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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

United States of America, Plaintiff, v. James R. Parker, Defendant.	CR 10-757-01-PHX-ROS **TRIAL MEMORANDUM**

The United States of America submits the following trial memorandum on legal issues that may arise during the trial of this case.

Respectfully submitted this 21st day of May, 2012.

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s/Walter Perkel

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I. FACTUAL BACKGROUND

On June 8, 2010, a federal grand jury returned an Indictment against James R. Parker ("defendant" or "defendant James Parker") and Jacqueline L. Parker ("Jacqueline Parker"). (CR 1.) Defendant Parker was charged with four counts of Tax Evasion in violation of 26 U.S.C.§ 7201, and four counts of making a False Statement in violation of 26 U.S.C.§ 7206(1).(Id.)[1]

A. James and Jacqueline Parker.

Defendant James Parker and his wife, Jacqueline Parker, have resided at 35802 North Meander Way in Carefree, Arizona since 1998. (Trial Exhibits 115, 118, 164, 167-68.) They have two sons, Samuel James Parker ("S. Parker") (born December 24, 1982), and James Parker Jr., and a daughter, Rachel T. Harris ("Harris") (born September 14, 1977). (Trial Exhibits 162-63.)

1. *The 1998 purchase of defendant's residence located at 35802 North Meander Way, Carefree, Arizona.*

On or about July 24, 1998, James and Jacqueline Parker purchased a home located at 35802 N. Meander Way, in Carefree, Arizona. (Trial Exhibits 115, 118, 164, 169.) They bought the home for $450,000. (Id.) The warranty deed for the property reflects that the property was sold to Cornerstone Resource Trust, with Harris (formerly Rachel T. Parker") and Lee O. Melby as trustees, and defendant James R. Parker as trust manager. (Id.) Bowman & Associates Insurance Agency facilitated defendant's purchase of home owner's insurance. (Trial Exhibits 177, 179-81.) Defendant made an initial deposit of $75,000 towards the purchase of the home. (Trial Exhibit 115,164.) The previous owner of the residence, a Robert W. Dietrich, loaned defendant the remaining $375,000 at annual interest rate of 7.5% to be repaid in monthly installments. (Id.) The loan documents reflect that full payment on the balance of the loan to be due July 24, 2003. (Id.)

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[1]Jacqueline Parker was charged with two counts of making a False Statement in violation of 26 U.S.C.§ 7206(1). (CR 1.) Her case was severed from that of defendant James Parker. (CR 88.)

2. *The establishment of Omega Construction, Inc.*

On September 15, 1999, Omega Construction, Inc. ("Omega") was formed in the State of Nevada. (Trial Exhibit 44.) State records reflect that defendant signed as the director, secretary, and treasurer of the company. (Trial Exhibit 45.). The false financial statements submitted to the IRS in 2004 and 2005 indicated that defendant was self-employed in real estate construction. (Trial Exhibits 104, 106, 110, 111, 114.)

3. *Harris Bank Account, associated with Omega Construction, Inc.*

On October 29, 1999, defendant opened up a checking account at ***Harris Bank*** for Omega. (Account 4810035). (Trial Exhibits 52-53.)

B. Tax Years 1997-2002; May 2003 U.S. Tax Court Stipulation.

1. *Defendant's 1997 and 1998 Federal Tax Returns*

Defendant and his wife, Jacqueline Parker, jointly filed U.S. Income Tax Returns for tax years 1997 and 1998. (Trial Exhibits 1-2, 11-12.) The 1997 and 1998 tax filings reported tax liabilities of $2,089 and $7,967 respectively. (Id.) The 1997 tax return was filed on May 30, 1998, and the 1998 return was filed on October 17, 1999. (Trial Exhibit 1-2, 11-12.)

2. *1999 IRS Audit, Notice of Deficiencies, and Tax Court Petition.*

In 2001, subsequent to an audit initiated by the Internal Revenue Service ("IRS"), the IRS determined that defendant owed $320,155 in unpaid taxes for the 1997 calendar-year. (Trial Exhibits 11, 32.) In 2002, the IRS determined defendant's tax liability to be $714,324 for 1998. (Trial Exhibits 12, 33.) The IRS also calculated penalties and interest in the amounts of $64,031 and $130,434.91 respectively for the 1997 calendar-year (trial exhibit 32), and penalties and interest of $143,064 and $258,362.19 respectively for 1998.(Trial Exhibit 33.)

On or about May 29, 2002, subsequent to the audit, the IRS issued and served defendant and Jacqueline Parker a Notice Of Deficiency for the calculated 1997 tax liability, wherein the IRS informed defendant that he owed $320,155 in taxes and $64,031 in penalties. (Trial Exhibit 34.) On or about August 28, 2002, defendant filed a petition in U.S. Tax Court appealing the 1997Notice of Deficiency. (Trial Exhibit 364.) The petition disputed the amount of tax, interest

and penalties that the IRS claimed defendant owed. (Id.)

On or about September 13, 2002, the IRS issued and served defendant and Jacqueline Parker a second Notice Of Deficiency for the 1998 tax year, informing defendant and Jacqueline Parker that they owed $715,324 in taxes and $143,064 in penalties. (Trial Exhibit 35.) On or about December 12, 2002, defendant filed a second petition in U.S. Tax Court disputing the amount of tax, interest and penalties that the IRS claimed defendant owed. (Trial Exhibit 364.)

3. *2003 Stipulated Tax Court Decisions*

On May 6, 2003, defendant entered into a stipulated agreement with the IRS in U.S. Tax Court with regards to the 1998 tax liability. (Trial Exhibit 38.) The total deficiency agreed upon was $715,324, with an additional penalty of $143,064.(Id.) On May 14, 2003, defendant entered into a second agreement with regards to the 1997 tax liability. (Trial Exhibit 37.) The total deficiency agreed upon for 1997 was $320,155, with an additional $64,031 in penalties. (Id.)

The 1997 and 1998 tax years are counts 1 and 2 of the Indictment. (CR 1.) As of July 20, 2010, the IRS still had not received any payments with regards to the 1997 and 1998 tax years. (Trial Exhibit 11-12.)

4. *Defendant's 2001 and 2002 Federal Tax Returns.* [2]

On or about August 19, 2003, the IRS received defendant's jointly filed tax return for the 2002 calendar year. (Trial Exhibit 4.) Defendant reported a tax liability of $12,331. (Id.) On or about September 5, 2003, the IRS received defendant's jointly filed tax return for calendar year 2001. (Trial Exhibit 3.) Defendant reported a tax liability of $13,924. (Id.)

As of July 20, 2010, the IRS has also not received any payments for these years. (Trial Exhibits 15-16.). The 2001 tax year is count 3 of the Indictment; the 2002 tax year is count 4. (CR 1.) On April 21, 2012, approximately one month before trial, defendant paid $13,324 towards his 2001 tax liability (Trial Exhibit 545), and $14,469 towards his 2002 tax liability.

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[2]For 1999 and 2000, defendants failed to timely file tax returns; the IRS again audited defendants and assessed a substantial liability in excess of $1.0 million, which defendants have failed to pay. (Trial Exhibits 13-14.)

(Trial Exhibit 546.)

5. *IRS Collection Efforts (2004-2007)*

Subsequent to the U.S. Tax Court Decision, IRS revenue officers began the process of attempting to collect the amount of tax liability owed by defendants. (Trial Exhibits 105; 445-46, 448-60.) On February 4, 2004, IRS Revenue Officer, Paul Wedephol, met with defendant's tax preparer and then power-of-attorney, Timothy Liggett. (Trial Exhibit 105, 446.) They discussed the payment of taxes owed based on amounts previously stipulated to in U.S. Tax Court.(Id.) Mr. Wedephol set a February 13, 2004 deadline, at which time he requested that defendant provide him with a summary of his assets and income, start making partial payments on unpaid taxes, and begin the process of obtaining a second loan against defendant's Carefree residence as a way to meet his tax liability. (Id.)

On February 5, 2004, defendant's attorney, Greg Robinson, in the course of representing defendant, wrote a letter to the IRS explaining that although defendant and his wife had agreed to the tax court stipulation, they wanted to wait on filing an offer in compromise until after the revenue agent had completed his audit. (Trial Exhibit 448.) He also stated that defendant was interested in setting up an installment plan. (Id.) On February 12, 2004, the IRS asked that Greg Robinson submit a form affirming that he also possessed defendant's power of attorney. (Trial Exhibit 449.)

On February 12, 2004, the IRS sent, via certified mail, to defendant and Jacqueline Parker a *Final Notice, Notice Of Intent To Levy And Notice Of Your Right To A Hearing*. (Trial Exhibits 105, 450.) In this letter, the IRS provided the amount of tax, interest, and penalties defendant owed for tax years 1997, 1998, 2001, and 2002. (Id.) Defendant signed the certified mail receipts. (Id.) Timothy Liggett was also provided a copy of the notice. (Id.)

On February 17, 2004, the IRS sent a *Notice Of Federal Tax Lien Filing* to Timothy Liggett, which again listed the amount of tax owed for 1997, 1998, 2001, and 2002. (Trial Exhibit 36, 451.) On March 10, 2004, Gregory Robinson, responding on behalf of defendant, filed a *Request for A Collection Due Process Hearing*. (Trial Exhibit 452.)

On June 8, 2004, the IRS informed defendant and Jacqueline Parker that the IRS had received their request for a *Collection Due Process Hearing*, and that a hearing would be set to discuss the collection process. (Trial Exhibit 454.) Subsequently, on August 10, 2004, the IRS notified defendant and Jacqueline Parker that it had granted their request to withdraw their request for the hearing. (Trial Exhibit 455.)

On September 10, 2004, Gregory Robinson informed the IRS that Timothy Liggett would be resubmitting defendant's 2002 return as an amended return, wherein he would remove the mortgage interest that had been previously deducted. (Trial Exhibit 456.)

As will be discussed in greater detail below, defendant then attempted to "compromise" their unpaid tax liabilities with the IRS on three different occasions, each time signing IRS documents under penalty of perjury. (Trial Exhibit 104.) On or about June 18, 2004, defendant and Jacqueline Parker submitted their first joint "Offer In Compromise," and sought to eliminate their collective $1.7 million obligation through a one-time payment of $130,000. (Id.) On October 13, 2004, the IRS sent a letter to defendant that it had decided to reject defendant's first offer. (Trial Exhibit 457.)

Again, on or about October 3, 2004, defendants again attempted to seek a second "compromise" with the IRS through a one-time payment of $130,000.00. (Trial Exhibits 106.) The second offer was also rejected. (Trial Exhibit 105.)

On or about April 4, 2005, defendants, for the third time, attempted to seek a "compromise" with the IRS for their unpaid tax liabilities. (Trial Exhibit 110-11.) This time they sought to eliminate their collective $1.7 million obligation through a one-time payment of $450,000. (Id.) The offer was rejected. (Trial Exhibit 105, 459.) The IRS sent a letter to defendant and Jacqueline Parker informing them of its' decision. (Trial Exhibit 460.)

After the IRS turned down the previous offers of compromise, defendants, on or about August 4, 2005, submitted a fourth set of false financial statements, which were signed under penalty of perjury. (Trial Exhibit 114.) The defendants were now requesting that because of their purported dire financial condition, they should be allowed to pay a monthly $2,000

installment on their now approximately $2.7 million tax liability. (Id.) This offer was again rejected by the IRS. (Trial Exhibit 105.)

On November 27, 2007, the assigned revenue officers requested that a nominee lien be placed on defendant's residence. (Trial Exhibit 445.)

C. The Creation Of Nominee Entities

Knowing that the IRS was determining that defendant owed substantial amounts in unpaid taxes, penalties and interest, defendant began in 2002 to hide his assets and sources of income. He concealed the source of a large land sale in Belize, placed assets in the names of other partnerships and companies that he controlled as alter egos, paid debts through these nominee entities and individuals, and submitted false financial statements to the IRS.

