EXHIBITS

A-13 to Z-13

MN

UNITED STATES TAX COURT
WASHINGTON, DC 20217

JANET MAVIS MARCUSSE,	)	
	)	
Petitioner,	)	
	)	Docket No. 14234-09.
v.	)	
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

Petitioner's status report filed September 1, 2010, stated: "A trial is currently scheduled for November 29, 2010, for which Marcusse has previously advised respondent she is not currently interested in agreeing to a continuance so long as she is able to obtain all of the necessary documents requested to prove her points, as contained in her August 2, 2010, Motion to Compel Production of Documents." The Court has now fully resolved petitioner's motion to compel, by its order of November 30, 2011, so it would seem that petitioner will be ready for the case to proceed to trial after she has received from respondent the documents it has been ordered to produce by January 6, 2012.

To equivalent effect, respondent moved on October 5, 2010, for a general continuance, so that the case could be put on a (later) trial calendar and be prepared for trial. The Court granted that motion only in part (continuing the case but not returning it to the general docket for placement on a trial calendar), so that the undersigned judge could resolve the motion to compel; but, again, that motion has now been resolved. The parties will now be ordered to file and serve their pretrial memoranda so that the Court can determine whether to schedule a special session for the case (in petitioner's prison or elsewhere) or have the case added to a regular trial calendar.

The Court's order of November 30, 2011, included a typographical error to the effect that "respondent is required to produce [certain documents] to petitioner on or before January 6, 2011". That error will be fixed by this order.

SERVED Dec 05 2011

EXHIBIT A-13

To give effect to the foregoing, it is

ORDERED that the Court's order of November 30, 2011, is corrected, in that the deadline for respondent's document production is January 6, 2012 (not 2011). It is further

ORDERED that by no later than February 13, 2012, each party shall (a) file and serve a pretrial memorandum that complies with the Court's standing pretrial order issued June 25, 2010 (and that, inter alia, identifies the witnesses that the party intends to call to testify), and (b) identify in writing and exchange with the other party any documents or materials which the party expects to utilize (except solely for impeachment) at the trial of this case.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
December 5, 2011

UNITED STATES TAX COURT
WASHINGTON, DC 20217

JANET MAVIS MARCUSSE, Petitioner,	)	
v.	)	Docket No. 14234-09.
COMMISSIONER OF INTERNAL REVENUE, Respondent	)	

O R D E R

On August 9, 2010, petitioner Janet Mavis Marcusse filed a motion to compel production of documents responsive to 17 requests she made of respondent (the IRS). On September 7, 2010, the IRS filed its objection, and thereafter Ms. Marcusse made additional filings. The Court held a telephone conference with the parties on January 5, 2010, to discuss the discovery disputes. Respondent has recently obtained from federal prosecutors certain "bulk exhibits" from petitioner's criminal trial, from which he expects to produce additional documents. It appears that most of what Ms. Marcusse seeks is among these documents. The parties' disputes about her discovery requests were addressed as follows:

1, 1(a), 4, 6(a), 18. Respondent agreed to produce responsive documents from among the bulk exhibits, so that Ms. Marcusse can review that production and confirm whether her requests have been satisfied.

2. Ms. Marcusse's motion will be denied as to Request 2, since it asks respondent to conduct third-party discovery on Ms. Marcusse's behalf. However, if Ms. Marcusse is correct that Flink's testimony (that the loan documents showed an amount of $27,000) contradicts an imputation of income in a higher amount (i.e, $45,000), then respondent should beware the high probability that the absence of the loan documents will redound to respondent's detriment.

3, 4, 5. Respondent agreed to attempt to find responsive documents, which may be in the possession of the prosecutors.

SERVED Jan 06 2011

6, 9. Respondent agreed to confirm whether third-party taxpayers have consented to disclosure of Forms 886-A that pertain to them and, if so, to produce them.

