Indemnity Agreement

This Indemnity Agreement (the "Agreement") is entered into as of July 11, 2002 by and between Fax.com, Inc., a Delaware corporation with its principal place of business in Aliso Viejo, California ("Seller"), on the hand, and Spenger Marketing ("Buyer"), on the other hand.

WHEREAS Buyer has agreed to purchase from Seller fax broadcast services for the express purpose of marketing via facsimile (the "Service" or "Services") and Buyer has requested that Seller execute an indemnity agreement regarding Buyer's use of the Service;

NOW THEREFORE, in consideration of the mutual covenants and agreements contained herein, the parties agree as follows:

Seller hereby agrees to indemnify Buyer from any and all liabilities, actions, causes of action, damages and obligations arising out of or in connection with the Buyer's utilization of the Service provided that the Service is used by Buyer in the ordinary course of Buyer's business, and for its intended purpose as disclosed by Buyer to Seller at the time of its purchase; provided further that Buyer notifies and copies Seller within ten days of Buyer's receipt, or service on Buyer, of any initial written claim, as well as any summons or complaint and Seller shall have the right to direct, defend or settle any such claim, summons or complaint at Seller's sole discretion; and provided further that this Agreement shall extend and apply to monetary damages only and that Seller's indemnification obligations under this Agreement shall continue only during such time as Buyer shall continue utilizing the Service at a level equal to the average use of the Service in the three months prior to giving Seller notice of any such claim, summons or complaint; and, further and notwithstanding the foregoing, Seller's total obligation under this Agreement shall not exceed one thousand, five-hundred U.S. dollars ($1,500).

This Agreement will bind and benefit the successors and assigns of the parties, but Buyer may not assign its rights under the Agreement without Seller's prior written consent. This Agreement shall be governed under the laws of the State of California. In the event that any provision hereof is held to be ineffective or invalid, the remaining provisions will nevertheless be given full force and effect. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The arbitration shall be conducted in Orange County, California before a single neutral arbitrator.

This Agreement, together with the parties' written "Fax Broadcasting Agreement" dated July 11, 2002, sets forth the entire agreement between Buyer and Seller as of the date of this Agreement. Any and all prior understandings, representations and agreements between the parties—whether written or oral--are hereby expressly superseded as of the date of this Agreement and shall have no force or effect. Further, this Agreement may be amended and/or modified only in writing and must be executed by the party to be charged, or, in the case of a waiver, by the waiving party.

Seller: FAX.COM, INC.

By: _____
CHARLES MARTIN

Buyer: SPENGER MARKETING

By: _____
BRADY SPEARS

iMPACT MARKETING SOLUTIONS

Marketing Agreement

Sales Rep: J.Horvat

This Marketing Agreement (the "Agreement") is entered into as of August 21, 2003, by and between Impact Marketing Solutions, LLC, a California corporation, with its principal place of business in Irvine, California ("Seller") and Singer Rider Chiropractic ("Buyer").

WHEREAS, Seller provides fax broadcasting, fax-on-demand and other proprietary fax systems for mass faxing and other marketing services for commercial purposes (the "Services" or "Service"); and

WHEREAS, Buyer desires to begin utilizing or continue utilizing the Services;

NOW THEREFORE, in consideration of the mutual covenants and agreements contained herein, Buyer and Seller (the "parties") hereby agree as follows:

1. The Services: Seller will provide the Services to Buyer in accordance with the terms of individual written sales orders to be completed by Buyer and delivered to Seller. However, Seller reserves the right in Seller's sole discretion to reject any sales orders or sales request submitted by Buyer to Seller.

2. Payment: Buyer shall pay for the Services based upon the terms set forth in the written sales orders. Payment shall be at the time Buyer places the sales order with Seller. Seller is capable as of the date of this Agreement of accepting payment by credit card.

3. Use of the Services with Seller's Fax Data. Except in those instances where the Buyer is supplying fax data to Seller (see paragraph 4 below), Seller will provide the Services by utilizing a database of fax numbers in the possession of Seller. Seller maintains all of its proprietary rights to this data base of fax numbers and Buyer is acquiring no rights to nor access to Seller's database, other than use of the Services as set forth in Buyer's sales order. In the fax transmissions, Seller will place on Buyer's message a toll-free telephone number that a fax recipient may call to add or delete the recipient's fax number from Seller's database. Buyer agrees that in the event the recipient instead contacts Buyer, Buyer will obtain the information communicated by the recipient and immediately inform Seller of the information, so that Seller may take all appropriate steps, such as to add or delete the recipient's fax number from Seller's data base. Buyer understands that Seller will not transmit to 800/888/976 numbers. Buyer further understands that Seller may not be able to process or fully complete Buyer's sales orders or sales request if to do so would violate Seller's own internal procedures or policies with respect to the Services.

4. Buyer Supplying Data. Should Buyer decide to supply fax data to Seller for use in the Services, Buyer accepts all responsibility for providing Seller clean and accurate data and Buyer further agrees to pay for 100% of all faxes sent regardless of completion success. Buyer also agrees to pay for any and all damages incurred by Seller during or as a result of the use of Buyer-provided data. Seller agrees to hold any data given by Buyer to Seller in strictest confidence under the same proprietary standards Seller holds its own data.

5. Late Payments. Buyer is responsible for payment of all charges, including taxes and surcharges, for the Services. Payment will be made in U.S. currency. If Seller does not receive payment within thirty (30) days of receipt of Buyer's placement of a sales order with Seller, Seller may levy a late charge of 1.5% per month on the unpaid balance or the maximum allowed by law, whichever is less. If payment is not received within ninety (90) days of Buyer's order, Seller shall be entitled to recover any and all amounts due, plus costs of collection, including, but not limited to, reasonable attorney's fees. Seller may use any agency or collection methods allowable under the law to recover any outstanding debts owed by Buyer.

6. Possible Additional Fees. Buyer agrees that should Buyer's message being transmitted over the Service require longer than one (1) minute per page for fax job completion, an overage charge will be applied to the overall job order in increments of ten (10) seconds at the agreed-upon rate set forth in Buyer's sales order. Buyer agrees to pay any extenuating fees incurred by Seller while executing the Services including, but not limited to, additional dialing fees for non-U.S. calling, de-contamination of any data supplied by Buyer or rush job charges.

7. Buyer's Responsibility re Content of Faxes. Buyer is solely responsible for the content and/or quality of any documents and commercial messages transmitted over the Service and Buyer expressly covenants that Buyer will not use the Services for any misleading or fraudulent purpose including, but not limited to, marketing of unlawful products or violations of securities laws. In addition, Seller reserves, in its sole discretion, the right to refuse to transmit any message over the Service that Seller believes might be deceptive, misleading, fraudulent, offensive, or otherwise inappropriate for transmission.

iMPACT MARKETING SOLUTIONS LLC

Marketing Agreement

8. Buyer's Authority to Execute and Perform Agreement. Buyer represents it is authorized to execute and deliver this Agreement and, specifically, that neither the execution nor the delivery of this Agreement, nor the taking of any action in compliance with the Agreement will breach any agreement to which Buyer is a party and/or violate Buyer's articles of incorporation or bylaws.

9. No Guaranty of Results. Although Seller expects the Services, once utilized, to increase Buyer's marketing presence, Seller makes no warranty–express or implied–as to the ability of the Service to in fact increase Buyer's marketability. In the event Buyer's marketing presence does not increase as a result of Buyer's utilization of the Services, Buyer shall have no recourse against Seller on any legal theory, whether based on representation, warranty or otherwise. Buyer assumes the entire risk as to the results and performance of the Services in regards to increasing marketability and revenues.

10. Assignment. This Agreement will bind and benefit the successors and assigns of the parties, but Buyer may not assign its rights under the Agreement without Seller's prior written consent.

11. Legal Issues re Fax Broadcasting. Buyer acknowledges that Buyer is aware that Seller's faxing of Buyer's commercial messages/advertisements on behalf of Buyer presents significant legal issues and risks. Buyer acknowledges that Seller has made no representations, promises or assurances to Buyer in this regard, and Buyer has had the opportunity to consult with its own legal counsel with respect to the federal Telephone Consumer Protect Act and applicable state law regarding transmission by fax of unsolicited commercial messages/advertisements and the risks attended thereto. The parties acknowledge and agree that Seller shall have no indemnity obligations to Buyer unless a separate written indemnity agreement is made and executed by the parties concurrently with or subsequent to the date of this Agreement.

12. Governing Law/Arbitration. This Agreement shall be governed under the laws of the State of California. In the event that any provision hereof is held to be ineffective or invalid, the remaining provisions will nevertheless be given full force and effect. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The arbitration shall be conducted in Orange County, California before a single neutral arbitrator.

13. Entire Agreement. This Agreement sets forth the entire agreement of the parties as of the date of this Agreement. Any and all prior understandings, representations and agreements between the parties–whether written or oral–are hereby expressly superseded as of the date of this Agreement and shall have no force or effect. Further, this Agreement may be amended and/or modified only in writing and must be executed by the party to be charged, or, in the case of a waiver, by the waiving party.

IT IS AGREED:

SELLER: Impact Marketing Solutions, LLC
Address: 5405 Alton Parkway, Suite 5A, #114 • Irvine, CA 92604

By: Jimmy Horvat

_____

An authorized agent for SELLER

BUYER: Singer Rider Chiropractic
Address: 12890 Hillcrest Rd. Suite 105 Dallas, TX 75230

By:Lisa Rider. An authorized agent for BUYER

Signature: _____

Fax Broadcasting Agreement

This Fax Broadcasting Agreement (the "Agreement") is entered into as of July 8, 2002, by and between Fax.com, Inc., a Delaware corporation with its principal place of business in Aliso Viejo, California ("Seller") and Singer Rider Chiropractic Center ("Buyer").

WHEREAS, Seller provides fax broadcasting, fax-on-demand and other proprietary fax systems for mass faxing and other marketing services for commercial purposes (the "Services" or "Service"); and

WHEREAS, Buyer desires to begin utilizing or continue utilizing the Services;

NOW THEREFORE, in consideration of the mutual covenants and agreements contained herein, Buyer and Seller (the "parties") hereby agree as follows:

1. **The Services:** Seller will provide the Services to Buyer in accordance with the terms of individual written sales orders to be completed by Buyer and delivered to Seller. However, Seller reserves the right in Seller's sole discretion to reject any sales orders or sales request submitted by Buyer to Seller.

2. **Payment.** Buyer shall pay for the Services based upon the terms set forth in the written sales orders. Payment shall be at the time Buyer places the sales order with Seller. Seller is [illegible] of this Agreement of accepting payment by credit card.

3. **Use of the Services with Seller's Fax Data.** Except in those instances where the Buyer is supplying fax data to Seller (see paragraph 4 below), Seller will provide the Services by utilizing a database of fax numbers in the possession of Seller. Seller maintains all of its proprietary rights to this data base of fax numbers and Buyer is acquiring no rights to nor access to Seller's data base, other than use of the Services as set forth in Buyer's sales order. In the fax transmissions, Seller will place on Buyer's message a toll-free telephone number that a fax recipient may call to add or delete the recipient's fax number from Seller's database. Buyer agrees that in the event the recipient instead contacts Buyer, Buyer will obtain the information communicated by the recipient and immediately inform Seller of the information, so that Seller may take all appropriate steps, such as to add or delete the recipient's fax number from Seller's data base. Buyer understands that Seller will not transmit to 800/888/900 numbers. Buyer further understands that Seller may not be able to process or fully complete Buyer's sales orders or sales request if to do so would violate Seller's own internal procedures or policies with respect to the Services.

4. **Buyer Supplying Data.** Should Buyer decide to supply fax data to Seller for use in the Services, Buyer accepts all responsibility for providing Seller clean and accurate data and Buyer further agrees to pay for 100% of all faxes sent regardless of completion success. Buyer also agrees to pay for any and all damages incurred by Seller during or as a result of the use of Buyer-provided data. Seller agrees to hold any data given by Buyer to Seller in strictest confidence under the same proprietary standards Seller holds its own data.

5. **Late Payments.** Buyer is responsible for payment of all charges, including taxes and surcharges, for the Services. Payment will be made in U.S. currency. If Seller does not receive payment within thirty (30) days of receipt of Buyer's placement of a sales order with Seller, Seller may levy a late charge of 1.5% per month on the unpaid balance or the maximum allowed by law, whichever is less. If payment is not received within ninety (90) days of Buyer's order, Seller shall be entitled to recover any and all amounts due, plus costs of collection, including, but not limited to, reasonable attorney's fees. Seller may use any agency or collection methods allowable under the law to recover any outstanding debts owed by Buyer.

6. **Possible Additional Fees.** Buyer agrees that should Buyer's message being transmitted over the Service require longer than one (1) minute per page for fax job completion, an overage charge will be applied to the overall job order in increments of ten (10) seconds at the agreed-upon rate set forth in Buyer's sales order. Buyer agrees to pay any extenuating fees incurred by Seller while executing the Services including, but not limited to, additional dialing fees for non-U.S. calling, de-contamination of any data supplied by Buyer or rush job charges.

7. **Buyer's Responsibility re Content of Faxes.** Buyer is solely responsible for the content and/or quality of any documents and commercial messages transmitted over the Service and Buyer expressly covenants that Buyer will not use the Services for any misleading or fraudulent purpose including, but not limited to, marketing of unlawful products or violations of securities laws. In addition, Seller reserves, in its sole discretion, the right to refuse to transmit any message

over the Service that Seller believes might be deceptive, misleading, fraudulent, offensive, or otherwise inappropriate for transmission.

8. **Buyer's Authority to Execute and Perform Agreement.** Buyer represents it is authorized to execute and deliver this Agreement, and, specifically, that neither the execution nor the delivery of this Agreement, nor the taking of any action in compliance with the Agreement will breach any agreement to which Buyer is a party and/or violate Buyer's articles of incorporation or bylaws.

9. **No Guaranty of Results.** Although Seller expects the Services, once utilized, to increase Buyer's marketing presence, Seller makes no warranty--express or implied--as to the ability of the Service to in fact increase Buyer's marketability. In the event Buyer's marketing presence does not increase as a result of Buyer's utilization of the Services, Buyer shall have no recourse against Seller on any legal theory, whether based on representation, warranty or otherwise. Buyer assumes the entire risk as to the results and performance of the Services in regards to increasing marketability and revenues.

10. **Assignment** This Agreement will bind and benefit the successors and assigns of the parties, but Buyer may not assign its rights under the Agreement without Seller's prior written consent.

11. **Legal Issues re Fax Broadcasting.** Buyer acknowledges that Buyer is aware that Seller's faxing of Buyer's commercial messages/advertisements on behalf of Buyer presents significant legal issues and risks. Buyer acknowledges that Seller has made no representations, promises or assurances to Buyer in this regard, and Buyer has had the opportunity to consult with its own legal counsel with respect to the federal Telephone Consumer Protect Act and applicable state law regarding transmission by fax of unsolicited commercial messages/advertisements and the risks attended thereto. The parties acknowledge and agree that Seller shall have no indemnity obligations to Buyer unless a separate written indemnity agreement is made and executed by the parties concurrently with or subsequent to the date of this Agreement.

12. **Governing Law/Arbitration.** This Agreement shall be governed under the laws of the State of California. In the event that any provision hereof is held to be ineffective or invalid, the remaining provisions will nevertheless be given full force and effect. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The arbitration shall be conducted in Orange County, California before a single neutral arbitrator.

