Robert S. Fink (RF 7924)
Caroline Rule (CR-6503)
Megan L. Brackney (MLB 6870)
KOSTELANETZ & FINK, LLP
7 World Trade Center
New York, NY 10007
Tel: (212) 808-8100
Fax: (212) 808-8108

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	)	
	)	**Crim. No.: 05-249 (JLL)**
v.	)	
	)	**ORAL ARGUMENT**
RICHARD STADTMAUER.	)	**REQUESTED**

MEMORANDUM OF RICHARD STADTMAUER IN OPPOSITION TO THE GOVERNMENT'S REQUEST FOR A DELIBERATE IGNORANCE OR WILLFUL BLINDNESS CHARGE

Defendant Richard Stadtmauer respectfully submits this memorandum of law in opposition to the government's request for a deliberate ignorance or willful blindness charge to the jury. The government's request for this jury instruction is perhaps understandable given that such an instruction serves to ease the government's burden in obtaining a conviction. In this tax prosecution, however, the instruction is supported neither by the facts nor the law.

ARGUMENT

THE DISFAVORED WILLFUL BLINDNESS CHARGE IS NOT APPROPRIATE IN THIS TAX PROSECUTION ARISING OUT OF THE COMPLEX RULES GOVERNING TAX DEDUCTIONS

A. A Willful Blindness Charge Should Not Routinely Be Given

The use of a willful blindness or deliberate ignorance instruction is disfavored, and the instruction should "rarely be given." *United States v. Soto-Silva*, 129 F.3d 340, 345 (5th Cir.), *reh'g denied*, 135 F.3d 142 (5th Cir. 1997). *See also United States v. Ebert*, 178 F.3d 1287 (Table), 1999 WL 261590 at *11 (4th Cir. May 3, 1999) (unpublished opinion) (noting that "courts are 'wary'" of giving deliberate ignorance instructions), *reh'g denied*, 188 F.3d 504 (4th Cir. 1999); *United States v. Fransisco-Lopez*, 939 F.2d 1405, 1409 (10th Cir. 1991) (instruction is "rarely appropriate"); *United States v. Alvarado*, 838 F.2d 311, 314 (9th Cir. 1988) (instruction should be "given rarely"), *cert denied*, 487 U.S. 1222 (1988).

The reason for this is simple and springs from the bedrock principle that, to be held accountable for a crime, a defendant must possess criminal *mens rea*. The willful blindness instruction endangers this principle by "allow[ing] a jury to convict without finding that the defendant was aware of the existence of illegal conduct," thereby giving rise to the dual risk that a jury could convict a defendant under a lesser standard, such as a negligence or recklessness standard, or that the instruction will shift the burden of proof in the jury's eyes, creating an expectation that the defendant must prove his lack of knowledge. *United States v. Ojebode*, 957 F.2d 1218, 1229 (5th Cir. 1992) (deliberate ignorance instruction risks having jury convict on

negligence standard), *cert denied*, 507 U.S. 923 (1993). *Accord United States v. Brodie*, 403 F.3d 123, 147 (3d Cir. 2005) (discussing dangers of deliberate ignorance instruction); *United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1991) ("The most powerful criticism of the ostrich instruction is, precisely, that its tendency is to allow juries to convict upon a finding of negligence for crimes that require intent"), *reh'g denied*, 928 F.2d 225 (7th Cir. 1991); *United States v. Sasser*, 974 F.2d 1544, 1552 (10th Cir. 1992) (deliberate ignorance charge risks shifting burden of proof from prosecution to defendant), *cert denied*, 947 F.2d 1544 (1993).

Because of the grave risks inherent in such a charge, the emphasis of courts understandably has been upon the deliberateness prong of the instruction. As the seminal case on this instruction makes clear, the circumstances where such an instruction may be appropriate are very narrowly-delineated: "[t]he rule is that if a party has his *suspicion aroused* but then *deliberately omits to make further enquiries, because he wishes to remain in ignorance*, he is deemed to have knowledge." *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir.), *cert denied*, 426 U.S. 951 (1976).

It is *not* sufficient that the record show that the defendant failed fully to investigate the facts giving rise to the offense, or even that the defendant "should have known" the actual facts. *See Ojebode*, 957 F.2d at 1229 (deliberate ignorance instruction creates risk that jury will convict upon believing that defendant "should have been aware" of illegal conduct); *United States v. Rivera*, 944 F.2d 1563, 1571 (11th Cir. 1991) ("[t]he government's contention that the defendants should have known of . . . cocaine because of the false bottoms in the suitcases and weight

distribution of hairspray cans skates dangerously close to a negligence standard under which [the defendants] ought to be convicted based on information that they should have had knowledge of").

