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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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|------------------------------|---|--------------------------|
| UNITED STATES |) | |
| |) | |
| Plaintiff |) | CR-S-04-0119 – KJD (LRL) |
| |) | |
| V |) | DEFENDANT’S REPLY |
| |) | TO THE GOVERNMENT’S |
| IRWIN SCHIFF, CYNTHIA NEUN |) | OBJECTION TO SCHIFF’S |
| And LAWRENCE N. COHEN, a/k/a |) | TESTIFYING AS AN EXPERT |
| LARRY COHEN |) | ON INCOME TAXES |
| Defendants. |) | |
| _____ |) | |

This is in response to the United States’ objection to my testifying as an expert witness.

The government’s penchant for making disingenuous statements simply knows no bounds. For example, the government states:

The probable substance of defendant Schiff’s proposed testimony would involve his interpretations of the law and discussion of the validity of the tax laws. Such testimony is impermissible as it would usurp the role of the judge and inappropriately instruct the jury on the law, which remains within the province of the trial judge. (Citations omitted) It is well settled that the judge instructs the jury in the law. Experts ‘interpret and analyze factual evidence. They do not testify about the law because the judge’s special legal knowledge is presumed to be sufficient, and it is the judge’s duty to inform the jury about the law that is relevant to their deliberations.’”

First of all, as the following will show, Schiff’s testimony (as an expert) will not involve his “interpretations of the law,” but will largely focus on why statements on documents attributed to defendant Schiff which the government claims are “false” (as a matter of law), are not false as a matter of law. In other words he will testify that government claims - based upon the opinions and claims of unknown, unidentified and phantom federal employees - are false. Certainly, defendants have a right to put on an expert who is prepared to testify, under oath, that claims made by phantom federal employee with respect to documents which the government intends to use against such defendants - represent **false claims**, as a matter of law – especially when such

experts can still be cross-examined with respect to their testimony. The irony is almost laughable. The government wants to indict and prosecute people based on: (1) the erroneous claims and charges of phantom federal employees who, (2) have **not** made their claims and charges under oath, where; (3) they would have been subject to cross-examination; but objects when **real people** want to testify **openly** and **under oath** and be subject to **cross-examination** that such claims and charges are false. What more proof does anyone need of the duplicity and deceit of the DOJ?

Secondly, my testimony as an expert will not be to challenge the “validity” of **any** tax law, but my testimony will be that **ALL tax laws are valid.** If anything, **my** 30 years of research and expertise have led to the **inescapable conclusion** that the DOJ in all of its civil and criminal prosecutions and litigation VIOLATES each and **every** law in the Internal Revenue Code bearing on the federal income tax, as well as violating all three of the Constitution’s three taxing clauses. My efforts over the last 30 years have been to try and force the DOJ to **OBEY** those laws. However, the DOJ **does not want to do so,** and its instant prosecution of me is designed to **interfere** and **obstruct** my efforts to **make it** do so.

The government’s further claim that expert testimony on the law is “impermissible as it would usurp the role of the judge” is further proof of the dishonesty and duplicity of claims made by the DOJ in this litigation. Included in Exhibit A are various transcript pages from *USA v. Dentice*. I would ask the court take judicial notice that on page 707 the United States introduces Revenue Agent Nancy McLeod as an “expert witness.” On page 708 she is asked “Have you testified in federal court before as an expert witness?”, and she responds, “Yes, I have.” And on page 709 she states that she has testified “Five times” as an “expert.” Presumably she is an “expert” in overall tax law, since her alleged “expertise” is not qualified in **any way**, such as her being an “expert” only in “tax calculations” as the government sought to disingenuously qualify its “expert” Revenue Agent Clinton Lowder in the instant case. Her alleged “expertise” is based upon her receiving a “Bachelor of Science from San Diego State in accounting,” and receiving additional IRS training, and based on her experience in having conducted approximately 1,500 income tax audits.¹ When asked by the prosecutor “Have you received training from the IRS specifically to testify regarding as an expert witness?” she answers, “Yes, I have.” When asked, “On what matters was this testimony related to?” she states, “Tax evasion

¹ Which she was specifically barred from doing by Code section 7608(a).

