorhies*, 658 F.2d 710, 715 (9th Cir. 1981); *United States v. Buckner*, 610 F.2d 570, 573-74 (9th Cir. 1979).

Defendants’ objection: The clients are on trial for an alleged criminal violation not a civil assessment of a tax deficiency. A civil decision has a lesser burden of proof. Jury isn't determining the tax deficiency or if one exists.

GIVEN: _____
REFUSED: _____
MODIFIED: _____

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5. Affirmative Act - Defined

A failure to act is not an attempt to evade one’s assessment or payment of taxes. But any affirmative act, “the likely effect of which would be to mislead or to conceal” one's tax liability or assets, is an attempt to evade taxes.

An affirmative “willful attempt” or act to evade or defeat income tax may be inferred from conduct such as 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 other conduct the likely effect of which would be to mislead or to conceal.

Other examples of affirmative acts of evasion of assessment or payment of tax include placing assets in the name of others, causing debts to be paid through and in the name of others, using bank accounts in the names of others, transacting business in cash or cashier’s checks, and paying other creditors instead of the government.

Authority: *Spies v. United States*, 317 U.S. 492, 499 (1943); *United States v. Pollen*, 978 F.2d 78, 88 (3d Cir. 1992); *United States v. Daniel*, 956 F.2d 540, 543 (6th Cir. 1992); *United States v. McGill*, 964 F.2d 222, 233 (3d Cir. 1992); *United States v. Masat*, 896 F.2d 88, 97 (5th Cir 1990); *United States v. Conley*, 826 F.2d 551, 553 (7th Cir. 1987); *United States v. Hook*, 781 F.2d 1166, 1169 (6th Cir. 1986); *United States v. Shorter*, 809 F.2d 54, 57 (D.C. Cir. 1987); *Cohen v. United States*, 297 F.2d 760, 762 (9th Cir. 1962).

Defendant’ objection: Redundant. Argumentative. If given requires an explanation that these actions maybe legally preferred.

GIVEN: _____

REFUSED: _____

MODIFIED: _____

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6. Substance over Form

Where an individual exercises complete dominion and control over income and its sources, the tax law generally attributes the income to the individual rather than to a nominal owner. The Tax Code taxes legal entities such as trusts and corporations separately from their owners. But if the entities lack economic substance or serve as the alter ego of an individual taxpayer who uses them to evade taxes, the tax burden falls on the individual taxpayer. This is a basic principle of federal income-tax law. Tax consequences flow from the substance rather than the form of a transaction, and defendant’s actual control of the property, rather than what the records reflect, is what controls for federal tax purposes.

Therefore, a trust or corporation that lacks economic substance and has no purpose other than tax avoidance is not recognized for Federal tax purposes. Generally, the law will not recognize a trust for Federal tax purposes if the creator keeps substantially unfettered powers of disposition or beneficial enjoyment of trust property. Federal tax law will disregard such an entity for Federal tax purposes, even if it is valid under State law.

Authority: *Neely v. United States*, 775 F.2d 1092, 1094 (9th Cir.1985); *Zmuda v. Commissioner*, 731 F.2d 1417, 1421 (9th Cir.1984); *Hanson v. Commissioner*, 696 F.2d 1232 (9th Cir.1983); *United States v. Schmidt*, 935 F.2d 1440, 1447-49 (4th Cir.1991); *United States v. Noske*, 117 F.3d 1053, 1059 (8th Cir.1997); *United States v. Buttorff*, 761 F.2d 1056, 1061 (5th Cir.1985).

Defendants’ objection: Argumentative. Not supported by case law.

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REFUSED: _____
MODIFIED: _____

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7. Income Defined

The term “income” is a broad concept that includes any economic gain from whatever source. The essence of income is the accrual of some gain, profit, or benefit to the taxpayer.

Federal income taxes are levied upon income derived from compensation for personal services of every kind and in whatever form paid, whether as wages, commissions, or money earned for performing services, or dealings in property. The tax is also levied upon profits earned from any business, regardless of its nature -- legal or illegal - and from interest, dividends, rents and the like. In short, the term “gross income” means all income from whatever source unless it is specifically excluded by law.

Authority: 26 U.S.C. § 61; *Commissioner v. Wilcox*, 327 U.S. 404 (1946).

