

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA	:	Criminal No. 05-66 (PLF)
	:	
v.	:	
	:	
WALTER ANDERSON,	:	
	:	
aka Mark Roth,	:	
Defendant.	:	

GOVERNMENT'S RESPONSE TO DEFENDANT'S SENTENCING MEMORANDUM

Comes now the United States, by its attorney, the United States Attorney for the District of Columbia, and submits this Response to Defendant's Sentencing Memorandum.

As set forth in detail in the Government's Memorandum in Aid of Sentencing, a 120 month period of incarceration coupled with an order of restitution is the appropriate sentence in this case. Not only does this sentence fall squarely within the agreed guidelines range, but it also furthers the goals of sentencing specified in 18 U.S.C. § 3553.¹ Defendant has asked this Court to exercise its discretion and impose a lesser sentence. He urges this Court to consider his history and characteristics and his experiences during pretrial detention. A ten year sentence, according to the defendant, is not needed to promote respect for the law or assure he will not re-

¹The 2001 Edition of the Guidelines Manual apply to this case. Defendant, the government and the Court agreed to use the 2001 Guidelines, as set forth in the 11(e)(1)(c) plea agreement. See United States v. Goodall, 236 F.3d 700, (D.C. Cir. 2001). Moreover, we note that *ex post facto* concerns would not be relevant to the now advisory U.S. Sentencing Guidelines. United States v. Demaree, 459 F.3d 791, 795 (7th Cir. 2006)(concluding that the *ex post facto* clause should apply only to laws and regulations that bind rather than advise, and therefore inapplicable to the voluntary sentencing guidelines)(reh'g en banc denied, September 13, 2006).

offend. He is wrong. For the reasons stated below, the Court should reject his request.

I. Defendant's History and Characteristics Dictate a 120 Month Sentence

Defendant presents a picture of his life that depicts an exceptional work history, favorable reputation in the business community, support for charitable and public interests, strong family ties, kindness and generosity, and a relatively modest lifestyle. However, in reality, the history and characteristics of this defendant depict a much less flattering image. It is undisputed that defendant was a brilliant visionary in the business world. His talents and hard work resulted in grand financial successes for himself and his close associates.²

Unfortunately, defendant is also a tax cheat. It was nothing but a waste of talent that defendant spent so much genius and energy in defrauding the citizens of the United States and the District of Columbia out of \$220 million in tax revenue. Remarkably, defendant attempts to veneer his common tax evasion and fraud as a noble effort to save humanity and the planet. Defendant decided to keep, and spend as he saw fit, the money that rightfully belonged to every U.S. citizen. This is money that should have been spent on collective goals of the citizenry: protecting democracy, strengthening public education, supporting public health needs and whatever else the voting citizens determine as important to our Country. Instead, that money was spent on the defendant and on those things that were amusing and interesting to him.

In reality, defendant simply loathed taxes. He hated all kinds of taxes, so much so, that as he developed his businesses he carefully considered how to avoid paying business taxes. For example, in directing one of his Board of Directors to incorporate a satellite business offshore,

²A number of the associates who wrote letters on behalf of defendant benefitted greatly from defendant's financial success. See Exhibit 27.

defendant simply explained: “As space related businesses become more high profile, the tax weasel will follow.” See Exhibit 28.

To prove his good character, defendant has attached dozens of letters from family members, friends and business associates. “Like any character witness testimony, however, the opinion is just that, an opinion all too often based on incomplete and episodic information.” See Detention Order, dated 3/16/05 at 14. Indeed, some of the letter writers readily acknowledge that they have not been privy to the substantial evidence in this case. See Def. Exhibit 1 at 2, 12, 17, 26, 34, 43, 50, 56. For others, it is apparent that defendant’s self-serving statements are the source of their information.

Over the last two years, the Court has heard substantial evidence of defendant’s repeated acts of deception. Regardless of their good intentions, the Court should have absolutely “no confidence that Mr. Anderson has been forthright with the very friends and associates who vouch for him.” See Detention Order, at 14. Accordingly, the Court should accord no weight to these testimonials.

