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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,)	Case # 08CR1171-W
)	
Plaintiff)	1) Motion for Reconsideration
)	Selective / Vindictive Prosecution
v.)	
)	2) Motion for Change of Venue
DAVID C. JACQUOT,)	
)	Judge: Hon. Thomas J. Whelan
Defendant)	Courtroom: 7
)	Date: 30 March 2009
)	Time: 9:00 a.m.

1 Now comes the Defendant, David Jacquot (“Jacquot”) and respectfully requests the Court to
2 reconsider its ruling on the Motion for Selective/Vindictive Prosecution and to grant a change of
3 venue.

4
5 1. Trial courts have “*inherent authority*” to decide motions for reconsideration and
6 rehearing in criminal proceedings. See, e.g., United States v. Barragan-Mendoza, 174 F.3d 1024,
7 1028 (9th Cir.1999). The grounds justifying reconsideration usually involve a change of law, the
8 availability of new evidence, or the need to correct an error or prevent injustice. In this case
9 new legislation has been introduced in Congress; President Obama has taken actions and made
10 statements; and new evidence has come to light via discovery (and otherwise) that needs to be
11 considered to prevent injustice. This new evidence includes evidence that would place proper
12 venue for this matter in another Federal District.

1 2. The prosecution has broad discretion to bring criminal charges, however, this power is
2 not “*unfettered. Selectivity in the enforcement of criminal laws is ... subject to constitutional*
3 *constraints.*” United States v. Batchelder, 442 U.S.114, 125 (1979). The controlling Supreme
4 Court case, Wayte v. United States, 470 U.S. 598 (1985) sets forth a two prong test for Selective
5 Prosecution claims. The two prongs require that there be a showing of 1) discriminatory effect,
6 and 2) that such discriminatory effect was motivated by a discriminatory purpose. Id at 608.

7
8 **Prong 1 – Discriminatory Effect.**
9

10 3. In order for there to be discriminatory effect, Jacquot must show that “*others similarly*
11 *situated generally have not been prosecuted for conduct similar to petitioner’s.*” Id. Recent
12 events and legislation clearly show that there is class of persons in similar situations that are not
13 being prosecuted for conduct similar to the government’s allegations against Jacquot. For the
14 purpose of this motion, these persons will be referred to as “Political Insiders.” These Political
15 Insiders include (but are not limited to): ¹

- 16
17 • **Tim Geithner, Secretary of the Treasury.** The new Treasury Secretary Timothy
18 Geithner failed to pay self-employment taxes during the years he worked at the
19 International Monetary Fund. These years happen to be the exact same years for which
20 the Defendant was investigated, i.e., 2001-2004. Documents released by the Senate
21 Finance Committee strongly suggest that Geithner knew what he was doing when he did
22 not pay self-employment taxes in 2001, 2002, 2003, and 2004. First, each employee was
23 given the IMF Employee Tax Manual. Then, employees were given quarterly wage
24 statements for the specific purpose of calculating taxes. Next they were given year-end
25 wage statements. And finally, each IMF employee was required to file what was known
26 as an Annual Tax Allowance Request. Geithner received all these documents. At the

¹ The Defendant has obtained the information on the Political Insiders from various news sources. The Defendant requests that the government in its Opposition stipulate to the information in Paragraph 3 relating to the Political Insiders. If the government does not agree to stipulate, the Defendant requests that the government specifically describe the information it disputes in its Opposition, so that the Defendant can subpoena only those individuals necessary to testify at the hearing.

1 end of the tax allowance form were the words, “*I hereby certify that all the information*
2 *contained herein is true to the best of my knowledge and belief and that I will pay the*
3 *taxes for which I have received tax allowance payments from the Fund.*” Geithner signed
4 the form. He accepted the allowance payment, but he didn’t pay the tax. Geithner paid
5 his 2003 and 2004 obligations after an IRS audit. However, the statute of limitations had
6 run on 2001 and 2002 and therefore, even though he knew that tax was owed, he did not
7 pay until after he was nominated to be Secretary of the Treasury. Just prior to his
8 confirmation vote, Geithner paid over \$43,000 in back taxes. As Secretary of the
9 Treasury, Mr. Geithner will oversee the operations of the Treasury, including the IRS.
10 He was appointed to this position by President Obama because of his expertise, holding a
11 master’s degree in International Economics from Johns Hopkins. He has been a career
12 staff official at the Department of the Treasury since 1988. He was named the President
13 and CEO of the New York Federal Reserve in 2003. He was appointed by President
14 Obama to supervise the IRS even though the President knew at the time of the
15 appointment that he had the above described tax problems. Mr. Geithner was not indicted
16 for his tax problems.

17
18 • **Congressman Charles Rangel, Chairman of the House Ways and Means Committee.**

19 Congressman Charles Rangel is the Chairman of the House Ways and Means Committee.
20 The Ways and Means Committee is responsible for drafting virtually all the tax laws in
21 the United States. Mr. Rangel is a lawyer who has served on the Ways and Means
22 Committee for more than three decades. Mr. Rangel has received more than \$75,000 in
23 rental income from a villa he owns in the Dominican Republic since 1988. However, he
24 never reported it on his federal or state income tax returns. He bought the beachfront
25 villa at the Punta Cana Yacht Club and has received twice-yearly payments from the
26 resort, which rents the property on his behalf for \$500 or more per night. He also omitted
27 the profit from the sale of a condo in Florida, and the value of a parking space in a
28 congressional garage where he keeps his vintage Mercedes. Mr. Rangel did not pay
29 penalties or interest on the back taxes he owed. Mr. Rangel was not indicted for
30 underreporting his income and his other tax problems.