Defendants’ objection: Objection to wording of US Code Section 61. Section 61 reads “...gross income means all income from whatever source derived...”

GIVEN: _____
REFUSED: _____
MODIFIED: _____

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8. Good Faith - Defined

The good faith of the defendant is a complete defense to the charges of tax evasion because good faith is simply inconsistent with the intent required to commit that violation.

If a person acts without reasonable grounds for belief that his conduct is lawful, it is for you to decide whether that person has acted in good faith in order to comply with the law or whether that person has willfully violated the law. In determining whether or not the government has proven that the defendant committed tax evasion of payment, or whether the defendant acted in good faith, you must consider all of the evidence received in the case bearing on the defendant's state of mind.

The burden of proving good faith does not rest with the defendant because the defendant has no obligation to prove anything to you. The government has the burden of proving to you beyond a reasonable doubt that the defendant acted willfully. If the evidence in the case leaves you with a reasonable doubt as to whether the defendant acted in good faith or acted willfully in committing tax evasion, you must find the defendant not guilty of that violation.

Authority: Devitt, Blackmar and O'Malley, Federal Practice and Instructions, (4th Ed. 1990) §56.26 [The Good Faith Defense] (Modified); *Cheek v. United States*, 498 U.S. 192 (1991).

Defendants' objection: Defendant did not submit reason for this objection.

GIVEN: _____

REFUSED: _____

MODIFIED: _____

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9. Requested Instruction §9.42 - Willfully-Defined

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.

[A defendant who acts on a good faith misunderstanding as to the requirements of the law does not act willfully even if [his] [her] understanding of the law is wrong or unreasonable. Nevertheless, merely disagreeing with the law does not constitute a good faith misunderstanding of the law because all persons have a duty to obey the law whether or not they agree with it. Thus, in order to prove that the defendant acted willfully, the government must prove beyond a reasonable doubt that the defendant did not have a good faith belief that [he] [she] was complying with the law.]

Authority: Manual of Model Criminal Jury Instructions
for the Ninth Circuit (2010 ed.), Instruction 9.42

Defendants’ objection: Defendant wants to include third paragraph. *See* page 81.

GIVEN: _____
REFUSED: _____
MODIFIED: _____

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10. Instruction §5.6 - Knowingly—Defined

An act is done knowingly if the defendant is aware of the act and does not [act] [fail to act] through ignorance, mistake, or accident. [The government is not required to prove that the defendant knew that [his] [her] acts or omissions were unlawful.] You may consider evidence of the defendant’s words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 5.6

Defendants’ objection: Objection to second sentence (not appropriate in this case). The government is required to prove that the defendant knew his acts or omissions were unlawful. The second sentence of this instruction should not be given where an element of the offense requires the government to prove that the defendant knew that what the defendant did was unlawful. *See United States v. Santillan*, 243 F.3d 1125, 1129 (9th Cir.2001) (violation of Lacey Act); *United States v. Turman*, 122 F.3d 1167, 1169 (9th Cir.1997) (money laundering case).

GIVEN: _____
REFUSED: _____
MODIFIED: _____

11. Willfully Instruction No. 1

2 The government has the burden of proving that James Parker and Jacqueline L. Parker
3 acted "knowingly" and "willfully" in this case. The word "willfully," as that term is used in the
4 Indictment and in these instructions, means that the act was done voluntarily and intentionally
5 and not because of mistake or accident. The word "knowingly," as that term is used in the
6 Indictment and in these instructions, means that the act was done voluntarily and intentionally
7 and not because of mistake or accident.

8 The proliferation of statutes and regulations has sometimes made it difficult for the
9 average citizen to know and comprehend the extent of the duties and obligations imposed by the
10 tax laws. Congress has accordingly softened the impact of the common-law presumption by
11 making specific intent to violate the law an element of certain federal criminal tax offenses.
12 Congress did not intend that a person, by reason of a bona fide misunderstanding as to his
13 liability for the tax, or as to his duty to make a return, should become a criminal by his mere
14 failure to measure up to the prescribed standard of conduct.

15 Willfulness means a voluntary, intentional violation of a known legal duty. A defendant
16 acted "willfully" if the law imposed a duty on him, he knew of the duty, and he voluntarily and
17 intentionally violated that duty. A defendant's conduct is not "willful" if it resulted from
18 negligence, inadvertence, accident, mistake or reckless disregard for the requirements of law,
19 or resulted from a good faith misunderstanding that he was not violating a duty that the law
20 imposed on him. If you have a reasonable doubt as to whether the defendant acted willfully, you
21 must acquit him.