Defendant and his supporters also urge the Court to consider his charitable endeavors. Again, with minor exception, all discuss his historical preoccupation with the exploration and commercialization of the space frontier. According to one friend, defendant has been dreaming of “owning” a space station since he was 14 years old. See Def. Exhibit 1 at 34. In 1999, his dream became a reality. With more than \$30 million, defendant leased the Mir Space Station from Russia, with funds that should have gone to the U.S. and D.C. treasuries. Simply put, some favor British sports cars, others are more inclined to luxury yachts, real estate deals, commodities trading, fast women, or racehorses. This defendant, a venture capitalist, favored

businesses--the creating, nurturing and developing of nascent businesses. His businesses were like his children.³ And, if the business was tied to his passion and love of space, then all the better. It would be an injustice for this Court to credit defendant's misuse of these funds.

Furthermore, his donations to other space projects, including the International Space University and other educational organizations, were minimal compared with his overall earnings during the prosecution period. As previously stated, defendant only gave away 3.7 percent of his gross income to charitable causes. See Exhibit 29. Moreover, there is no evidence of any substantial personal sacrifices by defendant, beyond the effort taken to write a check and attend space events. This is far from exceptional. Departures for civic and charitable contributions under the Guidelines were discouraged and only granted upon a finding that the charitable activities existed "to an exceptional degree or in an extraordinary manner." United States v. Serafini, 233 F. 3d 758, 775 (3rd Cir. 2000). A liberal consideration of charitable contributions would favor wealthy defendants, by providing a means to buy one's way out of prison sentence that is otherwise unavailable to the average citizen. Even post-Booker, Court's continue to scrutinize claims of philanthropy before imposing a more lenient sentence. See United States v. Repking, 467 F.3d 1091, 1095-96 (7th Cir. 2006) and United States v. Cooper, 394 F.3d 172, 176-77 (3rd Cir. 2005). When considered in proportion to his income, defendant's financial contributions were far from exceptional and should not keep him out of jail. United States v. Adelson, 441 F.Supp.2d 506, (S.D.N.Y. 2006) (considering charitable deeds as those good deeds that are not performed to gain status or enhance one's image).

Defendant alleges that his was not a lavish lifestyle. Clearly, this is a subjective term.

³ See, Letter from Bob Werb, See Def. Sentencing Memorandum Exhibit 1, at 56.

He projects a picture of modesty: cheeseburgers and french fries; a two bedroom condominium with a “few pieces of art he purchased as investments;” modest priced car; “partial ownership” interest in a private plane for “business reasons,” that he sold when it “became clear it was not a profitable investment.” His life was so humble, he tells this Court, that he did not even employ a housekeeper.

This representation is simply not true. Although defendant may have preferred cheeseburgers, the evidence is that he frequently dined at the finest restaurants where he enjoyed expensive wines, and stayed at luxury hotels. See Exhibits 30 and 31. His residence was a two bedroom condominium penthouse in a luxurious multi-purpose building on the banks of the Potomac in the exclusive Georgetown section of the District of Columbia, with a monthly maintenance fee of approximately \$2500. Inside that condominium, he displayed at least nine different pieces of original artwork. The combined value of that art, based upon purchase price, was more than \$4 million.⁴ Defendant employed someone to clean his home. Indeed, when he fired her in 2002, he was extremely angry about her failure to return his spare key. See Exhibit 32.

He drove a Volvo convertible, purchased a Jaguar for his girlfriend to drive in Manhattan, and, with G&A, owned half of a private Gulfstream IV jet. See Exhibit 33. This jet

⁴A painting by artist Rene Magritte entitled "La Peine Perdu," for \$1,212,500; a painting by artist Rene Magritte entitled "A la Rencontre du Plaisir," for \$442,500; a painting by artist Paul Delvaux entitled "Douce Nuit," for \$662,500; a landscape painting by artist Antoni Tapies for \$163,362; a painting by artist Antonio Saura entitled "Rubiloba," for \$145,380; a painting by artist Salvador Dali entitled "Le Bateau Echoue," for \$516,618; a painted wine bottle by artist Rene Magritte entitled "Paysage au Clair de Lune," for \$112,500; a painting by artist Giorgio de Chirico entitled "Piazza d'Italia," for \$82,294; a painting by artist Paul Delvaux entitled "Rosine," for \$1,000,000. Significantly, defendant told a business associate that he was “storing” the artwork in his condominium for G&A.

