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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,)	CR-10-757-PHX-ROS
Plaintiff,)	ORDER
vs.)	
James R. Parker,)	
Defendant.)	

Pending before the Court is Defendant’s motion in limine to exclude documents (Doc. 116), Defendant’s motion for immunity for Jacqueline Parker (Doc. 117), and the government’s motion in limine regarding defendant’s advice of counsel defense (Doc. 119). For the reasons below, the motions will be granted in part and denied in part.

A. Defendant’s Motion in Limine to Exclude Documents (Doc. 116)

Defendant moves in limine to exclude twelve documents or categories of documents. (Doc. 116). Defendant argues the evidence is not relevant, and, even if relevant, its probative value is substantially outweighed by its prejudicial effect.

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401. “Irrelevant evidence is not admissible.” Fed. R. Evid. 402. To determine relevance, a court analyzes the “relation between an item of evidence and a matter properly provable in the case.” Fed. R. Evid. 401 advisory

1 committee's note.

2 "The court may exclude relevant evidence if its probative value is substantially
3 outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury,
4 undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid.
5 403. "'Unfair prejudice' within its context means an undue tendency to suggest decision on
6 an improper basis" Fed. R. Evid. 403 advisory committee's note. Unfair prejudice
7 "must do more than 'damage the defendant's position at trial,' it must 'make[] a conviction
8 more likely because it provokes an emotional response in the jury or otherwise tends to affect
9 adversely the jury's attitude toward the defendant wholly apart from its judgment as to his
10 guilt or innocense [sic] of the crime charged.'" *United States v. Burgess*, 576 F.3d 1078,
11 1099 (10th Cir. 2009) (citing *United States v. Tan*, 254 F.3d 1204, 1211-12 (10th Cir. 2001)).

12 Defendant moves to exclude the following documents or categories of documents.

13 **1. Jacqueline Parker's American Express Statements (Government Exhibit**
14 **372).**

15 Defendant argues the 290 pages of American Express bills reflect only Jacqueline
16 Parker's purchases. Jacqueline Parker's trial has been severed. As such, the bills are
17 irrelevant, and such information is unfairly prejudicial and inflammatory.

18 The Government responds the tax liability was joint, and these records demonstrate
19 the Parkers made false statements to the IRS, such as they "have cut their expenses to the
20 bone," and "without the largesse of their family, [they] would have no place to live." (Doc.
21 123, at 11-12). Further, the monthly balance on the American Express card was often paid
22 with funds from nominee entities, which shows the nominee entities were not true and
23 separate entities, but an extension of Defendant himself. (Id., at 12). The records show the
24 entities were sham entities set up to hide Defendant's assets. (Id.). These records are
25 probative of the Parkers' actual net worth and sources of income, and show Defendant had
26 the ability to pay his tax debt. (Id.).

27 The Court finds the American Express statements are relevant to Defendant's sources
28 of income, and whether the entities though which Defendant allegedly attempted to hide

1 assets were sham entities. Any prejudice to Defendant is not unfair, and does not
2 substantially outweigh the probative value of the evidence. As such, the evidence is
3 admissible, and Defendant's motion will be denied.

4 **2. Boise City Bank Memo to File dated August 16, 2007 written by Tim**
5 **Barnes (Bates 008341, located in Government Exhibit 76).**

6 This memo discusses an alleged phone call between Tim Barnes and James Parker.
7 Defendant contends it is an uncorroborated opinion and prejudicial hearsay.

8 The Government argues the memo is a business record. Specifically, Tim Barnes
9 ("Barnes") sent a letter to Cimarron River Ranch ("CRR"), indicating a large sum of money
10 was wired to CRR's account from Belize. (Doc. 123, at 12-13). In accordance with the
11 bank's Customer Due Diligence Policy, which required the bank to examine funds from a
12 country listed by the United States Department of State as a major money laundering country,
13 the letter requested someone contact the bank. Defendant called Barnes, and Barnes
14 summarized the conversation in a memo placed with the records in CRR's account.
15 According to the memo, Defendant told Barnes the funds derived from Defendant's real
16 estate developments in Belize. (Id.). The Government argues the memo is admissible as a
17 business record, and is probative of the large sums of money transferred from Defendant's
18 nominee companies.

