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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

United States of America Plaintiff, v. 1. Stephen M. Kerr; 2. Michael Quiel; Defendants.	CR 11-2385-PHX-JAT **TRIAL BRIEF**

Plaintiff, United States of America, by and through its undersigned attorneys, the United States Attorney for the District of Arizona, and the Tax Division of the Department of Justice, respectfully submits it Trial Brief. The government does not believe that the page limitations of Local Civil Rule 7.2(e) apply given that this is not a motion, response, or reply. However, if the Court determines such rule does apply, the government requests permission to exceed the 17-page limit so as to permit the government to fully apprise the Court of the issues discussed herein.

I. STATEMENT OF THE CASE

The government will establish at trial that Defendants Stephen Kerr and Michael Quiel, with the assistance of co-defendant Christopher Rusch and others, conspired to defraud the IRS through the use of secret Swiss bank accounts held in the name of nominee Swiss entities. Specifically, Defendants Kerr and Quiel utilized these Swiss entities and accounts to conceal millions of dollars of proceeds from the sale of stock and never reported these accounts or income they earned to the IRS. The foreign bank accounts were not opened in the Defendants' names, but rather in the names of foreign entities which appeared to be controlled by foreign nationals, to conceal Defendants Kerr's and Quiel's ownership and receipt of income.

In or about 2006, the defendants engaged Rusch to set up seemingly legitimate and active Swiss investment funds and companies to find foreign investors to invest in U.S. companies. This engagement took place around the same time or shortly after Defendant Quiel resolved an audit initiated by the IRS in late 2005 regarding his failure to report a Belize bank account associated with offshore debit cards issued in the name of Defendant Quiel and his wife. Rusch represented Defendant Quiel during the audit, which resulted in Defendant Quiel paying additional tax on income earned that was associated with his use of the offshore debit cards and, beginning in 2007 (for tax year 2006), reporting the Belize account on his tax returns and Reports of Foreign Bank Accounts ("FBAR") filings.

During extensive discussions regarding the proper way to set up these Swiss investment businesses, the defendants initially represented that they did not want to have to report their interest in these businesses and wanted to defer payment of taxes from any income earned until the income was distributed to them. Rusch advised that the way to legitimately do so would be to give up control of the Swiss funds/businesses to active Swiss owners, in which case (1) they would not have to report any ownership interest in the funds, and (2) any income earned by the funds would be legitimate

"retained earnings" of the independently run funds until such income was distributed to the defendants. The defendants ultimately decided against this scenario, not wanting to give up complete control over these Swiss investment funds/businesses.

Thereafter, Rusch agreed to help the defendants set up a structure that involved Swiss bank accounts held by Swiss entities, created in such as way to provide the illusion that the defendants did not control the entities and accounts, when in fact they retained complete control over the them. Rusch did so by working with Swiss individuals Pierre Gabris and Arno Arndt to install nominee officers and directors in the foreign entities and to have these entities open up accounts at UBS AG ("UBS") and Pictet & Cie ("Pictet").[1] These nominee directors and officers had no role in the entities and accompanying bank accounts others than signing various documents, and they acted solely at the direction of Rusch and his Swiss associates, who were ultimately receiving direction from Defendants Kerr and Quiel. Bank records reflect that although not named as officers or directors of the Swiss entities that held the accounts, defendants Kerr and Quiel were the beneficial owners of the accounts. As part of the scheme Rusch acted as the authorized signatory for all of Defendants Kerr's and Quiel's foreign bank accounts. The evidence establishes that these structures never became actual Swiss investment funds or businesses, but rather merely bank accounts for the benefit of the defendants held in the names of these Swiss entities.

From in or about February 2007 though at least May 2007, the defendants, with the assistance of Rusch and others, deposited into the undeclared Swiss UBS accounts shares of stock that the defendants obtained from shareholders of companies that they

[1] For defendant Kerr, Rusch and others created or registered nominee Swiss entities Red Rock Investment AG (herein "Red Rock") and Swiss Fidelity Investment AG (herein "Swiss Fidelity"), and nominee Cyril Capital, LLC (herein "Cyril Capital"), a St. Kitts & Nevis entity. For defendant Quiel, Rusch and others created or registered nominee Swiss entities Legacy Asset Management AG (herein "Legacy") and Swiss International Trust Company AG (herein "Swiss International"). UBS and Pictet accounts in the names of these entities were opened throughout 2007.

helped take public.[2] As discussed in detail in the government's Rule 404(b) Notice [Doc. 102 at 2-3] and subsequent Response to Motions in Limine [Doc. 180 at 6-7], the defendants obtained these shares in a way that concealed their control over the stock. Many of these shares of stock were then sold through the undeclared Swiss accounts for a substantial profit. Defendants Kerr and/or Quiel communicated instructions regarding the sale of this stock and other transactions to Rusch, who relayed the information to intermediary Pierre Gabris, who ultimately relayed the information to the bank.