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IT IS AGREED:

SELLER:
Fax.com, Inc

Address: 120 Columbia Suite 500
Aliso Viejo, CA 92656

By: _____
Jeffrey Dupree
Its Vice President/Sales

BUYER:
Singer Rider Chiropractic Center

Address: 12890 Hillcrest Rd.
Dallas, TX 75230

By: Lisa Rider
Lisa Rider

United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Billie Mac JOBE, Stephen Taylor, Philip Mark Sutton, Stanley Pruet Jobe, and Fernando Novoa, Defendants-Appellants.

No. 94-50646.

Dec. 5, 1996.

Defendants were convicted in the United States District Court for the Western District of Texas, Harry Lee Hudspeth, Chief Judge, of offenses arising out of check kiting scheme. Defendants appealed. The Court of Appeals affirmed in part, vacated and remanded in part, 77 F.3d 1461. On rehearing, the Court of Appeals affirmed in part, reversed in part, and remanded in part, 90 F.3d 920. On second motion for rehearing, the Court of Appeals, Edith H. Jones, Circuit Judge, substituted its opinion for both previous opinions and held that: (1) defendants were not prejudiced by extrinsic evidence received by one juror; (2) instructions on good faith, willfulness, and specific intent were adequate; (3) defendants were not entitled to severance from codefendant who indicated that he would give exculpatory testimony at separate trial; (4) defendants were permitted to assert plain error on appeal based on intervening changes in the law; but (5) under plain error review Court of Appeals declined to exercise its discretion to correct trial court's failure to instruct jury that materiality was element of conspiracy to commit bank fraud; (6) evidence was sufficient to support conspiracy and aiding and abetting convictions; but (7) convictions for making false statement on loan application and aiding and abetting same offense were not supported by sufficient evidence; (8) evidence did not support sentencing enhancement based on management of other participants in scheme; (9) enhancement for abuse of public or private trust was supported by evidence; and (10) defendant's right to confront witnesses was not violated by denial of severance.

Affirmed in part, vacated in part, and remanded in part.

West Headnotes

[1] Criminal Law ⚿1156(1)
110k1156(1)

Court of Appeals reviews district court's denial of motion for new trial for abuse of discretion.

[2] Criminal Law ⚿868
110k868

Procedures used to investigate allegations of juror misconduct and decision as to whether to hold evidentiary hearing are matters which rest solely within sound discretion of district court.

[3] Criminal Law ⚿956(12)
110k956(12)

Presumption of jury impartiality may be defeated through evidence that extrinsic factual matter actually tainted jury's deliberations.

[4] Criminal Law ⚿868
110k868

District court must investigate asserted jury impropriety only when colorable showing of extrinsic influence is made.

[5] Criminal Law ⚿956(11)
110k956(11)

[5] Criminal Law ⚿956(12)
110k956(12)

When extrinsic evidence is introduced into jury room, defendant enjoys rebuttable presumption of prejudice, and government has burden of proving harmlessness of breach; when district court considers whether government has carried that burden, it should examine content of extrinsic material, manner in which it came to jury's attention, and weight of evidence against defendant.

[6] Criminal Law ⚿959
110k959

District court which considered juror's affidavit concerning information that had been given to him from an outside source and his failure to pass it on to other jurors, and which considered the evidence at trial, conducted the mandated inquiry into effect of extrinsic evidence on verdict.

[7] Criminal Law ⚿959

110k959

Court did not abuse its discretion in denying defendant's request for new trial without ordering evidentiary hearing where juror stated in affidavit that he had been given information that defendant had previously been convicted of a similar crime but did not relay that information to any other jurors, and where evidence against defendant on the two counts on which he was convicted was overwhelming.

[8] Criminal Law ⚿932
110k932

Where defendant was not prejudiced by fact that one juror was told that defendant had previously been convicted of similar offense, there was no likelihood that other defendants were tainted by that report.

[9] Criminal Law ⚿805(1)
110k805(1)

[9] Criminal Law ⚿1152(1)
110k1152(1)

District courts enjoy substantial latitude in formulating jury instructions, and Court of Appeals reviews refusal to provide requested jury instruction for abuse of discretion.

[10] Criminal Law ⚿835
110k835

District court does not abuse its discretion in denying proffered instruction unless instruction is correct statement of law, is not substantially covered in charge as a whole, and concerns important point in trial such that failure to instruct jury on the issue seriously impairs defendant's ability to present a given defense.

[11] Criminal Law ⚿778(6)
110k778(6)

Instruction that jurors, in determining whether defendant acted with criminal intent to defraud or deceive, could consider whether he had good-faith belief that what he was doing was legal and that they should vote to acquit if defendant did have a good-faith belief did not reduce government's burden of proof beyond reasonable doubt or thrust any burden on defendant.

[12] Criminal Law ⚿772(6)
110k772(6)

Instruction that jurors could consider, in determining whether any defendant acted with criminal intent to defraud or deceive, whether that defendant had a good-faith belief that what he was doing was legal did not limit good faith to certain defendants or certain defenses.

[13] Criminal Law ⚿822(7)
110k822(7)

Where court stated in conspiracy instructions that the jurors had to find that each defendant knew the unlawful purpose of the agreement and joined in it willfully with the intent to further the unlawful purpose, instructions, read as a whole, included a definition of willfulness even though instructions may not have separately defined willfulness.

[14] Criminal Law ⚿800(6)
110k800(6)

Court which instructed jury that the word "knowingly" meant that the act was done voluntarily and intentionally and not because of mistake or accident adequately defined knowingly.

[15] Criminal Law ⚿829(3)
110k829(3)

Where district court, although not explicitly defining specific intent, correctly charged jurors on elements of intent in each offense, proposed instructions on specific intent which merely reiterated that government must prove beyond reasonable doubt that defendants knowingly did an act which the law forbids were redundant and unnecessary.

[16] Criminal Law ⚿622.2(10)
110k622.2(10)

To allege prima facie case for severance based on exculpatory testimony of codefendant, defendant must first show that the testimony is truly exculpatory in nature and effect.

[17] Criminal Law ⚿622.2(10)
110k622.2(10)

Defendants were not entitled to severance which would have allowed codefendant to testify where codefendant's affidavit was self-serving and stated

only that, to his knowledge, the defendants had not committed any of the charged offenses.

[18] Criminal Law ⚿1038.2
110k1038.2

Where defendants did not object to court's charge at trial, and did not at any point during trial argue that element of materiality in certain offenses be submitted to jury, appellate review was confined to plain error analysis; standard of review of unobjected to Gaudin error is plain error analysis.

[19] Criminal Law ⚿1030(1)
110k1030(1)

Under plain error standard, appellate court may only reverse conviction if there was an error, if error was clear and obvious, and if error affected a defendant's substantial rights.

[20] Criminal Law ⚿1030(1)
110k1030(1)

[20] Criminal Law ⚿1181(2)
110k1181(2)

Defendants are permitted to assert plain error based on intervening changes in the law, even though objection at time would have been baseless under then- current law.

[21] Criminal Law ⚿1030(1)
110k1030(1)

Under plain error standard, even if error affected defendant's substantial rights, appellate court need not exercise discretion to correct error unless it seriously affects the fairness, integrity, or public reputation of judicial proceedings.

[22] Criminal Law ⚿1172.1(3)
110k1172.1(3)

[22] Criminal Law ⚿1172.8
110k1172.8

Even though plain error was committed with respect to defective jury instructions concerning materiality as element of conspiring to commit bank fraud and aiding and abetting bank fraud, and assuming that error affected defendants' substantial rights, court would not overturn convictions, where defendants succeeded against some counts, incriminating evidence on count at issue was overwhelming, and materiality of false entries, false representations, and amounts of money involved in check kiting scheme were not seriously contested by defendants, and thus, there was no reasonable likelihood that defendants were prejudiced by failure to instruct on materiality.

[23] Conspiracy ⚿24(1)
91k24(1)

[23] Conspiracy ⚿24.5
91k24.5

[23] Conspiracy ⚿27
91k27

In order to establish conspiracy, government must prove existence of agreement between two or more people to violate law of United States, that one of the conspirators committed overt act in furtherance of that agreement, and that defendants knew of conspiracy and voluntarily participated in it. 18 U.S.C.A. § 371.

[24] Criminal Law ⚿1144.13(3)
110k1144.13(3)

[24] Criminal Law ⚿1144.13(5)
110k1144.13(5)

[24] Criminal Law ⚿1159.2(7)
110k1159.2(7)

On review for sufficiency of evidence to support conviction, standard of review is whether, viewing evidence and all reasonable inferences to be drawn therefrom in light most favorable to government, reasonable trier of fact could have found that evidence established guilt beyond reasonable doubt.

[25] Conspiracy ⚿47(4)
91k47(4)

Under plain error review, convictions for conspiracy to commit bank fraud were supported by sufficient evidence, from which jury could have concluded that defendants were knowing, voluntary participants in agreement to commit bank fraud and that overt acts were committed in furtherance of that agreement. 18 U.S.C.A. §§ 371, 1005, 1014, 1344.

[26] Banks and Banking ⚿509.25
52k509.25

[26] Conspiracy ⚿47(4)
91k47(4)

Defendant who was charged with conspiracy to defraud bank and aiding and abetting bank fraud was shown to have shared intent to defraud bank where defendant was officer in charge of bank's wire room and accounting, where defendant's underlings figured out that codefendant's actions looked like check kiting, where defendant personally continued to approve many of the transactions, and where defendant eventually took a job with codefendant. 18 U.S.C.A. §§ 2, 371, 1344.

[27] Criminal Law ⚿59(5)
110k59(5)

To aid and abet an offense, defendants must share in criminal intent of principal and assist principal's perpetration of crime.

[28] Banks and Banking ⚿509.25
52k509.25

Rational trier of fact could have determined that defendants aided and abetted codefendant's bank fraud and that defendants had intent to defraud banks by facilitating codefendant's bank fraud; evidence and testimony presented at trial included defendants allowed overdrafts and wire transactions structured to facilitate check kiting scheme, covered scheme, and facilitated scheme in extensive ways.

[29] Banks and Banking ⚿509.25
52k509.25

Conviction for making materially false bank entries was supported by evidence that defendant signed and issued cashier's check to codefendant as part of codefendant's check kiting scheme and failed to disclose and detail transaction in bank records until several days later. 18 U.S.C.A. § 1005.

[30] Banks and Banking ⚿509.25
52k509.25

Conviction for making false statement on loan application and for aiding and abetting, making false entries in bank records concerning same application, were not supported by sufficient evidence; defendant, who was a guarantor, made no direct representations concerning loan, was neither borrower nor payee of proceeds, and did not sign any loan application, and there was no loan application on which defendant had made false statement. 18 U.S.C.A. §§ 2, 1014.

[31] Sentencing and Punishment ⚿814
350Hk814
(Formerly 110k1270)

Decision to enhance sentence will be upheld if it results from legally correct application of guidelines to factual findings that are not clearly erroneous. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

[32] Sentencing and Punishment ⚿300
350Hk300
(Formerly 110k986.4(1))

Presentence report generally bears sufficient indicia of reliability to be considered as evidence by trial judge making factual determinations required by Sentencing Guidelines. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

[33] Sentencing and Punishment ⚿976
350Hk976
(Formerly 110k1313(2))

Evidence did not show that defendant managed or supervised check kiting scheme as there was no evidence that he managed or supervised any of his codefendants or other people in connection with it. U.S.S.G. § 3B1.1(c), 18 U.S.C.A.

[34] Sentencing and Punishment ⚿976
350Hk976
(Formerly 110k1313(2))

Finding that defendant abused position of public or private trust in connection with check kiting scheme was supported by evidence that he was on board of directors of two banks and was apprised of codefendant's overdrafts that had been covered by wire transfers on account at one of the banks and that he had been advised of check kiting scheme at the other bank. U.S.S.G. § 3B1.3, 18 U.S.C.A.

[35] Criminal Law ⚿662.10
110k662.10

Sixth Amendment right to confrontation is violated when several codefendants are tried jointly, one defendant's extrajudicial statement is used to implicate another defendant in the crime, and confessor does not take stand and is not subject to cross-examination. U.S.C.A. Const.Amend. 6.

[36] Criminal Law ⚿422(1)
110k422(1)

Bruton can be violated when codefendant's statement directly alludes to defendant.

[37] Criminal Law ⚿622.2(7)
110k622.2(7)

Severance because of Bruton problem is proper only in cases where defendant's statement directly incriminates his codefendants without reference to other, admissible evidence.

[38] Criminal Law ⚿662.8
110k662.8

Testimony by bank examiner as to statements made by president of bank in connection with investigation of check kiting scheme, that defendant, the cashier at bank, had presented the president with a check and that president had signed the check because of his faith in the cashier and that the president had indicated at one time that he felt that defendant had some checks in his drawer that were written by the check kiter, was not incriminating without reference to other admissible evidence, so that admission of testimony did not violate defendant's Sixth Amendment right to confront witnesses. U.S.C.A. Const.Amend. 6.

[39] Criminal Law ⚿1169.7
110k1169.7

If there was Bruton error, limiting instruction that statement could be considered only as to the declarant and not as to a codefendant was powerless to rectify that error.

[40] Criminal Law ⚿1169.7
110k1169.7

Where statements of codefendant as to which witness testified did not directly incriminate defendant without reference to other admissible evidence, court's limiting instruction that the testimony concerning the statement should be considered only as to the declarant was adequate to protect defendant from any potential prejudice.

[41] Criminal Law ⚿1036.1(5)
110k1036.1(5)

Because defendant failed to object to testimony which might raise Bruton concerns, it would be reviewed for plain error.

[42] Criminal Law ⚿1169.7
110k1169.7

Even if testimony concerning statements made by codefendant did incriminate defendant, reversal is not required where other evidence was more than sufficient to confirm the conviction.

[43] Sentencing and Punishment ⚿752
350Hk752
(Formerly 110k1251)

Sentence can be enhanced for management or supervision of criminal scheme based on management of organization's property, assets, or activities, without regard to supervision of other people. U.S.S.G. § 3B1.1(c), 18 U.S.C.A.

[44] Sentencing and Punishment ⚿752
350Hk752
(Formerly 110k1251)

Two-level enhancement under Sentencing Guideline as organizer, leader, manager, or supervisor in criminal activity was vacated where record contained no evidence that defendant managed or supervised any of his codefendants in connection with illegal check kiting scheme; as district court did not order upward departure, exception allowing departure for defendant who exercised management responsibility over property, assets, or activities of organization was unavailable to sustain enhancement. U.S.S.G. § 3B1.1(c), 18 U.S.C.A.

[45] Sentencing and Punishment ⚿764
350Hk764
(Formerly 110k1251)

Denial of two-level reduction for being a minor participant in check kiting scheme was proper in view of evidence of defendant's role as cashier and head of wire transfer room at bank with responsibility for the accounts used in the scheme. U.S.S.G. § 3B1.2, 18 U.S.C.A.

*1051 Richard L. Durbin, Jr., Asst. U.S. Attorney, Joan E.T. Stearns, Office of the United States Attorney, San Antonio, TX, for plaintiff-appellee.

Albert G. Weisenberger, El Paso, TX, for Billie Mac Jobe defendant- appellant.

S. Michael McColloch, McColl & McColloch, Dallas, TX, Stacy R. Obenhaus, Cynthia C. Hollingsworth, Gardere & Wynne, Dallas, TX, for Fernando Novoa, defendant-appellant.

