UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA v. JOHN E. WEISBERG, Defendant.	**NOTICE OF MOTION** Cri. No. 07-CR-66(A)

PLEASE TAKE NOTICE:

MOTION MADE BY:	Rodney O. Personius, Esq., of Counsel PERSONIUS MELBER LLP Attorneys for Defendant JOHN E. WEISBERG.
DATE, TIME & PLACE:	Given that this is a motion for reconsideration, oral argument should be at the Court's discretion.
RELIEF SOUGHT:	Reconsideration of denial of Defendant's motion for disclosure (Dkt. No. 9) by Order dated October 21, 2007 (Dkt. No. 17).
GROUNDS FOR RELIEF SOUGHT:	Federal Rule of Civil Procedure 59(e) and controlling Second Circuit precedent.
SUPPORTING PAPERS:	Annexed Affirmation of Counsel, with Exhibit.

Dated: Buffalo, New York
September 5, 2007.

/s/ Rodney O. Personius, Esq.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

JOHN E. WEISBERG,

Defendant.

AFFIRMATION OF COUNSEL

Cri. No. 07-CR-66(A)

RODNEY O. PERSONIUS, ESQ., affirms the following under penalty of perjury:

1. I am a member of the law firm known as PERSONIUS MELBER LLP, retained attorneys for defendant John E. Weisberg.

2. This Affirmation is submitted in support of Dr. Weisberg's request for reconsideration of that portion of the Court's Order, dated August 21, 2007, that denied Defendant's motion for disclosure, dated June 29, 2007. A copy of that Order is annexed to this Affirmation as **Exhibit A**.

BASIS FOR SEEKING RECONSIDERATION

3. Dr. Weisberg recognizes that a motion for reconsideration is subject to a strict set of standards. *Schrader v. CSX Transportation, Inc.*, 70 F.3d 255, 257 (2d Cir. 1995).

4. Relief is requested herein upon the basis controlling case authority within the Second Circuit regarding the import of the term "materiality" as that term is used in Federal Rule of Criminal Procedure 16(a)(1)(E)(i) has been overlooked by the Court.

5. In particular, the Court's August 21, 2007 Order fails to recognize that requested documentary evidence having a clearly articulated value as impeachment material is subject to disclosure pursuant to Rule 16(a)(1)(E)(i).

THE PROPRIETY OF SEEKING RECONSIDERATION IN A CRIMINAL CASE

6. Neither the Federal Rules of Criminal Procedure nor the Local Rules of the Western District of New York expressly provide for reconsideration of a ruling on a criminal matter.

7. Nonetheless, a motion requesting reconsideration does constitute proper practice, and is subject to the guidelines set forth in the corresponding rule governing civil matters; that is, Federal Rule of Civil Procedure 59(e):

> Where the Rules of Criminal Procedure "do not speak specifically to [a] matter, a court conducting a criminal case is permitted to draw from and mirror a practice that is sanctioned by the Federal Rules of Civil Procedure." [Citation.] Thus, when deciding motions for reconsideration in criminal matters, "courts in this district have resolved [such motions] according to the same principles that apply in the civil context." [Citations.]
>
> * * *
>
> A motion for reconsideration in a civil case is governed by . . . Rule 59(e) of the Federal Rules of Civil Procedure, . . . which articulate[s] procedures and requirements for the filing of a motion for reconsideration. . . . In *Schrader v. CSX Transportation, Inc.*, the Second Circuit made it clear that the standard governing a motion for reconsideration "is strict and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the Court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the Court." 70 F.3d at 257.

United States v. James, 2007 WL 914242, at *3 (E.D.N.Y.) [omitted material from above citation is limited to cited case authorities and the discussion of Local Civil Rule 6.3 of the Southern and Eastern Districts of New York].

8. As noted above, in this instance, Dr. Weisberg interprets the Court's Order denying his motion seeking disclosure as having overlooked case law authority that should alter the conclusion reached by the Court.

THE COURT'S AUGUST 21, 2007 ORDER

9. Relying upon the decision of the United States Supreme Court in *United States v. Armstrong*, 517 U.S. 456 (1996), the Court interprets the documentation subject to disclosure under Rule 16(a)(1)(E)(i) as being limited to "documents necessary to prepare arguments in response to the Government's case-in-chief[.]" Order, at 4. Based upon controlling legal precedent in the Second Circuit, as discussed below, this constitutes an unduly narrow interpretation of the materials that are subject to production under Rule 16(a)(1)(E)(i).