Further, in 2007, Defendant Kerr engaged Rusch to facilitate the domestic sale of a block of 11.4 million shares of Intelligentias stock held in the name of Defendant Kerr's nominee entity Cyril Capital. As detailed in the government Rule 404(b) Notice [Doc. 102 at 4] and subsequent Response to Motions in Limine [Doc. 180 at 8], these shares were also acquired in a way that concealed Defendant Kerr's control over the stock. In order to conceal from the IRS the millions of dollars of income received by Defendant Kerr, Rusch, who was listed as a representative for Cyril Capital, facilitated the sale of Intelligentias stock through a domestic securities account opened in Cyril Capital's name. Once the domestic sale of the Intelligentias stock was completed, Defendant Kerr instructed Rusch to transfer the proceeds to the undeclared Cyril Capital account at UBS to conceal his receipt of income.

To create a further layer of separation between Defendants Kerr and Quiel and the income they concealed in the undeclared bank accounts, the defendants repatriated some of the proceeds in the undeclared accounts by directing Rusch to run the proceeds through his Interest on Lawyer's Trust Account (herein "IOLTA account"). Further, Rusch utilized a Panamanian entity that he had set up to facilitate defendant Kerr's

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[2] These companies include Intelligentias (formerly Merchandise Creations, Inc.), Stratos Renewables (formerly New Design Cabinets, Inc.), Ecotality (formerly Alchemy Enterprises), and Nascent Wine.

purchase of a golf course in Colorado with untaxed, repatriated funds. Rusch and Defendant Kerr utilized this Panamanian entity, WorldNet Corporate Services, to help conceal the fact that defendant Kerr purchase the golf course with unreported income held in his Swiss bank accounts.

Neither Defendants Kerr nor Quiel reported the existence of, or any income earned, from their foreign bank accounts on their U.S. Individual Income Tax Returns during 2007 and 2008. Additionally, neither defendants filed the requisite FBARs regarding any of their Swiss accounts. The government will establish unreported income through a specific items method of proof based on gains from the sale of stock and interest and dividends earned through the foreign accounts.

Evidence will establish that the defendants knew of their obligations to report these accounts and the income earned through or deposited into these accounts. For example, Defendant Quiel was audited by the IRS regarding his offshore debit card and throughout 2007 and 2008 reported the associated bank account to the IRS, yet he failed to make the same disclosures for the Swiss accounts. Further, both defendants knew that the structure set up by Rusch and others was not compliant with U.S. laws because Rusch specifically advised them regarding the proper way to set up the structure. The evidence will be clear that the structure ultimately set up was not compliant with U.S. laws and that the defendants retained control over their foreign entities and bank accounts. The defendants also concealed these offshore entities and bank accounts from their return preparers and others, and took extensive steps to conceal their receipt of income and assets held in the accounts.

Finally, the defendants' knowledge and intent can be established by their conduct after news broke about the United States' investigation and subsequent deferred prosecution of Swiss bank UBS. Upon learning of the investigation, Defendants Kerr and Quiel contacted Rusch on multiple occasions and requested that

Rusch, through his Swiss contacts, determine whether the defendants' beneficial ownership and control of undeclared accounts would be disclosed to the IRS. After speaking with Gabris, Rusch conveyed to Defendants Kerr and Quiel that their accounts would likely not be disclosed based in part on the size of the balance in the accounts. Additionally, after learning of the criminal investigation into their own activities, Defendants Kerr and Quiel repeatedly attempted to convince Rusch to fire his San Diego-based attorney and to get on board with them regarding mounting a defense. Defendants Kerr and Quiel wanted Rusch to take the blame by acknowledging that he was negligent in providing bad legal advice. Rusch ultimately did not agree to the plan.

III. APPLICABLE STATUTES

The defendants are each charged with one count of conspiracy to defraud the IRS, two counts of filing false income tax returns, and two counts of failing to file FBARs.