19 The Court finds the memo is a business record because it was created near the time
20 of the conversation in the regular course of business pursuant to a regular bank policy and
21 does not indicate a lack of trustworthiness. Fed. R. Evid. 803(6). The memo is relevant to
22 show sources of money available to Defendant. Further, according to the description of the
23 memo, Defendant made statements which do not constitute hearsay pursuant to Rule 801,
24 Federal Rules of Evidence. The prejudice to Defendant is not unfair, and does not
25 substantially outweigh the probative value of the evidence. As such, the evidence is
26 admissible, and Defendant's motion will be denied.

27 **3. Tax Returns for Years 2003, 2004, 2005, 2006 and 2007 (Government**
28 **Exhibits 6-10).**

1 Defendant argues tax returns from these years is unfairly prejudicial because he is not
2 charged with any crime relating to these years.

3 The Government responds that Defendant is charged with evading taxes for 1997
4 (Count 1), 1998 (Count 2), 2001 (Count 3), and 2002 (Count 4). (Doc. 123, at 14).
5 Defendant is also charged with making false statements to officers in his compromise and
6 installment requests (Counts 4-8), which were made in an attempt to compromise
7 Defendant's tax liabilities for tax years 1997-2004. (Id.). The Government seeks to present
8 evidence of assessments and payments, along with evidence of lavish spending and
9 representations of poverty, to show Defendant willfully evaded taxes and made false
10 statements to the IRS.

11 The Court finds the returns, or absence thereof, and the assessments of tax liability
12 and notices of such, are relevant to one or more of the charged accounts. The prejudice to
13 Defendant is not unfair, and does not substantially outweigh the probative value of the
14 evidence. As such, the evidence is admissible, and Defendant's motion will be denied.

15 **4. IRS Certificate of Assessments and Payments 1999, 2000, 2003, 2004, 2005,**
16 **2006, 2007, 2008 and 2009 (Government Exhibits 13, 14, 17,-23).**

17 Defendant argues tax returns from these years is unfairly prejudicial because he is not
18 charged with any crime relating to these years.

19 For the reasons stated in section A.3, *supra*, the evidence is admissible, and
20 Defendant's motion will be denied.

21 **5. IRS Certification for Lack of Record for the following entities:**

- 22 **a. Sunlight Financial LLP**
- 23 **b. Cimarron River Ranch LLC**
- 24 **c. RSJ Investments LLC**
- 25 **d. Parker Children IRRV**
- 26 **e. Cornerstone Resource Trust**
- 27 **f. Sunlight Partners**

28 Defendant argues these entities belong to and are controlled by Defendant's children,

1 and it is unfairly prejudicial to introduce evidence of his children's failure to file as evidence
2 of Defendant's alleged tax evasion.

3 The Government alleges these entities were shams, had straw owners, and were
4 created to hide assets. The fact that these entities failed to file tax returns is probative of the
5 entities' legitimate purpose or lack thereof. Therefore, the evidence is relevant. The
6 prejudice to Defendant is not unfair, and does not substantially outweigh the probative value
7 of the evidence. As such, the evidence is admissible, and Defendant's motion will be denied.

8 **6. Insurance coverage for a Rolls-Royce as pleasure (Bates State Farm**
9 **Insurance 0001507, Government Exhibit 135).**

10 Defendant argues he is not the owner of the Rolls-Royce and seeks to exclude
11 allegedly listing the purpose of the vehicle on insurance forms as "Pleasure."