7. Respondent agreed to decide whether to admit that it was in 2002, rather than 2001, that Ms. Marcusse received a check in the amount of $7,359. Respondent agreed that, if he does not so admit, then he will decide whether to attempt to subpoena the check from the bank and provide it to petitioner. If he does either of those things, then the request will become moot.

8. Respondent agreed to determine whether agent's work notes exist to provide detail (date, place, and amount) of the hotel expenses at issue and, if they do, to provide that information to Ms. Marcusse, in order to allow her to reconstruct her schedule and recall the business purpose for the travel.

11. Respondent affirmed that he will not call FBI agent Gerard Forrester as a witness. Ms. Marcusse undertook to request (under Rule 90) that respondent admit the authenticity of a letter from him that she alleges she possesses. Her motion to compel as to request 11 will be denied without prejudice to her renewing the motion if the request for admission does not met her need.

12, 20. In view of the IRS's representation that it will not rely in this civil case on any findings from the criminal case, Ms. Marcusse withdrew her motion as to requests 12 and 20.

13. Respondent affirmed that he will not call Treasury employee James Kramer-Wilt as a witness. Ms. Marcusse undertook to request (under Rule 90) that respondent admit Mr. Kramer-Wilt's employment and capacity during the period December 2000 through March 2001. Her motion to compel as to request 13 will be denied without prejudice to her renewing the motion if the request for admission does not met her need.

22. Respondent will attempt to find in his records responsive information about mortgage interest.

To conclude these discovery matters, it is

ORDERED that Ms. Marcusse's motion to compel as supplemented is denied in part (i.e., as to Requests 2, 11, and 13, for the reasons stated above, and as to Requests 12 and 20, because they have been withdrawn), and the motion is otherwise

taken under advisement, to be decided after the parties comply with the remainder of this order. It is further

ORDERED that, no later than April 5, 2011, respondent shall produce to Ms. Marcusse the documents and information that it has agreed to produce, as described above. It is further

ORDERED that, if Ms. Marcusse intends to request admissions in the manner suggested above in connection with Requests 11 and 13 above, she shall file those requests with the Court and serve them on respondent no later than February 4, 2011. It is further

ORDERED that, after Ms. Marcusse receives respondent's production ordered above and his responses to any requests for admission that she files and serves pursuant to this order, she shall file and serve, no later than May 20, 2011, a status report either confirming that respondent has responded satisfactorily to all her discovery requests or else describing in detail the particular requests that have not been satisfied.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
January 5, 2011

UNITED STATES TAX COURT

JANET MAVIS MARCUSSE,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 14234-09
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	Filed Electronically
	)	
Respondent.	)	

MOTION FOR ENTRY OF DECISION

RESPONDENT MOVES, pursuant to the provisions of Tax Court Rule 50, that the Court enter a decision in this case reflecting the following tax deficiencies:

		Additions to Tax/Penalties I.R.C.§§		
Year	**Deficiency**	**6651(a)(2)**	**6654**	**6651(f)**
1999	$0.00	$0.00	$0.00	$0.00
2000	$0.00	$0.00	$0.00	$0.00
2001	$0.00	$0.00	$0.00	$0.00

IN SUPPORT THEREOF, respondent respectfully states:

1. Respondent's counsel has reviewed the evidence available to him for the defense of this civil tax controversy and determined that due to the passage of time, and respondent's

inability to rely on the evidentiary foundations established in petitioner's criminal case, certain essential evidence may not be deemed admissible at trial over an appropriate objection.

2. Specifically, the age of bank records at issue has hindered respondent's ability to effectively litigate this civil tax controversy. Due to the seven year record retention period applicable to financial institutions at issue, respondent is unable to acquire new copies of the records at issue. Further, as the records at issue are no longer retained by the banks in question, respondent lacks the ability to secure appropriate certifications from custodians of records concerning new records, or validating that his current records are accurate.

3. Respondent notes that if this civil tax controversy had been litigated within the seven year bank retention period, authentication of the records would have been readily accomplished.

