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UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA,)	CR. 10-50092-JLV
)	
Plaintiff,)	FINAL INSTRUCTIONS
)	TO THE JURY
vs.)	
)	
EDWARD J.S. PICARDI, M.D.,)	
)	
Defendant.)	

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FINAL INSTRUCTION NO. 1 - INTRODUCTION

Members of the jury, the written instructions I gave you at the beginning of the trial and any oral instructions I gave you during the trial remain in effect. All instructions, whenever given and whether in writing or not, are equally binding on you and must be followed.

The final instructions I am about to give you will be available in the jury room. These instructions explain the law that applies to this case. You must consider my instructions as a whole and not single out some instructions and ignore others.

FINAL INSTRUCTION NO. 2 - DUTY OF JURORS

This is a criminal case brought by the United States government against the defendant, Dr. Edward J.S. Picardi. The defendant is charged with thirteen offenses—five counts of tax evasion, five counts of making and subscribing to a false Form 1040 Schedule B, and three counts of failing to file a report of foreign financial accounts. Each count charges a separate offense, and you must consider each count separately.

Your duty is to decide from the evidence whether the defendant is not guilty or guilty of each offense charged against him. You will find the facts from the evidence presented in court. “Evidence” is defined in Final Instruction No. 15. You are entitled to consider that evidence in light of your own observations and experiences. You may use reason and common sense to draw conclusions from facts established by the evidence. You will then apply the law to the facts to reach your verdict. You are the sole judges of the facts, but you must follow the law as stated in my instructions, whether you agree with the law or not.

It is vital to the administration of justice that each of you faithfully perform your duties as jurors. Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict based solely on the evidence, your common sense, and the law as I give it to you. Do not take anything I said or did during the trial as an indication of what I think about the evidence or what

I think your verdict should be. Do not conclude from any ruling or comment I made that I have any opinion on how you should decide the case.

Please remember only Dr. Picardi, not anyone else, is on trial here. Also, remember he is on trial only for the offenses charged against him, not for anything else.

FINAL INSTRUCTION NO. 3 - PRELIMINARY MATTERS

Each offense consists of “elements” which the government must prove beyond a reasonable doubt in order to convict the defendant of that offense. To help you evaluate the evidence, I will give you the elements that make up each offense charged in the indictment. However, I must first explain some preliminary matters.

The charges against the defendant are set out in an indictment. An indictment is simply an accusation. It is not evidence of anything. The defendant pled not guilty to the charges brought against him. Therefore, the defendant is presumed to be innocent unless and until the government proves, beyond a reasonable doubt, each element of an offense charged.

The indictment charges the offenses were committed “on or about” a certain date. The government does not have to prove with certainty the exact date of an offense charged. It is sufficient if the evidence establishes that an offense occurred within a reasonable time of the date alleged in the indictment.

In the next three instructions, I will give you the elements for each offense charged in the indictment. **Keep in mind each count charges a separate offense. You must consider each count separately and return a separate verdict for each count.**

Finally, you are instructed that the tax laws of the United States are valid and that the Internal Revenue Service is authorized to carry out those laws.

FINAL INSTRUCTION NO. 4 - COUNTS 1-5: TAX EVASION

Count 1 of the indictment alleges that, for calendar year 1999, Dr. Picardi received taxable income of approximately \$518,000 and willfully attempted to evade or defeat part of the income tax he owed to the United States, that is, approximately \$143,000 in additional tax.

Count 2 of the indictment alleges that, for calendar year 2000, Dr. Picardi received taxable income of approximately \$575,000 and willfully attempted to evade or defeat part of the income tax he owed to the United States, that is, approximately \$191,000 in additional tax.

Count 3 of the indictment alleges that, for calendar year 2001, Dr. Picardi received taxable income of approximately \$564,000 and willfully attempted to evade or defeat part of the income tax he owed to the United States, that is, approximately \$185,000 in additional tax.

Count 4 of the indictment alleges that, for calendar year 2002, Dr. Picardi received taxable income of approximately \$562,000 and willfully attempted to evade or defeat part of the income tax he owed to the United States, that is, approximately \$186,000 in additional tax.

Count 5 of the indictment alleges that, for calendar year 2003, Dr. Picardi received taxable income of approximately \$458,000 and willfully attempted to evade or defeat part of the income tax he owed to the United States, that is, approximately \$106,000 in additional tax.