10. The Court next concludes that the breadth of Rule 16's definition of "materiality" in this Circuit is different than that applied in other Circuits, nothing that "materiality either counters the Government's case or bolsters a defense[.]" Order, at 5, citing *United States v. Stevens*, 985 F.2d 1175, 1108 (2d Cir. 1993).

11. The Court then finds that Dr. Weisberg's disclosure motion relies upon the definition of materiality under Rule 16 applied in other Circuits, suggesting that the holdings in these decisions cannot be reconciled with controlling authority in the Second Circuit. Order, at 5-6.

12. The Court concludes its analysis by denying Dr. Weisberg's three specifically enumerated requests for disclosure in their entirety, incorrectly finding that Dr. Weisberg's disclosure requests are solely designed "to show that he was treated differently than other non-filers[,]" and then finding that the requested data is not "material to the elements of the offense charged against defendant, namely whether he intended not to file his tax returns." Order, at 8.

GROUNDS FOR REQUESTING RECONSIDERATION

A. The Supreme Court's decision in *Armstrong* does not alter the Second Circuit's standard for "materiality" under Rule 16.

13. The consideration of Rule 16's materiality standard in the *Armstrong* decision was different than that attendant to Dr. Weisberg's pending motion; that is, the defendants in *Armstrong* sought disclosure of data in the context of preparing a motion to dismiss the indictment under a selective prosecution theory.

14. This circumstance limits the applicability of the *Armstrong* rationale in the context of a motion seeking disclosure of materials to be used at trial. As explained by Magistrate Judge Foschio, the Court simply held that a selective prosecution challenge prior to trial seeking outright dismissal of all charges "was not directed to the government's case in chief and thus was beyond the authority granted by Rule 16." *United States v. Chimera*, 201 F.R.D. 72, 75 (W.D.N.Y. 2001). Accordingly, Magistrate Judge Foschio concluded that a request for eavesdropping-related materials that might form the basis for a challenge to the admissibility of evidence at trial could, upon a proper showing, satisfy Rule 16's materiality standard. 201 F.R.D. at 75-76.

15. In addressing the *Armstrong* decision in its Order, the Court also relies upon *United States v. Rigas*, 258 F.Supp.2d 299 (S.D.N.Y. 2003). While that decision does cite the *Armstrong* case in the context of considering the defendant's Rule 16 motion for disclosure, the Court nonetheless relies upon existing Second Circuit precedent, discussed below, as properly articulating the materiality standard under Rule 16. 258 F.Supp.2d at 306-307.

16. As such, *Armstrong* should not be interpreted as narrowing the otherwise applicable standard for disclosure of documents and other data under Rule 16 in this Circuit.

B. The standard for "materiality" in the Second Circuit, at minimum, contemplates the production of impeachment materials.

17. The Court's Order correctly recognizes that the two principal authorities in this Circuit upon which a Rule 16(a)(1)(E)(i) [formerly Rule 16(a)(1)(C)] request should be gauged are *United States v. Stevens*, 985 F.2d 1175 (2d Cir. 1993), and *United States v. Maniktala*, 934 F.2d 25 (2d Cir. 1991).

18. Neither case, however, supports an interpretation of the disclosure anticipated by Rule 16 that would foreclose the production of material to be used for impeachment purposes at trial.

19. In *Stevens*, the Court explicitly noted that evidence not to be used as part of the Government's case in chief at trial is nonetheless "material if it could be used to counter the government's case or to bolster a defense[.]" 985 F.2d at 1180. These two separate criteria ("counter the government's case" or "bolster a defense") are in no sense intended to foreclose the production of impeachment material under Rule 16.

20. The Court's earlier decision in *Maniktala* makes this fact clear. In considering whether or not a defendant's post-conviction complaint regarding the non-production of timesheets satisfied Rule 16's materiality standard, the Second Circuit expressly recognized that the impeachment value at trial of these materials, if demonstrated, would satisfy that standard. 934 F.2d at 28. [That the Court ultimately concluded the appellant had not made a proper showing does not undercut the fact that impeachment use of requested data falls within Rule 16's materiality standard.]