was used for more than business travel.⁵ For example, defendant traveled to St. Marten for a weekend holiday with a girlfriend, her daughters and their boyfriends, where they stayed at a luxury resort. See Exhibit 35. This three day get-away cost more than \$29,000. Defendant flew friends to Boston on the jet to celebrate a Birthday and enjoy a rock concert. See Exhibit 36. In January 2000, using his jet and leasing an additional one, defendant flew two groups of friends from Amsterdam and D.C. to the Caribbean for a millennium celebration. See Exhibit 37. The first landing was at the Casa de Camp Resort in Dominica, followed by a short jaunt to another luxury resort located on the island of St. Barts. Family members enjoyed personal travel on the jet, too. See Exhibit 38. In 1997, defendant and a girlfriend enjoyed a lovely private charter through the Greek Isles which cost more than \$20,000. See Exhibit 39.

Most disturbingly, defendant continues to minimize his culpability in this crime. He falsely alleges that his tax return preparers knew and advised him to not file tax returns in the District of Columbia where he was a resident. To the contrary, the evidence would have shown at trial that defendant was given a detailed explanation about residency requirements before he provided a Florida address for his residency, and a D.C. address for his office. See Exhibit 40. Defendant attempts to maintain a pretense that he didn't file D.C. income tax returns because he traveled for employment. However, this fails to explain the extensive efforts he undertook to conceal his D.C. residency through the purchasing his home in the name of a trust, using mailbox services,

⁵Notably, in his memorandum, defendant alleges he sold his share of the jet. In fact, he forfeited it when he was unable to continue to pay the costs of its operation, and make payments on an unrelated outstanding business loan. Former business partner, Donald Burns explained to an advisor: "Anderson and G&A have liquidity problems and can't service debt on the airplane notes. . . I compelled Walt to relinquish his interest in the G-4, roll the equity deficiency into the NetTel note . . ." See Exhibit 34.

fraudulently obtaining and maintaining a Virginia driver's license, and registering all of his vehicles in Virginia.

Defendant also lies to this Court about the circumstances of his possession of the illegal cell phone in CTF. It is his position that he "simply tried to 'self help' in relation to his telephone needs at CTF." See Defendant Exhibit 11 at 22. He goes so far as to represent to this Court that he accepted another inmate's offer to share the use of a cell phone that was already physically in the unit. According to defendant, this cell phone was brought into CTF "more than 1 year prior" to his usage.

Again, this simply is not true. The cell phone seized from defendant's cell on October 18, 2005 was purchased by his friend and former business partner, James Kenefick. See Exhibit 41. Mr. Kenefick paid a total of \$791.32 in bills for defendant's usage, which included an extensive calling plan, domestic and international long distance, text messaging and internet access features.⁶

Defendant knew that such possession was illegal. The phone contained a magnetic strip to permit it to be concealed under his cot. Defendant also possessed in his cell a paperback book with a carved out interior, which permitted the ready concealment of the cell phone.

Finally, defendant continues to lie and perpetuate his tax scheme through his assertions

⁶Between August 17, 2005 and September 16, 2005, 1,226 calls for a total of 8,336 minutes and 91 messages containing 1,132 kilobytes of text, were made/sent from this cell phone. From September 14, 2005 until the cell phone was seized, another 1,049 calls for a total of 7,665 minutes and 88 messages contained 253 kilobytes of text were made/sent from this cell phone. See Exhibit 40.

that he does not own the Smaller World Trust, the alleged trust that he formed and funded.⁷ This so-called “trust” is a sham. It was created by defendant as a response to the criminal investigation. On March 19, 2002, the IRS found Iceberg’s bearer shares in defendant’s possession and obtained overwhelming evidence to establish that he controlled G&A and Iceberg. There were no other owners. Defendant had to create another entity— one that the government could know nothing about.

On April 24, 2002, defendant visited the LAMBS Bookshop in London where he purchased six texts on trusts.⁸ See Exhibit 42. Less than a week later, he went to a bookstore in D.C. where he purchased two additional trust textbooks. See Exhibit 43. Then, on May 7, 2002, he contacted a British Virgin Island’s law firm to obtain a copy of that jurisdiction’s Trustee Act. See Exhibit 44. It was only sometime thereafter - when he finished drafting the trust documents -that defendant began referring to the Smaller World Trust as the ultimate beneficial owner of the G&A /Iceberg corporate structure.⁹ See Exhibit 45.

⁷Trust law dictates that the grantor, in this case defendant, is considered to be the owner of the trust, regardless of his denials of beneficial ownership.

