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15 UNITED STATES DISTRICT COURT
16 FOR THE CENTRAL DISTRICT OF CALIFORNIA
17 WESTERN DIVISION
18

19 UNITED STATES OF AMERICA,
20 Plaintiff,
21 v.
22 BARUCH FOGEL,
23 Defendant.

No. CR 14-691-TJH

GOVERNMENT'S (a) CONCURRENCE IN
PSR'S FINDINGS AND SENTENCING
RECOMMENDATION; AND (b) MOTION
PURSUANT TO U.S.S.G. § 5K1.1

Sentencing
Date: August 3, 2015
Time: 10:00 a.m.

24
25
26
27 The Government hereby respectfully concurs with the findings in
28 the Pre-Sentence Investigation Report ("PSR"), the PSR's recitation

1 of the relevant facts, and agrees with the advisory Sentencing
2 Guidelines range calculated in the PSR. The government further
3 submits its Sentencing Position and Motion for Downward Departure
4 Pursuant to U.S.S.G. § 5K1.1 as to defendant Baruch Fogel.¹

5 **GOVERNMENT'S SENTENCING RECOMMENDATION**

6 The United States recommends that the Court, after calculating
7 the advisory Sentencing Guidelines range, which the parties and the
8 PSR agree results in an offense level 15 and a sentencing range of 18
9 to 24 months' imprisonment, grant the government's motion for a
10 downward departure of four (4) levels, pursuant to U.S.S.G. § 5K1.1.
11 The government's recommended reduction results in an advisory
12 Sentencing Guidelines range of 8 to 14 months' imprisonment. The
13 government recommends that a sentence of 8 months' imprisonment, the
14 low end of the adjusted advisory Sentencing Guidelines range,
15 adequately reflects the seriousness of the offense, promotes
16 deterrence, and reduces unwarranted sentencing disparities. Such
17 sentence is sufficient, but not too harsh, so as to appropriately
18 address the factors delineated in 18 U.S.C. § 3553(a), including but
19 not limited to the express policy that a sentence for tax crimes
20 address the need to both punish taxpayer fraud and foster voluntary
21 compliance by U.S. taxpayers.

22 The government further recommends as follows:

23 SUPERVISED RELEASE: After the period of imprisonment, the
24 defendant shall be placed on supervised release for a term of one (1)
25 year under the following terms and conditions:

26 ¹ The government's recommendation as to term of imprisonment, term of
27 supervised release, and fine differ from the recommendation of U.S.
28 Probation.

1 1. The defendant shall comply with the rules and regulations of
2 the U.S. Probation Office and General Orders as ordered by the
3 Court;

4 2. The defendant shall truthfully and timely file tax returns
5 and pay all taxes due during the period of supervised release.
6 Further, the defendant shall show proof to the Probation Officer
7 of compliance with this order; and

8 3. The defendant shall cooperate in the collection of a DNA
9 sample from the defendant.

10 FINE: The defendant shall pay to the United States a total fine
11 of \$40,000, which is due immediately to the Clerk of the Court.

12 SPECIAL ASSESSMENT: The defendant shall pay to the United States
13 a special assessment fee of \$100, which is due immediately to the
14 Clerk of the Court.

15 RESTITUTION and FBAR PENALTY: As noted in the PSR, defendant
16 agreed to pay restitution of \$196,382 to the Internal Revenue Service
17 and pay a penalty of \$4,247,893.50 to the United States Treasury to
18 resolve his civil liability for failing to report his foreign
19 account. PSR ¶¶ 6, 7. Defendant has remitted payments for both
20 restitution and the FBAR penalty. However, in order that the
21 Internal Revenue Service may assess and correctly credit those
22 amounts to defendant pursuant to applicable procedures, the
23 government requests that the following orders be included in this
24 Court's judgment:

25 / / /

(a) The defendant shall make restitution to the Internal Revenue Service in the total amount of \$196,382 which consists of the following amounts, all to be credited to the joint individual income tax of the defendant and his spouse for the following tax years:

TAX YEAR	AMOUNT TO BE CREDITED TO TAX
2003	\$15,277.00
2004	\$46,512.00
2006	\$1,000
2007	\$82,667.00
2008	\$50,882.00
2009	\$44.00

(b) The defendant shall pay \$4,247,893.50 to the United States Treasury through the Department of Justice, which resolves the defendant's civil liability for failing to file Reports of Foreign Bank and Financial Accounts, Forms TD F 90-22.1 and other foreign information reporting obligations under the United States law for tax years 2003 through 2009.