- 1 • **Tom Daschle, Former Senate Majority Leader.** Tom Daschle was elected to the U.S.
2 House of Representatives in 1978, where he served four terms. He was first elected to
3 the Senate in 1986 and was the Senate Majority leader from 2001 to 2003. In 2004 he lost
4 his seat and took a lucrative role as a consultant, earning over \$5,200,000 in the past two
5 years. In one position he was paid \$83,333 per month, however, he only reported 11 of
6 the 12 months of payments that he received. He also did not report income for a full-time
7 car and driver that he was given. Lastly, Mr. Daschle took improper charitable
8 deductions. President Obama nominated Mr. Daschle to be the Health and Human
9 Services (HHS) Secretary. Although he had known since June of 2008 that he needed to
10 file amended returns, he did not file amended returns for 2005, 2006, and 2007 until 2
11 January 2009, which was shortly before his confirmation hearings to become the
12 Secretary of HHS. Mr. Daschle paid more than \$140,167 in back taxes and interest with
13 his amended returns, but apparently no penalties have been imposed. He was nominated
14 by President Obama to the HHS position even though the President knew at the time of
15 the appointment that he had the above described tax problems. Due to his tax problems,
16 Mr. Daschle withdrew from the confirmation proceedings on 3 February 2009. Mr.
17 Daschle was not indicted for underreporting his income or for his other tax problems.
18
- 19 • **Nancy Killefer, Chief Performance Officer for the Obama Administration.** Ms.
20 Killefer resigned shortly after being appointed when it became known she failed to pay
21 employment taxes on household help. Ms. Killefer was not indicted for her tax problems.
22
- 23 • **Ron Kirk, Nominee to be the U.S. Trade Representative.** Former Dallas mayor Ron
24 Kirk, who is President Obama's nominee to be the U.S. Trade Representative, failed to
25 pay almost \$10,000 in taxes during the past three years. Kirk's tax problems were largely
26 based on his failure to pay taxes on honoraria that he earned from speaking. He also
27 deducted too much from his taxes for the purchase of season tickets to NBA Mavericks
28 games. And he incorrectly apportioned accounting fees between his partnership forms
29 and his personal income tax forms. Lastly, he had problems with charitable deductions,
30 including overstating the value of a television he donated, valuing it at \$3,000 instead of

1 \$1,500. Mr. Kirk was not indicted for underreporting his income or for his other tax
2 problems.

- 3
- 4 • **Numerous Other Political Insiders.** This disparate tax treatment is not a new
5 phenomenon. Several other examples occurred recently. President Clinton had his
6 nominee for Attorney General, **Zoe Baird**, withdraw her name for failure to pay
7 employment taxes on an illegal aliens she hired. Mr. Clinton's second choice for
8 Attorney General, **Kimba Wood**, a federal judge, also withdrew regarding tax issues
9 related to illegal alien workers. Mr. Clinton's nomination for Commerce Secretary, **Ron**
10 **Brown**, failed to pay employment taxes for his maid. President Clinton's nominee to the
11 Supreme Court, **Justice Stephen Breyer** also failed to pay social security taxes on an
12 employee, but was still confirmed as a Supreme Court Justice. The Clinton
13 administration Transportation Secretary, **Federico Pena** failed to pay employment taxes
14 for a babysitter. President Bush's nominee to be Labor Secretary, **Linda Chavez**,
15 withdrew for providing free room and board to illegal workers in her home and not
16 paying taxes on the same. **None of these individuals were prosecuted.**

17

18 4. In comparison, a summary the allegations against Jacquot are:

- 19
- 20 • Jacquot is an attorney. He has a general practice of law and provides estate planning,
21 corporate advice, real estate advice, criminal defense, and, importantly, represents tax
22 payers against the IRS. The government alleges that Jacquot's professional corporation
23 misstated the amount of gross income it received in several years. No audit was
24 performed by the IRS and neither Jacquot nor anyone at his law firm was ever contacted
25 by the IRS regarding this matter. Although the criminal investigators reviewed 2001 to
26 2004, charges were only brought on 2001 and 2002 since in these years income was
27 allegedly understated. In years 2003 and 2004, the government alleges the firm
28 overstated its income, with the net effect that over the 4 year period there was an
29 **overstatement of gross income by almost \$200,000.** Jacquot is a private citizen and has
30 never been elected to public office. He is a retired Army officer and decorated disabled
31 combat veteran. Prior to this indictment, Jacquot has never been charged or convicted of

1 any crime. Shown below is a table of the amounts alleged by the government and the
2 actual amounts shown on the tax return.
3

Year	Government's Calculation of Payments Net of Non-Taxable Reimbursements	Amount Shown on Return
2001	\$469,139	\$344,250
2002	\$876,205	\$744,578
2003	\$744,758	\$897,340
2004	\$116,878	\$418,975
Total	\$2,206,980	\$2,405,143

4
5 **Note: This is gross income before deductions and before payments to other lawyers and**
6 **consultants in the firm and does not represent compensation to Jacquot.**
7

8 5. Jacquot **is similarly situated** to the Political Insiders in that they both are alleged to have
9 made errors on their tax returns. But there **has been no similarity in treatment**. The Political
10 Insiders have been treated differently than Jacquot as follows:
11

12 1) The Political Insiders were audited. Jacquot was not.

