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ATTORNEY FOR DEFENDANT MICHAEL BOWMAN

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, vs. MICHAEL BOWMAN, Defendant(s).	Case No. 3:17-CR-00068-MO **AMENDED MOTION TO DISMISS COUNT I - IMPROPER JOINDER - FAILURE TO STATE AN OFFENSE 26 USC §7201**

Defendant, Michael Bowman, through his attorney, Matthew Schindler, moves the Court pursuant to Federal Rules of Criminal Procedure 12(b)(3)(i) and (v) to dismiss Count 1 of the indictment because it improperly joins multiple, separate crimes in a single count and fails to adequately plead an offense under 26 USC §7201. This motion is further supported by the following Memorandum of Law.

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MEMORANDUM OF LAW

A. The Allegations in Count 1 of the Superseding Indictment:

The superseding indictment filed November 29, 2017 begins with a series of introductory allegations combining five different tax years: 1999, 2000, 2001, 2008, and 2009. *See Superseding Indictment* attached as *Exhibit 1* at 1. The introductory allegations state that Mr. Bowman has not filed an acceptable federal income tax return since at least 1997. *Id.*

The introductory allegations further assert that based on information the IRS received from his employers through 1099 or W-2 forms, the indictment alleges that Mr. Bowman received certain amounts of income in the tax years 1999, 2000, and 2001. *Id* at 2. The indictment then skips forward and alleges that for the 2008 and 2009 tax years employers reported that Mr. Bowman received wages or income to the IRS. *Id.* 3-4. Besides non-payment and non-filing, there is nothing that connects 2008 and 2009 to the earlier tax years.

On November 1 and November 3, 2013 Mr. Bowman left voicemail messages with the IRS stating that he would not pay his taxes because it interfered with his right to practice religion. *Id.* at 4.

In Count 1 the government alleges that Mr. Bowman affirmatively evaded the payment of his 1999, 2000, 2001, 2008, and 2009 taxes by

cashing income checks "at his bank" in 2012, 2013, and 2014. *Id.* at 4-6. Sometimes funds were deposited into his account. *Id.* The IRS was aware of his receipt of this income at the time because it was reported by Mr. Bowman's employers. *Id.* at 3-4.

B. Argument:

1. Legal Standards:

Federal Rule of Criminal Procedure Rule 7(c) requires an indictment to be a "plain, concise, and definite written statement of the essential facts constituting the offense charged." The sufficiency of such an indictment hinges upon whether it "adequately alleges the elements of the offense and fairly informs the defendant of the charge, not whether the Government can prove its case." *United States v. Blinder*, 10 F.3d 1468, 1471 (9th Cir.1993).

The allegations contained in an indictment should be "presumed to be true," read both as a whole and to "include facts which are necessarily implied," and should also be construed with "common sense." *Blinder*, 10 F.3d at 1471. In ruling on a pre-trial motion to dismiss an indictment, "the district court is bound by the four corners of the indictment." *United States v. Boren*, 278 F.3d 911, 914 (9th Cir.2002).

Combining multiple tax years into a single count is not specifically authorized by statute or the Federal Rules of Criminal Procedure. Authority

from other circuits suggests it is permissible under §7201 to charge tax evasion covering several years in a single count as a "course of conduct" in circumstances "where the underlying basis of the indictment is an allegedly consistent, long-term pattern of conduct directed at the evasion of taxes for these years." *See e.g. United States v. Shorter,* 809 F.2d 54, 58 (D.C.Cir.), *cert. denied,* 484 U.S. 817, 108 S.Ct. 71, 98 L.Ed.2d 35 (1987); *United States v. Pollen,* 978 F.2d 78, 84 (3d Cir. 1992). Common sense dictates such a reading of the statute given the breadth of the schemes designed to evade taxes over multiple years connected to all of the charged years.

In the *Pollen* indictment, for example, the government alleged for the years 1967, 1970, 1972 through 1975, and 1982, that Pollen attempted:

> "to evade payment in April 1984 by transferring gold through Canada to Switzerland (Count One); he attempted to evade payment in June 1984 by transporting an additional $285,000 through Canada to Switzerland (Count Two); he attempted to evade payment between October 5, 1981, and December 18, 1984, by using currency, money orders, and cashiers checks to buy assets and pay expenditures and by using nominees to conceal his expenditures (Count III); and he attempted to evade payment in August 1990 by placing gold bars, coins, jewelry, and gems in safety deposit boxes in North Carolina under a fictitious name."
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> *United States v. Pollen,* 978 F.2d 78, 87 (3d Cir. 1992).