4. As such, respondent's counsel believes that, while sufficient evidence to support the issuance of respondent's notice exists, he does not have sufficient admissible evidence to pursue the adjustments contained within the March 12, 2009 Notice of Deficiency at trial at this time.

5. Respondent's counsel notes that this position represents his internal evaluation of his defense of this

particular civil tax controversy for petitioner's 1999, 2000, and 2001 taxable years.

6. Respondent's position in this case is not to be construed as a comment on any other possible, current, or future litigation in relation to petitioner involving the United States, any Federal agency, or any third parties , including Marcusse v. United States, 1:09-CV-913 (U.S. Dist. Ct. W.D. Mich.), which is currently pending.

7. Respondent has not contacted petitioner to determine her position with regard to this motion as this motion effectively represents respondent's concession of this civil tax controversy due to evidentiary concerns.

WHEREFORE, it is prayed that this motion be granted.

WILLIAM J. WILKINS
Chief Counsel
Internal Revenue Service

Date: JAN 06 2012

By: J. Hauck

JONATHAN M. HAUCK
Attorney
(Small Business/Self-Employed)
Tax Court Bar No. HJ1560
455 Massachusetts Avenue, NW
Suite 500
Washington, DC 20001
Telephone: (202) 874-1319

OF COUNSEL:
THOMAS R. THOMAS
Division Counsel
(Small Business/Self-Employed)
NANCY B. ROMANO
Area Counsel
(Small Business/Self-Employed:Area 2)
NANCY C. CARVER
Associate Area Counsel
(Small Business/Self-Employed)

EXHIBIT C-13

BW

UNITED STATES TAX COURT
WASHINGTON, DC 20217

JANET MAVIS MARCUSSE,	)	
	)	
Petitioner,	)	
	)	Docket No. 14234-09.
v.	)	
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

O R D E R

On January 6, 2012, respondent (the IRS) filed a motion to vacate the Court's discovery order of November 30, 2011, and a motion for entry of decision, in which it asks the Court to determine zero deficiencies for all three of the years at issue. It now appears, in view of the motion for entry of decision, that any discovery issues are now moot, and that there is no dispute as to liability that needs to be adjudicated. It also appears that, if the case were to proceed to trial and petitioner were to prevail, she could do no better than what the IRS now proposes. If that is true, then she should indicate her non-objection to the motions. It is therefore

ORDERED that, no later than January 30, 2012, petitioner shall file and serve a written response to the IRS's motion to vacate and to its motion for entry of decision.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
January 11, 2012

EXHIBIT D-13

SERVED Jan 11 2012

TO: UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

05 OCT 21 AM 11:1

FROM: JANET MARCUSSE, et. al.
C/O NEWAYGO COUNTY JAIL

IN RE: YOUR CASE 1:04-CR-165

On or about June 3, 2005, a Robert W. Plaster testified for the UNITED STATES OF AMERICA and submitted some Gourmnt Exhibits which were entered into evidence. My papers have all been confiscated. Please provide me with copies of Robert Plaster's Exhibits in a timely fashion.

Date: October 20, 2005 By: Janet Mavis Marcusse

Janet Mavis Marcusse,
Authorized Representative
for JANET MARCUSSE

EXHIBIT E-13

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

SMALL BUSINESS/SELF-EMPLOYED DIVISION

February 4, 2011

Janet Marcusse, #17128-045
Federal Correctional Institution
501 Capital circle, NE
Tallahassee, FL 32301

Dear Ms. Marcusse:

I am responding to your Freedom of Information Act (FOIA) request dated October 18, 2010 that we received on January 18, 2011.

You asked for copies of wire transfer statements or cancelled checks, in regard to accounts at National City Bank, Wells Fargo Bank, Royal Bank of Scotland, and various other banks and financial institutions. You also asked for a full list of all bank accounts, account numbers, and registrations, in reference to Case No. 1:04-cr-165, U.S. District Court, Western District of Michigan. We have no jurisdiction over records maintained by banks, federal, state or local governments; therefore, I have no documents specifically responsive to your request.