A. Conspiracy to Defraud

Count One of the indictment charges the defendants with a conspiracy to defraud the United States by impeding and impairing the lawful function of the Internal Revenue Service in violation of 18 U.S.C. § 371. To prove the crime of conspiracy to defraud the United States, the Government must prove the following elements beyond a reasonable doubt: (1) an agreement between two or more persons; (2) to defraud the United States by obstructing the lawful functions of the IRS; (3) by deceitful and dishonest means; (4) one member of the conspiracy performed at least one overt act for the purposes of carrying out the conspiracy; and (5) the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it. United States v. Caldwell, 989 F.2d 1056 (9th Cir. 1993); Ninth Circuit Model Criminal Jury Instruction - 8.21 (2010 Edition).

B. Filing False Tax Returns

In order to establish a violation of § 7206(1), the government must prove each of the following elements beyond a reasonable doubt: (1) the defendant made and subscribed a return, statement, or other document that he or she knew was false as to a material mater; (2) the return, statement, or other document contained a written declaration that it was made under the penalties of perjury; and (3) in filing the false tax return, the defendant acted willfully. A 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. United States v. Bishop, 412 U.S. 346, 350 (1973); United States v. Pirro, 212 F.3d 86, 89 (2d Cir. 2000); United States v. Scholl, 166 F.3d 964, 979-80 (9th Cir. 1999); Ninth Circuit Model Criminal Jury Instruction - 9.39 (2010 Edition).

The government alleges and will establish at trial that Defendants Kerr's and Quiel's 2007 and 2008 tax returns are false as to the following material matters: (1) total income, Line 22, fails to report income earned through or diverted to the defendants' secret Swiss bank accounts; and (2) on Schedule B, Part III, Lines 7a or 7b, the defendants failed to report their interest in the secret Swiss bank accounts. Courts have held that omitting income and failing to report a foreign bank account are "material" falsehoods sufficient to establish a violation of § 7206(1). See, e.g., United States v. Helman, 630 F.2d 1184, 1196 (7th Cir. 1980) (unreported income); United States v. Franks, 723 F.2d 1482, 1485 (10th Cir. 1983) (failure to report interest in foreign account).

C. Failure to File FBARs

In order for the defendants to be found guilty of failing to file the necessary FBARs, the government must prove each of the following elements beyond a reasonable doubt: (1) the defendant was a United States person during the year specified in the count; (2) the defendant had a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country during

the calendar year; (3) the aggregate value of the defendant's foreign financial accounts exceeded $10,000 during the calender year; and (4) the defendants willfully failed to file an FBAR on or before June 30 of the following year. 31 U.S.C. §§ 5314, 5322; 31 C.F.R. §§ 1010.350 (filing requirement), 1010.306(c) (June 30 filing deadline); Instructions to Form TD F 90-22.1, Report of Foreign Bank and Financial Account (October 2008 rev.); Ratzlaf v. United States, 510 U.S. 135, 141-42 (1994) (citing authorities for application of Cheek willfulness to FBAR violations).

In this case although Defendant Quiel filed FBARs in 2007 and 2008, he only reported his Belize account that was subject to audit and inspection by the IRS. He failed to report on any FBARs his Swiss bank accounts. Defendant Kerr never filed any FBARs for years 2007 and 2008.

IV. EVIDENTIARY ISSUES

A. Potential Hearsay Statements

The government will likely introduce out-of-court statements made by individuals other than the defendants, including statements made by co-conspirator Rusch, Swiss financial intermediaries Pierre Gabris and Arno Arndt, and statements made by individuals working with or on behalf of the defendants related to the acquisition of stock. These statements will not be introduced as "hearsay statements" under Rule 801, which defines "statement" as a "person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." Rule 801(a). In particular, the government will likely offer out-of-court statements as to someone asking a question or providing directions or instructions. Such questions, commands, and directions are not hearsay because they are not assertions of fact. United States v. Bellomo, 176 F.3d 580, 586-87 (2d Cir. 1999) (commands, threats or rules are not hearsay so no foundation for coconspirator statements need be established); see also United States v. Chung, 2011 WL 4436271, *15 (9th Cir. 2011) (unpublished) (list of tasks "contained no declaration of fact capable of being proven true or false").

