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

Counsel for Defendant James Parker

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,
Plaintiff,

v.

JAMES PARKER, et al.,
Defendants.

No. 10-CR-757-PHX-ROS

DEFENDANT'S RESPONSE TO THE GOVERNMENT'S MAY 31, 2012 ORAL MOTIONS AND DEFENDANT'S MOTION ON EXPERT RELIANCE. DEFENSE DISCLOSURE OF WITNESS ESTIMATES

NOW COMES Defendant James Parker, by and through his counsel of record, and in response to the Government's May 31, 2012 Oral Motions, states as follows.

In open court on May 31, 2012, the Government moved to limit Defendant's cross-examination into James Parker's relationship with his tax attorney, Greg Robinson. The Government also moved for the Court to reconsider its earlier ruling that the defense would be allowed to cross-examine the Government's witnesses about their filing of excessive Suspicious Activity Reports (SARs). Both of these motions should be denied.

A. Cross-Examination of Greg Robinson

The Government's third witness in the trial in this case was Paul Wedepohl[1], who, after a couple of hours of testimony, gave his (unqualified) expert opinion that the Cornerstone property was a "nominee" owner of the Parker's homestead. He further opined that the two men he discussed having powers of attorney for Mr. Parker (Greg Robinson law partner, with his now-deceased, brother, Dave Robinson) and Timothy Liggett were (a) unethical, and/or (b) incompetent ... and perhaps (c) dishonest when they spoke on Mr. Parker's behalf.

The Government has waged a fierce war over the issue of Greg Robinson's ethics originally. It clarified it did not want Mr. Robinson's ethics discussed at trial. But the issue of Mr. Robinson's ethics became apparent, and even more relevant, when the Government selected Mr. Robinson as its primary reliance target, after abruptly, and without notice, dropping their former primary reliance target, Timothy Liggett. Then, because of Defendant's Exhibit 1025, in which the Government announced it had been in contact with Mr. Robinson, the issue became urgent. Defense counsel was forced to ask this Court to intervene.

The entire defense team—Michael Minns, Ashley Arnett, and Michael Kimerer—met with Mr. Robinson on the morning of June 1, 2012 to ascertain his version of the inappropriate contacts. In complete obedience to the Court's sequestration Order, there was no discussion of the trial to date or testimony of record. The defense is now satisfied that neither the attorney-client privilege, nor the nearly equally important duty of confidentiality, has yet been breached by Mr. Robinson or the Goverment, but the defense has spent precious limited resources pursuing this rabbit trail. Counsel was motivated in large part by the Government's recent about-face from trying to keep allegations of professional unethical conduct out of the courtroom to a

[1] Wedepohl's testimony began on the third day and the government estimates more of it to come.

360° re-evaluation of their alleged position and they are taking the lead and making a long-term controversy between Messrs. Wedepohl and Robinson the highlight of the trial so far. The Government's e-mail of May 18, 2012 to Mr. Robinson was calculated to lead Mr. Robinson to falsely think that it was the defender of his reputation, when in fact the Government's tactics have attacked his reputation. The defense was left puzzled as to the government's position. It appears to be "We have some really bad things to say about attorney Greg Robinson. We just don't want you to question them, or expand on them, or cross examine our witnesses on these issues as we bring them up. Perhaps we will let you know why at some time in the future."

The Sixth Amendment to the United States Constitution guarantees the criminal defendant the right to cross-examine the witnesses against him or her: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...." U.S. CONST. amend. VI. Cross-examination has been described by the Supreme Court as "the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska,* 415 U.S. 308, 315–16 (1974). The Court has held that a defendant's Confrontation Clause rights are violated when the court prohibits him or her from engaging in cross-examination that is otherwise appropriate, thereby exposing the jury to facts from which it could "could appropriately draw inferences relating to the reliability of the witness." *Id.* at 318. *See Slovik v. Yates*, 545 F.3d 1181 (9th Cir. 2008), *as amended*, 556 F.3d 747 (9th Cir. 2009) (holding the defendant's Sixth Amendment rights were violated when he was not permitted to cross-examine witness).