William L. Lutz, Las Cruces, NM, for Stanley Pruet Jobe, defendant- appellant.

James O. Darnell, Grambling and Darnell, El Paso, TX, for Philip Mark Sutton, defendant-appellant.

Appeal from the United States District Court for the Western District of Texas.

OPINION ON SECOND SET OF MOTIONS FOR REHEARING

Before JONES, STEWART and PARKER, [FN*] Circuit Judges.

FN* After oral argument, Judge Parker recused himself from any further participation in this matter. This opinion reflects only that of Judges Jones and Stewart.

EDITH H. JONES, Circuit Judge:

The court herewith substitutes the following opinion for its previous opinion, 77 F.3d 1461 and opinion on rehearing, 90 F.3d 920:

Appellants Billie Mac Jobe ("Billie Mac"), Stanley Pruet Jobe ("Stanley"), Stephen Taylor, Philip Mark Sutton and Fernando Novoa were convicted by a jury of various offenses undertaken to organize, conduct, and maintain an elaborate and expanded check-kiting scheme through El Paso banks for over a year and a half. On appeal, they pose numerous challenges to their convictions and sentences. After carefully considering these challenges and the underlying record, this court AFFIRMS the convictions for all of the appellants, except that we vacate Stanley's convictions on Counts 5 and 6, and we vacate Stanley's and Novoa's managerial or supervisory sentencing enhancements and REMAND these two defendants for resentencing.

FACTUAL BACKGROUND [FN1]

FN1. Our review of the record was much more difficult because the parties frequently either furnished incorrect record citations or no citation at all.

The appellants were indicted for bank fraud, in violation of 18 U.S.C. § 1344 and 2, and for conspiracy to commit bank fraud, to make false entries in bank records, and to obtain loans via false statements in loan applications, contravening 18 U.S.C. § 371. In addition, the indictment charged that some or all of the appellants had made false statements on loan applications, [FN2] false bank entries, reports, and transactions, [FN3] laundered funds, [FN4] or aided and abetted such activities. [FN5] The indictment requested a criminal forfeiture of property. [FN6]

FN2. 18 U.S.C. § 1014.

FN3. 18 U.S.C. § 1005.

FN4. 18 U.S.C. § 1956(a)(1)(A)(i).

FN5. 18 U.S.C. § 2.

FN6. See 18 U.S.C. §§ 982(a)(1) - (a)(2)(A), 982(b)(1)(A)--(B).

The district court bifurcated the criminal trial and the request for criminal forfeiture. After nearly two weeks of trial on the criminal charges, the jury returned the following verdicts: all defendants were convicted of conspiracy to commit bank fraud ("Count 1"); Billie Mac was convicted of bank fraud, while Stanley, Taylor, Sutton, and Novoa were convicted of aiding and abetting this bank fraud ("Count 2"); Taylor and Sutton were convicted of making false bank entries in violation of 18 U.S.C. § § 1005 and 2 (collectively, Counts ***1052** 4, 6, and 16); and Stanley was convicted both of aiding and abetting Sutton to make a false bank entry (Count 6) and of making false statements on a bank loan application (Count 5). [FN7]

FN7. The district court, after a separate forfeiture proceeding, entered a judgment of acquittal on those allegations.

Although each appellant was convicted by the jury of various offenses undertaken to organize, conduct, and maintain an elaborate check kiting scheme, at the sentencing hearing, the district court found no evidence of monetary loss to any of the financial institutions involved. In part for this reason, the appellants received light concurrent sentences: Billie Mac was sentenced to eighteen months incarceration and fined $30,000; Stanley received five months incarceration, five months of community

confinement in a residential facility or half-way house, and a $15,000 fine; Taylor, ten months incarceration; Sutton, ten months incarceration; and Novoa, five months incarceration and five months of community confinement in a residential facility or half-way house; the appellants were also ordered to serve three- year terms of supervised release.

A discussion of some of the voluminous evidence concerning the appellants' relationships to the involved financial institutions and the crucial transactions involved in the prosecution is necessary to understand this opinion's analysis.

Billie Mac was a 1/3 owner, officer and director of Jobe Concrete Products, Inc., in El Paso, Texas. He also owned the Jobe Bar Track Ranch and was a part owner, officer and director of Cal-Tex Spice Co. He and his son, Stanley, owned a 40% share of First Park National Bank ("FPNB") of Livingston, Montana, a federally insured financial institution. Billie Mac maintained checking accounts at FPNB as well as at El Paso State Bank ("EPSB"), a federally insured, state chartered bank in El Paso; Jobe Concrete Products and Cal-Tex Spice had checking accounts at EPSB. Billie Mac was a shareholder of EPSB.

Stanley, Billie Mac's son, was president and a 1/3 owner of Jobe Concrete Products, Inc., a partial owner and director of Cal-Tex Spice Co. and a shareholder and director of EPSB. At FPNB in Montana, Stanley maintained a checking account and sat on the board of directors.

The remaining appellants are employees of some of the financial institutions involved. Taylor was the president of EPSB. Novoa, as a cashier and officer of EPSB, approved significant wire transfer transactions involving Billie Mac. After leaving his employment with EPSB, Novoa became president of Cal-Tex Spice and performed various financial and administrative work for Jobe Concrete Products. Sutton was the president of another federally insured bank used in the kite, Continental National Bank ("CNB").

The scope of the expanded check kite was uncovered essentially by FBI special agent Randy Wolverton ("Wolverton"), whose analysis is of the activity in several Jobe checking accounts from December of 1989 through July of 1991, revealed that a large kite was underway involving Billie Mac and Stanley and their checking accounts at CNB, TCB, FNPB, and EPSB.

In order to manipulate and maximize the float, or lag time between transactions in the banking system, Billie Mac and his cohorts inflated his account balances artificially by making countless wire transfers based on uncollected funds, by writing checks against uncollected or nonexistent funds, and by consummating fraudulent loans that were camouflaged by false entries or statements in bank records. As a result of these machinations, very large checks were routinely paid in full despite the actual insufficiency of funds to cover them. Billie Mac's check kite was remarkably efficient; unlike the vast majority of check kites, this one not only stayed constantly ahead of the lag but never did self-destruct. Evidence at trial demonstrated that none of the checks written by Billie Mac was ever dishonored or returned for insufficient funds, and all of the loans used to commence the kiting scheme were paid in full and with interest to the lenders.

Further evidence of the "success" of the check-kiting is revealed by the vast sums of money floated. Wolverton testified that bank records for December 1, 1989 through March 12, 1990, created the impression that ***1053** $150,000,000 had been deposited into the Jobe accounts, although less than 15% of that figure, or approximately $20,000,000, was actually present in these accounts. Similarly, from April through June of 1991, Wolverton explained that although bank records indicated that $58,000,000 was deposited into these accounts, "77% of those, or about $44,000,000 worth of those deposits, were nothing more than checks and wire transfers being exchanged with each other through these accounts, thereby artificially inflating the accounts." Only $13,000,000 was actually deposited into the accounts.

Profits from the scheme were used to finance business ventures for Billie Mac and Stanley. For example, in late 1989, Cal-Tex Spice Co., co-owned by Billie Mac, purchased a spice plant from the Baltimore Spice Co. for nearly $3,500,000. Austin Hale ("Hale"), the credit manager and eventually vice-president of Jobe Concrete Products, testified that neither Jobe Concrete Products nor Billie Mac had enough liquidity to fund these purchases. Hale further testified that Stanley concurred and expressed his concern to Hale that the company needed cash not only to finance its investment and business activities, but also so that

his father, who was "overly stressed about the situation", would not need to work as hard.

Billie Mac commenced the kite by opening a checking account for the Jobe Bar Track Ranch at CNB. Before it was officially opened, Billie Mac wrote himself a check from the new account or starter booklet for $990,000, endorsed this check, and deposited it at EPSB. The opening balance of the CNB checking account was, however, only $1,000. Sutton was the account officer at CNB supervising the Jobe Bar Track Ranch checking account.

After the CNB check was deposited at EPSB, EPSB issued a cashier's check for $3,536,347 to Billie Mac signed by Taylor, the bank president. Although standard banking practice would require EPSB to post an entry in its books or records indicating that the cashier's check had been issued, no such entry was made in EPSB records that day; in fact, no entry was made into EPSB records until several days later on January 4, 1990. Nearly a week earlier, on the same afternoon that he obtained the EPSB check, Billie Mac used this cashier's check to purchase the spice plant.

When the original $990,000 CNB check was presented for payment at that bank, Martha Karlsruher ("Karlsruher"), a senior vice president and bank cashier, noticed that this large check had been written on the Jobe Bar Track Ranch account before it had opened and that the balance in the account was merely $1,000. She immediately advised Sutton of her findings, but he authorized forced payment of the check nonetheless, explaining that a pending loan from CNB to Billie Mac would provide the necessary funds.

As Sutton had explained, CNB did lend Billie Mac $925,000, its legal lending limit, on January 8, 1990 and back-dated this loan to January 5. The loan's stated purpose was to "[r]eplenish personal liquidity utilized in the purchase of Baltimore Spice of Texas." However, the loan did not replenish Billie Mac's personal liquidity, but was rather deposited directly into the Jobe Bar Track Ranch checking account, so that the $990,000 check that had been presented for payment could clear. Karlsruher further explained that because the bank's management and loan committee were "in a hurry to fund the loan [and] disburse the monies to the customer," they did not review Billie Mac's loan application before approving it.

This type of suspicious activity continued in the Jobe Bar Track Ranch account and in other accounts including the Jobe Concrete Products checking account at Texas Commerce Bank ("TCB"). In February or March of 1990, Hale, Jobe Concrete's credit manager, learned that Billie Mac was signing checks on the Jobe Concrete Products account but failing to list either a payee or amount on the company's check log. Hale began to be "suspicious of a check kite." As these suspicions grew, he "started looking for another job" and eventually quit in November of 1991.

The check kiting activity also became more obvious to employees in the banks used in the kite. For instance, from January *1054 through July of 1990, Karlsruher, who had already noticed unusual activity in the Jobe Bar Track Ranch account at CNB and had discussed this with Sutton, warned Sutton repeatedly that she suspected kiting by Billie Mac and that any further loans to him would exceed CNB's legal limit. Sutton assured her that "it was a normal business practice for certain companies to operate this way," but Karlsruher disagreed and had not observed such practice in her experience as a banker.

Sutton's actions began to breach standard banking practice or policy. He occasionally extended CNB's closing deadline in order to give Billie Mac sufficient time to deposit or wire funds to cover overdrafts. [FN8] Karlsruher testified that Billie Mac was virtually the only customer who received such specialized treatment. [FN9] Further, despite express warnings from Karlsruher that kiting was going on and that a criminal referral should be filed regarding Billie Mac's activities, Sutton continued to approve forced payment of countless checks written by Billie Mac far in excess of the balance in the Jobe Bar Track Ranch account at CNB. Although Karlsruher could have filed a criminal referral regarding the activity, she explained that she did not do so because she was "provided a copy of a board resolution that ordered management not to file this referral."

FN8. The closing deadline at CNB was normally 2:00 p.m. If the bank could not settle its funds by that time, these funds were not available for overnight investment and the bank risked losing the corresponding overnight interest.

FN9. As Karlsruher explained, "[t]he only [other

> customer] that comes to mind, but that was a few years later, that [sic] would have been El Paso Auction."

Others associated and employed by CNB, who could not help but notice that Sutton was approving numerous forced payments on checks written by Billie Mac, came to share Karlsruher's concerns about the check kite. Patrick Kennedy ("Kennedy"), CNB's attorney, reviewed some of Billie Mac's activities in the Jobe Bar Track Ranch account and suggested that CNB file a criminal referral. Although Kennedy repeatedly attempted to discuss this suggestion with Sutton and to obtain additional information from him, Sutton was unresponsive. Patricia McLean ("McLean"), CNB's loan review officer, not only suggested that a criminal referral be filed, but also expressed concerns to Sutton that if CNB continued to lend to Billie Mac or any affiliated entity, the bank might exceed its legal lending limits. Yet again, these warnings went unheeded.

Indeed, loan activity at CNB involving the Jobes continued. On May 21, 1990, with Sutton acting as the bank's loan officer, CNB funded a $750,000 loan to Deer Creek Spice Co., guaranteed by Stanley. In a loan presentation form, an internal document prepared by bank employees, the purpose of the Deer Creek Spice loan was described as acquisition of inventory, and the loan principals were listed as Stanley and Frank Owen IV. Although the size of the Deer Creek Spice loan mandated review by CNB's management loan committee, no such review occurred.

On the very day that the Deer Creek Spice loan was authorized, Stanley endorsed the check for the proceeds and turned it over to Billie Mac who, in turn, deposited it into the cashier's checking account at EPSB. The proceeds of the Deer Creek Spice loan were used to pay for cashier's checks that Billie Mac had obtained from EPSB earlier in the day. These cashier's checks had been deposited at CNB to allow a $750,000 check written against the Jobe Bar Track Ranch account to clear; not surprisingly, the $750,000 check had been written by Billie Mac and was payable to him.

Eventually, Sutton, Karlsruher, and McLean were asked to meet with Kennedy, John Wright, the chairman of the board of CNB, and Jack Cardwell, a board member, to discuss Billie Mac's relations with the bank. After the meeting, Karlsruher testified that Sutton ordered her not to contact either bank directors or bank attorneys without his preclearance; he threatened to fire her or any other employee who filed a criminal referral on Billie Mac and promised her a promotion and raise for her cooperation. Sutton stressed to her that a criminal referral on Billie Mac "would cause [the Jobes] ***1055** serious financial harm and set-backs and that the other banks they were dealing with may call their loans ... once an investigation ensued." Finally, however, after a CNB board meeting in June of 1990, the Jobe Bar Track Ranch checking account was closed and Billie Mac paid CNB for his use of uncollected funds an amount equal to what the bank would have earned in an overnight investment of those funds at the federal funds rate. Of course, as Karlsruher explained, the federal funds rate is lower than the commercial loan rate.

Undaunted, Billie Mac and his cohorts continued their expanded check kite even after the CNB account closed. Loans from other banks were used to float the kite, and unconventional wire transfer procedures both inflated checking account balances artificially and concealed insufficient funds or overdrafts. Unlike checks, wire transfers experience no float or lag time. When a normal electronic wire transfer occurs, funds are simultaneously deducted from the transferring institution's account at the Federal Reserve and credited to the recipient's bank account.

But Billie Mac's multiple wire transfers were not conventional ones. Taylor, the president of EPSB, and Novoa, the bank's cashier and senior officer in charge of accounting and of the wire transfer room, authorized wire transfer personnel to credit Billie Mac's checks immediately and to make wire transfers for him without waiting for the necessary funds to be collected. [FN10] Diana Vincent, an internal auditor with EPSB, testified that the countless wire transfers completed for Billie Mac on uncollected funds violated standard EPSB policy that all wires be paid for with collected funds. Vincent also testified that had Billie Mac been forced to comply with bank policy and deposit sufficient funds before conducting a wire transfer, his insufficient accounts would have appeared on the bank's uncollected funds or overdraft reports. Billie Mac's accounts escaped these reports because Novoa was initialing most of Billie Mac's checks and approving them for immediate credit. [FN11] According to Laura Avila an employee in the EPSB wire transfer room, both Novoa and Taylor would initial the

checks to authorize immediate credit.

FN10. Although this practice is unconventional, the government concedes that it is not necessarily illegal. Banks enjoy some discretion to extend immediate or "next day" credit on uncollected funds.