Elements

For you to find the defendant guilty of tax evasion as charged in Counts 1 through 5 of the indictment, the government must prove the following three essential elements beyond a reasonable doubt as to the offense charged in each count:

One, that for the calendar year identified in the count, Dr. Picardi owed a substantial income tax in addition to that which he reported on his tax return;

Even though the indictment alleges a specific amount of tax due for each calendar year, the proof need not show the precise amount of the additional tax due. The government is only required to establish, beyond a reasonable doubt, that the defendant attempted to evade a substantial income tax, whether greater or less than the amount charged in the indictment.

The term “income” is defined in Final Instruction No. 7.

Two, that Dr. Picardi attempted to evade or defeat that additional tax;

To “attempt to evade or defeat” a tax involves two things: first, an intent to evade or defeat the tax and second, some act willfully done in furtherance of such intent. The word “attempt” contemplates that the defendant knew and understood that, during the calendar year charged, he had some income which was taxable and which he was required by law to report, but that he nevertheless sought to evade or defeat all or a substantial portion of the tax on that income by willfully failing to report all his known income which he knew he was required by law to state in his return for such year.

A failure to act is not an attempt to evade paying taxes. But, any affirmative act, the likely effect of which would be to mislead or conceal a defendant's tax liability, is an attempt to evade or defeat taxes. The law makes it a crime willfully to attempt, in any way or manner, to evade or defeat any income tax imposed by law.

To "evade or defeat" a tax means to escape paying a tax by means other than lawful avoidance.

An attempt to evade an income tax for one year is a separate offense from an attempt to evade the tax for a different year.

The fact that an individual's name is signed to a tax return means that, unless the evidence in the case leads you to a different or contrary conclusion, you may find that a filed tax return was in fact signed by the person whose name appears to be signed to it. If you find proof beyond a reasonable doubt that the defendant signed his tax return, that is evidence from which you may, but are not required to, find or infer that the defendant had knowledge of the contents of the return.

and *Three*, that Dr. Picardi acted willfully.

To act "willfully" means to voluntarily and intentionally violate a known legal duty. In other words, "willfully" means both that the defendant knew of his duty to pay the tax and that he voluntarily and intentionally violated that duty. A defendant's conduct is not willful if he acted through negligence, inadvertence, or mistake.

To find the defendant guilty of tax evasion as charged in Counts 1 through 5 of the indictment, the government must prove all three essential elements beyond a reasonable doubt as to each offense. If the government proves all the essential elements beyond a reasonable doubt, you must find the

defendant guilty of that offense. If the government fails to prove any essential element beyond a reasonable doubt, you must find the defendant not guilty of that offense.

**FINAL INSTRUCTION NO. 5 - COUNTS 6-10: MAKING AND SUBSCRIBING
TO A FALSE FORM 1040 SCHEDULE B**

Counts 6 through 10 of the indictment allege that on or about October 17, 2005 (Count 6), October 16, 2006 (Count 7), October 15, 2007 (Count 8), October 15, 2008 (Count 9), and October 14, 2009 (Count 10), Dr. Picardi willfully made and subscribed to a Form 1040 Schedule B which he did not believe to be true and correct as to every material matter and which contained or was verified by a written declaration that it was made under the penalties of perjury.

Elements

For you to find the defendant guilty of making and subscribing to a false return, statement, or other document as charged in Counts 6 through 10 of the indictment, the government must prove the following five essential elements beyond a reasonable doubt as to the offense charged in each count:

One, that Dr. Picardi made and signed a Form 1040 Schedule B for the year specified in the count and the form was false in that it stated he did not have a financial interest in, or signature or other authority over, a foreign financial account;

The Form 1040 Schedule B must be false as to the defendant's declaration he did not have a financial interest in, or signature or other authority over, a foreign financial account. That is, to make this declaration false, the defendant must have had a financial interest in, or signature or other authority, over a foreign financial account. The government is not required to

prove that the defendant owed an additional tax for the years in issue. Whether the government has or has not suffered a monetary loss is not an element of this offense.

The fact that an individual's name is signed to a document means that, unless the evidence in the case leads you to a different or contrary conclusion, you may find that a filed document was in fact signed by the person whose name appears to be signed to it. If you find proof beyond a reasonable doubt that the defendant signed the Form 1040 Schedule B, that is evidence from which you may, but are not required to, find or infer that the defendant had knowledge of the contents of the form.