21. At oral argument, defense counsel referenced Magistrate Judge Foschio's ruling in *United States v. Holihan*, 236 F.Supp.2d 255 (W.D.N.Y. 2002). Expressly relying upon the Second Circuit's decision in the *Maniktala* case, Magistrate Judge Foschio found that "the use of [Suspicious Activity Reports] to **impeach** government witnesses will have a significant effect on the defense and, as thus, are material to the defense. *Maniktala, supra*, at 28. The SARs are, therefore, discoverable under [former] Rule 16(a)(1)(C)." 236 F.Supp.2d at 262 [emphasis added]. Under the same rationale, the Court concluded that attendance recordkeeping procedures of the victim bank, which would be used in cross-examining one of the Government's witnesses, also fell with Rule 16's materiality standard. *Id.*

22. The question of whether or not the Second Circuit entertains a narrower definition of materiality under Rule 16 than other Circuits aside, it is readily apparent that materials to be used for impeachment purposes qualify for production under Rule 16.

C. The Court's Order overlooks the impeachment value of the data requested by Dr. Weisberg.

23. The Court applies earlier cited case authorities to Defendant's specific discovery requests at pages 8-9 of its Order. There is no discussion of the impeachment value of this material.

24. Rather, the Court first finds that the singular purpose for requesting the materials at issue is to show that Dr. Weisberg was treated differently than other non-filers. Order, at 8. As demonstrated below, this is an incorrect characterization of the requests at issue.

25. The sole other comment made by the Court addresses the defendant's request in the context of the elements of the charged offense; that is, failing to file tax returns in violation of Title 26 United States Code §7203.

26. Disclosure under Rule 16 is not to be read in such a narrow fashion. Neither the decision of the Supreme Court in *Armstrong* nor precedent within the Second Circuit supports the Court's narrow reading of Rule 16.

D. Defendant did make a proper showing of materiality under Rule 16.

27. Defendant's motion papers are hardly conclusory, having been supported by a ten page Affirmation specifically detailing the factual background of Dr. Weisberg's dealings with the Internal Revenue Service within the timeframe 1997 through 2003, and including specific reasons as to why the requested data would be valuable at trial in countering the Government's evidence from an impeachment perspective.

28. At oral argument on July 25, 2007, counsel expanded upon this rationale, while also specifically narrowing the request for Internal Revenue Service guidelines to those applicable to responding to communications from non-filing taxpayers or their designated representatives.

29. The defendant's request for disclosure has been narrowly drawn to solely consist of (1) guidelines related to how Service personnel should respond to non-filer communications; (2) form letters utilized in responding to non-filer communications; and, (3) published responses used in answering the arguments raised by the tax protester organization retained by Dr. Weisberg, American Rights Litigators ["ARL"].

30. The impeachment value of these materials has been fully set forth in both Dr. Weisberg's original motion papers and at oral argument, *i.e.*, not for the purpose of advancing any type of selective prosecution theory, as suggested by the Government and apparently accepted by the Court, but rather to seriously question the Service's handling of its communication obligation with a non-filing taxpayer.

31. As such, the requested materials would serve to counter the Government's case that it handled its dealings with Dr. Weisberg in a fair, forthcoming and reasonable fashion and would support the contention he was improperly lulled into a false sense that the arguments advanced by ARL had merit.

CONCLUSION

32. For the reasons set forth above, it is respectfully requested that the Court reconsider its earlier ruling, denying *in toto* Dr. Weisberg's motion for disclosure, and direct that the Government produce the limited Internal Revenue Service data identified above.

Dated: Buffalo, New York
September 5, 2007.

/s/ Rodney O. Personius, Esq.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2007, I electronically filed the foregoing with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the following:

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

JOHN E. WEISBERG,

Defendant.

Hon. Hugh B. Scott

07CR66A

Order

Before the Court are defendant's motion for disclosure (Docket No. 9[1]), the Government's motion in limine (Docket No. 8[2]), and defendant's cross-motion for disclosure of the evidence about which the Government seeks an in limine ruling (Docket No. 11[3]).

BACKGROUND

Defendant was indicted on March 22, 2007, for four counts of willful failure to file tax returns for tax years 2000-2003, in violation of I.R.C. § 7203 (Docket No. 1), a misdemeanor with a fine of no more than $25,000, and imprisonment of up to one year, I.R.C. § 7203. The

[1]In support of his motion, defendant filed his attorney's affirmation and exhibits, Docket No. 9, and memorandum of law, Docket No. 10. In opposition, the Government filed its response, Docket No. 12.

[2]In support of this motion in limine, the Government filed its response, Docket No. 14. In opposition to this motion in limine, is defendant's cross-motion, Docket No. 11, and a reply, Docket No. 16.

[3]In opposition to this cross-motion is the Government's response (also in support of its motion in limine), Docket No. 14.

filed powers of attorney ten times with the IRS naming ARL as his agent, but the Service ignored defendant's communications (id. at 1-2). The discovery defendant seeks would show how the IRS treated similar non-filers and filers who used ARL or ARL's tax protest arguments in opposing filing tax returns.

