

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 09-60089-CR-COHN-SELTZER**

UNITED STATES OF AMERICA,
Plaintiff,

-v-

ROBERT MORAN,
Defendant.

**MEMORANDUM IN AID OF SENTENCING
ON BEHALF OF DEFENDANT ROBERT MORAN**

**I.
INTRODUCTION**

On April 14, 2009 Robert Moran, one month after having come forward to make a voluntary disclosure, pled guilty to a one count Information charging him with Willfully Filing a False Income Tax Return, in violation of Title 26, U.S.C. §7206(1). Through his plea, Mr. Moran took full and complete responsibility for his misconduct and agreed to assist the Government in its investigation of foreign banking practices, particularly those involving UBS AG. As the Department of Justice has stated in its USSG Section 5K1.1 departure motion, Mr. Moran's "substantial assistance has been timely, significant, useful, truthful, complete, and reliable."

Mr. Moran was the very first UBS account holder to voluntarily approach the Government and attempt to rectify his wrongdoing; he pled guilty immediately; and, as the Government acknowledges in its motion for downward departure, Mr. Moran has fully cooperated with the Government in its investigation of United States taxpayers who utilized secret offshore bank accounts to commit income tax evasion. Further crediting Mr. Moran, the Government's Section 5K1.1 motion reflects that, although in an average year, less than 100 individuals take advantage of the Internal Revenue Service's voluntary disclosure program, this year alone, thus far, more than 7,500 taxpayers have voluntarily

disclosed the existence of their offshore assets. The prosecution and guilty plea of this defendant generated tremendous worldwide publicity, coming as it did on the day just prior to “Tax Day,” April 15, 2009.¹ The Government candidly acknowledges in its Section 5K1.1 motion that this publicity “without a doubt, contributed to the drastic increase of taxpayers who voluntarily disclosed their offshore accounts to the IRS.” We respectfully submit that Mr. Moran’s guilty plea was a significant and early step in furtherance of these investigations.

This memorandum and accompanying documentation are submitted to assist the Court in determining a fair and just sentence for Robert Moran. The information contained herein is intended to supplement the Presentence Investigation Report (PSIR), Mr. Moran’s response, and the Addendum to the PSIR, and provide the Court with a complete understanding of Mr. Moran, his offense behavior, his extraordinary and early acceptance of responsibility, and his cooperation with the Government.

Mr. Moran’s guilty plea and sentence in this case, bringing with it the likely loss of his yacht broker license and the possible closure of his successful, locally headquartered international business, is the only blemish in an otherwise impeccable life, one characterized by three defining principles: commitment to family, hard work and generosity to his community. Through the example of his parents, Mr. Moran was raised with the belief that hard work was the answer to becoming successful, and that family and community formed the bedrock of one’s value system. Mr. Moran learned these principals early on, and applied these lessons throughout his life.

An examination of Mr. Moran’s tax returns demonstrates that he is not the typical criminal tax defendant. During the period 2001-2007, the criminal tax loss relating to his failure to disclose his

¹ Mr. Moran’s plea immediately garnered significant attention in news services such as Reuters and the Associated Press, and in print media and on the internet in publications such as in England, the Financial Times, Daily Telegraph and Times; in Germany, Bild and the Financial Times Deutschland; in France, Le Monde and Le Figaro; the Hong Kong Times; and the Wall Street Journal and New York Times.

foreign bank accounts was somewhere between zero and \$25,788.² During this same time period, Mr. Moran paid almost \$8 million in income taxes and, as an indication that his conduct here was not designed to avoid the payment of taxes, Mr. Moran, as noted in the PSIR, has continually repatriated to the United States income earned abroad by his business, Moran Yacht & Ship, Inc., and paid the taxes due thereon, rather than maintaining the funds overseas where lower tax rates would apply.

The Court will also see that Mr. Moran is a person intensely committed to his family and community. He has been married for over 23 years, has four children, and has been an active coach, mentor and role model. He is generous within his community, having donated hundreds of thousands of dollars to build a church hall and gymnasium, and has anonymously paid the Catholic school tuition of several students whose parents befell tragedy.

This memorandum will build upon the letters submitted to the Court documenting the life of Mr. Moran, in an effort to assist the Court in imposing a just and fair sentence in this case. In light of Supreme Court decisions over the past four years the Court is allowed, and indeed encouraged, to use its utmost discretion in imposing sentence. The Court has received the PSIR and the advisory guideline calculations which place Mr. Moran at a level 12, in Zone C, based upon the government's asserted tax loss of \$25,788. The Government has moved for a downward departure of one-third based upon Mr. Moran's substantial assistance, placing him within Zone B and eligible for probation. Moreover, there are several 18 U.S.C. §3553(a) variance arguments for the Court's consideration. Based upon these factors, we respectfully ask the Court to impose a term of probation as an appropriate sentence and one which represents the most fair and just resolution based on an individualized assessment of the unique facts and circumstances of this case.

As the Supreme Court has long recognized, "it has been uniform and constant in the federal

² The difference between these tax loss numbers is discussed in detail on page 16, *infra*.

judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” *Koon v. United States*, 518 U.S. 81, 113 (1996). With the United States Sentencing Guidelines now rendered “advisory only,” *Kimbrough v. United States*, 128 S. Ct. 558, 564 (2007), a district court, as this Court is well aware, has substantial discretion in fashioning a sentence appropriate to the individual circumstances of the defendant and the unique facts of the offense. “[T]he Guidelines are not the only consideration.” *Gall v. United States*, 128 S. Ct. 586, 597 (2007). As mandated by Congress, the fundamental principle of sentencing is that a court “*shall impose a sentence sufficient, but not greater than necessary*” to meet specified sentencing goals, including the goal of just punishment.