22 A defendant does not act "willfully" if he believes in good faith that he is acting within
23 the law or that his actions comply with the law, even though the belief turns out to be incorrect
24 or wrong. Having the burden to prove the defendant acted willfully as charged, the government
25 must prove the defendant did not believe in good faith that his actions were lawful. Defendant's
26 good faith belief that the tax laws did not impose a duty on him do not have to be objectively

1 reasonable in order to be considered by you. A good faith misunderstanding of the law or a good
2 faith belief that one is not violating the law negates willfulness, whether or not the claimed belief
3 or misunderstanding is objectively reasonable. The burden of proving good faith does not rest
4 with the defendant because a defendant does not have an obligation to prove anything in the
5 case.

6 Therefore, if you find that the defendant actually believed what he was doing was in
7 accord with tax laws, then you must conclude that the defendant did not act willfully. An honest
8 but irrational belief by the defendant that he owed no legal duty would negate the required
9 element of willfulness.

10
11 Authority: *Cheek v United States*, 498 U.S. 192, 201 (1991); *United States v*
12 *Ambort*, 405 F.3d 1109, (10th Cir. 2005); *United States v Pflum* F.3d ,
13 150 Fed.Appx. 840, 2005 WL2476245 (10th Cir. 2005) (UNPUBLISHED).
United States v Murdock 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381. *United*
States v Bishop, 412 U.S. 346 (1973).

14
15 Government’s Objection: The government objects to the definition of “knowingly” in the first
16 paragraph. The government objects to the entire second paragraph as dicta from *Cheek v United*
17 *States*, 498 U.S. 192, 199-200 (1991). Portions of the third paragraph simply restate in substance
18 the Ninth Circuit Model Instruction § 9.42, and much of the language in the second and third
19 paragraph is repetitive, redundant, and confusing. The government objects to the fourth
20 paragraph as it contains the phrases, “actually believed” and “honest but irrational belief,” which
21 is different than the language in *Cheek*: a “good faith belief” need not be “objectively
22 reasonable.” *Id.* at 202-03 (emphasis added). The Ninth Circuit’s Model Instruction §9.42 is
23 more appropriate which states that, “[a] defendant who acts on a good faith misunderstanding
24 as to the requirements of the law does not act willfully even if his understanding of the law is
25 wrong or unreasonable.”

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GIVEN: _____
REFUSED: _____
MODIFIED: _____

12. Good Faith Instruction No. 1

2 The Burden is on the Government to negate the defendants' claim that he or she had a
3 good faith belief that he or she was not violating the tax law.

4 Good Faith Reliance on a qualified accountant is a defense to willfulness in cases of tax
5 fraud.

7 Authority: *United States v. Moran*, 493 F.3d 1002(9th Cir. 2007); *United States v.*
8 *Powell*, 955 F.2d 1206, (9th Cir. 1992)

9
10 Government's Objection: The Ninth Circuit in *Moran* held that excluding the defendant's
11 testimony as to the advice she received from financial and legal experts was an abuse of
12 discretion. That does not mean that this statement of law should be added as a jury instruction.
13 Moreover, defendants, to this day, have not provided proof to support the submission of this
14 affirmative defense. Furthermore, even if this Court were to accept a jury instruction that deals
15 with a "good faith reliance on an accountant," defendant's instructions are incomplete. "[A]
16 defendant claiming good faith reliance on the advice of a tax professional must have made full
17 disclosure of all relevant information to that professional." *United States v Bishop*, 291 F.3d 1100,
18 1107 (9th Cir. 2002). Line 1 is also repetitive and confusing.

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21 GIVEN: _____

22 REFUSED: _____

23 MODIFIED: _____

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13. Good Faith Instruction No. 2

Good faith is a complete defense to the charges in the indictment since good faith on the part of the Defendant is inconsistent with intent to defraud or willfulness, which is an essential part of the charges. The burden of proof is not on the Defendant to prove good faith since the Defendant has no burden to prove anything. The government must establish beyond a reasonable doubt that the defendant acted with specific intent to defraud as charged in the indictment.