When the Government calls a witness as part of its case against the defendant, and raises certain issues with regard to that witness, the Sixth Amendment requires that the defendant be allowed to cross-examine that witness as to all aspects of his or her testimony on direct-

examination. The Sixth Amendment allows the Defendant to cross-examine all government witnesses.

The Government cannot simply open this door to attack Mr. Robinson, and make allegations about his apparent (according to previously undisclosed government information) long term duel with Robinson – cast Robinson in a bad light – and then ask the jury to convict Parker through guilt by association. The defense must be permitted to examine this, and let the jury decide if Robinson is better than Mr. Wedepohl would have them believe, or if not, if Parker is a victim.

B. Cross-Examination of Bank Witnesses about SARs

The purpose of the Government's proffers on the Oklahoma issues is prejudice agsint the Defendant, and it signals that with its pronunciation that it does not want the defense to cross-examine the Oklahoma witnesses, Timothy Barnes and Cerita Walker from First State Bank. The Oklahoma witnesses the Government proffers in duplication are for the purpose of slandering Defendant. The Government has asked this Court—again, after the Court ruled against it (*see* Order of 05/25/12 ("Defendant will be permitted to cross examine bank witnesses about the suspicious activity reports"))—to restrict the defense's cross-examination of the banking witnesses with regard to their filing of suspicious activity reports (SARs).

The Court should again deny the Government's Motion. They have raised no new issues. The cat is out of the bag. The existence of the SARs is known. There is nothing to protect. If there ever was anything to protect, both of the bank officials who will be called to testify have discussed these reports with counsel. Even more importantly, it is the substantial, excessive *number* of SARs, while the bankers continued to accept Belize money, that says a lot in and of itself. It goes directly to the motive of the witnesses. Motive of the witnesses is routine fair

cross-examination, and the jury must hear it ... if the bankers testify. The Government wants the Court to limit legitimate cross-examination on methods and motive, which are extremely relevant and not very time-consuming, so that it can paint a false picture of the character of the Parker family and ventures through the citizens who have aligned themselves against the business interests of the Parkers. In fact the Government objections have already taken up far more court time than a reasonable direct and cross should take.

The Government has not even suggested the possibility of a single case in which SARs lead to an investigation, or preceded one, and an indictment was given, in which cross-examination was limited in this regard. The undersigned counsel, always asks, if a banker testifies, whether an SAR has been filed. The bank is either suspicious or it is not suspicious. If it is suspicious, then it has certain requirements, and if there is any hint of a conflict its motives are fair game.

As discussed above, the trial court must "give a defendant a 'realistic opportunity to ferret out a potential source of bias.'" *United States v. Davis,* 127 F.3d 68, 70 (D.C. Cir.1997) (citation omitted). "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness...." *Delaware v. Van Arsdall,* 475 U.S. 673, 680 (1986).

The Government wants to dictate how the defense cross-examines its witnesses in advance, without allowing the defense to even know exactly what its witnesses will say. The Government is trying to micromanage the cross-examination of its evidence. In opening arguments, the Government has said that Oklahomans who had leases for generations lost them because they were out-bid by the Parkers. They imply something insidious about this. There has

1 been substantial litigation. There has been an appeal to the Supreme Court of Oklahoma. The
2 Oklahomans have picked sides, and the Government wants to bring that war into this courtroom.
3 Assuming, *arguendo*, that this war is relevant, it is equally relevant to cross-examine every
4 proponent of every element.[2]

5 Just as financial records almost invariably are a valid area of cross-examination, *United*
6 *States v. Walker*, 1997 U.S. Dist. LEXIS 17845, at *2 (S.D.N.Y. Nov. 10, 1997), likewise "there
7 is very little question but that bias, hostility and even complicity are valid goals that may be
8 shown through an examination of [certain] financial records," *id.* at *2. Unless a defendant has
9 been allowed sufficient cross-examination for the jury to adequately assess the witness'
10 credibility, the district court's limiting cross-examination will be error. *United States v.*
11 *Lankford*, 955 F.2d 1545, 1548 (11th Cir. 1992) (holding it was error for the district court to limit
12 the defendant's cross-examination of the chief government witness against him).