13
14 2) The Political insiders were offered an opportunity to correct their alleged tax problems
15 by the IRS. Jacquot was not.

16
17 3) All the Political Insiders have been shown to actually owe taxes, where the
18 government's investigation of Jacquot reveals that over the 4 year period in question that
19 Jacquot declared too much income and thus **no tax is owed**.

20
21 4) In some cases, all penalties and interest were waived for the Political Insiders.

22
23 5) Most significantly, none of the Political Insiders were prosecuted. Jacquot is being
24 prosecuted. The following table summarizes the similarities and differences:
25
26

Issue	Political Insider	Jacquot
Alleged Error on Return or Undeclared Income	Yes	Yes
Audited	Yes	No
Penalties / Interest Waived	Yes	No
Given Opportunity to Correct	Yes	No
Investigation shows taxes actually owed	Yes	No
Indicted	No	Yes

6. Congress Speaks. This disparity of treatment of Political Insiders is so rampant and severe, that on 28 January 2009, HR 735, known as the “**Rangel Rule Act of 2009**,” was introduced in Congress. This Bill is designed to level the playing field for non-Political Insiders and provides that all penalties and interest for citizens shall be waived by the IRS. The Bill reads:

111th CONGRESS
1st Session
H. R. 735

To amend the Internal Revenue Code of 1986 to provide that penalties and interest will not be imposed on individuals who are citizens of the United States.

IN THE HOUSE OF REPRESENTATIVES
January 28, 2009

Mr. CARTER introduced the following bill; which was referred to the Committee on Ways and Means

A BILL

To amend the Internal Revenue Code of 1986 to provide that penalties and interest will not be imposed on individuals who are citizens of the United States. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

1 SECTION 1. SHORT TITLE.

2
3 This Act may be cited as the ‘Rangel Rule Act of 2009’.

4
5 SEC. 2. PENALTIES AND INTEREST NOT IMPOSED ON
6 INDIVIDUALS WHO ARE CITIZENS OF THE UNITED STATES.

7
8 In General- Chapter 77 of the Internal Revenue Code of 1986 is amended
9 by adding at the end the following new section:

10
11 ‘SEC. 7529. UNITED STATES CITIZENS EXEMPT FROM
12 PENALTIES AND INTEREST.

13
14 ‘Any individual who is a citizen of the United States and who writes
15 ‘Rangel Rule’ on the top of the first page of the return of tax imposed by
16 chapter 1 for any taxable year shall be exempt from any requirement to pay
17 interest, and from any penalty, addition to tax, or additional amount, with
18 respect to such return.’

19
20 (b) Clerical Amendment- The table of sections for such chapter is amended
21 by adding at the end the following new item:

22
23 ‘Sec. 7529. United states citizens exempt from penalties and interest.’

24
25 Obviously, introduced legislation is not law, however its introduction is illustrative of the fact
26 that Congress has recognized that there is a great disparity between Political Insiders and the rest
27 of the citizenry regarding the treatment of tax issues.

28
29 7. President Obama Speaks. In addition to Congress recognizing that there is a disparity
30 between Political Insiders and the rest of the citizens, President Obama has also recognized this
31 fact. In an interview with NBC news on 3 February 2009 regarding the failed nomination of Mr.
32 Daschle, President Obama stated that he “*screwed up*” when he nominated Mr. Daschle with

1 knowledge of his tax problems. President Obama then stressed the importance of his
2 administration sending a message that “*there aren’t two sets of rules—you know, one for*
3 *prominent people and one for ordinary folks who have to pay their taxes.*” Thus it is clearly the
4 intent of President Obama and the present administration that Jacquot shall not be treated
5 differently than the Political Insiders.

6
7 8. Justice Department Policy Violated. It is the policy of the Department of Justice to try
8 criminal tax cases that provide a strong deterrent effect and thereby enhance voluntary
9 compliance of the masses:

10
11 **DOJ Criminal Tax Manual Section 43.11 – TAX DIVISION POLICY.**

12 “It has long been a priority of the Tax Division to pursue vigorous prosecution of a wide
13 range of tax crimes **to deter taxpayer fraud and to foster voluntary compliance.**
14 Consistent with this long-standing priority, the Tax Division has issued a number of
15 statements concerning policy and procedures as to pleas and sentencing.” (*Emphasis*
16 *added.*)

17
18 Consistent with this policy, high profile individuals are prosecuted because of the publicity that
19 such cases receive and the perceived deterrent effect that such cases will have on the general
20 population. Such cases include Willy Nelson, Leona Helmsley, and, most recently, actor Wesley
21 Snipes. The government touts the high value of deterrent effect in such cases in its Sentencing
22 Memorandum of Mr. Snipes (*U.S. v. Snipes*, Case # 5:06-cr-22(S1)-Oc-10GRJ, U.S. District
23 Court, Middle District of Florida, Ocala Division) which states:

24
25 “The parking lot next to the courthouse was filled with television satellite trucks, while a
26 gallery of reporters was present each day in the courtroom itself... **This case accordingly**
27 **presents the Court with a momentous opportunity to instantaneously increase tax**
28 **compliance on a national scale.**

29 ...