Rather, for a willful blindness instruction to be warranted, the record must contain evidence of "some *deliberate efforts* on the defendant's part to avoid obtaining actual knowledge." *United States v. Barnhart*, 979 F.2d 647, 651 (8th Cir. 1992) (emphasis added) (lower court erred in giving deliberate ignorance instruction); *Rivera*, 944 F.2d at 1571 (instruction should not be given in absence of evidence to support finding that defendant "purposefully contrived to avoid learning all of the facts . . ."). There is no such evidence here.

Several courts have adopted the practice, which the government urges upon the Court here, of inserting cautionary disclaimers in a deliberate ignorance instruction in order to guard against the dangers described above. While this practice is acceptable when the record contains sufficient evidence from which a jury could find that a defendant acted with deliberate ignorance, it is inappropriate, and indeed dangerous, when the instruction is not supported by the evidence in the record (*see* Section C., *post*) especially with respect to specific intent crimes such as the tax offenses charged here. *See, e.g.*, *Barnhart*, 979 F.2d at 651-52 (highlighting dangers of instruction notwithstanding "cautionary disclaimer[s]"). The reason for this is obvious: the less record evidence that exists to support such a charge, the greater the risk of a conviction on something less than a knowledge standard.

Accordingly, the courts of appeals, including this Circuit, have cautioned

the district courts to give the instruction *only* when there is *sufficient evidence* in the record that the defendant *acted deliberately* in order to avoid becoming aware of an illegal scheme. *See, e.g.*, *United States v. Leahy*, 445 F.3d 634, 652 (3d Cir. 2006) (deliberate ignorance charge must be "supported by sufficient evidence"); *Ebert*, 1999 WL 261590 at *12 (deliberate ignorance instruction was abuse of discretion when supported by scant record evidence); *Fransisco-Lopez*, 939 F.2d at 1410 ("The deliberate ignorance instruction must not be given unless evidence, direct or circumstantial, shows that defendant's claimed ignorance of an operant fact *was deliberate*") (emphasis added); *see also United States v. Marchand*, 308 F. Supp.2d 498, 506 (D.N.J. 2004)("an inference of knowledge based on deliberate ignorance is not appropriate where there is no evidence of knowledge . . .").

This is not a standard which is easily met, leading many courts to observe that "[t]he cases in which the facts point to deliberate ignorance are relatively rare." *Alvarado*, 838 F.2d at 314 (citing *United States v. McCallister*, 747 F.2d 1273, 1275 (9th Cir. 1984), *cert denied*, 474 U.S. 829 (1985)). *Accord Ebert*, 1999 WL 261590 at *11 (noting that the instruction is appropriate only in "those comparatively rare cases where the facts point in the direction of deliberate ignorance") (internal quotations omitted). This is not one of those rare instances.

B. A Deliberate Ignorance Charge Is Improper As A Matter of Law In A Tax Prosection Such As This One.

The government's proposed charge would permit conviction of a defendant who acted with "a conscious purpose" to "avoid enlightenment of the law."

Although, on a proper record, a jury may be instructed that a defendant's knowledge of a *fact* may be inferred from his willful blindness to the existence of that *fact*, it is contrary to the willfulness element of the criminal tax statutes to permit a jury to find an intentional violation of the tax laws, where no such intent existed, merely because the defendant may have consciously avoided learning the labyrinthine intricacies of the laws governing tax deductions. The portion of the government's proposed instruction that allows a jury to substitute knowledge of the tax laws with something less than actual knowledge must be rejected.

Of course, willfulness has a special meaning in criminal tax prosecutions. In *Cheek v. United States*, 498 U.S. 192 (1991), the Court reversed the conviction of a tax protester whose defense was that he believed that the law did not require him to pay federal income taxes. The Court concluded that such a belief, *however unreasonable*, was a valid defense to the offenses charged. While, "[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system," in the tax area the "proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws." *Id.* at 199. Consequently, Congress has made "specific intent to violate the law an element of certain federal tax offenses." *Id.* at 199-200. "Largely due to the complexity of the tax laws," the Supreme Court, in 1933, "interpreted the statutory term 'willfully' *as used in the federal criminal tax statutes* as carving out an exception to the traditional rule." *Id.* at 200 (citing *United States*

v. Murdock, 290 U.S. 389 (1933)) (emphasis added).