I have enclosed Notice 393 explaining your appeal rights.

If you have any questions please call me at 206-220-5660 or write to: Internal Revenue Service, Disclosure Scanning Operation, 4800 Buford Hwy, Mail Stop 93A, Chamblee, GA 39901-0093. Please refer to case number F11007-0031.

Sincerely,

Donald Davis

Donald Davis
Disclosure Specialist, ID 0080519
Disclosure Office 12

Enclosure
Notice 393

EXHIBIT F-13

IRS Appeals
Attention FOIA Appeals
M/Stop 55203
5045 E Butler Ave.
Fresno, CA 93727-5136

Re: Response of Donald Davis to FOIA request dated 2/4/11 mailed to me in an envelope postmarked 2/19/11

To Whom It May Concern:

This is to appeal the 2/4/11 response of Donald Davis (See Exh. A), in regards to my FOIA request of 10/18/10 directed to Gary Prutsman, IRS, Office of Disclosure (See Exh. B). Previously, William Stewart II, U.S. Dept. of Justice, in response to my FOIA request of 10/6/09, had advised me on 9/10/10 that Mr. Prutsman of the Office of Disclosure, IRS, had the National City Bank records (See Exh. C).

The 2/4/11 letter from Donald Davis states my FOIA request to the IRS dated 10/18/10 was received on 1/18/11 (See Exh. A). This is misleading in that, while Mr. Davis may not have received a copy of my FOIA request until 1/18/11, I served the 10/18/10 request to the Office of Chief Disclosure via certified mail date stamped on 10/19/10 (See Exh. B). In response, I received a letter from Paula Curren, Disclosure Manager dated 12/1/10 (See Exh. E), and another letter dated 12/14/10 (See Exh. F). I responded on 12/20/10, providing the information Ms. Curren requested (See Exh. G), serving the letter via certified mail date stamped 12/22/10 (See Exh. G).

Given Mr. Stewart's response on 9/10/10 that the Office of Disclosure, IRS, had the National City Bank records (See Exh. C), Mr. Davis's statement that the IRS has no jurisdiction over records maintained by banks, federal, state or local governments and therefore he would have no documents specifically responsive to my request would also be misleading and untrue in this instance. It should also be taken into account that prior to asking for the bank records via FOIA in the first place, I had contacted the banks directly. I received no records as requested, suggesting the IRS had tampered with them, directing them not to respond to me.

In addition, in current litigation I initiated on 6/3/09 against the Commissioner in U.S. Tax Court, given IRS witness perjury at a criminal trial, the IRS has recently admitted to having these "bulk" bank record exhibits from Case No. 1:04-cr-165, Western District of Michigan (See Court Order dated 1/5/11, Exh. I). While the IRS has been ordered to produce bank records in reference to the Tax Court case, Docket No. 14234-09 (Exh. I), there were additional bank records I require, which were specified in the 10/18/10 request (See Exh. D).

EXHIBIT F-13

These additional records
of Michigan case, and not to the U.S. Tax Court case. In any event, because the Office of Chief Counsel, IRS, has all of the "bulk" bank records, the individuals to contact to obtain these records are Erin Hines/Jonathan Hauck, Office of Chief Counsel, P.O. Box 50585, Washington, D.C. 20091 (See Exh. J).

Thus, it is clear the IRS is not engaging in good faith in this matter. As the result, my position, in light of the fact I am in prison based on IRS lies and fraud, is this--either produce the records requested in my 10/18/10 letter (Exh. B), or I will initiate litigation to obtain them. I will also add every IRS employee that obstructs my access to these records to my complaint pursuant to 26 USC §7433.