Furthermore, the government will likely offer statements that are not hearsay because they are verbal acts that have independent legal significance. United States v. Faulkner, 439 F.3d 1221, 1225-27 (10th Cir. 2006) (statements of planning, directing, or agreement of conspiracy are verbal acts). Additionally, statements offered not for their truth, but rather to show an effect on the listener or for background, are not hearsay. See, e.g., Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 173 n.18 (1988) (statement was not hearsay where "it was offered to prove what Rainey had said about the accident six months after it happened, and to contribute to a fuller understanding of the material the defense had already placed in evidence"); United States v. Goosby, 523 F.3d 632, 635 (6th Cir. 2008) (analyst's "background" testimony indicating how the defendant's tax return was flagged by a computer, offered to explain why the case was initiated, was not hearsay).

B. Co-Conspirator Statements

As discussed above, the government may offer numerous statements of co-conspirator's Rusch and other unindicted co-conspirators. The majority of these statements will not be offered for the truth of the matter asserted or are not "statements" as defined by Rule 801(a). However, the government may introduce limited co-conspirator statements against Defendants Kerr and Quiel, including statements made by co-conspirator Rusch and Gabris to the defendants and to other third parties during the course of and in furtherance of the conspiracy.

Federal Rule of Evidence 801(d)(2)(E) allows any statement by a co-conspirator of a party during the course and in furtherance of a conspiracy. The standard for determining the admissibility of statements is a preponderance of the evidence. See Bourjaily v. United States, 483 U.S. 171 (1987). The Supreme Court noted that "Congress has decided that courts may consider hearsay in making these factual determinations." Id. at 178. The Supreme Court provided further guidance for courts to consider when making a determination of admissibility:

> First, out-of-court statements are only presumed unreliable. The presumption may be rebutted by appropriate proof. Second, individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts. Taken together, these two propositions demonstrate that a piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence.

Bourjaily, 483 U.S. at 179 (internal citations omitted).

As to admissibility, the district court has discretion on when and how to make this determination, as long as it makes a formal finding regarding the required elements. United States v. Peterson, 611 F.2d 1313, 1330 (10th Cir. 1980). The court can conditionally admit an out-of-court co-conspirator statement, subject to a motion to strike if subsequent evidence does not connect it to a conspiracy with the defendant. United States v. Testa, 548 F.2d 847, 852 (9th Cir. 1977); United States v. Blevins, 960 F.2d 1252 (4th Cir. 1992). Alternatively, the court can require a preliminary circumstantial showing of the foundational elements by a preponderance of the evidence. Bourjaily v. United States, 483 U.S. 171, 175 (1987). The Supreme Court in Bourjaily held that the government may also use the actual coconspirator statements to establish that a conspiracy existed. Id. at 181.

C. Prior Inconsistent Statements of Witnesses

Some government witnesses have testified previously before a grand jury in this matter. Should a witness' testimony at trial be inconsistent with the witness' sworn statements before the grand jury, the prior statements will be admissible for the truth of the matters asserted. Fed. R. Evid. 801(d)(1)(A). A contrived loss of memory on the stand is inconsistent with a witness' prior testimony on the matter. United States v. Knox, 124 F.3d 1360, 1364 (10th Cir. 1997); United States v. Distler, 671 F.2d 954 (6th Cir. 1981). A transcript of the prior grand jury testimony of the witness will be admissible as substantive evidence. United States v. Brown, 943 F.2d 1246, 1255 (10th Cir. 1991) (previous statements made by coconspirators are admissible against a

defendant who subsequently joins the conspiracy); See United States v. Woods, 613 F.2d 629, 637 n.9 (6th Cir. 1980).

D. Self-Authenticating Certified Copies of Business and Public Records

To avoid the necessity of calling numerous records custodians, the government is seeking from the defendants stipulations to the foundation and hearsay admissibility of undisputed and routine domestic and foreign business and public records. To the extent that the parties are unable to agree to stipulations, pursuant to 18 U.S.C. § 3505 and Federal Rules of Evidence 803(6) and 803(8), as well as 902(11) and the government's Motion in Limine [Doc. 164], the government will offer into evidence certified copies of public records and other foreign and domestic business records from third parties.

