

1 Michael Louis Minns (pro hac vice)  
Texas State Bar No. 14184300  
2 Ashley Blair Arnett (pro hac vice)  
Texas State Bar No. 24064833  
3 MICHAEL LOUIS MINNS, P.L.C.  
9119 S. Gessner, Suite One  
4 Houston, Texas 77074  
Tel.: (713) 777-0772  
5 Fax: (713) 777-0453  
Email: [mike@minnslaw.com](mailto:mike@minnslaw.com)  
6

7 Counsel for Defendant James Parker  
8

9 **IN THE UNITED STATES DISTRICT COURT**  
10 **DISTRICT OF ARIZONA**

11  
12 **UNITED STATES OF AMERICA,**  
13 Plaintiff,  
14 v.  
15 **JAMES PARKER, et al.,**  
16 Defendants.

**No. 10-CR-757-PHX-ROS**  
**RESPONSE TO THE GOVERNMENT'S**  
**MOTION IN LIMINE TO PRECLUDE**  
**STATEMENTS FROM SPECIAL**  
**AGENT'S REPORT**

17  
18 NOW COMES Defendant James Parker, by and through his counsel of record, and in  
19 response to the Government's May 17, 2012 Motion in Limine to Preclude Statements from  
20 Special Agent's Report, states as follows.  
21

22 The IRS' Special Agent's Report is submitted to the Department of Justice and a decision  
23 about prosecution is based primarily on this report. Here, the prosecutions of Defendants are  
24 based on the investigation and recommendation of Special Agent Lisa Giovannelli as set forth in  
25 her Special Agent's Report. Special Agent Giovannelli concluded her Special Agent's Report  
26

1 with the statement, “Jacqueline [Parker] is a homemaker and has no known involvement with  
2 Parker’s business or any other known incoming [sic] producing activity.”

3 **A. The Statement Is Admissible Non-Hearsay.**

4 This conclusion in Giovannelli’s Special Agent’s Report is an admission by party-opponents  
5 and is not hearsay. The statement should be allowed into evidence under Fed. R. Evid.  
6 801(d)(2).

7 Rule 801(d)(2) of the Federal Rules of Evidence states:

8 (d) Statements That Are Not Hearsay. A statement that meets the following  
9 conditions is not hearsay:

10 ...

11 (2) *An Opposing Party’s Statement.* The statement is offered against an  
12 opposing party and:

13 (A) was made by the party in an individual or representative capacity;

14 (B) is one the party manifested that it adopted or believed to be true;

15 (C) was made by a person whom the party authorized to make a statement on  
16 the subject;

17 (D) was made by the party’s agent or employee on a matter within the scope of  
18 that relationship and while it existed; or

19 (E) was made by the party’s coconspirator during and in furtherance of the  
20 conspiracy.

21 Any statements Special Agent Giovannelli has made that are in opposition to the Government’s  
22 case should be admitted under Fed. R. Evid. 801(d)(2) as admissions by a party-opponent.

23 The Government’s position is that Special Agent Giovannelli’s statements are  
24 inadmissible hearsay because Fed. R. Evid. 801(d)(2) does not apply to law enforcement officers  
25 and/or case agents. (*See generally* Gov’t’s Mot. to Preclude Statements of 05/17/12.) The Court  
26 must reject this argument. Federal courts allow admission of statements in governmental reports  
as admissions by a party opponent under Rule 801(d)(2). *See English v. District of Columbia*,  
651 F.3d 1 (D.C. Cir.) (holding that report and statements by inspector were non-hearsay party

1 admissions and were admissible against the government under Rule 801(d)(2)), *reh'g in banc*  
2 *denied* (2011); *In re Jacoby Airplane Crash Litig.*, No. 99-6073, 2007 WL 2746833, at \*5  
3 (D.N.J. Sept. 19, 2007) (collecting cases demonstrating that “there is ample authority to allow  
4 statements as admissions by a party opponent in the appropriate context involving the  
5 Government”). *See also United States v. Am. Tel. & Tel. Co.*, 498 F. Supp. 353 (D.D.C. 1980)  
6 (finding statements by one agency of federal government were admissible as admissions by  
7 party-opponent against another governmental agency).

8 The decades-old Second Circuit case cited by the Government involved a defendant  
9 charged with assaulting a federal officer. The defendant sought to introduce evidence of a sworn  
10 affidavit written by a *different officer* than the one assaulted. *United States v. Santos*, 372 F.2d  
11 177 (2d Cir. 1967). This case is inapplicable.<sup>1</sup>

12 Further, the Ninth Circuit Court of Appeals has not adopted the position of the Second  
13 Circuit. Instead, to determine whether statements are admissible as non-hearsay statements  
14 against a party by an agent, the court must undertake a fact-based inquiry applying common law  
15 principles of agency. *United States v. Bonds*, 608 F.3d 495 (9th Cir. 2010). The court should  
16 consider ten factors: (1) the control exerted by the employer, (2) whether the one employed is  
17 engaged in a distinct occupation, (3) whether the work is normally done under the supervision of  
18 an employer, (4) the skill required, (5) whether the employer supplies tools and instrumentalities,  
19 (6) the length of time employed, (7) whether payment is by time or by the job, (8) whether the

20  
21 <sup>1</sup> The *Santos* case also does not represent a Second Circuit rule, as the Government suggests, that  
22 Rule 801(d)(2) “does not apply to law enforcement officers and/or case agents as they are not  
23 ‘party-opponents’ or agents of the government for purposes of this rule.” (Gov’t’s Mot. to  
24 Preclude Statements, at 2.) “The Second Circuit has ... ‘suggested that affidavits filed in  
25 furtherance of an application for the installation of an electric monitor and a subsequent search  
26 may constitute admissions of a party opponent, and be used as such against the government by a  
criminal defendant.” *United States v. Paloscio*, No. 99 CR. 1199, 2002 WL 1585835, at \*2  
(S.D.N.Y. July 17, 2002) (quoting *United States v. GAF Corp.*, 928 F.2d 1253, 1260 (2d Cir.  
1991) (citing *United States v. Ramirez*, 894 F.2d 565, 570 (2d Cir. 1990))).

