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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

GERARD MARCHELLETTA, SR., et al)
Plaintiff,) 1:09 CV-3037-JOF
v.)
INTERNAL REVENUE SERVICE)
Defendant.)

SECOND DECLARATION OF PATRICIA L. BERGSTROM

I, PATRICIA L. BERGSTROM, pursuant to the provisions of 28 U.S.C.

1746, declare and say:

1. I am a Special Agent in the Internal Revenue Service [IRS] office for Criminal Investigation [CI], Southeast Area field office in Atlanta, Georgia. I have been employed as a Special Agent with CI since 1992, working in the Atlanta office since 1992. As a Special Agent, I am charged by the IRS with responsibility for investigations involving income from illegal sources that would constitute crimes under Title 26 (federal tax), Title 18 (money laundering) and Title 31 (currency transactions) of the United States Code. In this capacity, I was assigned to the grand jury investigation of plaintiffs Gerard Marchelletta, Sr. and Gerard Marchelletta, Jr.

2. In the "DECLARATION OF PATRICIA L. BERGSTROM" dated July 8, 2010, (hereafter referenced as my "first Declaration") which was submitted to the Court in conjunction with the Government's Motion for Summary Judgment, I described the procedures the IRS generally follows with respect to grand jury

1 investigations, the actions that were taken in which I was involved in the grand
2 jury investigation targeting plaintiffs, the search for and determination as to
3 documents that were responsive to Freedom of Information Act [FOIA] requests
4 submitted to the IRS by plaintiffs, and descriptions as to such documents, or
5 portions of documents, that were withheld from plaintiffs and the bases for such
6 withholding.

7
8 3. I am submitting the instant "SECOND DECLARATION" in support of
9 the Government's 'Motion to Supplement the Summary Judgment Motion.'
10 Certain of the following paragraphs, specifically paragraph 4(a) and (b), are
11 submitted to clarify certain of the statements made in my first Declaration,
12 especially with respect to the manner in which I and my office became involved
13 in the Government's grand jury investigation of plaintiffs. Further, in paragraph
14 5(a) and (b), I am clarifying the bases under which certain of the documents
15 labeled in my first as "grand jury" documents are being withheld.
16

17 4. In paragraph 3 of my first Declaration, I discussed, in general terms,
18 those procedures that are usually followed within my office when the grand jury
19 investigation is initiated by the United States Attorney's office. In paragraph 4, I
20 discussed how I and my office became involved in the 'Marchelletta grand jury
21 investigation' and those procedures which were followed within my office with
22 respect to this specific investigation. With respect to the statements made in
23 these two paragraphs in my first Declaration, I want to clarify the following:
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25 (a) At paragraph 3 of my first Declaration, I cited to IRM 9.5.2.1, *et seq.*,
26 in describing the procedures when a request is made to CI from the United
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1 States Attorney for assistance with a grand jury investigation that has already
2 been initiated by the United States Attorney, I indicated that the Special Agent in
3 Charge (SAC) has the authority to review, analyze the relevant data and
4 determine the criminal prosecution potential for a matter within the IRS's
5 jurisdiction. I inadvertently failed to emphasize in this discussion that it is
6 actually the SAC **or his designee** who has the authority to undertake this
7 analysis and determination and I, as the Special Agent assigned to the
8 Marchelletta grand jury investigation, had been designated by SAC Andre Martin
9 to conduct this review and determination and to prepare Form 9131, "Request for
10 Grand Jury Investigation". (See IRM 9.5.2.3.1.).
11