and false returns.” Obviously, the government uses her to testify at criminal trials, as to why “under the law” certain representations made by defendants in those prosecutions constituted or indicated “tax evasion” and why, certain returns (which were at issue in those prosecutions) were “false returns” as a matter of law. Thus the government’s statement that “Such (expert) testimony is impermissible as it would usurp the role of the judge and inappropriately instruct the jury on the law, which remains within the province of the trial judge (Citations omitted)” stands revealed as being totally disingenuous. If this statement were true, what purpose would Revenue Agent McLeod’s testimony have served? - and why was she allowed to testify at all? The government obviously uses alleged “experts” like Ms. McLeod and Revenue Agent Clinton Lowder all the time to testify about “tax law” in income tax prosecutions. However, in the instant case, the government sought to disingenuously claim that Agent Lowder would be testifying about “tax calculations,” in order to mask the fact that he would *actually* be testifying about the law.² However, in the Dentices’ prosecution, the government made no bones about using an alleged income tax “expert” (Revenue Agent McLeod) to persuade the jury that the statements I instructed Dr. Dentice he could put on his amended returns were false – as a matter of law.

On page 742 the prosecutor asks her: “Now Ms. McLeod, in your expert opinion and based upon on what you heard at trial and reviewed prior to trial, are those amended tax returns correct.?” And her answer is “No.”

On that basis the Dentices were convicted of allegedly filing “false and fraudulent” amended returns. Consequently, I was charged in Counts 2-4 of the indictment of “aiding and assisting” James and Angela Dentice with filing “false and fraudulent” 1040X’s. Those 1040X’s made three legal statements: (1) the Dentices “had no ‘statutory’ income” but “reported sources of ‘income’ as being ‘income’ itself; (2) that they had no “statutory income tax ‘liability’”; and (3) pursuant to 26 CFR 301.6401-1(a)(2) and 1(b) they were entitled to an “automatic refund.” The Dentices were found guilty; therefore, on the representations of IRS tax “expert” Nancy McLeod that all three of those legal statements were incorrect as a matter of law. And the totally ineffectiveness of the Dentices’ lawyers, is demonstrated by the fact that they failed to challenge her totally erroneous claim with respect to these 1040X’s on any basis. As a

² However, I covered this attempted deception in my previous objection to his testifying as an “expert” as well as pointing out that - THE LAW – specifically Code section 7608(a) bars him from testifying on income taxes.

matter of fact, as shown on page 45 of the trial transcript, Mrs. Dentice's lawyer states at the opening of the trial:

Now, I want to be honest for a minute, **I'm not going to produce any evidence** that I believe Irwin Schiff. In fact, I'll tell you straight out, I don't believe Irwin Schiff. I've talked to him and I don't believe Irwin Schiff.

He then goes on to state that "The evidence will show that my client honestly believed Irwin Schiff." However if her lawyer was not going "to produce any evidence" as to why his client **might** have believed Irwin Schiff, on what basis would a jury believe that his client *might* have *actually* **believed** Irwin Schiff? Just because she said so? - but without being shown any legal basis as to why she **might** have believed Irwin Schiff or *why* such a belief might be legally or logically rational - even if it were not *legally* correct?

But, in any case, if Revenue Agent Nancy McLeod can testify as an "expert" as to why the statements on the Dentices' amended returns **were false** *as a matter of law*, I certainly can testify as an "expert" as to why those statements **were correct** *as a matter of law*, since my credentials as an expert are far superior than hers.³

For one thing, I too have a Bachelor of Science degree with a major in accounting, but from the University of Connecticut, not from San Diego State. So our academic credentials are exactly the same. However, from that point on my credentials are far superior to hers. For one thing, I have written at least five books on income taxes and related subjects that have sold in excess of 500,000 copies. One book "How Anyone Can Stop Paying Income Taxes" was a best seller in 1983. Exhibit B is a reprint that appeared in the May 2, 1983 issue of "Time" magazine which reported "How Anyone Can Stop Paying Income Taxes" as being a "best seller" Has Nancy McLeod written *any* books on the income tax, much less a "best seller."? In addition, I have attached (Exhibit C) an article that appeared in the St. Louis Daily Record" (the daily legal journal) reporting on a lecture I gave at the Washington University Law School. In addition I have attached (Exhibit D) an ad placed in the campus newspaper by the "Campus Activities & Programming (CAP)" committee publicizing the three lectures I would be giving on income taxes at the University of Toledo; two in the main auditorium and one at the Law School. I received an honorarium of \$500 from the student activities fund which also paid for my hotel, air fare, and car rental. Has Nancy McLeod ever been paid to lecture at a University on income