In sum, in every case, a sentencing court must now consider *all* of the §3553(a) factors, not just the guidelines, in determining a sentence that is sufficient but not greater than necessary to meet the goals of sentencing.

II. BACKGROUND OF THE OFFENSE

The Offense Conduct.

Mr. Moran committed a serious offense by failing to disclose the existence of his foreign bank accounts on his federal income tax return. He has accepted full and complete responsibility for his conduct and will endure the consequences for the rest of his life. There are, however a number significant aspects of the offense conduct which suggest that mitigation of punishment is warranted. First, Mr. Moran’s early acknowledgement of the offense and his early plea are the result of his coming forward to the Government and disclosing the conduct in connection with a “voluntary disclosure.” He came to the Government before it came to him, in an effort to resolve the matter. Second, after a detailed review by Mr. Moran's accountants, counsel, and the Internal Revenue Service

(who have been cooperating with each other throughout), the so-called tax loss -- the amount of tax unpaid to the Government as a consequence of Mr. Moran's conduct over the years 2001-2007 -- is at most \$25,788. Although a tax loss is not an element of the commission of the offense to which Mr. Moran has pled guilty, it does drive the guideline advisory sentence, and we suggest that a false tax return in which the Government has suffered a very small loss over a period of seven (7) years is of a different nature and circumstance than substantially all cases brought under Section 7206(1). We also note that Mr. Moran's accounts were not used to assist in evading taxes on income earned in the United States or as a piggy bank to make expenditures to be hidden from the U.S. government. Mr. Moran's accounts were relatively dormant and the relatively small tax loss here relates solely to the earnings on the account over the seven (7) year period. The conduct here is different and, while it must be punished, we respectfully suggest that it is deserving of a lesser punishment than the typical tax case.

Voluntary Disclosure.

The Internal Revenue Service and the Department of Justice have a long standing "voluntary disclosure" policy which essentially provides that if a taxpayer comes forward to the Government, discloses the taxpayer's criminal tax behavior before the Government learned of that behavior and cooperates in resolving the matter, both the IRS and the Department of Justice will consider that voluntary disclosure as a factor in determining whether to recommend criminal prosecution of the taxpayer or to decline such prosecution in the exercise of prosecutorial discretion.³ The policy is important in that it encourages taxpayers who have tax compliance issues and who may have committed tax crimes to come forward and make amends regarding their tax obligations without facing criminal prosecution. While the Government retains discretion in the application of the voluntary

³ See Internal Revenue Manual, Section 9.5.11.9 (Voluntary Disclosure Practice); see also Department of Justice 2008 Criminal Tax Manual, Section 4.01 (Voluntary Disclosure).

disclosure policy, in practice, if the taxpayer meets the criteria, the Government typically does not recommend criminal charges. The policy is tacit recognition that the Government does not have the resources to detect, investigate and prosecute all tax crimes and it thus fosters one of the cornerstones of our tax system -- voluntary compliance. Here, as discussed below, only the issue of "timeliness" runs against the current with respect to Mr. Moran.

There are certain brightline qualification criteria which apply to the voluntary disclosure policy and one of them, relevant to Mr. Moran's case, is the timing of the disclosure to the Government. If, for example, the Government had information about the specific taxpayer's non-compliance prior to the taxpayer's disclosure, and had already initiated an examination or investigation, the voluntary disclosure is considered untimely and the policy does not technically apply. Thus, we respectfully submit, Mr. Moran is before the Court for sentencing because his voluntary disclosure on March 17, 2009, was a few weeks too late.

Mr. Moran learned of the controversy surrounding the Government's enforcement efforts against UBS regarding undisclosed Swiss bank accounts related to United States' taxpayers and consulted with his accountant, Michael Borkowski, CPA, who advised Mr. Moran that corrections to his tax returns should be made and that he should consult with tax counsel. Mr. Moran subsequently engaged the undersigned, William B. McCarthy, Esq., on January 26, 2009, for the purpose of addressing his issues with the IRS, which specifically included approaching the Government to expeditiously resolve the matters. Inasmuch as Mr. Moran had little documentation relative to his relationship with UBS, Mr. McCarthy first proceeded to conduct a factual investigation in order to determine the scope of the problem and then attempting, on several occasions, to contact someone in the IRS with whom to discuss a voluntary disclosure by Mr. Moran.

