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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Civil No. CV –S-01-0895-PMP LR
v.	)	
	)	DEFENDANT'S REPLY TO THE
IRWIN A. SCHIFF,	)	GOVERNMENT'S OPPOSITION
	)	TO DEFENDANT'S RULE 59
Defendant.	)	MOTION

On July 20, 2004 Defendant Irwin Schiff filed a Rule 59 motion requesting that this Court alter, amend, or vacate its Judgment of July 13, 2004. On August 2, 2004 Defendant filed a Supplement to that Motion, and on August 3, 2004, Defendant filed an Affidavit in support of that Supplement. The Defendant based his motion on a number of contested and **uncontested** issues of fact (as well as issues of law), which Defendant believed the Court could not resolve in favor of the Government – as it had done in granting the Government a summary judgment. Let us turn to how Plaintiff responded to the issues raised by the Defendant in his Rule 59 Motion.

1) How Did the Government Respond to Defendant's Claim That No Statute Made Him "Liable" For Income Taxes?

The Government didn't address this issue at all! Therefore, it is clear from the Government's refusal to take issue with Defendant on this issue (let alone refute it) that the Government's entire lawsuit must be thrown out. Defendant should not have to proceed beyond this point to win this case, since how can this Court – legally – "reduce to judgment" taxes and penalties in connection with a "tax" for which neither the Government nor the Court can identify any statute making Defendant "liable"? As Defendant stated at page11 in his Rule 59 Motion:

> Therefore, it is clear, that no Court or Department of Justice Attorney has ever identified for Defendant any statute that would make Defendant "liable" for the income taxes that this Court would make Defendant "liable" for, in its Court Order.
>
> In both situations, Judge Clapp and the Government's attorneys were duty bound [during discovery] to answer the question. "Silence can be equated with fraud where there is a legal and moral duty to speak, or where an inquiry left unanswered would be intentionally misleading."

U.S. v. Tweel, 550 F.2d 297. See also U.S. v. Prudden, 424 F.2d 1021; and Carmine v. Bowen, 64 A. 932.

> Therefore, unless the Government and/or this Court can identify a ***specific statute*** that makes Defendant "liable" for the income taxes referred in the Court's Order (which, so far, neither has done) such a "liability" can only be assumed to be a ***legal fiction***, which involves a *fictional* "liability," which Defendant cannot legally be bound to pay.

However, the Government failed to identify any such statute in its Response – even though the issue of "liability" is fundamental to the Government's entire case. (See 28 U.S.C 1396, 26 U.S.C 6001 & 6011; United States v. Calamaro, 354 U.S. 351, 356-57 (1957); Botta v. Scanlon, 288 F.2d 504,506 (2nd Cir. 1961); Higley v. Commissioner, 69 F2d 160; White v. Hopkins, 51 F.2d 159 (5th Cir. 1931); and Drake v. United States, 355 F. Supp. 710 (E.D. Mo 1973). Therefore, this Court cannot provide the Government with a Court order to seize Defendant's property in connection with an alleged tax for which no statute makes him liable. Such an act by the Court would be more than an abuse of the Court's discretion; it would be a blatant act of judicial fraud, tantamount to thievery, and a void judgment pursuant to Rule 60(b). Therefore the Court's Order of July 13, 2004 must be vacated just on this ground alone – since the Government did not contest Defendant's claim that no statute makes him "liable" for any of the taxes at issue.

(**2) How Did the Government Respond to Defendant's Claim That the Income Taxes At issue Were Not Determined In Accordance With the Intent of Congress?**

Defendant alleged in Segment V of his Rule 39 Motion that:

> Included as Exhibit 3 in Defendant's Declaration were pages from House Report 1337 and Senate Report 1622 (Decl. Schiff), which clearly showed that in adopting the 1954 Code, Congress defined income, as that term appears in the Internal Revenue Code, as "income" received in the "constitutional sense." It is Defendant's contention that in determining Defendant's *taxable* "income" for all of the years at issue, the Government did so on the basis of "income" Defendant received in the "ordinary sense," not on "income" he received in the "constitutional sense."

Nowhere in its Response did the Government challenge or deny Defendant's claim on this issue. The Government made no mention of these reports in its Response, nor claim that they were without "legal force and effect," nor claim that Defendant's taxable income was determined in accordance with these reports. Instead, the Government sought to *obfuscate* and *circumvent* the legal force and effect of these reports, by claiming: (p 3, lines 9-17)

> The motion primarily consists of a rehash of Schiff's **own legal theories regarding the proper definition of the word "income"**….These arguments were not only rejected by this Court but have also previously been rejected by the numerous other courts that have considered them. These legal contentions have been found to be completely without merit and frivolous and do not merit reconsideration by this court.

Defendant, of course, did not present his "own legal theories." He simply presented the reports, which speak for themselves and claimed that none of the "income" he allegedly received fell within their meaning – and the Government made no counter claim that it did. Instead, the Government simply avoided making any reference to these reports, and fraudulently pretended that Defendant was presenting his "own legal theories." However, Defendant merely raised the issue of whether or not Defendant's taxable "income" was determined in accordance with these reports - and the Government never claimed that it was. Instead the Government fraudulently implied that "numerous other courts" had considered these reports and "rejected" them as being irrelevant. However no court has ever held that "income" in its "ordinary sense" falls within the meaning of "income" in its "constitutional sense" as defined in these reports – and it was an act of fraud for the Government to suggest any such thing.

In addition, while Defendant addressed this issue at length in Paragraph 6 of his Declaration (and included relevant pages from these Congressional Reports as Exhibit 3 of his Declaration), Defendant's lawyer **was derelict** in not raising this issue in opposition to the Government's motion for summary judgment in either his written response or at oral argument. So this issue was not actually argued to the Court by Defendant's lawyer, However, the Court was obviously made aware of this argument in Defendant's Declaration. It is clear that the Court did not consider this argument, since if it had, it never could have written in its decision of June 14, 2004 that "Defendant Schiff has failed to raise any genuine issue of fact to overcome the presumption of correctness afforded the tax assessments for the years 1980 through 1985 to judgment." By establishing that Defendant's "income" for the years at issue was not determined in accordance with these House and Senate reports Defendant certainly "overcame the (alleged) presumption of correctness" allegedly afforded to such tax assessments.[1] Not only did defendant "overcome" such an alleged "presumption," he totally obliterated it, in a manner the Government declined to even challenge.