One, who expresses an honestly held opinion or an honestly formed belief, is not chargeable with fraudulent intent even though the opinion is erroneous or the belief is mistaken.

Authority: *United States v Cheek*, 498 U.S. 192 (1991)

Government’s Objection: The government objects to the use of “intent to defraud,” which is not an element of the crime. The use of “fraudulent intent” is also misleading. In addition, language discussing the “burden of proof” is redundant and repeats language found in other instructions.

GIVEN: _____
REFUSED: _____
MODIFIED: _____

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14. Good Faith Instruction No. 3

An honest but irrational belief by the defendant that a deduction on a tax return was legal would negate the required element of willfulness.

Authority: *United States v Cheek*, 498 U.S. 192 (1991)

Government's Objection: The government objects to "honest but irrational belief," which as discussed above, is different than a "good faith belief" need not be "objectively reasonable." *Cheek v United States*, 498 U.S. 192, 201-203 (1991) (emphasis added). The Ninth Circuit's Model Instruction §9.42 is more appropriate which states that, "[a] defendant who acts on a good faith misunderstanding as to the requirements of the law does not act willfully even if his understanding of the law is wrong or unreasonable." Moreover, the instruction is repetitive. The use of "deduction" as an attempt to "create" a new instruction that merely repeats the same language found in previous intructions is also not appropriate.

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REFUSED: _____
MODIFIED: _____

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15. Good Faith Instruction No. 4

If you find that the defendant actually believed what she was doing was in accord with tax laws, then you must conclude that the defendant did not act willfully.

An honest but irrational belief by the defendant that she owed no legal duty would negate the required element of willfulness.

Authority *Cheek v. United States*, 498 U.S. 192, 201 (1991); *United States v. Ambort*, 405 F.3d 1109, _ (10th Cir. 2005) - Modified

Government's Objection: The government objects to this instruction for the same reasons previously discussed. The government objects to "honest but irrational belief," which, as discussed above, is different than the standard used in *Cheek*: a "good faith belief" need not be "objectively reasonable." *Cheek v United States*, 498 U.S. 192, 201-203 (1991). The instruction is redundant and repeats Instructions 10, 11, and 12.

GIVEN: _____
REFUSED: _____
MODIFIED: _____

1 16 Good Faith Instruction No. 5

2 One element that the government must prove beyond a reasonable doubt is that the
3 defendant had the unlawful intent to defraud. Evidence that the defendant in good faith followed
4 the advice of counsel would be inconsistent with such an unlawful intent. Unlawful intent has
5 not been proved if the defendant, before acting, made full disclosure of all material facts to an
6 attorney, received the attorney's advice as to the specific course of conduct that was followed,
7 and reasonably relied on that advice in good faith.

8 In order to rely on a good faith defense, the defendant must in fact have some "belief;"
9 either that her own understanding was correct or that she in good faith relied on the tax advice
10 of a qualified tax professional.

11
12 Authority: *See* Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010
13 ed.) §5.9. *See United States v. Bishop*, 291 F.3d 1100 (9th Cir.2002).

14 Government's Objection: As discussed above, "unlawful intent to defraud" is not an element of
15 the crime charged. The government objects to the use of this phrase as confusing and
16 misleading. In addition, the government objects to the use of "relied on...tax advice of a
qualified tax professional" for the same reasons discussed above on page 70.

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21 GIVEN: _____

22 REFUSED: _____

23 MODIFIED: _____

17. Good Faith Instruction No. 6

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Good faith of a Defendant is a complete defense to the charges of the indictment because good faith is simply inconsistent with willfulness. The burden of proving good faith does not rest with any Defendant because the Defendants have no obligation to prove anything to you. The government has the burden of proving to you beyond a reasonable doubt that each Defendant acted willfully.

A good faith belief is one which is honest and genuinely held. If a Defendant believes in good faith that he or she has done all that the law requires, he or she lacks the required criminal intent and cannot be found guilty of a crime. This is true regardless of how unreasonable the beliefs are so long as the beliefs were held in good faith.

Good faith reliance on an accountant or professional tax advisor is a complete defense to willfulness in cases of tax fraud and evasion.

If the evidence in the case leaves you with a reasonable doubt as to whether a given Defendant acted willfully or in good faith, you must acquit that Defendant.