12 The Government argues the Rolls Royce was purchased through CRR, with
13 Defendant's son as the straw buyer, after Defendant sold \$6 million in Belizean land the
14 month prior. (Doc. 123, at 16). The same month the Rolls Royce was purchased, Defendant
15 submitted his first allegedly false "Offer in Compromise" to the IRS, in which he claimed
16 to have little or no income and modest assets. (Id., at 16-17). The insurance records for the
17 Rolls Royce show the "principal operator" was Defendant, and the "use of vehicle" was for
18 "pleasure." (Id., at 17). The Government argues this evidence is highly probative of
19 Defendant's conduct of evading taxes and hiding assets. (Id.).

20 The Court finds this evidence is probative of one or more charges against Defendant.
21 The prejudice to Defendant is not unfair, and does not substantially outweigh the probative
22 value of the evidence. As such, the evidence is admissible, and Defendant's motion will be
23 denied.

24 **7. Pictures (Bates 16055 Turkey Track, Canyon, TX Property, Government**
25 **Exhibits 358, 359, 360 and 361).**

26 Defendant argues these pictures show vehicles that do not belong to Defendant or his
27 wife, and show the interior of a property that belongs to Defendant's children after they sold
28 the home. Defendant argues these are not a fair and accurate depiction of Defendant's

1 property.

2 The Government argues first that before offering to admit the photos adequate
3 foundation will be presented to establish accurate depiction. Second, the Government states
4 counsel should be able to resolve differences concerning the pictures to reach an
5 accommodation. (Doc. 123, at 17). The motion is denied as premature or moot.

6 **8. Breach of Contract against Prather Kalman, PC.**

7 Defendant seeks to exclude any mention alleging a finding of breach of contract
8 against Prather Kalman, PC. In the breach of contract case, a motion for a new trial was
9 granted. Any mention of the lawsuit would be irrelevant and prejudicial.

10 In response, the Government states it “has insufficient information about what this
11 concern is all about,” and it will seek to discuss the matter with counsel. (Doc. 123, at 18).

12 “[J]udicial findings of fact present a rare case where, by virtue of their having been
13 made by a judge, they would likely be given undue weight by the jury, thus creating a serious
14 danger of unfair prejudice.” *Nipper v. Snipes*, 7 F.3d 415, 417-18 (4th Cir. 1993) (vacating
15 and remanding based on admission of prior judicial findings of fact); *United States v. Sine*,
16 493 F.3d 1021, 1033 (9th Cir. 2007) (jurors likely to defer to Court’s findings rather than
17 make findings themselves); *See Engquist v. Oregon Dep’t of Agric.*, 478 F.3d 985, 1009 (9th
18 Cir. 2007) (same). The Court will exclude any mention of the lawsuit regarding a breach of
19 contract against Prather Kalman, PC absent sufficient foundation by the government.
20 Defendant’s motion in limine will be granted as to this category of evidence.

21 **9. Defendant’s failure to file a tax return for calendar years 1999 and 2000.**

22 Defendant argues tax returns from these years are unfairly prejudicial because he is
23 not charged with any crime relating to these years.

24 For the reasons stated in section A.3, *supra*, the evidence is admissible, and
25 Defendant’s motion will be denied.

26 **10. Defendant’s alleged failure to pay an alleged outstanding tax liability of**
27 **\$2,721,166.67 for tax year 1999, and alleged outstanding tax liability of \$485,951.49 for**
28 **tax year 2000.**

1 Defendant argues alleged tax liability from these years is unfairly prejudicial because
2 he is not charged with any crime relating to these years. Defendant argues he has not been
3 through an audit for these years and contests his tax liability.

4 For the reasons stated in section A.3, *supra*, the evidence is admissible, and
5 Defendant's motion will be denied.

6 **11. Defendant's alleged failure to pay an alleged outstanding tax liability of**
7 **\$76,861.35 for tax year 2003; an alleged outstanding tax liability of \$9,755.05 for tax**
8 **year 2004; and an alleged outstanding tax liability of \$19,496.06 for tax year 2005.**

9 Defendant argues alleged tax liability from these years is unfairly prejudicial because
10 he is not charged with any crime relating to these years.

