

CR-10-00757-PHX-ROS, March 14, 2011

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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| 5 | United States of America, |) | |
| 6 | |) | |
| 7 | Plaintiff, |) | |
| 8 | vs. |) | |
| 9 | |) | CR-10-00757-PHX-ROS |
| 10 | James R. Parker, |) | |
| 11 | |) | |
| 12 | Defendant. |) | |
| 13 | |) | March 14, 2011 |
| 14 | |) | 1:37 p.m. |
| 15 | |) | |

BEFORE: THE HONORABLE ROSLYN O. SILVER, CHIEF JUDGE
REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

Official Court Reporter:
Elaine Cropper, RDR, CRR, CCP
Sandra Day O'Connor U.S. Courthouse, Suite 312
401 West Washington Street, Spc. 35
Phoenix, Arizona 85003-2151
(602) 322-7249

Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

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A P P E A R A N C E S

1
2 For the Government:

3 **PETER S. SEXTON, ESQ.**

4 **WALTER PERKEL, ESQ.**

5 U.S. Attorney's Office

40 North Central Avenue, Suite 1200

Phoenix, AZ 85004-4408

602.514.7500

6 For the Defendant Jacqueline L. Parker:

7 **JOY MALBY BERTRAND, ESQ.**

8 **Joy Bertrand Esq., L.L.C.**

P.O. Box 2734

Scottsdale, AZ 885252-2734

480.656.3919/(fax) 480.361.4694

9
10 For the Defendant James L. Parker:

11 **MICHAEL LOUIS MINNS, ESQ.**

12 **ASHLEY BLAIR ARNETT, ESQ.**

Minns Law Firm, P.L.C.

9119 S. Gessner, Suite 1

Houston, TX 77074

713.777.0772/(fax) 713.777.0453

13
14 For the Defendant James Parker (Corporate Counsel):

15 **JOHN W. MCBEE, ESQ.**

16 Law Office of John W. McBee

3104 E. Camelback Road, PMB 851

Phoenix, AZ 85016

602.903.7710

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P R O C E E D I N G S

1 (Court was called to order by the courtroom deputy.)

2 (Proceedings begin at 1:37.)

3 THE COURT: Please be seated.

4
5 COURTROOM DEPUTY: This is case number CR 10-757,
6 *United States of America v. James H. Parker, and Jacqueline*
7 *L. Parker*, on for motion hearing.

01:37:18

8 MR. PERKEL: Good afternoon, Your Honor. Walter
9 Perkel and Pete Sexton on behalf of the United States.

10 MS. BERTRAND: Good afternoon, Your Honor. Joy
11 Bertrand on behalf of Jacqueline Parker. I waive her
12 appearance at this hearing.

01:37:32

13 MR. McBEE: Good afternoon, Your Honor. John McBee,
14 corporate counsel for Mr. Parker. I would also ask to waive
15 his appearance for the case.

01:37:45

16 MR. MINNS: And Michael Minns and Ashley Arnett for
17 Mr. Parker, Your Honor.

18 THE COURT: All right. And let me start off with
19 Mr -- let me see, Mr. Perkel or Mr. Sexton, have you complied
20 with the scheduling order that was proposed by the government
21 and signed by me?

01:38:05

22 MR. PERKEL: Yes, Your Honor.

23 THE COURT: Okay. Well, then, what about the
24 documentation that was turned over, the 15,000, where there
25 were duplicate copies, is that -- did that happen?

01:38:17

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1 MR. PERKEL: There may have been a few duplicates in 01:38:22
2 there. I don't think there was repetitive duplicates. I know
3 that in one of the defendant's motions there was a statement
4 that there was some duplication. There may have been only in
5 the sense that some of the reports, for example, the special 01:38:35
6 agent report, had a list of appendices and attachments that
7 supported some of the assertions and statements in the reports
8 and so some of those -- some of the evidence or discovery
9 obtained by the IRS during their investigation may have been
10 copied, pages may have been copied and then placed as 01:38:51
11 appendices.

12 So to that extent, there may be some duplication I
13 think but I don't think it's, like, every hundred pages there
14 was the same 50 pages or things of that nature, Your Honor.

15 THE COURT: Was this provided in an organized way or 01:39:05
16 just in boxes?

17 MR. PERKEL: No. It was provided in an organized
18 way, Your Honor. I, actually, was responsible for the
19 discovery. Every page of discovery was Bates stamped and then
20 before each Bates stamp, there was a prefix that can be 01:39:19
21 associated with the IRS prefix that was given to us. And that
22 was done as a way to not only let the defendants know about the
23 page numbers but also know the substance of the reports that
24 was going to be turned over to the discovery.

25 For example, pages one through 1500 was documents 01:39:38

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1 provided by Timothy Liggett who was a CPA who worked for the 01:39:40
2 defendants during this time period or for defendant Parker.
3 And so he -- his discovery would say Bates 1 through 1500.
4 There and would be some sort of prefix that would reference his
5 name and that might be the example of something that was 01:39:56
6 duplicated by the IRS when they submitted an investigative
7 report or memorandum. They may have taken specific pages from
8 there and attached it. Obviously, I wouldn't re-disclose all
9 1500 pages but just out of an abundance of caution, as things
10 were attached, there may have been some duplication. 01:40:16

11 THE COURT: Is there anything remaining to be
12 disclosed?

13 MR. PERKEL: Well, Your Honor, I think one of the
14 issues that is before Your Honor today is the grand jury
15 testimony. At this point, we don't intend to call the grand 01:40:29
16 jury witness to testify. Obviously, that could change within
17 the next two months. So that would be disclosable under Jencks
18 if the witness testified. So there may be some items like
19 that. If witnesses testify and we find out that they produced
20 reports with regards to their testimony, then under Jencks, we 01:40:49
21 would have to disclose those.