FN11. Although Vincent explained that, in most instances, Novoa's initials appeared on the checks, she admitted that occasionally other officers or authorized personnel would initial them.

Because of the specialized treatment that Billie Mac received from Taylor and Novoa at EPSB, he made the bank's wire transfer department a second home, visiting several times daily from January through September of 1990 and sending hundreds of wire transfers during that time. At trial, the testimony of Avila and Maria Reyes Novoa's administrative assistant who supervised the wire transfer room, indicated that Billie Mac's transfers began at around $50,000 a day, but quickly grew to $500,000 and then to a combined daily total of $1,000,000.

These frantic and unconventional wire transfers led other employees at EPSB to suspect kiting. For instance, Reyes grew concerned about the fact that Billie Mac was allowed to conduct wire transfers when his accounts were insufficient to pay for these transfers. Reyes recounted that once, after she had verified that the account against which Billie Mac had intended to pay for the transfer had insufficient funds, she took the check to Novoa and, although she did not expressly inform him of the insufficiency, he ordered her to proceed with the wire transfer. As this transfer activity continued, Reyes eventually spoke with Taylor, but to no avail. She explained, "[s]ince I was concerned, I went and asked [Taylor], you know, if he was aware that the checks were, you know, going through. And he told me that he was going to check into it and that he would get back to me. But he never got back to me."

Yvonne Pearson, an employee in the proof department at EPSB, testified that since Billie Mac was allowed to conduct transfers on uncollected funds, proof department employees were allowed to override the proof machine's time consuming determination of the *1056 float for a check. To circumvent the proof machine, Billie Mac's checks were deposited using special deposit slips initialed by bank officers to allow for next-day availability; most of these deposit slips were initialed by her boss, Novoa. Furthermore, when Billie Mac would present such a deposit slip, a special transaction code would be entered into the bank's records that would prevent the checks from appearing on the bank's uncollected funds report. Because of these suspicious activities and practices, Pearson concluded that she "knew" that Billie Mac was kiting checks.

Vincent, EPSB's internal auditor, warned Taylor in a memorandum that Billie Mac was kiting checks "to the tune of $790,000 to $1,760,000 a day, and this amount is steadily increasing," as well as conducting wire transfers on uncollected funds. Moreover, she explained that Taylor's and Novoa's decision to extend Billie Mac next day availability on checks made it difficult to ascertain the full extent of the ongoing kite. Taylor delayed responding to Vincent for nearly three weeks before asking her "to track the activity for a few days and report back to him."

Vincent did exactly that. After tracking Billie Mac's accounts for two days, she sent Taylor another memorandum detailing transactions in which Billie Mac was given more than $3,200,000 in immediate credit to pay for wire transfers from EPSB. After Taylor received this memo, Vincent testified that to her knowledge, Taylor did not take any remedial action and did not speak with her about either the memo or the activity which had been tracked.

Even Billie Mac's own employees began to question the deposit and wire transfer activity at EPSB. Hale, the vice president of Jobe Concrete Products, testified that he had a conversation with Billie Mac regarding this activity. According to Hale, Billie Mac explained that Novoa had developed a system by which he could receive immediate credit for deposits merely by using special deposit slips. [FN12] Eventually, Novoa resigned his position at EPSB and went to work for his esteemed customer, Billie Mac, as president of Cal-Tex Spice and at Jobe Concrete Products.

FN12. On appeal, Novoa objects to this portion of Hale's testimony under Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). The objection will be discussed infra.

Upon Novoa's departure from EPSB, Barbara Baker ("Baker"), the acting cashier for the bank,

learned about the practice of allowing Billie Mac to conduct wire transfers on uncollected funds. She testified that this practice did not leave a good audit trail and impeded the bank's ability to analyze float and collectability of Billie Mac's checks. Baker then sent Taylor a memo reiterating these conclusions and suggesting that funds be collected from Billie Mac before he be allowed to conduct a wire transfer.

After sending the memo to Taylor, Baker met with him. She testified that during this meeting, Taylor appeared shocked by the activity in Billie Mac's accounts; as Baker recalled, "[Taylor] had the memo in his hand and he just kind of shook his head a little bit and said, 'Billie Mac is kiting. How long did he think he could get away with this?' " Taylor then gathered the copies of Baker's memo and "threw them in the trash and he said he wanted all the copies out of circulation. He didn't want any copies of the memo in the bank." However, even after receiving memoranda from both Baker and Vincent, Taylor still approved wire transfers for Billie Mac on uncollected funds.

Perhaps exhausted by his daily trips to the wire room at EPSB, Billie Mac began wiring funds from CNB where he no longer had an account. Much as Taylor and Novoa had ordered at EPSB, Sutton authorized Billie Mac to conduct wire transfers on uncollected funds, even though no other customer was regularly extended such a privilege. However, these transactions, unlike the transfers at EPSB, were appearing regularly on the bank's "deficit available balance report" as suffering from a large, uncollected balance. Sutton approached Karlsruher with a proposal to give Billie Mac's checks a special transaction code which would camouflage them from the bank's reporting system. She refused to participate in such a scheme.

The very day that bank examiners arrived at CNB to analyze the transfer activity, Billie ***1057** Mac stopped making wire transfers from that bank. As the bank examiners analyzed accounts at CNB and at EPSB, they began to discover the vast extent of Billie Mac's kiting scheme. For instance, while EPSB was lending Billie Mac and Stanley over $1,000,000 each year, the bank's average collected balances were negative.

While the bank examiners continued to investigate, Taylor spoke to Tom Burress ("Burress"), one of the examiners analyzing loans and accounts at EPSB. Taylor wanted to explain the cashier's check for over $3,500,000 that Billie Mac had been given on December 29, 1989, without any confirmation that he had sufficient funds to pay for it. Taylor told Burress "[t]hat Fernando Novoa presented the check for him to sign. Taylor signed the check without verifying that there [sic] collected funds in the account sufficient to pay for the check. His stated reason was that he had faith in the cashier that that [sic] was okay." Taylor also told Burress that he believed that Novoa had held some checks written by Billie Mac in his desk until January 4, 1990, the date on which the cashier's check was actually purchased. The next day, however, Taylor changed his story, suggesting that "he was wrong in accusing [Novoa] of holding the checks in his drawer. And prior to this occurrence, he had no reason to fault [Novoa's] work." [FN13]

FN13. Novoa challenges the admission of Taylor's statements through Burress under Bruton. This issue will be discussed infra.

As the involvement of bank examiners and federal agents intensified, Billie Mac's expanded check kite came to a crashing halt. At trial, there was substantial disagreement over the loss, if any, that the banks involved in this kite had suffered. All of the loans and checks had been paid and honored. From this fact, Rene Pena ("Pena"), a certified public accountant who testified as a defense expert, concluded that the banks had suffered no loss. Although Pena recognized that the various Jobe accounts were frequently in overdraft, he noted that this overdraft was usually corrected quickly. According to Pena, Billie Mac was merely "actively utilizing the loans in a constant cash management ... of running the [Jobe] entities as a whole."

DISCUSSION

I. Appellants' Common Challenges to their Convictions

A. Juror Misconduct

Billie Mac, Stanley, Sutton, and Novoa appeal the district court's denial of an evidentiary hearing to investigate allegations of juror misconduct and its denial of their motions for a new trial based partially on this alleged misconduct.

Appellants complain that during the trial, John A. Shamaley ("Shamaley"), one of the jurors, was told by a relative that Billie Mac had "previously been

convicted in another bank fraud case." In an affidavit submitted to the district court, Shamaley explained that at some time during the trial, he told David Carnes a relative, that Carnes's employer, Jack Cardwell had been mentioned during the trial; Cardwell was a member of the board of directors of CNB. Carnes told Shamaley that Billie Mac had previously been convicted of bank fraud and suggested to Shamaley that because of this prior conviction, "he would not be at all surprised to find that something improper was going on here." However, Shamaley acknowledged in his affidavit that

> [t]here was no evidence presented at the trial that Billie Mac Jobe had any previous arrests or convictions. I did not relay this information to any of the other jurors on this case, but I was aware after the conversation with David Carnes that Mr. Jobe had previously been convicted of the same offense that he was charged with in this case. [FN14]
>
> FN14. In fact, the information that Carnes relayed to Shamaley was technically incorrect. In 1979, Billie Mac had pleaded guilty to one count of mail fraud. At a pretrial hearing, the district court indicated that this prior conviction would be admissible at trial for impeachment purposes only if Billie Mac testified; he did not.

(emphasis added).

[1][2] This court reviews the district court's denial of a motion for new trial for ***1058** abuse of discretion. United States v. Sanchez- Sotelo, 8 F.3d 202, 212 (5th Cir.1993), cert. denied, 511 U.S. 1023, 114 S.Ct. 1410, 128 L.Ed.2d 82 (1994). Likewise, "[t]he procedures used to investigate allegations of juror misconduct and the decision as to whether to hold an evidentiary hearing are matters which rest solely within the sound discretion of the district court." United States v. Roberts, 913 F.2d 211, 216 (5th Cir.1990), cert. denied sub nom., Preston v. United States, 500 U.S. 955, 111 S.Ct. 2264, 114 L.Ed.2d 716 (1991).

[3][4] Recently, this court reiterated the principle that in any trial there is an initial presumption of jury impartiality. United States v. Ruggiero, 56 F.3d 647, 652 (5th Cir.1995), cert. denied, 516 U.S. 979, 116 S.Ct. 486, 133 L.Ed.2d 413 (1995). This presumption may be defeated, however, through evidence that the extrinsic factual matter actually tainted the jury's deliberations. Id. (citing United States v. O'Keefe, 722 F.2d 1175, 1179 (5th Cir.1983)). A district court must investigate the asserted impropriety only when a colorable showing of extrinsic influence is made. Id.

[5] Ruggiero not only examined when a district court must investigate alleged juror misconduct, but also explained

> ... that a defendant is entitled to a new trial when extrinsic evidence is introduced into the jury room unless there is no reasonable possibility that the jury's verdict was influenced by the material that improperly came before it.

Id. (citations omitted). Hence, when extrinsic evidence is introduced into the jury room, the defendant enjoys a rebuttable presumption of prejudice and "the government has the burden of proving the harmlessness of the breach." Id. (citations omitted). When the district court considers whether the government has carried this burden, it should examine "the content of the extrinsic material, the manner in which it came to the jury's attention, and the weight of the evidence against the defendant." Id. at 652-53 (citations omitted).

[6] In the instant case, the district court investigated the alleged impropriety when it considered Shamaley's affidavit. Through this affidavit and through the evidence at trial, the court was able to conduct the inquiry mandated in Ruggiero. Having done so, the court concluded that there was no reasonable possibility that the extrinsic information had prejudiced the appellants. When discussing Billie Mac, the court reasoned that

> The circumstances fail to indicate that Defendant Billie Mac Jobe was prejudiced by the incident. Juror Shamaley obviously attributed no significance to the incident, because he did not report it to the Court or to any other juror. Furthermore, the record shows that Billie Mac Jobe was named as a defendant in six counts that were submitted to the jury for a verdict, and the jury found Jobe not guilty as to four of those counts.... Under the facts of this case, the Court is unable to find a reasonable possibility that the extrinsic information communicated to one juror prejudiced the Defendant.

[7][8] Because the information relayed to Shamaley did not taint his deliberations, the information was not relayed to any other jurors, and the evidence against Billie Mac on the counts of conviction was

overwhelming, the district court did not abuse its discretion when it denied the appellants' request for a new trial without first ordering an evidentiary hearing. [FN15] It is unnecessary to apply the Ruggiero factors separately to each of the other defendants, as there is no likelihood that they were prejudiced in any ***1059** way by the tainted report of Billie Mac's prior criminal conduct.

> FN15. Additionally, as Ruggiero explains, a court is limited in its ability to inquire into jury deliberations. Federal Rule of Evidence 606(b) forbids a juror from testifying about deliberations, and this rule also bars juror testimony regarding at least four topics: (1) the method or arguments of the jury's deliberations, (2) the effect of any particular thing upon an outcome in the deliberations, (3) the mindset or emotions of any juror during deliberation, and (4) the testifying juror's own mental process during the deliberations.
> Ruggiero, 56 F.3d at 652. Given these limitations, an evidentiary hearing would have provided the district court with virtually nothing but what was already contained in the Shamaley affidavit.

B. Jury Instructions

All of the appellants contend that the district court erroneously declined to submit their requested instruction on good faith to the jury. Furthermore, the appellants argue that the instruction given to the jury somehow shifted the burden of proof from the government to the appellants when it failed to inform jurors that the government carried the burden of negating their claims of good faith. The appellants also suggest that the district court erroneously limited their defense of good faith by failing to extend this defense to the false entry offenses.

Billie Mac urges similar error with respect to his requested instructions on willfulness and specific intent. He notes that the district court did not explicitly define either term and suggests that the court's omission seriously impeded his ability to present his defense to the jury.

[9][10] Recognizing that district courts enjoy substantial latitude in formulating jury instructions, this court reviews the refusal to provide a requested jury instruction for abuse of discretion. United States v. Smithson, 49 F.3d 138, 142 (5th Cir.1995). The district court will not abuse its discretion when it denies a proffered instruction unless this instruction "(1) was a correct statement of the law, (2) was not substantially covered in the charge as a whole, and (3) concerned an important point in the trial such that the failure to instruct the jury on the issue seriously impaired the defendant's ability to present a given defense." Id.

[11][12] In this case, the district court did instruct the jurors on good faith. The instruction explained that

> [i]n determining whether or not any defendant acted with criminal intent to defraud or deceive, you may consider whether or not that defendant had a good faith belief that what he was doing was legal. If you have a reasonable doubt as to whether or not a defendant had a good faith belief that was [sic] he was doing was legal, you must acquit that defendant or defendants and say by your verdict 'not guilty.'

The appellants' challenges to this instruction are meritless. This instruction in no way reduces the government's burden of proof beyond a reasonable doubt or thrusts a burden on the appellants. Moreover, the court did not limit its good faith instruction to certain appellants or defenses; rather, the instruction provides that the good faith of any appellant may be considered when adjudicating his criminal intent on any charged offense.

[13][14][15] Although Billie Mac contends that the district court erred when it refused separately to define either willfulness [FN16] or specific intent, the court clearly defined "knowingly." Indeed, its definition of this term came from this circuit's pattern jury instructions and provided that "[t]he word 'knowingly' as that term is used in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident." Though the district court did not explicitly define specific intent, it correctly charged the jurors on the element of intent in each offense. Both of Billie Mac's proposed instructions on specific intent merely reiterate that the government must prove beyond a reasonable doubt "that the defendants knowingly did an act which the law forbids...." (emphasis added). The effect of the proposed instructions is redundant, and they were unnecessary.

> FN16. In its conspiracy instructions, the court instructed the jury that they must conclude beyond reasonable doubt "[t]hat the defendant knew the unlawful purpose of the agreement and joined in it

> willfully, that is with the intent to further the unlawful purpose." Hence, while the instructions may have not separately defined willfulness, when read as a whole, they did include such a definition.

In sum, the court's instructions accurately reflected the law and substantially covered the appellants' proffered instructions without impairing the ability of any of the appellants to advance a defense.