Sincerely,

Janet Marcusse
#17128-045
FCI Tallahassee

7004 1160 0004 5678 8937

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Sent To IRS Appeals Attn: FOIA Appeal
Street, Apt. No.; or PO Box No. M/Stop 55203, 5045 E Butler
City, State, ZIP+4 Fresno, CA 93727-5136
PS Form 3800, June 2002 See Reverse for Instructions

EXHIBIT F-13

UNITED STATES TAX COURT

JANET MAVIS MARCUSSE,

Petitioner,

v. Docket 14234-09

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

_____/

NON-OBJECTION TO RESPONDENT'S MOTIONS

NOW COMES the Petitioner, Janet Marcusse, as a pro se, in response to the Court's Order of January 11, 2012, to submit her non-objection to respondent's motions filed on January 6, 2012, including the motion for entry of decision and the motion to vacate the Court's discovery order of November 30, 2011. Marcusse concurs with the decision made by respondent in his motion requesting entry of decision as zero deficiencies for all three tax years at issue, and understands that, as the result, it would cause her requests for discovery to become moot. She would also take this opportunity to thank Judge Gustafson for his thoughtful and fair consideration of her issues. Had she had such a judge presiding over her criminal trial in 2005, allowing for her to present a complete defense, she most likely would have been acquitted.

Respectfully submitted,

Date: 1/18/2012

Janet Marcusse, pro se
#17128-045
FCI Tallahassee
501 Capital Circle, NE
Tallahassee, FL 32301

EXHIBIT G-13

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JANET MAVIS MARCUSSE,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

No. 1:09-CV-913

Hon. Robert Holmes Bell

GOVERNMENT'S RESPONSE TO MOVANT'S MOTION TO TAKE JUDICIAL NOTICE OF TAX COURT DOCUMENTS

Marcusse has moved the Court to take "judicial notice" of a variety of documents concerning litigation over her outstanding tax liability in the United States Tax Court. (Doc. No. 71.) These include the judgment of the Tax Court, the IRS Office of Chief Counsel's Motion for Entry of Judgment, the docket sheet and various other documents associated with the Tax Court litigation. This Court should not take judicial notice of these documents in connection with this case, which involves her motion to vacate her criminal sentence pursuant to 18 U.S.C. § 2255, for three reasons.

First, whatever happened in the Tax Court regarding a determination of Marcusse's tax liability for the years 1999 to 2001 is irrelevant to the validity of her criminal convictions. The only tax-related count of which Marcusse was convicted was Count 42, which charged a *Klein* conspiracy – that is, a conspiracy to defraud

the United States, in violation of 18 U.S.C. § 371, by frustrating the functions of the IRS. *United States v. Klein*, 247 F.2d 908, 915 (2d Cir. 1957). *See also United States v. Sturman*, 951 F.2d 1466, 1472 (6th Cir. 1992). Although the indictment included a "failure to file a tax return" allegation, and evidence was presented demonstrating that Marcusse in fact both failed to file and failed to pay her own taxes, the jury was not instructed that these acts/omissions were sufficient alone to support a guilty verdict on Count 42. *See* Gov't Resp. to Marcusse § 2255 Mot. at 56-60 (addressing multiplicity argument). Indeed, there was ample evidence of multiple ways in which Marcusse and the other defendants conspired to impede the IRS, including but not limited to setting up fake "church" accounts to hold victims' money (and counseling others to do the same), funneling the victims' money through 20 different bank accounts, and failing to maintain appropriate standard business records. *See* Gov't Resp. to Marcusse § 2255 Mot. at 12-14.