Authority: *Cheek v. United States*, 498 U.S. 192,203-07 (1991); *United States v. Bishop*, 291 F.3d 1100 (9th Cir. 2002); *United States v. Gravich*, 152 F.3d 930 (Table), 1998 WL 416049, *1 (9th Cir. (Cal.) 1998) (unpublished opinion); 1A Kevin F. O'Malley, et al., *Federal Jury Practice and Instructions: Criminal* §19.06 (5th ed. 2000); LR.C. Regs. 1.6662-4(g)(4)(i)(A)(3).

Government's Objection: The government objects to any language not found in the government's proposed instruction as being redundant.

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REFUSED: _____
MODIFIED: _____

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18. Willfully Instruction No. 2

An act is done willfully if done voluntarily and intentionally with the purpose of violating a known legal duty.

Willfulness, as construed in criminal tax cases, 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.

An act is done willfully, as used in these instructions, if it is done voluntarily and intentionally with the purpose of violating a known legal duty. The conduct of a Defendant is not willful if the Defendant acted through negligence, inadvertence, justifiable excuse, mistake, or a good-faith misunderstanding of the law.

Authority: *Cheek v. United States*, 498 U.S. 192, 203-07 (1991); *United States v. Bishop*, 291 F.3d 1100 (9th Cir. 2002); *United States v. Pins/d*, 121 F.3d 718 (Table), 1997 WL 453730, *1 (9th Cir. (Or.) 1997) (unpublished opinion); *United States v. Barnes*, 46 F.3d 1146 (Table), 1994 WL725210, *2 (9th Cir. (Nev.) 1994) (unpublished opinion).

Government's Objection: The government objects to any language not found in the government's proposed instruction as being redundant.

GIVEN: _____

REFUSED: _____

MODIFIED: _____

19. Instruction §5.5

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2 As the Supreme Court has observed, "willful" is a word of "many meanings" and "its

3 construction [is] often . . . influenced by its context." *Ratzlaf v. United States*, 510 U.S. 135, 141

4 (1994). Accordingly, Ninth Circuit cases have defined "willful" in different terms depending on

5 the particular crime charged. See, e.g., *United States v. Easterday*, 564 F.3d 1004, 1006 (9th Cir.)

6 (for the crime of failure to pay employee payroll taxes, "willful" defined as "a voluntary,

7 intentional violation of a known legal duty"), cert. denied, 130 S. Ct. 490 (2009); *United States*

8 *v. Awad*, 551 F.3d 930, 939 (9th Cir.) (in health care fraud case, a "willful" act is one undertaken

9 with a "bad purpose" with knowledge that the conduct was unlawful), cert. denied, 129 S. Ct.

10 2748 (2009); *United States v. Reyes*, 577 F.3d 1069, 1080 (9th Cir.2009) (in a prosecution for

11 securities fraud willfully means "intentionally undertaking an act that one knows to be wrongful;

12 'willfully' in this context does not require that the actor know specifically that the conduct was

13 unlawful," quoting *United States v. Tarallo*, 380 F.3d 1174, 1188 (9th Cir.2004) (emphasis in

14 original)); *United States v. Karaouni*, 379 F.3d 1139, 1142 (9th Cir.2004) (in a prosecution for

15 falsely claiming United States citizenship, "willful" misrepresentation was defined as one made

16 voluntarily and deliberately). As the meaning of "willfully" necessarily depends on particular

17 facts arising under the applicable statute, the Committee has not provided a generic instruction

18 defining that term. In the context of tax crimes, however, see Instruction 9.42

19 (Willfully-Defined).

20

21 Authority: *See* Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010

22 ed.) §5.5

23 Government's Objection: This instruction is not appropriate in light of the model Ninth Circuit

24 Instruction §9.42.

25 GIVEN: _____

26 REFUSED: _____

27 MODIFIED: _____

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20. Criminal v. Civil Tax Trial

The counts in the indictment allege that Parker committed federal criminal tax evasion. There is a significant difference between a civil tax trial and a criminal tax trial. The purpose of a civil tax trial is the assessment of taxes and collection of money. The purpose of a criminal tax trial is to determine whether an individual willfully violated a criminal statute. Whether or not Parker is found guilty of criminal tax evasion, he must still pay civil taxes.