C. Joint Motion for Severance

Stanley, Taylor, Sutton, and Novoa contend that the district court abused its discretion *1060 when it denied their joint motion for severance. The joint motion was premised on the belief that at a separate trial, Billie Mac would provide exculpatory testimony for the appellants. To support this belief, the appellants submitted in camera Billie Mac's affidavit, which stated that he would testify at a separate trial in which he was not a co-defendant. The affidavit also asserted that Billie Mac would testify that, to his knowledge, none of the other appellants had committed any of the charged offenses.

[16] The district court denied the joint motion for severance after conducting a hearing. The court reasoned that Billie Mac's affidavit "falls far short of demonstrating a basis for severance". As the court put it, Billie Mac insisted in his affidavit

> that he acted in good faith in connection with all the financial transactions involved in the indictment, and that he committed no offense. The remainder of his affidavit consists of conclusory statements that his co-Defendants did not conspire with him to commit any offense and that they are innocent of any wrongdoing ... If he gave the testimony at a severed trial, it would have little evidentiary value.

To allege a prima facie case for severance based on the exculpatory testimony of a co-defendant, a defendant must first show, among other things, that the testimony is truly exculpatory in nature and effect. United States v. Rocha, 916 F.2d 219, 232 (5th Cir.1990), cert. denied, 500 U.S. 934, 111 S.Ct. 2057, 114 L.Ed.2d 462 (1991) (laying out detailed criteria for severance based on 26 codefendant testimony). Billie Mac's affidavit did not fulfill that standard.

The appellants rely on this court's decision in United States v. Neal, 27 F.3d 1035 (5th Cir.1994), cert. denied, 513 U.S. 1179, 115 S.Ct. 1165, 130 L.Ed.2d 1120 (1995), to support their claim that severance was improperly denied. In Neal, this court held that the district court erred when it denied severance in a drug conspiracy case in which the "undisputed leader of the conspiracy" gave extensive, specific, and exculpatory testimony both by affidavit and in camera and would have so testified in a separate trial on behalf of the co-defendants. Id. at 1047 & 1047 n. 21. Recognizing that "a defendant might suffer prejudice [from a joint trial] if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial," we vacated the convictions of the co-defendants and remanded for a new trial. Id. at 1047 (citing Zafiro v. United States, 506 U.S. 534, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993)) (emphasis added).

[17] The appellants' reliance on Neal is misplaced. In Neal, the district court was presented with far more than the conclusory, non- incriminating affidavit offered by Billie Mac; in that case, the defendant gave extensive, specific, and detailed exculpatory testimony. The Neal co- defendants suffered specific and compelling prejudice because their trial had not been severed and the testimony never heard. Here, the appellants did not suffer prejudice since the affidavit did not contain any specific exculpatory testimony. See United States v. Dillman, 15 F.3d 384 (5th Cir.), cert. denied, 513 U.S. 866, 115 S.Ct. 183, 130 L.Ed.2d 118 (1994) (no abuse of discretion in denying severance because of the lack of candor reflected in Dillman's affidavit on behalf of his co-defendants and because the "affidavit was in no sense self-incriminatory; it was in fact self-serving....").

Billie Mac's self-serving, non-incriminating affidavit offered no evidence that would exculpate the other defendants and, like that in Dillman, did not justify severance. The district court did not abuse its discretion when it denied this motion.

D. Gaudin Error

All of the appellants urge that the Supreme Court's recent decision in United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), requires reversal of their convictions. In Gaudin, the Supreme Court held that where materiality is an element of the charged offense, in that case 18 U.S.C. § 1001, the trial court's failure to submit the

question of materiality to the jury violates the defendant's Fifth and Sixth Amendment rights. Id. at ----, 115 S.Ct. at 2320.

*1061 In the present case, the district court instructed the jury on Counts 3, 5, 7, and 10, but not on Count 1 or 2, that they "need not consider whether the false statement was a material false statement, even though that language is used in the indictment. This is not a question for the jury to decide." The appellants contend that materiality was an element in each of these counts of conviction and that their constitutional rights were violated when the district court failed to tender to the jury the question of materiality.

The effect of Gaudin error, if any, on the multiple verdicts against these defendants is difficult to unravel. Further, the implications of Gaudin are subject to dispute. Where materiality is an element of the charged crimes, including § 1344 bank fraud and § 1014 making false statements to a federally insured institution, Gaudin may cast doubt on the convictions.

There is a threshold issue, however, whether materiality is an element of the offenses of conspiring to commit bank fraud and aiding and abetting bank fraud. [FN17] With but little assistance from counsel, the court has uncovered no cases that expressly decide that a conspiracy offense, the gravamen of which is the agreement to commit a crime, must incorporate as to all conspirators the elements underlying each substantive offense committed or attempted pursuant to the conspiracy. We will assume arguendo that such a predicate is required. The consequence of this assumption is that appellants' Count 1 conspiracy convictions required materiality findings insofar as they rested on substantive § 1014 false statement and § 1344 bank fraud offenses, which have up to now clearly incorporated a materiality element. [FN18] Likewise, despite counsel's fluctuations on this important question, aiding and abetting crimes like those charged in Count 2 require a finding of the elements of the underlying offense. [FN19] As appellants Sutton, Taylor, Stanley and Novoa were all charged in Count 2 with aiding and abetting Billie Mac's § 1344 bank fraud scheme, it was incumbent on the government to prove that they shared in furthering Billie Mac's material misrepresentations to the banks. In sum, actual or potential materiality elements were present in a number of the charged offenses.

FN17. Defendants asserted without dispute by the government in this case that materiality is also an element of the crime of making false entries in bank records with intent to injure or defraud the bank. 18 U.S.C. § 1005. Specifically, Stanley Jobe and Sutton make this point as a vehicle for a Gaudin challenge with respect to Counts 4 and 6, which alleged § 1005 violations. There is support in other circuits for this proposition. See United States v. Rapp, 871 F.2d 957, 963-64 (11th Cir.), cert. denied sub nom. Bazarian v. United States, 493 U.S. 890, 110 S.Ct. 233, 107 L.Ed.2d 184 (1989). In this circuit, however, materiality is not identified as an element of the offense except for the statement that a material omission of information as well as an actual misstatement qualifies as a false entry. United States v. Jackson, 621 F.2d 216, 219 (5th Cir.1980). For purposes of discussion, we will assume without deciding that materiality is an element of § 1005.

FN18. But see, United States v. Wells, 63 F.3d 745 (8th Cir.1995), cert. granted, 517 U.S. 1154, 116 S.Ct. 1540, 134 L.Ed.2d 645 (1996).

FN19. Under the aiding and abetting statute, 18 U.S.C. § 2, the government, in addition to proving that the elements of the substantive offense occurred, must also prove [the element of aiding and abetting]. United States v. Hall, 845 F.2d 1281, 1285 (5th Cir.1988), cert. denied sub nom. Hall v. United States, 488 U.S. 860, 109 S.Ct. 155, 102 L.Ed.2d 126, citing United States v. Smith, 631 F.2d 391, 395 (5th Cir.1980). See also United States v. Pedroza, 78 F.3d 179, 183 (5th Cir.1996); United States v. Beuttenmuller, 29 F.3d 973, 982 (5th Cir.1994); United States v. Fischel, 686 F.2d 1082, 1087-89 (5th Cir.1982); United States v. Longoria, 569 F.2d 422, 425 (5th Cir.1978).

[18] Because, however, appellants did not object to the court's charge at trial, and did not at any point during trial argue that the element of materiality in any of these offenses must be submitted to the jury, our appellate review is confined to plain error analysis. Indeed, nearly every court of appeals that has considered the standard of review of unobjected to Gaudin error has similarly adopted a plain error analysis. See Fed.R.Crim.P. 52(b). See also United States v. Baumgardner, 85 F.3d 1305, 1308-09 (8th Cir.1996); United States v. David, 83

F.3d 638, 645 (4th Cir.1996); United States v. Randazzo, 80 F.3d 623, 631 (1st Cir.1996) (assuming the issue arguendo); petition for cert. filed (Aug. 20, 1996) (No. 96-294); and *1062 United States v. Keys, 95 F.3d 874 (9th Cir.1996) (en banc) Defendant receives benefit of Gaudin "without being held to plain error standards"). This court had issued an inconclusive ruling on the subject in United States v. McGuire, 79 F.3d 1396 (5th Cir.1996), but that opinion was vacated and recently reheard by the en banc court and is not controlling. Nor does our opinion in United States v. Pettigrew, 77 F.3d 1500, 1510-11 (5th Cir.1996), establish Gaudin error as per se reversible. In Pettigrew, the United States conceded "that the district court erred in refusing to submit appellants' requested materiality instruction with respect to the section 1006 counts." 77 F.3d at 1510. Thus, the Pettigrew court's analysis considers only whether such an error can be harmless, the term which applies to appellate review of error that has been preserved by objection at trial. See Fed.R.Crim.P. 52(a). Pettigrew is distinguishable on its facts.

[19][20] According to the plain error standard, as articulated by the Supreme Court, this court may only reverse appellants' convictions if (1) there was an error, (2) the error was clear and obvious, and (3) the error affected a defendant's substantial rights. United States v. Olano, 507 U.S. 725, 730- 31, 113 S.Ct. 1770, 1775-76, 123 L.Ed.2d 508 (1993). An argument has been made, though not by these defendants, that error can only be "plain" if the action of the trial court was known to be erroneous at the time of trial, hence, defendants may not take advantage of changes that occur in the law after they are tried as a basis for arguing "plain error." See, e.g., McGuire, 79 F.3d at 1413 (Smith, J. concurring and dissenting). Our en banc court arguably suggested as much in United States v. Calverley, 37 F.3d 160, 162- 63 (5th Cir.1994) (en banc), cert. denied 513 U.S. 1196, 115 S.Ct. 1266, 131 L.Ed.2d 145. In Calverley, however, the error was at least arguable at the time of trial. Id. at 165. Here, there was no basis under the law at the time of trial to raise a Gaudin objection. See United States v. Gaudin, 28 F.3d 943, 955 (9th Cir.1994) (en banc) (Kozinski, J. dissenting) (all circuits but the Ninth had held that materiality in § 1001 was a matter of law for the court), aff'd, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). As the Fourth Circuit concluded:

> [a]llowing Rule 52(b) [plain error] review where an objection would have been baseless in light of then-existing caselaw, unlike allowing review where the error was merely "unclear" at the time of trial, furthers the substantial interest in the orderly administration of justice that underlies the contemporaneous objection rule.

David, 83 F.3d at 644. Allowing plain error review when an objection would have been baseless under then-current law does not countenance the sandbagging that the contemporaneous objection rule is designed to prevent, while denying plain error review in that situation would encourage frivolous objections by defense attorneys trying to preserve error based on every conceivable future change in the law. Id. at 645. In the interest of maintaining uniformity with the other circuits, we now adopt their formulation that permits defendants to assert plain error based on intervening changes in the law. [FN20]

> FN20. See United States v. Kramer, 73 F.3d 1067, 1074 n. 16 (11th Cir.1996); United States v. Retos, 25 F.3d 1220, 1230 (3d Cir.1994); United States v. Jones, 21 F.3d 165, 172-73 (7th Cir.1994); David, 83 F.3d at 644-45; and United States v. Viola, 35 F.3d 37, 42 (2d Cir.1994).

[21] Application of the Olano plain error standard does not, however, necessarily require reversal of these convictions. The third prong of the Olano test requires that the error must have affected the substantial rights of the appellants. And even if that is so, the Supreme Court explained that an appellate court need not exercise discretion to correct the error unless it seriously affects the fairness, integrity, or public reputation of judicial proceedings. Olano, 507 U.S. at 734-36, 113 S.Ct. at 1778.

[22] Reviewing all of the above-listed counts of conviction in light of these standards, we conclude that although plain error was committed with respect to the defective jury instructions, and assuming without deciding that the errors affected appellants' substantial rights, it is not necessary to overturn the convictions. Substantial government resources have been expended on these *1063 cases to date. The appellants succeeded in defending themselves against some counts (e.g. money laundering), while on those before us, the incriminating evidence, although often circumstantial, is overwhelming. The materiality of the false entries, false representations, and amounts of money involved in the expanded check kiting scheme were never seriously contested by the

defendants at trial. The paucity of record references to materiality is telling. On this record, there is simply no reasonable likelihood that the appellants were prejudiced by the failure to instruct on materiality. We do not feel compelled to order a new trial in the exercise of our considered discretion under Olano.

E. Joint Sufficiency of Evidence Challenges--Count 1 and Count 2

[23] Having declined to exercise our discretion to correct any alleged Gaudin error in Count 1, the only remaining challenge to the convictions for conspiracy to commit bank fraud suggests that the evidence against Novoa, Taylor, and Stanley Jobe is insufficient to support these convictions. In order to establish a conspiracy under 18 U.S.C. § 371, the government must prove beyond a reasonable doubt the existence of an agreement between two or more people to violate a law of the United States and that any one of the conspirators committed an overt act in furtherance of that agreement. See, e.g., United States v. Faulkner, 17 F.3d 745, 768 (5th Cir.1994), cert. denied, 513 U.S. 870, 115 S.Ct. 193, 130 L.Ed.2d 125 (1994); United States v. Chaney, 964 F.2d 437, 449 (5th Cir.1992). The government must also prove that the defendant knew of the conspiracy and voluntarily participated in it. Chaney, 964 F.2d at 449.

[24][25][26] Given the extensive evidence in this case, the challenges raised by Novoa, Taylor, and Stanley Jobe to the sufficiency of the evidence supporting their convictions is thoroughly meritless. The standard which guides this court's review is whether, viewing the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the government, a "reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt." United States v. Mergerson, 4 F.3d 337, 341 (5th Cir.1993), cert. denied, 510 U.S. 1198, 114 S.Ct. 1310, 127 L.Ed.2d 660 (1994). We have above described the extensive evidence supporting the convictions of Novoa, Taylor, and Stanley Jobe. From all of the evidence and testimony presented to the jury in this case, a rational trier of fact could easily have decided that Novoa, Taylor, and Stanley Jobe conspired to commit bank fraud with Billie Mac. Put differently, a rational jury could have concluded that Novoa, Taylor, and Stanley Jobe were knowing, voluntary participants in an agreement to commit bank fraud and that overt acts were committed in furtherance of that agreement; their convictions under Count 1 are affirmed. [FN21]

FN21. Novoa asserts particularly that, pursuant to Ingram v. United States, 360 U.S. 672, 79 S.Ct. 1314, 3 L.Ed.2d 1503 (1959), the government did not prove that he shared Billie Mac's intent to defraud the bank, a requirement of his conspiracy and aiding and abetting convictions. We disagree. Novoa was in charge of the wire room and accounting for EPSB. His underlings figured out that Billie Mac's actions looked like check kiting. Novoa personally continued to approve many of the transactions. He eventually took a job with Billie Mac. The jury was entitled to infer his guilty intent and the other elements of the crimes.

[27][28] To aid and abet an offense, as charged in Count 2, the appellants must share in the criminal intent of the principal and assist the principal's perpetration of a crime. Sutton, Taylor, Novoa and Stanley argue that the government did not prove "beyond a reasonable doubt that the defendant [s] willingly associated [themselves] with a criminal venture and participated therein as something [they] wanted to bring about." United States v. Cloud, 872 F.2d 846, at 850 (9th Cir.1989). From all of the evidence and testimony presented to the jury in this case, however, a rational trier of fact could have decided that the appellants aided and abetted Billie Mac's bank fraud. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). The jury could have rationally concluded that these appellants had an intent to defraud the banks by facilitating Billie Mac's bank fraud. In United States v. Knipp, 963 F.2d 839, 846 (6th Cir. *1064 1992), the Sixth Circuit affirmed the defendant's aiding and abetting bank fraud conviction where the defendant "allowed ... [the] overdrafts to continue and that he facilitated the kite to cover them because the overdrafts amounted to huge, unauthorized loans beyond the single customer legal lending limits...." The evidence in the instant case demonstrates that the remaining appellants facilitated Billie Mac's kite in similar and, indeed, more extensive ways. See also, United States v. Sims, 895 F.2d 326 (7th Cir.1990) (finding that the defendant acted with the intent to defraud was sufficient to sustain his conviction for aiding and abetting attempts to commit a wire fraud against a bank). Accordingly, the Count 2 convictions must be affirmed against these appellants.