The foregoing sentencing recommendation is based upon the attached Memorandum of Points and Authorities, the pleadings and records on file and any other evidence which may be adduced at the sentencing hearing of defendant.

Dated: July 20, 2015

Respectfully submitted,

EILEEN M. DECKER
 United States Attorney
 SANDRA R. BROWN
 Assistant United States Attorney
 Chief, Tax Division

/s/ Christopher S. Strauss
 CHRISTOPHER S. STRAUSS
 Trial Attorneys
 United States Department of Justice
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MEMORANDUM OF POINTS AND AUTHORITIES

I. **INTRODUCTION**

Defendant entered a plea of guilty to one count of Willful Failure to File Report of Foreign Bank and Financial Account TD F 90-22.1 (an "FBAR") in violation of 31 U.S.C. §§ 5314 and 5322(a) and 31 C.F.R. §§ 1010.350(a), 1010.306(c), and 1010.306(d). Defendant failed to report his foreign financial account at Bank Leumi in Luxembourg on an FBAR required to be filed with respect to such account for calendar year 2009. Pursuant to the plea agreement in this case, the parties agree that the loss caused by defendant's criminal conduct was more than \$80,000 but less than \$200,000. The parties also agree that defendant's offense involved sophisticated means and that U.S.S.G. § 2T1.1 of the Sentencing Guidelines should be applied to defendant's conduct. Thus, after credit for acceptance of responsibility, but prior to any consideration of a motion under U.S.S.G. § 5K1.1., the parties agree that the total offense level in this case is a level 15. See Rec. Doc. No. 9, Plea Agreement ¶ 18.

Defendant was a client of United Revenue Service, Inc. ("URS") and David Kalai. On David Kalai's advice and with his assistance, defendant opened foreign bank accounts at Bank Hapoalim in Luxembourg and, subsequently, at Bank Leumi in Luxembourg. Defendant opened a personal account at Bank Leumi Luxembourg under the name "Terra" and a corporate account under the name of Blairsdien Ltd., a foreign corporation that was established on David Kalai's advice. Defendant maintained his foreign financial accounts at Bank Leumi from at least 2003 until 2009. The tax loss computed for purposes of determining the advisory Sentencing Guidelines range is \$196,382, which represents tax due and owing on unreported income generated by the

1 Terra and Blairsden Ltd. accounts at Bank Leumi Luxembourg between
2 2003 and 2009.

3 The purpose for imposing an advisory guidelines sentence is two-
4 fold in tax cases:

5 Criminal tax prosecutions serve to punish the violator and
6 promote respect for the tax laws. Because of the limited
7 number of criminal tax prosecutions relative to the
8 estimated incidence of such violations, deterring others
9 from violating the tax laws is a primary consideration
10 underlying these guidelines.

11 U.S.S.G. § 2T1.1 *Introductory Commentary*, November 2014. This
12 Sentencing Guidelines policy has been affirmed by the Ninth Circuit.
13 See, United States v. Orlando, 553 F.3d 1235 (9th Cir.
14 2009) (affirming an upward variance in a tax evasion case because it
15 found that the guideline range "failed to capture tax crimes
16 particular sensitivity to deterrence"); United States v. Bragg, 582
17 F.3d 965 (9th Cir. 2009) (remanding to the district court a
18 probationary sentence in a tax-crime case where the district court
19 expressed doubt that deterrence works in tax cases and noting that
20 "Congress, in enacting the law, and the Sentencing Commission, in
21 prescribing prison for tax offenses, set out a policy").