12 (b) In paragraph 3 of my first Declaration, I stated that when a grand jury
13 investigation is initiated by the United States Attorney, the United States Attorney
14 or Assistant United States Attorney may ask for CI's assistance. It has been my
15 experience that these types of requests from the United States Attorney's office for
16 an expansion of a grand jury investigation to include CI vary as to the specifics of
17 the request on a case by case basis. In my experience, the initial request is
18 usually made verbally. As I recall with respect to the Marchelletta grand jury
19 investigation, I was initially contacted, verbally, sometime in January 2002, by
20 Assistant United States Attorney [AUSA] Daniel Griffin, who asked if, based on
21 information that he believed showed the potential for criminal violations of Title 26,
22 I would be interested in participating in the Marchelletta grand jury investigation.
23 Based on AUSA Griffin's verbal recitation and my own preliminary review of the
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1 IRS'S Integrated Data Retrieval System¹ [IDRS] for returns and return information
2 submitted to the IRS by, or on behalf of, Gerard Marchelletta, Jr., I determined that
3 there was a basis for a criminal tax investigation of Mr. Marchelletta and I agreed,
4 again verbally, to AUSA Griffin's request. In January 2002, I was also verbally
5 advised by AUSA Griffin that I had been placed on the list of persons designated
6 as authorized recipients of grand jury information in accordance with Rule 6(e) of
7 the Federal Rules of Criminal Procedure. As noted above and in accordance with
8 IRM 9.5.2.3.1.3, *et seq.*, as the designee for the SAC, I reviewed and analyzed the
9 relevant financial data and other relevant data and used this information to
10 prepare a Form 9131 which was completed on July 18, 2002. This form
11 constitutes CI's formal request to participate in the grand jury and, after it was
12 finalized, reviewed and approved by SAC Martin, it was reviewed and approved by
13 IRS Office of Chief Counsel, Criminal Tax and sent to the Tax Division at the
14 Department of Justice [DOJ] in accordance with those procedures that are
15 referenced in IRM 9.5.2.3.3. Based on this request from the IRS, the Tax Division
16 of DOJ sent a letter dated October 23, 2002, to the Atlanta United States
17 Attorney's Office notifying the U.S. Attorney that DOJ had approved the request for
18 the expansion of the grand jury to include the participation of my office. A copy of
19 this letter was sent by DOJ to SAC Martin and constitutes the formal
20 acknowledgment that DOJ agreed to CI's participation in the investigation. (This
21 document is being released to plaintiffs in this litigation and a copy is attached as
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26 1 IDRS is a database and operating system which manages data that the IRS captures with respect to individual
27 taxpayers. This data includes information submitted by taxpayers in their individual returns as well as
28 information returns submitted by third parties with respect to individual taxpayers. The system allows certain
designated IRS employees to have visual access to such returns for purposes of researching account information.

1 Exhibit A to this Second Declaration). This formal process is by necessity one that
2 usually takes months to complete as, first enough information must be available to
3 the Special Agent to prepare the Form 9131, then once approval is obtained from
4 the SAC and Criminal Tax, the request is forwarded to the DOJ's Tax Division in
5 Washington, D.C. who has final authority with respect to the review and approval
6 the request and who then must notify the appropriate United States Attorney's
7 office of the approval. In the instant case, the issuance of the October 23rd letter is
8 DOJ's formal acknowledgment of and acquiescence to the decision that had been
9 made in January 2002 by DOJ and CI to have CI participate in the on-going grand
10 jury investigation.
11

12 5. With respect to certain of the grand jury documents which were described
13 in my first Declaration, I want to amend and clarify my earlier assertions as follows:

14 (a) Grand Jury Pages 00010-00163; described at paragraph 24(b) of my first
15 declaration. This is Form 9131, "Grand Jury Request" and its exhibits. In addition
16 to those assertions made in my first Declaration with respect to the bases for
17 withholding these documents, these documents are also being withheld pursuant
18 to FOIA Exemption 5 and the deliberative process privilege. This document
19 represents a recommendation from me to SAC Martin that CI participate in an on-
20 going non-tax grand jury investigation of plaintiff Marchelletta, Jr. It is merely
21 conveys opinions and recommendations for consideration by those who have final
22 decision making authority, *i.e.*, the SAC and Criminal Tax for the IRS and the Tax
23 Division for the Department of Justice. For these documents, we also continue to
24 assert FOIA Exemption 3 in conjunction with Rule 6(e) and 26 U.S.C. §
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1 6103(e)(7); Exemption 7A. We continue our assertion of FOIA Exemption 7C and
2 Exemption 6 for portions of these documents.

3 (b) Grand Jury Pages 00164-01602 and 01629-02698; described at
4 paragraph 24(c) of my first Declaration. For those documents within this group
5 that are exhibits to the Special Agent's Report and which are Memoranda of
6 Interviews (MOIs) and Memoranda of Contacts and/or Memoranda of
7 Conversations (MOCs), I want to amend my earlier assertions as to the bases of
8 withholding this material to exclude FOIA Exemption 3 and Rule 6(e) of the
9 Federal Rules of Criminal Procedure. Copies these MOIs and MOCs were
10 provided to plaintiffs in the criminal proceeding. Although those documents
11 provided to plaintiffs were not exact duplicates of these exhibits, in that they were
12 not stamped 'exhibits to the SAR,' since Rule 6(e) is intended to protect the inner
13 workings of the grand jury by protecting access to information that was gathered
14 for, presented to, or used in the grand jury, such confidentiality was lost when the
15 government provided the MOIs and MOCs to plaintiffs in the criminal proceeding.
16 With respect to the SAR itself, this document is being withheld pursuant to
17 Exemption 5 and the deliberative process privilege. In the grand jury setting, the
18 SAR is a document prepared by the IRS for use by the Attorney representing the
19 government. While the SAR may set forth the IRS's views as to the specific basis
20 for prosecution and the IRS may participate in deliberations, the ultimate decision
21 as to whether to seek indictment, what counts on which to seek indictment, etc.
22 are decided by the Department of Justice's Tax Division. The SAR is intended to
23 serve as a tool for these deliberations and, as such, it is being withheld pursuant to
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1 Exemption 5 and the deliberative process privilege. All other FOIA assertions
2 made with respect to these documents, including FOIA Exemption 3 in conjunction
3 with 26 U.S.C

4 § 6103(e)(7) and Exemption 7A, are re-asserted in this second Declaration.