F. Making False Bank Entries: Count 16

[29] Taylor was convicted of making materially false bank entries in the records of El Paso State Bank under Count 16. Specifically, Count 16 alleged that on December 29, 1989, Taylor signed and issued a cashier's check for over $3,500,000 to Billie Mac Jobe, yet failed to disclose and detail this transaction in EPSB records until several days later on January 4, 1990. After examining the record and evidence in the light most favorable to the government, we conclude that the evidence supports Taylor's conviction. His argument to the contrary is meritless.

G. Making False Statements on a Loan Application and Aiding and Abetting the Same Offense: Counts 5 and 6

[30] Stanley Jobe was convicted under Counts 5 and 6 of making false statements on a loan application, in violation of 18 U.S.C. § 1014, and of aiding and abetting Philip Sutton to make false statements on the same application. Stanley argues insufficient evidence. In these instances, we agree with the contention. To prove a violation of 18 U.S.C. § 1014, the government must demonstrate beyond a reasonable doubt that "(1) the defendant made a false statement to a financial institution; (2) the defendant made the false statement knowingly; (3) he did so for the purpose of influencing the financial institution's action; and (4) the statement was false as to a material fact." United States v. Thompson, 811 F.2d 841, 844 (5th Cir.1987). Stanley is also charged in Count 6 with aiding and abetting Philip Sutton to make false entries in the bank records concerning the same application, which was made, as the indictment charges, "by Stanley Pruet Jobe." After reviewing the evidence and the reasonable inferences therefrom in the light most favorable to the government, this court concludes that the government has failed to prove that Stanley Jobe made a false statement to a financial institution or that he made a loan application concerning the Deer Creek Spice loan. As a result, Stanley Jobe's convictions are not supported by sufficient evidence.

Under Counts 5 and 6, the government's theory of false statement and aiding and abetting is that Stanley Jobe misrepresented that the purpose of the Deer Creek Spice loan was to finance the acquisition of inventory. The government further suggests that this intentional misrepresentation was entered on a "loan application" made by Stanley Jobe at CNB, dated May 18, 1990. CNB was allegedly influenced by the false statement because this statement was relied upon by bank officers in the bank's loan approval committee. Under the government's theory and indictment of Counts 5 and 6, because Stanley Jobe knowingly misrepresented the purpose of the loan and also aided and abetted Philip Sutton in making material false bank entries at CNB, he is guilty. The record does not, however, support the government's assertion that Stanley Jobe made a false statement on a loan application at CNB or communicated with Philip Sutton in any way to assist Sutton in making false bank records concerning the loan. It is undisputed that Stanley made no direct representations concerning the loan. [FN22] He was neither the borrower nor the payee of the proceeds, although he was a guarantor. Moreover, Stanley Jobe did not sign any loan ***1065** application at CNB on May 18, 1990; [FN23] in fact, there was no formal loan application whatsoever, but rather a loan presentation form that was compiled by CNB employees and used by Sutton but unsigned by Stanley. At no time during trial did the government introduce into evidence a loan application on which Stanley Jobe made a false statement. Because the government's evidence at trial was insufficient to allow a reasonable juror to conclude that Stanley made false statements on a loan application or aided and abetted Sutton, his Counts 5 and 6 convictions are reversed.

FN22. The record demonstrates that bank examiners investigating this loan at CNB did not suspect Stanley Jobe of criminal activity.

FN23. The promissory note was actually signed by Frank Owen.

II. Appellants' Individual Challenges to their Convictions

A. Stanley's Challenges to the Sentence Enhancements

The district court imposed two different sentence enhancements on Stanley. The first of these is a two-level enhancement imposed under U.S.S.G. § 3B1.1(c) for Stanley's supposed efforts as a manager or supervisor of criminal activity.

Stanley argues that the district court clearly erred when it imposed this enhancement on him because there was no evidence to support the requisite finding under § 3B1.1(c) that he managed or supervised criminal activity. Moreover, the Presentence Report ("PSR"), on which the district

court relied, incorrectly concludes that his position as a director of two of the banks involved in the kiting scheme demonstrates that he managed or supervised the criminal activity.

[31][32] As this court has frequently explained, the decision to enhance a sentence under the Guidelines will be upheld if it "results from a legally correct application of the Guidelines to factual findings that are not clearly erroneous." United States v. Sherrod, 964 F.2d 1501, 1506 (5th Cir.1992), cert. denied, sub. nom, Cooper v. United States, 506 U.S. 1041, 113 S.Ct. 832, 121 L.Ed.2d 701 (1992). Also, a PSR "generally bears sufficient indicia of reliability to be considered as evidence by the trial judge in making the factual determinations required by the guidelines." United States v. Elwood, 999 F.2d 814, 817 (5th Cir.1993).

[33] Nevertheless, a thorough review of the record lends no support to the district court's finding that Stanley somehow managed or supervised the criminal activity. According to United States v. Ronning, 47 F.3d 710, 711-12 (5th Cir.1995), § 3B1.1(c) requires that a defendant be the organizer of leader of at least one other participant in the crime and that he assert control or influence over at least that one participant. [FN24] There is no evidence that Stanley managed or supervised any of his codefendants or any other people in connection with the illegal acts. Absent such evidence, this court must vacate his sentencing enhancement under § 3B1.1(c).

> FN24. This is the requirement under § 3B1.1(c) for enhancing Stanley's sentence. As will be discussed later, however, this enhancement is also applicable if the defendant exercised "management responsibility over the property, assets, or activities of a criminal organization." See USSG § 3B1.1(c), comment., n. 2.

[34] The second sentence enhancement imposed on Stanley is not as problematic. Under that enhancement, the district court increased Stanley's offense level two levels because it found that he had "abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense...." § 3B1.3. This provision

> encompasses two factors: (1) whether the defendant occupies a position of trust and (2) whether the defendant abused her position in a manner that significantly facilitated the commission or concealment of the offense. To determine whether the position of trust "significantly facilitated" the commission of the offense, the court must decide whether the defendant occupied a superior position, relative to all people in a position to commit the offense, as a result of her job.

United States v. Fisher, 7 F.3d 69, 70-71 (5th Cir.1993).

Stanley raises a litany of challenges to this enhancement. For instance, he contends ***1066** that his ordinary, commercial relationships with the lenders were not trust relationships; that, although he did have a position of trust with two of the banks involved, he did not use this position to further his father's activities; that his acquisition of a loan was not an abuse of trust; that the Deer Creek Spice loan was from CNB where he occupied no position of trust; and that mere knowledge of his father's activities did not constitute an abuse of trust. While the record is admittedly close on this issue, Stanley's PSR found that Stanley was present at an EPSB meeting with bank examiners in early 1991 and was advised at this meeting of his father's check kiting scheme. Also, he was apprised of Billie Mac's overdrafts that had been covered by wire transfers on the Jobe Concrete Products account at FNPB. As discussed earlier, Stanley was on the board of directors at both EPSB and FNPB. Hence, there is some evidence to support the district court's finding that Stanley occupied positions of trust at both banks and used these positions to facilitate or conceal his father's check kiting scheme. Given this evidence, sentence enhancement under § 3B1.3 for abuse of trust was not clearly erroneous.

B. Novoa's Separate Challenges

1. Bruton Claims

[35][36][37] Novoa contends that the district court improperly denied his motion to sever, violating his Sixth Amendment right to confrontation as this right was explained by the Supreme Court in Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). This court has interpreted Bruton to provide that a defendant's Sixth Amendment right to confrontation is violated when "(1) several co-defendants are tried jointly, (2) one defendant's extrajudicial statement is used to implicate another defendant in the crime, and (3) the confessor does not take the stand and is thus not subject to cross-examination." United States v. Restrepo, 994 F.2d 173, 186 (5th Cir.1993). Bruton

can be violated when a co- defendant's statement "directly alludes to the complaining defendant." United States v. Beaumont, 972 F.2d 91, 95 (5th Cir.1992) (quoting United States v. Webster, 734 F.2d 1048, 1054 n. 6 (5th Cir.1984), cert. denied, sub. nom, Hoskins v. United States, 469 U.S. 1073, 105 S.Ct. 565, 83 L.Ed.2d 506 (1984)). However, severance is proper only in cases where a "defendant's statement directly incriminates his or her co-defendants without reference to other, admissible evidence." Id. (emphasis added).

[38][39] Novoa argues that the admission of certain statements by Taylor, through bank examiner Burress, and statements by Billie Mac, through Hale, the credit manager and vice-president of Jobe Concrete Products, violated his Sixth Amendment right to confront witnesses. [FN25] Neither Taylor nor Billie Mac testified at trial.

> FN25. Both of these statements were highlighted and noted in our earlier discussion of the factual background.

The first statement to which Novoa objects under Bruton was a statement by Taylor made through bank examiner Burress. At trial, Burress testified as follows:

> Mr. Taylor indicated that on December 29th, the date that check was issued, the cashier, Fernando Novoa, presented him with a check....
> That Fernando Novoa presented the check for him to sign. Mr. Taylor signed the check without verifying that there [sic] collected funds in the account sufficient to pay for the check. His stated reason was that he had faith in the cashier that that was okay....
> Next, he indicated he asked--When he was told that the transaction was illegal, he asked cashier Fernando ... Novoa what happened, what was the reason for this, and he did not get an answer....
> Stephen Taylor indicated that he felt like Fernando Novoa had some checks in his drawer that were written by Billie Mac Jobe until January 4th, the date that the cashier's check was paid for. [FN26]

> FN26. As was noted earlier, Taylor retracted this allegation in a subsequent conversation with Burress.

Prior to this testimony, Novoa's counsel objected that the testimony was not admissible as an exception to the hearsay rule under ***1067** Fed.R.Evid. 801(d)(2)(E). [FN27] The trial judge then asked Novoa's counsel whether he was asking that the statement not be considered against his client, and Novoa's counsel responded, "Absolutely." The district court then issued a limiting instruction to the jury that it must consider this testimony only as to Taylor.

> FN27. Novoa had, of course, also moved for severance prior to trial.

Novoa correctly contends that the district court's limiting instruction in this case was powerless to rectify an actual Bruton error. Cruz v. New York, 481 U.S. 186, 190, 107 S.Ct. 1714, 1717-18, 95 L.Ed.2d 162 (1987). Hence, if the admission of Taylor's statements through Burress violated Bruton, the district court's limiting instruction was ineffective.

But Taylor's statements did not violate Novoa's Sixth Amendment right to confront witnesses as this right was explained in Bruton. The statements did not directly incriminate Novoa without reference to other admissible evidence. See Beaumont, 972 F.2d at 95. The only potentially incriminating statement by Taylor suggested that Novoa kept Billie Mac's checks in his drawer until the date on which the cashier's check was paid. [FN28] At best, this statement was a tentative opinion by Taylor, one that he later retracted; Burress' testimony included Taylor's retraction of his statement. Taken as a whole, none of Taylor's statements through Burress directly incriminated Novoa, so these statements did not run afoul of Bruton.

> FN28. Although Novoa suggests that Taylor's statements also accuse Novoa of having dishonestly orchestrated an 'illegal' insufficient cashier's check transaction for Jobe, there is no support for this in the record. At most, Taylor suggests that Novoa could not explain why the cashier's check was not posted on bank records for several days. This in no way directly incriminates Novoa.

[40] Furthermore, because the statements did not directly incriminate Novoa without reference to other admissible evidence, the court's limiting instruction is adequate to protect Novoa from any potential prejudice. As this court recently explained in United States v. Leal, 74 F.3d 600, 605-06 (5th Cir.1996),

> [t]he Supreme Court has held that the admission of a nontestifying defendant's confession is

permissible if the trial court gives a proper limiting instruction. Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). This Court has held that a Bruton problem arises only when the statements clearly implicate the codefendant. United States v. Kelly, 973 F.2d 1145 (5th Cir.1992). Furthermore, even if a Bruton violation occurs, 'the error may be harmless if the statement's impact is insignificant in light of the weight of other evidence against the defendant.'

(citation omitted) (emphasis added). In Leal, as in the instant case, the proffered statements did not clearly implicate the codefendant and since "[t]here was no direct implication ... the limiting instruction was adequate to prevent prejudice." Id. Given both the nature of the proffered statements and the court's limiting instruction, this court concluded in Leal as we do now, that "[t]he district court acted well within its discretion in denying the motion to sever trials." Id.

The second statement to which Novoa objects was a statement by Billie Mac through Hale. At trial, Hale testified as follows:

I'm uncertain as to the time, but I did have a conversation with Mr. Jobe about deposit slips at El Paso State Bank....

He told me that he was receiving immediate credit via deposit slips that have been encoded to provide that....

[By "encoded"] I believe he was referring to the micro encoding at the bottom of the deposit slips....

Fernando Novoa [was the person at El Paso State Bank who 'had worked it' so that he could receive immediate credit with the encoding]....

Careful review of the record demonstrates that Novoa did not object to this testimony. [FN29]

FN29. Earlier in the testimony, Novoa had objected that the government's question inquiring about a period of time, "[b]efore Fernando Novoa came to work for Mr. Billie Mac Jobe and his entities," assumed facts not yet in evidence, but this objection did not relate to the testimony about which Novoa alleges Bruton error; no objection was raised to that testimony.

*1068 [41][42] Although this testimony is admittedly incriminating to Novoa and might raise Bruton concerns, as has been previously explained, because Novoa failed to object to this testimony, this court will review for plain error. After carefully considering the underlying record, this court declines to exercise its discretion to correct whatever Bruton error this testimony might contain. Even if this court were to grant Novoa's objection to the statements of Billie Mac through Hale and strike these statements from the record, the evidence is nonetheless more than sufficient to affirm Novoa's conviction sentences under Counts 1 and 2 for aiding and abetting bank fraud. Given the other, admissible evidence against Novoa, any Bruton error would be harmless, so this court's refusal to rectify it through plain error review does not cause a miscarriage of justice. See, e.g., U.S. v. Kelly, 973 F.2d 1145 (5th Cir.1992) (applying harmless error analysis to an alleged Bruton error); U.S. v. Cartwright, 6 F.3d 294, 300 (5th Cir.1993) (holding that no plain Bruton error occurred when the evidence of guilt was overwhelming).

2. Sentence Enhancements

Novoa contends that the district court erred in applying a two level enhancement under § 3B1.1(c) discussed above because he did not manage or supervise any other criminal participant in the check-kiting scheme. He also argues that the district court was clearly erroneous when it refused to grant him a reduction in sentence under § 3B1.2 for his status as a minimal or minor participant in the check kite. On the first point, Novoa is correct.