⁸The titles included: “Textbook on Trusts;” “Commonwealth Caribbean Trusts Law;” “Disputes Involving Trusts;” “A Practitioner’s Guide to Trusts;” “Trusts– A Comparative Study;” and “Practical International Tax Planning.”

⁹That defendant failed to disclose the existence of this purported trust is glossed over by the defendant as attributable merely to his privacy concerns. However, the trust was apparently so secret, that not even the purported “trust protectors,” such as Michael Potter and defendant’s mother, knew of its existence. It’s ironic that defendant claims that he sought privacy in his affairs, when the defendant has courted publicity through the years. As early as 1984 defendant appeared in the Washington Post crusading against HOV lanes in Virginia. In 1988 he used his own photograph in full page advertisements for MidAtlantic Telecom, (See Exhibit 46). In the late 1990s, defendant’s photo appeared on the Space Frontier Foundation’s website. He furnished interviews to a New York Time’s Reporter, who published a New York Times Magazine piece about defendant and his business ventures in 2000. In 2001, he appeared in a production by NOVA entitled “Stationed in the Stars.” Defendant appeared on a webcast “The

Despite his scheming, defendant's trust deed itself is perhaps the best witness to prove its fraudulent nature. See Exhibit 47. This document was not created October 1993, as claimed by defendant, and written on the document. The trust document makes reference to the Rwandan genocide "in which 1 million people may have been killed." This horrid massacre in Rwanda, however, did not occur until the following year, from April to July 1994. See e.g., Exhibit 48. The international community did not know of the full impact of the killings until some time later.

Furthermore, it was not unusual for the defendant to create a document after the fact. If this case had proceeded to trial, this Court would have heard that defendant's *modus operandi* was to reinvent history. He habitually drafted "legal" documents to recast facts in a light more favorable to him. In attempting to prepare corporate tax returns for defendant, accountant John Kilday wrote in an e-mail:

Walt-I am trying to finalize the Red Tulip returns for 2001. I have the mortgage loan agreements. Whoever put those together should pay a little more attention to the detail because the documents are full of contradictions. I also don't have any schedules that support the loan balances. I have to say this is all very tiresome and annoying to me. I don't mind doing this stuff but I'm not comfortable with the information I get which is supposed to support the accounting records. I am the one supposedly responsible for reporting the facts to the government and I can't even ascertain what the facts are. . .

Now, since I've been down this path before I know that you will tell me that it was just a simple error and that this should be changed and that should be changed. This is how we are in the mess where the previous tax returns don't even state who the actual owners of these entities are. I no longer want to shoulder any responsibility or liability for these filings. . . .Therefore, I encourage you to immediately engage a new accountant to worry about amendments or any future filings.

See Exhibit 49.

Space Show" for a 90 minute broadcast which included discussions of his personal, political and business views. From 2005 through present, he authorized a website, www.justiceforwalt.com, which contains his photograph and his personal writings.

Not only should this Court consider the above facts as they reflect upon his character, but also these points are salient in determining defendant's risk of recidivism. Additional relevant evidence regarding the likelihood he will re-offend exists in this Courthouse, in the form of motions filed by the defendant in the pending proceedings before the United States Bankruptcy Court. In his most recent Motion, seeking sanctions against the Official Liquidator, defendant describes the inconsequential nature of his plea of guilty:

Mr. Anderson has now pled guilty to a small portion of the charges originally brought against him. The trial Judge Honorable Paul Friedman indicated his intention to dismiss a number of other charges for which he was originally indicted. The evidence and claims in the Bill of Particulars prepared by the prosecutors per the order of Judge Friedman did not show that Mr. Anderson benefited (sic) personally from the formation, management and financial activities of Gold & Appel Transfer S.A. and it (sic) related organizations. The evidence in facts shows that Mr. Anderson contributed substantial assets to the Not-For-Profit and then later loaned additional funds to Gold & Appel Transfer S.A. ... The United States Government case against Mr. Anderson, now settled, was primarily driven by potential tax consequences related to a Not-for-Profit organization created and endowed by Walt Anderson . . . Mr. Anderson, **at the time he created this Not-For-Profit organization, was not aware of (sic) possibility of any United States tax liability associated with him which might effect him personally.**

See Defendant's Motion for Rule 11 Sanctions, filed March 2, 2007 (attached as Exhibit 50)

(emphasis added). The government agreed to a three level reduction based upon defendant's acceptance of responsibility in pleading guilty to the crime. Nonetheless, as is demonstrated by his bankruptcy filings, it is uncertain that defendant actually believes that he did anything wrong. Without first accepting that his conduct was criminal, it is difficult to believe that he will not re-offend.