1. *The nominee entities created include:*

- ***Sunlight Financials, LLP***. Sunlight Financial LLP ("Sunlight") was created on July 29, 2002 in the State of Arizona. (Trial Exhibit 42.) The partnership consisted of two partners, Rachel Harris, defendant's daughter, and the ***Parker Children Irrevocable Trust,*** with Rachel Harris, listed as the trustee. (Id.) An address 615 Zuni Drive, Prescott, AZ 86303, was listed for both partners. (Id.) Gregory Robinson, an attorney who represented defendant, was listed as Sunlight's chief executive officer. (Id.) Sunlight has never filed a tax return. (Trial Exhibits 24-25.)
- ***Parker Children Irrevocable Trust***. Interestingly, the Certificate of Trust states that defendant Parker and Jacqueline Parker established the trust on April 16, but the document was not signed until August 11, 2005, and only filed with the Maricopa County Recorder on September 15, 2005. 2002. (Trial Exhibit 122.) Though it is supposed to have been a partner in Sunlight, this trust did not exist until after Sunlight was formed.
- ***Cimarron River Ranch, LLC.*** Cimarron River Ranch, LLC ("CRR") was created on April 21, 2004 in the State of Oklahoma. (Trial Exhibit 40.) Samuel Parker, defendant's son, signed the registration documents as a member or manager of the company. (Id.) He was only 21 years old at the time. Ed Stanley Manske ("Manske"), an attorney in Boise City, was

named an agent for the corporation. (Id.) CRR has never filed a tax return. (Trial Exhibits 26-27.)

- ***Resorts Consulting Quorum***. Resorts Consulting Quorum LLP ("RCQ") was formed on January 26, 2005 in the State of Arizona. (Trial Exhibit 43.) Ralph David Robinson, the now deceased brother of Gregory Robinson, who was the attorney representing defendant during the IRS collection process, was named agent, and RCQ listed an address of 6040 N. 7th Street, #300, the same address associated with Gregory Robinson's law practice. (Id.) R.D. Robinson and Gila Shrimp LLP were named the general partners.(Id.) RCQ has never filed a tax return. (Trial Exhibits 28-29.)
- ***RSJ Investments, LLC.*** RSJ Investments, LLC ("RSJ Investments") was created on August 22, 2005 in the State of Oklahoma.(Trial Exhibit 41.) Again, similar to CRR, Samuel Parker signed as the company's member manager, and Manske was named the principal agent. (Id.) RSJ has also never filed a tax return. (Trial Exhibit 30.)

2. *Bank accounts associated with the nominee entities include:*

- On May 7, 2003, a checking account, in the name of Sunlight, was opened up at American Sterling Bank, now ***Metcalf Bank*** (account # 502030). (Trial Exhibits 67-68.) Defendant's sons, Samuel Parker and James Parker, signed the signature card. (Id.)
- On April 26, 2004, a checking account, in the name of CRR, was opened up at ***First State Bank*** in Boise City, Oklahoma (account # 231142.) (Trial Exhibits 76-77.) Samuel Parker and Rachel Harris both signed the signature card. (Id.)
- On January 24, 2005, a checking account, in the name of CRR, was opened up at First National Bank of Tribune, Elkhart, Kansas, now ***Colorado East Bank & Trust*** (account # 1011331102.) (Trial Exhibits 69-70.) Roy Young, a rancher employed by defendant, signed the signature card. (Id.)
- On January 31, 2005, a checking account, in the name of RCQ, was opened up at Bank One, now an account of ***JP Morgan Chase*** (accounts 684215809 & 2722320401). (Trial Exhibits 60-61.) Ralph Robinson signed the signature card. (Id.)

- On August 26, 2005, a checking account, in the name of RSJ Investments, was opened up at ***First National Bank of New Mexico*** (account # 106127). (Trial Exhibits 54-55.) Samuel Parker and Rachel Harris signed the signature card. (Id.)
- On September 21, 2007, a third account, in the name of CRR, was opened up at ***M&I Bank*** (account 43545964). (Trial Exhibits 48-49.) Rachel Harris signed the signature card.(Id.)

D. Defendant's Residence At 35802 N. Meander Way, Carefree, Arizona, & Sunlight Financial.

1. *The Transfer of defendant's Carefree residence to Sunlight Financial LLP.*

On or about August 9, 2002, approximately three months after defendant received the IRS' first Notice Of Deficiency for the 1997 tax year (which was served on the defendant on May 29, 2002), and approximately two weeks before defendant filed his petition disputing the tax deficiency (August 28, 2002), defendant transferred, for no consideration, ownership of his approximately $1.5 million Carefree, Arizona residence to Sunlight (which as discussed above was created on July 29, 2002). (Trial Exhibits 119, 165.) A Warranty Deed was filed with the Maricopa County Recorder's Office on or August 5, 2002 recording the transfer. (Trial Exhibit 119.)

Other than purportedly managing the Carefree home, Sunlight did not manage any other properties, or generate any income from the sale of any product or service. (Trial Exhibit 67.) In addition, IRS records show that the entity has never filed a tax return. (Trial Exhibits 24-25, 207-210.) Although ownership of the property was transferred in 2002, defendant and Jacqueline Parker continued to maintain sole use and control over the residence.

2. *The July 31, 2003 refinance of the Meander Way residence.*

On or about July 31, 2003, approximately three months after the May 2003 Tax Court stipulation, defendant, using the residence at 35802 N. Meander Way as collateral, obtained an interest-only loan for $355,000.00 from a private lender, Universal Properties ("Universal"). (Trial Exhibits 115, 120, 137-38. 149-54, 176, 204-05, 547-569.) A Deed Of Trust was filed with the Maricopa County Recorder on July 31, 2003. (Trial Exhibit 120.) Defendant's

outstanding loan balance with the original seller, Robert Dietrich. was paid off. (Trial Exhibit 115.)

Defendant exclusively negotiated the terms of the loan with Universal, although the loan documents reflect that the loan was made to Sunlight. (Trial Exhibit 115.) In 2003, representatives of Universal inspected the home, at which time defendant answered the door and invited them in. The Universal representatives were impressed with the residence.

Defendant agreed to pay an annual interest rate of 8.75% to be compounded monthly over a term of 36 months. (Id.) Payments were to be made quarterly starting with the first payment on November 1, 2003, followed by regular payments on the first day of February, May, August, and November until August 1, 2006. (Id.) Defendant's daughter, Rachel Harris, who had no role in obtaining the loan, nevertheless signed the loan documents. (Id.) The loan was serviced by Stewart Title and Trust of Phoenix, Arizona, a loan servicing company. (Trial Exhibit 115.)

3. Sham loan involving Sunlight Financial.

On or about February 3, 2004, as discussed above, after the IRS met with defendant's tax preparer to discuss using the residence to pay off defendant's tax liability, a February 13, 2004 deadline was set to begin the process. (Trial Exhibit 105.) On or about February 13, 2004, on the same day that the IRS filed a Notice of Federal Tax Lien, a Deed Of Trust was filed with the Maricopa County Recorder stating that Sunlight Financial purportedly borrowed $296,000 from Omega, thus further encumbering the property. (Trial Exhibit 166.) Rachel Harris signed the Deed Of Trust. (Id.)

The Harris Bank account, associated with Omega Construction, does not reveal the transfer of funds from the account to Sunlight to support the issuance of a $296,000 loan. (Trial Exhibits 52-53.)

E. Defendant's Sale of land in Belize For $6 Million.

On or about June 7, 2004, defendant Parker, as President, Chairman, and an owner of Mackinnon Belize Land and Development Limited, agreed to sell 597 prime acres in Belize for approximately $6.0 million. (Trial Exhibits 123-25, 203.) The buyer of the property was "ioVest

Development L.L.C" ("ioVest"), an unrelated Illinois company. (Id.) The Memorandum of Sale listed the vendor as "Mr. James Parker," at the address of "35802 N. Meander Way Carefree, Arizona 85377." (Id.) Defendant signed the document. (Id.)

Defendant signed several subsequent amendments, documents, and receipts pertaining to the sale. (Trial Exhibit 125, 203, 461-62, 467-501.) He signed as the "President" or "Chairman" of Mackinnon Belize Land & Development Ltd. (Id.) At the direction of defendant, ioVest wired payments for the agreed upon $6 million into an account (account #5019837) at Belize Bank Limited, Belize. (Trial Exhibit 124.) [3]

F. Defendant Repatriates Approximately $3 Million From Belize Into 3 Bank Accounts Associated With His Nominee Entities.

After the sale of the above-described property in Belize, and between June 2004 and January 2008, wire transfers were made from Belize Bank Limited into three accounts associated with defendant. (Trial Exhibits 211-247, 259-320, 341-351.) These transfers included the following:

- $1,302,000 wired into a CRR nominee account held at First State Bank of Boise City, Oklahoma (from June 15, 2004 through August 8, 2007);
- $1,544,375 wired into a CRR nominee account held by First National Bank of Tribune, Elkhart, Kansas (now Colorado East Bank Trust) (from January 27, 2005 through January 8, 2008); and
- $223,500 wired into a RCQ nominee account held by Bank One (now an account of JP Morgan Chase) (from September 28, 2005 through August 15, 2006).

G. CRR: The Formation Of a Cattle Ranch Operation And Western Hunting Lodge.

Starting at some point in 2004 and continuing to on or about 2007, defendant formed a cattle

[3] Defendant previously lied under oath to his extensive role in the sale of land in Belize. For example, prior to the $6 million sale of land, in a sworn affidavit dated March 13, 2003, defendant stated that he worked only as a project manager on a land development project in Belize that he referenced as the "Plantation" for a foreign entity known as Belize Land Development. (Trial Exhibit 117.) Defendant stated that he was responsible for overseeing the marketing and sale of land from the project. (Id.)

operation in the County of Cimarron River, Oklahoma called CRR. As discussed above, CRR was created on April 21, 2004 in the State of Oklahoma. (Trial Exhibit 40.) As part of the cattle operation, defendant wanted to start a hunting lodge that would contain a "western-style" bread and breakfast in the small rural town of Kenton, Oklahoma, approximately 35 miles from Boise City, Oklahoma. To hide the true ownership of CRR, defendant made his then 21-year old son, Samuel Parker, the straw owner, although it was clear to the local residents that it was defendant Parker who was the "brains and money" behind the operation. In addition, defendant hired a local rancher, Roy Young, to help run the cattle operation.

Although CRR officially became an entity on April 21, 2004, it appears that defendant had been involved there earlier. (Trial Exhibit 544.) In addition, according to local residents, prior to the formation of CRR, Samuel Parker was occasionally employed by other ranchers doing "odd jobs" on the farm.

In addition, as discussed above, two bank accounts were initially opened up in the name of CRR. First State Bank of Boise City, Oklahoma, was opened up on April 26, 2004 (Trial Exhibits 76-77), and the second, First National Bank of Tribune, Elkhart, Kansas (now ***Colorado East Bank Trust***), was opened on January 24, 2005.

Beginning in June of 2004, subsequent to defendant's $6 million Belizian land sale, and ending on or about August of 2007, 37 wire deposits totaling $1,302,000 were made from an account at Belize Bank Limited into the CRR account held at First State Bank. (Trial Exhibits 211-247). Defendant told First State Bank's then-president that the money came from his real estate development business in Belize, and the funds were to be used to build a lodge and cattle ranch. (Trial Exhibit 131.)

Starting in January of 2005 until January of 2008, 66 wire deposits, totaling $1,544,375, were made from Belize Bank Limited into a CRR account held at First National Bank of Tribune (***now Colorado East Bank Trust***). (Trial Exhibits 259-320.)

In sum, between both of these accounts, the money used to capitalize defendant's cattle ranching business, came from money generated by the 2004 Belizian land sale.

To start his business, defendant began the process of purchasing privately-held land from residents, and attempting to gain control of public lands controlled by the Oklahoma Commissioners of the Land Office ("Land Office"). In June of 2005, defendant purchased 400 acres of land from Monty Jo Roberts, a resident of Kenton, Oklahoma. He paid $350,000 for the land. He also purchased land from another family, the Koehlers. That same summer, defendant met with Keith Kuhlman, the then-Director of Real Estate Management of the Land Office for Oklahoma. Defendant offered to purchase public land held by the state. Defendant's offer was declined.