22 THE COURT: Don't you know who your witnesses are at
23 this point?

24 MR. PERKEL: We have a good idea, yes, Your Honor.
25 That's why I say I don't think that the witness that testified 01:41:00

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1 in the grand jury will be called to testify.

01:41:05

2 THE COURT: So as of this time, is it probable that
3 they would not be called?

4 MR. PERKEL: I think it's more probable than not,
5 Your Honor. But I have to at least reserve an open-ended
6 answer because as we start to prepare for trial and put
7 together our witness list and match up exhibits to witnesses,
8 as I'm sure the Court can appreciate, things would change
9 strategically.

01:41:13

10 THE COURT: Well, more probable than not is only 51
11 percent. It seems to me you should know by clear and
12 convincing who your witnesses are and whether or not you're
13 going to call them. But I do know -- you're right, I do know.
14 Generally, I know exactly who I'm going to call or I did know
15 at the time of indictment unless something changes in terms of
16 a defense.

01:41:32

01:41:49

17 MR. PERKEL: Fair enough, Your Honor. Fair point.
18 And I guess it's better to say it's more than 51 percent. I
19 think the higher standard that we will not call the witnesses
20 who testified in the grand jury.

01:42:07

21 THE COURT: Have you given a list of witnesses?

22 MR. PERKEL: No, Your Honor.

23 THE COURT: And why not?

24 MR. PERKEL: Partially, I think, because -- one is I
25 haven't actually put it together, a final list or a tentative

01:42:17

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1 list. I have a list but it hasn't been produced for the 01:42:25
2 defendants. So I haven't done it. And also, we're at the
3 stage where it's my understanding that we're at the stage to
4 decide some of these outstanding discovery issues brought by
5 the defendants. They want a chance to respond with their own 01:42:36
6 discovery within the 30 days and they want additional time to
7 file pretrial motions.

8 So it's my mistake and I should have done that. I
9 didn't think we were as close to that period of time.

10 THE COURT: I'm sorry. I'm misunderstanding. What 01:42:50
11 were you doing?

12 MR. PERKEL: I was just saying I didn't think we were
13 as close to turning over the witness lists as maybe the Court
14 thinks I should have been.

15 So if I have, I apologize. 01:43:01

16 THE COURT: Well, I don't have the order in front of
17 me. But the order doesn't require you to turn over the
18 witnesses?

19 MR. PERKEL: No, it doesn't, Your Honor. Generally,
20 as a courtesy, we do as we get closer to trial. I just haven't 01:43:14
21 put together that kind of list yet for the defendants because
22 of the nature of the last couple of months, it seems they were
23 still discussing and debating some issues regarding discovery.

24 THE COURT: And what do you think are debatable
25 issues? 01:43:31

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1 MR. PERKEL: At this point, because I think the 01:43:32
2 government has produced the special agent reports, which was
3 one of five issues raised by the defendants. All five were the
4 bill of particulars, special agent reports, copy of the grand
5 jury transcript that pertains to the indictment, agent notes as 01:43:43
6 well as government personnel records, those five issues.

7 Because we've turned over the special agent reports,
8 I really think the issues with regards to the grand jury
9 testimony as well as the issue with regard to the bill of
10 particulars are really moot now because with a speaking 01:43:59
11 indictment, which I know this court has looked at and read,
12 we're talking about approximately 15 pages, 20 pages of
13 introductory paragraphs as well as all of the discovery.

14 And with the special agent reports, which is, again,
15 another summary of the evidence and the theory of the 01:44:14
16 government's case, I don't think there's really any issue with
17 regards to whether or not the defendants can understand with
18 specificity the nature and allegations of the charges.

19 So I think with regards to the bill of particulars
20 and the indictment, the grand jury testimony with regards to 01:44:30
21 the indictment I think those issues are moot. The other two
22 issues I think are relatively easy and that's with regard to
23 agent notes. The law is pretty clear. Unless the witness
24 adopts the notes or assumes that those notes are his or the
25 statements in those notes are his, the notes aren't 01:44:47

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1 discoverable under Jencks. Not withstanding that, we still
2 have an obligation under *Brady* and *Giglio* to do our due
3 diligence.

01:44:50

4 And then, finally, with regard to *Henthorn* and the
5 production of agents' personnel records, that there's no
6 outright production of agents' personnel records. There's a
7 whole process that has been in place and we deal with it in
8 every case. And that is there's a process of asking the
9 agencies to review their agent personnel records. They provide
10 any information to us that we need pursuant to *Brady* and
11 *Giglio*. We review that. If there's an issue, we turn it over
12 for an in-camera inspection and that's the process that we're
13 doing now.

01:45:00

01:45:17

14 THE COURT: Okay. Let me go through line-by-line,
15 word-for-word what's in the scheduling order.

01:45:30

16 MR. PERKEL: Sure.

17 THE COURT: Compliance with Rule 16 discovery. That
18 has been done? You've turned over every item of Rule 16 except
19 for expert, that we'll deal with that later.