The Government responds that it has produced seven boxes of documents for defense review (Docket No. 12, Gov't Response at 7). The scope of defendant's present demands are overbroad, seeking all IRS guidelines regarding handling of non-filer cases, all form letters, memos, and other correspondence prepared by the IRS, and all Service memoranda, reports, and other writings (up to April 2004) in response to ARL arguments (id. at 8-9). The Government argues that IRS guidelines, policies, and procedures for dealing with non-filers have nothing to do with defendant's intent, the sole issue in his defense. The Government further contends that letters sent by the IRS to other taxpayers also are not probative of defendant's intent and IRS's arguments in response to the ARL's positions are irrelevant. (Id. at 12.) Finally, the Government argues that these documents are privileged and exempt from disclosure as internal government documents under Federal Rule of Criminal Procedure 16(a)(2) (id. at 16).

DISCUSSION

I. Document Production and Materiality

A. Rule 16

Rule 16(a)(1)(E)(i) (formerly Rule 16(a)(1)(C) prior to 2002 redesignation by the Advisory Committee) provides that

> "Documents and Objects. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or

> portions of any of these items, if the item is within the government's possession, custody, or control and:
>
> "(i) the item is material to preparing the defense . . . ."

Fed. R. Cr. P. 16(a)(1)(E)(i). Rule 16(a)(1)(E)(i) entitles defendant to documents necessary to prepare arguments in response to the Government's case-in-chief, United States v. Armstrong, 517 U.S. 456, 462 (1996); United States v. Rigas, 258 F. Supp. 2d 299, 306 (S.D.N.Y. 2003). The Supreme Court in Armstrong defined "defendant's defense" in the former version of the rule to mean "the defendant's response to the Government's case-in-chief," 517 U.S. at 462, with the defense in the narrower role as "shield" "refut[ing] the Government's arguments that the defendant committed the crime charged," rather than the more aggressive "sword" role of challenging the prosecution's conduct of the case, id. There, defendant sought discovery he believed would show selective prosecution, id., and the Armstrong Court held that this defense would open to examination the Government's otherwise privileged work product, exempt from disclosure by Rule 16(a)(2), Armstrong, supra, 517 U.S. at 463.

B. Materiality in the Second Circuit and Other Circuits

Thus, the issue is whether the documents defendant seeks are material in preparing his defense. This Court has broad discretion in deciding what is material, see 25 Moore's Federal Practice § 616.05[1][b][i], at 616-48 (3d ed. 2003). Defendant has the burden of establishing a prima facie case of materiality, United States v. Stevens, 985 F.2d 1175, 1180 (2d Cir. 1993); United States v. Elliott, 363 F. Supp. 2d 439, 449 (N.D.N.Y. 2005). If a defendant seeks immaterial internal Government documents, the privilege under Rule 16(a)(2) precludes their disclosure, Elliott, supra, 363 F. Supp. 2d at 449.

Defendant argues that there are more reasons that make those items material in preparing his defense aside from merely refuting the Government's assertions. He cites impeachment and uncovering additional evidence as well as assisting in countering the Government's case at trial, relying upon other Circuits' decisions (see Docket No. 10, Def. Memo. at 2).

But Second Circuit law applies here and the Court of Appeals, in United States v. Stevens, 985 F.2d 1175, 1180 (2d Cir. 1993), set a different standard than other Circuits. Under Stevens, materiality either counters the Government's case or bolsters a defense, id. The Stevens court held that, under this standard, the Government should have produced defendant's tape recorded telephone conversation, under Rule 16(a)(1)(A) which requires production of a defendant's statements, but held that failure to produce did not automatically require a new trial, id. at 1180-81. But, under the former Rule 16(a)(1)(C) (the present Rule 16(a)(1)(E), the court held that defendant failed to show that the recorded telephone conversation was material, id. at 1180. "Materiality means more than that the evidence in question bears some abstract logical relationship to the issues in the case. There must be some indication that pretrial disclosure of the disputed evidence would have enabled the defendant significantly to alter the quantum of proof in his favor." United States v. Maniktala, 934 F.2d 25, 28 (2d Cir. 1991) (quoting United States v. Ross, 511 F.2d 757, 762-63 (5th Cir.), cert. denied, 423 U.S. 836 (1975)); Elliott, supra, 363 F. Supp. 2d at 449.