Therefore, this Court must resolve this issue it in favor of Defendant, since the Government did not challenge Defendant's claims with respect to the *legal* and *factual* "force and effect" of these reports in any way.

[1] However no such "presumption of correctness" can exist in this case, as explained on pages 14-15 herein.

3) How did the Government Respond to Defendant's Claim That the Statute of Limitations Barred Reducing the Tax Court's 1979 Determination to Judgment?

The Government devoted approximately 2 ½ pages to explaining why "Irwin Schiff is barred under the doctrine of *res judicata* from relitigating the amount of the 1979 tax liabilities in this action." However, the issues Defendant raised with respect to the 1979 Tax Court determination, (as the Government well knew) had nothing to do with whether the Tax Court's determination was correct, but was solely related to the statute of limitations with respect to that determination, and the failure of the IRS to send Defendant a "notice and demand" for payment, without which its 1979 "determination" was null and void as a matter of law. Therefore Defendant's claim on these issues must stand, since the Government did not challenge Defendant's claims with respect to these issues on ***any*** bases.

However, to simplify the Court's consideration of this matter, Defendant has attached as Exhibit A, the first page of the documentation with respect to the year 1979, which was attached to Revenue Officer Sandra Davaz's Declaration. I would ask the Court to take **judicial notice** that it shows the first assessment occurring for the tax year 1979 as being made on 05-20-1985 and not on **09-03-92 as claimed by the Government in its complaint.** Therefore, the 10-year statute of limitation for reducing the Tax Court's 1979 determination to judgment (even if we assume it to be 100% correct) began on 05-20-1985 and not on 09-03-1992. Thus the statute of limitations for reducing the Tax Court's 1979 determination to judgment terminated at least 5 years before the Government instituted this lawsuit. In addition, I would ask the Court to take judicial notice that there is no entry anywhere on that document that shows that a "notice and demand" for payment was ever sent out with respect to the Tax Court's 1979 determination. This, of course, means that not only isn't the Government entitled to a summary judgment with respect to its 1979 claim, (on no less than two grounds), but its claim for that year should be dismissed. Therefore granting the Government a summary judgment on the issue would be "clear error," "manifestly unjust" and constitute a flagrant miscarriage of justice.

In addition, the Government did not challenge Defendant's claim that since Defendant was criminally prosecuted for alleged 7201 violations for the years 1980-1982 in 1985, and since the Government has already conceded that a "deficiency" is an "essential element of a 7201 prosecution," means that there had to have been assessments (even "zero" assessments, which the documents in Exhibit A and B1-B5 show the IRS makes) for the years 1980-1982 in order

for Defendant's 1985 prosecution for those years to have been legal.[2] So if Defendant's 1985 prosecution was legal, the statute of limitations for reducing 1980-1982 assessments to judgment ended in 1995, or more than 5 years before the Government instituted this law suit.

If there were no assessments for the years 1980-82 in 1985, then petitioner's 1985, 7201 prosecution for those years was illegal. If his prosecution was illegal, so was his being put on probation, which would make his alleged probation violation illegal, as well as the instant tax returns which resulted from that alleged violation. Therefore, the Government and the Court are estopped from claiming that Defendant's 1985 convictions were legal, **without also acknowledging** that there had to have been assessments in 1985 for the years 1980-1982 to support those convictions. For the Court to hold that (1) Defendant was legally convicted in 1985 for 7201 violations for the years 1980-1982, but (2) no assessments existed in 1985 to support those convictions would be legally inconsistent - especially since the Government has (1) not even contested Defendant's claim on this issue and (2) has already acknowledged in its Memoranda of Law supporting its claim for summary judgment, that such assessments are an "essential element" in order to support Defendant's 1985, 7201 convictions. Defendant would point out that the Government also argued in that Memorandum of Law (at page 13) that the "'The integrity of the judicial process is threatened when a litigant is permitted to gain an advantage by the manipulative assertion of inconsistent positions, factual or legal.' *Helfand,* 105 F.3d at 535. See also *Yniguez v. State of Arizona,* 939 F.2d 727, 738 (9th Cir 1991) (Ninth Circuit specifically found that the doctrine of judicial estoppel should be applied to prevent inconsistent legal positions)." How much more, therefore, is "*The integrity of the judicial process threatened"* when the inconsistent legal position is taken **by the court** and **not the litigant**? Therefore, based on the fact that the Government has not even contested the Defendant's claims on these issues, the Government's attempt to reduce to judgment the taxes and penalties at issue for the years 1979-1983 must be dismissed, or, in the alternative, the granting of a summary judgment to the Government on these issues must be reversed.

[2] As Defendant pointed out, in order for there to have been a tax deficiency in 1985 for the years 1980-1982 (as provided in Section 6211), there had to have been an initial assessment (pursuant to section 6201) that was "ascertained" as being "imperfect or incomplete" pursuant to Section 6204. Defendant repeatedly raised this issue in a number of his prior pleadings, and the Government never challenged Defendant's claim on this issue on any basis

(4) How Did the Government Respond to Defendant's Claim That the Government is Barred From Getting a Summary Judgment In Connection with Unproven Civil Fraud Allegations For the Years 1983, 1984 and 1985?

Since no court ever determined that Defendant committed tax fraud either within the meaning of sections 7201 or 6653 for the years 1983-1985, how did the Government respond to Defendant's claim that the Government is required to prove its allegations of tax fraud by "clear and convincing evidence," as required by 26 U.S.C. 7454? (However tax fraud cannot even apply in this case, as Defendant has already shown and as will be covered further on)