As to Counts 6, 7, 8, and 9 only, a "financial interest" in a bank, securities, or other financial account in a foreign country means an interest described in either of the following two paragraphs:

- (1) A United States person has a financial interest in each account for which such person is the owner of record or has legal title, whether the account is maintained for his own benefit or for the benefit of others including non-United States persons. If an account is maintained in the name of two persons jointly, or if several persons each own a partial interest in an account, each of those United States persons has a financial interest in that account.
- (2) A United States person has a financial interest in each bank, securities, or other financial account in a foreign country for which the owner of record or holder of legal title is: (a) a person acting as an agent, nominee, attorney, or in some other capacity on behalf of the U.S. person; (b) a corporation in which the United States person owns directly or indirectly more than 50 percent of the total value of shares of stock; (c) a partnership in which the United

States person owns an interest in more than 50 percent of the profits (distributive share of income); or (d) a trust in which the United States person either has a present beneficial interest in more than 50 percent of the assets or from which such person receives more than 50 percent of the current income.

As to Count 10 only, a “financial interest” in a bank, securities, or other financial account in a foreign country means an interest described in one of the following three paragraphs:

- (1) A United States person has a financial interest in each account for which such person is the owner of record or has legal title, whether the account is maintained for his own benefit or for the benefit of others including non-United States persons.
- (2) A United States person has a financial interest in each bank, securities, or other financial account in a foreign country for which the owner of record or holder of legal title is: (a) a person acting as an agent, nominee, attorney, or in some other capacity on behalf of the U.S. person; (b) a corporation in which the United States person owns directly or indirectly more than 50 percent of the total value of shares of stock or more than 50 percent of the voting power for all shares of stock; (c) a partnership in which the United States person owns an interest in more than 50 percent of the profits (distributive share of income, taking into account any special allocation agreement) or more than 50 percent of the capital of the partnership; or (d) a trust in which the United States person either has a present beneficial interest, either directly or indirectly, in more than 50

percent of the assets or from which such person receives more than 50 percent of the current income.

- (3) A United States person has a financial interest in each bank, securities, or other financial account in a foreign country for which the owner of record or holder of legal title is a trust, or a person acting on behalf of a trust, that was established by such United States person and for which a trust protector has been appointed. A trust protector is a person who is responsible for monitoring the activities of a trustee, with the authority to influence the decisions of the trustee or to replace, or recommend the replacement of, the trustee.

As to Counts 6, 7, 8, 9, and 10, a person has “signature authority” over an account if such person can control the disposition of money or other property in it by delivery of a document containing his signature (or his signature and that of one or more other persons) to the bank or other person with whom the account is maintained.

As to Counts 6, 7, 8, and 9 only, “other authority” exists in a person who can exercise comparable power over an account by direct communication to the bank or other person with whom the account is maintained, either orally or by some other means.

As to Count 10 only, “other authority” exists in a person who can exercise comparable power over an account by communication with the bank or other person with whom the account is maintained, either directly or through an agent, nominee, attorney, or in some other capacity on behalf of the U.S. person, either orally or by some other means.

Two, that the Form 1040 Schedule B contained a written declaration that it was signed under the penalties of perjury;

Three, that Dr. Picardi did not believe the Form 1040 Schedule B to be true and correct as to the statement he did not have a financial interest in, or signature or other authority over, a foreign financial account;

Four, that Dr. Picardi acted willfully;

To act "willfully" means to voluntarily and intentionally violate a known legal duty. In other words, "willfully" means both that the defendant knew of his duty to submit an accurate Form 1040 Schedule B and that he voluntarily and intentionally violated that duty. A defendant's conduct is not willful if he acted through negligence, inadvertence, or mistake.

and Five, that the false matter in the Form 1040 Schedule B was material.

False matter in a Form 1040 Schedule B is "material" if the matter was capable of influencing the Internal Revenue Service.

To find the defendant guilty of making and subscribing to a false Form 1040 Schedule B as charged in Counts 6 through 10 of the indictment, the government must prove all five essential elements beyond a reasonable doubt as to each offense. If the government proves all the essential elements beyond a reasonable doubt, you must find the defendant guilty of that offense. If the government fails to prove any essential element beyond a reasonable doubt, you must find the defendant not guilty of that offense.