Similarly, in *Shorter,* cited in *Pollen,* the DC Circuit affirmed a single evasion count covering seven tax years. *See United States v. Shorter*, 809 F.2d 54, 57 (D.C. Cir. 1987) *abrogated on other grounds by Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). The court described Shorter's evasive conduct as follows:

> "Briefly restated, since at least 1973, appellant has conducted all of his professional and personal business in cash, maintaining no bank accounts, office ledgers, or receipts or disbursement journals. Appellant received compensation in cash, paid his employees in cash, possessed no credit cards, and never acquired attachable assets. In short, appellant maintained what has come to be characterized as a "cash lifestyle."
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> *Shorter*, 809 F.2d at 57.

In these cases, the government alleged a scheme of continuous, affirmatively evasive conduct that was connected the specific tax years in question. That is where the government has fallen short here. Only when the indictment alleges conduct relating to the tax years that is long term, continuous, and evasive is the joinder of multiple tax years proper under 26 USC §7201. Nothing material has been changed in the superseding indictment ameliorating the joinder problems. No such course of conduct is alleged here that is affirmative evasive conduct. Because Count I collects five different tax years beginning 18 years ago and ending 9 years before the date of the

indictment without any allegation of a continuous course of evasive conduct connecting them to eachother, Count I is improperly joined under FRCP 12(b)(3)(i) and fails to state a claim under FRCP 12(b)(3)(v). It should be dismissed.

2. Mr. Bowman cashing income checks at his own bank in 2012 through 2014 is not affirmatively evasive conduct under § 7201 without something more.

Accepting everything in the indictment as true, the indictment fails to allege any affirmatively evasive conduct.

According to the indictment, Mr. Bowman's "affirmative evasive conduct" was involved banking in his own name, under the same company name, and at the same address for no less than 10 years. *See Exhibit 1*. Besides not paying and not filing, according to the indictment, his evasive conduct was limited going to his own bank and cashing checks in his own name he received for work he had done in that year. *Id.* According to the indictment, the employers disclosed all of these payments to the IRS through IRS required forms. According to the indictment, his affirmatively evasive conduct was telling the IRS at various times that he would not pay taxes.

None of the alleged conduct suffices to state an offense under §7201 and therefore it cannot provide a basis to join unrelated tax years that have no connection to one another or to the evasive conduct alleged.

Cases finding insufficient evidence of affirmative evasion are instructive. For example, in *United States v. McGill* the defendant, an attorney, was accused of five counts of tax evasion under 26 USC §7201 covering 1980-1987. *United States v. McGill*, 964 F.2d 222, 227 (3d Cir. 1992). In 1983, McGill filed returns but failed to pay. *Id.* In 1985, the IRS levied his personal bank accounts and he ceased using them. *Id.* He began to use accounts associated with his wife and a joint account he held with several other lawyers. *Id.* at 228.

McGill made one attempt to settle his tax debt through an offer in compromise in 1986. *Id.* It was not clear that he made all required disclosures but he definitely did not report his use of these other bank accounts. *Id.* In 1987, trying to become a judge, McGill sent a payment to the IRS. *Id.* In March 1988, the IRS initiated a criminal investigation of McGill. In August 1988, McGill opened a checking account in his own name at another bank. *Id.* He did not disclose the existence of the account to the IRS. *Id.* Despite the IRS levies against him, McGill received $9000 in payments for work that he did. *Id.* at 229. Instead of paying that money to the IRS he deposited in his bank account. *Id.*

The Court held that, as to the evasion counts supported by McGill's use of bank accounts in others names, there was affirmative evasive conduct

sufficient to sustain a §7201 conviction. *McGill*, 964 F.2d at 233. But regarding two other counts involving McGill's opening of an account at a different bank and then depositing money into that account instead of paying it to the IRS, the Court held the evidence insufficient to sustain a §7201 conviction:

> "the failure of the taxpayer to report the opening of an account in his or her own name in his or her own locale cannot amount to an affirmative act of evasion. Omissions, including failures to report, do not satisfy the requirements of § 7201; the Government must prove a specific act to mislead or conceal."
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> *United States v. McGill*, 964 F.2d 222, 233 (3d Cir. 1992).