On March 3, 2009, after conducting due diligence, Mr. McCarthy was able to discuss the matter with a member of the IRS Chief Counsel's Office who informed him that he needed to contact

local Assistant United States Attorney Jeffrey Neiman about voluntary disclosures involving UBS accounts. Mr. McCarthy first contacted AUSA Neiman on March 5, 2009, and both of Mr. Moran's undersigned counsel subsequently met with him for an "attorney's proffer" on March 10, 2009. Thereafter, pursuant to a Proffer Agreement tendered by the Government, Mr. Moran, his counsel, and representatives of the Department of Justice Tax Division, US Attorney's Office, and the IRS met in Fort Lauderdale on March 17, 2009, where and when Mr. Moran fully and completely disclosed his involvement with UBS. Of note here, and of consequence in this sentencing proceeding, Mr. Moran disclosed not only his beneficial interest in an entity of which the Government was aware -- "Winter Drive Investments, S.A." ("Winter Drive") -- but his ownership, as well, of a cash account with UBS in Switzerland, held in his own name, of which the Government was not aware.⁴

Notwithstanding Mr. Moran's complete candor, however, and because the Government had received information regarding Mr. Moran's Winter Drive account some four (4) weeks earlier, the Department of Justice determined that Mr. Moran's disclosure was not "timely," and would, therefore, not exercise its discretion to decline prosecution of Mr. Moran; instead, Mr. Moran promptly accepted responsibility and entered a felony plea on April 14, 2009.

On or about March 23, 2009, less than a week after Mr. Moran's proffer, the IRS announced a voluntary disclosure initiative regarding holders of bank accounts at UBS (as well as other foreign banking institutions). Originally, the initiative was to last six (6) months, to September 23, 2009, but it was thereafter extended to October 15, 2009. Taxpayers who otherwise qualified under the terms of the initiative could avoid criminal prosecution in exchange for payment of all back taxes and interest for the years 2003-2008, plus payment of civil penalties consisting of a twenty percent (20%) penalty

⁴ Information concerning the Winter Drive account, an off-the-shelf corporation that UBS made available to Mr. Moran as a securities investment account, had been disclosed to the Government by UBS pursuant to its Deferred Prosecution Agreement in Case No. 09-60033, also before this Court.

on the tax understatement plus a foreign information reporting penalty of twenty percent (20%) of the highest balance in the previously undeclared foreign bank account during this period of time. Taxpayers whose information from UBS had already been turned over to the Department of Justice -- such as Mr. Moran -- were, however, not eligible for this voluntary disclosure initiative inasmuch as they could not satisfy the “timeliness” element of the policy.⁵ Nevertheless, Mr. Moran’s voluntary disclosure and prompt cooperation with the Government are substantial mitigating factors which, we respectfully submit, warrant the Court’s consideration of a probationary sentence.

III. PERSONAL AND PROFESSIONAL HISTORY

Personal History.

Robert Moran was born on June 13, 1951 in Leicester, England, the third of seven children born to Dennis and Catherine Moran, nee Byrne (both deceased). Mrs. Moran died in 1985 at age 66 from health related issues; Mr. Moran died one year later, in 1986, at age 72, from what some believe was a broken heart.

Mr. Moran has four brothers and two sisters. His elder brother, Dennis Moran, age 62, an executive in the sales division of a beverage company, resides with his wife in Markfield, Leicestershire, England; his elder sister, Kathleen Gamble, age 61, is widowed and resides in Gloucester, England; Michael Moran, age 56, is president of his own landscaping business and resides with his family in Leicester, England; Brian Moran, age 49, lives with his family in Lighthouse Point,

⁵ In announcing the voluntary disclosure initiative, the Commissioner of the Internal Revenue Service stated “my goal has always been clear—to get those taxpayers hiding assets offshore back into the system....It will make sure those who hid money offshore pay a significant price, but also allow them to avoid criminal prosecution if they come in voluntarily.” Doug Shulman, Commissioner of the IRS, March 26, 2009.

Florida; Carole Moran, age 47, lives in Lighthouse Point, Florida; and the youngest, Paul Moran, age 45, resides with his family in Lighthouse Point, Florida. These last three of Mr. Moran's siblings, Brian, Carole and Paul, all work with him at Moran Yacht & Ship, Inc. ("MYSI"), the company Mr. Moran founded and built into one of yachting's premier brokerages.

Mr. Moran's parents were natives of Ireland who immigrated to England to find work. They settled in Leicester, England where their seven children were born and raised. The Moran children were raised in a modest, working class family. Their father was a merchant marine, trained as an engineer, who worked on boats and, in later years, in the automobile industry. The elder Mr. Moran was known to work two to three jobs at a time to support his family. Mrs. Moran was a homemaker, who worked on occasion at a local restaurant to help supplement the family's income. The children, including Robert, attended English schools, the equivalent of Catholic elementary and high schools in the United States.

Robert Moran completed high school in 1967, and enrolled in Hinckley College in Leicestershire, England, where he studied engineering. Following his graduation, he worked as an engineer. In 1972, at the age of 21, he and a friend opened an import/export wholesale garment business that was not very successful. In 1974, Mr. Moran tried his hand as a mate on a yacht. He saw this as an opportunity to travel and see the world. While working on different yachts, realizing how much he enjoyed being at sea, and seeing the potential for his growth in the industry, Mr. Moran decided that he would pursue a career as a captain. He attended a merchant marine college while working to gain the hours required to apply for his captain's license.

In 1978, while still working as a deck hand on a yacht in the South of France, Mr. Moran met his future wife, Sonja Hilton, who was vacationing there with friends. After a lengthy engagement, Mr. Moran and Ms. Hilton married on January 25, 1986. The wedding took place in England among

family and friends. That same year, while working on an American yacht, Mr. Moran's boss sponsored him in the process of becoming a legal resident of the United States, while Mrs. Moran remained in England.