5 Those portions of the documents which would reveal the identify of third parties
6 are being withheld pursuant to Exemption 7C and Exemption 6.

7
8 (c) Grand Jury Pages 01603-01605. This is a letter dated October 17, 2006,
9 from the Tax Division, Department of Justice to David E. Nahmias, United States
10 Attorney, Northern District of Georgia regarding expanding the grand jury to
11 include additional targets and recommendation to prosecute plaintiffs for tax
12 liabilities made by the IRS's Special Agent in Charge, with a copy to the SAC. In
13 addition to a discussion of expansion of targets of the grand jury, the letter sets
14 forth determinations as to litigation strategy pertaining to the prosecution of all
15 three defendants, and possible actions the United States Attorney could take in
16 the prosecution of the case. The discussions in this letter are based, in part, on
17 the SAR and its exhibits, which contain information that was received, gathered or
18 prepared by the Service. The letter is being withheld in full pursuant to Exemption
19 3 in conjunction with 26 U.S.C. § 6103(e)(7) and Exemption 7A. The information
20 contained in the letter is return information because it discusses information
21 received and gathered by the IRS in connection with potential criminal tax liability
22 charges against Marchelletta, Jr. Disclosing the letter would seriously impair
23 federal tax administration because: (a) the recent Court of Appeals decision on
24 plaintiffs' convictions resulted in a remand to the District Court for a possible re-
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1 trial, as well as some acquittals; (b) its disclosure would provide access to
2 evidence obtained with respect to defendant Marchelletta, Jr. and would reveal the
3 direction, scope, limits of the IRS's investigation, and potential trial strategy the
4 government may employ at any re-trial and/or re-sentencing. Further the Service
5 asserts Exemption 5 and the attorney work-product doctrine as a basis to withhold
6 this letter in its entirety. The letter is an inter-agency communication that primarily
7 discusses the Tax Division's thoughts and actions, including possible future
8 actions, regarding the criminal prosecution of Marchelletta, Sr., Marchelletta, Jr.
9 and a third individual and, as such, is subject to withholding under the attorney
10 work-product doctrine and FOIA Exemption 5. Certain portions of this letter are
11 being withheld under Exemption 5 and the deliberative process privilege. These
12 portions include an outline intended for use by the United States Attorney as he
13 considers possible future actions in the case. The letter sets forth certain actions
14 that are within the discretion of the United States Attorney as the case moves
15 forward and recommends certain actions that the United States Attorney may want
16 to consider as he deliberates how to proceed. These portions, reflecting the
17 deliberative process, are being withheld under Exemption 5.

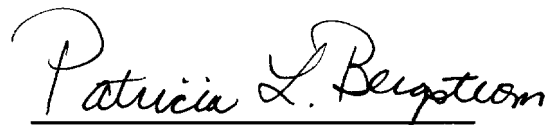
20 (d) Grand Jury Pages 01606-1628: in my first Declaration, I inadvertently
21 omitted to assert Exemptions 7C and 6 for certain pages within GJ 01606-1628.
22 These pages represent the memorandum dated August 11, 2006 from the
23 Service's Criminal Tax counsel to the SAC, bearing the subject "Evaluation of SAR
24 and Exhibits, Grand Jury Tax Case." The information being withheld consists of
25 the names and other identifying information of third parties. The Service asserts
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1 Exemptions 7C and 6 to withhold portions of pages GJ 01610-18, GJ 01620-22,
2 GJ 01625, GJ 01626. These Exemptions are asserted to protect the personal
3 privacy of these third parties because disclosure of the identity of these individuals
4 would invade their privacy and would not serve any public interest.

5 I declare under penalty of perjury that the foregoing is true and correct.

6 Executed on SEPTEMBER 1, 2010 in Atlanta, GA

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PATRICIA L. BERGSTROM
Special Agent
Criminal Investigation
Internal Revenue Service
Atlanta, Georgia



U.S. Department of Justice

Tax Division

EJO'C:TEZ:SHVrahoretis:imw
5-19-20396
2002201524

Washington, D.C. 20530
OCT 23 2002

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

William S. Duffey, Jr., Esquire
United States Attorney
Northern District of Georgia
Richard Russell Building
75 Spring Street, S.W.
Suite 600
Atlanta, Georgia 30303-3309

ATTN: AUSA Daniel P. Griffin

Re: Grand Jury Investigation
Marchelletta Investigation
Northern District of Georgia
5-19-20396
Concerning: Gerard C. Marchelletta, Jr.