Defendant then began the process of bidding on the right to lease state public lands, which had been used by local ranchers for cattle operations. In October 2005 and 2006, defendant attended and participated in the state's auction of lease agreements to publicly-held lands in Cimarron County. (Trial Exhibits 155-59.) Defendant was able to out bid many of the local residents, by paying sometimes more than four times the market rate. Because several parcels of public land had been used by specific Cimarron families for generations, defendant's actions angered and frustrated other cattle ranchers. The lease agreements provided for 5-year term. (Id.) From January 2005 until December 2007, defendant paid the Commissioner Of The Land Office approximately $592,914.54. (Trial Exhibits 252-58, 352-58.)

The two CRR bank accounts also show that from February 2005 until April 2006, deposits made into the account, from money wire transfers, were used to purchase $699,550 worth of cattle for the business (trial exhibits 72-75), and pay for other general expenses associated with the operation, including the salary of a cattle rancher, and the purchase of equipment and feed. (Trial Exhibits 69, 76.)

Defendant also constructed a large-sized cabin on the above-mentioned land that he had bought, and began to build his western style hunting lodge. (Trial Exhibits 436-442.) In sum, defendant invested more than $1.2. million into a startup cattle operation on land both owned and leased in the State of Oklahoma.

H. The $1.5 million loan using the Meander Way property as collateral.

On August 16, 2005, defendant Parker obtained a second loan for $1.5 million against the Carefree, Arizona residence. (Trial Exhibit 115, 121, 137-38, 447, 204-05, 384, 447, 547-569.) Again, he used Universal Properties as the private lender. Again, defendant exclusively negotiated the terms of the loan with Universal. Universal representatives inspected the Meander Way property for a second time, and were again impressed with the property.

The loan was an interest-only five-year note, with annual rate set at the Wall Street prime rate plus 2 3/4%, but never less than 9% regardless of the prime rate. (Id.) Interest was to be compounded monthly and paid on a quarterly basis. (Id.) The note was to be paid in full on August 13, 2010.

Defendant Parker netted approximately $1,445,000 in cash after the second refinance. (Id.) The previous loan of $355,000.00 was rolled into the second loan. (Id.) The new loan was again serviced by Stewart Title and Trust (Trial Exhibit 115.) Three separate checks in the amounts of $377,419.00 were issued to Sunlight Financial LLP, endorsed by defendant's daughter, Rachel Harris, and deposited into the RSJ account at The First National Bank of New Mexico associated with the nominee entity, RSJ Investments. (Trial Exhibits 57-59.)

In addition, Rachel Harris, as the purported general partner for Sunlight and nominee trustee of the Parker Children Irrevocable Trust, signed a Deed of Trust, reflecting the new $1.5 loan. (Trial Exhibit 121.) This was filed with the Maricopa County Recorder. (Id.)

I. Defendant purchases a $1 million home at 218 Turkey Track in Amarillo, Texas.

On or about August 17, 2005, defendant entered into contact to purchase a $1.0 million 7,000 square foot residential property in Amarillo, Texas. (Trial Exhibits 139-141,178, 443.) Defendant signed as the buyer on the original purchase contract, dated August 17, 2005. (Id.)

Sometime before August 17, 2005, defendant had telephoned Connie Taylor, a real estate agent with Keller Realty, in Amarillo, Texas. Defendant explained that he had seen the listing for a home located at 218 Turkey Track in Amarillo on the Internet and offered to purchase the

property for $1 million cash, contingent on an inspection. He also told the agent that he was hoping to relocate to Texas to be near a new business he was building in Oklahoma.

On August 15, 2005, defendant's tax preparer, Liggett, signed a letter stating that defendant had cash reserves to purchase a million dollar residence. (Trial Exhibits 139, 178.) On or about August 16, 2005, defendant, using a bank account associated with Sunlight Financial, paid $ 10,000 as earnest money, in the form of a cashier's check on the property. (Trial Exhibit 147.)

Soon thereafter, defendant and his wife, Jacqueline Parker, drove to Amarillo and inspected the home prior to the purchase. There, they met the current owners of the home, Dr. Robert and Becky Gross. Prior to and during that visit, defendant and his wife expressed an interest in purchasing some of the furniture inside the residence, and agreed to pay $72,400 for several pieces. (Trial Exhibits 139-141,178.) Defendant also signed a non-realty items addendum to the contract as the buyer of the furniture. (Id.)

On August 30, 2005, defendant signed an amendment to the contract, as the buyer, wherein the assigned buyer was amended to RSJ Investments, rather than defendant Parker. (Id.) As discussed above, RSJ Investments was created on August 22, 2005 in the State of Oklahoma. (Trial Exhibit 141.)

On or about September 6, 2005, defendant gave Connie Taylor a $990,000 cashier's check to complete the purchase of the Texas property. (Trial Exhbit 148.) The check was issued by First National Bank of New Mexico. (Id.)

On or about September 14, 2005, the parties closed on the house. (Trial Exhibits 116, 143-48.) Chicago Title Company was used as the title company to facilitate the transaction. (Id.) At the closing, the defendant's 22-year old son, Samuel Parker, represented RSJ Investments. (Id.) On September 19, 2006, a warranty deed reflecting the sale of the home was filed in Randall County, Texas. (Trial Exhibit 142.)

J. Use Of Belizian Sales Proceeds.

1. *Land proceeds used to service defendant's $1.5 million dollar loan with Universal Properties.*

In order to make the quarterly interest payments from 2005 through 2007 on the $1.5 million dollar loan, defendant used funds from the Bank One account (currently **JP Morgan Chase**), associated with the nominee entity RCQ, and the First State Bank Account, associated with the nominee entity CRR. (Trial Exhibits 65-66, 327-28, 248-51.)

- Between September 2005 and June 2006, defendant made four interest payments from the RCQ account, totaling $152,575.10 to Stewart Title. (Trial Exhibits 65-66, 327-28.)
- Between September 2006 until June of 2007, defendant made four interest payments, using the First State Bank CRR account, totaling $171,548.85. (Trial Exhibits 248-51.)

As explained above, these accounts were primarily capitalized with money wired directly into them from Belize subsequent to the June 2004 sale of Belizian land to ioVest. (Trial Exhibits 211-47, 341-51.) In other words, these accounts were used as conduits, which permitted the flow of Belizian revenues through them in order to facilitate the interest payment.[4]

Defendant also made interest payments from an account with Marshall & Isley Bank, a third account associated with CRR that was opened up on September 21, 2007. (Trial Exhibits 50-51.) This account appears to have been capitalized by the sale of cattle. (Trial Exhibits 48-49.)

2. *Land proceeds used to pay for "consulting fees" allegedly preformed by Omega Construction.*

Defendant also used the First National Bank of Tribune account, associated with CRR, and the Bank One account, associated with RCQ, to facilitate payments for alleged services performed by Omega Construction Inc. (Trial Exhibits 52, 60-64, 69-71, 185-202, 329-40.) These payments, deposited into the bank account associated with Omega, purportedly reflect "consulting fees" on the memo line of these checks. (Id.) Approximately $112,000, in monthly

[4] To service the previous $355,000 loan, defendant made interest payments from an account associated with Sunlight Finanical LLP, which also had been capitalized with previous Belizian land sales (Trial Exhibits 322-326).

installments of $7,000, was paid to defendant Parker's Omega Construction Company from the RCQ account. (Id.)

3. *July 2004: Belizian land proceeds used to purchase a $306,00 Rolls Royce motor-vehicle.*

On or about July 16, 2004, defendant Parker, using CRR as the purported owner, and his 21-year old son Samuel Parker as the "straw buyer," purchased a $306,695 Rolls Royce automobile from Desert European Motorcars Ltd., a dealership in Rancho Mirage, California. (Trial Exhibits 126-29, 184.) The money used to purchase the car was wired directly from Belize Bank Limited from an account associated with MacKinnon Belize Land and Development. (Id.) The Rolls Royce was subsequently delivered by the California car dealership to defendant's Carefree residence. (Id.)

On or about July 23, 2004, defendant purchased automobile insurance for the vehicle with State Farm Insurance. (Trial Exhibits 135, 367, 519.) The insurance policy listed the primary driver as defendant Parker, and the purpose of the vehicle was for pleasure and not business. (Id.)

The vehicle was registered with the State of Oklahoma Tax Commission as belonging to CRR. (Trial Exhibits 79, 183.)

4. *December 2004: Land proceeds used to purchase a $36,000 Ford truck.*

On or about December 2, 2004, defendant purchased a $36,029 Ford truck. (Exhibit 132-34, 206.) The money used to purchase the vehicle was wired from Belize to the dealership. (Id.) Defendant again purchased automobile insurance for the vehicle from State Farm Insurance. (Trial Exhibit 136, 519.)

5. *September 2005: Land proceeds used to purchase second Texas home.*

On or about September 2005, defendant purchased a second Texas home at 103 Jyntewood Drive, in Canyon, Texas, for his daughter Rachel Harris. (Trial Exhibits 355, 357.) The purchase price of the home was $205,000. (Id.) The money used to purchase the home was wired directly from Belize. (Id.)

K. Bank Accounts Associated With Nominee Entities Are Used To Pay The Monthly Balances On Defendant's Credit Card Bills.

Defendant and Jacqueline Parker possessed and used at least three credit cards. (Trial Exhibits 372-73, 375.) Two of the cards were in defendant's name, which included accounts serviced by Bank of America and Capital One. (Id.) Jacqueline Parker used an American Express card. (Id.)

Statements provided by the credit card companies show that the cards were used to purchase good and services that appear to have been for defendant and his wife's personal use, to include expenditures made at beauty salons, department and grocery stores, restaurants, hotels, etc. (Id.) These records also show that payments to the cards came from bank accounts associated with defendant's nominee entities including Sunlight Financial, RSJ Investments, and CRR. (Id.)

L. Tax Returns For Calendar Years 2003 - 2009.

Despite having made the $6 million land sale to ioVest in June of 2004, defendants' tax returns for the years 2003, 2004, 2005, and 2006 reflected the following taxable income: $141,990, $13,320, $37,391, and $40,810 respectively. (Trial Exhibits 6-9.) Other than the nominal monies that flowed to Omega through the RCQ bank account and one CRR account, none of the repatriated funds from the Belize land sale (approximately $3,411,904) was reported on defendant's tax returns. (Trial Exhibits 6-10, 17-23.)

M. Trips to Belize

From 2000 through February, 2008, defendants frequently traveled to Belize. (Trial Exhibit 369.) Defendant Parker made approximately eighteen (18) trips, and defendant Jacqueline Parker made approximately eleven (11) trips. (Id.)

N. Offers in Compromise

After the establishment of CRR in April 2004 and the June 7, 2004 Belizian land sale, defendant and Jacqueline Parker, on or about June 18, 2004, submitted what is referred to as an "offer in compromise" with the IRS as to their unpaid tax liabilities. (Trial Exhibit 104.) They sought to eliminate their collective $1.7 million obligation through a one-time payment of

$130,000.00. (Id.) Defendants never mentioned the land sale, and also falsely claimed that they were borrowing the proposed sum of money from friends and a bank. (Id.) Defendant informed the IRS that his only car was a 1999 Cadillac Seville, with 91,300 miles, and valued at $5,500. (Id.) Defendant listed his personal assets as $6,600 in furniture, watches valued at $700, a $2,450 wedding ring, and a gun valued at $560 (Id), despite having an insurance policy for personal items in his home valued at $500,000. (Trial Exhibit 177, 570-581.) This fraudulent offer was not accepted by the IRS.

On or about October 3, 2004, defendants again attempted to seek a second "compromise" with the IRS through a one-time payment of $130,000.00. (Trial Exhibit 106.) Defendants again falsely state that they intend to borrow the proposed sum of money from friends and family. (Id.) Again, this second fraudulent offer in compromise failed to mention the Belizian land sale, the creation of CRR, and the recent purchase of the $306,695 Rolls Royce. (Id.) This offer was not accepted by the IRS.