In 1987, Mr. Moran purchased a three-bedroom home in Lighthouse Point, Florida and his wife and son moved from England to make the United States their new home. During the time Mr. Moran worked as a captain, he saved every penny he could with the plan that he would someday start his own business. In 1988, both Mr. and Mrs. Moran received their green cards and several years later became United States citizens, Mr. Moran in 1994, and Mrs. Moran in 1998.

The Morans have four children together: Sean, the eldest, age 23, is the only child who was born in England. He is a graduate of the University of Florida and appears to be following in his father's footsteps, currently working as a deck hand; Rory, age 22 is a student at the University of New Orleans in Louisiana; Kiera, age 17, is a junior at Cardinal Gibbons High School in Fort Lauderdale; and Meghan, age 13, is a eighth grade student at Saint Joan of Arc Elementary School in Boca Raton, Florida. The family currently resides in a six bedroom house in Lighthouse Point, Florida.

Mr. Moran's faith impacts the way he and his wife raise their children and the way in which Mr. Moran lives his life. All of the Moran children attended Catholic elementary school and attend weekly Mass, together with their parents, as a family. Mr. Moran is committed to spending time with his children and being a role model for them. He has been a volunteer coach for the Catholic Youth Organization (CYO) for the past 16 years. He coached soccer and baseball when his boys were young and now coaches the girls' soccer team. In his attached letter⁶ Mr. Colin Durie, a family friend, describes Mr. Moran as a role model who, despite his busy schedule, always found time to volunteer with youth:

⁶ This quotation and those that follow are taken from character reference letters written on Mr. Moran's behalf. These eleven (11) letters are attached as Exhibit "A."

...Our son, along with his own, have been the objects of Robert's many pithy lectures as to the value of hard work, determination, and moral character from a very early age. There is no doubt that he is a sterling example of his own value system...

Our sons and daughters have participated in the city recreation sports together. Robert was a very active volunteer coach of boys and girls soccer. In spite of his hectic travel schedule, he always made the time to practice and coach. It was also my pleasure to have coached soccer with him, and against him.

Mrs. Moran understands the importance of having her husband spend quality time with each of his children. He made sure that yearly family vacations always centered on the children and their interests. She describes her husband as a strict dad, a good man who is fair, driven and disciplined. As summarized by former colleague and now friend, Thomas Fleming, of all Mr. Moran's accomplishments, his family and his faith have always been the two most important things in his life.

...Rob's business success seems small in comparison to his role as a father and husband.

Mr. Moran shares a close relationship with all of his siblings and their extended families. He is extremely proud of the fact that he has been able to provide employment to two of his brothers and one of his sisters at MYSI, here in the United States. He remains close, as well, to his sister and brothers in England and spends time with them when he is in Europe.

Professional History.

Mr. Moran had an interest in boats and the sea from an early age. As noted previously, Mr. Moran's first real experience working on a ship was at the age of 23, when he was hired to work as a deck hand on a yacht. He quickly developed a love for the sea and traveling abroad. Mr. Moran saw a potential business opportunity working on yachts and continued to expand his knowledge in the field. He attended a merchant marine college in England while gaining the time at sea needed to become a captain. In 1978, Mr. Moran obtained his first captain position at the age of 28. He continued to

increase his knowledge, advanced his career and, in 1985, expanded the scope of his professional undertakings when he oversaw the building of a yacht in Holland.

In 1988, operating out of his home in Lighthouse Point, and with the assistance of his wife, Sonja, he started MYSI, which offered yacht sales, marketing, construction, and a charter management business. With young children at home, he was even more determined to build a successful business. Three years later in 1991, just when their money was about to run out and Mr. Moran was considering going back to sea, he sold his first vessel and thereafter began an incredibly successful career.

Over the years since that initial sale, Mr. Moran worked hard at building a reputation that relied on hard work, honesty and integrity. MYSI now has offices in Fort Lauderdale, Florida and Moscow, Russia, and currently employs nine people with expertise in the yacht business, three of whom are related to Mr. Moran. His business incorporates new yacht construction, the purchase and sale of used and new yachts, as well as yacht leasing and charters. While MYSI directly employs nine people, the business creates employment for thousands of workers associated with yacht building in Florida, other states where shipbuilding and outfitting occur, and in Europe, as well. In a letter written to the Court by Mr. Moran's younger brother, Brian Moran credits his brother for employing a number of people whom would otherwise be unemployed during the current financial recession:

Robert's company employs directly or indirectly a great many people in South Florida. A large number of shipyards in Florida value the business that is directed to them by Robert, this keeps them busy in these trying times.

Mr. Kevin Callahan, an employee of MYSI who has been with the company since 1994, describes the far-reaching employment opportunities created by Mr. Moran's yachting projects:

...When we sell a new build project, be it a Westport in Washington State or Palmer Johnson in Wisconsin to the projects overseas, these projects employ hundreds of people. Recently on a trip to Germany, the hotel manager said he was happy to see him as he knew there was a new build commencing that would bring guests and work to town...

In a letter written to the Court by Mrs. Moran, she describes what she believes is the key to her husband's success:

Moran Yacht and Ship is a success today because of a few other attributes of Robert: honesty integrity and tenacity. He single handedly built the company from nothing . . . His motto was that he wanted to be in business for a long time and that if he represented his clients ethically, with their best interests at heart, business would come his way. He was right. Moran Yacht and Ship is one of the foremost yacht brokerage companies in the world today because of Robert's commitment to the honest and ethical treatment of his clients.