[43] To support his argument that the § 3B1.1(c) enhancement was erroneous, Novoa relies on the language in the commentary accompanying that section that indicates that he must supervise, manage, or control another co- defendant in order to qualify for the enhancement. However, as this court explicitly recognized in Ronning, "[t]he note recognizes an exception to the control requirement if a defendant exercises management responsibility over a criminal organization's property, assets, or activities." Ronning, 47 F.3d at 711. Indeed, the note expressly provides that

[a]n upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.

USSG § 3B1.1(c), comment., n. 2.

[44] As the district court did not order an upward departure, this ground of enhancement is unavailable to sustain the enhancement on appeal. Further, the record contains no evidence, required by Ronning, that Novoa managed or supervised any of his codefendants in connection with the illegal check kite. We must vacate this adjustment and remand for resentencing. [FN30]

> FN30. This decision is without prejudice to the possibility that an upward departure for Novoa's "management responsibility" over the assets involved in check kiting might be warranted.

[45] Novoa also claims that the district court was clearly erroneous when it failed to grant him a sentence reduction under § 3B1.2. This section provides that

> [b]ased on the defendant's role in the offense, decrease the offense level as follows: (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels; (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels. In cases falling between (a) and (b), decrease by 3 levels.

USSG § 3B1.2. On appeal, Novoa claims that he was entitled to a two-level downward adjustment as a "minor participant." The government counters that Novoa has waived this claim since he argued at sentencing for a four-level downward adjustment for his role as a "minimal participant."

The record supports the government's claim that Novoa sought the four-level downward adjustment at sentencing rather than the two-level reduction given to a "minor participant." While this court could conclude that Novoa has waived his claim for treatment as a "minor participant," the district court's denial of this two-level reduction was nonetheless proper because there was ample ***1069** evidence in the record to support the conclusion that Novoa was more than a minor participant in Billie Mac's check kiting scheme.

CONCLUSION

For the foregoing reasons, this court AFFIRMS all but two of the convictions of all the appellants, VACATES only Stanley's convictions on Count 5 and Count 6, VACATES Stanley's and Novoa's managerial or supervisory sentencing enhancements, and REMANDS Stanley and Novoa for resentencing. All other points raised on petitions for rehearing are DENIED.

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United States Court of Appeals, Fifth Circuit.

J. A. NEWSOME, Jr., Plaintiff-Appellee,
v.
UNITED STATES of America, Defendant-Appellant.

No. 27613.

July 8, 1970, Rehearing Denied and Rehearing En Banc Denied Sept. 10, 1970.

Action by corporate officer against the United States for recovery of his partial payment of a penalty assessed against him for willfully failing to account for and pay over social security and federal income taxes withheld from corporation's employees. The government counterclaimed for the amounts due. The United States District Court for the Southern District of Texas, John V. Singleton, Jr., J., 301 F.Supp. 757, entered judgment for officer, and the government appealed. The Court of Appeals, Rives, Circuit Judge, held that responsible officer, who, with knowledge of facts which reflected a substantial amount of withheld taxes but only a small amount of funds, permitted corporation to pay its creditors apparently under expectation that corporation would collect a sufficient amount of receivables to remit the withheld taxes by last date for payment of withheld taxes to the government for quarter in question, and who, after being informed two days prior to that date that corporation had insufficient funds to remit withheld payroll taxes for the quarter, signed and distributed checks to other corporate creditors, willfully failed to pay over taxes due and was liable for taxes withheld by corporation during quarter in question.

Reversed and remanded.

West Headnotes

[1] Internal Revenue ⇐4849
220k4849
(Formerly 220k1766.3)

Where employer has collected tax by withholding from employees' wages but has failed to pay it over to the United States, the employees are credited with payment; unless the government has recourse for collection of the taxes withheld or an equal sum, it must suffer the loss. 26 U.S.C.A. (I.R.C.1954) § 6672.

[2] Internal Revenue ⇐4849
220k4849
(Formerly 220k1766.3)

Taxes withheld from employees' wages are held by corporation as special fund in trust for the United States. 26 U.S.C.A. (I.R.C.1954) § 6672.

[3] Internal Revenue ⇐4849
220k4849
(Formerly 220k5215, 220k2341)

For purposes of statute providing for assessment of penalty against responsible corporate officer for willful failure to collect and pay over taxes withheld from employees' wages, duty of corporate officer or agent to see that withheld funds are properly collected from employees, are maintained during the quarter, and are paid over to the government at end of quarter is a continuing one which arises when federal income and social security taxes are withheld from employees' wages and ends when such funds are paid over to the United States. 26 U.S.C.A. (I.R.C.1954) § 6672.

[4] Internal Revenue ⇐5219.25
220k5219.25
(Formerly 220k5215, 220k2341)

Responsible officer's actions before due date for payment of withheld taxes satisfy willfulness requirement for penalizing officer when responsible officer knows that the withheld funds are being use for other corporate purposes, regardless of his explanation that sufficient funds will be on hand on due date for payment over to the government. 26 U.S.C.A. (I.R.C.1954) § 6672.

[5] Internal Revenue ⇐5219.25
220k5219.25
(Formerly 220k5215, 220k2341)

Under statute providing for assessment of penalty against responsible corporate officer for willful failure to collect and pay over social security and federal income taxes withheld from corporation's employees, the officer is only liable if corporation does not pay over the withheld taxes at date prescribed by regulations; however, he subjects himself to liability when he voluntarily and

consciously risks the withheld taxes in operation of the corporation, and subsequently the corporation is unable to remit the withheld taxes. 26 U.S.C.A. (I.R.C.1954) § 6672.

[6] Internal Revenue ⚿5219.30
220k5219.30
(Formerly 220k5215, 220k2341)

Under any circumstances, the advice and information in this particular case which responsible officer received from corporation's accountants and attorneys did not constitute reasonable cause for officer's failure to account for and pay over withheld taxes. 26 U.S.C.A. (I.R.C.1954) § 6672.

[7] Internal Revenue ⚿4812
220k4812
(Formerly 220k1732)

Responsible officer, who, with knowledge of facts which reflected a substantial amount of withheld taxes but only a small amount of funds, permitted corporation to pay its creditors apparently under expectation that corporation would collect a sufficient amount of receivables to remit the withheld taxes by last date for payment of withheld taxes to the government for quarter in question, and who, after being informed two days prior to that date that corporation had insufficient funds to remit withheld payroll taxes for the quarter, signed and distributed checks to other corporate creditors, willfully failed to pay over taxes due and was liable in amount to be determined for taxes withheld by corporation during quarter in question. 26 U.S.C.A. (I.R.C.1954) § 6672.

[8] Internal Revenue ⚿4849
220k4849
(Formerly 220k1766.3)

In enacting statute respecting liability for taxes withheld or collected, Congress intended to impress withheld taxes with a trust in favor of the United States. 26 U.S.C.A. (I.R.C.1954) § 7501.

[9] Internal Revenue ⚿5219.25
220k5219.25
(Formerly 220k5215, 220k2341)

Under statute providing for assessment of penalty against responsible corporate officer for willful failure to collect and pay over social security and federal income taxes withheld from corporation's employees, liability for penalty is not limited to conduct involving a conscious preference of another creditor over the United States. 26 U.S.C.A. (I.R.C.1954) § 6672.

*743 Anthony J. P. Farris, U.S. Atty., James R. Gough, Asst. U.S. Atty., Houston, Tex., John O. Jones, Tax Division, Dept. of Justice, Fort Worth, Tex., Johnnie M. Walters, Asst. Atty. Gen., Lee A. Jackson, William A. Friedlander, Jeanine Jacobs, Attys., Tax Div., Dept. of Justice, Washington, D.C., Carolyn R. Just, Atty., Dept. of Justice, Washington, D.C., for defendant-appellant.

Robert I. White, Robert L. Waters, Houston, Tex., for plaintiff-appellee; Chamberlain & Hrdlicka, Houston, Tex., of counsel.

Before RIVES, GOLDBERG and GODBOLD, Circuit Judges.

RIVES, Circuit Judge:

Newsome instituted this action against the United States for recovery of his partial payment of a penalty assessed against him under section 6672 of the Internal Revenue Code of 1954. [FN1] The assessments were against Newsome, as the responsible officer of New Wolf Construction Company (New Wolf), for willfully failing to account for and pay over the social security and federal income taxes withheld from New Wolf's employees during the fourth quarter of 1961 ***744** ($31,074.81) and the first quarter of 1962 ($7,724.25). The government counterclaimed for the balance due. The district court entered judgment for Newsome. Newsome v. United States, 301 F.Supp. 757 (S.D.Tex.1968). On appeal the government contends that the district court's holding-- that Newsome's failure to account for and pay over the taxes withheld was not willful-- is erroneous because contrary to standards of law applicable under section §§ 6672.

FN1. '§ 6672. Failure to collect and pay over tax, or attempt to evade or defeat tax
'Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under

section 6653 for any offense to which this section is applicable.'
26 U.S.C.A.

The facts as found by the district court (301 F.Supp. 760, 761) are not questioned on appeal. Both parties accept the conclusion of the district court 'that Newsome was a person within the meaning of §§ 6672 and 6671(b) of the Internal Revenue Code of 1954 up to and through February 14, 1962, but was not such a person thereafter' (301 F.Supp. at 761). [FN2]

FN2. Sec. 6672 has been quoted in n. 1, supra. Sec. 6671 reads:
'Rules for application of assessable penalties
'(a) Penalty assessed as tax.-- The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary or his delegate, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.
'(b) Person defined.-- The term 'person', as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.'
26 U.S.C.A.

The gist of the district court's decision is summarized in the concluding paragraph of its opinion:

'Viewing the record in this case as a whole, the Court is persuaded that Newsome did not wilfully fail to pay over the payroll taxes involved for the fourth quarter of 1961 and for January of 1962, in that he had reasonable cause for not paying such taxes because of his reliance upon the advice and information furnished by regularly employed accountants and attorneys, and he was not negligent in following such advice in that in following such advice he exercised the degree of ordinary care and prudence required of a man in his position and under the circumstances described.' Newsome v. United States, supra, 301 F.Supp. at 762.

This conclusion, the government argues, misapplies the standards applicable to Newsome's statutory duty to truthfully account for and pay over the taxes withheld from New Wolf's employees. The government contends that Newsome's failure to account for and pay over was 'willful' within the meaning of section 6672. Its argument is twofold: (1) that before January 29, 1962, Newsome was 'willful' when he permitted taxes withheld from employees' wages to be used by New Wolf to meet corporate expenses and obligations in the expectation that corporate receivables would be collected in sufficient amount to replace the expended withheld funds by the date for payment to the government; and (2) that Newsome was 'willful' when he continued to use available funds to prefer other creditors after he was informed on January 29, 1962, that there were insufficient funds to remit the withheld taxes for the fourth quarter of 1961.

I.

[1] Where, as here, the employer has collected the tax by withholding from employees' wages but has failed to pay it over to the United States, the employees are credited with payment. Dillard v. Patterson, 326 F.2d 302, 304 (5 Cir. 1963); United States Fidelity & Guaranty Co. v. United States, 201 F.2d 118, 120 (10 Cir. 1952). Unless the government has recourse for collection of the taxes withheld or an equal sum, it must suffer the loss.

*745 While the penalty imposed by section 6672 is distinct from and not in substitution of the liability for taxes owed by the employer, [FN3] it brings to the government only the same amount to which it was entitled by way of the tax. The Second Circuit has stated succinctly that the penalty 'is simply a means of ensuring that the tax is paid.' Botta v. Scanlon, 314 F.2d 392, 393 (2 Cir. 1963). Section 6672's 'basic purpose is the protection of governmental revenue. * * * It provides a remedy to prevent the unnecessary loss of tax funds by permitting the 'taxing authority to reach those responsible for the corporation's failure to pay the taxes which are owing.'' Monday v. United States, 421 F.2d 1210, 1216 (7 Cir. 1970), and cases cited therein.

FN3. Hewitt v. United States, 377 F.2d 921, 925 (5 Cir. 1967); Smith v. C.I.R., 294 F.2d 957 (5 Cir. 1961), aff'g Benjamin jamin T. Smith, 34 T.C., 1100.

Willful

It must be remembered, however, that while the corporation is absolutely liable for the taxes withheld

from its employees, the penalty imposed upon its responsible officer or employee is only for his willful failure. The word 'willful' is susceptible of many meanings. As noted by this Court in Frazier v. United States, 304 F.2d 528, 529 (5 Cir. 1962): 'As with many such issues, the definition of 'willful' has been smothered with a maze of semantics.' It has been consistently held by this Court and other courts that 'willfully,' as used in section 6672, does not require a criminal or other bad motive on the part of the responsible person, but simply a voluntary, conscious and intentional failure to collect, truthfully account for, and pay over the taxes withheld from the employees. [FN4]

FN4. Monday v. United States, 421 F.2d 1210, 1216 (7 Cir. 1970); Gefen v. United States, 400 F.2d 476, 482 n. 7 (5 Cir. 1968); Hewitt v. United States, 377 F.2d 921, 924 (5 Cir. 1967); United States v. Hill, 368 F.2d 617, 622 (5 Cir. 1966); Scott v. United States, 173 Ct.Cl. 650, 354 F.2d 292, 295 (1965); Cash v. Campbell, 346 F.2d 670, 672-673 (5 Cir. 1965); Dillard v. Patterson, 326 F.2d 302, 304 (5 Cir. 1963); Frazier v. United States, 304 F.2d 528, 530 (5 Cir. 1962); Bloom v. United States, 272 F.2d 215, 223 (9 Cir. 1959). See also 8A Mertens, Federal Income Taxation § 47A.25a (1964). The most recent statement by this Court is in Gefen: 'We pause to restate the established principle that the term 'willful' for purposes of Section 6672 of the Code does not require a finding of intent to defraud or to deprive the United States of taxes. It requires only that the choice to pay funds to other creditors instead of the government be made voluntarily, consciously, intentionally, and without reasonable cause.' 400 F.2d at 482 n. 7.

In many of these cases, a responsible officer's 'willfulness' is established by the knowing preference of other corporate creditors over the United States after the due date [FN5] for the corporation to remit the withheld taxes. However, liability under section 6672 can also be premised upon use of withheld funds for other corporate purposes before the date for the corporation to pay over the funds.

FN5. Under Treasury Regulations 31.6151-1(a) and 31.6071(a)-1, New Wolf was required to pay over the withheld taxes for the fourth quarter of 1961 'on or before' January 31, 1962.

[2] The taxes withheld from employees' wages are held by the corporation as a special fund in trust for the United States. Section 7501; see Monday v. United States, 421 F.2d 1210, 1214 (7 Cir. 1970); United States v. Hill, 368 F.2d 617, 621 (5 Cir. 1966). [FN6] Although *746 section 7501 does not require a corporation to segregate the withheld taxes from its general funds, [FN7] it is clear that the withheld taxes are more than simply a debt of the corporation.

FN6. Section 7501 reads as follows:

(a) General rule.-- Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.'

Title 26, U.S.C.A.

It is clear from the legislative history and Treasury Regulations that 'person' as used in section 7501 is the corporation (or other employer) collecting or withholding the taxes-- not its officers. S.Rep.No.558, 73d Cong.,2d sess., p. 53, 1939 1 Cum.bull. (Part 2) 586, 626; Treasury Reg. 301.6672-1.

FN7. The corporation is required to segregate the withheld funds in a separate bank account only when specifically requested by the government, Section 7512.