³ Especially when she is specifically barred by Code section 7608(a) from **even giving** testimony on income taxes. At least, no Code section **bars me** from testifying on income taxes.

taxes? In addition, I have enclosed an article written about me that appeared in the July 5, 1995 issue of the New York Times (Exhibit E) I must have some expertise on income taxes to have warranted such an extensive write-up in the “Times.” In addition, I have been interviewed by Larry King with respect to income taxes and have guested on hundreds of radio shows as well as appearing on such popular TV shows as: “Cross-Fire,” “20/20”, “Extra” “The Tom Snyder Show” “Hannity & Colmes” and hundreds of other TV shows. Has Ms. McLeod ever been interviewed even ONCE on radio or TV in connection with her alleged “expertise” on income taxes? Obviously, if she can qualify and testify as an “expert” on income taxes, so can I.

If the government doubts I am an expert on income taxes, they can certainly voir dire me with respect to my claimed “expertise” and impeach my “expertise” in front of the jury. They can use against me as a defendant, anything that I say as an “expert.” And if, as the government claims, everything I say about the income tax is both false and fraudulent, the government should relish the opportunity to cross-examine me with respect to my claimed “expertise.” So what is the government’s problem?

In addition, in its Memorandum the government makes a number of statements which it knows are FALSE! For example the government states that my “expert” testimony will involve; “(a) discussion of the Internal Revenue Code, and (Schiff’s) contention that its provisions are invalid”; the government repeats this canard further with, “he intends to testify that the tax laws are invalid”; and then modifies its canard later by stating, “Schiff’s testimony may constitute disagreement with the law, another impermissible ground for expert testimony”; and, in addition, claims my testimony “could potentially confuse the jury”; “and “what qualifications (does) he have to form these opinions?”⁴ As I have stated before, the government’s “penchant for making disingenuous statements simply knows no bounds.” The government knows FULL WELL that in the 15 or so pre trial motions I filed in this case, I never ONCE claimed that ANY LAW in the Internal Revenue Code was “invalid” or that I had any DISAGREEMENT with ANY LAW in the IR Code. And my testimony will involve no such claim. My claim is that all my returns and all of the documents I ever filed in connection with income taxes or any documents that I might have recommended that others might file in connection with income taxes, ALL COMPLIED WITH THE LAW. My expert testimony (which is akin to Ms. McLeod’s expert testimony, albeit from a different perspective) is that every document claimed

⁴ I believe I covered this in a prior pleading.

by the government in the indictment to be false, *as a matter of law*; is not false, *as a matter of law*. So if the government can use “experts” to testify at criminal trials that documents filed by defendant, and/or under his direction, were “false” as a matter of law, defendants certainly have a similar right to use “experts” to testify that such documents were “**not false**,” as a matter of law. And who is more qualified than me to testify as an “expert” on this issue?

As to what are my “qualifications”? The government knows full well what they are. Thirty years of study, and the numerous books I have written on the subject of income taxes certainly establish my “expertise” with respect to this subject, and establish that I have far greater “expert” credentials on this subject than either Revenue Agents Nancy McLeod or Clinton Lowder. And if the government doubts my “expertise” they have three able bodied tax lawyers from the Justice Department standing by who can voir dire and impeach me, and expose my alleged lack of expertise when I call myself to the stand to testify as my expert. And the government’s further claim that I “could potentially confuse the jury” is utter nonsense and tantamount to an admission by the government that its three tax lawyers are so incompetent that they cannot prevent me – even on cross-examination – from “confusing the jury.” If this is so, that’s the government’s problem, and not mine. Defendants should not have their “due process” rights to call expert witnesses in their own behalf, compromised and infringed upon, simply because government prosecutors are so incompetent that they are incapable of preventing experts from “confusing” juries⁵ It would be my pleasure to cross-examine any one of the government’s three Justice Department tax lawyers (or any other tax lawyer the government wants to put on the stand as a tax expert’) should they elect to take the stand – and **I would not permit them** to “confuse the jury” as to what the law is, and why my beliefs and the documents I have filed in connection with income taxes conform to those laws. So why should these Justice Department tax lawyers have any problem when it is the other way around?