II. Defendant's Sentencing is not a Public Referendum
on the D.C. Department of Corrections

Defendant continues to blame others for his circumstances, and complains bitterly about a situation that was of his own creation— his pre-trial detention in the Department of

Corrections. His own conduct is what landed him in detention. Defendant was deemed a flight risk by two independent fact finders, whose findings were affirmed by the Court of Appeals of the District of Columbia.

Originally, defendant was housed in a facility in Montgomery County. He was moved shortly thereafter to the Correctional Treatment Facility (“CTF”), in the District of Columbia. It wasn’t until he was determined to be unmanageable at CTF because of numerous violations, including paying off inmates and possession of a cell phone, that he was moved to the Central Detention Facility (“CDF”). See Exhibit 22.

Defendant complains about the conditions of the jail.¹⁰ There is nothing unique about defendant’s detention at CDF. As of January 2007, 55% of the population at the CDF were in the same circumstances as defendant: they were incarcerated awaiting trial on pending charges. See Defendant’s Sentencing Memorandum, Exhibit 7, p. 8. His complaints are indistinguishable from the rest of that jail population, and certainly do not rise to a level that would entitle defendant to any special consideration. See, e.g., United States v. Dyck, 334 F.3d 736, 742-43 (8th Cir. 2003) (no evidence that the conditions at the Grand Forks County jail facility were so

¹⁰His complaints allege: insufficient access to a law library; the library itself, although staffed with a law librarian, was substandard insofar as some of its material was dated; the four computers available in the library, which use Microsoft Windows 2000 NT, had limited printing capabilities; legal and personal visitors waited excessively prior to obtaining access to defendant; imposition of disciplinary solitary confinement for a variety of offenses; difficulties with legal and personal telephone calls; inability to store legal and personal papers in his cell; difficulties receiving and sending mail; lack of recreational reading material; inadequate grievances procedures; overcrowding housing in general population with inadequate televisions, limited outside recreation time, lack of soundproof walls, outdated and ergonomically unsuitable furnishings, limited shower facilities and meals that although they include vegetables and fruit are inconsistent in quality; poor air ventilation inside the facility; inadequate medical care; sleep deprivation due to the lack of soundproofing in the facility and the schedules of inmates.

substandard as to merit consideration of departure); United States v. Brown, 95 F.Supp.2d 277 (E.D.PA.) (crowding, poor food, noise and inadequate law library insufficient to depart from sentence) compare with United States v Pressley, 345 F.3d 1205, 1219 (11th Cir. 2003) (six years of pre-sentence confinement, during which five years were spent in 23-hour-a-day lock down an appropriate consideration for a departure); United States v. Carty, 264 F.3d 191, 196 (2d Cir. 2001) (pretrial incarceration in Dominican Republic jail, where defendant kept in a four-foot by eight-foot cell with three or four other prisoners, without electricity, lights or running water, and defendant lost forty pounds and suffered various inhumane conditions.); United States v. Rodriguez, 213 F. Supp.2d 1298, 1302 (defendant raped by jailer during pretrial detention) amended, 214 F.Supp.2d 1239, 1241 (M.D.Ala. 2002). Further, unlike most inmates, defendant maintained an office operating in the District of Columbia complete with telephone, office equipment, and his full-time administrative assistant of more than nine years to assist him during his incarceration. According to defendant, his administrative assistant's efforts while defendant was incarcerated "really made a difference" and helped the defendant to prepare for trial. See Exhibit 51. As a result of her efforts, which included scanning over one hundred thousand documents and creating a massive file for his attorneys, the defendant wrote that he felt "more prepared to prove his innocence."