30 “The United States submits that the public good would be best served by the imposition
31 of a substantial prison sentence, as such **a sentence could instantaneously improve tax**
32 **compliance on a national scale.**” (*Emphasis added.*)

1
2 This same sentencing memorandum also quotes United States v. Catlett, 584 F.2d 864, 868
3 (8th Cir. 1978) which states:

4
5 “Since the government lacks the means to investigate and prosecute every suspected
6 violation of the tax laws, it makes good sense to prosecute those who will receive, or are
7 likely to receive, the attention of the media.”
8

9 Clearly it is the written policy and the practice of the Department of Justice to seek high profile
10 cases for prosecution. **Inconsistent with this policy is the lack of prosecution of Political**
11 **Insiders**. The prosecution of Political Insiders would result in the exact widespread media
12 coverage the government desires. The lack of prosecution of Political Insiders is fundamentally
13 inconsistent with the deterrent objectives stated by the Department of Justice in its policy manual
14 and in its pleadings. This inconsistency is further evidence that a class of similarly situated
15 individuals receives special treatment that is not afforded to ordinary citizens such as Jacquot.
16

17 9. **Conclusion – Prong 1 – Discriminatory Effect**. Political Insiders are receiving special
18 treatment not afforded ordinary citizens. Congress and President Obama have recognized this
19 disparate treatment between Political Insiders and ordinary citizens like Jacquot. The Justice
20 Department is violating its own policy and long standing practice of seeking high profile cases
21 for deterrent effect by not prosecuting the Political Insiders. The foregoing clearly shows that
22 “*others similarly situated generally have not been prosecuted for conduct similar to*” that alleged
23 against Jacquot. Wayte at 608. Therefore, the Defendant argues that he has met the burden of
24 establishing Prong 1 of the test for Selective Prosecution.
25

26 **Prong 2 – Discriminatory Purpose.**
27

28 10. The discriminatory purpose prong requires Jacquot to show that the decision to prosecute
29 was “*deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary*
30 *classification including the exercise of protected statutory and constitutional rights.*” Wayte at
31 608. Citing Bordenkircher v. Hayes, 442 U. S. 434,364; Oyler v. Boles, 368 U. S. 448, 456

1 (1962); and United States v. Goodwin, 457 U. S. 368,372. Jacquot contends that the decision to
2 prosecute is for a discriminatory purpose for two reasons: 1) arbitrary classification, and 2)
3 retaliation for exercise of constitutional and statutory rights.
4

5 11. Arbitrary Classification. Jacquot is being arbitrarily classified by the government.
6 Contrary to the very fundamentals of our nation, the government has created two classes relating
7 to tax problems, 1) the ruling elite and 2) ordinary citizens. Although this type of discrimination
8 may not be as obvious as racial profiling, it is far more dangerous and damaging. This insidious
9 form of discrimination undermines the foundations of our Constitution and the reasons that this
10 country was formed. Nowhere in the Constitution can you find support for preferential treatment
11 of a ruling elite class of citizens. In fact, the Constitution and other the founding documents are
12 packed with provisions that declare just the opposite, that all citizens are created equal and **all**
13 **are entitled to equal treatment under the law.**
14

15 As described above, Congress has introduced legislation that recognizes the disparity between
16 the ruling elite and ordinary citizens. President Obama has publically stated that there should not
17 be different treatment for the ruling elite and ordinary citizens. Jacquot urges this Court to
18 recognize the same. This Court should find that there are two classes of citizens when it comes
19 to government's treatment of tax problems. This Court should find that the two classes are
20 Political Insiders and the ordinary citizens (which includes Jacquot), and further find that such
21 classification is arbitrary and contrary to the rule of law in this country.
22

23 12. Exercise of Constitutional and Statutory Rights. The prosecution against Jacquot was
24 initiated for the discriminatory purpose of retaliating against him for his zealous representation
25 of his clients, and as a result of the embarrassing defeat the government (including prosecutor
26 AUSA Faith Devine) suffered in the prior TRO and civil action against Jacquot.
27

28 The standard to establish discriminatory purpose in retaliation for the exercise of constitutional
29 rights is an **objective standard**. There is no requirement to produce any evidence of bad faith to
30 establish the element of discriminatory purpose. Blackledge v. Perry, 417 U.S. 21 (1974). The
31 reason that the Supreme Court held that **no** proof of bad faith is required is that "*fear of*

1 *vindictiveness may unconstitutionally deter the exercise*” of these constitutional, statutory or
2 procedural rights. Id. To prevent such chilling effect, **there must only be a showing that the**
3 **prosecution was initiated in response to the exercise of constitutional, statutory or**
4 **procedural rights**. Jacquot’s exercise of his 1st and 5th Amendment rights, combined with the
5 zealous exercise of constitutional, statutory and procedural rights and legal defense of his clients’
6 interests are the reason that the government initiated this prosecution, and such vindictive
7 behavior meets this objective standard.

