IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 08-13740-CC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THERESA KOTTWITZ
GERARD MARCHELLETTA, SR., and
GERARD MARCHELLETTA, JR.,

Defendants-Appellants.

On Appeal From The United States District Court
For The Northern District of Georgia

BRIEF FOR APPELLEE

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UNITED STATES OF AMERICA,	:	
	:	
Appellee	:	
	:	
v.	:	APPEAL NO. 08-13740-CC
	:	
THERESA L. KOTTWITZ,	:	
GERARD MARCHELLETTA, SR.,	:	
and GERARD MARCHELLETTA, JR.	:	
	:	
Appellants.	:	

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

The United States concurs with the Certificate of Interested Persons and Corporate Disclosure Statement included with the brief filed by Appellants, and agrees that they reflect a complete list of all persons and entities known to have an interest in the outcome of this appeal, except that the United States adds:

Horn, John A., Assistant United States Attorney and Appellate Chief, Northern District of Georgia.

STATEMENT REGARDING ORAL ARGUMENT

The government respectfully submits that oral argument is not necessary in this case. The issues and positions of the parties, as presented in the record and briefs, are sufficient to enable the Court to reach a just determination.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this direct appeal from the judgment and sentence of the district court, pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. DID THE DISTRICT COURT PLAINLY ERR BY FINDING THAT DEFENDANTS' PROPOSED RELIANCE INSTRUCTION WAS UNSUPPORTED BY THE EVIDENCE, WITHOUT ANY SPECIFIC OBJECTION, AND, EVEN IF SO, WAS THE PROPOSED CHARGE NEVERTHELESS SUBSTANTIALLY COVERED BY THE INSTRUCTIONS AS TO INTENT AND THE COMPLETE DEFENSE OF GOOD FAITH?

II. DID THE DISTRICT COURT PERMISSIBLY FIND THAT THE EVIDENCE, VIEWED IN THE LIGHT MOST FAVORABLE TO THE VERDICT, SUFFICIENTLY SUPPORTED THE CONVICTIONS?

III. DID THE PROSECUTION IMPROPERLY APPEAL TO THE JURORS PERSONALLY, BY (WITHOUT ANY OBJECTION) STATING THAT THE VICTIMS OF THIS TAX EVASION CASE WERE "THE UNITED STATES AND ITS TAXPAYERS," AND, IF SO, WAS THIS IMPROPRIETY SO PRONOUNCED, PERSISTENT AND OBVIOUS THAT (1) IT PREJUDICED THE DEFENDANTS' SUBSTANTIAL RIGHTS; (2) IT WAS INCURABLE BY THE INSTRUCTIONS GIVEN; AND (3) THE DISTRICT COURT COMMITTED PLAIN ERROR BY NOT *SUA SPONTE* DECLARING A MISTRIAL?

4. DID THE DISTRICT COURT CLEARLY ERR AT SENTENCING IN DETERMINING THE AMOUNT OF TAX LOSS ATTRIBUTABLE TO MARCHELLETTA, SR.?

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition Below

The government concurs with the course of proceedings described in the Defendants' briefs.

2. Statement of the Facts[1]

I. The Offense Conduct

Junior and Senior jointly owned and operated a family drywall construction business, Circle Industries ("Circle"). (Government Trial Exhibit ("Ex.") 5; Doc. 206 at 223-225). They founded Circle in the 1990s after working for a New York company called Nastasi & Associates ("Nastasi"). (Doc. 207 at 438-439). As of 2000, Senior owned 75% and devoted approximately 75% of his time to the business, while Junior owned 25% and devoted 100% of his time. (Ex. 5). In 2000, Circle enjoyed over approximately $25 million in annual revenue (Ex. 5), principally from large commercial projects including hospitals, hotels, and casinos (Doc. 206, at 223-225). Kottwitz worked with the Marchellettas at Nastasi, and moved to Atlanta to become Circle's bookkeeper in 2000. (Doc. 207 at 371-75, 391-395, 437-441, 504; Doc. 99 at 27-32).

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[1] For efficiency and ease of identification, the Government will refer to the Marchellettas, respectively, as "Senior" and "Junior."

A. Payment Of Junior's Personal Expenses By Circle

In 2000 and 2001, Circle paid over $800,000 in personal expenditures on behalf of Junior. (Exs. 520, 529; Doc. 100 at 229-233; Doc. 101 at 257-264). The major expenses related to the construction and outfitting of a 5,000-square-foot, $700,000 residence in the "Crabapple" neighborhood of Alpharetta, Georgia. (Doc. 206 at 272-275, 192-196; Ex. 114). This was Junior's personal residence, contracted for by himself, on land that he purchased himself. (Doc. 206 at 193-194; Ex. 34.1; Ex. 114).[2]

The builder (Seay) testified that a substantial amount of payments were issued on Circle company checks. (Doc. 206 at 282-288). Seay described a meeting at Circle in April 2000 with the Marchellettas, during which Senior approved the use of Circle funds to pay invoices relating to Junior's house. (Doc. 206 at 281-286). Seay explained that it was "very rare" in his experience to be paid for a personal project with company checks, but did not inquire further. (Doc. 206 at 287).

The architect, real estate agent, and numerous suppliers and subcontractors relating to Junior's house also identified thousands of dollars of checks made to them in 2000 and 2001 on Circle

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[2] Count Two alleged that Junior paid for the land with funds he illegally repatriated from an overseas construction project. The jury acquitted him of this count.

company checks. (Doc. 208 at 621-845; Doc. 206 at 192-220, 267-315, Exs. 535, 536.)

These personal payments for the construction of Junior's residence were not recorded on Circle's books as compensation, salary, or loans. (Doc. 101 at 264-272; Exs. 524-527). Rather, the payments were booked under a construction expense account named "Crabapple." (Id.). Circle maintained a job management ("JM") account ledger, which listed all of the approximately 200 construction jobs on the company's books. (Doc. 207 at 377-378; Exs. 431.1, 603). Included within this report was a job account entitled "Crabapple," in which all of the personal expenses relating to the construction of Junior's residence were posted. (Ex. 431.1; Doc. 101 at 258-269). As of March 2002, the JM Report reflected over $1 million in costs posted to this account. (Ex. 431.1).

Circle paid other personal expenses for Junior. For example, in 2000 and 2001, Circle paid more than $10,000 to Hong Kong Tailors, a company that furnished numerous custom suits to Junior. (Exs. 524, 527; Doc. 207 at 587-598). These payments were also recorded on Circle's books as business expenses, including "vehicle expenses" and "misc office expenses." (Exs. 524, 527, Doc. 101 at 258-269).

In total, Circle paid more than $150,000 in personal payments for Junior during 2000, and over $675,000 during 2001, all of which

were recorded on the company's ledgers as "Crabapple" job costs or other business expenses. (Ex. 524, 527).

B. Payment Of Senior's Personal Expenses By Senior

Senior also financed the construction of a residence and paid for other personal expenses using Circle funds in 2000-2001. (Doc. 100 at 228-234, Doc. 101 at 241-46; Exs. 522-531).

In early 2001, Senior contracted with a builder to construct a personal residence for himself in Alpharetta's "Newport Bay" subdivision. (Doc. 206 at 337-347; Ex. 125). Senior instructed the builder, Dorman, to pick up his draw checks from Circle. (Doc. 206 at 349-350). Typically, Dorman would fax his invoice to Circle, and pick up his Circle check at Circle's office. (Id.). Occasionally, Senior or Kottwitz physically handed Dorman the Circle checks. (Id.). At least one subcontractor spoke with Kottwitz about getting paid for an invoice, (Doc. 207 at 615), and received at least one Circle check by way of a Fed-Ex delivery that listed "Terri Kottwitz" as the sender. (Id. at 612-613; Ex. 412.4).

The Circle checks to Dorman and subcontractors on Senior's house were posted to a project identified on Circle's books as "Newport Bay." (Doc. 101 at 243-244). "Newport Bay" - like "Crabapple" - was one of the 200 company construction jobs listed on Circle's Job Management Report. (Ex. 431.1). According to the

March 2002 report, Circle had paid over $800,000 on "Newport Bay." (Id.)

The Newport Bay construction expenses were paid in 2001 and 2002. (Exs. 522, 531). Separately, Circle also paid thousands of dollars in 2000 to Cameron-Padgett, the architect who designed the house, accounted for as Circle "consulting" expenses. (Doc. 206 at 209-219; Doc. 100 at 228-238; Ex. 522).

The Marchellettas purchased the Newport Bay land in 1999 in Circle's name, (Ex. 75.4), to be used as Senior's residence. (Doc. 206 at 321). Junior handled the transaction, and explained to the Realtor that he was buying land because a "home was going to be built on there for his father." (Id.). Originally, Senior executed the purchase contract in his own name, (Ex. 75.1), but immediately prior to closing, the forms were changed to identify Circle as the purchaser instead. (Doc. 206 at 323-324; Ex. 75.2).

The Newport Bay house was built solely for Senior's personal use, not for the company. The contract with the builder, Dorman, was executed by Senior and his wife, as owners. (Doc. 206 at 341-42; Ex. 125). Senior and his wife executed contracts with subcontractors as well, including for tens of thousands of dollars worth of custom cabinetry that they explained they were purchasing "for their house" (although which were ultimately paid with Circle checks). (Doc. 207 at 610-11; Ex. 412.6). The architect was told that the residence was for Senior and his wife. (Doc. 206 at 209).

Neither the house nor the land were recorded on Circle's books as an asset of the company. (Doc. 101 at 355; Doc. 99 at 75; Ex. 475). Circle's accountant was never informed that Circle supposedly owned this asset, and had never seen the deed, closing statement, or purchase agreement before trial. (Doc. 99 at 75; Exs. 75.2, 75.4, 24). And the property was transferred to Senior's name in March 2002 for only $10. (Ex. 25).

Circle also paid thousands of dollars, in 2000 and 2001, for landscaping expenses at Senior's home in New York (typically posted on Circle's books as "misc. office exp"), and for a rental townhouse in Alpharetta (typically posted on Circle's books as "Rent-Offices"). (Doc. 100 at 228-238, Doc. 101 at 243-245, Exs. 522, 531, 524; Doc. 208 at 693-701, 731-735).

In all, Circle paid over $500,000 in personal expenses for Senior in 2001, booked as business expenses, most of which were related to the residence. (Doc. 100 at 228-238, Doc. 101 at 243-245, Ex. 531). Circle paid approximately $13,000 in such personal expenses for Senior in 2000. (Id.).

C. Accountant Gary Schwartz

Circle employed an outside accountant, Gary Schwartz, to prepare certified financial statements and corporate tax returns at the close of its fiscal year. (Doc. 99 at 19-21, 37-39). The audits were required for Circle to receive bonding insurance. (Id. at 47). Schwartz worked alone, out of his home in New York. (Id.

at 36, 41). He visited Circle's offices for two days a year to perform the audit. (Id. at 41-42). He typically visited in June, several months after the close of Circle's fiscal year (which occurred at the end of the first quarter, March 31). (Id. at 43).

Schwartz required assurances from Circle management that "the financial statements are free of material misstatement, whether caused by error or fraud." (Ex. 425). He also explained that "material misstatements may remain undetected" notwithstanding his audit, that an audit "is not designed to detect error or fraud that is immaterial to the financial statements," and that "a material fraud may occur and not be detected." (Id.).