Incredibly, the Government alleged (page 5, line 1) that Judge Peter Dorsey's determination that Defendant failed to file returns for the years 1983 – 1985 is "directly probative as to whether Schiff had fraudulent intent in 1983-1985," with respect to section 6653 fraud penalties at issue for those years. This is an example of the type of fraudulent claims the Government has been making throughout this litigation. The Government's lawyers know full well that failure to file tax returns does not constitute tax fraud on *any* basis – either pursuant to section 6201, or section 6653. They are well aware that the Supreme Court held in the definitive Spies v. United States, 317 U.S. 492 (1943) that mere failure to file a tax return is an "omission," and at most a misdemeanor, not a felony. In reversing Spies conviction on these grounds, the Supreme Court said, "Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors, " and gave "illustrations" of such "affirmative" acts: "such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets." The point is, even if Defendant failed to file (which he did not do) Judge Dorsey's determination that he did, could not constitute the felony of criminal tax fraud under section 6201, or civil fraud under section 6653. The Government even pointed out in its Memoranda in support of its motion for summary judgment (page 9, line 4): "The elements of criminal tax evasion under I.R.C. 7201 are virtually identical to the elements of civil tax fraud under former I.R.C. 6653", and in footnote 6 pointed out "The essential elements of a tax evasion charge under I.R.C. 7201 are (1)willfulness; (2) the existence of a **tax deficiency** (i.e , an additional tax due and owing); and (3) an affirmative act constituting an evasion or attempted evasion of tax." Therefore, the Government's lawyers knew that a finding at a probation hearing that Defendant failed to file tax returns was not "probative" of tax evasion under either sections 7201 or 6653 on *any* basis.

To compound their egregious claim even further, the Government asked the Court to consider (at page 5):

> On August 1, 1991, during the probation revocation hearing…Schiff filed income tax returns….reporting substantial income …for the years 1980-1988….Schiff had previously attempted to file "zero" returns which reported zero income and tax for the same periods….The mere filing by the taxpayer of "zero" returns has been found to be more than adequate justification for the imposition of fraud penalties under 26 U.S.C. 6653. *Goodmon v. Commissioner,* 761 F.2d 1522, 1524 (11th Cir. 1985).

However in *Goodmon,* the Court noted, "Finally, the evidence is more than adequate to sustain the Tax Court's findings of fraud. n3 Goodmon's 1979 tax return indicated a fraudulent intent…". Therefore, Goodman's 1979 return was obviously "accepted for filing" and "considered" by both the IRS and the Tax Court. However, in Defendant's case, the Government contended in its Memorandum supporting its claim for summary judgment (page 10, lines 6-9) that "Schiff's…so called 'zero' returns for the years 1980 through 1988. (CFS Par. 48) were not considered valid returns and ***were not accepted for filing by the IRS.*** (CSF par. 49.)" (Emphasis added). If Schiff's "zero" returns "were not accepted for filing by the IRS," they certainly could not be the basis for imposing section 6653 fraud penalties for the years 1980-1985 – proving that the Government's duplicity simply knows no bounds. In addition, as stated in *Goodmon,* "The **deficiency** assessed by the Commissioner was substantially correct….The Tax Court determined that Goodmon owed a **deficiency** of $9,101.01 and a fraud penalty of $4,550.51. We affirm." (Emphasis added)

Therefore, in *Goodmon,* the Tax Court "determined" the "deficiency" – further confirming that a "deficiency" is the essential element of a section 6653 civil fraud penalty. However as shown in Exhibits B1-B5: no deficiencies were ever "determined" by the Secretary in the instant case; nor ruled upon by the Tax Court; nor were "90 day deficiency notices" ever sent to Defendant in connection with any of the years 1980-1985; and Defendant supplied the Court with an affidavit to that effect. Since the "essential" element of a "deficiency" is missing in connection with all of the returns at issue for the years 1980-1985, no section 6653 fraud penalties can apply to Defendant ***for any of those years*** on *any* basis, not withstanding the fact that Defendant was convicted of tax evasion for the years 1980-1982.[3]

[3] Defendant was convicted in 1985 of (1) failing to file tax returns for the years 1980-1982, (2) failure to pay the taxes and (3) the concealment of income. Defendant was ***not convicted*** of fraudulently making "underpayments" of tax for any of the years 1980-1982 – which is what the fraud penalties at issue here are all about. Therefore,

Further in its Response, the Government states,

> However, in cases under the version of 26 U.S.C. 6653(c) in effect for the years in suit, fraud penalties can be assessed based upon the amounts reflected on late-filed returns. *Iles v. Commissioner*, T.C. Memo 1998-337 (1998). In this case, in 1991 Schiff filed returns for 1980-1985 years late, at the probation hearing. Thus, all of the underpayment of tax shown on Schiff's late-filed returns was properly used to calculate the fraud penalties.

However, the following excerpts from *Iles*. show that this decision, not only does not support the Government's position, but it supports Defendant's position

> On April 14, 1988, after respondent issued the notices of **deficiency** and a joint **petition** was filed as to all 3 years, petitioners Robert E. Iles, ….and Monica M. Iles, filed joint tax returns for 1981 and 1982….. respondent recomputed [*7] the deficiencies for 1981 and 1982 by combining the adjustments to income determined in the separate notices of deficiency and using joint filing rates.
>
> **For purposes of the fraud addition to tax, the term "underpayment" means a "deficiency",** as defined in section 6211, except that the tax shown on the tax return is taken into account only if that tax return was filed on or before the last day prescribed for filing that tax return …In the instant case, each of petitioners' 1980, 1981, and 1982 tax returns **was filed after the extended due dates, and thus the tax shown on each of these returns is not taken into account in determining the existence or amount of an underpayment.** Secs. 6653(c)(1) and 6211(a)(1)(A). (Emphasis added throughout)

So in *Iles*, (1) the IRS issued deficiency notices **which was not the case here**; (2) the Iles' filed petitions to Tax Court, **which was not the case here**; (3) the Tax Court *determined* the deficiency, **which was not the case here**; and (4) the deficiency determined by Tax Court was obviously *assessed* as a TC 300 determination, **which was not the case here**. In addition, the *Iles* Court clearly stated that the term "underpayment" for the purpose of a 6653 penalty "means a deficiency." And there were simply no "deficiencies" "determined," litigated" or "assessed" in connection with the years 1980-1985 that are at issue here. Therefore no 6653 penalties can apply for any of those years *as a matter of law.* So the two cases cited by the Government (*Goodmon* and *Iles*) support Defendant's position and not the Government's.[4] [5] Therefore,

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Defendant's 1985 convictions with respect to the years 1980-1982 **have nothing to do with the 50% civil fraud penalties at issue here** and cannot be used as a basis for establishing such penalties for any of the years at issue.