8
9 13. **Burden of Proof**. Since the Defendant is alleging retaliatory prosecution for the exercise
10 of his and his clients’ rights, the law relating to prosecutorial vindictiveness is applicable to
11 establishing the burden of proof. A showing by the Defendant of vindictive behavior by a
12 prosecutor gives rise to a rebuttable presumption of vindictiveness and the burden of proof shifts
13 to the government to have to disprove that the prosecution was initiated for a vindictive purpose.
14 U.S. v. Goodwin, 457 U.S. 368, 373 (1982). All that is required in the 9th Circuit is a “*mere*
15 *appearance of vindictiveness*” to raise the rebuttable presumption of vindictiveness. United
16 States v. Rusega-Martinez, 534 F.2d 1367 (9th Cir. 1976); See also, United States v. Burt, 619
17 F.2d 831 (9th Cir. 1980); United States v. Griffin, 617 F.2d 1342. As detailed below, the acts of
18 government’s agents, and particularly AUSA Faith Devine, establish the “*appearance of*
19 *vindictiveness*” Ruesga-Martinez at 1369 therefore the Defendant argues that the burden of proof
20 is on the government to disprove the allegations.

21
22 14. **Case History Showing Vindictive Behavior**. Much of the applicable case history has
23 already been presented to the Court. To present the full picture of vindictive behavior, it is
24 necessary to cover this case history. The Defendant apologizes to the Court for the duplication
25 that has occurred, but feels it is easier to describe the allegations rather than make numerous
26 cross references to other filed documents.

27
28 15. Jacquot and the other lawyers in his firm represented the xelan family of companies.
29 Beginning around 2000, xelan came under investigation by the IRS. Throughout the
30 investigation into xelan, the government decried the legitimate strategy and legal tactics Jacquot
31 employed to defend xelan and its clients. This case does not result from a legitimate exercise of

1 prosecutorial discretion, but from a bad-faith desire to punish the one person the government
2 most blames for its humiliating defeat in the xelan case and to chill and deter zealous
3 representation by making an example of Jacquot. During the summer of 2004, Jacquot was
4 interviewed by two IRS criminal investigators at his home in Idaho. The agents asked many
5 questions about his representation of xelan, but **asked no questions regarding Jacquot’s taxes**
6 **or the law firm’s tax returns.**

7
8 In late 2004, government attorneys, including the prosecutor in this case, AUSA Faith Devine,
9 filed an ex parte action against Jacquot, his clients, and others in the Southern District of
10 California, designated Case No. 04CV2184-W. The government seized all the defendants’ assets
11 and their passports. The case was unsealed and at the very first hearing on the matter before
12 Judge Larry Burns, the government suffered a humiliating defeat. The Court dismissed the TRO
13 and denied the government’s application for a Preliminary Injunction and returned to all the
14 defendants their assets and passports. Several days later the Court issued a written opinion
15 harshly criticizing the government. That opinion included findings that:

- 16 • the government’s allegations of a “ponzi scheme” are “**without merit,**”
- 17 • “**no evidence**” that the defendants are dissipating their assets,
- 18 • “**no evidence**” that assets are traceable to criminal activity,
- 19 • “**the government conceded**” that it can produce “**no evidence**” that the
20 xelan program violated internal revenue statutes or regulations,
- 21 • the government’s evidence that the xelan programs were not legitimate
22 was “**speculative,**” and
- 23 • the government did **not** show that “**the tax implications of any**
24 **particular xelan product were mischaracterized.**”
25

26
27 The Court also ordered the government to pay hundreds of thousands of dollars in attorney fees
28 to the defendants in the case and the government voluntarily dismissed their case. (The **Exhibit**
29 **to Document 47** contains Judge Burn’s final order). It is important to note that **nowhere in the**
30 **complaint or in the ex parte TRO/receivership application or the supporting declarations is**
31 **there a single mention of any problem or issues with individual tax returns for Jacquot,**

1 **Jacquot's law firm or any other person.**

2
3 Shortly after the government dismissed its case, and even though the government's claims were
4 unsupported by the declarations that AUSA Faith Devine presented to the Court, Ms. Devine
5 indicated to Jacquot's attorney, Jim Frush, that she was going to continue to pursue criminal
6 charges on the same allegations that Judge Burns just dismissed. The standard for criminal
7 charges is much higher than for a TRO and **this action alone by AUSA Devine should raise a**
8 **presumption of vindictiveness.**

9
10 In January 2005, just several weeks after the allegations in the TRO/receivership and supporting
11 declarations were shown to be false, one of the major false affiants in the case, Postal Inspector
12 Timothy France sent out a letter to virtually all xelan clients informing them that they were
13 victims of violations of federal criminal laws and soliciting them to provide information. Not
14 only does this letter imply violations of federal criminal law without a trial, it is packed with
15 leading questions and factual inaccuracies. A copy of this letter can be found in **Document 29,**
16 **Exhibit 2.** Apparently no "victims" stepped forward as **no charges were ever brought relating**
17 **to any of the laws described as broken in this letter.**

18
19 Ultimately, the various xelan programs entered into settlement agreements with the IRS
20 upholding the deductibility of the programs. In other words, no fraud was found and the
21 deductions were allowed to stand.