1 work is in the regular business of the employer, (9) the subjective intent of the parties, and (10)  
2 whether the employer is or is not in business. *Id.* See also *In re Jacoby*, 2007 WL 2746833, at  
3 \*5 (noting that in *Huber v. United States*, 838 F.2d 398 (9th Cir. 1988), the Ninth Circuit  
4 suggested that a Coast Guard might be admissible against the government under Rule 801(d)(2)).

5 Here, Special Agent Giovannelli is not only an employee of the Government—she was  
6 the primary investigator. She wrote a report that was the basis of the decision-making process of  
7 charging Defendants. Special Agent Giovannelli is a crucial witness to the Government. By  
8 agreement of the parties, she will be excluded from the exclusionary rule because she is so  
9 important.

10 The second case the Government relies on is the Seventh Circuit case of *United States v.*  
11 *Kampiles*, 609 F.2d 1233 (7<sup>th</sup> Cir. 1979), in which the court found that a court reporter’s  
12 statements were not allowed into evidence as party-opponent admissions because “agents of the  
13 Government are supposedly disinterested.” Special Agent Giovannelli is not a disinterested  
14 agent of the Government. She is a critical part of the case against the Parkers. Circumscribing a  
15 defendant’s cross-examination of government witnesses implicates the confrontation clause of  
16 the Sixth Amendment, and constitutional concerns are especially heightened when the statement  
17 was by the government’s most crucial witness. U.S.C.A. Const. Amend. 6; *United States v. A &*  
18 *S Council Oil Co.*, 947 F.2d 1128 (4th Cir. 1991).

20 **B. The Statement May Not Be Excluded as Improper Opinion Evidence.**

21 The Government, attempting to diminish the strength of Special Agent Giovannelli’s  
22 statement contained in the Special Agent’s Report as merely a “two-sentence thought process,”  
23 asserts that the statement “is clearly improper opinion testimony” and is therefore inadmissible.  
24 (Gov’t’s Mot. to Preclude Statements, 5.) This argument also must fail.

1 Cases cited by the Government to support its assertion that the statements in the Special  
2 Agent's Report constitute inadmissible expert or lay opinion evidence are inapposite. The  
3 Government cites no authority for the exclusion of the Special Agent's Report as improper  
4 opinion evidence. Indeed, such reports and the statements contained therein are routinely  
5 admitted into evidence. *E.g.*, *United States v. Pennington*, No. CR 10-2112-TUC-CKJ, 2012  
6 U.S. Dist. LEXIS 52067 (D. Ariz. Apr. 13, 2012). Further, a special agent's opinion may be  
7 admissible as expert opinion. *United States v. Gomez-Norena*, 908 F.2d 497 (9<sup>th</sup> Cir. 1990).

8 **C. The Statement Is Relevant and Is Not Unduly Prejudicial.**

9 It should go without saying that Special Agent Giovannelli's statements contained in the  
10 Special Agent's Report—which was the basis for the indictments in these prosecutions—are  
11 relevant to Defendants' defense. Such statements are not unduly prejudicial to the Government.  
12 The Government's primary purpose is to prevent effective cross-examination.

13  
14  
15 Respectfully submitted on May 22, 2012.

16 /s/ Ashley Blair Arnett  
17 Michael Minns (pro hac vice)  
18 State Bar No. 14184300  
19 Ashley Blair Arnett (pro hac vice)  
20 State Bar No. 24064833 (Texas)  
21 MICHAEL LOUIS MINNS, P.L.C.  
22 Counsel for Defendant James Parker  
23 9119 S. Gessner Suite One  
24 Houston, TX 77074  
25 Tel.: (713) 777-0772  
26 Fax: (713) 777-0453  
Email: ashley@minnslaw.com

- AND -

/s/ Michael D. Kimerer  
Michael D. Kimerer  
Local counsel for Defendant James Parker

1 Kimerer & Derrick, P.C.  
2 221 East Indianola Avenue  
3 Phoenix, AZ 85012  
4 Tel.: 602-229-5900  
5 Fax: 602-264-5566  
6 Email: MDK@kimerer.com

7 - AND -

8 /s/ John McBee  
9 John McBee  
10 Arizona State Bar No. 018497  
11 Local counsel for Defendant James Parker  
12 3104 E. Camelback Rd. RD PMB 851  
13 Phoenix, AZ 85016-0001  
14 Tel.: 602-903-7710  
15 Fax: 602-532-7077  
16 Email: [mcbec@cox.net](mailto:mcbec@cox.net)

17 **CERTIFICATE OF SERVICE**

18 On May 22, 2012 I, Ashley Blair Arnett, attorney for the Defendant, James Parker, filed  
19 the Response to the Government's Motions in Limine *via* ECF. Based on my training and  
20 experience with electronic filing in the federal courts, it is my understanding that a copy of this  
21 request will be electronically served upon opposing counsel, Peter Sexton and Walter Perkel, and  
22 co-counsel, Joy Bertrand, upon its submission to the Court.

23 Respectfully submitted this 22 day of May, 2012.

24 /s/ Ashley Blair Arnett  
25 Ashley Blair Arnett  
26 Attorney for Defendant