20 MR. PERKEL: Yes, Your Honor.

01:45:45

21 THE COURT: There's nothing left?

22 MR. PERKEL: Yes, Your Honor.

23 THE COURT: And you've given the 404(b) notification?

24 MR. PERKEL: Yes, Your Honor.

25 THE COURT: Initial expert disclosures?

01:45:53

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1 MR. PERKEL: Yes, Your Honor. We disclosed the 01:45:55
2 initial experts disclosure, a list of all potential experts.

3 THE COURT: And then rebuttal expert disclosures.
4 That's February 1.

5 MR. PERKEL: I think that's the defendants' experts. 01:46:09

6 MR. SEXTON: It would be in response to theirs,
7 Judge, and they haven't disclosed any for us to list as
8 rebuttal experts.

9 THE COURT: Production of Jencks Act material and
10 witness impeachment material. That's October 8. That's all 01:46:37
11 been provided?

12 MR. PERKEL: Yes, Your Honor.

13 THE COURT: So you don't know who your witnesses are;
14 but at least, out of an abundance of caution, you provided
15 everything? 01:46:48

16 MR. PERKEL: Mostly everything, Your Honor.

17 THE COURT: Well, wait, wait. It says production of
18 all so tell me -- so you don't know yet?

19 MR. PERKEL: Well, the Rule 16 discovery materials we
20 provided, which include all of the statements, the Jencks 01:47:01
21 statements made by the witnesses and also the memorandums of
22 interviews that correspond to the other witnesses that we
23 planned to call.

24 THE COURT: Well, the answer is yes or no.

25 MR. PERKEL: Yes, Your Honor. 01:47:18

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1 THE COURT: I'm sorry to have to cross-examine you on 01:47:19
2 this but that's a simple question that requires a simple
3 yes-or-no answer.

4 It says production of Jencks Act material and witness
5 impeachment material not produced earlier is due on October 8, 01:47:29
6 2010.

7 MR. PERKEL: Yes, Your Honor.

8 THE COURT: So that has been done? All right.
9 Let me hear from the defense.

10 MS. BERTRAND: Good afternoon, Your Honor. My 01:47:43
11 concern with the Jencks material as discussed in the motion to
12 compel is the government, two months before the scheduled trial
13 and five months after the production deadline, is saying, "We
14 don't think we're going to call her," and obviously --

15 THE COURT: I'm sorry? 01:48:07

16 MS. BERTRAND: They are saying --

17 THE COURT: You may be seated and put the microphone
18 in front of you so I can hear you better.

19 MS. BERTRAND: Judge, the government is saying,
20 regarding Jencks material, that they only had one grand jury 01:48:17
21 witness and it was a summary witness and they are saying at
22 this time they don't believe they will call this witness. But
23 it sounds to me like they are still hedging a little bit on
24 that and that gives the defense some concerns. It seems like
25 if we had a Jencks deadline of October 8, that this 01:48:36

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1 determination about whether or not to call this witness, the 01:48:41
2 case agent, should have been made before October 8.

3 And this is --

4 THE COURT: I assume now you're not going to call
5 that agent because, otherwise, you would have to turn it over 01:48:54
6 and it was due October 8; right?

7 MR. PERKEL: Your Honor, I think if we called the
8 agent to testify, we have to turn over the grand jury
9 testimony.

10 THE COURT: It says October 8, 2010, all Jencks Act 01:49:10
11 material.

12 Now, you just said you provided it. Now I'm hearing
13 that you may provide that grand jury testimony later.

14 So if you do call that witness, then you haven't
15 provided the Jencks Act material by October 8, 2010. Am I 01:49:28
16 right?

17 MR. PERKEL: That would be correct, Your Honor. The
18 only thing I just want to point out is that while we're not
19 likely to call the summary witness in the grand jury to
20 testify, I think that we have the right to change our minds. 01:49:47

21 THE COURT: Well, you have the right to change your
22 mind unless it's in violation of the court order that was
23 proposed by the government.

24 So if you are in violation, then I am going to
25 preclude that testimony. 01:50:05

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1 Now, if you couldn't comply with your own order 01:50:11
2 composed by me and signed by me, then you should have come
3 forward and said, "Your Honor, there may be another witness.
4 So we would like an extension of time to make the determination
5 as to whether or not we're going to allow this witness or we're 01:50:25
6 going to need this witness." That's the way we handle a court
7 order. Otherwise, you're in violation of the court order.

8 MR. PERKEL: I understand, Your Honor.

9 THE COURT: Mr. Perkel, have you read the court
10 order? 01:50:46

11 MR. PERKEL: I have, Your Honor, yes.

12 THE COURT: Were you responsible for drafting it or
13 was it Mr. Sexton?

14 MR. PERKEL: Mr. Sexton drafted it, Your Honor.

15 THE COURT: All right. Then, you know, then, 01:50:53
16 technically, that according to this order and not technically
17 as required by this order, production of Jencks Act material
18 and witness impeachment material, if not produced earlier, was
19 due October 8, 2010, and that's why the defense has filed this
20 motion in addition to a bunch of other things and other reasons 01:51:16
21 why this motion is in front of me.

22 So whatever you've turned over by October 8, 2010 is
23 permissible. Otherwise, you better have a substantial reason
24 why you haven't turned it over because you're in violation of
25 this order. I don't understand why I'm dealing with this all 01:51:35

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1 the time with the U.S. Attorney's Office. You prepare these 01:51:38
2 orders. You propose them to me after substantial hearing. I
3 sign the orders and then the defense has to come forward and
4 file motions to compel.