Each year on New Year's Eve, Mr. Moran makes a list of personal and professional goals he vows to achieve over the coming year. He holds himself to very high standards, to which the instant offense stands in stark contrast.

Good Works and Charitable Contributions.

Mr. Moran has been extremely successful in business but he has not forgotten his roots and those less fortunate. His good deeds are often performed on a personal and private level, and remain anonymous to all but Mr. Moran and the recipients of his kindness.

Marc R. Weglowski, Mr. Moran's longtime friend, recalls Mr. Moran's very personal act of kindness to him and his wife during a devastating tragedy they experienced:

I have known Rob for 27 years and he has always proved to be a trusting, generous and reliable friend as well as a caring and dedicated husband and father. Rob is the type of individual to always go to great lengths to help others. He was one of the first friends to contact me and my wife when our son was born with a life-threatening heart defect, offering his support and friendship. I recall the conversation with Rob when our baby went on life-support . . . he was the first person to call me and told us he was only a phone call away if we ever needed anything. My wife and I later started a non-profit called Healing Little Hearts to benefit Children's Hospital Boston and Rob continues to support and make generous annual donations to this important charity.

Similarly, Mrs. Moran described a situation in which her husband was of great assistance to her friend who had been diagnosed with brain cancer. The cost of her treatment was so expensive that it

depleted the family's savings and they were forced to move from their home into much smaller accommodations. The family's health coverage did not pay for the entire cost of the necessary treatment and the family's out-of-pocket responsibility was well over \$20,000. Mr. Moran took it upon himself to pay the out-of-pocket expenses. He never told his wife about his kind gesture. She later found out when her friend's husband shared the information with her at the time of her friend's death.

When Mr. Moran found out that this family's children, who attended the same school as one of his daughters, were going to have to transfer to another school, he asked his wife to go to the school and take care of the girls' tuition. Mr. Moran's continued generosity to this family at a time after they had been displaced from their home and were broken-hearted by the loss of their loved one is just one measure of his compassion.

In addition to donations to charities including the American Heart Association, the Kidney Foundation and the Leukemia Society, Mr. Moran gives generously of his time and money to the Catholic parish where his children attended school. He has been generous with both his time and financial resources to three local Catholic churches: Saint Joan of Arc, where his children attended elementary school; Saint Paul the Apostle, the church where the family attend weekly services; and, Saint Ambrose. Each year around the holidays, Mr. Moran asks priests from Saint Paul's and Saint Ambrose for a list of needy families and he and his family purchase food, package it and deliver it to these families. His two daughters, Kieran and Meghan, carry this tradition a step further by making sandwiches every two weeks for the homeless.

In his letter to the Court, Monsignor John R. McMahon, now retired pastor of Saint Joan of Arc, lists the numerous church and school projects that have been underwritten by Mr. Moran. As examples, Mr. Moran donated \$400,000.00 to build a canopy to enclose the school gymnasium, underwrote the tuition for children whose families were struggling with their financial situation, and has given generously to school and church auctions, magazine drives, raffles and capital campaigns.

Perhaps even more telling of Mr. Moran's faith and generosity is the fact that he gives freely of his own time and effort.

In Monsignor McMahon's words:

He has modeled his life's works after those of Jesus Christ and has given much back to the parish and school community. Robert has always done his work with a humble heart, preferring to be anonymous in many of his donations rather than looking for praise or accolades . . . I feel that Robert's presence at Saint Joan of Arc has been a blessing from God that has allowed us to do many things that would not be possible without his generosity and support.

As you decide on Robert's sentence, I ask for your lenience . . . Robert has done so many good things and has acted with the caring needs of others in mind every day of his life. May God bestow upon you the gifts of wisdom and sympathy as you make your decision. (See also a letter from Nicolas J. Ziccardi, former Director of Development at Saint Joan of Arc.)

Mr. Moran's charitable history depicts a man who is dedicated to ~~and~~ improving the lives of others. He has continually donated his time and money in an effort to support a myriad of worthy causes. Perhaps most compelling, however, are the many descriptions of his unconditional assistance to individuals in need.

IV.

SENTENCING GUIDELINES ISSUES

The PSIR has determined a Zone C Guideline adjusted offense level of 12, criminal history category 1, and sentencing range of 10-16 months, before any reduction based upon the Government's motion under Section 5K.1. The Government's motion for a downward departure for substantial assistance recommends the Court reduce Mr. Moran's sentence by one-third. If the Court follows the recommendation, that would place Mr. Moran at a low end of seven (7) months and into Zone B and eligible for probation. If the income and tax loss relating to Mr. Moran's personal account disclosed

by him is excluded, as it must be and as discussed below, then the tax loss is zero. We therefore respectfully submit that the correct adjusted offense level under the Guidelines is Level 6, reflective of a zero tax loss, to which, pursuant to Mr. Moran's Plea Agreement (D.E. 14), two (2) levels are added then subtracted for use of "sophisticated means" and for acceptance of responsibility, respectively, with the resultant sentencing range being 0-6 months, within Zone A.

Tax Loss to the Government.