**FINAL INSTRUCTION NO. 6 - COUNTS 11-13: FAILING TO FILE A REPORT
OF FOREIGN FINANCIAL ACCOUNTS**

Counts 11 through 13 of the indictment allege that on or about June 30, 2007 (Count 11), June 30, 2008 (Count 12), and June 30, 2009 (Count 13), Dr. Picardi, knowing he had a legal duty to file a report of foreign financial accounts, knowingly and willfully failed to file with the Internal Revenue Service a report disclosing a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country, that is, accounts held by E&S International Limited with the Royal Bank of Scotland in Guernsey and with London and Capital and Collins Stewart Ltd. in England.

Elements

For you to find the defendant guilty of failing to file a report of foreign financial accounts as charged in Counts 11 through 13 of the indictment, the government must prove the following five essential elements beyond a reasonable doubt as to the offense charged in each count:

One, that at the time alleged in the count, Dr. Picardi was a resident or citizen of the United States or was a person in, and doing business in, the United States;

Two, that Dr. Picardi had a financial interest in, or signature or other authority over, one or more bank, securities, or other financial accounts in a foreign country during the previous calendar year;

As to Counts 11 and 12 only, a “financial interest” in a bank, securities, or other financial account in a foreign country means an interest described in either of the following two paragraphs:

- (1) A United States person has a financial interest in each account for which such person is the owner of record or has legal title, whether the account is maintained for his own benefit or for the benefit of others including non-United States persons. If an account is maintained in the name of two persons jointly, or if several persons each own a partial interest in an account, each of those United States persons has a financial interest in that account.

- (2) A United States person has a financial interest in each bank, securities, or other financial account in a foreign country for which the owner of record or holder of legal title is: (a) a person acting as an agent, nominee, attorney, or in some other capacity on behalf of the U.S. person; (b) a corporation in which the United States person owns directly or indirectly more than 50 percent of the total value of shares of stock; (c) a partnership in which the United States person owns an interest in more than 50 percent of the profits (distributive share of income); or (d) a trust in which the United States person either has a present beneficial interest in more than 50 percent of the assets or from which such person receives more than 50 percent of the current income.

As to Count 13 only, a “financial interest” in a bank, securities, or other financial account in a foreign country means an interest described in one of the following three paragraphs:

- (1) A United States person has a financial interest in each account for which such person is the owner of record or has legal title, whether the account is maintained for his own benefit or for the benefit of others including non-United States persons.
- (2) A United States person has a financial interest in each bank, securities, or other financial account in a foreign country for which the owner of record or holder of legal title is: (a) a person acting as an agent, nominee, attorney, or in some other capacity on behalf of the U.S. person; (b) a corporation in which the United States person owns directly or indirectly more than 50 percent of the total value of shares of stock or more than 50 percent of the voting power for all shares of stock; (c) a partnership in which the United States person owns an interest in more than 50 percent of the profits (distributive share of income, taking into account any special allocation agreement) or more than 50 percent of the capital of the partnership; or (d) a trust in which the United States person either has a present beneficial interest, either directly or indirectly, in more than 50 percent of the assets or from which such person receives more than 50 percent of the current income.
- (3) A United States person has a financial interest in each bank, securities, or other financial account in a foreign country for which the owner of record or holder of legal title is a trust, or a person acting on behalf of a trust, that was established by such United States person and for which a trust protector has been appointed. A trust protector is a person who is responsible for monitoring the activities of a trustee, with

the authority to influence the decisions of the trustee or to replace, or recommend the replacement of, the trustee.

As to Counts 11, 12, and 13, a person has “signature authority” over an account if such person can control the disposition of money or other property in it by delivery of a document containing his signature (or his signature and that of one or more other persons) to the bank or other person with whom the account is maintained.

As to Counts 11 and 12 only, “other authority” exists in a person who can exercise comparable power over an account by direct communication to the bank or other person with whom the account is maintained, either orally or by some other means.

As to Count 13 only, “other authority” exists in a person who can exercise comparable power over an account by communication with the bank or other person with whom the account is maintained, either directly or through an agent, nominee, attorney, or in some other capacity on behalf of the U.S. person, either orally or by some other means.