22 Based upon the government's motion for a 4-level downward
23 departure based upon defendant's substantial cooperation and
24 assistance, the advisory Sentencing Guidelines range is 8 to 14
25 months' imprisonment. Consideration of the factors set forth in 18
26 U.S.C. § 3553(a) compel a finding that a sentence at the low end (8
27 months) would be appropriate in this case.
28

1 **II. SUMMARY OF SUBSTANTIAL COOPERATION**

2 The government first learned of defendant when his name appeared
3 on an "OFFSHORE CORPORATIONS" list and other documents that were
4 seized from the offices of United Revenue Service, Inc. in March
5 2011. At that time, David Kalai and Nadav Kalai were under
6 investigation for assisting U.S. taxpayers with opening foreign bank
7 accounts in the names of nominee offshore corporations to evade
8 income taxes. On June 14, 2012, an indictment was filed charging
9 David Kalai and Nadav Kalai with conspiring to defraud the United
10 States by marketing and implementing a scheme to use offshore bank
11 accounts and nominee offshore corporations to conceal URS clients'
12 assets and fraudulently reduce URS clients' income taxes. In or
13 about October 2012, defendant agreed to meet with the government
14 regarding his participation in URS's offshore scheme and began
15 cooperating with the government.

16 The government first made contact with defendant concerning his
17 offshore accounts on December 11, 2011. Defendant agreed to meet
18 with the government in or about October 2012. On October 23, 2012,
19 defendant was interviewed with counsel present (Dennis Perez, Esq.)
20 pursuant to a proffer agreement. As set forth in the factual basis
21 of defendant's plea agreement and defendant's testimony at trial,
22 defendant identified David Kalai as the individual that suggested he
23 open foreign bank accounts at Bank Hapoalim in Luxembourg and,
24 subsequently, at Bank Leumi in Luxembourg. Defendant was a long-time
25 client of David Kalai's and has been able to provide the details of
26 the conversations between him and David Kalai dating back to the late
27 1990's regarding how to open foreign bank accounts in a way that
28 would conceal defendant's association with the accounts, where to

1 open the accounts, how to use the accounts to create false business
2 deductions, and ultimately how to close the foreign accounts in 2009
3 in a way designed to conceal from U.S. authorities that the account
4 and funds in the account were defendant's. Defendant has described
5 how David Kalai introduced him to bankers from Bank Hapoalim and Bank
6 Leumi, and how David Kalai facilitated and attended a meeting with a
7 Bank Leumi executive in Beverly Hills. The meeting in Beverly Hills
8 was arranged by David Kalai in order to implement his scheme to
9 create millions of dollars in false business expenses to fraudulently
10 reduce Fogel's income tax.

11 Defendant has admitted his role in URS's offshore tax evasion
12 scheme, explained documents that memorialized various steps of the
13 scheme, and has not attempted to minimize his conduct or conceal
14 information he thought the government did not know about. For
15 instance, defendant has admitted his participation in David Kalai's
16 scheme to create \$8 million in false business expenses in 2002 and
17 2003 by obtaining loans from Bank Leumi in the United States and
18 transferring those loan proceeds to defendant's Bank Leumi account in
19 Luxembourg held in the name of a Belizean corporation.

20 Additionally, defendant admitted in his plea agreement that in
21 2009, he repatriated the funds in his Bank Leumi Luxembourg accounts
22 by following David Kalai's advice to create a false "gift" from a
23 relative in order to conceal the character of the money transferred
24 to the United States and avoid the detection of Fogel's unreported
25 foreign accounts by the IRS. Prior to defendant's first interview,
26 the government was in possession of documents from the URS search
27 warrant detailing the false gift; however, defendant admitted to the
28 facts set forth in the factual basis of his plea agreement regarding

1 the false gift without having to be confronted with that evidence.
2 Based in part upon the strength of the information provided by
3 defendant, the government presented a superseding indictment in
4 October 2013 to include overt acts specific to defendant's offshore
5 transactions, tax returns and undeclared foreign accounts.