Defendant cites other Circuits and their definitions of materiality under Rule 16. These courts have "broadly construed" Rule 16 discovery to "allow discovery of documents for which 'there is a strong indication that they will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment and rebuttal,'" United States v. Halpin, 145 F.R.D. 447, 450 (N.D. Ohio 1992) (quoting United States v. Gaddis, 877 F.2d 605, 611 (7^{th} Cir. 1989) (per curiam)). These formulations if applying the Stevens standard, however, flesh out possible forms of bolstering a defense, such as witness preparation, corroboration of testimony, and in impeachment and rebuttal, United States v. Lloyd, 992 F.2d 348, 351 (D.C. Cir. 1993); Gaddis, supra, 877 F.2d at 611 (both cases quoting United States v. Felt, 491 F. Supp. 179, 186 (D.D.C. 1979)), or both countering the Government's case and bolstering a defense by uncovering admissible evidence, Lloyd, supra, 992 F.2d at 351. The courts within the District of Columbia Circuit, relied upon by defendant, appear to have a broader view of criminal defense discovery than this Circuit, cf. United States v. Safavian, 233 F.R.D. 12, 15 (D.D.C. 2005) (citing United States v. Poindexter and United States v. George); United States v. Poindexter, 727 F. Supp. 1470, 1473 (D.D.C. 1989) (Rule 16 intended to give defendant "the widest possible opportunity to inspect and receive such materials in the possession of the Government as may aid him in presenting his side of the case"); United States v. George, 786 F. Supp. 11, 13 (D.D.C. 1991) (materiality hurdle "is not a high one"); but cf. United States v. Stein, No. S1 05 Crim. 888, 2007 U.S. Dist. LEXIS 31513, at *15 (S.D.N.Y. May 1, 2007) (citing Lloyd and other circuits' cases).

Further, in some of the cases defendant cites, the documents sought ultimately were not produced, Gaddis, supra, 877 F.2d at 611 (held defendant failed to show how document uncovered evidence, aided in witness preparation, corroborated testimony, or assisted in impeachment or rebuttal); United States v. Peitz, No. 01CR852, 2002 WL 31101681, at *5-7 (N.D. Ill. Sept. 20, 2002) (held sought SEC action memorandum was privileged and barred from production under Rule 16(a)(2)).

In Stein, defendants, former partners of KPMG, were indicted for conspiracy to design, market, and implement fraudulent tax shelters, tax evasion, and related charges, 2007 U.S. Dist. LEXIS 31513, at *7-9. KPMG previously was indicted, but plead guilty and entered into a plea agreement wherein it agreed to cooperate with the Government, id. at *1-7. Defendants in the Stein prosecution sought production of documents KPMG prepared concerning the legality of the tax shelters, both subpoenaing KPMG and serving discovery notice upon the Government, id. at *10. The district court invited the parties to brief the issues whether the documents were discoverable under Rule 16(a)(1)(E)(i) if they were in the physical possession of the prosecution, id. at *12-13, and at oral argument defendants stated that they were seeking a Rule 16 order compelling their production, id. at *13. On defendants' motion to compel production of a set of documents sought in the KPMG subpoena, the court said that one issue raised was whether these documents were material to the preparation of the defense, id. at *15. The Stein court then applied both the Second Circuit and D.C. Circuit standards for materiality, first noting that the "'materiality standard . . . normally is not a heavy burden,'" id. at *15 & n.25 (quoting Lloyd, supra, 992 F.2d at 351), and the Second Circuit's Stevens and Maniktala standards, id. at 15 & nn.26, 27. The court then reviewed each category within the subpoena request, finding that some were material and others were not, id. at *16-18, *18-26. Applying Lloyd's standard, the district court found that the correspondence between KPMG and the IRS and a Senate subcommittee and drafts of a statement of facts negotiated between KPMG and the Government in plea discussions were likely to play a role in uncovering admissible evidence, aid in witness preparation, corroborate testimony, and assist in impeachment or rebuttal and was hence material, id. at *18-19, *23. While applying Maniktala and whether the document significantly alters the quantum of proof, the district court found that a white paper within correspondence between KPMG and the Government during plea negotiations was **not** material, id. at *20, *22-23. However, as to a category of KPMG communication with various government entities, where it sought documents beyond the ones the court found to be material, the court deemed them not to be material, excluding wholesale Government internal documents within that category, id. at *24-25 (citing Fed. R. Crim. P. 16(a)(2)). The Stein court, however, did not note the differences in the Second Circuit and other Circuits' standards regarding materiality.