5 At some point I am going to -- and this may be the 01:51:57
6 point -- where I'm going to preclude evidence by the government
7 for failure to comply with an order that was proposed by the
8 United States of America.

9 What else is missing?

10 MS. BERTRAND: Judge, our next concern are the 01:52:17
11 agents' investigatory notes and the catch 22 we're in, from a
12 Rules of Evidence standpoint, is the government saying we don't
13 have to turn those over because they don't believe the case
14 agent, or any other witness for that matter, has adopted those
15 notes is their statement but we don't know that because we 01:52:43
16 haven't seen the grand jury material to know if she did or not.

17 So we're -- we know these materials exist but we
18 don't know what they say and that makes us uncomfortable in
19 looking at a complex tax matter with international business
20 transactions, at least three real estate transactions and an 01:53:07
21 indictment that uses inflammatory language such as nominee
22 entity and straw buyer to -- we can't know but we can certainly
23 develop concerns about what our notes said about specific
24 interviews with specific witnesses versus what was typed up in
25 a summary. 01:53:33

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1 For example, in discussing the transactions of the 01:53:34
2 co-defendant to my client, Mr. Parker, on one hand, one of the
3 witnesses says that they got the money through a source and
4 source implies in this context something sneaky. And yet you
5 read along and you talk to the clients and the witnesses and 01:54:01
6 they say, "Well, it was a loan? Well, what is it? What word
7 was said?"

8 This case is going to hinge on what exact words were
9 used in these transactions and what specifically these
10 witnesses, many of them licensed professionals, CPAs, lawyers, 01:54:19
11 what they are going to say these transactions were.

12 So we can't just take broad, open language such as
13 source or straw buyer or nominee entity and say, "Oh, it's
14 obvious. We need those notes to see what exactly was said."
15 It's a better -- it's a better record of this investigation 01:54:47
16 than what was typed up.

17 THE COURT: Do you have the handwritten notes of the
18 agents that are testifying; right?

19 Do you have any handwritten notes at all?

20 MS. BERTRAND: Judge, in the 15,000 plus pages of 01:55:02
21 discovery, I haven't seen any handwritten notes.

22 THE COURT: Have there been any handwritten notes
23 provided?

24 MR. PERKEL: I don't think so, Your Honor. I don't
25 think the handwritten notes that Ms. Bertrand is referring to I 01:55:12

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1 think are the handwritten notes that correspond to the 01:55:17
2 memorandums of interview. Is that correct?

3 MS. BERTRAND: Yes.

4 MR. PERKEL: Those notes have not been turned over.
5 I don't know if there are other handwritten notes. 01:55:24

6 THE COURT: But you would turn over the handwritten
7 notes of the agents who testified? If an agent testifies and
8 the testimony relates to an interview of a witness and it's
9 relevant, in other words, I don't sustain an objection, then
10 those notes are provided. You understand that? 01:55:47

11 MR. PERKEL: I understand. So a handwritten note
12 that was made by a witness who is going to testify at trial I
13 think would be covered by the Jencks Act; correct?

14 THE COURT: But at this point, you don't have agents
15 testifying who have been responsible for interviewing 01:56:03
16 individuals?

17 MR. PERKEL: I don't believe so, Your Honor.

18 THE COURT: Do you know so?

19 MR. PERKEL: At this point, no, Your Honor.

20 THE COURT: At this point, according to the order, 01:56:15
21 you are to produce all Jencks material and witness impeachment
22 material for every one of the government's witnesses, October
23 8, 2010. And I'm going to hold your feet to the fire.

24 MR. PERKEL: I understand, Your Honor.

25 With regards to your question, then, no. With 01:56:37

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1 regards to those types of interview notes or those types of 01:56:40
2 notes. And I think what Ms. Bertrand was referring, to I think
3 the motion actually deals with the interview notes, witness
4 interview notes, and those are notes that were taken during the
5 interview of witnesses. Those have not been disclosed because 01:56:53
6 under the case law, those are not Jencks until the witness
7 adopts the notes.

8 THE COURT: I understand and there's no *Brady*
9 material.

10 As I understand it, you've decided that although the 01:57:09
11 defense is attempting to analyze whether or not the statements
12 actually -- the individuals actually gave the statements in the
13 reports, that you do not believe that there is any potential
14 *Brady* material that would be anything inconsistent with what's
15 set forth in the report; right? 01:57:37

16 MR. PERKEL: Correct, Your Honor.

17 THE COURT: So if the witness, however, is called to
18 testify by the defense, then you would understand that if they
19 attempt to impeach that witness, you would turn over the notes;
20 right? The agent who took the interview. But at this point 01:57:57
21 you're not offering these agents in your case-in-chief?

22 MR. PERKEL: That's correct, Your Honor. I
23 understand.

24 THE COURT: And you are maintaining that those --
25 that that may relate to testimony in the defense case, but 01:58:14

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1 you're not going to turn it over now? 01:58:17

2 MR. PERKEL: That's correct, Your Honor. If
3 Ms. Bertrand proffers a witness from the IRS or an agent who
4 she would like to call to testify as a way of impeaching a
5 civilian witness or a witness who was interviewed, then I think 01:58:29
6 we would have to turn over the notes or revisit the issue, yes,
7 Your Honor.

8 THE COURT: All right. Ms. Bertrand, Mr. Perkel is
9 correct on what the law is. The United States government has
10 an obligation from the outset and continuing until judgment to 01:58:44
11 turn over any *Brady* material.