22
23 **Only after all these embarrassing defeats** did the government seek to attack Jacquot's law
24 firm's tax returns. Around mid-2006, AUSA Faith Devine stated to Jacquot's attorney, Jim
25 Frush, that she was no longer focusing on alleged xelan fraud and stated that she believes that the
26 law firm did not file a corporate tax return in 2004, and that the amounts on 2001 through 2003
27 corporate tax returns were wrong. **This is the first time that alleged errors on law firm**
28 **corporate tax returns were raised.** AUSA Faith Devine later told Jim Frush that they found
29 the 2004 return that they previously stated had not been filed. The numbers the government
30 alleges that should be on the returns have changed numerous times. Ultimately, the government
31 alleges numbers shown in the table on Page 6, above.

1 More details regarding the case history can be found in the Statement of Facts and Supporting
2 Declaration (see Documents 28, 29, 32). Such case history in the Statement of Facts is
3 incorporated by reference herein as if set forth in full.
4

5 16. Intentional Failure to Present Exculpatory Evidence to the Grand Jury. In addition to the
6 fact that the tax returns only became a problem after a string of humiliating losses, more
7 evidence that this is a retaliatory prosecution is the fact that **the government never audited the**
8 **returns of the law firm or contacted the individual(s) responsible for record keeping.** If it
9 were not for the long battle with xelan, the government would not have initiated a prosecution
10 without audit or review of the tax returns, or interviews with those responsible for record
11 keeping. When the government did initiate its investigation, it only presented part of the story to
12 the Grand Jury. The Department of Justice Policy Manual states that a prosecutor **must** provide
13 known exculpatory evidence to the Grand Jury:
14

15 **9-11.233 Presentation of Exculpatory Evidence.**

16 **It is the policy of the Department of Justice, however, that when a prosecutor**
17 **conducting a grand jury inquiry is personally aware of substantial evidence that**
18 **directly negates the guilt of a subject of the investigation, the prosecutor must**
19 **present or otherwise disclose such evidence to the grand jury before seeking an**
20 **indictment against such a person.** While a failure to follow the Department's policy
21 should not result in dismissal of an indictment, appellate courts may refer violations of
22 the policy to the Office of Professional Responsibility for review. (*Emphasis added.*)
23

24 Although the government has refused to provide copies of the Grand Jury transcript, it is
25 apparent from the information received in discovery that the government did not present
26 evidence of tax years 2003 and 2004 to the Grand Jury. In the government's Opposition to
27 Jacquot's Motion to Suppress, AUSA Devine submitted a proffer of the government's intended
28 case. In that proffer she claims that Cheryl Bartley will produce the evidence regarding law
29 firm payments from xelan, stating:
30

31 "The government will call former xelan controller Cheryl Bartley. She will testify that
32 Defendant had a contractual relationship with xelan and was paid for legal services. Ms.
33 Bartley will introduce into evidence"
34

1 The government only recently provided discovery that contains a copy of the Declaration of
2 Cheryl Bartley that was submitted to the Grand Jury. (See Exhibit 1, filed herewith.) This
3 declaration **does not** contain information for 2003 and 2004. AUSA Devine clearly knew of this
4 exculpatory information, because she had previously met and discussed it with Jacquot's counsel
5 Jim Frush on 11 July 2006. Yet **despite the mandatory Justice Department policy, she did**
6 **not present it to the Grand Jury.**

7
8 The 2003 and 2004 returns are clearly admissible evidence. Tax returns surrounding the tax year
9 in question are admissible in tax cases, **even when such years are not part of the investigation.**
10 However here, 2003 and 2004 **were** part of the investigation. The courts have routinely held that
11 returns containing similar acts (in this case misstatement of gross income) in prior and
12 subsequent years are admissible. See United States v. Middleton, 246 F.3d 825, 836-837 (6th
13 Cir. 2001); Matthews v. United States, 407 F.2d 1371, 1381 (5th Cir. 1969); United States v.
14 Johnson, 386 F.2d 630, 631 (3d Cir. 1967); United States v. Magnus, 365 F.2d 1007, 1009-10
15 (2d Cir. 1966); United States v. Alker, 260 F.2d 135, 139, 149 (3d Cir. 1958). If the
16 government's investigation is correct, the 2003 and 2004 returns are relevant and exculpatory as
17 to the elements of willfulness and intent. The overstatement of gross income in 2003 and 2004
18 defeats the government's contention that the law firm was deliberately understating its income to
19 cheat on its taxes. Admission of such returns on the element of intent has also been routinely
20 allowed by the Courts. See Hoyer v. U.S. 223 F.2d 134 (8th Cir 1955); Leeby v. United States,
21 192 F.2d 331 (8th Cir 1951); Lisansky v. United States, 31 F.2d 846 (4th Cir 1929).

22 It is important to note AUSA Devine has argued, and will likely argue to this Court, that the
23 numbers for 2003 and 2004 were artificially inflated to make up for the shortfalls in 2001 and
24 2002. These arguments clearly can not stand because:

- 25
26 • Jacquot was not aware of the review of the DJPA returns and the allegations of problems
27 with the 2001 and 2002 returns until around mid-2006 when AUSA Devine first raised
28 the issue with Jacquot's counsel, Jim Frush. The point in time when this issue was raised
29 (mid-2006) was well after the 2003 and 2004 returns were filed.