Three, that the bank, securities, or other financial account or accounts had a balance exceeding \$10,000 in aggregate value maintained during the previous calendar year;

The aggregate balance of a defendant’s financial accounts in foreign countries had to exceed \$10,000. No single account needs to have had a \$10,000 balance in a particular year.

Four, that Dr. Picardi knew he had a legal duty to file a report of foreign financial accounts;

and *Five*, that Dr. Picardi knowingly and willfully failed to file the report on or before June 30 of the year specified in the count.

An act is done “knowingly” if the defendant realized what he was doing and did not act through ignorance, mistake, or accident.

To act “willfully” means to voluntarily and intentionally violate a known legal duty. In other words, “willfully” means both that the defendant knew of his duty to file a report of foreign financial accounts and that he voluntarily and intentionally violated that duty. A defendant’s conduct is not willful if he acted through negligence, inadvertence, or mistake.

To find the defendant guilty of failing to file a report of foreign financial accounts as charged in Counts 11 through 13 of the indictment, the government must prove all five essential elements beyond a reasonable doubt as to each offense. If the government proves all the essential elements beyond a reasonable doubt, you must find the defendant guilty of that offense. If the government fails to prove any essential element beyond a reasonable doubt, you must find the defendant not guilty of that offense.

FINAL INSTRUCTION NO. 7 - DEFINITION OF INCOME

The term “income” is a broad concept that includes any economic gain from whatever source. The essence of income is the accrual of some gain, profit, or benefit to the taxpayer.

The term “taxable income” means gross income minus any deductions allowed by law.

Federal income taxes are levied upon taxable income derived from compensation for personal services of every kind and in whatever form paid, whether as wages, commissions, or money earned for performing services.

Money or property received from any source constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it, in other words, when he has freedom to dispose of it or use it at will. It is the dominion and control over property, and not documentary title, that determines to whom the income from that property is taxable. This concept is also known as constructive receipt.

A loan that the parties to the loan agree is to be repaid does not constitute income. However, merely calling a transaction a loan is not sufficient to make it a loan. When money is acquired and there is no good faith intent on the part of the borrower to repay the funds advanced, the funds are income and are taxable as such.

A taxpayer may deduct from taxable income any loss sustained during the taxable year and not reimbursed by insurance or otherwise. Deductible losses include losses that arise from theft. The term "theft" is used broadly to encompass all criminal appropriations of another's property, including larceny or embezzlement.

FINAL INSTRUCTION NO. 8 - TAX LAW AS TO ALL COUNTS

The United States tax laws require that a taxpayer report his income for every taxable year in which the income is actually or constructively received. Income is constructively received by a taxpayer in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time. In other words, income is not taxable to a person unless and until it is “realized.” This means that income or a gain is taxable when the taxpayer receives the benefit of it.

Earned income is taxable to those who earn it and that dominion and control over property—and not documentary title—determine to whom the income from that property is taxable.

Tax consequences depend on the substance of a transaction, not the form. Income is taxed to the person or entity that, in fact, earned it. Therefore, a transaction which lacks economic substance that is entered into for the primary purpose of evading tax is disregarded by the law as a sham.

If you find from the evidence that entities do not exist except in form and are otherwise a sham, you are to consider whether or not the defendant engaged in willful wrongdoing.

It is your responsibility as jurors to judge the facts and determine whether the contracts or agreements in this case were “sham” contracts or agreements. You are instructed that a legitimate contract or agreement (as

opposed to a “sham” one) actually serves some kind of industrial, commercial, or other business activity besides avoiding lawful tax obligations. As jurors, you must make this factual determination whether the contracts or agreements in this case actually served some sort of industrial, commercial, or other business activity or purpose of the defendant.

Even if you find a contract or agreement was legitimate, you can still consider whether this contract or agreement was used by the defendant to avoid his lawful tax obligations such that the entire transaction can be considered a “sham” transaction.

A transaction is not necessarily a “sham” simply because it is motivated by some tax-savings considerations.

A transaction without economic substance that is entered into solely for the purpose of tax avoidance cannot properly be used to compute taxes. The law does not allow a deduction that arises out of a transaction which has no purpose, substance, or utility apart from the anticipated tax consequences. On the other hand, a deduction is proper in this context if there is some economic substance to the transaction giving rise to the deduction beyond the taxpayer’s desire to secure a deduction.