During the audit, Schwartz reviewed the books and uploaded electronic information to his laptop so that he could finish the audit at home. (Doc. 99 at 42-43). He spent only about "50%" of the two days actually reviewing Circle books, and the remainder waiting for information. (Id. at 56-57).

Schwartz's main contact and source of information was Circle's bookkeeper/controller, Kottwitz. (Id. at 54-61). When Schwartz arrived for his annual two-day visit, he met with Kottwitz, and reviewed the ledgers and other information that she provided in a conference room. (Id. at 55-56).

The records that Schwartz reviewed included the "JM" report. (Ex. 431.1, Doc. 99 at 59-64). Schwartz did not review every record or every one of the hundreds of construction jobs listed in

the report, but rather picked at random certain expenses to review. (Id. at 59-60).

While engaged in these audits, Schwartz was told nothing about any personal expenses being paid by Circle for the Marchellettas, and specifically was told nothing about the "Crabapple" and "Newport Bay" jobs. (Id. at 59-64, 69-71). Rather, in a management representation letter, Junior assured Schwartz that any "related party transactions ... including sales purchases, loans, transfers, leasing arrangements, and guarantees..." "have been properly recorded or disclosed in the financial statements." (Ex. 427.10). Schwartz considered constructing a personal residence for an officer/shareholder to be a related party transaction that was required to be disclosed, but was not. (Id. at 53-54).

Junior also assured Schwartz that "[t]here are no material transactions that have not been properly recorded in the accounting records underlying the financial statements," and "there have been no fraudulent financial reporting or misappropriation of assets involving management or employees who have significant roles in internal control." (Ex. 427.10).

Had Schwartz been aware of these personal payments, he would have advised the company to record the expenses as employment compensation, or loans. (Doc. 99 at 70-71). These expenses were not documented as loans to the Marchellettas, and the company's

books revealed no compensation to them other than their regular W-2 payroll deposits. (Id.).

On the basis of the information obtained during the audits, Schwartz prepared financial statements and corporate tax returns for the company, which were filed with the IRS for the fiscal years ending the first quarter of 2001 and 2002. (Doc. 99 at 73-76; Exs. 475-476, 5, 7.3).

In addition, Schwartz prepared personal tax returns for the Marchellettas. (Doc. 99 at 83-84). Schwartz prepared Junior's 2000 return, based on the information Junior provided, reporting $145,000 in business income from Circle, all of which was reflected as salary in the Form W-2 issued by Circle. (Id. at 84-87, Ex. 3). This return did not disclose the $150,000 in personal expenses the company paid for Junior on top of his W-2 salary. (Id.). Junior signed and filed this return under penalty of perjury. (Id.).

Schwartz similarly prepared the personal tax return for Senior for 2000, which reported $176,000 in salary income from Circle. (Doc. 99 at 102-103; Ex. 4). This return did not disclose the $13,000 in personal expenses the company paid for Junior on top of his W-2 salary. (Id.). Senior signed and filed this return under penalty of perjury. (Ex. 4).

Schwartz followed his same customary audit process for the company fiscal year ending in March 2002. (Doc. 99 at 89). Thus, Schwartz prepared audited Circle's financial statements and tax

returns, and personal tax returns for the Marchellettas for 2001. (Doc. 99 at 89-93; Ex. 479). The 2001 tax return that Schwartz prepared for Junior reported approximately $200,000 in income, the vast majority of which was W-2 salary from Circle. (Doc. 100 at 98-100; Ex. 487). The return omitted the approximate $675,000 in personal expenses paid by Circle to Junior, discussed above, including the expenditures for construction of the "Crabapple" house. (Id.).

The 2001 return that Schwartz prepared for Senior, reported approximately $338,000 in income, of which $176,000 was attributed to salary income from Circle. (Ex. 497; Doc. 100 at 129-130). The return omitted the more than $500,000 in personal expenses paid by Circle. (Id.).

The 2001 personal returns and corporate return prepared by Schwartz were never signed or filed. (Exs. 497, 487, 479). Rather, shortly before those returns were due to be filed in 2002, Circle became aware of a criminal tax investigation, and hired criminal defense counsel. (Doc. 512).

D. Circle's Awareness Of This Investigation And Subsequent Filing Of New 2001 Returns

In July 2001, Customs Agent Kimberly Sellers initiated an unrelated investigation into an overseas transaction by Circle. (Doc. 210 at 927-931). Sellers met with Kottwitz and an attorney for Circle, and at the conclusion of that meeting, the attorney

asked Sellers, "Well, you're not going to contact the IRS, are you?" (Doc. 210 at 927-931). After the meeting, Sellers referred the matter to IRS Special Agent Patricia Bergstrom, who initiated this investigation. (Doc. 210 at 955-957).

In August 2002, Sellers received correspondence stating that Circle learned of a criminal investigation and that they were hiring criminal counsel. (Doc. 210 at 938-939; Ex. 512). Shortly thereafter, Circle's counsel requested a meeting with Sellers and the IRS. (Doc. 210 at 940-942). Counsel did not explain how Circle became aware of the IRS investigation, which was not yet overt. (Id.; Doc. 210 at 955-969). In September 2002, criminal defense counsel for the Marchellettas met with Agent Bergstrom and others. (Id.). Counsel stated that they had advised the Marchellettas and Circle not to file their 2001 returns at that time. (Id.). These returns, drafts of which had already been prepared by Schwartz as explained above, were due to be filed the following month, as Schwartz customarily obtained six-month extensions from April 15. (Doc. 99 at 90-91).

In 2004, the Marchellettas' attorneys and private investigator hired another accountant, Randy Brown, who prepared new 2001 returns. (Doc. 100 at 94-97). The new 2001 returns reported all the personal expenses paid by Circle to the Marchellettas, including for the construction of their houses. (Doc. 100 at 98-147; Exs. 491, 504). The new 2001 returns further reported all

the previously unreported personal expenses summarized earlier, whether received in calendar year 2000, 2001 or even in 2002. (Id.). The Marchellettas signed and filed these returns. (Id.).

E. Consulting Fees And Other Income To Senior From Nastasi

Senior co-owned and operated Nastasi for years before moving to Atlanta in 2000-2001. (Doc. 207 at 438-39). In 1998 he signed a separation agreement, in which he swapped his shares in Nastasi with shares that Nastasi owned in Circle. (Doc. 458).

Senior's Nastasi stock was valued at $1.3 million, but Nastasi's stock in Circle was only valued at $1,050,000. (Doc. 207 at 501-502; Exs. 473, 473.1). Thus, in 1999 Nastasi made an additional cash payment to Circle of $250,000 as part of the consideration for Senior's stock. (Doc. 207 at 501-505; Exs. 473, 473.1, 456).

Because Senior's management abilities and knowledge were critical to Nastasi's business, the parties also separately executed a consulting agreement, by which Senior and/or Circle was available to provide services to Nastasi, but would not compete with Nastasi for construction work. (Doc. 207 at 449-451; Ex. 460).

The consulting agreement had no payment terms. (Ex. 460). Nastasi and Senior instead executed a separate "Payment Guarantee" contract by which Senior was to be paid $6,000 weekly for his

consulting availability and the non-compete guarantee. (Ex. 459). Senior was the only beneficiary of the Payment Guarantee; Circle was not a party. (Id.).

In 1999, Senior met with an accountant, Lou Fuoco, who told him that consulting/non-compete payments constitute ordinary taxable income. (Doc. 207 at 1108-1109). Fuoco also advised Senior that any cash received for his Nastasi stock - on top of Circle stock that he received - would constitute a taxable capital gain. (Id.).

Although Circle was not a party to the payment contract, Circle sent weekly invoices throughout 2000 and 2001 to Nastasi seeking collection of Senior's $6,000 weekly fee. (Doc. 207 at 458-459; Exs. 461-463). Several of these invoices stated on their face "consulting fees for Jerry Marchelletta [Senior]." (Exs. 461-463).

Nastasi paid these invoices. (Doc. 207 at 461-62; Exs. 465.1-465.44, 466.1-466.42, 467.1-467.13). Because the invoices were issued by Circle, the checks were made out to Circle. (Id.).

The $250,000 cash payment to Circle from Nastasi as part of the consideration for Senior's stock was used by the Marchellettas to purchase Senior's "Newport Bay" land, but was accounted for in a way such that none of it was recognized as income to either Circle or Senior. (Doc. 100 at 198-207).

The $250,000 payment was initially recorded on Circle's books in February 1999 as a loan from Nastasi. (Doc. 100 at 198-200). However, the accounting was changed twice before the close of the fiscal year. (Doc. 100 at 200-208). First, the money was taken out of the "due to Nastasi" account, and recorded as "other income" to Circle. (Doc. 100 at 203). This transaction was re-classified at the end of the 2000 fiscal year by debiting the income account and crediting "notes payable officer." (Doc. 100 at 202-203; Ex. 427.4). In other words, this money was ultimately characterized on Circle's books as a loan coming from an "officer," i.e., Senior. (Doc. 101 at 202-203; Ex. 427.4). This money was therefore not considered taxable income to Circle, because a loan from an officer is not income. (Id.).

Meanwhile, in October 1999, Circle purchased the Newport Bay property with a $270,000 cashier's check. (Doc. 100 at 200-202; Doc. 206 at 323-324; Ex. 12.3). This check was accounted for as a debit in the "notes payable officer" account - i.e., as a "loan" to Senior. (Doc. 100 at 202-203; Ex. 427.4). This was the same account to which the $250,000 Nastasi payment was later posted as a credit. (Id.). Thus, the effect of the Nastasi payment and the way it was ultimately recorded was to almost entirely eliminate the "loan" recorded on the company's books for the purchase of the Newport Bay property. (Doc. 100 at 206-7). And, because merely recouping a loan is not income, Circle's purchase of land for

Senior would not appear to be taxable to him. (Doc. 100 at 198-207).

Circle treated the weekly $6,000 consulting agreement payments from Nastasi in 2000 and 2001 in the same way. (Doc. 100 at 217). In other words, the money was initially booked as "other income." (Id.). Before the books closed, however, the money was transferred to the "notes payable officer" account, reflecting loans supposedly made to the company by Senior. (Id.; 427.8). The result, again, was that this money was not reflected as income to either Circle or Senior; rather, since it was reflected as a "loan" from Senior, any withdrawals of this money would appear to be tax-free. (Doc. 100 at 220).

In 2001 and 2002, the Marchellettas withdrew $100,000 from the "notes payable officer" account for their personal benefit, which were recorded as repayments of these supposed loans. (Doc. 100 at 220-223; Exs. 12.123, 600, 12.124, 12.154). First, Circle executed a $12,966 check in April 2001, which was used to pay Senior's 2000 New York State taxes. (Doc. 100 at 220-21; Exs. 12.123, 600). Second, also in April 2001, Circle executed a $49,122 check to the IRS, which was used to pay Senior's 2000 federal taxes. (Doc. 100 at 221-222, Exs. 12.124, Ex. 4). Third, in June 2001, Circle executed a $53,680 check to Seay, the builder of Junior's Crabapple residence. (Doc. 100 at 222-23; Ex. 12.154). Each of these

expenditures came out of the "notes payable officer" account on Circle's books. (Doc. 100 at 223).