[3] Since a corporation can act only through its agents-- its officers and those designated by the officers-- a corporate officer or agent has a duty to see that withheld funds are properly collected from the employees, are maintained during the quarter, [FN8] and are paid over to the government at the end of the quarter. This duty, for purposes of section 6672 liability, is a continuing one which arises when the federal income and social security taxes are withheld from employees' wages and ends when such funds are paid over to the United States. [FN9]

FN8. This would encompass depositing withheld payroll taxes in a federal reserve bank as required by Treasury Regulation 31.6302(c)-1.

FN9. See Scott v. United States, 173 Ct.Cl. 650, 364 F.2d 292, 295 (1965); Long v. Bacon, 239

F.Supp. 911, 912 (S.D. Iowa 1965).

[4][5] The responsible officer's actions before the due date for payment of the withheld taxes satisfies the 'willfulness' requirement under section 6672: when the responsible officer (as defined by section 6671(b)) knows that the withheld funds are being used for other corporate purposes, regardless of his expectation that sufficient funds will be on hand on the due date for payment over to the government. Of course, the officer is only liable under section 6672 if the corporation does not pay over the withheld taxes at the date prescribed in the regulations. However, he subjects himself to liability under 6672 when he voluntarily and consciously 'risks' the withheld taxes in the operation of the corporation, and subsequently the corporation is unable to remit the withheld taxes.

One example of using withheld taxes for other corporate purposes would be when, at any time during the quarter, the responsible officer is aware that the amount of corporate funds is lower than the amount of taxes withheld for the quarter and allows, or has knowledge of, the corporation's continuing to pay other corporate creditors. See Part III, infra.

REASONABLE CAUSE

In defining the term 'willfully' this Court, although other Circuits have held to the contrary, [FN10] has held that 'reasonable cause' is part of the civil test in determining whether the failure to collect, account for, and pay over was willful. [FN11] Without attempting a precise definition,*747 we point out only that, in order to further the basic purposes of section 6672, see p. 4, supra, reasonable cause should have a very limited application. See cases cited in note 12, infra.

FN10. Monday v. United States, 421 F.2d 1210, 1216 (7 Cir. 1970); see 22 A.L.R. 3d 88-89 (1968).

FN11. Gefen v. United States, supra; Cash v. Campbell, supra; Frazier v. United States, supra. We included the 'reasonable cause' element in the meaning of 'willfully' in Frazier:
'We are of the opinion that 'without reasonable cause' as used in the Grandquist (sic) and Kellems cases is part of the civil test in determining whether the failure to pay was willful. * * * For the present we need only hold that in a civil case where a responsible officer paid employees their net wages at a time when the corporation had insufficient funds to cover the taxes thereon and, when such funds became available, preferred subsequent creditors over the United States, knowing at all times his obligation to pay such taxes, his failure to pay was 'without reasonable cause' and 'willful' within the meaning of section 6672.'
304 F.2d at 530.

II.

[6] After defining 'reasonable cause' as 'the failure to exercise ordinary care and prudence in connection with his actions,' the district court concluded that Newsome

'* * * had reasonable cause for not paying such taxes because of his reliance upon the advice and information furnished by regularly employed accountants and attorneys, and he was not negligent in following such advice in that in following such advice he exercised the degree of ordinary care and prudence required of a man in his position and under the circumstances described.'

301 F.Supp. at 762. Without giving approval to the court's definition of reasonable cause, we conclude that, under any circumstances, the 'advice and information' which Newsome received from New Wolf's accountants and attorneys do not constitute reasonable cause for his failure to account for and pay over the withheld taxes.

The district court's finding of Newsome's reliance upon advice and information of New Wolf's accountants is apparently a reference to the June-November 1961 financial statements received by Newsome on December 27, 1961. New financial statements prepared at the direction of New Wolf's bank in March 1962 reflected that the statements prepared in December had overstated accounts receivable as of November 30, 1961 by approximately $100,000. Although it is not clear from the district court's opinion, the court's finding is premised upon the following: Newsome, after examining the financial statements on December 27, 1961, believed New Wolf would collect a sufficient amount of receivables to remit the withheld taxes for the fourth quarter of 1961, even though the balance sheet also reflected 'cash on hand and in banks' as $7,737.59 and withheld income and payroll taxes as approximately $20,700. If the accounting firm had not overstated the amount of trade receivables, New Wolf would not have paid its creditors from

December 27 through January 1962 until sufficient funds were received and the withheld taxes were paid.

The above circumstances do not constitute a 'reasonable cause' for Newsome's failure to account for and pay over the withheld taxes. Whether or not Newsome believed New Wolf had a sufficient amount of outstanding trade receivables, as of the end of the quarter, to pay the withheld taxes demonstrates only the absence of an intent to deprive the government of funds owed by New Wolf. We have previously pointed out that the element of 'willfulness' does not require an intent to deprive the United States of its taxes. Gefen v. United States, supra, 400 F.2d at 482 n. 7; Dillard v. Patterson, supra, 326 F.2d at 304.

The district court's finding that Newsome relied upon the advice of New Wolf's attorney is apparently in reference to (i) the attorney's assistance in drafting a letter to the District Director and (ii) the attorney's advice on February 9, 1962 that Newsome should execute a chattel mortgage in favor of its bank. We conclude that the district court erred in holding that (i) and (ii) constituted reasonable cause for Newsome's failure to account for and pay over the withheld taxes.

In assisting Newsome to draft a letter, explaining the delay in payment to the District Director, the attorney's only advice was that Newsome send in Form 941 without payment (unless he was certain that sufficient funds were in the bank to cover the check) with the explanation that the delay was due to New Wolf's failure to collect certain receivables and that payment would be made within ten days. Newsome was not advised, nor did he interpret the advice as meaning, that he had been justified in using withheld taxes during December *748 and January to pay other creditors or that he should continue to pay creditors with funds then available or that might become available instead of paying the government. In urging Newsome to execute a chattel mortgage on certain New Wolf equipment in order to renew a note, the attorney did not advise Newsome that he could prefer the bank over the United States without subjecting himself to section 6672 liability. Although we will not attempt to explore the outer boundaries of 'reasonable cause,' we think it clear that the information furnished by the attorney did not constitute 'reasonable cause.' [FN12]

FN12. The term 'reasonable cause' has been interpreted as advice by counsel under certain circumstances not to pay the withheld taxes as they became due, Cash v. Campbell, 346 F.2d 670, 672-673 (5 Cir. 1965); advice of non-collection by attorney and tax collector, Grey Line Co. v. Granquist, 237 F.2d 390 (9 Cir. 1956); advice by counsel that there was no tax liability, Cross v. United States, 204 F.Supp. 644, 649 (E.D.Va.1962.) The following have been held not to constitute 'reasonable cause': assumption that government would satisfy its tax claim out of another fund, Cash v. Campbell, 346 F.2d 670, 671 (5 Cir. 1965); mere delegation of responsibility to another, Lawrence v. United States, 299 F.Supp. 187, 191 (N.D.Tex.1969); a presumption that the government will look elsewhere for its taxes, Spiegel v. United States, 65-2 U.S.Tax Cas. P9655 (N.D.Ga.1965); the expectation that financial condition of business will improve, Paisner v. O'Connell, 208 F.Supp. 397, 401 (D.R.I.1962). See also Frazier v. United States, 304 F.2d 528, 530 (5 Cir. 1962).

III.

[7] In addition to our conclusion that the advice of New Wolf's accountants and counsel does not constitute 'reasonable cause,' we hold that Newsome 'willfully' failed to pay over the taxes due and thus is liable under section 6672 for the taxes withheld by New Wolf during the fourth quarter of 1961.

On December 27, 1961, Newsome examined financial statements prepared by New Wolf's accountants, including a balance sheet as of November 30, 1961. Although the statements reflected that current assets ($345,266.58) exceeded current liabilities ($302,035.39), 'cash on hand and in banks' was $7,739.59 and withheld payroll taxes were approximately $20,700 (withheld income taxes-- $17,090.87; withheld F.I.C.A. taxes-- $3,643.14). Thus, as of December 1, either taxes withheld from employees' wages had been used for other purposes or net wages had been paid at a time when New Wolf had insufficient funds to cover the taxes thereon. During December New Wolf made regular payroll payments. The mid-December deposit [FN13] for its November withholding amounted to only $2,169.65. As of December 29, 1961, New Wolf's bank statement reflected a balance of $2,073.15. With knowledge of these

facts, which reflected a substantial amount of withheld taxes but only a small amount of funds, Newsome permitted New Wolf to pay its creditors during the month of January, apparently under the expectation that New Wolf would collect a sufficient amount of receivables to remit the withheld taxes by January 31, 1962. [FN14]

FN13. These deposits were made pursuant to section 6302(c) and Treas.Reg. 31.6302(c)-1.

FN14. New Wolf's bank statement for January 1962 shows that deposits were made during January in the amount of $64,011.60.

Under these circumstances, Newsome's conduct amounted to a voluntary, conscious and intentional action to use the withheld taxes for payments to other corporate creditors with the ultimate result of nonpayment to the government. [FN15]

FN15. Although the last date for payment of the withheld taxes to the government for the fourth quarter of 1961 was January 31, 1962, preference of other corporate creditors over the United States can occur before this last date for payment. See White v. United States, 178 Ct.Cl. 765, 372 F.2d 513, 521 (1967); Scott v. United States, 173 Ct.Cl. 650, 354 F.2d 292, 295 (1965); Hewitt v. United States, 377 F.2d 921, 923-924 (5 Cir. 1967). See also Seaton v. United States, 254 F.Supp. 161 (W.D.Mo.1966); Long v. Bacon, 239 F.Supp. 911 (S.D.Iowa 1965); Tiffany v. United States, 228 F.Supp. 700 (D.N.J.1963).

*749 After Newsome was informed on January 29, 1962 that New Wolf had insufficient funds to remit the withheld payroll taxes for the fourth quarter of 1961, he signed and distributed checks amounting to $410.37, and distributed checks which were signed before January 29 in the amount of $1,862.54 (one of which was a payroll check for himself in the amount of $498.25). These payments clearly constitute a voluntary, conscious and intentional choice to prefer other creditors of New Wolf over the United States. See cases cited in note 4, supra.

The district court erred in entering judgment in favor of Newsome against the United States for the amount of Newsome's partial payment of the penalty, $28.00, and in further adjudging that Newsome is not liable in any amount on the government's counterclaim. The judgment is therefore reversed and the cause remanded. [FN16]

FN16. The amount of judgment to which the government may be entitled on its counterclaim depends upon questions of law or of both law and fact not yet determined by the district court and, hence, not ripe for our consideration, for example: (1) whether the penalty provided by section 6672 is the same whenever there has been any willful failure to collect, or truthfully account for and pay over any part of the tax, or depends upon the amount which the responsible officer has willfully failed to collect, account for, and pay over, and if the latter, then (2) whether Newsome carries his burden of proving that the amounts of the assessments are excessive, Horwitz v. United States, 339 F.2d 877, 878 (2 Cir. 1965).

Reversed and remanded.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

PER CURIAM:

On petition for rehearing Newsome's attorneys state: 'On these facts, the Court's opinion, reversing the district court, imposes personal liability on Newsome for the payroll taxes withheld for the fourth quarter of 1961 in the amount of approximately $31,000.' That is not accurate. The amount of the judgment was left to be determined on remand. (See footnote 16 at close of original opinion.)

As their first point, petitioner's attorneys urge: 'The Court has patently erred in construing Section 7501 (of Title 26, U.S.C.) to create a trust fund of withheld taxes.' They argue in support as follows:

'Section 7501 provides, as was provided in the original enactment in 1934, that withheld taxes 'shall be held to be a special fund in trust for the United States.' It is crucial to note that the statute says such taxes 'shall be held to be a special fund in trust' not 'shall be held as a special fund in trust.' The difference in language was intentional, for the predecessor of Section 7501 was enacted for the explicit purpose of providing the United States with a priority in an insolvency proceeding, the language being explicitly directed to courts involved in those insolvency proceedings, i.e., cash in an amount equal to the withheld taxes shall 'be held (by the courts) to be a special fund in trust,' and, upon that basis the United States would have a prior claim.' (Emphasis is that of petitioner's attorneys.)

[8] This argument is startling. We had not thought that Congress either would or could direct the courts what to hold, and we remain far from convinced. The normal way for Congress to accomplish any such purpose would be actually to impress the withheld taxes with a trust in favor of the United States. The legislative history of Section 7501(a) confirms that this was precisely what the Congress intended to do. That history was well stated by Judge Hastings for *750 the Seventh Circuit in In re Halo Metal Products, Inc., 1969, 419 F.2d 1068, 1072:

'The Senate Committee Report, S.Rep. No. 558, 73d Cong., 2d Sess., p. 53, noted:

"Under existing law the liability of the person collecting and withholding the taxes to pay over the amount is merely a debt, and he cannot be treated as a trustee or proceeded against by distraint. Section (7501(a)) * * * impresses the amount of taxes withheld or collected with a trust and makes applicable for the enforcement of the Government's claim the administrative provisions for assessment and collection of taxes.' The Conference Report, H.Conf.Rep. No. 1385, 73d Cong., 2d Sess., p. 32, reflected the same purpose:

"This amendment impresses taxes collected or withheld with a trust in favor of the United States and makes applicable for the enforcement of the Government's claim the administrative provisions applying to the assessment, collection, and payment of taxes."

Our original opinion (footnote 6) pointed out that the legislative history (and Treasury Regulations) also made clear 'that 'person' as used in section 7501 is the corporation (or other employer) collecting or withholding the taxes-- not its officers. S.Rep.No. 558, 73d Cong., 2d sess., p. 53, 1939 1 Cum.Bull. (Part 2) 586, 626; Treasury Reg. 301.6672-1.' at 745. As to the 'willfulness' requirement, we held that the responsible officer 'subjects himself to liability under 6672 when he voluntarily and consciously 'risks' the withheld taxes in the operation of the corporation, and subsequently the corporation is unable to remit the withheld taxes.' at 746.

In their point 2, petitioner's attorneys attack that holding as follows:

'Restated, until the instant decision, all courts of appeals have consistently held that there can be no willful failure to pay over payroll taxes to the Government unless (1) the corporate officer knows he is put to a choice of paying either general creditors or the Government in circumstances where he knows the corporation cannot pay both and (2) that officer then decides to pay general creditors.'

Similarly in their point 3, petitioner's attorneys urge: 'The prior decisions of this Court, heretofore cited, with clarity and uniformity established that a willful failure under Section 6672 involves a conscious preference of another creditor over the Government.'

[9] The attorneys are simply mistaken. It is true that a conscious preference of another creditor over the United States is the usual way by which a 'person' becomes liable for the penalty prescribed by Section 6672. In such cases only the third and final step described in the statute, failure 'to pay over the tax,' is necessarily involved. The statute covers also the failure (1) 'to collect such tax' and (2) 'to truthfully account for' the tax so collected. If a 'person' willfully fails to perform either (1) or (2), then there is no money to pay over. Hence, if Section 6672 is so construed as to limit liability for the penalty to a willful failure to pay the tax, the result in cases where there had been a failure to perform either (1) or (2) would be like locking the door of an empty garage.

Contrary to the argument of petitioner's attorneys, this is not the first decision in which the trust fund theory of Section 7501 has resulted in liability under Section 6672. E.g., see United States v. Hill, 368 F.2d 617, 621 (5 Cir. 1966); Monday v. United States, 421 F.2d 1210, 1211, 1214 (7 Cir. 1970).

We find no merit in Newsome's petition for rehearing. The Petition for Rehearing is denied and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the Petition for Rehearing En Banc is also denied.

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