III. The Need to Provide Restitution to Victims of the Offense

The Court should order restitution as a condition of supervised release. Restitution should be ordered in the amounts of \$45,693,989 for the 1998 tax evasion (Count 5) and \$94,894,118 for 1999 tax evasion (Count 6). Restitution to the District of Columbia should be ordered in the amount of \$22,809,033.00 for the 1999 fraud (Count 11). Restitution can be

ordered as a condition of supervised release or probation.¹¹ See 18 U.S.C. § 3563(b)(2); 18 U.S.C. § 3583(d); 18 U.S.C. § 3556; U.S.S.G. § 5E1.1(a); § 5E1.1, comment. (Backg'd); United States v. Butler, 297 F.3d 505, 518 (6th Cir. 2002); United States v. Bok, 156 F.3d 157, 167 (2d Cir. 1998); United States v. Daniel, 956 F.2d 540, 543-544 (6th Cir. 1992); United States v. Comer, 93 F.3d 1271, 1278 (6th Cir. 1996). A court's authority to do so is also explicitly recognized in the Sentencing Guidelines, which mandate the use of that authority. See U.S.S.G. §5E1.1(a)(2); Gall v. United States, 21 F.3d 107, 109-100 (6th Cir. 1994). Under § 5E1.1(a)(2), where a court finds that the government has suffered a loss, defendants convicted of the various tax crimes under Title 26 must be ordered to make restitution as a condition of supervised release. See U.S.S.G. § 5E1.1(a)(2).¹² If the sentencing court does not order

¹¹Section 3563(b)(2) of Title 18 of the United States Code provides that a court may provide, as a condition of probation, that the defendant “make restitution to a victim of the offense under section 3556 (but not subject to the limitation of section 3663(a) or 3663A(c)(1)(A))”, and section § 3583(d) provides that a court may order as a condition of supervised release “any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10)” Thus, a court may order the payment of restitution for a Title 26 violation as a condition of probation or as a condition of supervised release. See, e.g., Bok, 156 F.3d at 167; United States v. Butler, 297 F.3d 505, 518 (6th Cir. 2002), cert. denied, 538 U.S. 1032, 123 S. Ct. 2074 (2003).

¹² There are exceptions to the advisory Guidelines' mandate that a court impose restitution as either an independent element of the sentence or as a condition of probation or supervised release. See U.S.S.G. § 5E1.1(b)(2). The advisory Guidelines provide that a court may not order restitution or make it a condition of probation or supervised release if full restitution has already been made. U.S.S.G. § 5E1.1(b)(1). Similarly, the advisory Guidelines requirement that the court order the payment of restitution does not apply in the case of a restitution order under section 3663, a restitution order under section 3663A that pertains to an offense against property described in 18 U.S.C. § 3663A(c)(1)(A)(ii), or an order of restitution imposed as a condition of probation or supervised release if the court finds, from facts on the record, that the number of identifiable victims is so large as to make restitution impracticable or that determining complex issues of fact related to the cause or amount of the victim's loss would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process. U.S.S.G. § 5E1.1(b)(2). The

restitution, or orders only partial restitution, it must state its reasons for not imposing full restitution on the record. See U.S.S.G. 4E1.1 comment. (Backg'd).

It is well settled that the United States and its agencies, such as the IRS, may be victims under 18 U.S.C. § 3663, and that an unpaid tax may represent a loss covered by restitution principles. See United States v. Gibbens, 25 F.3d 28, 32 (1st Cir. 1994); United States v. Helmsley, 941 F.2d 71, 101 (2d Cir. 1991).

The determination of the amount of restitution is governed by VWPA. See U.S.S.G. § 5E1.1; 18 U.S.C. § 3663; United States v. Gall, 21 F.3d at 110-111 (restitution imposed as a condition of supervised release must still be imposed in conformity with VWPA); United States v. Daniel, 956 F.2d at 543; United States v. Husky, 924 F.2d 223, 226 n.4 (11th Cir. 1991) (§ 5E1.1 provides that restitution shall be ordered in accordance with the VWPA). VWPA directs the court to consider (1) the amount of the loss sustained by each victim as a result of the offense and (2) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate. 18 U.S.C. §3663(a)(1)(B)(I); United States v. Joseph, 914 F.2d 780, 785-86 (6th Cir. 1990).

The amount of restitution must be judicially determined pursuant to notice and a hearing.¹³ See United States v. Minneman, 143 F.3d at 284-85; United States v. Bourne, 130

Government has submitted schedules to the Probation Office and this Court which identify each financial transaction which is the basis of the actual tax loss, and sets forth with substantial clarity the restitution numbers. The Government intends to present testimony from the agents who prepared the summary charts at the sentencing hearing. See exhibits 19 and 26.