Kottwitz, as the controller, made the initial bookkeeping entries for the Nastasi payments. (Doc. 99 103-108, 118-123). Schwartz made the year-end re-classification entries - moving the Nastasi money from "income" to the "notes payable to officer" account - because Kottwitz told Schwartz that this money was owed to Senior (Id.). Kottwitz told Schwartz that the money reflected Senior's "return of capital" invested in Nastasi. (Id. at 121). Schwartz requested documentation from Kottwitz, but received none. (Id. at 104-5). He also was never provided the invoices and checks that stated the money was for "consulting," and was never provided copies of Senior's separation agreements from Nastasi. (Id.).

F. Circle's and Senior's Tax Returns

Neither Circle's nor Senior's 1999 or 2000 tax returns included any of the income from Nastasi, including the $250,000 cash payment in 1999 and more than $300,000 in consulting agreement payments in 2000. (Doc. 100 at 232-238, Ex. 522, Doc. 101 at 245-246, Ex. 531).

The 2001 returns drafted by Schwartz - but not filed - also did not include more than $300,000 in consulting payments received that year from Nastasi. (*Supra* at 10-11; Ex. 497). Senior's 2001 return prepared in 2004 by Brown ultimately reported the $307,000 received from Nastasi in 2001, although as capital gains, not

ordinary income. (Doc. 100 at 98-147; Exs. 504, 490.1-490.3). No amended return was prepared for 2000 to report more than $300,000 of Nastasi consulting income received in 2000. (Id.).

II. The Jury Charges And Charge Conference

At trial, the Defendants requested an instruction entitled "Good Faith Reliance Upon Accountant Failure Of Accountant To Exercise Due Care." (Doc. 81-2). The district court at the charge conference declined to give the instruction, finding insufficient evidentiary foundation. (Doc. 212 at 1200). The Defendants offered no objection, argument or explanation of a foundation. (Id. at 1200-1202). The only response was from Junior's counsel. (Id.). He asked to clarify that he could still argue that the Defendants relied on Brown's advice in 2004, with regard to the belated filing of the 2001 returns. (Doc. 212 at 1200-1202). The district court indicated that it would permit that argument. (Id.). Junior's counsel responded "That's all I need, your honor." (Doc. 213 at 1202).

The district court instructed the jury at the conclusion of the trial, including as to willfulness:

> The word "willfully," ... means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is, with bad purpose either to disobey or disregard the law... So, if you find beyond a reasonable doubt that the acts constituting the crime charged were committed by a defendant voluntarily as an intentional violation of a known legal duty; that is, with specific intent to do something the law forbids, then the

element of willfulness as defined in these instructions has been satisfied.

On the other hand, if you have a reasonable doubt as to whether a defendant acted in good faith, sincerely believing that the tax returns in question were true and correct as to every material matter and that no additional tax was owed, then the defendant did not intentionally violate a known legal duty; that is, the defendant did not act willfully, and that essential part of the offense would be not be established. It is not the purpose of the tax laws to penalize innocent errors made despite the exercise of reasonable care, and it is not enough to show merely that a lesser tax was paid than was due. Nor is a negligent, careless, or unintentional understatement of income sufficient.

(Doc. 213 at 1229-30).

The court also separately instructed the jury as to the defense of good faith:

Good faith is a complete defense to the charges in the indictment since good faith on the part of the defendant would be inconsistent with intent to defraud or willfulness which is an essential ... part of the charges. While the term "good faith" has no precise definition, it means an honest belief, a lack of malice, and the intent to perform all lawful obligations. The burden of proof is not on the defendant to prove good faith, of course, since the defendant has no burden to prove anything. The Government must establish beyond a reasonable doubt that the defendant acted with specific intent to defraud as charged in the indictment.

One who expresses an honestly held opinion, or an honestly formed belief, is not chargeable with fraudulent intent even though the opinion is erroneous or the belief is mistaken; and, similarly, evidence which establishes only that a person made a mistake in judgment or an error in management, or was careless, does not establish fraudulent intent.

(Doc 213 at 1228-30).

Later, after the charges were furnished, closings were given, and the jury retired from the courtroom, Defendants lodged an objection to the failure to give the requested reliance charge. (Doc. 213 at 1343-1344; Doc. 95). This objection provided no grounds, but just re-stated the language of the omitted charge. (Id.).

3. Standard of Review

The government concurs with the standards of review set forth by the Defendants, except as to the district court's refusal to give the proposed jury charge. For the reasons explained, *infra* at 23-28, that issue is subject to plain error review only.

SUMMARY OF THE ARGUMENT

I. The district court correctly rejected Defendants' proposed reliance instruction as lacking evidentiary foundation and as insufficiently tailored to the case. The Defendants' accountant, Schwartz, never advised Defendants about how to record and report the personal expenditures to the Marchellettas. In addition, the Defendants told Schwartz nothing about those payments, gave him false books that disguised the payments, and made other false assurances and statements. His "advice" – had it been sought – would have been the opposite of what Defendants did – to record and report the payments as compensation. Accordingly, there was no basis for the charge and it only would have confused the jury, and the court did not err in refusing the charge. Indeed, the issue is subject only to plain error review only, because Defendants never articulated any specific evidentiary grounds in support of the charge, before or after the district court's ruling, and did not even object to its omission until after the jury retired. Finally, the charge was unnecessary, in view of the court's instructions about the high standard of criminal intent in a tax case, that "mistake" and "negligence" do not qualify, and specifically that "good faith is a complete defense."

II. The evidence, in the light most favorable to the verdict, was more than sufficient to sustain the convictions. The Marchellettas skimmed over $1 million from their family company to fund personal

expenses, without disclosing these expenditures to their accountant, and then signed false tax returns that omitted all of this income. These payments were facilitated by Kottwitz, their longtime employee and "bookkeeper." Kottwitz wrote and distributed many of the checks, which under her supervision were falsely recorded on Circle's books as business expenses, and she made or caused Schwartz to make several of the fraudulent entries herself.

III. The prosecution's references in opening to the "United States and its taxpayers," and other remarks, were not improper, and did not lead to plain error requiring reversal. Rather, the remarks outlined the nature of this tax evasion case, in which the indictment alleged that the government had been deprived of tax income. And there was no substantial prejudice requiring reversal, as the comments were limited, generalized, and not personally directed to the jury; the court issued several mitigating instructions; and the evidence of guilt on the counts of conviction was overwhelming.

IV. The district court did not clearly err in calculating the loss amount at sentencing. The evidence was more than sufficient to establish the amount of unreported income and tax loss as to Senior.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE TRIAL COURT DID NOT PLAINLY ERR OR ABUSE ITS DISCRETION IN REFUSING THE DEFENDANTS' PROPOSED RELIANCE INSTRUCTION, AS THERE WAS NO FOUNDATION SHOWING THE DEFENDANTS SOUGHT, RECEIVED OR RELIED ON ADVICE OF ANY ACCOUNTANT, AND AS THE DISTRICT COURT FULLY INSTRUCTED THE JURY AS TO SPECIFIC INTENT TO DEFRAUD AND THE "COMPLETE DEFENSE" OF "GOOD FAITH"

A. This Issue Is Subject To Plain Error Review

Properly preserved objections to the trial court's jury instructions are reviewed for abuse of discretion. *U.S. v. Cornillie*, 92 F.3d 1108, 1109 (11th Cir. 1996). The court's failure to give an appropriate instruction is reversible error only where the requested instruction "(1) was correct; (2) was not substantially covered by the charge actually given; and (3) dealt with some point in the trial so important that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense." *U.S. v. Chastain*, 198 F.3d 1338, 1350 (11th Cir. 1999). "The district court has broad discretion in formulating jury instructions as long as those instructions are a correct statement of the law." *U.S. v. Garcia*, 405 F.3d 1260, 1273 (11th Cir. 2005) (per curiam).

Non-preserved objections are reviewed under the even more stringent standard of plain error. Under plain error review, an Defendant must demonstrate (1) error, (2) that is plain, i.e.,

"clear" or "obvious," and (3) that affects substantial rights. *U.S. v. Olano*, 507 U.S. 725, 730-32 (1993).

The onerous plain review standard applies to this issue. The district court rejected the proposed charge on the ground that it was unsupported by the evidence and not sufficiently tailored to the facts. (Doc. 213 at 1200). Defendants never responded. They never pointed to even a shred of evidentiary support, or attempted to more narrowly tailor the language - before or after the judge's ruling. (Id.)

Defendants now argue on appeal that a sufficient foundation existed. Although meritless, these arguments are not preserved and must be rejected. Simply requesting an instruction, and/or lodging a general, non-specific objection to the omission of a particular instruction, is not enough. The rules state that "[a] party who objects to ... a failure to give a requested instruction must inform the court of the specific objection before the jury retires to deliberate." Fed. R. Crim. P. 30(d) (emphasis added); *U.S. v. Wright*, 392 F.3d 1269, 1277 (11th Cir. 2004) ("[i]n order to preserve an objection to jury instructions for appellate review, a party must object before the jury retired, stating distinctly the specific grounds for the objection.") This follows the well-established principle that "[t]o preserve an issue for appeal, a general objection or an objection on other grounds will not suffice." *U.S. v. Gallo-Chamorro*, 48 F.3d 502, 507-508 (11th Cir.

1995); *U.S. v. Dennis*, 786 F.2d 1029, 1042 (11th Cir. 1986) ("To preserve an issue at trial for later consideration ... one must raise an objection that is sufficient to apprise the trial court and the opposing party of the particular grounds upon which appellate relief will later be sought.").

Thus, this Court has repeatedly refused to allow a defendant to appeal the omission of requested charges where, like here, the defendant failed to make specific arguments supporting the charge before the district court. In *U.S. v. Yeager*, 331 F.3d 1216, 1223-24 (11th Cir. 2003), for example, the defendant requested a particular instruction as to the elements of mail fraud, and the district court refused. *Id.* The defendant objected to the omission of his charge, arguing only that it was "an accurate statement of the law." *Id.* The defendant never responded to the grounds stated on by the district court – that the defendant's language was essentially subsumed in the court's charge. *Id.*

The defendant in *Yeager* then challenged the refusal to give the instruction on appeal. This Court rejected this argument as unpreserved and waived, stating "[the defendant] did not object or respond to [the district court's] ground for refusal, and his failure to do so should remove this issue from the realm of those validly heard on appeal." *Yeager*, 331 F.3d at 1223. In other words, the defendant in *Yeager* failed to preserve the issue by simply requesting the instruction and generally objecting to its

omission. The defendant was also expected to specifically address the particular argument at issue in order to preserve that argument on appeal. The defendant in *Yeager* failed to do so, and so did Defendants here.

Yeager is not alone. In *U.S. v. Sirang*, 70 F.3d 588, 594 (11th Cir. 1995), like here, the defendant requested an instruction as to the good faith defense. The district court refused the proposed instruction, which it found to be insufficiently tailored to the case. *Id.* The defendant did not specifically object. *Id.* This Court, as in *Yeager*, found the belated appellate argument to be unpreserved and thus subject only to plain error review. *Id.*; *U.S. v. Flynt*, 15 F.3d 1002, 1006 (11th Cir. 1994) (appeal of omission of instruction not preserved by objection that did not cite any grounds, but rather just generally objected "to the court's failure to give all of his requested charges").