ADDITIONAL EXPERTS I WILL CALL AS WITNESSES

In addition, I will call as an expert tax lawyer Elliot Silverman who wrote the attached article (Exhibit F) entitled “IS AFFIRMATIVE MISCONDUCT NECESSARY FOR TAX EVASION’? that appeared in the February, 1987 edition of “The Journal of Taxation.” I would

⁵ Of course, what the government really means is “persuading,” and not “confusing.”

want him to testify as to why in his expert opinion I was never legally convicted of tax evasion in 1985, as covered in his article.

In addition, I will call as an expert the government's expert psychologist who examined me on behalf of the government, Daniel S. Hayes of Coeur d' Alene.

WHAT I WILL TESTIFY ABOUT AS EXPERT IN TAX LAW

The government claimed that I did not provide it with a description of what I would testify about. I informed the government that I would testify concerning all of the material as contained in my pre trial motions. I believed that covered everything. However, if the government wants me to spell it out, here it is.

- 1) I will testify that every document named in the indictment as containing "false and fraudulent" information, is itself a false and fraudulent claim, and that all statements contained in all such documents are legally correct.
- 2) I will testify that all of the evidence obtained in the IRS search and seizure was obtained illegally, as was fully covered in my Motion to Suppress and I will use all of the Exhibits as contained in that motion to support my claim.
- 3) I will explain how the government misled the grand jury as to the legal meaning of "income" and did not use the meaning given to it in Senate Report 1622 and House Report 1337 (83rd Congress, 2d Session)
- 4) I have attached as Exhibit G the **first page** regarding the taxing power of Congress as contained in the "United States Supreme Court Digest." I ask the Court to take judicial notice that the "Digest" refers to no less than three decisions: *Stanton*, *Tyee Realty*, and *Bushaber* in which the "Digest" points out the Supreme Court held, "The whole purpose U.S.C.A. Const. Amend. 16 authorizing an income tax, was to exclude the source from which a taxed income was derived as the criterion by which to determine the applicability of constitutional requirement as to apportionment of direct taxes." I don't think the government explained this to the grand jury when it secured the instant indictment. Nor do I think this Court intends to explain this aspect of the income tax to the jury when it instructs them on "the law" governing income taxes. However, I believe defendant Schiff has a "due process" right to make sure that the petite jury understands what the Supreme Court meant by these words, before it is asked to convict him of an income tax crime. These words must be **fundamental** to a

proper understanding of our income tax laws – otherwise it would not have occupied 25% of the decisions cited on the first page of the “Digest.” However, unless Schiff explains what the Supreme Court meant by these words, I doubt that the petite jury will be made aware of a principle that is *obviously* so **fundamental** to an understanding of our income tax laws that is was repeated **three times** just on the first page of the “Digest’s” coverage on taxes.

- 5) I will also testify that based upon 30 years of research, I could not find any statute that made Defendant Schiff: “liable” for income taxes; required him “to pay” income taxes; required him to keep books or records; or provided for penalties with respect to income taxes. Obviously, on cross-examination, the government could prove how inept, bungling, and sloppy was my research by confronting me with the statutes that have eluded me for 30 years.
- 6) I will also testify that as an “expert” based on 30 years of research I could not find any statute that authorized the IRS to enforce - **in any manner** - any provision of the IR Code. In fact, in my expert opinion, the IR Code (especially considering the provisions of 7608) **specifically bars** all IRS agents “by whatever term designated” (with the possible exception of “criminal investigators of the Intelligence Division of the IRS” whom the Secretary has specifically charged with such duties) from **even getting involved in income tax enforcement**. Of course, in their cross-examination of me the government’s three, **expert**, tax lawyers, will certainly be able to **discredit** and **impeach** any such testimony and confront me with the statutes that have, for 30 years, eluded me.