In short, as the *Cheek* Court concluded, "[w]illfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." *Id.* at 201. No matter how unreasonable it may be for a defendant – even a tax protester – to believe that he was not under a duty to take some action required by the tax laws, the government cannot rely on the unreasonableness of that belief to avoid its obligation to prove a "voluntary" and "intentional" violation of a "known" legal duty. *Id.* at 202 ("one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist").

The willful blindness instruction, as proposed by the government, is barred in this case by the rule set forth in *Cheek*. While some courts have approved the instruction in tax prosecutions, the instruction is appropriate only in those cases where there is sufficient evidence for the jury to conclude that a defendant deliberately closed his eyes to the existence of a *fact* that is material to the offense. The beginning of the government's proposed request improperly attempts to conflate this permissible use of such an instruction with a situation where the defendant purportedly has allowed himself to remain ignorant of the *law*. It states:

> The element of knowledge may be satisfied by inference drawn from proof that a defendant closed his eyes to what would otherwise have been obvious to him. A finding beyond a reasonable doubt of a conscious purpose by a particular defendant to avoid enlightenment of the law would permit an inference of

> knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from his willful blindness to the existence of that fact.

Government Request 31.

The second and third sentences are classic *non sequiturs*. The third sentence does *not* "state[]" in " another way" the point of the previous sentence. Instead, it implicitly recognizes that the proposed instruction applies to issues of *fact*, not to knowledge of the complex requirements of the tax laws. Indeed, the cases on which the government relies deal with willful blindness to the existence of facts rather than to knowledge of the law. In *United States v. One 1973 Rolls Royce, V.I.N. SRH-16266*, 43 F.3d 794 (3d Cir. 1994), for example, a case dealing with civil forfeiture of property derived from drug offenses, the Third Circuit cited to its "leading case on willful blindness, *United States v. Caminos*, 770 F.2d 361, 365 (3d Cir. 1985)," for the proposition that "the deliberate ignorance requirement is met only if 'the defendant himself was subjectively aware of the high probability of the *fact* in question, and not merely that a reasonable person would have been aware of the probability.' *Id.* at 365." 43 F.3d at 807-08 (emphasis added).[1]

The Second Circuit case to which the government cites also explicitly draws a distinction between deliberate ignorance of law and deliberate ignorance of facts. In *United States v. MacKenzie*, 777 F.2d 811 (2d Cir. 1985), the defendants

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[1] Even if *One 1973 Rolls Royce* or *Caminos* – a drug trafficking case – had purported to extend the willful blindness instruction beyond issues of fact, they still would be of no help to the government. Neither opinion had reason to address the special willfulness element found in the tax statutes.

argued, as we do here, that "decisions supporting a conscious avoidance charge involve defendants' knowledge of facts, not of law." *Id.* at 818. The Second Circuit reviewed the instruction, which made no reference to a conscious purpose to avoid enlightenment *of the law*, and explained that the instruction "included a reference to 'willful blindness to the existence of the fact,' which as applied here would simply mean that the [defendants] could not ignore the fact that their employees were employees and not independent contractors." *Id.* The court went on to hold, in light of this and the other instructions, that the district judge had "ma[de] clear to the jury that knowledge of the law was distinct from knowledge of facts." *Id.*[2]

Under *Cheek*, the government must prove a defendant had actual knowledge of his legal obligations under the tax laws. Although some courts have stated that a willful blindness instruction can extend to issues of law as well as fact, these cases either have not dealt with tax prosecutions or have failed to address *Cheek*'s clear instruction in the special context of tax prosecutions that "one cannot

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[2] The first paragraph of the instruction approved in *MacKenzie* is almost identical to that quoted above from government request number 31. The critical difference is that the government has added the following italicized words to its second sentence: "A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment *of the law* would permit an inference of knowledge." *Cf.* 777 F.2d at 818 n.2. This, no doubt, explains why the third sentence of the government's request – referring to knowledge of a fact – does not follow from its second sentence.