On or about April 4, 2005, defendants, for the third time, attempted to seek a "compromise" with the IRS for their unpaid tax liabilities. (Trial Exhibit 110-11.) This time they sought to eliminate their collective tax obligations, more than $2 million dollars, through a one-time payment of $450,000. (Id.) Defendants were trying to compromise what they owed for eight tax years from 1997 through 2004.(Id.) Defendants again falsely claimed that they were borrowing the money from their family, and receiving collections from a purported note that Omega Construction supposedly held from Sunlight Financial.(Id.)

This third offer in compromise contained a letter signed by Gregory Robinson, defendant's attorney, in which he claimed that defendants had been unable to pay their rent since August of 2004, that they had cut "their expenses to the bone," that they lacked health insurance, that they share one car, and that defendant's children own the Carefree house through Sunlight Financial. (Id.) This offer was made while hundreds of thousands of dollars were being wired into defendant's CRR accounts from Belize. The offer also failed to mention the Belizian land sale, the Rolls Royce, the creation of CRR, and the purchase of hundreds of thousands of dollars

worth of cattle.(Id.)

This offer was also made approximately four months before defendant obtained the $1.5 million loan on his Carefree residence, which was used to purchase the $1 million residence in Amarillo, Texas and approximately $70,000 in furniture. (Trial Exhibits 139-141,178, 443.) This third offer was not accepted by the IRS.

For all three offers, defendants submitted and signed under penalty of perjury various IRS documentation falsely reflecting that the defendants purportedly had neither the income nor the assets to pay the IRS. (Trial Exhibits 104, 106, 110.)

After the IRS turned down the previous offers of compromise, defendants, on or about August 4, 2005, submitted a fourth set of false financial statements, which were signed under penalty of perjury. (Trial Exhibit 114.) The defendants were now requesting that their purported dire financial condition entitled them to pay only a monthly $2,000 installment on their now approximately $2.7 million tax liability. (Id.) This offer was again rejected by the IRS.

The financial statements submitted by the defendants in connection with the above-referenced offers of compromise and installment request, falsely failed to disclose defendant's true ownership in the Carefree residence, worth at least $1.5 million, a Rolls Royce automobile, a million dollar cattle operation, and approximately $6 million in proceeds received from the sale of Belizian land. (Trial Exhibits 104, 106, 110-11.) The defendants falsely and fraudulently stated to the IRS that they were unable to pay their rent, were impoverished, would be homeless if not for the kindness and support of their two children, and further misrepresented their monthly income and net worth. (Id.)

II. COUNTS 1-4: TAX EVASION.

A. Tax Evasion.

Counts 1 through 4 of the Indictment charge defendant James R. Parker with four counts of Tax Evasion in violation of 26 U.S.C. § 7201. (CR 1.)

Tax Evasion can be committed in two distinct manners: (a) the willful attempt to evade or defeat the assessment of a tax and (b) the willful attempt to evade or defeat the payment of a tax.

United States v. Mal, 942 F.2d 682, 686-88 (9th Cir. 1991)(***citing Sansone v. United States***, 380 U.S. 343, 354 (U.S. 1965)); ***United States v. Voorhies***, 658 F.2d 710, 713 (9th Cir. 1981); ***Cohen v. United States***.

To avoid the "assessment" of a tax, an individual attempts to conceal his true tax liability. ***Mal,*** 942 F.2d at 687 ("Evasion of assessment generally involves efforts to prevent or deter the government from determining tax liability prior to an assessment, for example by "failing to file a return, filing a false return, failing to keep records, concealing income or other means.")***(citing Cohen,*** 297 F.2d at 770). While defendant Parker tried to deter the IRS from "assessing" his tax, the IRS was able to come to assessments in this matter, which is why this case is being prosecuted as an "evasion of payment" matter.

To avoid the "payment" of tax, an individual generally attempts to conceal the existence of assets or income in order to evade the payment of the tax that is due and owing. ***Mal***, 942 F.2d at 687 ("Evasion of payment ... involves conduct designed to place assets beyond the government's reach after a tax liability has been assessed, such as by transferring assets abroad, placing assets in the names of others, or using cash transactions to conceal the existence of assets.") (referencing ***Conley***, 826 F.2d at 556-58; ***Voorhies,*** 658 F.2d at 714; ***Cohen***, 297 F.2d at 762). [5]

B. Statutory Language.

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

Any person who willfully attempts in any manner to evade or defeat any tax imposed

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[5]***See, e.g., United States v. Conley***, 826 F.2d 551, 556-558 (7th Cir. Ill. 1987)("[Defendant] transferred away the title to his house in order to protect it from the IRS ... He manipulated his bank accounts in various ways, turning finally to his Client Fund account because of its protected status, a status he then violated. He also used his son's name on a bank account he opened for his own personal use, and attempted to separate himself from his horse business ... During the years in issue the defendant used cash for expense payments and avoided a personal bank account. He also moved his brokerage accounts around."); ***Voorhies***, 658 F.2d at 714 ("[Defendant] traveled out of the country on three occasions in 1974, carrying with him over $ 80,000.00 in highly negotiable assets. In spite of his prior experience with customs reporting duties, he did not declare either that he took out of or returned to the United States with such large amounts of money ... [defendant] was unable to account for his use of the cash and gold coins on his return to Las Vegas, except to acknowledge that he did not place them in his Nevada bank account....").

by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution." 26 U.S.C. § 7201.

C. Elements.

In order for the defendant to be found guilty of willfully attempting to evade or defeat the "payment" of a tax, the government must prove each of the following elements beyond a reasonable doubt with respect to Counts 1-4:

- *First*, defendant owed more federal income tax for the specific calendar than was paid by him for any income tax return filed for that year;
- *Second*, defendant knew he owed more federal income tax than was paid by him for any tax return defendant filed for that specific year;
- *Third*, defendant made an affirmative attempt to evade or did an affirmative act to defeat the payment of income tax for that year; and
- *Fourth*, in attempting to evade or defeat the payment of this income tax, defendant acted willfully.

United States v. Conforte,624 F.2d 869, 873 (9th Cir. 1980); ***see also United States v. Marashi***, 913 F.2d 724, 735 (9th Cir. 1990; **Ninth Circuit Manual of Model Criminal Jury Instructions** (2010 revision) 9.37 (as modified).

1. *Additional Tax Due and Owing: 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.*

In this matter, the government must show that there was a "tax deficiency," that 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. ***United States v. Kayser***, 488 F.3d 1070, 1073 (9th Cir.2007); ***Marashi***, 913 F.2d at 735. A deficiency is defined as the amount by which the tax imposed by statute exceeds the sum of (1) the amount of tax shown on the return, (2) plus the amount of any previously assessed deficiency, (3) minus any rebate previously received. 26 U.S.C. § 6211; ***United States v. Bishop***, 264 F.3d 535 (5th Cir. 2001).

The government must show the existence of the tax deficiency on the date that the taxpayer should have filed a return. ***Voorhies***, 658 F.2d at 714. In order to prove a "tax deficiency," the government must prove that there was a "tax due and owing." ***Id.*** A tax due and owing arises from the date a return is due to be filed. ***Id.*** The deficiency arises by operation of law. ***Id.***

A certificate of assessments and payments is prima facie evidence of the asserted tax deficiency, which may prove the tax due and owing. ***Voorhies***, 658 F.2d at 715 ("In the absence of an administrative- or judicial-level contention by the taxpayer that these assessments were invalid, the certificates of assessment were prima facie correct and therefore adequate evidence of the amount of Voorhies' tax liability."); ***United States v. Silkman***, 220 F.3d 935, 937 (8th Cir. S.D. 2000) ("[A]n assessment gives the taxpayer notice of the IRS's position and an opportunity to contest the assessed deficiency by administrative appeal and civil deficiency or refund litigation. When the taxpayer declines to invoke these procedures, the assessment becomes final for purposes of the IRS's civil tax collection remedies."); ***United States v. Josephberg***, 562 F.3d 478, 489 (2d Cir. 2009) (upholding tax evasion conviction based on IRS certificates of assessment, notices of deficiency sent to defendant, and tax court judgments.); ***United States v. Blood***, 806 F.2d 1218 (4th Cir. 1986) (upholding tax evasion conviction after lower court allowed the government to read into evidence portions of prior tax court decisions.")

A certificate of assessment, however, is not necessary to show evasion of paymentbecause the deficiency "arises by operation of law." ***Voorhies***, at 714-15; ***United States v. Ellett***, 527 F.3d 38, 40 (2d Cir. 2008)("A tax deficiency arises by operation of law the date a tax return is due but not filed; no formal demand or assessment is required"). In the case when a taxpayer has filed a return and not paid the reported tax, the reporting of the tax is a self-assessment of the tax due and owing. The existence of a tax due and owing is established by the introduction of the return. ***See Voorhies***, at 714-15;***Marashi***, 913 F.2d at 735-36.[6]

[6]The amount of tax deficiency in a particular case may include penalties and interest. 26 U.S.C. § 6671(a) (the phrase "'tax' imposed by this title" also refers to the penalties and liabilities imposed by this subchapter [Subtitle F, Chapter 68B]); 26 U.S.C. § 6665(a)(2) (the phrase "'tax' imposed by this title" also refers to the additions to the tax, additional amounts, and

It is not required that the government prove the exact amount of the tax that is due and owing. ***United States v. Bishop***, 264 F.3d at 550-52; ***United States v. Buckner***, 610 F.2d 570, 573-74 (9th Cir. 1979); ***see also United States v. Johnson***, 319 U.S. 503, 517-18 (1943) [7]

2. *The defendant made an affirmative attempt to evade or defeat payment of such additional tax.*

An omission or refusal to pay taxes due and possession of the funds needed to pay the taxes, without more, does not establish the requisite affirmative act necessary for an attempted evasion of payment charge. ***See Spies***, 317 U.S. 492, 499 (1943). To prove an affirmative act, it must be established that the taxpayer took some affirmative action to defeat the payment of the tax. Merely failing to pay assessed taxes, in of itself, does not constitute evasion of payment. ***Sansone v. United States***, 380 U.S. 343, 351 (1965).***United States v. Mal***, 942 F.2d 682, 684-85 (9th Cir. 1991)

Generally, "any conduct, the likely effect of which would be to mislead or to conceal" constitutes an affirmative attempt to evade tax. ***Spies***, 317 U.S. at 499 ("concealment of assets or covering up sources of income"); ***see Cohen v. United States***, 297 F.2d 760, 762, 770 (9th Cir. 1962) ("[defendant] placed his assets in the name of others, deposited them with others, dealt in currency, caused his obligations to be paid through and in the name of others, caused moneys paid to him to be paid through and in the name of others, and paid other creditors but not the government, all for the purpose of defeating the payment of his income tax liabilities.); ***see also United States v. Gonzalez***, 58 F.3d 506, 509 (10th Cir. 1995) (signing and submitting

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penalties provided by this chapter [Subtitle F, Chapter 68A]); 26 U.S.C. § 6601(e)(1) (the phrase "tax imposed by this title" also refers to interest imposed by that section on such tax); USSG §2T1.1, comment, (n.1) (tax loss includes interest and penalties in evasion of payment and willful failure to pay cases).