The government has already provided notice of its intent to utilize foreign records certifications pursuant to 18 U.S.C. § 3505 and Rule 902(11) certifications for certain domestic business records, including the following custodians: CCN Worldwide, Land Title Guaranty Co., Corporate Stock Transfer, Inc., Vision Opportunity Capital Partners, LP, J.P. Morgan Chase, Sterne, Agee & Leach, and Wells Fargo Bank. The government has also provided to the defense the underlying records to be certified and declarations for all of the domestic custodians above. Certifications obtained from custodians prior to the government's Motion in Limine [Doc. 164] were attached as an exhibit. Certifications obtained after the filing of the government's Motion in Limine are attached hereto as Exhibit 1. The attached domestic business certifications, as well as the certifications previously attached to the government's Motion in Limine, attest to the foundational requirements cited in these rules with respect to the government exhibits at issue. For these reasons, the government respectfully requests that the Court permit admission of the above domestic business records under Rules 902(11) and 803(6), without the need for a live witness to introduce the records.

Regarding foreign records, at this time the government expects to call as a live witness a custodian from UBS to introduce foreign UBS bank records. The government is still determining whether Pictet will produce a live witness to introduce foreign bank records. At this time the government does not intend to introduce any foreign records from Panama. If the government cannot produce a live witness, in accordance with 18 U.S.C. § 3505, the government will seek to introduce foreign business records accompanied by a foreign records certification prepared by the foreign custodian.

Section 3505 "was not intended to add technical roadblocks to the admission of foreign records, but rather, to streamline the admission of such records." United States v. Strickland, 935 F.2d 822, 830 (7th Cir. 1991); see also United States v. Abrego, 141 F.3d 142, 177 (5th Cir. 1998) (failure to give timely notice of an intent to offer foreign records under § 3505 does not bar admission of the records; requirement designed to promote pretrial resolution of issues, not to require such resolution). Such certified foreign records are admissible as authentic, non-hearsay business records without the government having to call foreign nationals as witnesses at trial. The government has already provided required notice to the defendants and has provided the required foreign certifications for Pictet. The government is still attempting to obtain the necessary foreign certification from UBS and will make it available for inspection by the Court and provide the defendants with a fair opportunity to challenge it in advance of offering the records into evidence.

If the Court were to deny permission to introduce these foreign records through a certification, the government will seek to introduce them under the residual hearsay exception. See, e.g., Karme v. Comm'r of the Internal Revenue, 673 F.2d 1062 (9th Cir. 1982) (admitting foreign bank records under the residual hearsay exception). The Fifth Circuit has said that "for purposes of Rule 807 courts frequently compare the circumstances surrounding the statement to the closest hearsay exception." United States v. El-Mezain, 664 F.3d 467, 498 (5th Cir. 2011).

The Ninth Circuit addressed the admissibility of foreign bank records under the residual hearsay exception in Karme v. Comm'r of the Internal Revenue, 673 F.2d 1062 (9th Cir. 1982). On appeal, taxpayers Alan and Laila Karme argued that the Tax Court had improperly admitted records from Banco Popular Antilliano, N.V., a Netherlands Antilles bank. Id. at 1064. The government obtained these records pursuant to a treaty request and attempted to introduce them at trial through the testimony of an IRS special agent. Id. The court found that the records were not admissible under Rule 803(6). Id. However, the court found that the records were admissible under the residual hearsay exception. The Ninth Circuit held:

> The records were both material and probative. Given the circumstantial guarantees of trustworthiness which were present here, the distant location of the bank, and the lack of any evidence in the record to suggest that the bank records are anything other than what they purport to be, we conclude that there was no abuse of discretion in admitting them under 803(24).

Id. at 1065.[3] If necessary the government can establish that the foreign bank records at issue meet the requirements of the residual hearsay exception and are of the type admitted under this exception by other courts.

E. Certified Translations

The government will introduce limited translations (approximately 75 pages) of the foreign bank records produced by UBS and Pictet. These translations have already been provided to the defendants along with the necessary certificates of translation. The government has sought stipulations as to these translations from the defense. Counsel for Defendant Quiel responded by objecting to any translations. As such, the government will likely be forced to call as a witness the translator to authenticate these translations.

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[3] See also United States v. Wilson, 249 F.3d 366 (5th Cir. 2001), abrogated on other grounds by Whitfield v. United States, 543 U.S. 209 (2005) (admitting Bahamian bank records under residual hearsay exception given reliability established through domestic bank records); Bail Bonds by Marvin Nelson, Inc. v. Comm'r of the Internal Revenue, T.C. Memo 1986-23, 1986 WL 21439 (Tax Court 1986) (admitting Netherlands Antilles bak records under residual hearsay exception).