- Jacquot's name was on the xelan Foundation Donor List stolen by IRS Agent John Wong and which was the basis for audits occurring all over the U.S. as described in the Statement of Facts (Document 28, Paragraph 5 to 7). Because Jacquot, as counsel for xelan, was aware the IRS was using the Donor List to initiate audits of the donors to the Foundation, coupled with the fact that Jacquot's zealous representation of his clients was angering the IRS, Jacquot fully expected to be audited when the 2001 to 2004 returns were filed.
- Even though the government's position for 2003 and 2004 indicates a substantial overstatement of income, for which a refund could be sought, Jacquot and DJPA did not seek such refund.

AUSA Devine had a mandatory obligation to provide the 2003 and 2004 returns and payments as exculpatory information to the Grand Jury and did not do so. Only by excluding the findings for 2003 and 2004 was AUSA Devine able to improperly contort the system to allow her to obtain indictments for 2001 and 2002.

In addition to being exculpatory and damaging to the government's allegations, the tax returns from 2003 and 2004 were executed in Idaho. With tax years 2001 and 2002 allegedly in California and tax years 2003 and 2004 in Idaho, the case would have been more appropriate in Idaho where Jacquot resides. **Using the government's theory, 2003 and 2004 are equally as false as the 2001 and 2002 returns.** Introduction of this evidence and indictment for all 4 years of alleged false returns would have stripped AUSA Devine's ability to file her retaliatory indictment and attempt to obtain the vengeance she seeks. Due process can be vindictively violated in regards to the exercise of venue rights. See United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir.), cert. denied, 434 U.S. 827 (1977). Only by excluding the findings for 2003 and 2004 was AUSA Devine able to improperly contort the system to allow her to retain venue.

The violation of venue is not harmless. This case may have never been indicted if a non-vindictive AUSA in Idaho was involved. An objective review by a non-vindictive AUSA may have resulted in the case never being presented to a Grand Jury, or presented fairly to a Grand

1 Jury that did not indict. Additionally, being hailed into Court in San Diego has imposed
2 significant hardship in both time and money to Jacquot. Attendance at each hearing in the matter
3 means that Jacquot must miss 2 to 4 days of work, and each trip costs \$500 to \$1000.
4

5 17. Adverse Publicity. Publicity is also a telling factor in the government's motivations.
6 When the TRO/Receivership and raid occurred, the government launched a massive publicity
7 campaign and the story was carried in local and national newspapers, television shows, and
8 internet sites. This publicity even included a prepared statement by the IRS Commissioner Mark
9 W. Everson who said "*This is one of the biggest cases we have seen in years...*" Obviously the
10 agents involved and AUSA Faith Devine must have really sold the xelan case to their superiors
11 as a huge deal if the IRS Commissioner himself had a prepared statement waiting to be released
12 in conjunction with the raid. After it was disclosed that the declaration was full of lies and the
13 case was thrown out by Judge Burns, AUSA Devine and the agents involved were publically
14 humiliated and, Jacquot alleges, that AUSA Devine sought payback by indicting Jacquot. AUSA
15 Devine and the agents involved had their personal reputations tarnished and are attempting to
16 salvage their careers from their unwarranted, expensive and fruitless investigation by bringing
17 this meritless case.
18

19 Another instance where publicity speaks volumes about motive to retaliate is the timing of the
20 indictment and associated press releases. On April 15, 2008, which just happens to be the date
21 each year when the media is most attune to tax issues, AUSA Devine secured the indictment in
22 this case. Coordinated with this indictment is a press release that is issued on the same day that
23 "*David Jacquot, a tax attorney*" is indicted for "*filing false tax returns.*"
24

25 18. Failure to Follow DOJ Guidelines re: Adequate Non-Criminal Action. The tax code
26 provides many methods of dealing with errors on tax returns, with prosecution occurring only on
27 the most egregious of cases. In fact in the latest year for which statistics are fully available,
28 2005, (IRS Website FY2005) there were **226,676,936** tax returns filed. Out of these hundreds of
29 millions of returns, only **731 cases** were indicted for crimes not related to narcotics trafficking or
30 other illegal sources of income. This means that only **0.00000322%** of returns were criminally
31 indicted as being the worst of the worst. The case at bar should clearly not be among these.

1 Specifically, if the facts are as the government alleges, under the tax code, the numbers for 2002,
2 2003 and 2004 **do not even qualify** as a substantial understatement of income that would
3 warrant an extension of the civil audit statute of limitations from 3 years to 6 years, let alone
4 constitute a criminal violation. Moreover, based on the government's own investigation of the
5 four years at issue, Jacquot actually declared too much income. Based on these factors, this case
6 is not one of the "worst of the worst" and the government should have followed its own
7 Department of Justice Policy Manual which states:

8
9 **9-27.220 Grounds for Commencing or Declining Prosecution**

10 The attorney for the government should commence or recommend Federal prosecution if
11 he/she believes that the person's conduct constitutes a Federal offense and that the admissible
12 evidence will probably be sufficient to obtain and sustain a conviction, unless, in his/her
13 judgment, prosecution should be declined because:

- 14
15 1. No substantial Federal interest would be served by prosecution;
16 2. The person is subject to effective prosecution in another jurisdiction; or
17 3. **There exists an adequate non-criminal alternative to prosecution.** (*emphasis added*)