[4] In addition the *Iles* court noted that since Iles' returns were "**filed after the extended due dates …the tax shown on each of these returns is not taken into account in determining the existence or amount of an underpayment."** Thus, in accordance with this holding and the provision of 6653, since all of the "zero" returns were filed after their due dates, the "amounts" shown on them can not be taken into consideration in determining the 6653 fraud penalties at issue. This is but another reason why the Government's attempt to use tax returns which were "not considered by the IRS" as a basis for the 6653 fraud penalties, reveals the fraudulent and egregious character of the Government's lawyers, and why nothing they say can be believed.

since there are obviously no "deficiencies" with respect to the returns at issue and as revealed by the IRS documents included as Exhibits B1-B5, this Court cannot award the Government a summary judgment pursuant to fraud penalties ***that can not exist as a matter of law*** and which were ***never proven as a matter of fact.*** Not only would such an award violate the principles for which Defendant's Rule 59 Motion should be granted, since such an award would constitute "clear error" and be "manifestly unjust," it would also constitute "judicial fraud" on the part of the Court (to say nothing of "abuse of process" on the part of the Justice Department lawyers who brought this action) and a "void judgment" pursuant to Rule 60(b).

(5) How Did the Government Respond to Defendant's Claim that the Government Never Sent Defendant a "Notice and Demand" For Any Of the Years At Issue? Resorting to their usual technique, the Government's lawyers totally misrepresented Defendant's claim in this issue too. They stated:

> Schiff claims... that he has not received a notice and demand to pay the assessments… This is typical tax-protestor argument in which Schiff randomly alleges an IRS failure to complete some procedural step, which, he argues, invalidates the tax. The statute, 26 U.S.C. 6303, requires only that the notice be sent; it is not required to be received. Thus the bare allegation that the taxpayer has not received a notice and demand is insufficient as a matter of law to create a triable issue of fact on the mailing of a Section 6303 notice and demand," and citing *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993) in support of its fraudulent claim.

However, Defendant **never claimed** that he "did not **receive** a notice and demand to pay the assessments," what he repeatedly claimed in a number of pleadings he filed in this case is that the record shows that no such notices **were ever sent out**. In his Rule 59 motion he claimed as follows….

> In Paragraph 7 of its complaint, the Government says, "Proper notice and demand for payment of the assessments set forth in Paragraph No. 5, above has been made on defendant Irwin A. Schiff." The Government repeats this claim in paragraph No. 8 as follows, "Despite notice and demand for payment…Irwin A. Schiff has neglected…to fully pay etc…etc…etc." **However, it is Defendant's claim that the Government never sent Defendant a "proper notice and demand for payment"** - which is a condition precedent to the enforced collection of income taxes, and the finalizing of any Tax Court determination, such as the one at issue for the year 1979. However, in responding to discovery (as shown in the exhibits which supported

[5] If the Government wants to base the fraud penalties at issue on the "zero" returns Defendant filed on 10/13/1990, then it must assume that these returns were "accepted" at that time by the IRS and the "zero" amounts shown on them "assessed" shortly thereafter. This would mean the Government's claim, that all of the initial assessments for the years 1980-1985 took place on 8/8/91, was false. It would mean that initial assessments for those years took place at least 9 months prior to that date – and thus the statute of limitations for reducing such assessments to judgment would have terminated about 9 months prior to the date that the Government instituted this lawsuit. Therefore, if the Government wants to claim that Defendant's "zero" returns (filed on 10/13/1990) can be the basis of the 6653 fraud penalties at issue, then all of the Government's claims for those years have to be dismissed as being barred by the statute of limitations.

> Defendant's Declaration) the Government could not (1) produce a copy of any notice and demand that it claimed had been sent to Defendant, nor (2) could it identify the form number of any document that it claimed was the "proper" notice and demand it allegedly sent to Defendant. In addition, none of the documents produced by the Government in this litigation is there any entry claiming that a "notice and demand" was ever been sent to Defendant for any of the years at issue. Therefore, the Court cannot resolve this contested issue of fact in favor of the Government. This one contested issue of fact is enough to deny a summary judgment to the government, since unless the Government sent a "notice and demand" for payment to Defendant for each of the years at issue (which they never proved), none of the alleged assessments and penalties needed to have been paid by Defendant – which is why the Government had to **twice claim** in its complaint that such notices were sent out - nor would any of the interest charges have been justifiable. And the issue of whether or not the Government sent Defendant "notices and demands" for payment (as twice alleged in its complaint) is a contested issue of fact, which cannot be resolved in favor of the Government.

At no time did Defendant ever state that his "claim" on this issue was that he never "**received** a notice and demand to pay the assessments" as the Government fraudulently claims. His claim, as he repeatedly stated throughout this litigation, is that the records shows that no such notices were ever sent to him. Defendant again asks this Court to take *judicial notice* that there is no entry in any of the IRS documents (Exhibits B1-B5) showing that "notices and demands" for payment of the taxes and penalties at issue were ever sent to Defendant for any of the years 1980-1985.

In addition, the failure to send out such "notices and demands" for payment, is not some insignificant "procedural step" as the Government attempts to suggest in its Response, but such a "failure" is a ***total bar*** to the Government's ability to collect any of the taxes and penalties at issue. Section 6671 captioned "Rules for application of assessable penalties" states, "The penalties and liabilities shall be paid upon **notice and demand** by the Secretary …" Section 6303 states, "the Secretary shall…within 60 days, after the making of an assessment…**give notice** to each person liable for the unpaid tax, stating the amount and **demanding payment** thereof." Section 6215 provides, "the entire amount redetermined as the deficiency by the decision of the Tax Court shall be assessed and shall be paid upon **notice and demand** from the Secretary." (Emphasis added through out.) So the sending of a "notice and demand" for payment is **a prerequisite**, before anyone can be required to pay, any income tax, any penalty, or a Tax Court determination.