F. Tax Returns and FBARs

A custodian of records from the IRS will introduce and discuss tax returns of the defendants and co-conspirator Rusch. A custodian of records from Financial Crimes Enforcement Network ("FinCEN") will introduce and discuss FBAR files (or the lack thereof) for these individuals. The trial exhibits will be certified copies of tax returns or FBARs. Tax returns and similar IRS documents, including FBARs, are public records under Rule 803(8) and thus an exception to the hearsay rule. See United States v. Stefani, 338 Fed.Appx. 579, 581 (9th Cir. 2009) (unpublished) (tax returns are admissible under the public records exception to the hearsay rule). Further, the tax returns and FBARs of Defendants Kerr and Quiel are the defendants' own statements and thus admissible as statements against a party opponent under Rule 803(d)(2)(A). Finally, certain statements on the tax returns of the defendants and co-conspirator Rusch will not be offered for the truth of the matter asserted, but rather to show the falsity of such statements or that certain information was omitted from the filings, including "total income" and the reporting of foreign accounts as alleged in the Indictment. Finally, the certified tax returns and FBAR filings are self-authenticating and admissible pursuant to Federal Rules of Evidence 902(4) even absent a live witness.

G. The "Lucky Loser" Argument

As detailed in the government's recent Motion to Exclude and/or Limit Defendants' Proposed Expert Witnesses [Doc. 200 at 12-13], based on their recent expert disclosures, it appears the defendants will attempt to present evidence and argue that a loss carry-back from a subsequent year wipes out any tax deficiency in an earlier year. In this case, it appears they will argue that the defendants had a tax due and owning in 2007, but that losses incurred in 2008 could be "carried back" to eliminate any tax deficiency for 2007. The defense will then likely argue that the 2007 tax returns are not "materially false" because there is no tax due and owning. However,

because the crime of filing a false tax return is complete at the time such tax return is filed, such arguments and evidence should be rejected.

This defense, referred to as the "lucky loser argument," has been expressly rejected by the courts. A defendant's false statements in a tax return simply cannot be undone by the fortuity of a subsequent loss. As the Supreme Court made clear: "Once a fraudulent return has been filed, the case remains one 'of a false or fraudulent return,' regardless of the taxpayer's later revised conduct, for purposes of criminal prosecution." Badaracco v. Commission of Internal Revenue, 464 U.S. 386, 394 (1984) (crime of tax fraud complete upon the filing of return, regardless of taxpayer's later revised conduct). The applicable principle in criminal tax prosecutions is that each tax year is treated as a separate unit and all items of gross income and deductions must be reflected as they exist at the close of the tax year. See United States v. Cruz, 698 F.2d 1148, 1151-52 (11th Cir. 1983) (applying this principle to a situation involving a claimed foreign tax credit).

Similarly, the Fifth Circuit upheld a district court's refusal to admit evidence of a loss outside of charged years to negate the defendant's tax deficiency in an attempted tax evasion case. Willingham v. United States, 289 F.2d 283, 288 (5th Cir. 1961). The Fifth Circuit held that the crime was complete when the tax return for that year was due, and "could not be undone by subsequent year's tax consequences." Id. In United States v. Keltner, 675 F.2d 602 (4th Cir. 1982), the Fourth Circuit, following Willingham, affirmed the district court's refusal to allow subsequently incurred losses by a Subchapter S corporation to eliminate a tax liability that existed at the time the return was required to be filed.[4]

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[4] See also Goo v. United States, 187 F.2d 62 (9th Cir. 1951) (carry-back losses not relevant in affirming denial of motion to withdraw guilty plea); Manning v. Seely Tube and Box Co., 338 U.S. 561 (1950) (since the correct tax is due when the return is due, a subsequent year's loss could not be carried back to negate interest due on deficiency).