12 And as I understand it now, the United States
13 government has complied. If they haven't complied, then they
14 will, of course, have to live with it. That is, a variety of
15 different potential sanctions including dismissal. 01:59:08

16 So what else is missing?

17 MS. BERTRAND: Your Honor, at this point we don't
18 have a choice but to take the government's word about that.
19 And regarding what else is missing from the documents, I think
20 the documents -- this resolves the issues about documents. We 01:59:31
21 have some concern that the government's only expert is going to
22 be a handwriting expert which, frankly, I don't think is really
23 going to be the crux of the matter. And that goes, then, to
24 our bill of particulars and concerns we have about their
25 calculations of values of real and personal property. 01:59:50

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1 For example, the -- 01:59:55

2 THE COURT: Well, I take it the United States
3 government is not going to offer an expert; right? Or have you
4 already -- have you indicated who your experts are?

5 MR. SEXTON: We have, Your Honor, and there's a 02:00:12
6 handwriting expert and we've listed two other people in the
7 notice that are really of the nature of summary witnesses since
8 they will summarize the IRS database or the certified records
9 that come from the IRS as to various tax filings or the absence
10 or lack thereof. 02:00:31

11 And then --

12 THE COURT: These are IRS agents?

13 MR. SEXTON: They are IRS employees within sort of
14 the --

15 THE COURT: But they weren't responsible for this 02:00:43
16 investigation?

17 MR. SEXTON: No. They will testify to just certain
18 aspects that are within the records of the Internal Revenue
19 Service.

20 THE COURT: So they didn't interview anybody but they 02:00:52
21 are basically just -- they have the expertise to put together
22 this documentation?

23 MR. SEXTON: To respond to our request for what
24 records are on file with the IRS or what records were not on
25 file with the IRS in regard to the tax liability or the tax 02:01:06

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1 periods in question. 02:01:13

2 THE COURT: And these two individuals are?

3 MR. SEXTON: They are Kristy Morgan, who was
4 notified -- this is in your filing document number 41. And
5 then Elizabeth Marriga. M-A-R-R-I-G-A. And the only other 02:01:31

6 person we've indicated, Judge, is an internal auditor in our
7 office, Mark Klamrzynski may be used to summarize some of the
8 bank records.

9 THE COURT: And he's been -- all of these -- so, in
10 other words, you have four potential witnesses that are expert 02:01:53
11 witnesses and notice has been given on October 8, 2010, of
12 those witnesses?

13 MR. SEXTON: That's correct.

14 THE COURT: Okay. And have reports been provided,
15 assuming there are any reports? 02:02:08

16 MR. SEXTON: They have as to the handwriting expert
17 and the records that the person -- the tax records or the
18 Internal Revenue files or lack thereof have been produced.

19 THE COURT: Let me ask, is this a report or what are
20 we talking about here? 02:02:32

21 MR. SEXTON: The handwriting report.

22 THE COURT: No. No. No. The IRS information and
23 opinion testimony?

24 MR. SEXTON: It's information we obtained from the --
25 what their database shows in the way of filings and they will 02:02:44

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1 put together certified records that show, for the tax year in 02:02:48
2 question that we're requesting, this is what was filed or this
3 was not filed. There was nothing on record for that period of
4 time. So it's more of a summary of that.

5 THE COURT: All right. So what I have in front of me 02:03:02
6 now is what you filed on October 7. And these are your
7 experts?

8 MR. SEXTON: Well, those are the four, yes. But as I
9 say, I would suggest that two, three, and four really are more
10 in the nature of summary witnesses. But we put them in here in 02:03:22
11 the nature of -- they are really fact summary witnesses, two,
12 three, and four.

13 THE COURT: So they don't have a report?

14 MR. SEXTON: No. They don't have a report.

15 THE COURT: So the only actual report you have is 02:03:35
16 from Mr. Miller who is the handwriting expert.

17 MR. SEXTON: That's correct.

18 THE COURT: So there has been compliance with that
19 issue of the expert disclosures; right?

20 MS. BERTRAND: Well, my concern is, in looking at the 02:04:04
21 summaries of the anticipated testimony in document 41 that the
22 government is referencing to me, I don't think you can simply
23 define witnesses two, three, and four. That would be Morgan,
24 Marriga, and Klamrzynski as simply summary witnesses. And I
25 think it's important to keep these distinctions clear. Either 02:04:34

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1 they are experts giving opinions and helping the jury make a 02:04:38
2 decision or, basically, they are document witnesses saying,
3 "These documents are kept in the course of IRS business."

4 So, for example, with Mr. --

5 THE COURT: But let me stop you for a second. That 02:04:51
6 sounds to me like an objection that you would make at trial.
7 This isn't an appropriate summary witness under I think it's
8 1006, not an objection you make during discovery because the
9 United States government, it sounds to me, in looking at what
10 they have here, they have provided you what they intend to 02:05:09
11 proffer this witness for. And of course they would have to
12 turn over any Jencks Act material concerning this witness, and
13 they should, and it looks like, to some extent, they have told
14 you what they are going to testify to and what kind of
15 documents they are going to review. 02:05:28

16 So I, frankly, think that they have done what they
17 should.

18 MR. MINNS: Could I add on behalf of Mr. Parker, Your
19 Honor? The distinction that I would make on the summary
20 witness, what we're accustomed to receiving are numbers and 02:05:44
21 charts and the basis for which they put them together. And
22 then if we disagree with those summary --

23 THE COURT: Well, indeed they have to turn over those
24 exhibits in advance of trial. And if they are preparing them
25 as if they are testifying to them, then technically they are 02:06:04

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1 Jencks Act material. But I don't see that at this point. I 02:06:08
2 mean, it seems to me that they haven't prepared anything;
3 right? We don't have exhibits of any sort?