Here, Defendants did not respond to the court's grounds for denial. Nobody supported the proposed reliance charge with any reference to any evidence. Among other things, Defendants never explained: (1) what advice was supposedly sought, given and relied upon; (2) what accountant(s) gave the advice; and (3) what "full" disclosures were made to the accountant(s).

If anything, the discussion during the charge conference suggested acquiescence to the district court's ruling. Junior's counsel simply asked permission to make a particular reliance-type

argument to the jury during his closing notwithstanding the ruling; and when the court gave the permission, counsel stated "[t]hat's all I need, your honor." (Doc. 212 at 1200-1202). No other counsel said a word. Nothing about this interchange suggested that there remained an actively-contested issue that would be pursued on appeal. Thus, just like in *Sirang*, "[c]ounsel's responses and lack of further objection allowed the judge to conclude that he had addressed" the issue. 70 F.3d at 594.

That Defendants lodged an objection after the charges and closings were already presented, and the jury had been excused from the courtroom, (Doc. 213 at 1343-44; Doc. 95), was not timely under Rule 30. More importantly, even this remained nothing more than a general objection to the omission of the charge. It lacked any evidentiary grounds, and continued to not respond to the judge's concern. (Id.). This remained exactly the sort of non-specific objection that this Court has routinely found insufficient to preserve an issue on appeal, as explained above.

The preservation rule is not technical. It promotes judicial economy by providing the district court "the chance to correct errors before the case goes to the jury." *Sirang*, 70 F.3d at 594. In other words, had Defendants presented a modicum of support for their proposed instruction, the district court might have been persuaded. If that had happened, this issue would have been moot.

Instead, Defendants stood silent below, and as a result this claim is subject to plain error review.[3]

B. The Court Correctly Rejected The Instruction Because It Lacked Foundation And Was Insufficiently Tailored To The Case

Under any applicable standard of review, the district court properly determined that Defendants's requested charge was unsupported and not properly tailored to the facts of the case.

1. No Foundation Existed For A Reliance Instruction

To receive this instruction, Defendants were required to show foundational evidence that: (1) in seeking advice, they fully disclosed all relevant facts; and (2) they relied in good faith on the advice, including by strictly following that advice. *U.S. v. Johnson*, 730 F.2d 683, 686-87 (11th Cir. 1984). While the district court should submit the instruction to the jury if a foundation exists, "an instruction should not be given if it lacks evidentiary support or is based upon mere suspicion or speculation." *U.S. v. Condon*, 132 F.3d 653, 656 (11th Cir. 1998) (*quoting U.S. v. Lindo*, 18 F.3d 353, 356 (6th Cir. 1994)); *Sirang*, 70 F.3d at 593.

The district court's gatekeeping responsibility to exclude unsupported legal instructions is important. The court:

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[3] As stated below, the district court correctly denied the instruction whether based on the plain error or abuse of discretion standard.

> ha[s] to avoid diverting the jury with idle speculation and frivolous considerations. A confused jury can give as improper a verdict as one which has failed to receive some significant instruction. Therefore, the charge should direct and focus the jury's attention on the evidence given at trial, not on far fetched and irrelevant ideas that do not sustain a defense to the charges involved.

U.S. v. Blair, 456 F.2d 415, 420 (3d Cir. 1972).

a. There Was No Evidence Of Accountant Advice

On appeal, Defendants claim that they relied on the advice of accountant Schwartz. However, there is no evidence of any "advice" sought from or received by Schwartz during the relevant time, or any actions by any Defendant conforming with any such "advice." Schwartz was never consulted about how to treat the more than $1 million in Junior's and Senior's personal expenses paid for by the company, and in fact was told nothing about those transactions. *Supra* at 9-10. That all of this money was falsely recorded as business expenses was therefore not the result of any "advice" from Schwartz. Indeed, Schwartz testified that had he been aware, he would have advised that the expenses must be recorded as either loans or executive compensation. *Id.* Similarly, there was no evidence that Schwartz at any time advised Senior that he could somehow refrain from reporting the consulting fees from Nastasi. The only accountant advice Senior received at the time on this subject was from Fuoco, who advised that the consulting payments must be reported as taxable ordinary income. *Supra* at 13-14.

There was no evidence that Schwartz personally interacted with the Marchellettas in any material way. Schwartz did not meet with the Marchellettas, but rather obtained the information "usually by mail." (Doc. 99 at 84). Schwartz would simply say: "it's income tax time, personal returns are due, please send me your information." (Id.). The requested documents included "[a]ll the W-2s or 1099s or interest or capital gains, anything that goes on 1040 [the IRS form for personal tax returns." (Id.). The Marchellettas provided these documents, which revealed none of the omitted income at issue here. Schwartz could not recall any advice being asked or questions that otherwise arose. (Id.).

Thus, just as in *Johnson*, "[t]he flaw in the defendants' argument is that no expert advice was given to the defendants on which they relied." 730 F.2d at 686-87. In *Johnson*, the defendants employed a CPA to fill out certain forms. Like here, there was no "advice" sought or received as to what information to disclose or what answers to provide, and the information provided by the clients was false. *Id.* This Court found that the mere use of the accountant - with no evidence of advice - was insufficient foundation for the provision of a reliance instruction. *Id.* The same reasoning applies here. *See also U.S. v. Miles*, 290 F.3d 1341, 1354 (11th Cir. 2002) (that the defendant utilized an attorney for a transaction did not itself justify reliance

instruction, absent evidence that the defendant sought, received, and followed any legal advice regarding the transaction).

b. There Was No Full Good Faith Disclosure

Without sufficient evidence of full, good faith disclosure, no reliance instruction is proper. *See Condon*, 132 F.3d at 656-57 (affirming denial of instruction because defendant never told attorney that he never made requisite down payment for loan he secured, which "went to the heart of the misrepresentations [defendant] made to the [Small Business Administration]"); *U.S. v. Lindo*, 18 F.3d 353, 357 (6th Cir. 1994) (instruction denied because "[n]o evidence establishe[d], ... that Lindo provided all of the pertinent facts regarding the stock sales at issue ... to [counsel] before [counsel], according to Lindo, directed the issuance of the opinion letters that serve[d] as the basis for Lindo's advice of counsel theory."); *U.S. v. Cheek*, 3 F.3d 1057, 1062 (7th Cir. 1993) (no instruction because "[n]owhere [did] Mr. Cheek contend either that he made a full and accurate report as to his tax status to any attorney or that he 'acted strictly in accordance with the advice of his attorney.'"); *U.S. v. Brimberry*, 961 F.2d 1286, 1290-91 (7th Cir. 1992) (no instruction because insufficient evidence of disclosure); *see also U.S. v. DeClue*, 899 F.2d 1465, 1472 (6th Cir. 1990) ("A taxpayer who relies on others to keep his records and prepare his tax returns may not withhold information from those

persons relative to taxable events and then escape responsibility for the false tax returns which result.") (internal quotations omitted)); *U.S. v. Garvaglia*, 566 F.2d 1056, 1059 (6th Cir. 1977) ("a defendant's failure to record fees he personally received or to deposit them in his office bank account made it virtually impossible for his accountant to include them in his tax returns") (internal quotations omitted)).

Here, the record does not support - and indeed contradicts - that Defendants fully informed Schwartz of all material facts. Schwartz was told nothing about the more than $1 million in personal payments that Circle made for the Marchellettas and which were falsely booked as job expenses. *Supra* at 6, 8-9. Schwartz was told nothing about the real estate that Circle bought in its name, although not recorded on its books, for Senior. *Id.* The record contains no suggestion that Schwartz was told about the thousands in custom clothing purchases booked as company "vehicle" expenses, the residential landscaping costs booked as "miscellaneous" company expenses, the residential townhouse rental booked as "office rent," or the other personal expenses for the Marchellettas.

What Schwartz was told about the Nastasi payments was <u>false.</u> Kottwitz falsely told Schwartz that this money was Senior's "return of capital" in Nastasi. (Doc. 99 at 121). Despite asking for documentation, Schwartz was never provided copies of Senior's

agreements with Nastasi, or the invoices or checks. (Id. at 103-105).

In short, Defendants told Schwartz nothing about the major issues in the case, and if anything misled him. Junior's management letter further misled Schwartz. Junior falsely assured Schwartz that "[t]here are no material transactions that have not been properly recorded in the accounting records underlying the financial statements," that all "related party transactions" "have been properly recorded," and "there have been no fraudulent financial reporting or misappropriation of assets involving management or employees who have significant roles in internal control." (Ex. 427.10). All of these representations were false.

It is astonishing, therefore, that Defendants now argue that they provided "full" disclosure in good faith to Schwartz. Their argument, essentially, is that while they told Schwartz nothing, and took steps to affirmatively mislead him, they nevertheless dumped of all of the company's ledgers on him during his annual two-day visit to Circle, even while hiding from him the false entries within those books. Thus, the Defendants' idea of full disclosure is that it was up to Schwartz to fortuitously choose in his audit to examine the right accounts, ask the right questions, ask for the right documents, and to see through the false bookkeeping. This is so, even though Schwartz told Circle about

and executed a representation letter that memorialized the limitations of his audit. (Ex. 425).

These records were voluminous. The production of Circle's financial records in response to the IRS subpoena in this case exceeded 15 boxes. (Doc. 210 at 967). Some of the voluminous ledgers, bank records, and other financial documents were introduced at trial. (Exs. 201.1-393, 12). Dumping all of this data on Schwartz would not have disclosed that, for instance, the "vehicle expenses" account actually falsely included Junior's custom suits, or that the "Newport Bay" account was not just one of hundreds of Circle construction jobs but was actually Senior's personal residence. And that Schwartz's audit might have uncovered these needles in the haystack of accounting records cannot constitute good faith - both factually and legally. *See U.S. v. Lisowski*, 504 F.2d 1268, 1272 (7th Cir. 1974) (merely supplying accounting records to company tax preparer without identifying cash income handled in a "clandestine manner" was not good faith, because "a taxpayer cannot shift the responsibility for admitted deficiencies to the accountants who prepared his returns if the taxpayer withholds vital information from his accountants or takes positive action designed to mislead them") (internal quotations omitted).

2. The Requested Instruction Was Substantially Covered And Its Absence Did Not Seriously Impair The Defense

The district court thoroughly instructed the jury as to willfulness and the government's burden to disprove good faith. *Supra* at 18-19. These instructions more than sufficiently addressed the meaning of criminal intent in this case and enabled Defendants to fully present any reliance defense.