After a thorough review of Mr. Moran's taxes for the years 2001 through 2007, the parties are in agreement that the additional tax loss as a result of his failure to disclose his foreign bank accounts for the years 2001 through 2007 was not more than \$25,788. However, if the calculation under the Guidelines excludes the loss attributable to Mr. Moran's personal bank account under Guideline Section 1B1.8, as we believe it should, the tax loss for sentencing purposes would be zero. Under Guideline Section 1B1.8, the tax loss would include only the Winter Drive account -- the account known by the Government to be tied to Mr. Moran, as its beneficial owner, at the time of his proffer -- and would exclude the income activity in Mr. Moran's personal account, which the Government was unaware was owned by him until he disclosed it during that proffer. The parties agree that the Government was aware of another account number contained in the UBS-disclosed Winter Drive material at the time of that proffer, but did not know of its connection to Mr. Moran or the income activity in the account until Mr. Moran volunteered the information during his proffer. Since the income activity was not "known" to the Government at the time of the proffer, it should be excluded under the Guideline Section 1B1.8. See, *U.S. v. Shacklett*, 921 F 2d. 580 (5th Cir 1991) (reversing district court where Government knew of drug lab but that knowledge was insufficient to establish additional amounts of drugs.) See also, *U.S v. Pham*, 463 F3d 1239 (11th Cir. 2006); *U.S. v Kinsey*, 917 F2d 181 (5th Cir. 1990).

We understand that the Government disagrees with the Defendant's legal position as to the impact of Guideline Section 1B1.8 on the amount of tax loss, but we respectfully submit that tax loss amounts not "known" to the Government at the time of the proffer are to be excluded in determining the amount of the tax loss for Guideline purposes.⁷

V.
APPLICATION OF 18 U.S.C. §3553(a) FACTORS

The United States Supreme Court has made clear that the Guidelines are now only one of the factors courts must consider when imposing sentence. *See Rita v. United States*, 127 S. Ct. 2456 (2007); *Gall v. United States*, 128 S. Ct. 586 (2007); *Kimbrough v. United States*, 128 S. Ct. 558 (2007). Instead of rigid adherence to the Guidelines, the Supreme Court directed lower courts to follow the language of 18 U.S.C. §3553(a) and impose sentences "sufficient but not greater than necessary" to meet the statutory purposes of sentencing, regardless of the advisory Sentencing Guideline range. Therefore, and as the Court is aware, in considering an appropriate sentence for Mr. Moran, each of the seven enumerated factors of Section 3553(a) must be considered, only one of which directs courts to consider the Sentencing Guidelines.

Furthermore, the Guidelines may be rejected based on other factors, such as the need for the specific sentence to fulfill the statutory purposes of sentencing, the history and characteristics of the offender, or the nature and circumstances of the offense. No longer are "extraordinary circumstances" required to justify sentences outside the guidelines; no longer are proportional mathematical formulas required — or even allowed — to justify departures. These approaches, the Supreme Court has

⁷ The parties are in agreement as to the amount of tax loss determined for civil tax purposes, which, together with applicable interest and penalties, has been paid to the Government. It is only the application of Guideline Section 1B1.8 and the criminal tax loss for Guidelines purposes which are in dispute.

declared, “come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range.” *Gall* at 595.

We respectfully suggest that the application of all of the sentencing factors justifies a sentence of probation.

Analysis of the Section 3553(a) Factors.

In exercising its enhanced sentencing discretion, §3553(a) directs the Court to consider the following factors, as are here relevant:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed to: (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, afford adequate deterrence to criminal conduct, and protect the public from further crimes of the defendant;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines;
- (5) any pertinent policy statement;
- (6) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

The Nature and Circumstances of the Offense.

Pursuant to §3553(a)(1), the Court must consider the “nature and circumstances of the offense” in crafting an appropriate sentence for the defendant. Several aspects of the nature and circumstances of Mr. Moran’s offense make a sentence of probation appropriate in this case. The unique

circumstances of this case suggest anything other than a probationary sentence would be “greater than necessary” to accomplish the sentencing objectives of §3553(a)(2). The Guidelines, by making the tax loss an important factor, suggest that a false tax return case, with little or no tax loss, should be treated less harshly than similar conduct involving a larger tax. Moreover, the fact that Mr. Moran’s plea is a direct result of his voluntary disclosure reflects a circumstance which sets this case apart from most all other criminal tax cases and suggests mitigation of punishment.

History and Characteristics of the Defendant.

Section 3553(a)(1) also directs a district court to evaluate the “history and characteristics of the defendant” in determining the proper sentence for that individual. When the nature of the offense described above, viewed in combination with Mr. Moran’s personal history and character, it is even more readily apparent that a probation sentence serves the purposes of §3553(a)(2).

a) Mr. Moran is a First-Time Offender

Mr. Moran is a 58-year-old family man who has never before been in trouble with the law. This is significant because, notwithstanding that the now advisory Guidelines take into account a defendant’s lack of criminal history, the Supreme Court has recently affirmed the sentences in two cases where this factor has been specifically identified by the district court as one of the mitigating factors justifying a non-guidelines sentence. See *Gall v. United States*, 128 S. Ct. at 601 (affirming district court’s non-guidelines sentence based, in part, on defendant’s lack of serious criminal history); *Kimbrough*, 128 S. Ct. at 575-76 (affirming non-guidelines sentence where district court “properly honed in on the particular circumstances of Kimbrough’s case,” including considering his lack of prior felony convictions as part of defendant’s “history and characteristics” under §3553(a)(1)).