In Martinez v. United States, 669 F.2d 568 (1981), the Ninth Circuit ruled that "the taxpayer must be given notice and an opportunity to fail or refuse to pay the tax", pursuant to the provisions of Section 6303. Failure to send a notice and demand nullifies the assessment and any action the Service may have attempted to collect the amount assessed. ***No lien can arise***, nor can

a levy be effective, absent a notice and demand: Jersey Shore State Bank v. United States, 107 S.Ct. 782 (1987); Commissioner v. Shapiro, 424 U.S. 614, 616, 622 n. 7 (1976); United States v. Coson, 286 F.2d 453 (9th Cir. 1961); United States v. Berman, 825 F.2d 1053, 1055 (6th Cir. 1987); United States v. Jersey Shore State Bank, 781 F.2d 974 (3d Cir. 1986); United States v. Associates Commercial Corp., 721 F.2d 1094 (7th Cir. 1983); Bauer v. Foley, 404 F.2d 1215 (2d Cir. 1968), on rehearing, 408 F.2d 1331 (1969); United States v. Ball, 326 F.2d 898, 901 (4th Cir. 1964); L.O.C. Industries, Inc. v. United States, 423 F.Supp. 265, 273 (M.D.Tenn. 1976).

Thus all of the thousands of dollars of seizures of Defendant's property and money (as well as his Social Security benefits), as reflected in the "notices of levy," "notices of seizure," and "notices of liens," shown in Sandra Davaz's Affidavit, were all illegal, since they were never proceeded by a "notice and demand" for payment (as well as being illegal on other grounds). Thus, since there is absolutely no evidence in the record that "proper notice and demand for payment of the assessment (at issue)" was ever sent to Defendant as claimed by the Government in paragraphs 7 and 8 of its complaint, no summary judgment can be given to the Government in the face of such a contested issue of fact – especially since the Government did not deny Defendant's claim on this issue on any basis. All the Government did, is misrepresent it.

(6) What Was the Government's Response to Defendant's Claim that the Assessments at Issue Were Erroneous On a Variety of Grounds?

In footnote 2 of its Response, the Government states, in relevant part:

> In the motion for summary judgment, the United States presented evidence that IRS Revenue Agents conducted exhaustive audits of Schiff's income…. They summoned his bank records and carefully analyzed his expenses. In order to oppose such evidence, Schiff had the burden of proving by admissible documentary evidence his correct income and tax for each year at issue.

The Government extended this claim further by stating on page 7, lines 17-19:

> Once the **United States** has admitted some evidence of **unreported income,** the burden shifts to the taxpayer to prove by a preponderance of the evidence that the **amount** is excessive. *Id*: *Edelson v. Commissioner*, 829 F2d 828, 831(9th Cir. 1987) (Emphasis added)

However, the Government has not alleged there is any "unreported income" in the instant case. The Government is claiming that Defendant merely owes all of the taxes as shown on the 1980-1985 coerced returns he submitted at a probation hearing in order to avoid being held to have violated the terms of his probation and being sent back to jail. However, Judge Dorsey did not accept those returns, violated Defendant, and (illegally) sent him back to jail for two years anyway.

Further, the *devious* and *dishonest* nature of the Government's attorneys is revealed by the way they altered the alleged holding in *Edelson* to make it fit their argument in this case. What the *Edelson* court actually said is:

> Once the **Commissioner** has introduced some evidence that a taxpayer received unreported income, the burden shifts to the taxpayer to prove by a preponderance of the evidence that the **deficiency determination** is arbitrary or excessive.

The *Edelson* Court *specifically* referred to the "Commissioner" as introducing the "unreported income" and not the all inclusive and indefinite "United States," which is the term that Government's lawyers substituted for "Commissioner" so as to make *Edelson* fit in with their presentation of this case; and the "unreported income" referred to in *Edelson* related to a "deficiency determination" which is what the Government's lawyers left out of their alleged *Edelson* citation. And the burden "shifted" only after "the Commissioner introduced evidence that the taxpayer received unreported income." However there is no claim by the Government that there is **"unreported income"** with respect to the returns at issue here. The Government is claiming that the returns at issue **correctly** reflect Defendant's income for the years 1980-1985. Therefore, this is another example of the fraud that runs through the Government's entire case.

In any case the *Edelson* court also held as follows:

> Joseph Edelson and his wife Harriet Edelson appeal the **tax court's decision** dismissing their petitions for federal income tax redetermination, upholding the Commissioner's issuance of **deficiencies** and additions to tax against Joseph for fraud, and finding Harriet liable for a portion of Joseph's taxes as a transferee. We affirm.
>
> On May 22 and 24, 1985 the Commissioner subpoenaed both Joseph and Harriet to appear at the trial session in Newark, New Jersey and to bring their records. **Neither the Edelsons nor their representative appeared** [**6] at calendar call on May 28, 1985 or at the trial on June 6, 1985, where the Commissioner presented his case. On June 3, 1986 the tax court entered its decision dismissing the Edelsons' petitions for failure to prosecute and upholding the **Commissioner's deficiency** determinations. (Emphasis added throughout)

Obviously, the *Edelson* case involved the Tax Court's finding of a "deficiency" and contained other elements none of which were present in the instant case. Therefore, it is clear that *Edelson* cannot apply to the instant case on ***any*** basis.

In addition to *Edelson*, the Government cites two other Ninth Circuit decisions: *Palmer v. United States*, 116t F.3d 1309 (1997); and *United States v. Stonehill*, 702 F2d 1288(1983) as supporting its proposition that "the burden shifts to the taxpayer to prove by a preponderance of the evidence that the amount is excessive," and that "Schiff has (the)….burden of proving his

correct income." The fraud sought to be perpetrated by the Government is that the amounts at issue in these cases were all determined by a Court or by the Secretary and deficiency notices sent out. In the instant case, the amounts at issue were not determined by any court or on the basis of deficiency notices, but reflect the amount of taxes reported on coerced returns **filed by the Defendant himself**, on which he stated that he was filing these returns purely as a means of avoiding being held to have violated the terms of his probation, and that he didn't believe that the amounts shown on them "correctly and accurately reflected" his actual taxable income, but that the amounts reported on his previously filed "zero" returns, did.