1 Accordingly, the Court should preclude any questioning, evidence, or argument
2 that any losses incurred by Defendants Kerr or Quiel incurred in 2008 or later years
3 somehow eliminates the defendant's tax liability or the materiality of alleged false
4 statements in earlier years, to include 2007 and 2008. Any ruling to the contrary would
5 permit a defendant to willfully file a false tax return, wait to see if they get caught, and
6 then generate losses that could be carried back to eliminate any material falsities. As
7 the Supreme Court has put it, "[a]ny other result would make sport" of the tax laws, as
8 "[a] taxpayer who had filed a fraudulent return would merely take his chances that the
9 fraud would not be investigated or discovered, and then, if an investigation were made,
10 would simply" realize losses to negate his tax liability. Badaracco, 464 U.S. at 394.
11 H. Summary Charts
12 Pursuant to Federal Rules of Evidence 1006 and 611(a), the government intends
13 to use summary charts and exhibits as described in its Notice of Intent filed on
14 September 23, 2011 [Doc. 109]. IRS Revenue Agent Deborah Saparata will testify
15 regarding these summaries. Consistent with this Court's written order of December 27,
16 2012 [Doc. 145], and oral order on February 6, 2013 [Doc. 184], the government will
17 not call Ms. Saparata as a summary or expert witness to testify about various tax
18 computations and false items on the defendants' individual income tax returns and
19 FBARs. Further, she will not be summarizing any oral testimony. Instead, Ms.
20 Saparata's testimony will be limited to laying foundation and describing summary
21 charts she prepared of the defendants' previously admitted foreign bank accounts and
22 financial transactions.
23 The charts will summarize underlying foreign bank records that encompass
24 several thousand pages, reflecting hundreds of financial transactions, to include deposits
25 and withdrawals, the purchase and sale of stock and other investments, and transfers
26 between various accounts and sub-accounts. The summaries will encompass financial
27 transactions in Defendant Kerr's and Quiel's combined seven undeclared UBS and
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Pictet Swiss bank accounts. For the Court's benefit, attached hereto as Exhibits 2 and 3 are summary charts the government intends to use related to two of Defendant Kerr's foreign bank records. The government intends to introduce the underlying foreign bank records into evidence. Pursuant to Rules 1006 and 611(a), the government will seek to admit into evidence the summary charts to assist the jury in their deliberations. Alternatively, if the Court does not permit such admission, these charts will be displayed to the jury while Ms. Saparata explains how she created the summaries and what they reflect. Under either scenario the government will request a limiting instruction pursuant to the Ninth Circuit Model Criminal Jury Instructions, §§ 4.15 (Summaries Not Received in Evidence) or 4.16 (Charts and Summaries in Evidence) (2010 Edition). The fact that Ms. Saparata has the qualifications to be an expert witness in this case does not prevent her from testifying about summaries of bank and financial records. She will likewise not be offering expert testimony. This is similar to Goldberg v. United States, 789 F.2d 1341, 1343 (9th Cir. 1986), in which the Ninth Circuit affirmed a lower court's ruling that an experienced IRS revenue agent's testimony concerning Rule 1006 summaries of voluminous tax records was not expert testimony because no expert opinions or conclusions were offered.

Summaries of defendants' foreign accounts and transactions are admissible under Fed. R. Evid. 1006, which states:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Fed. R. Evid. 1006. The proponent of a summary under Rule 1006 must establish the admissibility of the underlying documents as a condition precedent to introduction of the summary. United States v. Johnson, 594 F.2d 1253, 1257 (9th Cir. 1979). The proponent must also establish that the underlying documents were made available to the opposing party for inspection. Paddack v. Dave Christensen, Inc., 745 F.2d 1254, 1259

1 (9th Cir. 1984). Rule 1006 does not require that it be literally impossible for the trier
2 of fact to examine the underlying records before a summary may be admitted. See
3 United States v. Stephens, 779 F.2d 232, 238-39 (5th Cir. 1985); United States v.
4 Scales, 594 F.2d 558, 562 (6th Cir. 1979). Further, the fact that the underlying
5 documents are already in evidence does not mean that they can be "conveniently
6 examined in court." Stephens, 779 F.2d at 239.[5]

7 Summaries of voluminous records that are introduced into evidence pursuant to
8 Rule 1006 in lieu of or in addition to the underlying documents may be admitted into
9 evidence in the court's discretion. United States v. Shirley, 884 F.2d 1130, 1133 (9th
10 Cir. 1989) (Rule 1006 summary charts of telephone calls permitted in evidence to help
11 jury organize and evaluate underlying evidence previously admitted); United States v.
12 Meyers, 847 F.2d 1408, 1412 (9th Cir. 1988) (properly admitting chart detailing long
13 distance calls made by various co-conspirators). Alternatively, the government should
14 be permitted to published them to the jury as demonstratives while the witness that
15 created the summaries testifies concerning them, followed by a limiting instruction. See
16 Ninth Circuit Model Jury Instructions, 4.15.