4 MR. SEXTON: Not as to those last three at this
5 point. We're -- we have produced the certifications that are 02:06:27
6 associated with the tax filings that numbers two and three
7 would be speaking to and then number four, Mr. Klamrzynski is
8 somebody that we have to sort of sit down and decide if we even
9 need him to summarize the flow of, for example, what the bank
10 records show the money from Belize was being sent to and where 02:06:54
11 it went after that. We're not even sure. We think it's -- the
12 transactions are so few, we may not even need a summary witness
13 even as to that.

14 So the answer is nothing else has been prepared that
15 would be producible at this time. 02:07:12

16 MR. MINNS: Your Honor, we have -- on the basis of
17 their expert witnesses, we could not even guess what the case
18 is going to be about. But on the basis of the special agent's
19 report, which we received recently, there seems to be a great
20 deal of rebuttal information. So we have two -- 02:07:35

21 THE COURT: I'm not sure I understand what you're
22 saying.

23 MR. MINNS: Well, generally, we get a report they
24 send. The IRS will say the taxpayers received X number of
25 dollars that was hidden in a Belize bank. It was income or 02:07:55

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1 something like that. And then we either agree with it or have 02:07:59
2 an expert that disagrees with it. We don't have that.

3 The special agent's report does give us indications
4 of what the government's case is, and I am grateful that it has
5 been supplied even late, because it tells us what we need to be 02:08:12
6 prepared for. I agree it does answer a great deal of the
7 questions that were raised in the request for bill of
8 particulars.

9 As a result of that, we have retained two experts to
10 rebut things if they showed what they say they are going to do 02:08:32
11 in the special agent's report, the basis of their case.

12 If we get a summary report which, if we don't, this
13 will be the first time I've not received one in advance of
14 trial.

15 THE COURT: You'll get it in advance of trial but 02:08:51
16 we're not there.

17 MR. MINNS: Thank you.

18 I don't know. We do have two expert witnesses as a
19 result. We didn't have them until we had the special agent's
20 report. We didn't know what we would need to respond to. I am 02:09:00
21 prepared to give the government the names of those two experts
22 today.

23 THE COURT: Do you anticipate they will have reports
24 that you will be providing, and then any production material
25 under Rule 26, too? 02:09:22

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1 MR. MINNS: They are rebuttal witnesses, Your Honor. 02:09:25

2 If the government does not prove up anything in the special
3 agent's report through experts, then they probably wouldn't be
4 rebutting it.

5 If the Court wants, we will order them to prepare 02:09:32
6 reports.

7 THE COURT: No. I'm certainly not going to order
8 that. I wouldn't order that. That is part of your defense and
9 the government's not entitled to it and I don't think they
10 would ask for it because they are not entitled to it. Maybe 02:09:46
11 they would want it but that's certainly not up to me.

12 My obligation is to ensure only that the constitution
13 has been complied with and that the rules have been complied
14 with. The government has assured me and assured counsel and
15 certified to the Court and counsel that they have complied with 02:10:05
16 *Brady*.

17 Other than this one issue concerning the one
18 potential witness by the government who might be called, it
19 seems to me they have complied with their obligations under
20 this order issued in September. 02:10:22

21 What else is missing?

22 MR. MINNS: I suppose, Your Honor, and I'm not
23 suggesting that we would ask for a *Daubert* hearing but I don't
24 know the qualification of their experts; but I would like to
25 have a curriculum vitae of all of their experts so that we can 02:10:42

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1 make a decision as to whether to challenge it or not. 02:10:46

2 THE COURT: That's fair. You have one real expert
3 and the other two are going to be giving opinions in connection
4 with their summary testimony which is essentially opinion
5 testimony. 02:11:04

6 MR. MINNS: Your Honor, I apologize. My co-counsel
7 says we do have CVs. It's my mistake. Please accept my
8 apology on that.

9 THE COURT: Okay. What else is missing?

10 MS. BERTRAND: Judge, I think at this time, there's 02:11:18
11 no other documents that we can think of other than what we've
12 discussed here today.

13 THE COURT: All right. You have gotten the
14 government's reports and it is correct. The government doesn't
15 have an obligation to turn over those reports. They often do, 02:11:39
16 particularly in a case like this, because it saved needless
17 consumption of time and because it's complex and so that is
18 something that you have and the government must have decided
19 that you were entitled to it for whatever reason.

20 So seems to me that the motion to compel is denied as 02:12:08
21 moot other than what is remaining and then that seems to be
22 resolved in favor of the government, that they have complied as
23 much as they are required to under the law. That's the
24 constitution and the Federal Rules and also the case law.

25 So what remains now, and perhaps this is something 02:12:38

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1 that is at least moot and a substantial part, the bill of 02:12:44
2 particulars.

3 Now, I intended to go through it line by line, word
4 for word, seriatim, but I would suspect that a lot of it has
5 been resolved. Am I right? 02:13:02

6 MS. BERTRAND: I think a good portion of it has. I
7 think we could discuss, if the Court's comfortable, the issues
8 set forth in the bill of particulars in more general terms than
9 line item because I think it's more with the turnover of the
10 special agent report, the issues are a little bit more 02:13:17
11 conceptual than simply six, seven.