Second, it is improper to take judicial notice of purported "facts" established in a foreign tribunal, where those facts are still in dispute. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of acurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). Thus, in *Barrow v. United States*, No. 09-2297, 2012 WL 89154 (6th Cir. Jan. 10, 2012), the Sixth Circuit affirmed the district court's refusal to take judicial notice of a Tax Court decision in connection with a criminal defendant's petition for a writ of *coram nobis*. There, the defendant had

been convicted of actual tax offenses (tax evasion and failure to file) and argued that the IRS revenue agent's purported admission during testimony in a subsequent Tax Court proceeding that he had manipulated certain financial information rendered the criminal convictions invalid. *Id.* at *3. The Sixth Circuit affirmed the district court's refusal to take notice of the Tax Court's findings: "The fact that the Tax Court found in Barrow's favor in part on the calculation of certain tax deficiencies, based on application of a civil standard of proof to a different factual record, has no bearing on the adjudicative facts that were before the jury in the criminal case and concerning which the jury applied a higher burden of proof to convict Barrow of multiple tax offenses." *Id.* Thus, the court held, "because the facts underlying the criminal convictions were in dispute, the Tax Court decision was not an appropriate subject for the taking of judicial notice." *Id.* (citing Fed. R. Evid. 201(b) and *United States v. Collier*, 68 F. App'x 676, 682 (6th Cir. 2003)).

Third, and perhaps most importantly, the Tax Court documents do not actually contain any "facts" that would undermine Marcusse's criminal convictions in this case – even if it were proper to consider them. The Tax Court issued an Order and Decision (Marcusse Mot. Ex. A) upon the IRS's motion (Marcusse Mot. Ex. B). The IRS motion explains that the basis for its motion is difficulty in establishing evidentiary foundations for certain bank records "due to the passage of time." (Mot. Ex. B at ¶ 1.) The motion's reference to an inability to rely on the evidentiary foundations established in petitioner's criminal case (*id.*), does not indicate that there was an infirmity in the admission (by stipulation) of bank

records in the criminal case. Rather, it merely indicates that the IRS believed it was required to establish the foundation and authenticate records independent from what occurred in the criminal case, and that it was unable to do so because the banks have not retained the records. (*Id.* at ¶ 2.) Importantly, the IRS states that (1) if the civil tax controversy had been litigated within the seven year bank retention period, authentication of the records would have been "readily accomplished" (*id.* ¶ 3); (2) IRS counsel believed that sufficient evidence to support the issuance of the tax deficiency notice did exist; and (3) the entire motion was based on IRS counsel's own evaluation of the "particular civil tax controversy" and was "not to be construed as a comment on any other possible, current, or future litigation in relation to petitioner involving the United States," including, expressly, this case (*id.* at ¶¶ 5-6).

Even if the IRS had not encountered the authentication problems it evidently encountered that did not arise (and would not have arisen) in the prior criminal case, Marcusse would not likely have ever satisfied any civil tax judgment in addition to her existing criminal restitution obligation of more than $12 million. In any event, neither the IRS motion nor the Tax Court decision (nor any of the related Tax Court documents) has any bearing on the validity of Marcusse's criminal convictions.

Respectfully submitted,

DONALD A. DAVIS
United States Attorney

Date: March 26, 2012

/s/ Jennifer L. McManus
JENNIFER L. McMANUS
Assistant United States Attorneys
P.O. Box 208
Grand Rapids, Michigan 49501-0208
(616) 456-2404

CERTIFICATE OF SERVICE

I certify that on 3/26/12 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid to the address of record.

/s/ Jennifer L. McManus
Assistant United States Attorney

there is virtually no chance that the jury could have convicted Marcusse of any offense other than that for which she was charged, there has not been a constructive amendment. *See United States v. Chilingirian*, 280 F.3d 704, 712 (6th Cir. 2002).

Nor was there a fatal variance. A variance occurs when the charging terms of the indictment are left unaltered but the evidence offered at trial proves materially different from those alleged in the indictment. *United States v. Mahar*, 801 F.2d 1477, 1503 (6th Cir.1986). Variances, even on direct review, will not result in reversal unless the "substantial rights" of the defendant have been affected. *United States v. Hathaway*, 798 F.2d 902, 911 (6th Cir.1986). Substantial rights are affected only when a defendant proves prejudice to his ability to defend himself, to the overall fairness of the trial, or to the indictment's sufficiency to bar subsequent prosecutions. *Id.* Finally, the burden of proof rests upon the defendant to prove that the variance is fatal. *United States v. Miller*, 471 U.S. 130, 138 n. 5 (1985).