This Court and others have repeatedly affirmed refusals to give reliance instructions in light of other overlapping instructions on intent. In *Condon*, the defendant asserted that he relied on his counsel's silence to suggest that a transaction was proper. 132 F.3d at 657. The district court denied a specific reliance instruction but, like here, thoroughly instructed the jury as to willfulness, as well as that "good faith is a complete defense to the charges in the indictment...." *Id.* at 657, n.3. This Court affirmed because these instructions "adequately addressed the concepts of willfulness and good faith," and enabled defense counsel to argue reliance on counsel. *Id.*; *Accord U.S. v. Tannehill*, 49 F.3d 1049, 1058 (5th Cir. 1995) ("Tannehill's reliance on counsel was adequately covered by the court's instruction that, if the jury found that Tannehill acted with an honest, good faith belief that his statements and actions were legitimate business transactions, that would negate the specific

intent required for conviction."); *Cheek*, 3 F.3d at 1062-63 (no reliance instruction, because the standard willfulness and good faith defense instructions were adequate); *U.S. v. Kouba*, 822 F.2d 768, 771 (8th Cir. 1987) (intent and good faith defense instruction "adequately covered the substance of Kouba's defense theory and gave defense counsel the opportunity to make a fair and adequate argument on the theory that Kouba had a good faith misunderstanding of the law"); *see also U.S. v. Martinelli*, 454 F.3d 1300, 1315-16 (11th Cir. 2006) (affirming refusal to give good faith defense instruction where, under the definition of specific intent and willfulness, "the jury plainly had to rule out the possibility that Martinelli actually harbored a good faith belief in the legitimacy of the business before it could have found that he knew the money represented proceeds of mail fraud"); *U.S. v. Dohan*, 508 F.3d 989, 993 (11th Cir. 2007) (affirming refusal to give requested "good faith" instruction, because the charges given "adequately informed the jury's good faith analysis"); *U.S. v. Walker*, 26 F.3d 108, 110 (11th Cir. 1994) ("The court's instruction to the jury on intent to defraud adequately addressed the concept of good faith. So, the jury essentially considered the defense of good faith and rejected it when it found defendants guilty.")

Here, the Court's instructions on intent and good faith allowed Defendants to argue, and they did argue, that they relied on Schwartz in good faith for the accounting, that they assumed the

accounting was correct, and that the unreported income resulted from Schwartz's mistakes, not any fraud. (Doc. 213 at 1282-83, 1298-1304). There is simply no way that a rational jury having been instructed as to specific intent, willfulness, and the "complete defense" of good faith would convict, if it credited these assertions. Thus, "the jury essentially considered the defense of good faith and rejected it when it found defendants guilty." *Walker*, 26 F.3d at 110.

Defendants' cases with respect to this issue are inapposite, and if anything support affirmance. Indeed, several cases do not even discuss the specific reliance instruction at issue here.

In *U.S. v. Morris*, 20 F.3d 1111 (11th Cir. 1994), the defendants were charged with aiding and abetting false tax returns. Their defense - supported by "substantial evidence," including that the returns were prepared by outside accountants - was that the falsities "were due to mistakes and were not intentional." *Id.* at 1114. The Court found that the district court erred by not providing a good faith instruction, and by not explaining that criminal intent in a tax case requires willful violation of a known legal duty. *Id.* at 1114-8. But the Court did not state that the instruction necessarily had to include specific language about reliance on any accountant's advice, as reflected in Defendants' instruction. *Id.* The Court did not address this issue at all.

Here, by contrast, the district court fully instructed the jury about the "complete defense" of good faith, fully explained the onerous standard of criminal intent applicable in tax cases, and also made clear that mere negligence or mistakes would be insufficient to convict Defendants of tax fraud. Thus, everything this Court in *Morris* found lacking, the district court did here. *Morris* does not suggest anything more was necessary.

Neither *U.S. v. Pechenik*, 236 F.2d 844 (3d Cir. 1956), nor *Berkovitz v. U.S.*, 213 F.2d 468 (5th Cir. 1954), other cases prominently cited by Defendants, addressed reliance instructions either. *Pechenik* did not involve jury instructions at all; rather, the court found the evidence insufficient to convict a company president of tax evasion relating to his company's returns, absent evidence that the president was involved in or aware of the bookkeeping. 236 F.3d at 847. This has nothing to do with the case here, in which the evidence showed the Marchellettas skimmed company money for their personal benefit, and did not report that money on their own returns. *Pechenik* dealt with inapposite facts, and did not even address jury instructions.

U.S. v. Platt, 435 F.2d 789 (2d Cir. 1970), addresses the need for a reliance instruction, but on very different facts. In *Platt*, the court considered whether the taxpayer's failure to file was willful, or whether he reasonably believed that he had received an extension. The court found that the taxpayer was entitled to a

reliance instruction, not just because he used a preparer, but on the basis of specific testimony that could suggest that the preparer assured to the taxpayer that the preparer had secured the necessary extensions. *Id.* at 790-91. The Defendants pointed to no such foundation here, and there was none. Moreover, it does not appear that the district court in *Platt* provided other instructions as to the "complete defense of good faith." *See also U.S. v. Duncan*, 850 F.2d 1104 (6th Cir. 1988) (error not to give reliance instruction, where evidence showed that the accountant was fully aware of all pertinent facts because he was the one who actually initiated the transaction at issue, and where the district court did not even give a general good faith defense instruction).[4]

3. The Portion Of The Instruction Relating To Accountant "Due Care" Was Factually And Legally Unsupported

Defendants' proposed instruction was faulty in another respect. The second half of the instruction purported to explain the professional standards of "due care" in the accounting

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[4] Another inapposite case cited by Defendants is *U.S. v. Head*, 641 F.2d 174 (4th Cir. 1981). That case reversed and remanded for a new trial on other specific grounds unrelated to the reliance instruction. *Id.* at 176. In light of the remand, the court stated, without any discussion of the pertinent evidence or what other instructions were given, that an instruction "reflecting at least the substance" of the requested reliance instruction should have been given. *Id.* at 180. The court did not conclude that this issue in itself would have constituted reversible error. This incomplete discussion of an issue not necessary to the holding is therefore not persuasive authority.

profession and the implications for whether Defendants had criminal intent. This extends far beyond any advice-of-accountant/counsel language found in any case cited by Defendants; indeed, no authority suggests that this instruction has ever been given or even discussed. There is good reason for that.

First, defining industry standards of accounting conduct is not a proper subject for an instruction of law from the court. Much of the proposed instruction includes express citations to and quotations from industry standards, including the American Institute of Certified Public Accountants and the New York State Society of CPAs. This is factual evidence that – if relevant – could and should have been the subject of expert testimony, not legal instruction.[5] The district court did not abuse its discretion in refusing to deliver and place its imprimatur on this information.

Second, and relatedly, there was no foundation for the "due care" language. Defendants adduced no expert testimony or other evidence as to the standards of due care that accountants apply in conducting audits and/or preparing tax returns. Nor was there any

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[5] The proposed instruction cited one IRS regulation, 26 C.F.R. § 1.6694-1. This regulation explains how preparers might be penalized by the IRS for negligently contributing to a false return. It does not purport to create any duties owed to the taxpayer by the preparer. There is no provision suggesting that the preparer's responsibility to the IRS exonerates the taxpayer for filing a false return. Thus, this regulation was irrelevant to this case, and referencing it in an instruction would only have confused the jurors.

evidence that the Defendants were aware of these standards and relied on them in forming their intent.

Third, the proposed instruction was legally wrong. It purported to direct the jury that they "must acquit the defendants" – regardless of their actions or intent – if the false returns were a result of their accountant's negligence. In other words, Defendants would have taxpayers acquitted as a matter of law – even where they fully intended to evade taxes, took affirmative steps to hide income, and willfully signed false returns – simply because their preparer should have discovered the fraud but did not.

This reasoning is quickly rejected by the case law. "[A] taxpayer cannot shift the responsibility for admitted deficiencies to the accountants who prepared his returns...." *Lisowski*, 504 F.2d at 1272. Rather, the taxpayer's culpability turns on his own intent and actions, such as his own willful filing of false taxes. It is no defense that the taxpayer was able to fool a bad accountant or that the accountant otherwise failed to discover the taxpayer's fraud. Yet the Defendants' proposed charge says otherwise.

Fourth, the court's instructions already expressly stated that:

> It is not the purpose of the tax laws to penalize innocent errors made despite the exercise of reasonable care, and it is not enough to show merely that a lesser tax was paid than was due. Nor is a negligent, careless, or unintentional understatement of income sufficient.

(Doc. 213 at 1230). Thus, the jury already understood that it would have to acquit if the false returns were solely the fault of Schwartz's mistakes - and no criminal intent or conduct by the Defendants. No additional charge was required to make this clear.

* * * *

For all of these reasons, the district court properly denied the requested instruction - whether under plain error or abuse of discretion review - because no evidence supported the instruction. And, even if not, there was no substantial prejudice, because the jury was plainly aware from the charges presented that any good faith reliance on Schwartz would negate criminal intent.

II. THE COURT CORRECTLY DENIED THE DEFENDANTS' MOTIONS TO DISMISS UNDER RULE 29 BECAUSE THE EVIDENCE VIEWED IN THE LIGHT MOST FAVORABLE TO THE VERDICT WAS MORE THAN SUFFICIENT

Each Defendant challenges the sufficiency of the evidence as to Count One (conspiracy) and Count Six (aiding and abetting Circle's false return, for the fiscal year ending 3/31/2001). The Marchellettas also contest the sufficiency of the counts for which they were individually convicted: for Junior, Count Four (the 2000 false return); for Senior, Counts Four and Five (the false return and tax evasion, respectively, for 2000).

Based on the evidence, any reasonable trier of fact could have found Defendants guilty of these crimes beyond a reasonable doubt, and therefore all of these challenges fail. *U.S. v. High*, 117 F.3d 464, 467 (11th Cir. 1997).

A. Count One

To sustain a conspiracy conviction, the evidence must show: (1) the existence of an agreement to achieve an unlawful objective; (2) the defendant's knowing and voluntary participation; and (3) the commission of an overt act in furtherance of the conspiracy. *U.S. v. Brenson*, 104 F.3d 1267, 1281-82 (11th Cir. 1997). This indictment charged a tax conspiracy, for which the evidence must additionally show that at least a "slight" object of the conspiracy was to impede the IRS. *U.S. v. Adkinson*, 158 F.3d 1147, 1152 (11th Cir. 1998).

1. An Agreement Existed

An agreement to conspire may "be proved by circumstantial as well as direct evidence," *U.S. v. Hernandez*, 921 F.2d 1569, 1575 (11th Cir. 1991), "and may be inferred from the relationship of the parties, their overt acts and concert of action, and the totality of their conduct." *U.S. v. Schwartz*, 541 U.S. 1331, 1361 (11th Cir. 2008); *U.S. v. Guerra*, 293 F.3d 1279, 1285 (11th Cir. 2002).

Thus, the jury could consider the relationship among the parties in this small, family-run company. And the jury could conclude that the father and son who owned the company did not just happen to engage in almost the exact same scheme, at the exact same time, all by coincidence. Indeed, the Marchellettas were simultaneously skimming large amounts of company money to build residences, using the same architect (Cameron-Padgett), the same

builder for some of the work (Dorman), some of the same subcontractors (e.g., Diversified Cabinets), and the same tax preparer (Schwartz). (Doc. 206 at 192, 207-208, 338, 354; Doc. 207 at 600-601; Doc. 99 at 84). All of these payments were booked the same way - to job accounts created in the names of the subdivisions in which the residences were located. The jury was entitled to infer that, given the common scheme and methods used by the Marchellettas, they entered into an agreement to conduct the scheme. And that the agreement included the controller who maintained the books through which so much of the scheme was accomplished.