In *dicta* in a later decision approving an instruction substantially the same as that given in *MacKenzie*, the Second Circuit blurred the distinction between knowledge of fact and knowledge of law, stating that the defendant's knowledge of tax law "was, itself, a fact to be proved as part of the government's case." *United States v. Schiff*, 801 F.2d 108, 113 (2d Cir. 1986) (following *MacKenzie*). But that *dicta* depended on an interpretation of the willfulness requirement that the Supreme Court later repudiated in *Cheek*. *See Schiff*, 801 F.2d at 113 (rejecting a defense based on the defendant's "subjective good faith" belief about the tax laws).

be aware that the law imposes a duty upon him and yet be ignorant of it[.]" 498 U.S. at 202; *see, e.g.*, *United States v. Dean*, 487 F.3d 840, 851 (11th Cir. 2007) (erroneously purporting to find, "albeit in not so many words," *Cheek*'s endorsement of a willful blindness instruction in the portion of that opinion where the Court instead upholds liability for a taxpayer who "with full knowledge of the [tax code] provisions at issue" believes that the law is unconstitutional or otherwise invalid, 498 U.S. at 205-06); *United States v. Bussey*, 942 F.2d 1241, 1249 (8th Cir. 1991) (noting only that "*Cheek* did not involve a willful blindness instruction and is therefore irrelevant to Bussey's willful blindness issue on appeal"). Under *Cheek*, the jury must find that a defendant *knew* his conduct was in violation of the tax laws. 498 U.S. at 201. The government's effort to make up for that evidentiary deficiency with a charge that would allow a finding of guilt based on proof that a defendant avoided knowledge of the tax laws' detailed requirements – whether such avoidance was conscious or not – must be rejected.

C. The Trial Record In This Case Does Not Support A Willful Blindness Instruction

The trial evidence does not support a finding that Richard Stadtmauer's suspicions were aroused that the Kushner Companies' tax returns included deductions that were incorrect under the tax laws, and that he then made efforts to avoid learning the complexities of the tax rules governing deductions. There is no such evidence.

While there is evidence that Mr. Stadtmauer knew what expenses the partnerships paid for, there is no evidence that he suspected, or was given reason to

suspect, that the way these expenses were dealt with on the partnerships' tax returns was unlawful. Indeed, despite the many witness's testimony about Mr. Stadtmauer's knowledge of how the Kushner Companies real estate properties were run, and about the Kushner Companies' partnerships' finances, there was very little evidence at all about Mr. Stadtmauer's involvement with the tax returns at issue. There was no evidence that Mr. Stadtmauer directed how the tax returns should be prepared, or, indeed that he was involved at all in their preparation. Evidence of knowledge of the partnerships' finances simply does not translate into evidence of knowledge, or even reason to suspect, that anything on the partnerships' tax returns violated the tax laws.

The only evidence connecting Mr. Stadtmauer to the tax returns was that he signed approximately 800 returns per year. He "flipped through" some returns while doing so, and may have asked about a particular partnership's *profitability*. But there was no evidence that he asked questions about, or that anyone mentioned to him, the issue of what items were capitalized or expensed on the returns, *or* even suggested what the tax laws require in this respect. There was no evidence that he asked questions about, or that anyone mentioned to him, how charitable contributions were *or should be* treated on the tax returns, how gifts and entertainment expenses were *or should be* treated on the tax returns, or how payments for other partnership's expenses were *or should be* treated on the tax returns.

This evidence simply does not go anywhere near showing that Mr. Stadtmauer made deliberate efforts to avoid learning how expenses were treated on the tax returns *and then* made deliberate efforts to avoid learning the tax rules about

how those expenses should be treated. There is no basis for a willful blindness charge here.

Conclusion

Richard Stadtmauer respectfully requests that the Court not include a willful blindness charge in its instructions to the jury.

Dated: New York, New York
May 22, 2008

Respectfully submitted,

KOSTELANETZ & FINK, LLP

By: /s/ Robert S. Fink
Robert S. Fink (RSF-7924)
Caroline Rule (CR-6503)
Megan L. Brackney (MLB-6870)
7 World Trade Center
New York, New York 10007
(212) 808-8100

Counsel to Richard Stadtmauer

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that the forgoing document was served on the parties of record by electronic notification and by mailing a copy thereof by Federal Express, postage prepaid, to the following:

Thomas J. Eicher, AUSA
United States Attorney's Office
District of New Jersey
U.S. Department of Justice
970 Broad Street, Suite 700
Newark, NJ 07102

This, the 22nd day of May 2008.

/s/ Robert S. Fink

Robert S. Fink