In *Palmer*, supra, the Court stated, in pertinent parts, as follows:

> We must decide whether the Internal Revenue Service made proper **deficiency** determinations and assessments for unpaid taxes against non-cooperative taxpayers.
>
> **Deficiency notices** were prepared and mailed to the Palmers' last known address on July 28, 1981. They listed **deficiencies** for unpaid individual income taxes…plus a combined total of $5,042. in penalties. The Palmers **did not respond** to the **deficiency notices**, which were returned to the IRS marked "unclaimed."
>
> In April 1982, after the statutory period for **objecting to the deficiency notices** had passed, the IRS prepared assessments against the Palmers in the combined amount of $ 33,794.51 representing the couple's unpaid taxes, penalties, and interest.
>
> Where the **Commissioner's** method of calculating income is rationally based, courts afford a presumption of correctness to the **Commissioner's** determination. *Cracchiola v. Commissioner, 643 F.2d 1383, 1385 (9th Cir. 1981)* (per curiam). The taxpayer has the burden of proving the method to be wrong. *Id.* (Emphasis added throughout)

Therefore, in *Palmer* the "presumption of correctness" was afforded to *deficiency* "determinations and assessments" made by "the Commissioner" on the basis of "deficiency notices…mailed" to the Palmers. **None of these elements are present in the instant case**, so, obviously, *Palmer* does not apply to the instant case *on **any** basis.*

The other case cited by the Government, *Stonehill* involved the validity of a tax lien. The **court said in pertinent parts:**

> These illegal dealings were documented by evidence introduced on the issue of fraud. The district court held that the government had *proved fraud by clear and convincing evidence.* **The taxpayers do not contest this portion of the decision.** [**5]
>
> **The Commissioner computed tax deficiencies** (including interest and penalties) of $13,613,721.51 against Stonehill and $11,182,966.73 against Brooks.
>
> If the Secretary or his delegate believes that the assessment or collection of a **deficiency**, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately **assess such deficiency** (together with all interest, additional

amounts, and additions to the tax provided for by law), and **notice and demand** shall be made by the Secretary or his delegate for the payment thereof.

Therefore, all of these cases, as the Government's lawyers had to know, involved the assessment of deficiencies, and the claim of unreported income. As shown by the documents in Exhibit B there are no "deficiencies" at issue here, nor is the government claiming that there is "unreported income" with respect to the tax returns at issue. Therefore, Defendant has no "burden" as alleged by the Government, since there is no amount at issue here that can be "afforded the presumption of correctness." (In addition the *Palmer* court reiterated the legal necessity of sending a "notice and demand" for payment.) In this case, the Defendant **himself claims** that the amounts he reported on his returns for the years 1980 – 1985 **were incorrect.** They did not reflect the some $72,505. in payments he made to Howy Murzin in the years 1982 and 1983. In addition, Defendant claims that the taxable "income" shown on his coerced returns are erroneous, since they were not based on the meaning of income given to it by Congress in House Report 1337 and Senate Report 1622 (83rd Congress 2d Session). In addition, Defendant stated right on those returns (3rd page attachment), in relevant part:

> While I believe that my return originally filed for the year 1980 (as shown by the original return) correctly and accurately reflected my taxable income for that year. I have been informed by the U.S. Probation Department in New Haven, Conn. That despite my reliance on the holding in United States v. Long 618 F. 2d 74, (1980), U.S. v. Kimbal No. 87-1392 D.C. No Cr – 86-00167-ECR, (1990) and U.S. v. Moore, 627 F2d 830 (7th Cir), they do not consider the filing of such a return as falling within the terms of the conditions of my probation.
>
> In addition, I have been informed by the government (see attachment page 3) that the government considers my gross income for civil purposes to be $241,703 for 1980 my "Taxable income for Civil Purposes to Date" to be $82,377.00; and my "Tax Liability for Civil Purposes to Date" to be $36, 377.00 for the taxable year 1980. [6]
>
> Therefore, not to be in violation of the conditions of my probation, I have decided to accept the government's determination with respect to these amounts, since I do not have any books or records with which to challenge these figures in any way.
>
> Since I do not have any money to pay the some $232,901. I owe for the years 1980-1989, I trust the government will work with me to arrange a realistic repayment schedule.

Therefore, in this litigation, the Government is not claiming that the taxes at issue were determined by the "Secretary," or the "Commissioner," or by any "Court" or that they reflect a "deficiency." What the Government is claiming is that the *amounts shown on Defendant's tax returns* for the years 1980-1985 (and upon which the instant assessments are

[6] This shows the attachment I used for 1980; however for each of the succeeding years, I used the amounts shown on that Government document for those succeeding years, and *Long* and *Kimball* were 9th Circuit decisions.

based) ***are correct***. However, amounts shown on a taxpayer's tax return **carry no presumption that they are correct.** Defendant claims that they are, in fact, not correct on a variety of legal and factual grounds. Therefore, the Court cannot give the Government a summary judgment based on its claim that the amounts shown on Defendant's 1980-1985 returns are correct, since the Government has never proven "by a preponderance of the evidence" given to any court, that **they are correct** – and there is no presumption that amounts reported on tax returns are correct. Therefore, the Court's claim in its order of June 14, 2004 that tax assessments based on amounts reported on a taxpayer's tax return (in this case, the returns at issue) are "afforded" the "presumption of correctness" is totally incorrect. No such "presumption" attaches to amounts reported on tax returns, if such a "presumption" existed, there would be no reason for Tax Court.

The Government's claim that Schiff submitted a declaration with respect to Howy Murzin which only showed " two checks attached in the total amount of $7,400" is another example of the Government's penchant for making false statements. The Government neglected to mention that there was also a journal page attached to that Affidavit, largely prepared by Defendant's bookkeeper at that time, Frances Silberberg that showed payments to Howy Murzin through 6/10/1983 of $57, 865., including $2,015 in travel reimbursement. However, additional checks and the note from Defendant's subsequent bookkeeper Ann Tokaz stating that "another check in the same amount" would be sent "next week." In any case, on page 67 of his Declaration, Gerald A. Dragon points out that as of 11/82, 129,362 copies of How ***Anyone Can Stop Paying Income Taxes*** were printed. However additional printings were done subsequent to 11/82 until approximately 200,000 copies were printed. Assuming that Defendant only paid Mr. Murzin his .55-cent royalty on the 129, 362 copies printed as of 11/1982,this would amount to $71,149. It is clear, therefore, that Defendant paid Mr. Murzin a considerable sum in connection with the distribution of ***How Anyone Can Stop Paying Income Taxes,*** none of which was taken into consideration in connection with the amounts reported on Defendant's 1982-83 returns. Therefore, the amounts shown on his tax returns were incorrect, just on this basis alone.