b) Mr. Moran’s Family Circumstances

Mr. Moran’s family circumstances are well documented elsewhere in this memorandum. He is a valuable member of his community and has been deeply involved with all of his children’s academic, athletic and religious activities.

c) Mr. Moran's Consistent Charitable Efforts

As documented in the letters to the Court, Mr. Moran has a significant history of involvement in his community. His involvement was in an active, hands-on approach involving coaching, mentoring, and charitable contributions. His charitable efforts over an extended period of time are an appropriate factor for the Court's consideration.

d) Mr. Moran's Indispensability to His Business

Also relevant to the Court's assessment of Mr. Moran's personal history and characteristics is the hard work and dedication he has invested over the past two decades building a business that now provides employment opportunities for several family members and contributes to the overall economy in southern Florida and other locations where MYSI builds, leases, sells, charters, and repairs yachts. If Mr. Moran is absent from the business it will unquestionably falter, if not fail or possibly be shuttered altogether. *See also*, page 22, *infra*, addressing the loss of Mr. Moran's yacht brokers license as an unintended consequence of his conviction of a felony.

Need for the Sentence Imposed to Reflect the Seriousness of the Offense and Provide Adequate Deterrence.

In fashioning an appropriate sentence, the Court must also consider the need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence to criminal conduct, and protect the public from further crimes of the defendant. 18 U.S.C. §3553(a)(2). In Mr. Moran's case, all of these purposes may properly be served by a probationary sentence, taking into account the other severe consequences and penalties he will endure as a result of his conviction.

It is significant that, as the Supreme Court has recently pointed out, the need for a sentence to promote respect for the law does not invariably weigh in favor of imposing a prison sentence whenever it is among the available sentencing options. In *Gall*, for example, the Supreme Court specifically

agreed that the unique facts of the defendant's case supported the district court's conclusion that "a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing." 128 S. Ct. at 599. Here, Mr. Moran was the very first UBS account holder to voluntarily approach the Government and attempt to rectify his wrongdoing; he pled guilty immediately; he has fully cooperated with the Government in its investigation; he has paid all taxes and penalties; and his guilty plea, and the worldwide publicity that accompanied it, "without a doubt, contributed to the drastic increase of taxpayers who voluntarily disclosed their offshore accounts to the IRS" from 100 in a typical year to more than 7,500 thus far this year alone.

Consequences of Mr. Moran's Felony Plea.

Mr. Moran has already been, and will continue to be, severely punished for his offense conduct, even without a sentence which includes incarceration. A probationary sentence carries significant consequences. The Supreme Court in *Gall* took pains to point out that a sentence of probation constitutes significant punishment and involves "substantial restriction of [a defendant's] freedom." 128 S. Ct. at 595. The Court held:

We recognize that custodial sentences are qualitatively more severe than probationary sentences of equivalent terms. Offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty....Probationers may not leave the judicial district, move, or change jobs without notifying, and in some cases, receiving permission from, their probation officer or the court. They must report regularly to their probation officer, permit unannounced visits to their homes, and refrain from associating with any person convicted of a felony, [etc.]. Most probationers are also subject to individual "special conditions" imposed by the Court.

Id. at 595-96.

In Mr. Moran's case, there are two important consequences to his felony plea which impose an incredibly harsh punishment: the likely loss of his yacht brokers license as a result of his felony

conviction and his payment of a civil penalty to the IRS of \$1,800,000, constituting 50% of the highest balance in his unreported foreign accounts, for his failure to file the form reporting the existence of those accounts (TD F90.22-1).

a) Loss of Yacht Brokers License.

The loss of Mr. Moran's yacht brokers license, an unintended consequence of his guilty plea and one that was not contemplated by either the Government or undersigned counsel at the time the plea was being negotiated, can be financially catastrophic to MYSI and will severely limit Mr. Moran's activities on its behalf. Mr. Moran is currently licensed as a yacht broker under the provisions of Florida Statute §326.004, and his business is almost entirely dependent on his services as such to generate its revenue. However, the licensing authority, the Division of Florida Condominiums, Timeshares, and Mobile Homes of the Department of Business and Professional Regulation, may deny a license, or renewal of a license, to any applicant who does not provide satisfactory proof that he is of good moral character, including certification that he has never been convicted of a felony. §326.004 (6)(a) and (b), *Fla. Stat.* Obviously, once this Court enters its Judgment of Conviction as to Mr. Moran pursuant to Rule 32(k)(1), *Fed. R. Crim. P.*, he will never again be able to so certify, and the revocation of his license is likely, as will be the denial of his application for license renewal.

From the inception of MYSI in 1988, through 1999, eleven (11) years, only two (2) new yachts were sold. For the past ten (10) years, the business has been evenly divided between used and new yacht transactions. Although under Florida's Yacht and Ship Brokers' Act, a license is not required for transactions involving sales of a new yachts, a license is required for transactions involving the exchange, purchase, sale, offer, or negotiating to exchange, buy or sell used vessels, and the solicitation and obtaining of listings of such vessels for purchase, sale or exchange.

Mr. Moran estimates that easily 50% of his time is spent talking with owners of existing yachts, trying to solicit listings or attempting to sell their yachts. However, MYSI has not sold even a single

yacht in 2009, used or new. Mr. Moran, who must be considered an expert in matters of this sort, believes strongly, given the state of the world-wide economy, that the market for new yachts has collapsed, and that all of today's business, and for the foreseeable future, will be in used vessels. Therefore, the loss of his yacht brokers license will prevent him from working in his field of expertise, will put MYSI out of business, and constitutes a death sentence on his working career.

b) Settlement and Payment of Civil Tax Liabilities, Including Payment of a \$1,800,000 Penalty for Failure to File the Foreign Bank or Financial Account Report.