[7] "The Courts of Appeals have divided over whether the Government must prove the tax deficiency is 'substantial.'" ***Boulware v. United States***, 552 U.S. 421, 424 (2008) (citing ***United States v. Daniels***, 387 F.3d 636, 640-41 & n.2 (7th Cir. 2004)) (collecting cases). However, the Ninth Circuit has held that there is no substantiality requirement for a Section 7201 violation. ***Marashi***, 913 F.2d at 735. In ***Marashi***, the court held that both Section 7201 and its predecessor, section 145(b) of the 1939 Code, prohibit attempts to evade "any tax" and impose no minimum amount in their language. ***Id***. at 735. As a result, the court reasoned, the trier of fact needs to find only "some tax deficiency" to warrant a conviction. ***Id.*** at 736.

false financial statements to the IRS); ***United States v. Pollen***, 978 F.2d 78, 88 (3d Cir. 1992); (defendant placed assets out of the reach of the United States Government by maintaining more than $350,000.00 in gold bars and coins, platinum, jewelry, and gems in safety deposit boxes at bank, in a fictitious name); ***United States v. McGill***, 964 F.2d 222, 227-29, 232-33 (3d Cir. 1992) (defendant concealed assets by using bank accounts in names of family members and co-workers); ***United States v. Brimberry***, 961 F.2d 1286, 1291 (7th Cir. 1992) (defendant falsely told IRS agent that she did not own real estate and that she had no other assets with which to pay tax); ***United States v. Daniel***, 956 F.2d 540, 542-43 (6th Cir. 1992) (defendant used other persons' credit cards, used cash extensively, placed assets in other persons' names); ***United States v. Conley***, 826 F.2d 551, 553 (7th Cir. 1987) ("[defendant] transferred away the title to his house in order to protect it from the IRS . . . . His house maneuvers began ten days after he failed to pay his 1979 taxes and were rushed to completion by the defendant's law office. He manipulated his bank accounts in various ways, turning finally to his Client Fund account because of its protected status, a status he then violated. He also used his son's name on a bank account he opened for his own personal use, and attempted to separate himself from his horse business . . . .").

Even an activity that would otherwise be legal can constitute an affirmative act supporting a Section 7201 conviction, so long as the defendant commits the act with the intent to evade tax. ***See United States v. Voigt***, 89 F.3d 1050, 1090 (3d Cir. 1996); ***United States v. Jungles***, 903 F.2d 468, 474 (7th Cir. 1990) (taxpayer's entry into an "independent contractor agreement," although a legal activity in and of itself, satisfied "affirmative act" element of Section 7201); ***United States v. Conley***, 826 F.2d 551, 556-57 (7th Cir. 1987) (use of nominees and cash with intent to evade payment of taxes).

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

Willfulness requires the government to prove that "the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." ***Cheek v. United States***, 498 U.S. 192, 201 (1991); ***United States v. Pomponio***, 429 U.S. 10, 12

(1976); ***United States v. Bishop***, 412 U.S. 346, 360 (1973). To satisfy this element, it must be established that the defendant was aware of his or her obligations under the tax laws. ***See United States v. Conforte***, 624 F.2d 869, 875 (9th Cir. 1980).

The jury must apply a subjective standard; thus a defendant asserting a good faith defense is not required to have been objectively reasonable in his misunderstanding of his legal duties or belief that he was in compliance with the law. ***Cheek*** 498 U.S. at 202-03 (1991); ***United States v. Powell***, 955 F.2d 1206, 1211-12 (9th Cir. 1992). Thus, in order to prove its case, the government may be obligated to disprove "a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws." ***Cheek***, 498 U.S. at 202 ("This is so because one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist."). Good faith reliance on a qualified tax professional, including an attorney, can be a defense to willfulness in cases of tax fraud and evasion. ***United States v. Bishop***, 291 F.3d 1100, 1106-07 (9th Cir. 2002) (internal citations omitted).

The government is not required to prove that the defendant possessed "bad faith or evil motive." ***Pomponio***, 429 U.S. at 11 ("In Bishop we held that the term willfully has the same meaning in the misdemeanor and felony sections of the Revenue Code, and that it requires more than a showing of careless disregard for the truth. We did not, however, hold that the term requires proof of any motive other than an intentional violation of a known legal duty.")(internal quotations omitted"); ***see also Powell***, 955 F.2d at 1211 ("[T]he government may prove willful conduct by establishing either: (1) that the defendant acted with a bad purpose or evil motive, or (2) that the defendant voluntarily, intentionally violated a known legal duty.")

Willfulness may be sufficiently shown by inferences from the defendant's acts or conduct. ***See United States v. Marchini***, 797 F.2d 759, 766 (9th Cir. 1986)("The evidence showed ... that [the defendant] created and cashed spurious supplier checks from 1977 to 1980, forged the first endorsement, and had a member of his office cash the check at a friendly bank.

He then used this cash along with payroll checks to pay wages, and he did not report the cash wages paid to his employees or to himself. From this evidence, the jury could reasonably have inferred Marchini willfully underreported cash wages."); ***United States v. Marabelles***, 724 F.2d 1374, 1379 (9th Cir. 1984) (willfulness inferred from (1) [defendant's] "failure to keep records, (2) the large amount of his unreported income (51% omitted in gross receipts in 1977 and 62% in 1978); (3) his consistent pattern of not reporting all gross receipts, (4) his submitting insufficient information regarding his income to the tax return preparers, (5) his practice of dealing in cash; (6) his admittedly false statements to IRS agents that he had reported all of his income and that he made out a billing receipt for every painting job he did.")(internal citations omitted.)

There are no artificial limits on the type of conduct from which willfulness can be inferred, as long as the "likely effect" of the conduct would be to mislead or conceal. ***See Spies***, 317 U.S. at 499 ("Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished "in any manner." By way of illustration, and not by way of limitation, we would think affirmative willful attempt 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 conduct, the likely effect of which would be to mislead or to conceal.") (emphasis added)

The element of "wilfulness" can be inferred from a large number of differing circumstances and facts. ***See United States v. Gardner***, 611 F.2d 770, 776 (9th Cir. 1980) (consistently under reporting large amounts of income);. ***Sherwin v. United States***, 320 F.2d 137, 140-41 (9th Cir. 1963) ("[E]vidence of a consistent pattern of not reporting large amounts of income was sufficient to support an inference of willfulness.") (internal citation omitted); ***United States v.***

Ratner, 464 F.2d 101, 105 (9th Cir. 1972) (use of bank accounts held under fictitious names)' ***United States v. Daniel***, 956 F.2d 540, 542-43 (6th Cir. 1992)(the defendant "... purchased investments under his second wife's name; . . . titled several business-related vehicles in his son's name; . . . refused to keep checking or savings accounts in his name, despite his receipt of checks for large amounts of money from his theatre-seat installation business . . . ."); ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986) (Subsequent taxpaying conduct.).

D. Statute of Limitations

The statute of limitations is six years "for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof." 26 U.S.C. § 6531(2). The general rule is that the six-year period of limitations begins to run from the latter of the due date of the tax return or the last affirmative act constituting an attempt to evade. When the affirmative act occurs before a tax deficiency is incurred, the statute of limitations generally begins to run at the time the tax deficiency arises. ***United States v. Carlson***, 235 F.3d 466, 470 (9th Cir. 2000) ("[T]he statute of limitations for evasion of assessment begins to run from the occurrence of the last act necessary to complete the offense, normally, a tax deficiency"). However, if the delinquent filing of a false return is the method of attempting to evade, the statute will usually start running on the day the return is filed. ***United States v. Habig***, 390 U.S. 222, 225 (1968); ***see also United States v. DeTar***, 832 F.2d 1110, 1113 (9th Cir. 1987) (affirmative acts of both placing assets in names of nominees and conducting business in cash within six years prior to indictment made indictment timely, even though taxes evaded were due and payable more than six years before the indictment).

III. COUNTS 5-8: FALSE STATEMENT

A. False Statement.

Counts 5 through 8 of the Indictment charge defendant with making a False Statement in violation of 26 U.S.C. § 7206(1) and 18 U.S.C. § 2. The Indictment also charges co-defendant Jacqueline L. Parker in counts 7 through 8.

Section 7206(1) makes it a felony to willfully make and subscribe a false document, if the

document was signed under penalties of perjury. "[T]he primary purpose of section 7206(1) 'is to impose the penalties of perjury upon those who willfully falsify their returns regardless of the tax consequences of the falsehood.'" ***United States v. Romanow***, 509 F.2d 26, 28 (1st Cir. 1975) (***quoting Gaunt v. United States***, 184 F.2d 284, 288 (1st Cir. 1950)).

Section 7206(1), however, expressly applies to "any return, statement, or other document" signed under penalties of perjury. It is not limited to tax returns. ***United States v. Marston***, 517 F.3d 996, 1002 (8th Cir. 2008).

B. Statutory language

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 a felony and, upon conviction thereof, shall be fined . . . or imprisoned not more than 3 years, or both, together with the costs of prosecution." 26 U.S.C. § 7206(1) (2011).

C. Elements

In order for the defendant to be found guilty of making a false statement, the government must prove each of the following elements beyond a reasonable doubt with respect to Counts 5-8:

- *First*, defendant made and signed a tax document that the defendants knew contained false information as to a material matter;
- *Second*, the tax document contained a written declaration that it was being signed subject to the penalties of perjury; and
- *Third*, in submitting the tax document, defendant acted willfully.

26 U.S.C. § 7206(1);**Ninth Circuit Manual of Model Criminal Jury Instructions** (2010 revision) 9.39.

1. *Tax Document*

Section 7206(1) is not limited to tax returns. ***Marston***, 517 F.3d at 1002. ***See, e.g., United States v. Droms***, 566 F.2d 361, 362-63 (2d Cir. 1977) (per curiam) (financial information

statement submitted to the IRS for settlement purposes); ***United States v. Cohen***, 544 F.2d 781, 782-83 (5th Cir. 1977) (false statement made in an offer in compromise, Form 656); ***United States v. Holroyd***, 732 F.2d 1122, 1124, 1128 (2d Cir. 1984) (applying section 7206(1) to two false IRS collection information statements -- Form 433-B and Form 433-A.).

2. *Defendant made and subscribed a document that contained false information.*

The tax document must be filed with IRS. ***United States v. Harvey***, 869 F.2d 1439, 1448 (11th Cir. 1989). The maker of the return does not have to physically complete or prepare the document. ***United States v. Badwan***, 624 F.2d 1228, 1232 (4th Cir. 1980) ("The evidence did clearly show, however, that the accountant who prepared the returns did so solely on the basis of information provided to him by the [defendants], and that the [defendants] then signed and filed the returns. This satisfies the statute.").

When the document is signed, the signature can be authenticated by lay witness testimony, expert testimony, and jury comparison. **FED. R. EVID.** 901(b)(2)-(3). However, if an individual's name is signed to a document, there is a rebuttable presumption by virtue of § 6064 that the document was actually signed by that individual. ***See v. Kim***, 884 F.2d at 195 (5th Cir. 1989); ***United States v. Cashio***, 420 F.2d 1132, 1135 (5th Cir. 1969). However, is not necessary to present direct evidence showing that the defendant actually signed the returns; it is sufficient that the defendant's name is on the returns and the returns are true and correct copies of returns on file with the Internal Revenue Service. ***United States v. Wilson***, 887 F.2d 69, 72 (5th Cir. 1989); ***United States v. Carrodeguas***, 747 F.2d 1390, 1396 (11th Cir. 1984).

3. *Document was signed under penalties of perjury.*

Section 7206(1) requires that the return, statement, or other document be made "under the penalties of perjury." The IRS document, Form 656, referred to as an offer in compromise, as well as the accompany forms, Form 433-B (Collection Information Statement For Business) and Form 433-A (Collection Information For Wage Earners and Self-Employed Individuals), contain such language.

4. *Document contained false information as to a material matter*

A false 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." **Ninth Circuit Manual of Model Criminal Jury Instructions** (2010 revision) 9.39.

A "material matter" affects or influences the ability of the IRS to carry out its mission or impacts "the calculation of tax due and payable.'" ***United States v. Griffin***, 524 F.3d 71, 76-77 (1st Cir. 2008) ("A false statement may be material even if it was only likely to influence the calculation of tax due and payable.") (citations omitted); ***See United States v. Scholl*** 166 F.3d 964, 979 (9th Cir.1999) ("Information is material if it is necessary to a determination of whether income tax is owed.")(internal citation omitted); ***see also United States v. Hayes***, 190 F.3d 939, 946 (9th Cir. 1999) (not reporting money received from academic grade-selling scheme "obviously material to the IRS's ability correctly to calculate [defendant's] tax liabilities), aff'd, 231 F.3d 663, 667 n.1 (9th Cir. 2000) (en banc) Furthermore, materiality is a question for the jury, and not the court, in prosecutions under 7206(1). ***Neder v. United States***, 527 U.S. 1, 8 (1999), ***United States v. Gaudin***, 515 U.S. 506, 522-23 (1994).