Mr. Bowman cashing checks as alleged is far more similar to the conduct deemed insufficient in *McGill* than it is to the affirmatively evasive conduct outlined in *Spies. See Spies v. United States*, 317 U.S. 492, 499 (1943). Evasion of payment, as is charged here, involves conduct designed to place assets beyond the government's reach after a tax liability has been assessed, such as by transferring assets abroad, placing assets in the names of others, or using cash transactions to conceal the existence of assets. *United States v. Mal*, 942 F.2d 682, 687 (9th Cir. 1991). The combination of using a nominee and making false statements about ability to pay is a recurring theme in the cases sustaining felony § 7201 cases that is entirely absent here.

Mr. Bowman appears to have been transparent in what he was doing. The indictment makes clear that the IRS was notified by Mr. Bowman's employers about the payments. The IRS filed substituted returns. He did not demand cash for his services that would have concealed this income from the IRS. There is no allegation that he failed to keep records or other paperwork relating to his business. The transactions were not structured such that it would be obscured from the IRS. He never requested or demanded that employers not file required 1099 or W-2 forms. He did not demand that the bank not cooperate with or provide information to the IRS. He is not alleged to have used a false name or nominee. He did not operate alternative accounts. He has operated with the same website at the same URL (http://www.verticalworks.com) since at least January 16, 1999. He has done business as the same entity from the same address for at least a decade.

Mr. Bowman may not have filed an acceptable tax return since 1997 but "mere failure to file a return and to pay the tax is insufficient for a conviction under section 7201 for willful evasion of payment." *United States v. Voorhies*, 658 F.2d 710, 715 (9th Cir. 1981).

The government has not sufficiently alleged timely evasive conduct and therefore it has both failed to state an offense under § 7201 under FRCP 12. Count I should be dismissed on this basis.

3. Because Count I does not allege a continuous, long term course of affirmatively evasive conduct, the tax years are improperly joined.

The entirety of the affirmatively evasive conduct the government alleges relating to the 1999-2001 and 2008 and 2009 tax years (Count 1) can be summarized as follows:

- Mr. Bowman has not filed an acceptable tax return since 1997. *Exhibit 1* at 2.

- In 2012-2014 he cashed checks made out to him for work done in that year at his bank which were then disclosed to the IRS by the employers. *Id.* at 4-5.

- In 2013 Mr. Bowman called the IRS and left two messages lodging a religious objection to paying taxes. *Id.* at 3.

- In 2015, Mr. Bowman made a video explaining his religious and moral objections to paying taxes. *Id.*

These do not sufficiently allege a "consistent, long-term pattern of conduct directed at the evasion of taxes for these years."

Taking everything the indictment says as true, a gap of twelve years between allegations of evasive conduct and the tax year in question cannot be "continuous" such that these disparate tax years can be grouped in the same count. Looking at *Pollen* and *Shorter*, it is obvious why. Both indictments clearly alleged continuous forms of affirmatively evasive conduct applying to the specific tax years in question.

In *Pollen*, the defendant admitted that he took income from the relevant tax years converted it to gold and then physically carried it to Switzerland on several occasions. *United States v. Pollen*, 978 F.2d 78, 82 (3d Cir. 1992). Throughout the entire relevant time period Pollen admitted he kept a safety box under a fictitious name where he cached income from the relevant tax years for the purposes of evading taxes. *Id.* He also admitted that at the same time he used nominees to hide and shield assets from the IRS. *Id.* The Court found this to be sufficiently continuous to be grouped in a single count.

In *Shorter,* the defendant conducted all of his professional and personal business in cash during the entire time period covered by the indictment. *Shorter, 809 F.2d at 57 (D.C. Cir. 1987).* Shorter maintained no bank accounts. *Id.* He did not keep any office ledgers, or receipts or disbursement journals. *Id.* During the entire time frame covered by the indictment, Shorter received compensation in cash, paid his employees in cash, possessed no credit cards, and never acquired attachable assets. *Id.* The conduct alleged was "continuous" for the purposes of joinder.

In *United States v. Richards*, Judge England Jr. of the Eastern District of California addressed successive tax indictments against one defendant challenged for duplicity and violating the statute of limitations. *Compare*

United States v. Richards, No. 2:10-CR-00089 MCE, 2011 WL 1326869 (E.D. Cal. Apr. 6, 2011) and *United States v. Richards*, No. 2:10-CR-00089 MCE, 2012 WL 5210803 (E.D. Cal. Oct. 22, 2012); *Compare Indictment from Richards I* attached as *Exhibit 2* with *Richards II Indictment* attached as *Exhibit 3*. The Court there reached two different holdings after considering two very different indictments.

In *Richards I*, the Court considered the defendant's motions to dismiss for improper joinder and violating the statute of limitations. It dismissed the indictment because failed to connect the affirmatively evasive conduct with the tax years in question.