Consistent with his plea agreement, Mr. Moran has fully cooperated with the IRS in completely resolving his civil tax liabilities for the taxable years 2001 through 2007, inclusive. This resolution has been memorialized in a revenue agent's report and a closing agreement. Mr. Moran's plea agreement does not require that he pay a fifty (50) percent penalty for the one year with the highest balance in the account as of June 30 for calendar years 2001 through 2007 to resolve his civil liability for failing to file Reports of Foreign Bank and Financial Accounts, Forms TD F 90-22.1. Nevertheless, he has done so. As reflected in the Closing Agreement, Mr. Moran agreed to, and has paid, the following amounts:

Civil Tax Liability	\$43,865
Civil Fraud Penalty	32,898
Interest	6,417
Penalty for failure to file the information return re Winter Drive Investments, S.A.	10,000
Penalty for failure to file the Report of Foreign Bank or Financial Accounts	<u>1,800,000</u>
TOTAL	<u>\$ 1,893,180</u>

The civil tax liability is attributable to the additional income from the UBS accounts in taxable years 2006 and 2007. In the years 2001 through 2005, Mr. Moran had no additional income as a result of not declaring the UBS accounts. In fact, in years 2004 and 2005, had Mr. Moran declared the UBS accounts on his originally filed tax returns, his tax liability for those years would have been reduced.

The penalties paid in resolution of Mr. Moran's civil tax liability are either predicated on the

civil tax understatement or attributable to Mr. Moran's failure to file certain information returns. The civil fraud penalty amount is a function, 75%, of the civil tax liability for taxable years 2006 and 2007. 26 U.S.C. §6663. The interest amount is a calculated amount based on the period of time for which the tax and civil fraud penalty balances due were outstanding. The penalty for failure to file the Information Return of U.S. persons with respect to certain foreign corporations (here, Winter Drive Investments, S.A.) is a flat dollar amount, \$10,000, for not filing the report as to Certain Controlled Foreign Corporations (Form 5471). 26 U.S.C. §6038. The penalty for not filing the Report of Foreign Bank or Financial Accounts (Form TD F 90.22-1), is a calculated amount, 50% of the highest account balance, for willfully not filing the report. 31 U.S.C. §5321.

Deterrence.

Finally, §3553(a)(2) requires the Court to consider the need for deterrence when imposing sentence. Here, the Court can have a high degree of confidence that Mr. Moran will not commit future crimes. First, his entire background, as well as the many letters of support the Court has received from his friends and professional colleagues, suggests that his offense was an aberration from an otherwise law-abiding life. Second, there is every indication that the humiliation of his plea, the financial toll the case has taken on him, the mental anguish looming over him and his family throughout the past seven (7) months, and the huge monetary penalty are, we respectfully submit, sufficient to deter Mr. Moran from future criminal conduct, even in the absence of a sentence of imprisonment.

On the unique facts of Mr. Moran's case, and because of all the consequences suffered by him as a result of his conduct, a probationary sentence that takes those consequences into account and recognizes Mr. Moran's early acceptance of responsibility and his assistance in the investigation and prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the United States to avoid preparing for trial and permitting the United States and the court to allocate their resources efficiently, sends a message to others that reflects the

seriousness of the offense, promotes respect for the law, provides just punishment, and affords adequate deterrence. Such a sentence also informs other tax offenders that incarceration is not a foregone conclusion, thereby encouraging them to voluntarily disclose their offshore accounts and otherwise become tax compliant.

Kinds of Sentences Available.

18 U.S.C. §3553(a)(3) also requires the Court to consider “the kinds of sentences available” in a given case. Here, the Court has available many forms of punishment, other than imprisonment, which will permit it to craft an appropriate sentence for Mr. Moran.

With the Guidelines now advisory and with the enhanced sentencing discretion mandated by *Gall*, the Court is now able to use the availability of such non-incarceratory sentences to further calibrate a sentence so that it is no “greater than necessary” to accomplish the statutory purposes. As a result, in Mr. Moran’s case, where there are substantial mitigating factors under the law which weigh in favor of a sentence of probation.

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VI.

CONCLUSION

A sentence of probation would adequately reflect the seriousness of the offense, promote respect for the law, and provide just punishment for Mr. Moran. Here, the significant mitigating factors relating to Mr. Moran's offense and his personal and professional background, as well as his cooperation with the Government, provide compelling support for a probation sentence.

We therefore respectfully ask the Court to sentence Mr. Moran to a term of probation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 4, 2009, I filed a true and correct copy of the foregoing **MEMORANDUM IN AID OF SENTENCING ON BEHALF OF DEFENDANT ROBERT MORAN** with the Court's CM/ECF system, which will cause a copy hereof to be served on all counsel of record, and that a true and correct copy hereof was served via first-class U.S. mail, postage prepaid, and also via electronic mail, upon Kathryn A. Gomez, Senior U. S. Probation Officer, 299 East Broward Blvd., Suite 409, Fort Lauderdale, FL 33301-1865.

 /s/Gary M. Bagliebter
GARY M. BAGLIEBTER