12 If the Court is comfortable discussing it in those
13 terms, I would be happy discussing it.

14 THE COURT: I'm comfortable discussing it in whatever
15 way would be the easier to get it resolved. 02:13:35

16 MS. BERTRAND: I think in general terms might be the
17 easiest.

18 What is, then, of concern to the defendants in
19 particular is some of the language in the indictment. And the
20 reason that is important here is, first of all, it helps us in 02:13:45
21 forming a defense. But it also goes to pretrial motion
22 decision-making in terms of precluding evidence or even the
23 language of the government and making sure that what we talk
24 about at trial when we talk about these transactions is
25 absolutely accurate. 02:14:11

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1 So, for example, the concerns that we've had about
2 nominee entity, this comes up throughout the discovery, it
3 comes up throughout the indictment and yet the government -- I
4 couldn't find -- cannot say how the use of a nominee entity,
5 which is a pretty common business practice, is illegal either
6 in this specific case or in general terms.

02:14:13

02:14:33

7 So that would be issue one. Related to that is the
8 discussion of straw buyer.

9 In my experience, doing white collar work in this
10 building, that is a pejorative term to discuss, again,
11 sneakiness in talking with lenders, in talking with other real
12 estate professionals that talk to you about it in the real
13 estate context and it really shouldn't be.

02:14:52

14 So we need to know exactly what they mean by straw
15 buyer and what is illegal about that, how does that indicate
16 illegal activity? And I don't think it's enough for them to
17 say, "Well, obviously, they were shelters, tax liability."
18 Let's hammer this out. This is the time to do it in pretrial.

02:15:15

19 We also have some concerns, and I don't know that
20 this was resolved entirely by the experts, they proffer
21 regarding valuation of property. There's a car that they
22 define as a luxury car I guess. I don't know if it's the most
23 tasteful car, a Rolls Royce, and then there's three pieces of
24 real property. One here in Maricopa County, one in Amarillo,
25 Texas, and then one in Oklahoma. And they talk about values,

02:15:38

02:15:59

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1 they talk about financing these and then imply that the 02:16:04
2 properties were worth much more than they were financed for.

3 They transferred values. I don't see anywhere in the discovery
4 where I have a real estate person or a banker or anybody
5 saying, yes, this is what this is worth. This is what it was 02:16:20
6 worth on that date. This is what it was worth on that date.

7 And, again, this goes to intent and willfulness of our clients.

8 And it particularly goes to their proof because if
9 these activities are innocuous, then, first of all, it may not
10 be relevant to the government's case. And second of all, the 02:16:38
11 jury shouldn't hear about them in pejorative terms if they are
12 not.

13 THE COURT: Sounds to me like this is something which
14 is fodder for motions, not something that the government is
15 required to provide you as a matter of preparing you for your 02:16:57
16 defense. That's not required.

17 I know that the state rules are much looser when it
18 comes to -- or much stricter when it comes to requirements of
19 discovery. The federal rules are not. And it requires defense
20 counsel to glean just precisely what the government's case is 02:17:22
21 from the discovery that they are required to give you.

22 So they are not required to answer any of those
23 questions. It's unfortunate, I suppose, if you will learn
24 about their theory of the case and their opening statement, but
25 that's the law in federal court. 02:17:42

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1 MS. BERTRAND: I believe our -- one of our 02:17:44
2 intentions, and of course this was filed well before we
3 received the special agent report that did resolve a lot of our
4 questions. Our intention was to avoid unnecessary motion
5 practice and streamline as much as possible in anticipation of 02:17:56
6 trial. But I'm happy to also deal with this in a motion in
7 limine and proceed on motion context.

8 THE COURT: I certainly want to avoid, and I would
9 imagine Mr. Perkel and Mr. Sexton want to avoid having to
10 respond to a question that can be resolved very simply. 02:18:19

11 So it seems that now that you've turned over the
12 agent's reports that it makes some sense to talk to counsel and
13 as much as you can resolve issues about -- that Ms. Bertrand
14 has raised, then do so. It will save a lot of time.

15 MR. SEXTON: We agree with you. We will gladly sit 02:18:44
16 down with counsel and find out what things the parties will
17 stipulate to, what things the parties are bothered by and hear
18 each other out. If there's a reason why we think they are
19 correct about something, we'll back off of something and vice
20 versa. 02:19:00

21 So it doesn't seem that we couldn't answer all of
22 those questions today, let counsel get together, and we would
23 be happy to see --

24 THE COURT: So you understand their concern about
25 what a straw buyer is and are you prepared to why it 02:19:10

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1 constitutes -- using a straw buyer -- consciousness of guilt
2 and whatever? It seems to me that's what she's asking for.

02:19:17

3 MR. SEXTON: Sure. I think it's explained in the
4 indictment why we characterize a 21-year-old who buys a Rolls
5 Royce for his father in his name and has, yes, as a straw
6 purchase. He's not the true purchaser. He's the person
7 hiding -- he's hiding behind.

02:19:33

8 So we're comfortable in having that dialogue first
9 with them and then if the parties can't agree, then it will
10 have to come before the Court, but we'll try to avoid involving
11 the Court.

02:19:50

12 THE COURT: All right. Then the motion for bill of
13 particulars is denied.

14 Now, I signed the motion to extend the time for
15 filing your pretrial motions. I don't believe I have altered
16 the schedule other than that, have I?