> "[T]he information included in the indictment listed 1994–2003 as the relevant tax years in question. Defendant allegedly conducted further evading activity in 2005, 2006, and as recently as 2008. However, nothing on the face of the indictment indicates how Defendant's more recent behavior, falling in the appropriate statutory period, constitutes affirmative acts to attempt to evade, or actually evade, paying taxes from 1994 through 2003, years well outside the relevant statutory period. For example, the Court cannot piece together, on the face of the indictment, how Defendant's yacht purchase in 2005 constitutes an affirmative act to evade payment of arrears from his earlier tax returns."
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> *United States v. Richards*, No. 2:10-CR-00089 MCE, 2011 WL 1326869, at *2 (E.D. Cal. Apr. 6, 2011); see also *Exhibit 2*.

The Court here is left trying to entangle the same knot. What does cashing a check in 2014 have to do with evading taxes from 1999 or 2008? What does 2008 have to do with 2001? Nothing in this indictment makes this connection and therefore, just like *Richards I*, Count 1 must be dismissed.

In *Richards*, the government did not go away. It went back to the grand jury and obtained a superseding indictment against Mr. Richards. See *Exhibit 3*; *United States v. Richards*, No. 2:10-CR-00089 MCE, 2012 WL 5210803 (E.D. Cal. Oct. 22, 2012)("Richards II"). This time the indictment was very different. *See Exhibit 3*.

When the *Richards II* indictment is juxtaposed with the *Richards I* indictment it serves to demonstrate why Count I against Michael Bowman must be dismissed. The court in *Richards II* noted that there were significant details included in the superseding indictment which showed evasive conduct related to the tax years that did take place within the limitations period.

> "The Superseding Indictment goes on to provide, however, unlike the original Indictment, considerably more detail as to how the purported concealment occurred. From October 2002 through January 2005, for example, the Superseding Indictment alleges that Defendant continued to use a client's trust account, even after the client's lawsuit settled and the funds were disbursed, to conduct his own personal business and real estate

> transactions so as to conceal such assets and their location from the IRS. Sup. Ind., ¶ 9. One example cited is Defendant's withdrawal, on June 2, 2004, of a cashier's check in the amount of $100,000 of his personal funds from the client trust account to give to another person. Id. The Superseding Indictment goes on to allege that on January 11, 2005, Defendant instructed his bank not to provide the IRS with any records pertaining to the trust account, and then proceeded to withdraw approximately $100,000 the same day in the form of five different cashier's checks, each with a face value of approximately $20,000. Id. at ¶ 10.
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> Additionally, as the Government maintained in its previous indictment (albeit in less detail), the Defendant is alleged to have purchased a yacht in July of 2005 for the sum of $92,000, only to register and title the watercraft in the name of another in January of 2006 for purposes of concealing the asset and its location from the IRS. Id. at ¶ 15. Finally, the Superseding Indictment details several material misrepresentations made by Defendant both to an IRS officer and to the bankruptcy court in order to hide assets from the IRS."
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> United States v. Richards, No. 2:10-CR-00089 MCE, 2012 WL 5210803, at *1–2 (E.D. Cal. Oct. 22, 2012); *Exhibit 3.*

Citing *Shorter*, the Court found in *Richards II* that, unlike the first indictment, the second indictment contained sufficient allegations of continuous evasive conduct to defeat a motion to dismiss. *United States v. Richards*, No. 2:10-CR-00089 MCE, 2012 WL 5210803, at *3 (E.D. Cal. Oct. 22, 2012).

The government did not go away here either but it somehow still failed to see the basic flaws in its reading of Rule 12. The superseding indictment here still suffers from the same flaws as *Richards I*. It does not adequately allege a single course of continuous, long term evasive conduct connected to the specific tax years alleged such that these disparate tax years can be joined in a single count. Absent something more, cashing a check in 2012 cannot possibly represent a continuous course of evasive conduct regarding the 1999 tax year. When compared to the conduct alleged in *Pollen*, *Shorter*, and *Richards I* it is clear that Count 1 is duplicitous and must be dismissed.

C. Conclusion:

For the reasons stated above, Count I of the indictment fails to state an offense under 26 USC § 7201 and should be dismissed. Alternatively, because the government has failed to allege a long term, continuous course of affirmative evasive conduct connecting these five years, Count I is duplicitous and should be dismissed.

Respectfully submitted on February 20, 2018.

s/Matthew Schindler
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