13 The Government has spent close to an hour of argument time during two hearings, and
14 many more hours of forced briefing, on an issue of cross-examination that is unlikely to take
15 more than ten minutes of trial time. These frivolous motions are invading the limited resources
16 of the defense and wasting court time. The do not constitute legitimate advocacy but are instead
17 obstructionist in nature.

18 The defense made a motion in limine to keep out Exhibit 76, Bates Numbers 8341 and
19 8342, entering evidence of the SAR. The Court overruled the motion. Part of that exhibit
20 discusses SARs. The Government wants its cake and wants to eat it, and require the defense to
21 eat some too, but we don't like the icing, and the Government doesn't want us to participate in
22 cutting the cake. Perhaps it will interfere with their culinary sensibilities. That's the problem

23
24
25
26

[2] If all the Government wants is unbiased records, the defense has already agreed to the records entry.

with the Sixth Amendment. It allows the opposing questions to be fairly aired before the jurors so *they* can decide whether or not to dine on the dessert, and whether or not the dessert is just.

C. Evidence of Defendant's Reliance on Tax Professionals

As the Court is aware, for 20 years, the standard in a criminal tax case based on a willful violation is the "voluntary, intentional violation of a known legal duty." *Cheek v. United States*, 498 U.S. 192 (1991), as the Ninth Circuit Court of Appeals immediately following *Cheek* and has repeatedly affirmed, *United States v. Powell*, 955 F.2d 1206 (9th Cir. 1991).[3] *See United States v. Matthies*, 319 F. App'x 554, 556 (9th Cir. 2009) ("A good faith misunderstanding of the law negates the element of willfulness, and a defendant must be permitted to present evidence of his subjective beliefs of what the law is."); *United States v. Easterday*, 564 F.3d 1004 (9th Cir. 2008), *as amended* (2009) (reiterating, under *Powell* and subsequent Supreme Court and Ninth Circuit authority, that "willful" in the tax context means the voluntary and intentional violation of a known duty). "The premise of *Cheek* is that a person cannot be convicted of willful failure to file a tax return if he subjectively believes in good faith that the tax laws do not apply to him. The test does not focus on the knowledge of the reasonable person, but rather on the knowledge of the defendant." *Powell*, 955 F.2d at 1211. Thus, in this case as in any federal criminal tax case involving willfulness, "the government must demonstrate that the defendants did not have a subjective belief, however irrational or unreasonable, that the income tax system did not apply to them … If the defendant had a subjective good faith belief, … the government cannot establish that the defendant acted willfully." *Id.* at 1211, 1212 (reversing, and holding that "[t]he vice of the jury instruction given" by the district court was "that it did not make clear that the defendant

---

[3] The undersigned attorney Minns was appellate counsel in the *Powell* case, the first court of appeals case to interpret *Cheek* after the Supreme Court's ruling.

must demonstrate only that a subjective good faith belief is held and not that the belief must also be found to be objectively reasonable").[4]

A defendant may refute that he or she acted willfully in regard to compliance with the tax laws by showing good-faith reliance on a tax professional after full disclosure of all tax-related information. *United States v. Bishop*, 291 F.3d 1100 (9th Cir. 2002). *See also United States v. Moran*, 493 F.3d 1002 (9th Cir. 2007) [5] (holding that the defendant was entitled to rebut showing of willfulness by establishing that she relied in good faith on a qualified accountant, after fully disclosing all tax-related information[6]); *Gray Line Co. v. Granquist*, 237 F.2d 390 (9th Cir. 1956) (holding no willful violation where failure to pay tax was on advice of counsel). The Government has in fact anticipated this defense before counsel was retained.

Determining what the defendant believed when good-faith reliance is asserted, as it is here, is answered by learning what the client relied on. Here, Defendant is entitled to admission of evidence as to what he relied on.

D. <u>Jury Instruction about Reliance on Tax Professionals</u>

If one of the things the client relied on was a CPA and/or a lawyer, then the defendant is entitled to an additional reliance instruction. Thus, in *United States v. Nordbrock*, 38 F.3d 440

---

[4] Michael Minns, *A Brief History of Willfulness as it Applies to the Body of American Criminal Tax Law*, 49 S. TEX. L. REV. 395 (2007).