6 At the trial of David and Nadav Kalai, defendant was called to
7 testify. Defendant testified that (a) David Kalai's offshore scheme
8 dated back to at least 1999; (b) David Kalai introduced him to Bank
9 Hapoalim and Bank Leumi bankers; (c) David Kalai implemented a scheme
10 in 2002 and 2003 to create \$8 million in false business expenses; and
11 (d) David Kalai advised Fogel to repatriate his money to the U.S.
12 using the false gift scheme. Defendant's trial testimony was
13 consistent with defendant's prior statements as set forth in
14 defendant's plea agreement, and it was corroborated by testimony of
15 URS employees, bank documents obtained from Bank Leumi Luxembourg and
16 Bank Leumi USA, documents seized from URS, and tax returns prepared
17 for defendant and his companies by URS. For example, defendant's
18 testimony established the relevance of bank records pertaining to his
19 offshore corporation, Blairsdien Ltd., and documents pertaining to the
20 Bank Leumi USA loans. Defendant's testimony also established the
21 foundation on which the government introduced an email seized from
22 URS that was direct evidence of an agreement between co-conspirators
23 David Kalai, Nadav Kalai, and Robert Sandlin to establish a nominee
24 entity for Fogel.² The corroboration of Dr. Fogel's testimony by

25
26 _____
27 ² Trial Exhibit 73, United States v David Kalai and Nadav Kalai, 11-
28 CR-930(B)-TJH, is an email dated 8/15/03 from URS administrative
assistant Christine Laub to "belizelawyer@hotmail.com" and copied to
Nadav Kalai and Robert Sandlin, which reads in pertinent part as
follows:

(footnote cont'd on next page)

1 other trial evidence, Dr. Fogel's forthright acceptance of his role
2 in the scheme during his testimony, and his consistency with prior
3 statements permitted the government to argue, and the jury to find,
4 that defendant's testimony was credible.

5 In sum, defendant has cooperated with the government by being
6 interviewed, authenticating documents relevant to transactions
7 regarding his offshore bank account and offshore corporation, and
8 testifying at the trial of David and Nadav Kalai. In that regard,
9 defendant provided important information relating to the offshore
10 scheme promoted by David Kalai, his conversations with David Kalai
11 regarding using the offshore structure to create \$8 million in false
12 business expenses, and the advice David Kalai gave him regarding how
13 to repatriate the funds to conceal his association with the offshore
14 assets. The records admitted into evidence at trial from Bank Leumi
15 Luxembourg established that David Kalai had referred customers to
16 that bank. Defendant's testimony was important because he was able
17 to testify that not only did David Kalai advise Fogel to open foreign
18 accounts at Bank Leumi Luxembourg, David Kalai accompanied him to a
19 meeting with a Bank Leumi Beverly Hills banker in order to establish
20 accounts at Bank Leumi USA which facilitated the fraud. Defendant
21 was the only URS client called to testify who had attended a meeting
22 with David Kalai and Bank Leumi bankers. Defendant's cooperation

23
24
25 _____
26 This email is sent as a follow-up to Nadav Kalai's request
27 for information regarding setting up a Belize Corporation.
28 David Kalai would like you to be the nominee and requests
the address for the corporation be your office in Belize
City. The name we would like to use is Blairsden Ltd. We
will need a Power of Attorney in the name of Baruch Fogel.

1 substantially assisted the government in presenting its case to the
2 jury and obtaining convictions of David Kalai and Nadav Kalai.

3 **III. STATEMENT OF CASE**

4 **A. *Guilty Plea***

5 On February 2, 2015, defendant pleaded guilty to Count One of
6 the Information in this case, charging him with Willful Failure to
7 File Report of Foreign Bank and Financial Account TD F 90-22.1 (an
8 "FBAR") in violation of 31 U.S.C. §§ 5314 and 5322(a) and 31 C.F.R.
9 §§ 1010.350(a), 1010.306(c), and 1010.306(d)

10 **B. *Plea Agreement***

11 Defendant's guilty plea was entered pursuant to a Plea Agreement
12 in which the parties stipulated to: (1) a base offense level of 16;
13 (2) a two-level enhancement for sophisticated means; and, (3) a
14 three-level decrease for acceptance of responsibility, resulting in a
15 total offense level of 15.

16 As a part of his plea agreement, defendant entered into a
17 cooperation agreement with the Government. Accordingly, the plea
18 agreement provides that the government, in its sole discretion, may
19 move the Court, pursuant to U.S.S.G. § 5K1.1, to impose a sentence
20 below the advisory Sentencing Guidelines range determined prior to
21 such a motion. In the opinion of the government trial attorneys,
22 defendant has cooperated and substantially assisted with the
23 government's investigation and prosecution of David Kalai, URS and
24 Nadav Kalai, as well as providing information relevant to other
25 investigations.