A taxpayer may try to pay as little tax as possible, so long as he uses legal means. Transactions may be arranged in an attempt to minimize taxes if the transactions have economic substance. The government contends that the

employee leasing companies and employee leasing contracts in this case have no economic substance. The defendant contends that these transactions related to foreign deferment programs did have economic substance. In determining whether a particular transaction had economic substance or not, you are instructed to consider the overall circumstances surrounding the asserted transactions.

FINAL INSTRUCTION NO. 9 - PROOF OF INTENT OR KNOWLEDGE

Intent or knowledge may be proven like anything else. You may consider any statements made and acts done by the defendant and all the facts and circumstances in evidence which may aid in a determination of the defendant's intent or knowledge.

You may, but are not required to, infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

FINAL INSTRUCTION NO. 10 - DELIBERATE IGNORANCE

You may find the defendant acted knowingly if you find beyond a reasonable doubt:

- (1) (a) as to Counts 1 through 5, he believed there was a high probability he owed a substantial income tax in addition to that which he reported on his tax return;
 - (b) as to Counts 6 through 10, he believed there was a high probability he had a financial interest in, or signature or other authority over, a foreign financial account and had to report that information on the Form 1040 Schedule B;
 - (c) as to Counts 11 through 13, he believed there was a high probability he had a legal duty to file a report of foreign financial accounts; and
- (2) he took deliberate actions to avoid learning those facts.

Knowledge may be inferred if a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts. You may not find the defendant acted “knowingly” if you find he was merely negligent, careless, reckless, or mistaken.

As to Counts 1 through 5, you may not find the defendant acted knowingly if you find he actually believed he did not owe a substantial income tax in addition to that which he reported on his tax return.

As to Counts 6 through 10, you may not find the defendant acted knowingly if you find he actually believed he did not have a financial interest in, or signature or other authority over, a foreign financial account and did not have to report that information on the Form 1040 Schedule B.

As to Counts 11 through 13, you may not find the defendant acted knowingly if you find he actually believed he did not have a legal duty to file a report of foreign financial accounts.

FINAL INSTRUCTION NO. 11 - GOOD FAITH

One of the issues in this case is whether the defendant acted in good faith. Good faith is a complete defense to each offense charged in the indictment if that good faith is inconsistent with willful conduct, which is an essential element of each offense.

Evidence a person acted in good faith may be considered by you, together with all other evidence, in determining whether or not the defendant acted with the requisite willfulness for each offense charged in the indictment.

While the term good faith has no precise definition, it means among other things an honest belief, a lack of malice, and the intent to perform all lawful obligations. A person who acts on a belief or an opinion honestly held is not punishable under that belief merely because it turns out to be incorrect or wrong. It is a subjective, rather than an objective standard in evaluating whether the defendant acted in good faith. The tax laws subject to criminal punishment only those who act willfully.

If a person in good faith believes that his income tax return, statement, and other forms of the Internal Revenue Service are truthful and consistent with internal revenue laws, then that person cannot be guilty of willful wrongdoing.

FINAL INSTRUCTION NO. 12 -

RELIANCE ON ADVICE OF AN ATTORNEY OR TAX PREPARER

Advice of an attorney or tax preparer is not a defense to the offenses charged in the indictment. It is only a circumstance that may be considered in determining whether the defendant acted in good faith and lacked willfulness.

The defendant does not act willfully if, before taking any action with regard to the alleged offenses, he consulted in good faith with an attorney or tax preparer whom he considered competent, and for the purpose of securing advice on the lawfulness of his possible future conduct, made a full and accurate report to that attorney or tax preparer of all material facts of which he had the means of knowledge, and then acted strictly in accordance with the advice given to him by that attorney or tax preparer.

Whether the defendant acted in good faith for the purpose of seeking advice concerning questions about which he was in doubt, and whether he made a full and complete report to that attorney or tax preparer, and whether he acted strictly in accordance with the advice he received, are questions for you to determine.

Advice of an attorney or tax preparer does not under all circumstances confer complete immunity on a defendant. No one can intentionally and knowingly violate the law and excuse himself from the consequences by claiming that he followed advice of an attorney or tax preparer.

FINAL INSTRUCTION NO. 13 -

PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

The defendant is presumed innocent and, therefore, not guilty. This presumption of innocence requires you to put aside all suspicion that might arise from the arrest or charge of the defendant or the fact he is here in court. The presumption of innocence remains with the defendant throughout the trial. This presumption alone is sufficient to find the defendant not guilty. The presumption of innocence may be overcome only if the government proves, beyond a reasonable doubt, each essential element of an offense charged.