But the evidence included much more than just these circumstances and relationships. Reviewing the record in the light most favorable to the verdict, there was substantial direct evidence of conspiracy, including:

1. Senior had to and did specifically approve the use of company money to pay the builder of Junior's house (Doc. 206 at 281-86);
2. Junior arranged for the purchase of his father's Newport Bay land in 1999, (Doc. 206 at 321-6), and Junior helped arrange to falsely put this purchase in the company's name, when it was always intended to be Senior's residence (Id.);

3. Junior regularly reviewed the Job Management reports that detailed all of Circle's pending construction jobs, (Doc. 207 at 377-78), which reports would have revealed the large amounts being paid for "Newport Bay," which Junior knew from his involvement in the transaction was the property purchased for Senior;

4. Junior regularly approved the payment of pending unpaid invoices, (Doc. 207 at 389-90, 395-6), which would have necessarily included the invoices relating to the construction of the Newport Bay residence;

5. Senior's Newport Bay residence was transferred to Senior's name in March 2002 for the nominal consideration of $10; The deed was executed on Circle's behalf by Junior, and was witnessed by Kottwitz; This entire transaction was a sham, or so the jury was entitled to infer; The property was always intended to be for Senior, was never treated as a company asset, and was never disclosed to Schwartz. *See supra* at 5-6.

6. Junior directly benefitted from the scheme to falsely book the Nastasi payments. One of the payments that Circle made from the "loan payable shareholder" account - funded by the Nastasi payments to Senior - was a $53,000 check to his builder. (Doc. 101 at 222-23; Ex. 12.154).

7. Kottwitz facilitated the convoluted bookkeeping that so concealed the nature of the Nastasi payments. Kenya Diggs, the former accounting clerk, and Schwartz, the accountant, both explained that Kottwitz initially booked the payments as "other income." (Doc 207 at 554, Doc. 99 103-120). Kottwitz told Schwartz (falsely) that these payments were merely a "return" of Senior's capital in Nastasi. *Supra* at 16. Thus, it was Kottwitz who induced Schwartz to back the payments out of "other income" and into the "note payable officer account," which is what allowed Senior to withdraw the money tax-free.

8. Kottwitz was Schwartz's principal source of information. She never disclosed the existence of the Newport Bay property supposedly held in Circle's name, or Circle's "sale" of that asset to Senior, despite having participated in that transaction herself. Instead, she supplied Schwartz with false ledgers that failed to list this supposed asset. *See supra* at 6, 8;

9. Kottwitz personally signed numerous company checks to the contractors and subcontractors building her bosses' houses. (Ex. 550; Doc. 207 at 572-4). She also personally handed or mailed checks to the vendors for this personal work. *Supra* at 5. These same checks were

routinely booked, falsely, to company job accounts set up for those projects;

10. Kottwitz never disclosed to Schwartz that the "Newport Bay" and "Crabapple" job accounts actually reflected personal projects for the Marchellettas. More generally, she never disclosed the highly material fact that Circle - through checks she personally wrote and distributed - was building houses for its owners; and

11. Kottwitz submitted a false affidavit in the arbitration proceedings between Junior and his builder. She stated, in 2002, prior to this investigation, "I have been responsible for making payments for the Marchelletta's [Junior's] house, which is being partly paid by the company as a form of Mr. Marchelletta's compensation from the company." (Doc. 206 at 312; Ex. 28). Notably, Kottwitz did not claim lack of knowledge about Crabapple and how the payments were being booked. Rather, she asserted something that was untrue, as the Crabapple payments were never treated as "compensation" by Circle. The jury was entitled to infer that she lied, and that she did so because she was continuing to facilitate and cover up the fraud.

Moreover, there was ample evidence from which the jury could infer Kottwitz's knowledge if not direction of the fraudulent way

in which the personal expenses were booked. Kottwitz was the company controller during the relevant time period of the case, the highest accounting official within the company (Doc. 207 at 563) and a long-time employee of the Marchellettas, first at Circle and previously at Nastasi. *Supra* at 2. She supervised a staff of only approximately 4-5 accounting clerks. (Doc. 207 at 386). Although individual transactions might have been posted by clerks, "any journal entries usually came from, you know, someone telling someone to put them in." (Doc. 207 at 409). Diggs testified that Kottwitz specifically directed her as to what account to book particular transactions to. (Doc. 207 at 557). Kottwitz's predecessor at Circle, Kasandra Logan, was trained by Kottwitz (who was then still working at Nastasi) to use Circle's bookkeeping system. (Doc. 207 at 374). Indeed, Logan also explained that Kottwitz and Schwartz were the only ones with sufficient experience and expertise to make reclassifying or other unusual entries into the books. Id. at 408-9. Moreover, Kottwitz was the Circle representative present when Circle's outside counsel expressed concern as to whether the IRS was involved in the Customs investigation. *Supra* at 11.

These and other facts more than sufficiently allowed the jury to infer that the Defendants worked together in accomplishing this crime. Junior and Senior together skimmed the company's funds for their own personal use in a manner that avoided the appearance of

taxable income, assisted each other in doing so, and were assisted by Kottwitz. This was a classic conspiracy, or so the jury could rationally find.[6]

2. The Object Was To Impede The IRS

The evidence was also more than sufficient to find that the object of the conspiracy was to impede the IRS. Defendants fail to explain what other possible purpose was served by the conduct. The Marchellettas were the sole owners of the company, so stealing company money for their own benefit would have been pointless. The only logical purpose - or at least a purpose - was to skim income tax-free from Circle.

In other words, this is not like the cases relied on by Defendants, where the tax fraud was a mere collateral consequence of some other scheme. *See, e.g., Adkinson*, 158 F.3d at 1147. In *Adkinson*, the defendants allegedly committed a "massive bank fraud conspiracy in which the huge proceeds of two allegedly fraudulently obtained bank loans were diverted for personal use." *Id.* at 1150-51. The sole proof of a tax conspiracy was that the defendants did not report the income, and booked the transaction in a way that did

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[6] For the same reasons, there was sufficient evidence to convict as to Count Six. Many of these personal expenditures occurred during the tax year that ended on 3/31/01 and were falsely billed as business expenses during that year. (Ex. 524). This corporate return was prepared by Schwartz, based on information provided by Kottwitz, and was signed on behalf of the company by Junior. (Doc. 99 at 40-43,54-61, 78; Ex. 5).

not result in a 1099 disclosure. *Id.* No tax returns were even cited in support of the conspiracy. *Id.* In this context, the Court found insufficient proof of a conspiracy specifically for the purpose of tax evasion. *Id.* at 1154-59.

Here, by contrast, the jury could find, among other things, that: (1) a major if not only motive for the conduct was to provide substantial tax-free income to the Marchellettas; (2) this hidden income was accomplished through bookkeeping tricks with Kottwitz's assistance; (3) efforts were made to keep this income hidden from the tax preparer; (4) these acts resulted in false filings of personal and corporate returns; and (5) Defendants were unusually concerned about the IRS investigating them.

That the Marchellettas ultimately reported the majority of the unreported income on year 2001 returns - filed in 2004 - did not negate the conspiracy evidence. Defendants filed these belated returns years after learning of the criminal tax investigation. Those returns were even prepared by the accountant hired by the criminal defense team. *Supra* at 12. The jury therefore reasonably concluded that had the Marchellettas not fortuitously discovered the investigation, they would have done in 2001 exactly what they did in 2000 - sign and file the returns prepared by Schwartz, based on the false information fed to him, which omitted all of these personal expenditures.

Thus, this was from top to bottom a tax fraud conspiracy, as the jury permissibly found. *See, e.g., U.S. v. Useni*, 516 F.3d 634, 650 (7th Cir. 2008) (sufficient evidence of tax conspiracy existed where defendants ran the casino, knew of income that was not being recorded, and did not report that to the accountant).

B. The Timing Of Circle's Fiscal Year Does Not Require Acquittals For Counts Three Through Five

The Marchellettas argue that the personal expenditures were not taxable in the year received. Rather, they argue, the money only became "income" once the company closed its books, at the end of the first quarter of the following calendar year. In other words, if Circle bought a $1,000 suit for Junior in December 2000, it was supposedly not "income" until March 31, 2001, the close of the company's fiscal year. Thus, the Marchelletts argue that their 2000 returns - the subjects of Counts Three through Five - were not false, because the income at issue was not due to be reported until 2001.

This technical issue is raised solely in retrospect. There was no evidence that the Marchellettas at the time considered, relied on, or were advised as to the implications of Circle's fiscal year. To the contrary, as discussed above, the personal expenses were never accounted for as compensation, were never disclosed to Schwartz, and remained on the books as false business deductions, before and after the fiscal year end. *Supra* at 3-4, 7-

9. The Marchellettas' argument therefore does nothing to negate their criminal intent at the time of the offenses.

Thus, the Marchellettas rely heavily on the Supreme Court's decision in *Boulware v. U.S.*, 128 S.Ct. 1168 (2008). *Boulware* does not address these timing issues. Rather, it more generally states that, if no taxes are owed, there can be no "evasion" as a matter of law, regardless of intent. *Id.* In other words, Defendants argue that, at least for purposes of Counts Three through Five, their contemporaneous criminal intent was irrelevant.[7]

This argument was meritless, was properly rejected by the jury and district court, and *Boulware* is inapposite.

1. The Personal Expenditures Made On The Marchellettas' Behalf Were Taxable When Received

Basic tax principles provide that the payments by the company were taxable when made. Thus, the Marchellettas' 2000 returns were false for not reporting the massive amounts of personal payments and other income during 2000.

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[7] This issue has no bearing on the conspiracy convictions. Regardless of when the income should have been reported, it remains that the jury could have permissibly found that the Defendants conspired to never report it. Conspiracy requires only specific intent, an object to defraud the IRS, and overt acts. The evidence satisfies all of these elements, even if some of the income received in 2000 was technically not taxable until 2001 (which, as discussed below, was not the case).

Money paid by a corporation for the benefit of a shareholder is considered a "constructive dividend," and is required to be reported as such. *See, e.g., U.S. v. Mews*, 923 F.2d 67 (7th Cir. 1991). Dividends are considered gross income to the shareholder in the year in which they are actually received or otherwise "unqualifiedly made." *See, e.g., Avery v. Commissioner*, 292 U.S. 210 (1934); *Mason v. Routzahn*, 275 U.S. 175 (1927); 26 C.F.R. § 1.301-1(b); *Dynamics Corporation v. U.S.*, 392 F.2d 241, 247-248 (Ct. Cl. 1968) (following rule that "the time of actual receipt of the dividend governed its inclusion in taxable income."); *Stearns Magnetic v. Commissioner*, 208 F.2d 849, 853 (7th Cir. 1954) (same).

Here, the distributions were unquestionably made and received when the company cut checks paying personal expenses of the shareholders. There is no evidence suggesting that these distributions were subject to any qualification. They were not booked as loans, and there was no evidence of any loan agreements, interest repayments, or any receivable set-up on the company books to reflect money owed from the shareholders.[8] The jury could easily infer that the money was paid free-and-clear with no

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[8] *See Haber v. Commissioner*, 52 T.C. 255, 266 (1969) (rejecting characterization of distribution as loan where there was no contemporaneous evidence, such as journal entries, interest payments, or notes, noting that "[w]hether a withdrawal is a bona fide loan is a factual question, and depends upon the existence of an intent on the shareholder's part to repay at the time the withdrawal is made, and the intent of his collective alter ego, the corporation, to enforce the obligation.")

repayment obligation. The money was thus received and spent by the Marchellettas and, just like any other income, was due to be reported when received. The IRS Revenue Agent told the jury just that. (Doc. 101 at 354 ("these expenditures are taxable when the individual receives the benefit....")).