Here the government's proof at trial was consistent with the allegations in the indictment: that Marcusse conspired to "defeat the lawful functions of the Internal Revenue Service ... in the collection of revenue" by engaging in such acts or omissions as "fail[ing] to report to the [IRS] the salaries and commissions they paid themselves," "fail[ing] to report ... the monies ... received ... with which they paid personal expenses" and conducting transactions in a manner "so as to hide" funds "for the purpose of evading the payment of appropriate income taxes." *See* Indictment, Count 42. As for Marcusse or her coconspirators failing to file tax

returns, even if such acts or omissions were not fairly subsumed within these express terms of Count 42, "[i]t is axiomatic that all the overt acts in furtherance of a conspiracy need not be alleged in the indictment." *United States v. Henson*, 848 F.2d 1374, 1385 (6th Cir. 1988). Indeed, the failure to file tax returns more than qualifies as a sufficient "overt act" in furtherance of a *Klein* conspiracy to frustrate or defeat the function of the IRS where, as it was argued and proved here, the act or omission was for the purpose of and part of a broader scheme to defeat the lawful functions of the IRS by dishonest means executed in conjunction with a money laundering operation in which honest filings with the IRS might have disclosed the mail fraud (Ponzi) scheme the laundering was intended to hide. *Cf. United States v. Williams*, 649 F.Supp. 1290, 1293-96 (M.D. Fla. 1986) (failure to report income was part of larger scheme to evade taxes and avoid detection of profit skimming scheme) (citing *United States v. Enstam*, 622 F.2d 857 (5th Cir. 1980)). *See also United States v. Shermetaro*, 625 F.2d 104 (6th Cir. 1980) (*Klein* conspiracy to frustrate IRS as part of effort to conceal Medicare kickback scheme). In light of the broad "failure to disclose" allegations in Count 42 and the related money laundering and mail fraud conduct specifically incorporated by reference into that Count, Marcusse cannot demonstrate prejudice to a substantial right warranting collateral relief.

COUNT 42
(Conspiracy to Defraud the United States)

From on or about January 1, 1998, to on or about the date of this Superseding Indictment, in the Southern Division of the Western District of Michigan, and elsewhere, the Defendants,

JANET MAVIS MARCUSSE,
DAVID REX ALBRECHT,
GEORGE TERRANCE BESSER,
DIANE RENAE BOSS,
WESLEY MYRON BOSS,
DONALD MAYNARD BUFFIN, JR.,
WILLIAM EDWARD FLYNN and
JEFFERY ALAN VISSER,

did knowingly combine, conspire and agree together and with one or more of the other Defendants to defraud the United States for the purpose of impeding, impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue Service of the Treasury Department in the ascertainment, computation, assessment and collection of revenue, that is, income taxes.

The manner and means by which the Defendants conspired to defraud the United States and the Overt Acts committed by one or more of the Defendants to effect the object of the conspiracy are as follows:

Manner and Means

1. The Grand Jury incorporates by reference Counts 1-39 (mail fraud), Count 40 (mail fraud conspiracy), Count 41 (conspiracy to commit money laundering), and Counts 43-82 (money laundering).

2. The Defendants paid themselves and others large commission salaries and other payments from victims' funds and did not keep accurate and complete records of the payments.

3. The Defendants set up more than 20 different bank accounts into which they

4. The Defendants opened and used non-interest bearing checking accounts in the name of "church chapters" to receive and spend victims' funds for personal expenses.

5. The Defendants failed to report to the Internal Revenue Service the salaries and commissions they paid themselves from the victims' funds.