The burden is always on the government to prove guilt beyond a reasonable doubt. This burden never shifts to the defendant to prove his innocence, for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. The defendant is not even obligated to cross-examine the witnesses called to testify by the government.

If the government proves beyond a reasonable doubt all the essential elements of an offense charged in the indictment, you must find the defendant guilty of that offense. If the government fails to prove beyond a reasonable doubt any essential element of an offense charged in the indictment, you must find the defendant not guilty of that offense.

FINAL INSTRUCTION NO. 14 - REASONABLE DOUBT

A reasonable doubt may arise from the evidence or lack of evidence produced during trial. A reasonable doubt is a doubt based upon reason and common sense and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the more serious and important affairs of life. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

FINAL INSTRUCTION NO. 15 - DEFINITION OF EVIDENCE

I mentioned the word “evidence.” “Evidence” includes the testimony of witnesses and documents and other things received as exhibits. Certain things are *not* evidence. I shall list those things for you now:

1. Statements, arguments, questions, and comments by lawyers representing the parties in the case are not evidence. Opening statements and closing arguments by lawyers are not evidence.
2. Objections and rulings on objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question, you must ignore the question and must not try to guess what the answer might have been.
3. Anything you see or hear about this case outside the courtroom is not evidence.
4. Certain charts and graphs were shown to you in order to help explain the facts which may have been disclosed by the evidence in this case. Those charts and graphs were used for convenience only. They are not evidence or proof of any facts. If they do not correctly reflect the facts shown by the evidence in this case, you should disregard the charts and graphs and determine the facts from the evidence presented in court.

Other charts, graphs, and summaries were admitted in evidence. You may use those charts, graphs, and summaries as evidence even though the underlying documents and records are not here.

The fact an exhibit was shown to you does not mean you must rely on it more than you rely on other evidence.

During trial, certain evidence was presented by reading a written transcript into the record. The witness testified under oath at that prior proceeding just as if the witness was here in court. You should consider this testimony together with all other evidence received.

Some of you may have heard the terms “direct evidence” and “circumstantial evidence.” You should not be concerned with those terms. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

The weight of the evidence is not determined by the number of witnesses testifying as to the existence or non-existence of any fact. Also, the weight of the evidence should not be determined merely by the number or volume of documents or exhibits. The weight of evidence depends on its quality, not quantity. The quality and weight of the evidence are for you to decide.

FINAL INSTRUCTION NO. 16 - CREDIBILITY OF WITNESSES

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness says, only part of it, or none of it.

In deciding what testimony to believe, consider the witness's intelligence; the opportunity the witness had to see or hear the things testified about; the witness's memory; any motives the witness may have for testifying a certain way; the behavior of the witness while testifying; whether the witness said something different at an earlier time; the witness's alcohol use, if any; the general reasonableness of the testimony; and the extent to which the testimony is consistent with any evidence that you believe. In deciding whether or not to believe a witness, keep in mind people sometimes see or hear things differently and sometimes forget things. You need to consider whether a contradiction results from an innocent misrecollection or sincere lapse of memory or instead from an intentional falsehood or pretended lapse of memory.

Also, you should judge the testimony of the defendant in the same manner in which you judge the testimony of any other witness.

Finally, just because a witness works in law enforcement or is employed by the government does not mean you should give more weight or credibility to the witness's testimony than you give to any other witness's testimony.

FINAL INSTRUCTION NO. 17 - IMPEACHMENT

In the last instruction, I instructed you generally on the credibility of witnesses. I now instruct you further on how the credibility of a witness may be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness’s present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness and therefore whether they affect the credibility of that witness.

If you believe a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight you think it deserves.

FINAL INSTRUCTION NO. 18 - EXPERT WITNESSES

You may have heard testimony from people described experts. A person who has become an expert by knowledge, skill, training, education or experience may state their opinions on matters within their expertise and may also state the reasons for their opinions.

Expert testimony should be considered just like any other testimony. You may accept or reject it and give it as much weight as you think it deserves considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case.