Section 7206(1) does not require a showing that the government relied on the false statements. "[I]t is sufficient that they were made with the intention of inducing such reliance." ***Genstil v. United States***, 326 F.2d 243, 245 (1st Cir. 1964). The government is also not required to prove that the defendant intended to induce the government to rely on his or her false statement or that the government was actually deceived. "[T]he intent to induce government reliance on a false statement or to deceive the government is not an element of 26 U.S.C. § 7206(1)." ***United States v. Griffin***, 524 F.3d 71, 81 (1st Cir. 2008).

5. *Defendant acted willfully in submitting the documents*.

Section 7206(1) is a specific intent crime requiring a showing of willfulness. Proof of this element is essential, and "neither a careless disregard whether one's actions violate the law nor gross negligence in signing a tax return will suffice." ***United States v. Claiborne***, 765 F.2d 784, 797 (9th Cir. 1985); ***United States v. Collorafi***, 876 F.2d 303, 305 (2d Cir. 1989)("[T]rial courts

should follow a liberal policy in admitting evidence directed towards establishing the defendant's state of mind.")

In establishing willfulness, a defendant's signature on a document can be considered. ***See United States v. Tucker***, 133 F.3d 1208, 1218 n.11 (9th Cir. 1998) (noting that signature proved knowledge of contents of return). However, in ***United States v. Trevino***, the court held that it was error to instruct the jury that "[a] return or other tax document signed with the defendant's name creates a rebuttable presumption that the defendant actually signed it and had knowledge of its contents." 419 F.3d 896, 902 (9th Cir. 2005). The court noted that while 26 U.S.C. § 6064 provides that an individual's signature on the return is prima facie evidence that the return was actually signed by that individual, it does not create any other presumption. ***Id***.

IV. ANTICIPATED ISSUES/DEFENSES

A. Trusts.

The government anticipates that defendant may argue that he created a trust for his children when he transferred title of his Carefree residence, at 35802 North Meander Way, from Cornerstone Resource Trust to Sunlight Financial LLP, which was created on July 29, 2002 as a limited liability partnership in the State of Arizona. In other words, defendant may argue that he was engaged in simple estate planning.

Sunlight consisted of two partners, Rachel Harris, defendant's daughter, and the *Parker Children Irrevocable Trust*, with Rachel Harris listed as the trustee. Although the *Certificate Of Trust* stated in its recital that the trust was established on April 16, 2002 by defendants, the trust document itself was not signed until August 11, 2005, and only filed with the Maricopa County Recorder on September 15, 2005. (Id.) Therefore, the recital to 2002 was a disingenuous play to make it seem like the trust came into being before August, 2005 (when it was signed by defendants).

The government respectfully submits that the *Parker Children Irrevocable Trust* is a nominee entity, created by defendant to hide his residence valued at well over $1.5 million. A valid trust is a legal arrangement whereby a grantor transfers property into a trust and a trustee

holds legal title to property for the benefit of another person, the beneficiary. In order for a trust to be regarded as a valid trust for income tax purposes, the trustee must manage and control the property for the beneficiary's benefit. The beneficiary cannot manage or control the property. Treas. Reg. §301.7701-4(a)&(b). Every trust that has over $600 in gross income, regardless of the amount of taxable income, must file a tax return and must pay taxes on taxable income. 26 U.S.C. § 6012(a)(4); 26 U.S.C. § 641.

A trust is invalid for Federal income tax purposes if (1) the trustor retains the same relationship to the property both before and after the trust is established, or (2) the trustee does not have independent control over the property in the trust, or (3) the beneficiary did not receive an economic interest in the property. 26 U.S.C. §§ 671-677; Treas. Reg. § 1.671-1 et seq; ***Zmuda v. Commissioner***, 79 T.C. 714, 720-722 (1982), aff'd, 731 F.2d 1417 (9th Cir. 1984); ***Markosian v. Commissioner***, 73 T.C. 1235 (1980); ***Hanson v. Commissioner, T.C. Memo*** 1981-675 (1981), aff'd, 696 F.2d 1232 (9th Cir. 1983).

B. Good Faith Reliance On A Tax Professional.

In order to prove its case, the government may be obligated to disprove "a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws." ***Cheek v. United States***, 498 U.S. at 201-202. ("This is so because one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist."). Good faith reliance on a qualified tax professional, including an attorney, can be used to negate the element of willfulness in cases of tax fraud and evasion. ***United States v. Bishop***, 291 F.3d at 1106-07; ***United States v. Moran***, 493 F.3d 1002, 1013 (9th Cir. 2007).

A defendant who is claiming a good faith reliance on the advice of a tax professional must demonstrate the following: 1) Before taking action, (2) he in good faith sought the advice of an attorney whom he considered competent, (3) for the purpose of securing advice on the lawfulness of his possible future conduct, (4) made a full and accurate report to his attorney of all material facts which the defendant knew, and (5)acted strictly in accordance with the advice

of his attorney who had been given a full report. ***United States v. Cheek***, 3 F.3d 1057, 1061 (7th Cir. 1993); ***see also Bishop***, 291 F.3d at 1106-07 ("There was no evidence to support their claim that they relied on professional advice after full disclosure of relevant facts); ***United States v. Kenney***, 911 F.2d 315, 322 (9th Cir. 1990) ("In order to qualify for an advice of counsel instruction the appellant must show that there was full disclosure to the attorney of all material facts, and that he relied in good faith on the attorney's recommended course of conduct."). Defendant must show that he sought advice regarding the lawfulness of future conduct. ***United States v. Polytarides***, 584 F.2d 1350, 1352-53 (4th Cir. 1978) (no error to reject reliance defense when evidence shows illegal acts before advice was sought).

Good faith reliance on third parties is an issue to be determined by the jury. ***United States v. Duncan***, 850 F.2d 1104, 1117 (6th Cir. 1988); ***Schad v. Arizona***, 501 U.S. 624, 634-35 (1991). A defendant who demonstrates that he made full disclosure of all pertinent facts and relied in good faith on the advice received is entitled to the jury instruction. ***United States v. Ford***, 184 F.3d 566, 579 (6th Cir. 1999).

V. EVIDENTIARY ISSUES.

A. Non-hearsay Evidence.

1. *Assertions with Direct Legal Significance.*

If an out-of-court assertion has direct legal significance, regardless of its truth, it is not hearsay. Words expressed that constitute a crime itself or an element of a crime have direct legal significance. ***See, e.g., United States v. Jones***, 663 F.2d 567, 571 (5th Cir. 1981) (threats against judge and prosecutor admitted because statements were "paradigmatic non-hearsay" of operative words of criminal action); ***United States v. Anfield***, 539 F.2d 674, 678 (9th Cir. 1976) (assertion the basis for perjury charge).

An out-of-court assertion may have direct legal significance as a misrepresentation. If so, the statement will be introduced to prove the assertion was made and establish its falsity, not its truth. Operative misrepresentations are not hearsay. ***See Anderson v. United States***, 417 U.S. 211, 220 (1974); ***United States v. Wellington***, 754 F.2d 1457, 1464 (9th Cir. 1985); ***United***

States v. Hathaway, 798 F.2d 902, 904-05 (6th Cir. 1986).

2. *Assertion Used as Circumstantial Evidence.*

An out-of-court statement constitutes circumstantial evidence if the trier of fact may infer from it, regardless of its truth, the existence or nonexistence of a fact in issue. Statements offered as circumstantial evidence are not hearsay. ***See Sica v. United States***, 325 F.2d 831, 836 (9th Cir. 1964) (statements were circumstantial evidence of relationship between defendant and others); ***United States v. Martin***, 773 F.2d 579, 583 (4th Cir. 1985) (bookmaking records were circumstantial evidence showing that defendant was bookmaker).

3. *Circumstantial Evidence of Fraud.*

False out-of-court statements may be offered as circumstantial evidence of fraud. The statements are not offered to prove the truth of the matters asserted; thus they are not hearsay. ***See, e.g., Anderson v. United States***, 417 U.S. 211, 216-21 (1974); ***United States v. Wellington***, 754 F.2d 1457, 1464 (9th Cir. 1985) (evidence of representations to investors in real estate scam admitted to show falsity); ***United States v. Gibson***, 690 F.2d 697, 700-01 (9th Cir. 1982) (assertions by salesmen established scheme to defraud); ***United States v. Saavedra***, 684 F.2d 1293 (9th Cir. 1982) (testimony by victims of wire fraud scheme admitted as circumstantial evidence of conspiracy to defraud).

4. *Assertion Implying Particular State of Mind of Declarant.*

Out-of-court statements are admissible as circumstantial evidence of the declarant's intent, knowledge, or guilty conscience.

A direct assertion of the declarant's present intent is hearsay, but is typically admitted as an exception to the hearsay rule. See Fed. R. Evid. 803(3) (then-existing mental, emotional, or physical condition). An out-of-court assertion may be introduced as circumstantial evidence of the declarant's intent, regardless of its truth or falsity. ***See Atlantic-Pacific Construction Co., Inc. v. National Labor Relations Board***, 52 F.3d 260, 263 (9th Cir. 1995) (statements introduced as circumstantial evidence to prove declarant's intent to act); ***United States v. Abascal***, 564 F.2d 821, 829-30 (9th Cir. 1977) (declarant's statements admitted to clarify or

explain his ambiguous conduct).

A statement is not hearsay if offered as circumstantial evidence of the declarant's knowledge of facts otherwise established. ***See United States v. Parry***, 649 F.2d 292, 295 (5th Cir. 1981) (testimony regarding phone conversation admitted to show defendant had knowledge of caller's identity); ***United States v. Frank***, 494 F.2d 145, 155 (2nd Cir. 1974) (statements admitted to show knowledge of transactions).

An out-of-court assertion, if shown by other evidence to be false, may be introduced as circumstantial evidence that the declarant had a guilty conscience. ***See Wilson v. United States***, 162 U.S. 613, 620-21 (1896) (false statements by defendant to explain his innocence were admissible as circumstantial evidence of defendant's guilty conscience). **Accord *United States v. Fox***, 613 F.2d 99, 100-01 (5th Cir. 1980); ***United States v. Sawyer***, 607 F.2d 1190, 1192 (7th Cir. 1979); ***United States v. Cline***, 570 F.2d 731, 735-36 (8th Cir. 1978).

5. *Assertion That Produces Particular State of Mind in Another.*

A person's particular state of mind may be proved by circumstantial evidence that the person heard an assertion made by another. Where such assertions are offered to show their effect on the person hearing them, they are not hearsay. This type of evidence is often admitted to show knowledge, notice, or motive.

An out-of-court assertion introduced to prove the person to whom the assertion was communicated had knowledge of something is not hearsay. ***See Stevens v. Moore Business Forms, Inc.***, 18 F.3d 1443, 1449 (9th Cir. 1994) (statements introduced to show witness had knowledge of records); ***United States v. Kenney***, 911 F.2d 315, 319 (9th Cir. 1990) (statements to attorney admissible to prove that defendant knew he would not be granted immunity); ***United States v. Castro***, 887 F.2d 988, 1000 (9th Cir. 1989) (reports admissible to show defendant had knowledge of certain information); ***United States v. Tamura***, 694 F.2d 591, 597-98 (9th Cir. 1982) (same); ***United States v. Kutas***, 542 F.2d 527, 528 (9th Cir. 1976) (statement by defendant admissible to prove he knew he was harboring an escaped federal prisoner); ***United States v. Moody***, 376 F.2d 525, 530 (9th Cir. 1967) (assertions by declarant admissible to show defendant

was aware of unlawful practices of business enterprise).

Similarly, an out-of-court statement introduced to prove that the person to whom the statement was communicated had notice of something is not hearsay. ***See Kunz v. Utah Power & Light Co.***, 913 F.2d 599, 605 (9th Cir. 1990) (press releases admissible to show plaintiffs had notice of potential flooding); ***Gibbs v. State Farm Mutual Insurance Company***, 544 F.2d 423, 428 (9th Cir. 1976) (letters admissible to show defendants had received them).