02:20:06

17 MR. SEXTON: You have not.

18 MS. BERTRAND: No, ma'am.

19 THE COURT: So we are scheduled for trial, then, in
20 May. What are we going to do about all of that?

02:20:24

21 MS. BERTRAND: Your Honor, the parties spoke before
22 we went on the record today and it will be our suggestion,
23 after talking about our prospective trial schedules and making
24 sure we're not double-booked so when we go, we go.

25 Our suggestion, if the Court is amenable to it, would

02:20:45

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1 be continuing the trial to September. That would take into
2 consideration the trials that the parties have set on their
3 calendars now that also appear to be mostly complex matters.
4 I'm happy to file a motion so the record is clear.

02:20:47

5 THE COURT: Well, let's do this: File a motion. If
6 it's stipulated, that is with new deadlines and it's
7 reasonable, then I will sign the order. So propose the order
8 with all of the deadlines and that would be including providing
9 exhibits. Say, for example, if you are going to use these
10 summary witnesses, then you need to provide the summary
11 documentation, make it clear what you're relying on well in
12 advance of trial so we won't waste any time.

02:21:05

02:21:32

13 And this also will either encourage or discourage the
14 offering of plea agreements or taking of plea agreements.

15 So I strongly urge the government to be as open as
16 possible and certainly, as I said, didn't have an obligation to
17 turn over the reports of the agents. But that made a lot of
18 sense and I would strongly urge you to continue doing so.

02:21:59

19 MR. SEXTON: We will, Your Honor.

20 THE COURT: All right. So, then, you'll need to add
21 with respect to the date for the trial, I'm going to talk to
22 Christine.

02:22:22

23 Take a look at September. How long do you think this
24 trial will take? Mr. Perkel and Mr. Sexton?

25 MR. SEXTON: Judge, without any sort of stipulations

02:22:39

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1 between the parties, I think the government's case will be 02:22:42
2 presented in -- are you still inclined to do a three-day a week
3 or four trial days?

4 THE COURT: It depends upon how long the trial is.

5 MR. SEXTON: We're looking at approximately four days 02:22:58
6 a week, somewhere in the neighborhood of three weeks.

7 THE COURT: So 12 days?

8 MR. SEXTON: 12 days from our presentation.

9 THE COURT: And how much for the defense?

10 MR. MINNS: Your Honor, my best guess right now would 02:23:14
11 be about four or five days.

12 THE COURT: Okay. So, then, we most likely will need
13 a week -- I mean, a month, and a little bit longer.

14 So what do we have, Christine?

15 COURTROOM DEPUTY: September 6, Your Honor. 02:23:30

16 THE COURT: September 6 we'll start the trial and
17 then you will need to back it up from that point when you're
18 going to turn over your exhibits. And if, along the way,
19 Mr. Perkel, and Mr. Sexton, if something comes up, none of
20 this, well, it's more probable than not. Once I sign that 02:23:50
21 order, that is the order. And if any other witnesses there are
22 you're going to call or any other exhibits that you have that
23 extend the deadline, you better come to me and ask for it and
24 you better have substantial reason for it.

25 If it's reasonable, I will extend the time. 02:24:06

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1 And the same for the defense. 02:24:09

2 So, all right. Propose that to me and get it to me

3 by the end of the week and if it's reasonable, then I will sign

4 it. At this point, it is tentatively we'll have the trial

5 beginning on September 6. 02:24:25

6 Are there other motions that I need to --

7 Christine, is there anything else?

8 COURTROOM DEPUTY: There is. I think I gave you this

9 one. I'm printing it out right now.

10 THE COURT: Didn't I sign that one already? 02:24:42

11 COURTROOM DEPUTY: That was a different one.

12 THE COURT: So, and I will grant your motion to

13 extend the deadline to defendant's --

14 MS. BERTRAND: This is the pretrial motions deadline?

15 THE COURT: Let's see, discovery deadline of February 02:25:32

16 21. Well, that's been extended. And certainly juror

17 questionnaires and the joint statement of the case. So that

18 motion is granted and you'll just need to propose another

19 schedule and that is covering every single issue. That is

20 expert reports, expert witness disclosures, and the defendant's 02:26:02

21 disclosures and expert reports, Rule 26, two statements. And

22 if the government is now persuaded they are going to have

23 another witness, then they need to turn over all of that

24 evidence. Now that we've had an extension of time for trial,

25 there should be no prejudice to the defense by your disclosing 02:26:36

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1 this expert or this witness.

02:26:45

2 And then there's also exhibits, when those have to be
3 turned over, the list of exhibits and what they are,
4 particularly summary witness exhibits and the defense's
5 exhibits and then questionnaires. And I think that covers it.

02:27:07

6 So all of that.

7 Anything else? Mr. Perkel? Mr. Sexton?

8 MR. SEXTON: No, Judge. We'll try to meet right
9 after this and come up with some dates.

10 THE COURT: Great.

02:27:32

11 Anything else, Miss Bertrand?

12 MS. BERTRAND: No. Thank you.

13 THE COURT: Counsel.

14 MR. MINNS: No. Thank you very much, Your Honor.

15 THE COURT: All right. We're adjourned.

02:27:39

16 COURTROOM DEPUTY: All rise.

17 (Whereupon, these proceedings recessed at 2:27 p.m.)

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C E R T I F I C A T E

I, ELAINE M. CROPPER, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control, and to the best of my ability.

DATED at Phoenix, Arizona, this 8th day of August, 2012.

s/Elaine M. Cropper

Elaine M. Cropper, RDR, CRR, CCP

United States District Court