FINAL INSTRUCTION NO. 19 - OBJECTIONS

The lawyers made objections and motions during the trial that I ruled upon. If I sustained an objection to a question before it was answered, do not draw any inferences or conclusions from the question itself. The lawyers have a duty to object to testimony or other evidence they believe is not properly admissible. Do not hold it against a lawyer or the party the lawyer represents because the lawyer made objections.

FINAL INSTRUCTION NO. 20 - USE OF NOTES

You must make your decision based on the evidence. We have an official court reporter making a record of the trial. However, we will not have a typewritten transcript of the trial available for your use in reaching a verdict.

Notes you took during the trial are not necessarily more reliable than your memory or another juror's memory. Therefore, you should not be overly influenced by the notes.

At the end of the trial, you may take your notes out of the notebook and keep them or leave them, and we will destroy them. No one will read the notes.

FINAL INSTRUCTION NO. 21 - DUTY TO DELIBERATE

A verdict must represent the considered judgment of each juror. Your verdict as to the defendant must be unanimous. It is your duty to consult with one another and to deliberate with a view to reaching agreement if you can do so without violence to your individual judgment. Of course, you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict. Each of you must decide the case for yourself, but you should do so only after considering the evidence with your fellow jurors.

In the course of your deliberations, you should not hesitate to re-examine your own views and change your opinion if you are convinced it is wrong. To bring twelve minds to a unanimous result, you must examine the questions submitted to you openly and frankly with proper regard for the opinions of others and with a willingness to re-examine your own views.

Remember that if, in your individual judgment, the evidence fails to establish the defendant's guilt beyond a reasonable doubt on an offense charged against him, then the defendant should have your vote for a not guilty verdict on that offense. If all of you reach the same conclusion, then the verdict of the jury must be not guilty on that offense. Of course, the opposite also applies. If, in your individual judgment, the evidence establishes the defendant's guilt beyond a reasonable doubt on an offense charged against

him, then your vote should be for a verdict of guilty on that offense. If all of you reach that conclusion, then the verdict of the jury must be guilty on that offense. As I instructed you earlier, the burden is upon the government to prove beyond a reasonable doubt every essential element of an offense charged.

Remember also that the question before you can never be whether the government wins or loses the case. The government, as well as society, always wins when justice is done, regardless of whether your verdict is not guilty or guilty.

Finally, remember that you are not partisans. You are judges of the facts. Your sole interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence.

You may conduct your deliberations as you choose. However, I suggest you carefully consider all of the evidence bearing upon the questions before you. You may take all the time you feel is necessary.

There is no reason to think that another trial would be tried in a better way or that a more conscientious, impartial, or competent jury would be selected to hear it. Any future jury must be selected in the same manner and from the same source as you. If you should fail to agree on a verdict, the case is left open and must be resolved at some later time.

FINAL INSTRUCTION NO. 22 - DUTY DURING DELIBERATIONS

There are certain rules you must follow while conducting your deliberations and returning your verdict:

First, when you go to the jury room, you must select one of your members as your foreperson. He or she will preside over your discussions and speak for you here in court.

Second, if the defendant is found guilty, the sentence to be imposed is my responsibility. You may not consider punishment of the defendant in any way in deciding whether the government has proven its case beyond a reasonable doubt as to each offense charged in the indictment.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the court security officer, signed by one or more jurors. After conferring with the lawyers, I will respond as soon as possible, either in writing or orally in open court. Remember you should not tell anyone—including me—how your votes stand numerically.

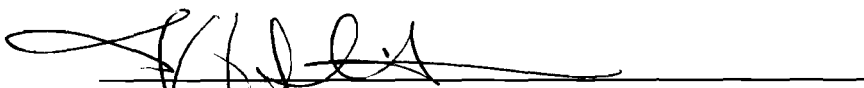
Fourth, your verdict must be based solely on the evidence and on the law in these instructions. **The verdict, whether not guilty or guilty, must be unanimous as to each count.** Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision you reach in this case. You will take this form to the jury room. You must return a

separate verdict for each count. When you have unanimously agreed on a verdict, the foreperson will fill in the form, sign and date it, and advise the court security officer that you have reached a verdict. You will then return to the courtroom where your verdict will be received and announced.

Dated October 4th, 2012.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Jeffrey L. Viken", is written over a horizontal line.

JEFFREY L. VIKEN
UNITED STATES DISTRICT JUDGE