Out-of-court statements that are communicated to a person may also be introduced as circumstantial evidence of that person's motive for doing something, including whether the person acted in good faith. ***See Jones v. Los Angeles Community College District***, 702 F.2d 203, 205 (9th Cir. 1983) (statements admitted to show college had legitimate basis for terminating plaintiff); ***Ostroff v. Employment Exchange, Inc.***, 683 F.2d 302, 305 (9th Cir. 1982) (testimony introduced to show defendant believed in good faith that plaintiff was not qualified for job referral).

6. *Prior Inconsistent Statement as Evidence that Witness is Unreliable***.**

An out-of-court statement by a witness that conflicts with the person's testimony at trial may be admissible to show that the witness is unreliable. A statement used for this purpose is not hearsay. **FED R. EVID. 801(d)(1)(A)**; ***United States v. Crouch***, 731 F.2d 621, 623-24 (9th Cir. 1984).

B. Admissions.

1. *Admission by Defendant.*

A statement offered against a party, which is the party's own statement in either an individual or representative capacity, is not hearsay. ***Fed. R. Evid. 801(d)(2)(A); United States v. Weiner***, 578 F.2d 757, 770 (9th Cir. 1978); ***United States v. Calaway***, 524 F.2d 609, 613 (9th Cir. 1975). Extrajudicial declarations made by the defendant are not hearsay and qualify as independent evidence.

2. *Adoptive Admission by Defendant.*

Rule 801(d)(2)(B), Fed. R. Evid. provides:

> A statement is not hearsay if the statement is offered against a party and is . . . a statement of which the party has manifested an adoption or belief in its truth, ...

The possession of a statement, and an act of defendant manifesting some reliance on it or belief in its trustworthiness, makes the statement admissible as an "adoptive admission." ***United States v. Carrillo and Benavidez***, 16 F.3d 1046, 1048-49 (9th Cir. 1994); ***United States v. Ospina***, 739 F.2d 448, 451 (9th Cir. 1984). In ***Ospina***, the Ninth Circuit held that business cards found in the defendant's hotel room were admissible as adoptive admissions under Fed. R. Evid. 801(d)(2)(B) because the cards were in the possession of the defendant and because the defendant acted on the information written on the cards when he traveled to the listed address to pick up the cocaine. ***Id***. In ***Carrillo***, the Ninth Circuit held that a slip of paper found on an arrested defendant, which contained numbers similar to those involved in negotiations for the subject drug sale, was admissible against the defendant at his trial for the drug offense under the "adopted admission" exception to the hearsay rule. The fact that the prices and quantities were consistent with those discussed in the negotiations created a sufficient link between the writing and the defendant's actions to permit the district court to find an adoption. ***Carrillo***, 16 F.3d at 1048-49.

Adoptive admissions by silence should not go to the jury unless the court first finds that the United States has made a showing through foundational questions that the defendant was present and heard the statement, and that he had an opportunity and incentive to deny the statement if untrue. ***United States v. Sears***, 647 F. 2d 902, 904-05 (9th Cir. 1981); ***United States v. Giese***, 597 F.2d 1170, 1196 (9th Cir. 1979); ***United States v. Moore***, 522 F.2d 1068, 1076 (9th Cir. 1975). If the United States lays a sufficient foundation, evidence with respect to the defendant's silence at the time the statement was made, and his adoption of the statement, are admissible, and it is for the jury to decide whether the defendant actually heard, understood, and acquiesced in the statement. ***United States v. Monks***, 774 F.2d 945, 950 (9th Cir. 1985).

3. Defendant's Prior Self-Serving Statements Are Inadmissible Hearsay.

A defendant's self-serving declarations in prior statements are inadmissible because they are hearsay and do not fall within one of the exceptions to the hearsay rule. ***Fed. R. Evid. 801; United States v. Dorrell***, 758 F.2d 427 (9th Cir. 1985); ***United States v. Jackson***, 780 F.2d 1305 (7th Cir. 1986).

In ***United States v. Ortega***, 203 F.3d 675 (9th Cir. 2000), the defendant was charged with multiple drug and firearm-related offenses. During a law-enforcement interview, the defendant confessed to various things, including: (1) living in the residence in which the drugs were found; (2) an unnamed cousin gave him the drugs; (3) he was going to sell the drugs; (4) he carried the gun for personal protection; and (5) the gun belonged to him but was given to him by his cousin. Prior to trial, the United States moved to preclude the defendant from eliciting his own exculpatory statements, which were made within a broader inculpatory statement. ***Id.*** at 681. The district court granted the motion and precluded the defendant from eliciting statements, from the law-enforcement officer, that the defendant allegedly received the drugs and gun from his cousin and that the defendant had no knowledge of the drugs or indicia of drug trafficking found in the garage attached to his shared residence. ***Id.*** at 681-682.

The Ninth Circuit affirmed the exclusion of defendant's non-self-inculpatory statements, noting that when offered by the government, the statements are admissible pursuant to Fed. R. Evid. 801(d)(2), but when offered by the defendant, the statements are inadmissible hearsay. ***Id***. The Court noted that if it were to hold otherwise it would allow the defendant to place his exculpatory statements "before the jury without subjecting [himself] to cross-examination, precisely what the hearsay rule forbids." ***Id.***, ***citing***, ***United States v. Fernandez***, 839 F.2d 639, 640 (9th Cir. 1988). Further, in ***Ortega***, the Ninth Circuit also held that even if the rule of completeness applied, the exclusion of defendant's exculpatory statements would still be proper because the statements were hearsay. ***Id.*** at 683.

In ***United States v. Dorrell***, 758 F.2d 427 (9th Cir. 1985), the defendant was charged with entering a military reservation for an unlawful purpose and willfully injuring property of the

United States. During the investigation of the crimes, the defendant admitted that he entered the military base with the intention of damaging MX missiles. ***Id.*** at 429. He further admitted to causing damage to property of the United States. ***Id.*** The defendant then prepared a written statement setting forth the substance of his oral confession. Additionally, two days before he committed the crimes, the defendant made a videotape, setting forth his political and religious motivations for entering the base.[8]

The trial court granted the government's motion in limine to redact the defendant's written confession, removing as irrelevant those portions which stated his motivations for entering the base. ***Id.*** at 430. Additionally, the trial court found that the videotape was inadmissible on the grounds that it was hearsay and irrelevant. ***Id.*** at 434. The Ninth Circuit affirmed both of these evidentiary rulings.

The Ninth Circuit noted that the videotape was clearly hearsay as it was being offered for the truth of the matter asserted. The Court also found that there was no hearsay exception for the admissibility of the videotape. The Court noted that the self-serving portions of the written statement were properly excluded by the trial court and that such exclusion did not violate Fed. R. Evid. 106, the rule of completeness. ***Id.*** at 434.; ***see also***, ***United States v. Velasco***, 953 F.2d 1467, 1474-1476 (7th Cir. 1992), (trial judge did not abuse discretion in ordering that the self-serving portions of a statement be redacted from *defendant's post-arrest statement*).

In ***United States v. DeLuca***, 692 F.2d 1277 (9th Cir. 1982), the defendants were charged with various counts of conspiracy and racketeering. During trial, one of the defendants moved to admit a taped recorded conversation between himself and a government witness. ***Id.*** at 1285. The tape recording contained the defendant's exculpatory statements. ***Id.*** The Ninth Circuit held that the conversation took place after the defendant knew he was under investigation for the offense and that the statements were not trustworthy and therefore, inadmissible hearsay. ***Id.***; ***see also United States v.Woosley***, 761 F.2d 445 (8th Cir. 1985) (self-serving letter to grand

[8] The defendant's "motivation," as reflected by his statements on the videotape, stemmed from his concern about nuclear war and world starvation. 758 F.2d at 429.

jury).

C. Business Records.

Rule 803, Fed. R. Evid., provides:

> The following are not excluded by the hearsay rule even though the declarant is available as a witness:
>
> * * *
>
> **(6) Records of Regularly Conducted Activity**. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Rule 902(11), Fed. R. Evid., provides:

> **(11) Certified Domestic Records of Regularly Conducted Activity.** –The original or a duplicate of a domestic record of a regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, . . ., certifying that the record–
>
> (A) was made at or near the time of the occurrence of the matter set forth by, or from information transmitted by, a person with knowledge of those matters;
>
> (B) was kept in the course of the regularly conducted activity; and
>
> (C) was made by the regularly conducted activity as a regular practice.

For a document to be admitted as a business record, a custodian or other "qualified witness" must establish that: (1) the writing was made or transmitted by a person with knowledge at or near the time of the incident recorded; and (2) the record is kept in the course

of a regularly conducted business activity. ***Kennedy v. Los Angeles Police Department***, 901 F.2d 702, 717 (9th Cir. 1990).

A "qualified witness" can be anyone who understands the record keeping system involved. ***United States v. Ray***, 930 F.2d 1368, 1370 (9th Cir. 1990). It is not necessary that this witness be the one who personally generated the document or that this person verified the underlying information. ***Id.*** Nor is it necessary that the qualified witness have been employed when the records were prepared, ***United States v. Evans***, 572 F.2d 455, 490 (5th Cir. 1978), or have personal knowledge of the particular evidence in the record. ***United States v. Reese***, 568 F.2d 1246, 1252 (6th Cir. 1977).

The requirement that a record be "made at or near the time" of the incident recorded means that the record be created within some reasonable time of the incident. For example, a computer printout prepared eleven months after the close of year has been held to be contemporaneous. ***United States v. Russo***, 480 F.2d 1228, 1241 (6th Cir. 1973). That a record was "received" rather than "made" in the ordinary course of business does not preclude its admissibility under Rule 803(6). ***United States v. Flom***, 558 F.2d 1179, 1182-1183 (5th Cir. 1977); ***United States v. Carranco***, 551 F.2d 1197, 1200 (10th Cir. 1977); ***United States v. Pfeiffer***, 539 F.2d 668, 670-671 (8th Cir. 1976).

In offering a document as a business record, the United States is not required to prove who created the document or precisely when it was made. As the Ninth Circuit has noted, "there is no requirement that the government establish when and by whom the documents were prepared." ***Ray,*** 920 F.2d at 565; ***see also United States v. Arias-Villanueva***, 998 F.2d 1491, 1503 (9th Cir. 1993) (to be admissible "there is no requirement that the government establish when and by whom the documents were prepared"); ***Miller v. Fairchild Industries, Inc.***, 885 F.2d 498, 514 (9th Cir. 1989) ('[o]bjections, relating to the identity or competency of the actual preparer, may [be] relevant to the evidentiary weight or credibility of the documents, but [do] not [affect] their admissibility').

Authentication is satisfied by "evidence sufficient to support a finding that the matter in question is what its proponent claims." ***Fed. R. Evid. 901(a)***. Rule 901 allows the district court to admit evidence "if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification." ***United States v. Tank***, 200 F.3d 627, 630 (9th Cir. 2000). To establish authentication for a document, the Ninth Circuit has held that the necessary prima facie showing is satisfied by it being found in a defendant's warehouse. ***Burgess v. Premier Corp.***, 727 F.2d 826, 835 (9th Cir. 1984); ***see also E.W. French & Sons, Inc. v. General Portland Inc.***, 885 F.2d 1392, 1398 (9th Cir. 1989). That a document is circulated within a business as part of its regular practice and is made by a person with knowledge is sufficient to establish its admissibility. ***Gibbs v. State Farm Mut. Ins. Co.***, 544 F.2d 423, 428 (9th Cir. 1976). Moreover, the fact that a business record may itself contain hearsay within hearsay does not make the record inadmissible if it was relied upon in the ordinary conduct of the business. ***See Ray***, 920 F.2d at 565; ***Clark v. City of Los Angeles***, 650 F.2d 1033, 1037 (9th Cir. 1981) (hearsay in business records is admissible if information furnished 'in the regular course of business') (citations omitted).