Authority: See *United States v. Christo*, 614 F.2d 486 (5th Cir. 1980) (regulatory violations were included in the indictment and throughout trial, so a jury instruction should have been given that the defendant was on trial for the criminal section at issue rather than merely regulatory violations)

Government's Objection: The government objects. *United States v. Christo*, 614 F.2d 486 (5th Cir. 1980) does not support the proposed instruction. The facts in *Christo* can be distinguished; the government in *Christo* charged a civil regulatory violation to prove criminal conduct.

GIVEN: _____
REFUSED: _____
MODIFIED: _____

21. Good Faith Instruction No. 7

One of the issues in this case is whether the defendant acted in "good faith." "Good faith" is a complete defense to the charge of income tax evasion if it is inconsistent with willfulness, which is an element of the charge.

A person acts in "good faith" when he has an honestly held belief, opinion, or understanding that he is following the law, even though the belief, opinion, or understanding turns out to be inaccurate, erroneous, or mistaken. A good faith belief can even be unreasonable or irrational.

A good faith belief can be formed by relying and acting upon the advice of a professional, such as a qualified accountant, certified public accountant, attorney, or other expert. Parker would not be "willfully" doing wrong if, before taking any action with regard to the alleged offense, he consulted in good faith with someone and relied on their advice.

Whether Parker acted in good faith for the purpose of seeking advice concerning questions about Parker was in doubt, and whether Parker made a full and complete report to those individuals, and whether Parker acted strictly in accordance with the advice received, are all questions for you to determine.

Evidence that the defendant acted in good faith may be considered by you, together with all the other evidence, in determining whether or not he acted willfully. In other words, if you find that Mr. Parker acted in good faith, then you must find him not guilty.

The burden of proof is not on Parker to prove good faith, of course, since Parker has no burden to prove anything. The Government must establish beyond a reasonable doubt that Parker acted knowingly and willfully as charged in the indictment.

Authority: See Manual of Model Criminal Jury Instructions for the Eighth Circuit (2009 ed.) § 9.05 (Good Faith: Income Tax & Fraud Cases) & § 9.05 (Theory of Defense); Third Circuit Pattern Jury Instructions § 5.07 (Good Faith Defense); *United States v. Cheek*, 498 U.S. 192 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system. ... [However, the]

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proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. ... Willfulness, as construed by our prior decisions in criminal tax cases, 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." Further the defendant can have an "irrational belief" that is "unreasonable."); *United States v. Brooks*, 174 F.3d 950, 955 (8th Cir. 1999) (explaining that to negate the element of willfulness, a defendant may show a "good faith belief" that he or she did not violate the law); *United States v. Masat*, 948 F.2d 923, 930 (5th Cir. 1991) (reliance on a professional); *United States v. Pomponio*, 563 F.2d 659, 662 (4th Cir. 1977) (reliance on accountant's interpretation of the tax laws); *United States v. Moran*, 493 F.3d ___, 1013 (___) (explaining that defendant's were entitled to a new trial because the trial court refused to allow one of the defendants to testify about her good faith reliance); ___ *Ross*, 487 U.S. 81, ___; *United States v. Harrold*, 796 F.2d 1275 (10th Cir. 1986) (defendant is not willful if consulted in good faith and followed the advice of an attorney, CPA or expert).

Government's Objection: The government objects to much of the language as redundant and repetitive, and for all the same reasons as described above in previous objections.

GIVEN: _____
REFUSED: _____
MODIFIED: _____

22. Willfully Instruction No. 3

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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.

A defendant who acts on a good faith misunderstanding as to the requirements of the law does not act willfully even if [his] [her] understanding of the law is wrong or unreasonable. Nevertheless, merely disagreeing with the law does not constitute a good faith misunderstanding of the law because all persons have a duty to obey the law whether or not they agree with it. Thus, in order to prove that the defendant acted willfully, the government must prove beyond a reasonable doubt that the defendant did not have a good faith belief that [he] [she] was complying with the law.

Willfulness, as construed... in criminal tax cases, 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.

Authority: See Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.) § 9.42. Modified. See Also *Cheek v. United States*, 498 U.S. 192, 201 (1991).

Government's Objection: The government objects to the third paragraph of the instruction as repetitive. The first two paragraphs track the language in 9.42. The last paragraph comes directly from the Comment section in the Ninth Circuit Model Instruction.

GIVEN: _____
REFUSED: _____
MODIFIED: _____