6. The Defendants failed to report to the Internal Revenue Service the moneys they received from victims' funds with which they paid personal expenses.

7. The Defendants failed to file the appropriate employee and payroll tax information, failed to issue Forms 1099 or W-2, and failed to keep accurate and normal books and records of the victims' funds.

8. The Defendants conducted financial transactions with victims' funds in a manner so as to hide the source and the amount or nature of funds received for the purpose of evading the payment of appropriate income taxes.

Overt Acts

9. The Grand Jury incorporates by reference, Counts 1-41 and Counts 43-82 of this Superseding Indictment.

18 U.S.C. § 371

fellow salesmen/co-defendants

D. Paragraphs 180, 210 and 213. The government concedes that the title "sales manager" and the role of sales manager in Access Financial referred to a concept of being responsible for a group of assigned investors. Thus, if an investor called to obtain information, the caller would be referred to their assigned "sales manager." The government also concedes that although his wife, Diane Renae Boss, (and later Donald Maynard Buffin, Jr. and Jeffrey Alan Visser) supervised the day to day activities of the office staff - Bonnie Kurnat, Julie Sieman, Kristen Hayes and others - Wesley Myron Boss did not, according to the testimony of Bonnie Kurnat and Julie Sieman. The defendants' observation that the sales managers operated independently of each other and answered to Janet Mavis Marcusse and George Terrance Besser also appears to be borne out by the evidence. The government concedes that the management of investors by the defendant/sales managers does not meet the requirement of managing "participants" of the offense, as required in USSG § 3B1.1, application note #1.

E. Paragraph 205. The offense clearly involved more than 250 victims, as the number proven was approximately 577.

F. Paragraphs 206-207 and follow through paragraphs. The defendant, like all the co-defendants, represented to the victims and third parties that they were a church and a charitable foundation. Wesley Myron Boss promoted church subchapters of the church he formed, called Sanctuary Ministries. He signed many documents claiming to be an officer of that church; he was a signator on the bank account of the church. He made application for health insurance coverage claiming to be an employee of a church organization. He signed church subchapter acknowledgment forms as a church officer for investors who bought a church

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. File No. 1:04-CR-165

GEORGE TERRANCE BESSER,

Defendant.

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Sentencing

Before

THE HONORABLE ROBERT HOLMES BELL
Chief United States District Judge
October 13, 2005

APPEARANCES

THOMAS J. GEZON
MICHAEL L. SCHIPPER
Assistant U.S. Attorneys
P.O. Box 208
Grand Rapids, MI 49501
Attorneys for Plaintiff

MICHAEL J. DUNN
1303 McKay Tower
146 Monroe Center, NW
Grand Rapids, MI 49503
Attorney for Defendant

Also Present: Sue Jager, Victim Spokesperson

Kevin W. Gaugier, CSR-3065
U.S. District Court Reporter

EXHIBIT L-13

First of all, the mail fraud statute changed in 2002 from being a five-year offense to a 20-year offense. Now, the charges in Counts 1 through 39 describe in the indictment a conspiracy which began in '98 and concluded at the time of the indictment in 2004, but then it goes on to list these 39 individual mailings and gives a particular date for each of those 39 mailings, which they all occur prior to the change in the statute. So I think probably the more conservative course and what I've seen from the few cases I've seen on this is that those 39 counts should be listed as five-year maximum each instead of 20-year maximum each.

THE COURT: That's correct. That's what I intend to do.

MR. GEZON: Thank you.

The other thing is, Your Honor, with regard to restitution, we have the same issue in this report as we have had before. We've prepared a list of all the people that I've identified as victims who did not write in. The list that Probation received, although mostly accurate and complete, is not totally accurate and complete in that even, for example, some of the trial witnesses did not respond to Probation's letter, so would not be on the victim list.

We propose that the greater list that we've prepared and submitted of about 550 people be listed as those who should share in any restitution. I recognize that the amount