¹³As a general rule, the District Court may not delegate the judicial functions inherent in the grant of restitution to another body such as the probation office or the IRS. Compare United States v. Overholt, 2002 WL 31296164 (10th Cir. 2002) (where district court knew defendant could not pay restitution immediately court's failure to set appropriate payment schedule

F.3d 1444, 1447 (11th Cir. 1997); United States v. Woodley, 9 F.3d at 780-781; United States v. Jordan, 890 F.2d 247, 253 (10th Cir. 1989) (considering restitution ordered as a condition of supervised release); United States v. Butler, 297 F.3d at 518-19 (court could not order defendant to pay restitution in an amount to be determined by the IRS or the tax court); United States v. Carboni, 204 F.3d 39, 47 (2nd Cir. 2000) (restitution is actual loss, not intended loss). The Government must establish the amount of loss for restitution by a preponderance of the evidence. United States v. Boney, 977 F.2d 624, 636 (D.C. Cir. 1992). The loss must result directly from the offense of conviction. United States v. Daniel, 956 F.2d at 543. The amount of restitution may also include interest. United States v. Kress, 944 F.2d 155, 160 (3rd Cir. 1991) (post-judgment interest may be included in restitution order); see also United States v. Helmsley, 941 F.2d at 101 (defendant ordered to pay restitution to government of taxes owed, and all penalties and interest thereon). The District Court has broad discretion to determine the type and amount of evidence necessary to support an award of restitution. United States v. Najjor, 255 F.3d 979, 984 (9th Cir. 2001) (quoting United States v. Barany, 884 F.2d 1255, 1261 (9th Cir. 1989)).

District Courts may also order convicted defendants to pay back taxes as a condition of supervised release. See 18 U.S.C. 3583(d); U.S.S.G. §5D1.3(b). See also United States v. Braxtonbrown-Smith, 278 F.3d 1348, 1356 (D.C. Cir. 2002); United States v. Hatchett, 918 F.2d 631, 644 (6th Cir. 1990) (collecting cases); United States v. Schiff, 876 F.2d 272, 275 (2nd Cir.

essentially delegated court's responsibility to Bureau of Prisons and probation office; collecting cases discussing split in circuits); United States v. Butler, 297 F.3d at 518 (district court could not order restitution in an amount "To be determined thru tax court or IRS."); United States v. Braxtonbrown-Smith, 278 F.3d at 1356 (court may not allow probation to modify amount of restitution defendant must pay upon release from custody).

1989) (court may order defendant to comply with all state, federal or local laws).

This Court should order restitution even if it finds that the defendant cannot pay a fine. Where a defendant has a substantial probability of earning future income, an order of restitution is proper. United States v. Sanders, 95 F.3d 449, 456 (6th Cir. 1996). See, e.g., United States v. Ben Zvi, 242 F.3d 89, 100 (2nd Cir. 2001) (defendant's limited financial resources at time of imposition of sentence not dispositive, particularly where defendant has reasonable potential for future earnings; in absence of showing by defendant of restricted future earnings potential district court may reasonably presume future earnings); United States v. Lawrence, 189 F.3d at 848 (while district court is not required to make express finding concerning ability to pay, the court must consider the information and "cannot completely defer to the monitoring capabilities of the probation officer); United States v. Wells, 177 F.3d at 611 (court can consider likelihood that defendant will acquire resources in future and defendant's entrepreneurial talents); United States v. Adelson, 441 F. Supp.2d 506, 514 (S.D.N.Y. 2006) (ordering defendant to pay restitution of \$50 million, to be paid at a monthly rate of 15% of defendant's monthly income following prison term, despite fact that defendant's reputation destroyed and future employment severely limited by criminal conviction).

By all accounts, based upon his successful history as a venture capitalist, defendant has a demonstrated future earning ability that this Court can rely upon in ordering restitution. Moreover, there are outstanding lawsuits of which the defendant is a plaintiff and may recover substantial funds that can be used toward future restitution payments. Substantial assets are held in the Smaller World Trust Foundation which was funded and controlled by the defendant as of

the date of his arrest in February 2005.¹⁴ See Exhibit 52.

Defendant proposes that restitution be left to the civil process of the IRS. It was defendant's decades-long flagrant ignoring of the IRS administrative process that in part led to his criminal indictment for tax evasion. In fact, it was the contact from the IRS civil agents that sent defendant scurrying to tax havens to hide assets. See Superceding Indictment, Count One. One thing is certain, IRS civil remedies will not work with this defendant.