D. Telephone Conversations.

Telephone conversations are subject to the same evidentiary standards that apply to face-to-face conversations, except that the proponent seeking to admit the conversation must make a prima facie showing of its authenticity, i.e., the identity of the person against whom it is offered. ***See United States v. Espinoza***, 317 F.2d 275, 276-77 (9th Cir. 1963). Once a prima facie case of authorship is presented, the issue of authenticity, including the identity of participants, is for the trier of fact. ***Id., citing Carbo v. United States***, 314 F.2d 718, 743 (9th Cir. 1963). A prima facie showing is met if a reasonable juror could find in favor of authenticity or identification. ***United States v. Blackwood***, 878 F.2d 1200, 1202 (9th Cir. 1989).

The identity of a party to a telephone call may be established directly by recognition of the voice or indirectly by the circumstances of the call. The prima facie threshold for admissibility

is low, ***see Id.***, and can be met by a witness identifying a voice based on previous conversations with the speaker. ***United States v. Turner***, 528 F.2d 143, 163 (9th Cir. 1975). Any hesitancy or uncertainty on the part of a witness in identifying a voice affects only the weight and not the admissibility of the testimony. ***United States v. Rizzo***, 492 F.2d 443 (2d Cir. 1974); ***United States v. Turner***, 485 F.2d 976 (D.C. Cir. 1973).

The identity of a telephone caller may also be shown by a person's self-identification coupled with additional evidence such as the context and timing of the call, the contents of the conversation, and the speaker's knowledge of facts known by a particular person. ***United States v. Orozco-Santillan***, 903 F.2d 1262, 1266 (9th Cir. 1990).

Illustrative is ***United States v. Basey***, 613 F.2d 198 (9th Cir. 1979), where a defendant challenged the admission of recorded telephone conversations with an individual identifying himself as "Snake." The Ninth Circuit held that these calls were properly admitted where witnesses testified that the defendant was known by the name "Snake," one witness identified the voice on the calls as the defendant's, and telephone records showed increased phone activity by the defendant during the relevant time period.

Identity may also be proven circumstantially. For example, ***Noreiga v. United States***, 437 F.2d 435, 436 (9th Cir. 1971), admitted a call because it was made in response to a prior communication. A narcotics agent was given a business card by a co-defendant and instructed to call the listed telephone number. The agent made several calls to the number and was told that the defendant would call him. A call was subsequently made and arrangements were made for the narcotics sale. These circumstances supported the admission of the call.

E. Absence of Records.

Fed. R. Evid. 803(7) treats evidence of the absence of entries in records of a regularly conducted activity as an exception to the hearsay rule. ***United States v. Rich***, 580 F.2d 929, 937-38 (9th Cir. 1978). Similarly, Rule 803(10) excludes from the hearsay rule evidence of the absence of a public record or an entry in a public record. These exceptions to the hearsay rule,

which provide for the admissibility of negative search records, were designed to resolve any doubts about such evidence in favor of admissibility. ***United States v. Lee***, 589 F.2d 980, 987 (9th Cir. 1979).

These rules have been applied to police records, credit records, and city directories. ***Rich***, 580 F.2d at 937-939. When testimony is offered that certain records do not contain entries of designated information, the proponent is not required to produce the records or directly show they did not contain the entry. ***United States v. Madera***, 574 F.2d 1320, 1323 n.3 (5th Cir. 1978); ***see also Advisory Committee Notes, Fed. R. Evid. 1002*** (rule requiring production of the original of a document to prove its contents does not "apply to testimony that books or records have been examined and found not to contain any reference to a designated matter").

F. Moving Self-Authenticating Public Documents into Evidence Without Witness

Fed. R. Evid. 902(11) dispenses with the need for live testimony by a custodian of record as to the authenticity of a business record. This section states that extrinsic evidence of authenticity is not required with respect to the following:

> **(11) Certified Domestic Records of Regularly Conducted Activity**: The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or otherwise qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record-
>
> > (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by a person with knowledge of those matters;
> >
> > (B) was kept in the course of the regularly conducted activity; and,
> >
> > (C) was made by the regularly conducted activity as a regular practice.

In this case the government intends to introduce various documents through this method. Authentication in this manner is appropriate and does not violate a criminal defendant's rights under the Confrontation Clause. ***United States v. Weiland***, 420 F.3d 1062 (9th Cir. 2005)***;*** ***United States v. Klinzing***, 315 F.3d 803, 809 (7th Cir. 2003).

Fed. R. Evid. 1005, provides in pertinent part, as follows:

> The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be provided by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original.

Under Rule 902(4), a copy of an official record, or of a document authorized by law to be recorded or filed, and actually recorded or filed in a public office, requires no extrinsic evidence of authenticity if there is compliance with Rules 902(1), (2), or (3). If the document contains a signature and displays evidence of a seal (raised, embossed, etc.), the document can be introduced, subject to relevance, as self-authenticating.

Rule 27, Fed.R.Crim.P., provided:

> A party may prove an official record, an entry in such a record, or the lack of a record or entry in the same manner as in a civil action.

The Advisory Committee Notes incorporate by reference Rule 44 of the Federal Rules of Civil Procedure. Rule 44 states, in turn:

> **(a) Authentication.**
>
> **1. Domestic.** An official record kept within the United States, or any state, district or commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entity therein, when admissible for any purpose, may be evidenced by an official publication thereof, or by a copy attested by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge or court of record of the district or political subdivision in the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.

> **(b) Lack of Record**. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, . . .is admissible as evidence that the record contains no such record or entry.

Rule 44 provides a simple and uniform method of proving public records, and entry or lack of entry therein, in all criminal cases.

G. Opinion Testimony by Lay Witnesses.

Fed. R. Evid. 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

This rule allows a lay witness, upon establishing a proper foundation, to provide his opinion as to authorship of handwriting. ***United States v. Tipton***, 964 F.2d 650, 654-55 (7th Cir. 1992); ***United States v. Whittington***, 783 F.2d 1210, 1214-15 (5th Cir. 1986); ***United States v. Barker***, 735 F.2d 1280, 1283-84 (11th Cir. 1984); ***United States v. Barron*** 707 F.2d 125, 128 (5th Cir. 1983) (one of accused's coworkers could identify handwriting as accused's even if he could not be "absolutely certain").

A lay witness can also make a voice identification. ***United States v. Thomas***, 586 F.2d 123, 133 (9th Cir. 1978). Under Fed. R. Evid. 901(b)(5), voice identification to determine admissibility of recorded conversations may be made by one who has heard the voice "at any time under circumstances connecting it with the alleged speaker."

H. Expert Witness Testimony.

Rule 702, Fed. R. Evid., provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

An expert need not express his opinion with certainty for it to be admitted. ***United States***

v. Collins, 559 F.2d 561, 565 (9th Cir.), ***cert. denied***, 434 U.S. 907, 98 S. Ct. 309 (1977) (FBI photographic comparison expert testified that shoes and briefcase found in search were "most probably" the same as those depicted in bank surveillance photographs. testimony was proper under rule 702); ***United States v. Spencer***, 439 F.2d 1047, 1049 (2nd Cir. 1971); J. Weinstein and M. Berger, ***Weinstein's Federal Evidence***, § 702[02] (2004).

Rule 703, Fed. R. Evid., provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions of interferences upon the subject, the facts or data need not be admissible in evidence.

An expert may base his opinion upon hearsay. "Expert's testimony based on hearsay is now the rule, if certain conditions are met, rather than the exception." ***United States v. Robbins***, 579 F.2d 1151, 1154 (9th Cir. 1978); ***United States v. Sims*****,** 514 F.2d 147, 149 (9th Cir.), ***cert. denied,*** 423 U.S. 845 (1975); *Weinstein's Federal Evidence*, § 703[03] (2004).

Rule 704, Fed. R. Evid., provides:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

United States v. Davis, 564 F.2d 840, 845 (9th Cir. 1977), ***cert. denied***. 434 U.S. 1015, 98 S. Ct. 733 (1978), involved the prosecution of a doctor who distributed drugs outside the usual course of professional practice and not for legitimate medical purposes. The United States' expert witness testified the defendant was not prescribing drugs in the usual course of a professional practice and not for a legitimate medical purpose. This testimony on the "ultimate issue" was held proper under Rule 704. ***United States v. Hearst***, 563 F.2d 1331, 1351 (9th Cir. 1977).

A qualified expert may examine voluminous or intricate books and records and, for the

convenience of the court and jury, give a summary of their contents. The use of a qualified investigative agent to summarize extensive bank records, accounting machine tapes, debit and credit slips and loan papers is proper. ***United States v. Cooper***, 464 F.2d 648, 656 (10th Cir. 1972), ***cert. denied***, 409 U.S. 1107 (1973), ***rehearing denied***, 410 U.S. 959 (1973).

Rule 705, Fed. R. Evid., provides:

> The expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

I. Summary and Demonstrative Evidence.

Charts may be used in opening statements where they do no more than assist the jury in understanding the nature of the proof they are about to hear. ***See United States v. De Peri***, 778 F.2d 963, 978-79 (3rd Cir. 1985); ***United States v. Churchill***, 483 F.2d 268, 274 (1st Cir. 1973); ***United States v. Rubino***, 431 F.2d 284, 289-90 (6th Cir. 1970). Where a summary chart is not itself admitted in evidence, the Court should give a limiting instruction advising the jury that the chart is not evidence but is only an aid to the jurors' understanding the evidence. ***United States v. Scales***, 594 F.2d 558 (6th Cir. 1979).

Rule 1006 provides that evidence may be admitted "in the form of a chart, summary, or calculation" where "[t]he contents of voluminous writings, recordings, or photographs" cannot conveniently be examined in court. Charts may be admitted in evidence to illustrate testimony, to coordinate underlying facts that have been placed in evidence, and to summarize such facts. ***United States v. Saniti***, 604 F.2d 603, 605 (9th Cir. 1979). Trial courts are given wide discretion in the introduction of summary evidence. ***United States v. Williams***, 952 F.2d 1504, 1519 (6th Cir. 1991).

Under Rule 1006, the underlying documents or recordings need not be "in evidence." ***See United States v. Smyth***, 556 F.2d 1179, 1184 (5th Cir. 1977). The rule only requires that the summaries be based on admissible documents which have previously been made available to the opposing side at a reasonable time and place. ***United States v. Johnson***, 594 F.2d 1253, 1255 (9th Cir. 1979). It is also not necessary that the witness presenting the summary be an expert witness or have specialized knowledge if the chart does not contain complicated

calculations requiring expert explanation. ***United States v. Jennings***, 724 F.2d 436, 443 (5th Cir. 1984). Under Rule 1006, the summary itself is the evidence which the trier of fact may consider. ***United States v. Strissell***, 920 F.2d 1162 (4th Cir. 1990). The jury may take summary evidence, like other evidence, with them into the jury room. ***United States v. Orlowski***, 808 F.2d 1283, 1289 (8th Cir. 1986).

Summaries, including the captions or headings of charts, may reflect conclusions or assumptions that are supported by the evidence. ***Jennings***, 724 F.2d at 442; ***United States v. Diez***, 515 F.2d 892, 905 (5th Cir. 1975). There is no requirement that the government's summary charts reflect the defendant's version of the facts or theory of the case. ***United States v. Ambrosiani***, 610 F.2d 65 (1st Cir. 1979); ***Myers v. United States***, 356 F.2d 469, 470 (5th Cir. 1966). Examples of allowed captions and headings include: "Total Net Unreported Income," ***United States v. Lacob***, 416 F.2d 756, 762 (7th Cir. 1969); "Amounts Not Reported on Taxable Gains," ***Diez***, 515 F.2d at 905; and "Falsified Data," ***United States v. Smyth***, 556 F.2d 1179, 1182 (5th Cir. 1977).

Respectfully submitted this 21st day of May 2012

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s/Walter Perkel

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Certificate of Service:

I hereby certify that on May 21, 2012, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants: Michael Minns, Ashley Arnett, Michael Kimerer John McBee, and Joy Bertrand.

s/Beverly Dennie