When the company's fiscal year closes is irrelevant to when the individual taxpayer receives the unqualified distribution. The only impact of the fiscal year close is that it might not be clear until then how to characterize the distribution - whether it is a "dividend," "return of capital," or "capital gain". This is because 26 U.S.C. §§ 301(a) and 316(a) provide that a distribution is a "dividend" only if there exist sufficient earnings and profits to pay it, as of the end of the close of the company's taxable year. *See Boulware*, 128 S.Ct. at 1179.[9] By definition, it cannot be known whether the company will have sufficient earnings - and

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[9] Otherwise, if earnings are insufficient, the distribution would be considered a return of the shareholder's capital. If the shareholder has insufficient paid-in-capital, the distribution would be considered a capital gain. 26 U.S.C. §§ 301(a), 316(a); *Boulware*, 128 S.Ct. at 1179.

Here, the government adduced evidence that the company had more than sufficient earnings as of March 31, 2001 to pay the personal expenses to the Marchellettas during April through December 2000. *Compare* Ex. 5 at 4 ($1.3 million in retained earnings as of the end of the FY 2001 end) *with* Ex. 524 (summary of $309,459 in personal expenses during that taxable year). Therefore, there is no question that the distributions qualify as dividends.

therefore whether the distribution should be reported as a "dividend" - until the fiscal year close.

But just because the form of the distributions was not definitely known until March 31, 2001, does not mean that is when they were received. They were still unqualifiedly received when the money was paid, and when the shareholders enjoyed the benefit. Nothing in Sections 301 or 316 changes this basic rule. Here, the Marchellettas received substantial payments in 2000. And by March 31, 2001 - well before their 2000 taxes were due (in October 2001) - it was clear that these payments were "dividends" because Circle had more than sufficient earnings. The payments were required to be reported when received.

Although this issue was not directly presented in *Boulware*, the Court discussed, in *dicta*, the timing rules that apply to the payment and reporting of dividends. 128 S.Ct. at 1179. These rules necessarily contemplate that dividends are reportable as income when received, even if the company's books close the following year. As the Court explained, a distribution must be reported as a dividend unless it is "clear at the time the reporting forms and returns are filed" that the corporation lacks sufficient earnings and profits. *Id.*, n.11. If there is doubt as to whether earnings will ultimately be sufficient, the "entire amount must be reported as a dividend." *Id.*

These rules would make no sense if dividends are only considered income when the company closes its taxable year. By definition, if that were the case, there would never be a question as to whether the company had sufficient earnings. These rules only exist because the shareholder might receive a dividend in one year, and have to wait until some time the following year to see exactly how to treat it. *See Midwest Stainless v. Commissioner*, T.C. Memo. 2000-314, 2000 WL 1470664 (U.S. Tax Ct.), *4 n.5 (if a distribution were not a loan, it "would have been treated as a constructive dividend distribution...in 1993 [the year of receipt], taxable as a dividend to the extent of corporate earnings and profits for the corporate fiscal year in which it occurred....").[10]

Boulware has little direct relevance here. In *Boulware*, the Court found that the trial court erred by precluding a defendant accused of tax evasion from arguing that the funds he diverted from his company should be characterized as a non-taxable return of capital, instead of as a dividend. (*Id.* at 1177-82). According to

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[10] Senior makes a separate timing argument - that none of the "Newport Bay" expenditures constituted income to him until 2002, because it was not until then that he "bought" the property from Circle. (Senior Br. at 45). This was another factual argument that the jury was entitled to reject. As discussed above, *supra* at 5-6, 43-44, the evidence was sufficient to show that Circle's "ownership" of Newport Bay was a sham. It was Senior's property all along - never even recorded on Circle's books or disclosed to its CPA - and only put in Circle's name as part of the scheme. The jury could permissibly conclude that the money to build Senior's house was income to Senior, when paid, just as if he had chosen to take it in salary and paid the contractors himself.

the Court, whether the defendant intended to treat the expenditures as a return-of-capital was not the determining factor. *Id.* Rather, the "economic substance remains the right touchstone for characterizing funds received when a shareholder diverts them before they can be recorded on the corporation's books." *Id.* at 1176. Thus, according to *Boulware*, if the transaction could be characterized as a return-of-capital - even if the defendants never considered this at the time - the defendant should have been permitted to present this theory to the jury.

Here, the Marchellettas never claimed that the personal expenditures should be treated as a return-of-capital from Circle, which is an issue as to which the defendant has traditionally been required to produce some evidence. *Boulware*, 128 S.Ct. n.14 (citing prior cases in support of this evidence production rule, although ultimately "express[ing] no view on that issue here....") . Rather, as discussed above, the evidence established more than sufficient earnings by which the distributions would have to be considered dividends.

And, unlike in *Boulware*, the Marchellettas here were fully allowed to present evidence and argument to the jury in support of their timing argument. Indeed, the issue in *Boulware* was not whether acquittals were required as a matter of law - as the Marchellettas here demand - but rather simply whether a motion precluding the jury from hearing a defense should have been

granted. The Supreme Court answered that question in the negative, but that has no meaning here, where the district court imposed no such limitations on the defense case.

2. Regardless Of The Timing Issue, Sufficient Evidence To Convict Remained As To Every Count

In any event, this argument is a red herring. Circle paid personal expenses for both Marchellettas - improperly booked as business expenses - during the fiscal year that ended March 31, 2000. Under the Marchellettas' theory, these expenses were taxable to the Marchellettas in their year 2000 personal returns. But the 2000 returns included none of this income either. In other words, whether the income was taxable when received, or when the fiscal year ended, the Marchellettas' year 2000 returns were false either way.

Specifically, Circle paid almost $5,000 in custom suits for Junior during the second half of 1999, improperly booked as business expenses, during the company fiscal year that ended March 31, 2000. (Ex. 218). Circle also paid over $8,000 during that same time for Junior's visits to Atlanta-area nightclubs, improperly booked as "vehicle" or other "miscellaneous" office expenses on the books that closed March 31, 2000. (Id.).[11] None

[11] At trial, Junior contended that these payments were legitimate business expenses for client entertainment. There was more than sufficient evidence for the jury to find otherwise,

of this income was reported on Junior's 2000 returns, which only included Junior's actual W-2 salary from Circle. (Exs. 1, 3, 518).

Junior's argument is that these 1999 payments should not be considered because the jury acquitted him of filing a false return in 1999. But this is besides the point. If the jury accepted Junior's argument, then the 1999 payments would not be reportable until 2000. In any event, it is well established that a defendant convicted on one count cannot attack that conviction because of a potential inconsistency with an acquittal on another count. *See U.S. v. Powell*, 469 U.S. 57, 69 (1984); *Dunn v. U.S.*, 284 U.S. 390 (1932).

Similarly, Circle paid over $1,000 for Senior's architect in January 2000, and Nastasi paid weekly $6,000 payments for Senior's consulting services during the entire first quarter of 2000, none of which was reported on Senior's 2000 return. (Exs. 4, 522; Doc. 100 at 228-238). Even accepting the Marchellettas' timing argument, there remained sufficient evidence for the jury to find that Senior willfully failed to report this year 2000 income on his year 2000 return.

Senior argues that the Nastasi payments were "appropriately taxable income to Circle, not [Senior]." (Br. at 50). But the jury was not compelled to agree. Indeed, Senior's lawyer argued

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including the fact that the expenses were not booked as travel/entertainment but rather mainly as "vehicle" expenses.

exactly the opposite at trial - that the "consulting" payments were disguised capital distributions from Nastasi to Senior. (Doc. 213 at 1294-96).

There was sufficient evidence - including the testimony of Nastasi, the payment contract (of which Senior, not Circle, was the beneficiary), the invoices that referenced "Jerry Marchelletta's [Senior's] consulting fees," and the fact that the consulting fees were ultimately booked to the "notes payable shareholder" account - that these payments were truly for Senior and were only being paid through Circle as part of the scam. *Supra* at 12-16.

Thus, sufficient evidence supported the verdicts even accepting the Marchellettas' theory about the timing of the fiscal year. For the reasons set forth above, the Court should conclude that sufficient evidence establishes the convictions of all three Defendants.

III. THE PROSECUTION'S OPENING STATEMENT WAS PROPER, AND CERTAINLY WAS NOT PLAIN ERROR THAT WAS SO PREJUDICIAL AS TO REVERSE

Despite no objection by any defendant, the Marchellettas now demand reversal of their convictions and a retrial, arguing that the prosecution's opening statement contained "an outrageous and highly improper diatribe ... that casts a haunting shadow over the fairness and integrity of" the trial. (Junior Br. at 19). This argument is not only unpreserved, it is meritless. There was no

impropriety, and certainly nothing constituting plain error requiring reversal.

To warrant reversal of a verdict based on a prosecutor's alleged improper argument, the Court must find: (1) that misconduct occurred, (2) which was so pronounced and persistent that it permeated the entire atmosphere of the trial. *U.S. v. McLain*, 823 F.2d 1457, 1462 (11th Cir. 1987). Specifically, a prosecutor's argument must be both improper and prejudicial to a substantial right of the defendant. *U.S. v. Bascaro*, 742 F.2d 1335, 1353 (11th Cir. 1984). The Court must consider any instructions that the trial court gave that would have mitigated or eliminated the prejudice. *See U.S. v. Stone*, 702 F.2d 1333, 1338 (11th Cir. 1983). And, in the case of an unpreserved objection such as this, the existence of such serious, pervasive, prejudicial, and unmitigable error must be plain. *See U.S. v. Wiggins*, 788 F.2d 1476, 1478 (11th Cir. 1986).

The Marchellettas complain that, during a 30-minute opening statement, which was filled with descriptions of the charges and anticipated evidence, and which concluded by telling the jurors that they would only be asked to consider a verdict "after you've heard the evidence for yourself, you've heard the testimony and seen the documents," (Doc. 205 at 9-28), the prosecutor: (1) on two occasions described the victims of these tax crimes as "the U.S. and its taxpayers"; and, (2) stated that the Marchellettas "knew

the rules and didn't follow the rules because they didn't want to be covered by the same rules that everyone else does." (Id., 10-11, 27-28). The Marchellettas also complain that the opening appealed to "class and economic envy" by using words like "mansions," "custom-clothing," and "multi-million." (Junior Br. at 20-21).

These isolated statements were not improper. The reference to these crimes as against the "U.S. and its taxpayers" was part of the explanation of what this tax evasion case was about. Indeed, the Indictment charged that the purpose of the crime was to "defraud the U.S.," with regard to "the ascertainment, computation, assessment, and collection of ... income taxes." (Doc. 42 at 1-2). The reference to knowing and ignoring rules applicable to all, reflected the required element of intent - that the Defendants acted "voluntarily as an intentional violation of a known legal duty; that is, with specific intent to do something the law forbids." (Doc. 213 at 1230).