IV. ___ A 120 Month Sentence and An Order of Restitution are Required To Promote Respect for the Law and Afford Adequate Deterrence

The need to deter others from committing tax crimes is urgent. As of February 2006, the overall gross tax gap – the difference between what taxpayers should have paid and what they actually paid in taxes on a timely basis – was \$345 billion for 2001. That means, that taxpayers failed to pay \$345 billion dollars owed in taxes to the United States.¹⁵ The entire voluntary tax system is undermined by those Americans who don't pay their fair share. The magnitude of the tax gap highlights the critical role of enforcement in keeping our system of tax administration healthy. It is crucial that those individuals who commit tax evasion and fraud are punished.

The Sentencing Guidelines pertaining to tax violations were crafted with the recognition that criminal tax prosecutions protect the public interest in preserving the integrity of the

¹⁴ Section 3664 which controls the procedure for the issuance and enforcement of the restitution order, directs the court to consider the financial resources of the defendant "including a complete listing of *all assets owned or controlled by the defendant as of the date on which the defendant was arrested.*" Section 3664(d)(3).

¹⁵ See IR-2006-28, Feb. 14, 2006, Washington — Internal Revenue Service officials announced updated estimates of the Tax Year 2001 tax gap based on the National Research Program (NRP).

nation's tax system. The tax guidelines rely heavily on the amount of loss that was the object of the offense. Recognizing that tax offenses, in and of themselves, are serious offenses the guidelines specify that a greater tax loss is obviously more harmful to the treasury and more serious than a smaller one with otherwise similar characteristics. Obviously, as the potential benefit from the tax offense increases, the sanction necessary to deter would-be tax evaders also increases. See e.g., U.S.S.G. § 2T.1.1 Tax Evasion, Background. Here, where the defendant's successful completed tax fraud resulted in the largest U.S. Individual evasion tax loss, the sentence must be commensurate with the fraud. Nothing less than ten years will suffice.¹⁶

CONCLUSION

Wherefore, the United States respectfully requests this Court to sentence defendant to a

¹⁶ A ten year sentence is appropriate for this case. Congress specifically amended the tax loss tables (effective November 1, 2001) to "reflect more appropriately the seriousness of tax offenses and to maintain proportionality with the offenses sentenced under the consolidated guideline." See U.S.S.G. Appendix C, Volume II, Amendment 617. In short, Congress intended penalties to be more commensurate with the harm caused by the criminal conduct.

A sentence within the applicable guidelines range in this case is proportionate to those imposed in other tax prosecutions. For example, on April 22, 2005, Keith Anderson, aged 63, received a 20 year sentence for his role in the promotion an abusive trust tax evasion scheme. The tax loss caused by the scheme was \$120 million. Anderson's co-defendants, Wayne Anderson, aged 67, and Richard Marks, aged 63, both received 15 years imprisonment. On August 31, 2005, Royal Hardy was sentenced to 156 months imprisonment and ordered to pay restitution for conspiring to defraud the IRS. The tax loss caused by Hardy was \$8.6 million. On April 27, 2006, James and Jeanine Delfino were sentenced to 78 months and 60 months respectively, and ordered to pay restitution, for evading more than \$1.5 million in taxes by funneling their income through bogus trusts. On May 18, 2006, David Stephenson was sentenced to 96 months in prison and ordered to pay \$8.5 million in restitution to the IRS for his role in a tax evasion scheme. On June 29, 2006, Dennis Poseley was sentenced to 84 months in prison for his role in promoting an abusive trust and tax scheme that resulted in \$3-7 million in loss to the United States. On July 6, 2006, Jimmy Chisum was sentenced to 97 months for assisting others in the filing of false trust tax returns. On October 6, 2006, Susan O'Brien was sentenced to 125 months in prison and ordered to pay restitution, for her role in a tax evasion scheme which resulted in a tax loss of more than \$1 million.

term of 120 months in prison for the federal charges, a period of eight years in prison for the D.C. charge to run concurrent,¹⁷ and an order of restitution in the amount of \$140,588,107 to the Federal Government and \$22,809,032.92 to the District of Columbia.

Respectfully submitted,

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¹⁷ See Government's Supplemental Sentencing Memorandum.