[5] Attorney Minns was also counsel in the *Moran* case.

[6] The Government no doubt will argue that the good-faith reliance defense does not apply here based on a failure to disclose. Both the IRS and Robinson knew everything about the house and Cornerstone. Dave Robinson, Greg's law partner and brother was a partner to Parker too in real estate ventures, and received funds from Belize and knew everything. The lawyer in Oklahoma knew everything about the Oklahoma project and the financing from Belize. The lawyer in Belize knew everything. These are not questions of law, but issues of fact. The jury alone decides if disclosure is adequate.

(9th Cir. 1994), for example, the Ninth Circuit approved the instructions given by the District Court for the District of Arizona on reliance:

> "If you find that Mr. Nordbrock honestly and in good faith sought the advice of an attorney as to what he may lawfully do in the matter of responding to Revenue Agent Bennett's request, and fully and honestly laid all the facts before his counsel, and in good faith followed such advice and relied upon it believing it to be correct, and only intended that his acts should be lawful, you may not find him willful, even if the advice given by the attorney was an inaccurate construction of the law."

Id. at 445-46.

The Court should instruct the jury accordingly.

E. <u>Defense Witnesses</u>

The defense case is always a rebuttal case. Without seeing how the Government's case unfolds the Defense anticipates calling the following:

1. **Possible Hostile Witnesses:**
   a. **Lisa Giovannelli –** The Defense anticipates cross for 1 hour.
   b. **Timothy Liggett –** The Defense anticipates cross for 1.5 hours.
   c. **Greg Robinson –** The Defense anticipates cross for 3 hours.
2. **Potential Witnesses**
   a. **Rachel Harris –** The Defense anticipates 3 hours of direct.
   b. **Stan Manske -** The defense anticipates 2 hours of direct.
   c. **James Parker Jr. -** The Defense anticipates 1 hour of direct.
   d. **Sam Parker -** The Defense anticipates 2 hours of direct.
   e. **Jacqueline Parker –** Depending on immunity issues and pleading 5th Amendment the Defense would anticipate 1 hour of direct.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

f. **Roy Young -** The Defense anticipates 1.5 hours of direct.

3. **Possible Rebuttal Witnesses**

a. **Joy Bertrand** - The Defense anticipates 30 minutes of direct.

b. **Anjali Patel -** The Defense anticipates 30 minutes of direct.

c. **Shannon Peters –** The Defense anticipates 30 minutes of direct.

4. **Expert Witnesses**

a. **Professor Grosse –** The Defense anticipates 2 hours of direct.

b. **Gail Prather -** The Defense anticipates 8 hours of direct

5. **Possible Witness, Defense reserves the right to call**

a. **James Parker** - If called, the Defense anticipates 8 hours of direct.

Respectfully submitted on June 4, 2012.

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

- AND -

/s/ Michael D. Kimerer
Michael D. Kimerer
Local counsel for Defendant James Parker
Kimerer & Derrick, P.C.
221 East Indianola Avenue
Phoenix, AZ 85012
Tel.: 602-229-5900
Fax: 602-264-5566
Email: MDK@kimerer.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

- AND -

/s/ John McBee
John McBee
Arizona State Bar No. 018497
Local counsel for Defendant James Parker
3104 E. Camelback Rd. RD PMB 851
Phoenix, AZ 85016-0001
Tel.: 602-903-7710
Fax: 602-532-7077
Email: mcbee@cox.net

CERTIFICATE OF SERVICE

On June 4, 2012 I, Ashley Blair Arnett, attorney for the Defendant, James Parker, filed the Defendant's Response to the Government's May 31, 2012 Oral Motions and Defendant's Motion on Expert Reliance. Defense Disclosure of Witness Estimates. Based on my training and experience with electronic filing in the federal courts, it is my understanding that a copy of this request will be electronically served upon opposing counsel, Peter Sexton and Walter Perkel, and co-counsel, Joy Bertrand, upon its submission to the Court.

Respectfully submitted this 4th day of June, 2012.

/s/ Ashley Blair Arnett
Ashley Blair Arnett
Attorney for Defendant