17 In this case, the underlying bank records of UBS and Pictet are admissible
18 pursuant to Federal Rules of Evidence Rule 803(6) and § 3505. The government
19 provided the documents to the defense shortly after indictment. The summaries will
20 accurately reflect transactions entered in the defendants' foreign bank accounts. The
21 government has also provided draft copies of the summaries to the defense, and will
22 provide final summaries sufficiently in advance of their use at trial. The summaries will
23 aid in organizing the information contained in a large number of documents into
24

25 [5] Additionally, the charts may "include assumptions and conclusions, but said assumptions and conclusions must be based upon evidence in the record." United
26 States v. Green, 428 F.3d 1131, 1134-35 (8th Cir. 2005) (admitting into evidence under Rule 1006 summary charts of voluminous evidence previously admitted; charts assisted
27 jury in understanding how scheme was perpetrated and witness who prepared charts was subject to cross examination).
28

understandable form and assist the jury in understanding many of the financial transactions that the government will prove establishes unreported income. The Ninth Circuit has repeatedly approved of the use of Rule 1006 summaries in these types of situations. See, e.g., Goldberg, 789 F.2d at 1343 (experienced IRS revenue agent permitted to testify concerning Rule 1006 summaries of voluminous tax records); Shirley, 884 F.2d at 1133; Meyers, 847 F.2d at 1412.

The government's summary charts of the defendants' financial transactions, as well as Ms. Saparata's testimony regarding these charts, are also permissible under Rule 611(a). The use of summary witnesses and summary schedules pursuant to Rule 611(a) has long been approved by the courts, including the Ninth Circuit. United States v. Gardner, 611 F.2d 770, 776 (9th Cir. 1980) (summary chart admissible in tax evasion case under Rule 611(a) because "contributed to the clarity of the presentation to the jury, avoided needless consumption of time and was a reasonable method of presenting the evidence"); United States v. Paulino, 935 F.2d 739, 752-54 (6th Cir. 1991) (testimony of non-expert summary witness regarding cash generated from cocaine sales in drug conspiracy admissible under Rule 611(a)).

Such summaries themselves can also be properly admitted into evidence. In Gardner, the Ninth Circuit affirmed admission of a chart summarizing the assets, liabilities and expenditures of the defendant in a tax evasion prosecution, finding that the government witness that presented the chart was cross-examined extensively with respect to the sources of the figures on the chart and the chart summarized facts and calculation in already evidence. 611 F.2d at 776. The Court found that it was well within the discretion of the court to permit this use pursuant to Rule 611(a). Id.; see also Ninth Circuit Model Jury Instructions, 4.16; United States v. Marchini, 797 F.2d 759, 766 (9th Cir. 1986) (summary chart of IRS expert witness properly admitted in tax prosecution). Even if the summaries are not admitted into evidence, the government should be permitted to published them to the jury as demonstratives while the witness

1 that created the summaries testifies concerning them, followed by a limiting instruction.
2 See Ninth Circuit Model Jury Instructions, 4.15.

3 **V. CONCLUSION**

4 The foregoing is a summary of points the government anticipates may arise at
5 trial. The government has addressed other evidentiary and legal issues in its separate
6 motions in limine, oppositions to defendant's motions in limine, motion to exclude
7 and/or limit expert testimony, pre-trial notices, and proposed jury instructions. Should
8 additional legal issues arise that have not been addressed in this brief, the government
9 respectfully requests permission to file a supplemental brief.

10

11 **DATED** this 20th day of February, 2013

12 Respectfully submitted,
13 JOHN S. LEONARDO
United States Attorney

14 /s/ Timothy J. Stockwell
15 MONICA B. EDELSTEIN
TIMOTHY J. STOCKWELL
16 Trial Attorneys
United States Department of Justice
17 Tax Division

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20 **CERTIFICATE OF SERVICE**

21 I certify that on this date, February 20, 2013, I electronically transmitted the
22 attached document to the Clerk's Office using the CM/ECF and caused a copy to be
23 electronically transmitted to all CM/ECF registrants under this cause number.

24 /s/ Timothy J. Stockwell
Timothy J. Stockwell
25 Trial Attorney
Department of Justice Tax Division

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