IN SUMMATION

The government’s claim implying that there is no justifiable or legal basis for calling “expert” witness on the law in income tax prosecutions, because “the judge instructs the jury in the law” is, as shown by the attached Exhibits, to be a total fabrication. The government uses such “experts” at practically all income tax trials. However, when such “experts” testify in favor of the government, expert testimony is okay; but if such expert testimony might interfere with the government’s case, then expert testimony is not okay. That, obviously, is the only criterion that is being applied here. In addition, I will not testify that I regard any tax law as being “invalid” or that I “disagree” with any statute involving income taxes. The government’s further

claim that I could “confuse the jury” is totally without merit. The government has three Justice Department tax lawyers whose job it is to make sure my expert does not “confuse the jury.” If they claim that they are so incompetent as to prevent this from happening, then that is the government’s problem, not mine. My constitutional right to call an expert witnesses on my behalf can not be infringed upon simply because the government claims that its prosecutors are so incompetent that they cannot prevent expert testimony from “confusing” the jury on matters involving income taxes and on issues that are vital to my defense.

I, as a defendant (and not necessarily as an expert) will also testify to establish my lack of “willfulness” and to establish my defense in accordance with United States v. Bishop, 412 U.S. 346, 361 (1973), which held, that: “The requirement of an offense committed ‘willfully’ is not met, therefore, if a taxpayer has relied in good faith on a prior decision of this Court... ,” As shown my Declaration and in a number of my pleadings I relied on the following Supreme Court decisions: *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1 (1916), *Pollock v. Farmers Loan & Trust*, 157 U.S. 429 (1894), *Stanton v. Baltic Mining*, 240 US 103 (1915), *Eisner v. Macomber* 252 US 189 (1920), *Flint v. Stone Tracy Company*, 220 U.S. 107; *Merchant’s Loan & Trust Co v. Smietanka*, 255 U.S. 509, *Stratton’s Independence v. Howbert*, 231 U.S. 399; *Southern Pacific v. Lowe*, 247 U.S. 330 (1918); *Bowers v. Kerbaugh-Empire Co.*, 271 U.S. 170 (1926); *Burnet v. Harmel*, 287 U.S.103 (1932); and *Doyle v. Mitchell Bros.*, 247 U.S. 179 (1918) - and, of course, I will testify as to all of these cases and why I relied on them to establish my “good faith” defense in accordance with the *Bishop* doctrine.

In addition I will testify that I relied on the: Congressional Research Service, Library of Congress, by Howard M. Zaritsky, Legislative Attorney, American Law Division of the Library of Congress, Report No. 80-19A, entitled “Some Constitutional Questions Regarding The Federal Income Tax Laws”, which states at page CRS-5:

The Supreme Court, in a decision written by Chief Justice White, first noted that the Sixteenth Amendment did not authorize any new type of tax, nor did it repeal or revoke the tax clauses of Article I of the Constitution, quoted above. **Direct taxes were, notwithstanding the advent of the Sixteenth Amendment, still subject to the rule of apportionment** and indirect taxes were still subject to the rule of uniformity.

In addition I will testify that I relied on House Report 1337 and Senate Report 1622, that the “definition” of “gross income” as used in Section 61 of the 1954 Code “is based upon the 16th Amendment and the word ‘income’ is used in its constitutional sense, ” and on the Privacy

Act Notice contained in a 1040 Booklet which notified me that I only had to file and pay “any tax” *only* if a statute *made* me “liable” for that tax. Since I could not find any statute in the Internal Revenue Code that me “liable” for income taxes (and the Notice did not identify any such statute for me), I relied upon this Notice as notice to me by the government that no law required me to file income tax returns or pay income taxes. This was especially persuasive since I discovered that the Privacy Act Notice used in connection with the Federal wagering tax specifically informed those who might be subject to that tax, that (1) they were required to file a Form 730, and (2) also informed them of the statute that (a) made them “liable” for that tax. And I also relied on my understanding of a number of other statutes, such as Code Sections: 6001, 6011, 6201, 6211, and a number of other statutes that persuaded me that I had a right under the law to file as I did.

ORAL ARGUMENT REQUESTED

Dated: August 2, 2005

Irwin Schiff, pro per

CERTIFICATE OF SERVICE

I certify that I have this date hand delivered a copy of the foregoing Reply to the Government’s Objection to Schiff testifying as an Expert Witness to:

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And that I have this day mailed a copy of this Motion by first class mail, to the following Attorney’s of record.

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Date: August 2, 2005

Irwin Schiff