Next, the Government argues that "Because Schiff did not produce the Murzin checks (again leaving out the journal page) in discovery, the Court should not consider them." The reason Schiff did not produce the checks and journal entries "in discovery" is because he did not have them at that time. They only surfaced when he cleaned out two filing cabinets on or about Feb. 17, 2004, so they should be regarded as "newly discovered evidence." However, Defendant

mentioned such payments to Mr. Murzin in his Declaration (paragraphs 18, 20 and 25(a)) and at his Deposition – however, he did not believe he had actual records to substantiate these payments. The point is, these checks and journal entries show that that the amounts Defendant reported on his tax returns were wrong (just on this issue alone), while the Government maintains the amounts he reported on his returns are correct, notwithstanding the fact that the documents attached to Defendant's affidavit proves they are wrong.

(7) How Did the Government Respond to Defendant's Claim That "All of the Taxes For the Years 1980-1985 Are Based On Coerced Returns"?

Though Defendant devoted approximately two pages to this argument in his Rule 59 Motion, the Government made no mention of it in its Response, as Defendant stated in his Rule 59 Motion:

> Defendant fully documented in Exhibits supporting his Declaration: (1) no probation "revocation" hearing (as claimed by the Government) was ever held, only an extended "probable cause" hearing; (2) Defendant was not permitted to cross-examine the probation officer who violated him; (3) was not permitted to call a key witness in his defense; (4) was denied the assistance of counsel, all in violation of the law governing probation hearings. Further, Judge Dorsey refused to recuse himself, as he was required to do under the law, since Defendant had accused him of a number of things having nothing to do with mere courtroom error. For one thing, Judge Dorsey was at that very moment, Defendant's opponent in a civil lawsuit. Clearly, tax returns that were filed under such circumstances cannot be lawful, yet it was based on such returns that the Government claims the assessments for the years 1980-85 are based.[7]
>
> It is unquestionable, based on such circumstances, an impartial jury should be the ones deciding whether returns filed under such circumstances can be factually regarded as the returns that Defendant filed for 1980-85, or whether the "zero" returns Defendant had previously filed in accordance with Long, supra, congressional reports, and as approved by Defendant's assigned probation supervisor should be regarded as the returns he actually filed for those years at issue.

However, based upon the arguments contained in Segment 8 as shown above, the Government can not rely on those returns as being conclusive as to what Defendant's actual taxable income is for the years 1980-1985, especially since defendant is claiming that the amounts shown on those returns are wrong, both factually and legally, and has provided the Court with proof of both claims.

(8) How Did the Government Respond to Defendant's Claim That Defendant's Alleged "Delusional Disorder" Is An Issue for the Jury?

[7] However, based on the statements of Netcoh and Dragon it was clear (as analyzed in Defendant's Declaration) that the taxes for the years 1980-85, were actually based on the "zero" returns that Defendant filed, and were not based on the returns that Defendant filed under duress at his probation hearing as claimed by the Government – which is also a **contested issue of fact,** which can only be determined by cross-examination, at a trial.

In its Response the Government did not mention this issue, let alone challenge it. Summarizing Defendant's claim on this issue, as contained in his Rule 59 Motion, he stated:

> Defendant's attorney submitted a Declaration from an attorney who has known Defendant for a number of years, and clinical reports from Dr. Luis Ortega head of the Geriatric Center for Behavioral Medicine at Valley Hospital Medical Center, Las Vegas, Nevada and Psychologist Cynthia Barry, PhD. who had been retained by the Government in "similar tests and assessments." All three concluded that Defendant suffers from a "delusional disorder" with respect to his beliefs that (1) no law requires anyone to pay income taxes, and (2) there is a conspiracy on the part of the Federal judiciary to hide this fact from the American public. In his report Dr. Ortega specifically states, "In my professional opinion I felt that the patient did not pay taxes because **he was convinced that the law does not require him to do so**. I think this is a delusional disorder."
>
> Whether Defendant is "delusional" is a factual issue that falls within the purview of a jury and not within the purview of this Court. See the 9th Circuit's decision in U.S. v. Morales, 108 F.3d 1031 (1997). Therefore, it is error for the Court to resolve this issue in favor of the Government, rather than allowing a jury to decide the disputed fact.

Since the Government did not challenge Defendant's claim on this issue in its Response, the Court certainly cannot resolve this issue in favor of the Government. This issue has a direct impact on the fraud penalties at issue (illegal on other grounds), and Defendant has a right to call each of the professional people who claim that Defendant has a "Delusional Disorder" with respect to his understanding of the tax laws and the Federal judiciary to present their beliefs to a jury.

(9) In addition, the Government did not respond to Petitioner's claim that the Government's request for a final order was based on an **unauthorized** Affidavit of Revenue Officer Sandra Davaz Code, since Code section 7608 clearly bars Revenue Officers from being involved "with any Federal tax other than those dealing with the 'Enforcement of subtitle E and other laws pertaining to liquor, tobacco and firearms'" In addition, Defendant pointed out that her claim that section 6151 applies to income taxes was false, since the only regulations implementing that section are contained in C.F.R. 27, not in C.F.R. 26. Since Section 7608(a) bars IRS Revenue Officers from enforcing any tax other than those contained in "Subtitle E and other laws pertaining to liquor, tobacco, and firearms", all of the "notices" and seizures referred to in her Affidavit were illegal on this ground and on other grounds as noted on page 11.

As is clear from all of the above: (1) the Government was not able to identify any statute that made Defendant "liable" for the taxes at issue; (2) Refused to deny that the "income" at issue, as

reported on Defendant's 1980-1985 tax returns, **was incorrect**, because it did not conform to the meaning of "income" given to it by the U.S. Congress in House Report 1337 and Senate Report 1622 (while Defendant also showed it to be incorrect on other grounds); (3) refused to challenge or deny Defendant's claim that the statute of limitations barred the reduction to judgment of all of the taxes for the years 1980-1982 , wherein Defendant was prosecuted for 7201 violations; (4) refused to challenge or deny Defendant's claim that the statute of limitations, coupled with a 1985 assessment, barred the Government from to reducing to judgment the Tax Court's 1979 determination, which was also barred by the IRS' failure to send Defendant a "notice and demand" for its payment; (4) failed to disprove, but could only misrepresent, Defendant's claim that the IRS failed to send Defendant "notices and demands" for payment for any of the years at issue; (5) could not disprove that none of the 6653 fraud penalties for the years 1980-85 can apply in this case **as a matter of law**; while the fraud alleged was never proven in any court, as a **matter of fact**; (6) could not even challenge Defendant's claim that this Court had no authority to take it upon itself to decide the factual question as to whether or not Defendant has a certain "delusional disorder" (as claimed by two psychological professionals and an attorney) that might impact, at trial, on the factual issue of "willfulness."