11 For the reasons stated in section A.3, *supra*, the evidence is admissible, and
12 Defendant's motion will be denied.

13 **12. Defendant's failure to file a tax return for calendar years 2008 and 2009.**

14 Defendant argues tax returns from these years is unfairly prejudicial because he is not
15 charged with any crime relating to these years.

16 For the reasons stated in section A.3, *supra*, the evidence is admissible, and
17 Defendant's motion will be denied.

18 **B. Defendant's Motion for Immunity**

19 Defendant's wife, Jacqueline Parker, is charged with two counts of making false
20 statements in violation of 26 U.S.C. § 7206(1). (Doc. 123, at 2). Jacqueline Parker's trial
21 has been severed. Defendant argues Jacqueline Parker is a necessary defense witness (Doc.
22 117). Jacqueline Parker's attorney has informed Defendant that Jacqueline Parker will not
23 take the stand and will instead plea the Fifth Amendment. (Id.). Defendant argues his
24 Constitutional right to present testimony of a crucial witness requires granting Jacqueline
25 Parker immunity. (Doc. 117).

26 The Government argues Defendant's motion is devoid of any factual basis showing
27 Defendant is entitled to have Jacqueline Parker granted immunity. Indeed, Defendant
28 provides no record cites and cites no legal authority.

1 Under 18 U.S.C. § 6002-6003, the United States may seek immunity for a witness
2 whose testimony “may be necessary to the public interest.” This is referred to as “use
3 immunity.” *United States v. Lord*, 711 F.2d 887, 889-90 (9th Cir. 1983). “Use immunity
4 means that while the government may prosecute the witness for an offense related to the
5 subject matter of the witness’s testimony, the testimony itself and any ‘fruits’ thereof may
6 not be used against the witness in any criminal case except a prosecution for perjury arising
7 out of the testimony.” *Id.* Use immunity is generally granted by the Court only to
8 government witnesses. *Id.*; *United States v. Westerdahl*, 945 F.2d 1083, 1086 (9th Cir.
9 1991). Use immunity is rare when the defense witness is the target of prosecution. *Williams*
10 *v. Woodford*, 306 F.3d 665, 700 (9th Cir. 2002). “In fact, we think trial judges should
11 summarily reject claims for defense witness immunity whenever the witness for whom
12 immunity is sought is an actual or potential target of prosecution.” *United States v. Croft*,
13 124 F.3d 1109, 1117 (9th Cir. 1997); *United States v. Condo*, 741 F.2d 238, 239 (9th Cir.
14 1984) (citing *United States v. Turkish*, 623 F.2d 769, 778 (2d Cir. 1980)).

15 An exception exists for prosecutorial misconduct. *See Westerdahl*, 945 F.2d at 1086;
16 *Lord*, 771 F.2d at 892. To prove this exception, a Defendant must show the evidence sought
17 from the witness is relevant and the government distorted the judicial fact-finding process
18 by denying immunity. *Id.* Here, Defendant has offered no insight into the substance of
19 Jacqueline Parker’s proposed testimony. (Doc. 117). Defendant’s unsupported assertions
20 have not established relevance. Similarly, Defendant has not made any showing of
21 misconduct by the Government.

22 In light of the fact that Jacqueline Parker is separately being prosecuted for the same
23 charges, and Defendant’s failure to offer any evidence, record cite or legal citation to support
24 its motion, Defendant’s motion will be denied.