C. Application

Here, defendant seeks three classes of documents: IRS guidelines regarding the handling of non-filers such as defendant; IRS form letters and other correspondence sent to non-filers; and IRS arguments to contentions raised by ARL. Under either the Stevens standard (significant alteration of quantum of proof in defendant's favor in either countering the Government's case or bolstering defendant's) or the more liberal discovery standard from other Circuits, defendant fails to establish a prima facie case of materiality for these categories of documents. Essentially, defendant seeks these categories of documents to show that he was treated differently than other non-filers. Although not asserting a selective prosecution argument, defendant contends that the IRS, through its guidelines and other policies, may have responded to non-filers in a certain way while not responding to defendant's repeated inquiries (either by him or through ARL) (see Docket No. 10, Def. Memo. at 3). It is not clear whether IRS policies or forms of communication applicable to non-filers are material to the elements of the offense charged against defendant, namely whether he intended not to file his tax returns. As for IRS responses to ARL's arguments for other taxpayers, again it is not material to the Government's case-in-chief or the defense in this prosecution. The fact that the Service may have responded to ARL's arguments for others has no bearing on defendant in this action.

As a result, defendant's motion to compel (Docket No. 9) is **denied**.

II. Motion in Limine and Disclosure of in Limine Items

In its motion in limine (Docket No. 8), the Government seeks leave of the Court to introduce evidence of defendant's pattern of not filing tax returns and generally evading paying income taxes for years prior to the ones subject to this indictment. Defendant, in turn, cross-moves for disclosure of the evidence the Government intends to introduce (Docket No. 11). Since the Indictment charges a misdemeanor, see I.R.C. § 7203, this case will be tried by the undersigned, see 18 U.S.C. § 3401(a); see also 28 U.S.C. § 636(a)(3), and, therefore, the motion in limine will be considered here rather than by the District Judge.

Defendant argues, in his cross-motion to produce particularization of the evidence the Government intends to offer, that the Government's in limine motion "was too vague to enable the defense or the Court to properly perform the analysis contemplated in [Fed. R. Evid.] 403, when read in conjunction with [Rule] 404(b)" (Docket No. 11, Def. Atty. Affirm. ¶¶ 9, 15). The Government counters that its has supplied adequate notice to defendant of the nature of its Rule 404(b) evidence and produced records surrounding defendant's non-charged tax years, namely defendant's knowing use of sham trusts in the late 1990s in his state tax returns and drafted (but not filed) federal returns (Docket No. 14, Gov't Response at 2-3). The Government seeks to show with the pre-charged tax year returns a pattern of tax evasion by defendant (see id. at 3). The Government claims that defendant does not object to the admission of this Rule 404(b) evidence and that the motion in limine should be granted (id. at 1), although defendant raises the admissibility question under Rule 403. The Government argues that under Rule 404(b) it need only provide reasonable notice in advance of trial of "the general nature" of that evidence (id. at 4, quoting Fed. R. Evid. 404(b), emphasis added). The Government alternatively argues that if an additional evidentiary foundation is required before ruling on its motion in limine, then the motion should be held under advisement until it hears such additional foundation (id.). Defendant replies that this response introduces new items, furthering his need for particularization of the evidence the Government intends to use (Docket No. 16).

Before deciding the Government's motion in limine, the evidentiary record and context for this evidence needs to be fleshed out at trial. Within the proper context, the Court can assess whether the prejudice of this evidence outweighs it probativeness, see Fed. R. Evid. 403. Therefore, the Government's motion in limine (Docket No. 8) shall be held in abeyance pending trial.

As for defendant's cross-motion, the Government has outlined the general nature of the Rule 404(b) evidence it will seek to introduce–defendant's federal and state tax returns in tax years 1995 to 1999 to show instances of defendant's evasion of his tax obligations. The Government need not particularize further the proffered evidence in the way defendant requests, such as producing specific notices sent to defendant or his tax preparer during the relevant period. Defendant's cross-motion (Docket No. 11) is **denied**, and the Government's motion in limine is **held in abeyance** pending trial.

CONCLUSION

For the reasons stated above, defendant's motion for disclosure (Docket No. 9) is **denied**. The Government's motion in limine (Docket No. 8) is **held in abeyance pending trial** and defendant's cross-motion to produce the in limine item (Docket No. 11) is **denied**.

So Ordered.

/s/ Hugh B. Scott

Honorable Hugh B. Scott
United States Magistrate Judge

Dated: Buffalo, New York
August 21, 2007