Dear Mr. Duffey:

Reference is made to a letter dated September 12, 2002, from the Special Agent-in-Charge (SAC), Internal Revenue Service, Atlanta, Georgia, approving your request to expand an existing non-tax grand jury investigation to include an investigation of potential criminal tax violations in the above-entitled matter. In accordance with Tax Division Directive 86-59, the Tax Division has no objection to this expansion concerning the tax years 1999-2001.

Pursuant to established procedures, no tax or tax-related charges, including charges to which a target has agreed to enter into a plea agreement, may be filed without prior approval of the Tax Division. You are reminded that any expansion of this grand jury investigation, to include additional targets, requires Tax Division approval as well. If you determine that use of the statutory compulsion process pursuant to 18 U.S.C. § 6003(b) or a non-prosecution agreement with a witness ("letter immunity") are warranted, refer to the procedures set forth in U.S.A.M. § 9-23.000, et seq., and U.S.A.M. § 9-27.600, et seq., respectively.

Upon conclusion of the investigation, please provide the testimony, documents, and other materials accumulated by the grand jury to the assisting Internal Revenue Service agent for the sole purpose of

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EXHIBIT A

- 2 -

analyzing the potential criminal tax aspects of the case and preparing a report setting forth his or her recommendation regarding prosecution. This report will be reviewed by the appropriate Internal Revenue Service Counsel, who will make a written evaluation and recommendation to the Special Agent-in-Charge. The Special Agent-in-Charge will forward the reports and exhibits, along with his or her recommendation regarding prosecution to the Tax Division.

You must provide the Tax Division with a written report of your views regarding the prosecution potential of this case, the non-tax charges, if any, that you intend to bring, and the anticipated date of indictment. In addition, the case should be submitted to the Tax Division for review at least 60 days prior to the date on which you need a decision.

You have the authority to terminate this investigation, provided that prior written notification is given to both the Tax Division and the Internal Revenue Service. This notification should indicate that the matter is terminated pursuant to 26 U.S.C. § 7602(d). Please be reminded that your use of all tax returns and return information is governed by 26 U.S.C. § 6103(h). In the event that the tax aspects of the investigation are terminated, you must obtain a court order pursuant to Section 6103(i) in order to retain and use such returns and return information previously obtained under Section 6103(h).

In all future correspondence, please use the following caption:

Re: Grand Jury Investigation
Marchelletta Investigation
Northern District of Georgia
5-19-20396
Concerning:

Please list each target (individuals and entities) who is the subject of the correspondence.

A copy of the SAC's letter and its attachments is enclosed. You are reminded that Fed. R. Crim. P. 6(e)(3)(B) requires that you furnish the court with the names of all persons with access to grand jury material. Enclosed with the SAC's letter are the IRS Counsel's memorandum and IRS Form 9131 (Request for Grand Jury Investigation) which list all Internal Revenue Service personnel to whom such material has been disclosed.

Please advise all Internal Revenue Service personnel who assist you in this investigation, and who will have access to grand jury material, that such material is supplied to them on the following conditions:

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EXHIBIT A

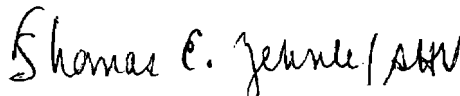
- 3 -

1. All grand jury material will remain under the custody of the grand jury, the United States Attorney, and the Tax Division;
2. Disclosure of grand jury material may be made only to Internal Revenue Service personnel who are assisting in the investigation and formulating a recommendation by the Service regarding prosecution, and such Internal Revenue Service personnel may only use the grand jury material for this purpose;
3. The Internal Revenue Service will furnish the Tax Division with advice and a recommendation, whether favorable or unfavorable, regarding the prosecution potential of this case;
4. The Internal Revenue Service will return all grand jury material to you when it is no longer needed for use in advising and assisting the Department of Justice in the investigation of this matter.

If you have any questions about this case or your authority under Directive 86-59, you may contact Trial Attorney Susan Vrahoretis at (202) 616-3868. Please acknowledge receipt of this letter and its enclosures.

Sincerely yours,

EILEEN J. O'CONNOR
Assistant Attorney General
Tax Division

By: 

THOMAS E. ZEHNLE
Chief, Southern Criminal
Enforcement Section

Enclosure
1 Volume

cc: Special Agent-in-Charge
Atlanta, Georgia

GJ00009

EXHIBIT A