25 **C. Government’s Motion in Limine Regarding Advice of Counsel**

26 The scope of discovery in a criminal case is limited. *See gen. Fed. R. Crim. P. 15-17.*
27 Defendant intends to assert an advice of counsel defense. *See* (Doc. 127). The Government
28 argues Defendant has waived the attorney-client privilege by asserting the advice of counsel

1 defense.¹ The Government moves in limine for Defendant to disclose: (1) the names of
2 those attorneys he claims provided him legal advice that he relied upon in good faith, and the
3 nature and substance of the specific advice; and (2) all privileged documents and
4 communications between Defendant and any attorney with regard to any tax advice he
5 sought, and permit the government to interview all attorneys who provided him with such
6 advice. (*Id.*).

7 “[W]illfulness is an element in all criminal tax cases.” *United States v. Bishop*, 291
8 F.3d 1100, 1106 (9th Cir. 2002).² Good-faith reliance on the advice of a qualified tax
9 professional, including a tax attorney, can be a defense to willfulness in cases of tax fraud
10 and evasion. *United States v. Bishop*, 291 F.3d 1100, 1106-07 (9th Cir. 2002). A defendant
11 claiming a good-faith reliance on advice of a tax professional must show he or she: (1) acted
12 in good faith; (2) made full disclosure of all relevant evidence of the tax professional; and
13 (3) received the tax professional’s advice as to the specific course of conduct taken. *Id.*

14 “[T]estimony about the reliance on qualified experts [is] relevant to establishing this
15 defense” *United States v. Moran*, 493 F.3d 1002, 1013 (9th Cir. 2007). “The defendant
16 is entitled to testify about the tax advice he received” *Id.* (citing *Bishop*, 291 F.3d at
17 1111). “Such testimony does not constitute hearsay when not offered for the truth of the
18 matter stated.” *Id.* (quoting *Bishop*, 291 F.3d at 1111). “[T]estimony about the defendant’s
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21 ¹“As we have said: The privilege which protects attorney-client communications may
22 not be used both as a sword and a shield. Where a party raises a claim which in fairness
23 requires disclosure of the protected communication, the privilege may be implicitly waived.”
United States v. Ortland, 109 F.3d 539, 543 (9th Cir. 1997) (internal citations omitted).

24 ² To prove tax evasion, the Government must show “the law imposed a duty on the
25 defendant, that the defendant knew of this duty, and that he voluntarily and intentionally
26 violated that duty.” *Cheek v. United States*, 498 U.S. 192, 2011 (1991). The Government
27 must disprove “a defendant’s claim of ignorance of the law or a claim that because of a
28 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.” *Id.*

1 reliance on qualified experts, and the specific advice upon which the defendant claims to
2 have relied, does not constitute hearsay when not offered for the truth of the matter asserted.”
3 *United States v. Fitzgerald*, 2007 U.S. Dist. LEXIS 42076 (S.D. Cal. 2007). Testimony
4 about advice given to a defendant may also fall under the state of mind exception under Rule
5 803(3), Fed. R. Evid.. *Bishop*, 291 F.3d at 1112.

6 The Government anticipates Defendant may attempt to rely on advice from Henry
7 Tom (“Tom”), Gregory A. Robinson (“G. Robinson”), and Ralph Robinson (“R. Robinson”).
8 (Doc. 119, at 7). Tom represented Defendant during tax court litigation, and signed
9 stipulations for the 1997 and 1998 deficiencies. Tom died in 2011. G. Robinson represented
10 Defendant during negotiations with the IRS and was involved in filing offers in compromise
11 for Defendant. G. Robinson currently practices law. R. Robinson was the signor on the bank
12 account for Resorts Consulting Quorum (“RCQ”), a nominee entity which received money
13 directly from Belize. R. Robinson signed checks on behalf of RCQ to Defendant’s Omega
14 Construction, Inc. R. Robinson died in 2006. (Id.).

15 In response,³ Defendant argues certain materials are already in the Government’s
16 possession, and the Government “has now provided a nearly exhaustive list of the experts
17 in its motion.” (Doc. 124, at 2). As such, Defendant argues the Government’s request for
18 discovery regarding advice of counsel should be denied.