Since it is not even debatable that the 6653 fraud penalties at issue for 1980-85 had to be based on the existence of a "deficiency," but since no "deficiencies" existed for those years, the imposition of such fraud penalties was ***itself a blatant act of fraud*** which the Government sought to perpetrate. "Fraud destroys the validity of everything into which it enters," *Nudd v. Burrows*, 91 U.S 426. "Fraud vitiates everything," *Boyce v. Grundy*, 3 Pet. 210. "Fraud vitiates the most solemn contracts, documents and even judgments," *U.S. v. Throckmorton*, 98 U.S. 61. Therefore, based upon this obvious case of governmental fraud in connection with the fraud penalties at issue, not only should the Court vacate its order of June 14, 2004, it should throw out the Government's entire case just on this ground, overlooking all the other grounds that warrant such action.

Indeed, Defendant pointed out in par 25 of his Declaration, (by quoting par. 25 of the Government's *Undisputed Facts)* "reveals the massive fraud" the Government was seeking to perpetrate. It called the Court's attention to the following passage from that document:

> The full RAR [Revenue Agent's Report] was never processed for the issuance of a 90-day statutory notice of deficiency, because Schiff later filed tax returns containing income information. **However, a separate RAR concerning only the**

civil fraud penalties was later processed and a statutory notice of deficiency issued to Schiff.

Since no "deficiency" was determined for any of the years 1980-1982, how could a "statutory notice of deficiency be issued to Schiff"? Secondly, as pointed out by Defendant, at that time, Code section 6211 does not provide that a "deficiency" can be determined just for the purposes of assessing "fraud penalties." Defendant has attached (as Exhibit C) pages 105-107 of Dragon's Declaration in which he describes the basis for his imposing the Section 6653 fraud penalties for the years 1980-1983. Relevant excerpts from these pages follow:

> The taxpayer during 1980-1982 was a nationally prominent tax protestor. He earned income by selling books he wrote, lecturing, and selling other material concerning advocating the tax protest movement. He did not file individual tax returns for 1980-1982. He was previously convicted of failure to file his 1978 and 1979 tax returns. He was also been convicted of failure to file his 1980-1982 tax returns. He has been sentenced to 3 years in prison and three years suspended sentence.
>
> IRS Section 6653(b)(1) states that a 50% penalty will be assessed if the deficiency is due to fraud…The Government believes it has amply fulfilled its burden of proving fraud.

The fraud being perpetrated here is obvious. Dragon admits that the 50% fraud penalty is based upon a "deficiency," but since he didn't find a deficiency, he had to know that the 6653 fraud penalty was totally unwarranted in this case – and, therefore, its imposition was itself an act of fraud. None of the elements that he writes about, as shown above, can be the basis of a section 6653 fraud penalty – as the lawyers for the Government had to know. In addition, Gerald Dragon had no authority to impose fraud penalties on his own initiative, and how could the Government have meet its "burden" under Section 7454 based on his sole opinion? In addition, Code section 7608(a) even bars him from having anything to do with income taxes and only authorizes him to "Enforce subtitle E (taxes) and other laws pertaining to liquor, tobacco, and firearms." So the fraud being perpetrated here is massive and multi-leveled.

However: (1) because of the complexity of the Code; (2) the enormous volume of paper work generated by the Government in connection with its motion for summary judgment; (3) the interruptions and litigation demands created by the Government in simultaneously bringing other civil and criminal actions against defendant concurrent with this lawsuit (including the seizure of 14,000 of his documents and subjecting him to the conditions of a restraining order an a preliminary injunction); and (4) the mental and physical state of defendant that all of these **simultaneous** governmental actions created; prevented him from initially uncovering the full

extent of the fraud being perpetrated by the Government in its motion for summary judgment, as he has been able to present here. Therefore, Defendant would remind this Court that since he is a pro per litigant, his pleadings should be "read and construed liberally," *Haines v. Kerner,* 404 U.S. at 520(1980); *Birl v. Extelle,* 660 F.2nd 592(1981).

In any case, based on all of the facts as presented above, the Government's entire case should be thrown out since the government has not one legal or factual leg to stand on. As the 9ith Circuit stated in *Palmer v. U.S.*, supra, in determining a summary judgment the court must view the evidence in the light most favorable to the party opposing summary judgment. In essence the Court must resolve all contested issues of fact in favor of the Defendant. However, the Court has not done that. It has viewed all of the evidence in the light must favorable to the Government and has resolved all contested issues of fact, and **even issues the Government did not contest**, in the light most favorable to the Government.

In addition to all of the above, Defendant would also remind this Court that it has no jurisdiction to hear this case on grounds already submitted to this Court. Defendant moved this court to dismiss this case since the income tax at issue is not "traceable" to any of the taxing powers conferred on Congress in the Constitution. (See U.S. v Hill, 123 US. 681 (1887)) The Court rejected that motion on the ground that the 16th Amendment gave Congress the power to impose a direct tax without apportionment. That claim was directly contrary to numerous, bedrock Supreme Court decisions that held that the 16th Amendment gave Congress no new taxing powers, and its taxing powers were still limited by the provisions contained in the original Constitution. (See Brushaber v. Union Pacific RR, 240 U.S. 1 (1915); Stanton v. Baltic Mining, 240 U.S.103 (1915); and Eisner v. Macomber, 252 U.S. 189 (1920)

Based on all of the above this Court is duty bound to vacate its Order of June 13, 2004 or to substantially alter or amend that order in the face of all of the facts presented in this Reply to the Government's Response.

Dated: September 3, 2004

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Irwin A. Schiff, pro per

CERTIFICATE OF SERVICE

I certify that I have this day hand delivered a copy of the foregoing to Henry C. Darmstadter and G. Patrick Jennings, Trial Attorneys, Tax Division, in care of Danial G. Bogden, United States Attorney, District of Nevada, Lloyd D. George Federal Courthouse, 333 Las Vegas Blvd. South, Suit 5000, Las Vegas, Nevada.

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Irwin A. Schiff