Thus, the comments explained the crime and what the government anticipated the evidence would show, and did not impermissibly appeal to the jurors personally. *See, e.g., U.S. v. Abu Ali*, 528 F.3d 210, 243 (4th Cir. 2008) (prosecutor's multiple statements in a terrorism case that the defendant wanted to "'kill'" or "'hurt *us*,'" were not improper given the nature of the crime, and "were not directed to the jurors personally and were intended to refer to

the entire American populace"); *U.S. v. Schimmel*, 943 F.2d 802, 806 (7th Cir. 1991) (in bank fraud case, it was not improper for prosecutor to say "that law is there ... to protect depositors," even though prosecutor earlier stated "people like you and I" deposit money).

By contrast, the cases cited by the Marchellettas involved direct, personal references to the jurors themselves, *see U.S. v. Smyth*, 556 F.2d 1179, 1185 (5th Cir. 1977) (in rebutting defense, prosecutor stated to the jury "that's *your* tax money being kicked in there," although even this did not merit reversal) (emphasis added); *U.S. v. Gainey*, 111 F.3d 834, 836 (11th Cir. 1997) (in narcotics case, prosecutor played to community fears by stating "*we* live in South Florida and *we* are very familiar with it by now," although even this did not merit reversal) (emphasis added); *Buttermore v. U.S.*, 180 F.2d 853, 856 (6th Cir. 1950) (prosecutor argued that "*you and I* are paying the premium" for the crime, although even this did not merit reversal) (emphasis added); *U.S. v. Trutenko*, 490 F.2d 678, 679 (7th Cir. 1973) (prosecutor argued that the "reason *you* are paying plenty [in insurance premiums] is because the insurance companies are forced to pay out on phony claims," although even this did not merit reversal) (emphasis added); *U.S. v. Blecker*, 657 F.2d 629, 639 (4th Cir. 1981) (not addressing propriety of remark that "*we* had to pay more" because of

the crime, because, regardless, no reversal warranted) (emphasis added).

The other cases cited by the Marchellettas involve blatantly improper arguments not remotely comparable to those here. *See U.S. v. Rodriguez*, 765 F.2d 1546, 1560 (11th Cir. 1985) (prosecutor improperly impugned the character of non-testifying immigrant defendant, by calling him a "liar" and stating that he "spit on the country that's accepted him," although even this did not merit reversal); *Ivy v. Sec. Barge Lines*, 585 F.2d 732, 741 (5th Cir. 1978) (plaintiff's lawyer in asking the jury to value a child's life, asked that they "place yourselves in [the parents'] shoes"); *Handford v. U.S.*, 249 F.2d 295, 298-99 (5th Cir. 1958) (prosecutor improperly argued that "too many of his friends" and "his friends' children get run over, up and down the highway," which was inapposite to the alleged crime of failing to pay whiskey taxes).

The statements here were hardly of the same personal nature as those discussed in these cases. Impersonally referring in the third-person to the "U.S. and its taxpayers," and the rules "everyone must follow," was far from personally telling the jurors "that's <u>your</u> tax money being kicked in there," and cannot possibly be compared to suggesting that the Defendants' crimes resulted in "children get[ting] run over."

The references to "mansions" and "custom-suits" - and other luxuries - were accurate descriptions of evidence. That the

Marchellettas skimmed from Circle in the amounts they did to fund luxurious personal expenses was exactly what the evidence would show, and was directly relevant to (1) the existence and extent of unreported income; and (2) intent. For example, that the Marchellettas chose luxury refinements for million-dollar homes was evidence of intent, because the Marchellettas knew they were not personally paying for any of these obviously expensive items.

Moreover, any impropriety was not so egregious as to render the trial "fundamentally unfair." *See, e.g., Johnson v. Bell*, 525 F.3d 466, 484 (6th Cir. 2008) (refusing to remand even where prosecutor made highly improper personalized argument that "[i]t could have been my little girl that was in that store, a witness eliminated. It could have been you. It could have been your children. It could have been any one of us, if we decided that we wanted to buy something from Bob Bell, at nine fifty-eight on July 5, 1980, we would have been dead," where there was no objection at trial, the district court instructed the jury that statements of counsel were not evidence, and the evidence of guilt was strong).

Only <u>three</u> of Defendants' cases granted the drastic relief of a new trial, and <u>none</u> appear to have done so on the basis of plain error: (1) *Ivy*, 585 F.2d at 741, which remanded based on the cumulative effect of many errors, and not specifically because of improper argument; (2) *Handford*, 249 F.2d at 298-99, the sales-tax case involving the prosecutor's reference to "children get[ting]

run over"; and (3) *Cooper v. Miami Dade County*, 2004 WL 2044288 (S.D. Fla., July 9, 2004), a district court opinion, in which the plaintiff's counsel said "I'm asking you to put yourself in [plaintiffs'] shoes."

The Marchellettas' argument further suffers from the fact that the district court issued several instructions that eliminated any arguable prejudice. Before trial began, the court stated "[s]tatements, arguments and questions by lawyers are not evidence," and that the prosecution's opening "is simply an outline to help you understand the evidence as it comes in." (Doc. 205 at 4, 7). The court in its closing instructions repeated that "anything that the lawyers say is not evidence in the case," and that "[y]ou must make your decision only on the basis of the testimony and other evidence presented here during the trial, and you must not be influenced in any way by either sympathy or prejudice for or against any defendant or the Government." (Doc. 213 at 1214-6). *See U.S. v. Stone*, 702 F.2d 1333, 1338 (11th Cir. 1983) (rejecting claim of improper prosecutor argument, in part based on instructions such as those given here, "which must be taken to have mitigated any prejudice that might have existed").

Moreover, the jury acquitted Defendants of three charges - Count Two (against Junior, as to his 1999 return), and Counts 7-8 (accusing Kottwitz of aiding the filing of the false 2000 Marchelletta returns) - which shows that the jury was not driven by

prejudice and emotion.[12] Rather, the record suggests that the jury, as instructed, issued its verdict based on the evidence, and in doing so carefully and individually contemplated each count and each defendant.

The Defendants' failure to preserve their objection was, again, not merely technical. The trial court might have considered even stronger cautionary instructions - or might even have instructed the jury to disregard any comments the court deemed improper. The trial court, after all, is in the best position to gauge potential bias and whether sufficient steps short of the severe remedy of mistrial are available. *See Arizona v. Washington*, 434 U.S. 497, 510-14 (1978); *U.S. v. Moreno*, 991 F.2d 943, 948 (1st Cir. 1993) ("The experienced trial judge, who was in the best position to appraise the prejudicial impact of the

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[12] Junior wrongly argues that the jury's split verdict shows that the case was "close." The jury was instructed to - and apparently did - weigh the evidence of each count separately. That it found reasonable doubt on one count has no bearing on the quality of the evidence as to the remaining counts. Indeed, the overwhelming issue as to Junior's 1999 conduct was a transaction involving a Circle affiliate in the Bahamas, which the indictment alleged to be an illegal repatriation of assets. (Doc. 42 at 6-7). That the jury would acquit as to this conduct had no bearing on whether it found the remaining evidence "close." And that the jury acquitted Kottwitz - who does not join in this issue - of certain counts also does not show that it found the issues as to the Marchellettas close.

In fact, the evidence was not "close." The Marchellettas spent over a million dollars to buy land, build houses, custom suits, and other things, without paying taxes on this obvious income, and instead hid it. This was not a "close" case.

prosecutor's remark, thought a curative instruction the correct remedy."). If the district court determined that a mistrial was warranted - albeit erroneously - that relief could have been granted minutes into the trial, sparing the court, jurors, and dozens of witnesses the inconvenience of this nearly two-week trial.

The Marchellettas, however, deprived the court of the chance to make these determinations. Instead, they stood silent, and now argue for a whole new trial on appeal. This is offensive to any notion of judicial economy and should be rejected.

IV. THE EVIDENCE SUPPORTED THE JUDGE'S FINDINGS OF TAX LOSS AS TO SENIOR AT SENTENCING

"A district court's ... factual findings are reviewed for clear error." *U.S. v. Douglas*, 489 F.3d 1117, 1129 (11th Cir. 2007) (per curiam). In particular, when calculating loss to victims according to the Sentencing Guidelines, the district court need only make a reasonable estimate of the loss. *U.S. v. Masferrer*, 514 F.3d 1158, 1164 (11th Cir. 2008).

Senior disputes the district court's finding as to the tax loss,[13] arguing that the court clearly erred in including a number

[13] The court sentenced the Defendants based on the intended tax loss, i.e., the amount that it found the Defendants conspired to get away with. Doc. 204 at 142-49; *see* U.S.S.G. § 2T1.1(c). Thus, the Court properly did not consider that the Marchellettas ultimately reported the income in the returns prepared by Brown.

of categories of unreported income. Each of these issues, however, reflect sufficiently supported factual determinations.

Senior argues that the district court was obligated to disregard: (1) the $600,000 in Nastasi consulting fees, which Senior claims was "income to Circle, not Marchelletta" (Senior's Br. at 53); (2) the funds that Circle spent in 2000-2002 to build "Newport Bay" and purchase the land, which Senior argues was not "income" to him until he "bought" Newport Bay from Circle in 2002; and (3) the rent on Senior's Atlanta apartment and the landscaping on his New York house. Senior also argues that the court improperly considered the unfiled draft 2001 returns prepared by Schwartz because they "were never signed ...." (Senior Br. at 55-56).

Indeed, Senior's arguments as to sentencing essentially repeat those made in challenging the sufficiency of the evidence of guilt. And for the same reasons that the jury was entitled to reject those factual arguments, so too was the judge at sentencing.

In particular, the district court properly considered the draft returns prepared by Schwartz for 2001 - and the corporate books for that fiscal year - as the best evidence of contemporaneous intent. While Senior never signed the draft 2001 return, it was prepared based on the false information provided to Schwartz, and the omission of other material information. It was not clear error to find that Senior would have willfully filed that

false return had he not happened to learn he was being investigated.

CONCLUSION

Thus, the government respectfully requests that this Court affirm.

Respectfully submitted,

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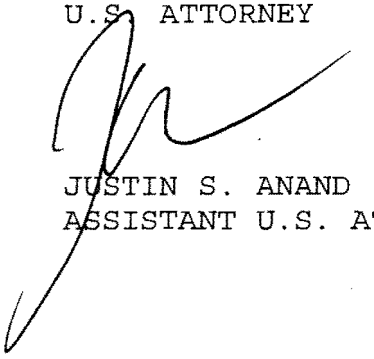

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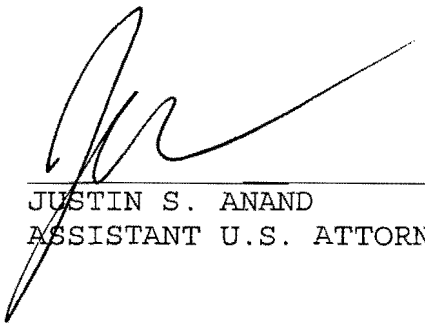
CERTIFICATE OF COMPLIANCE

This brief is in excess of the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains 15,999 words. The government is filing a motion to extend the word limit in conjunction with this brief.



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This is to certify that I have this day served upon the persons listed below a copy of the foregoing document by depositing in the U.S. Mail a copy of same in an envelope with correct postage for delivery. Uploading of the government's brief awaits the Court's Order on motion to extend the word limit.

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