26 Based on defendant's substantial assistance, the Government
27 requests a 4-level downward departure. The government's
28 recommendation is limited to a 4-level departure, and the government

1 objects to any additional variance pursuant to 18 U.S.C. § 3553(a),
2 because although defendant agreed to meet with the government, he did
3 not agree to meet with the government until approximately ten months
4 after the government's initial contact with him and after David Kalai
5 and Nadav Kalai were charged in an indictment with conspiring to
6 defraud the United States. Additionally, defendant did not sign his
7 plea agreement until the eve of trial. Should the Court grant this
8 motion, the advisory Sentencing Guidelines offense level would be
9 Level 11, Zone B, with a corresponding imprisonment range of 8 to 14
10 months.

11 **IV. GOVERNMENT'S DEPARTURE RECOMMENDATION**

12 Section 5K1.1 of the Sentencing Guidelines provides in pertinent
13 part, as follows:

14 Upon motion of the government stating that the defendant
15 has provided substantial assistance in the investigation or
16 prosecution of another person who has committed an offense,
the court may depart from the guidelines

17 Application Note 3 to § 5K1.1 provides that "[s]ubstantial
18 weight should be given to the government's evaluation of the extent
19 of the defendant's assistance, particularly where the extent and
20 value of the assistance are difficult to ascertain."

21 Defendant provided statements, authenticated documents and
22 testified at the trial of David and Nadav Kalai. Defendant's
23 cooperation allowed the Government to save resources, strengthen its
24 case against the URS co-conspirators, and move other investigations
25 forward. Defendant's cooperation with, and substantial assistance
26 to, law enforcement should be encouraged and recognized for its
27 value. The timeliness of defendant's cooperation is also a factor
28 that is properly considered with respect to the government's

1 recommendation as to the extent of a departure pursuant to §
2 5K1.1(a)(5). Accordingly, the government hereby respectfully
3 recommends a sentence at the low-end of the advisory Sentencing
4 Guidelines range based upon a 4-level departure and a resulting
5 offense level of 11. The government believes that the recommended
6 sentence balances the seriousness of defendant's underlying criminal
7 conduct with the value of his cooperation and takes into
8 consideration the factors set forth under 18 U.S.C. § 3553(a).

9 Should the Court grant the Government's motion under § 5K1.1,
10 defendant's offense level will be 11 which corresponds to an
11 imprisonment range within Zone B of the sentencing table. Under the
12 advisory Sentencing Guidelines, a Zone B sentencing range may be
13 satisfied by imprisonment, a combination of imprisonment and
14 supervised release with conditions of confinement, or a term of
15 probation with conditions of confinement. U.S.S.G. § 5C1.1(c). The
16 government recommends a sentence of imprisonment of 8 months.

17 **V. CONCLUSION**

18 Based upon the above, the Government respectfully requests that
19 the Court exercise its discretion and reduce defendant's total
20 offense level by 4 levels for a Total Offense Level of 11. The
21 Government respectfully recommends that defendant be sentenced to 8
22 months' imprisonment, which is the low-end of the adjusted advisory
23 Sentencing Guidelines range. Additionally, as more fully set forth
24 above in the "Government's Sentencing Recommendation," the government
25 recommends that defendant be sentenced to pay a fine of \$40,000, that
26 he be ordered to pay restitution and the FBAR penalty, and that he be
27 ordered to serve a one (1) year of supervised release pursuant to the
28

1 conditions set forth above and any other conditions based upon the
2 recommendation of U.S. Probation that the Court deems appropriate.

3
4 Dated: July 20, 2015

Respectfully submitted,

5 EILEEN M. DECKER
United States Attorney
6 SANDRA R. BROWN
Assistant United States Attorney
7 Chief, Tax Division

8
9 /s/ Christopher S. Strauss
CHRISTOPHER S. STRAUSS
10 Trial Attorney

11 Attorneys for Plaintiff
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