19 The Government has identified possible hearsay issues, but is unable to “fully
20 articulate and delineate each and every hearsay and foundational concern” until Defendant
21 “reveals the nature and source of any legal advice” on which he claims to have relied. (Id.,
22 at 11). This Order provides guidance as to the admissibility of testimony regarding advice
23 of counsel. If not offered for the truth of the matter asserted, testimony is not hearsay.

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25 ³ Defendant argued he had not decided whether to take the stand, and therefore had
26 not waived the attorney-client privilege. (Doc. 124). Defendant acknowledged he would
27 waive the attorney-client privilege by asserting the advise of counsel defense, but argued that
28 waiver would be tailored to the defense rather than a wholesale waiver. (Id., at 4-5).
Defendant subsequently gave notice he will rely upon the advice of counsel defense. (Doc.
127, at 1-2).

1 *Moran*, 493 F.3d at 1013; *Bishop*, 291 F.3d at 1111. If offered to prove Defendant's state
2 of mind, testimony falls under the hearsay exception under Rule 803(3), Fed. R. Evid..
3 *Bishop*, 291 F.3d at 1112.

4 **D. Defendant's Motion to Permit Late Disclosure of Expert**

5 On May 11, 2012, Defendant filed a motion to permit late notice and utilization of an
6 expert witness on legal ethics. (Doc. 127). Defendant states, "the notice is admittedly late,"
7 but until recently Defendant was unsure if he was going to use the advice of counsel defense.
8 (Id.). This defense "often pivots on the defendant testifying on his behalf," and "the defense
9 was resistant to prematurely commit to that defense." (Id.). Defendant argues his "ability
10 to give timely notice of an ethic[s] expert [sic] was thwarted by the dilemma of the timing
11 and utilizing the defense." (Id.) In addition, Defendant did not want to use his limited
12 resources unless he was certain he was going to use the expert. (Id.). Defendant argues the
13 Government will have ample time to prepare for the expert's testimony "[g]iven the length
14 of the trial." (Id.). The Government has not yet responded to Defendant's motion.

15 Rule 16(b), Federal Rules of Criminal Procedure, governs a defendant's disclosure.
16 Rule 16(b)(1)(C) requires a defendant to disclose expert witnesses upon request from the
17 government. Rule 16(c) imposes a duty to promptly update disclosures. On March 24, 2011,
18 the Court issued an Amended Scheduling Order. (Doc. 64). Defendant's discovery pursuant
19 to Rule 16 was due April 15, 2011. Specifically, Defendant's disclosure of experts and
20 reports was due June 30, 2011. (Id.).

21 Defendant has not demonstrated good cause for the late disclosure. Defendant's
22 motion essentially states Defendant waited until the last minute to decide whether to use the
23 expert. Defendant will not be permitted to utilize the ethics expert because he was not timely
24 disclosed.

25 **IT IS ORDERED** Defendant's motion in limine to exclude documents (**Doc. 116**) is
26 **GRANTED IN PART AND DENIED IN PART.**

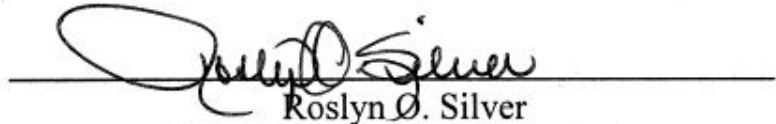
27 **IT IS ORDERED** Defendant's motion for immunity (**Doc. 117**) is **DENIED.**

28 **IT IS ORDERED** the Government's motion on advice of counsel (**Doc. 119**) is

1 **DENIED WITHOUT PREJUDICE** as premature.

2 **IT IS ORDERED** Defendant's motion to permit late disclosure (**Doc. 127**) is
3 **DENIED.**

4 DATED this 16th day of May, 2012.

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7 Roslyn O. Silver
8 Chief United States District Judge
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