18
19 In Jacquot's case there is a more than adequate method to deal with this matter other than
20 criminal prosecution. The IRS could have initiated an audit of the years in question. If the audit
21 findings were the same as alleged by AUSA Devine, the IRS could have assessed additional tax
22 for 2001 and 2002 and added **penalties and interest** and these amounts would have been offset
23 by the overpayments in 2003 and 2004. The ultimate outcome would be that the government
24 would have received all the tax it was owed, plus penalties and interest, the law firm would
25 receive a tax refund, and the audit would have been closed. Instead, AUSA Devine has pursued
26 a course of expensive investigation and prosecution, seeking incarceration of Jacquot (at
27 government expense) and destroying Jacquot's reputation while so doing. This abuse of
28 prosecutorial power must not be allowed to stand.
29

1 19. Additional Improper Behavior by the Government. Although occurring after the decision
2 to indict, there have been several instances of behavior by AUSA Faith Devine that shed even
3 more light on her retaliatory motives and behavior.
4

5 19.1. It appears that when AUSA Devine is embarrassed, she reacts with retaliatory
6 behavior. For example, when it came to the attention of AUSA Devine that a potential
7 conflict of interest may exist between Jacquot and his lawyer, Mr. Jenkins she requested
8 that Jacquot read a Memorandum and acknowledge and waive any conflicts that might
9 exist. Jacquot had his lawyer inquire into what AUSA Devine was going to do with the
10 waiver, and she replied in an email:
11

12 “We have no intention to take any action regarding the Memorandum or your
13 clients acknowledgement that he has reviewed it and waives any conflicts. The
14 waiver is simply for our files in the event that your client raises at a later date that
15 his Sixth Amendment right to counsel was violated due to a conflict of which he
16 was not aware but which was known to the government.”
17

18 Mr. Jenkins notified AUSA Devine that the waiver would be forthcoming. However, on
19 January 16, 2009, just one (1) day after Mr. Jenkins embarrassed AUSA Devine by
20 pointing out in his Reply Brief that she was misleading the Court by arguing a legal
21 theory with supporting cases that had been abolished by the Supreme Court fifteen (15)
22 years ago, she retaliated. Rather than simply send an email and stating that she had not
23 received the waiver, she filed the Memorandum with the Court in a clear effort to
24 retaliate and embarrass or discredit Mr. Jenkins in the with the Judge.
25

26 19.2. AUSA Devine has submitted false evidence to the Court in her continuing
27 retaliation against Jacquot. The search warrant that the government obtained used
28 affidavits that are virtually identical to the TRO declarations that Judge Burns found to
29 be false. When Jacquot challenged the legitimacy of the search, based on these proven
30 false affidavits and improper use of attorney-client privileged materials, **AUSA Devine**
31 **knowingly submitted another false declaration to the Court.** When the falsity of the

1 declaration was pointed out, AUSA Devine had a legal duty to correct the error, which
2 she did not do. See Jacquot’s Motion for Sanction and Reply Brief (**Documents 48, 50,**
3 **52)** for more details on this unconscionable behavior.
4

5 20. Conclusion Prong 2 – Discriminatory Purpose. Jacquot has established two separate and
6 adequate grounds to find discriminatory effect. First, an arbitrary and unjustifiable classification
7 has occurred that puts Jacquot in a different class than the ruling elite. Second, Jacquot has been
8 vindictively attacked for the exercise of his Constitutional rights and zealous representation of
9 the Constitutional and statutory rights of his clients. Either or both of these grounds are
10 sufficient to meet the second prong of the test for Selective Prosecution, that the decision to
11 prosecute was “*deliberately based upon an unjustifiable standard such as race, religion, or*
12 *other arbitrary classification including the exercise of protected statutory and constitutional*
13 *rights.*” Wayte at 608.
14

15 21. Summation – Selective Prosecution Claim. Jacquot has shown that the initiation of
16 charges was for a discriminatory purpose and had a discriminatory effect. Although similarly
17 situated, Jacquot has been treated markedly differently than the Political Insiders and the reason
18 for such disparate treatment is the arbitrary classification of Jacquot as a not being a member of
19 the ruling elite and/or retaliation by the government for Jacquot’s zealous representation of his
20 client’s rights which resulted in humiliating losses to the government. Since the elements of a
21 Selective Prosecution claim are met, the Court should therefore dismiss the indictment with
22 prejudice.
23

1 **Vindictive Prosecution**

2
3 22. Vindictive behavior of a prosecutor is grounds for dismissal. See U.S. v. Goodwin, 457
4 U.S. 368 (1982). Vindictive behavior in this case is one of two grounds alleged to satisfy the 2nd
5 prong of the Selective Prosecution test. It is also a separate basis for dismissal of the case. The
6 Defendant alleges that the behavior described in Paragraphs 15 to 19, above, constitute improper
7 vindictive acts and incorporates them by reference into his claim of Vindictive Prosecution.
8

9 23. It is established law that actual proof of vindictiveness will result in reversal. *“To punish*
10 *a person because he has done what the law plainly allows him to do is a due process violation*
11 *‘of the most basic sort.’”* Id at 372 quoting Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978).
12 However, the Courts have held that upon a showing of vindictive circumstances, a presumption
13 sufficient for dismissal arises which the government may *“overcome only by objective*
14 *information in the record.”* Goodwin at 374. The 9th Circuit law is that all that is required to
15 raise this presumption and obtain a dismissal is a *“mere appearance of vindictiveness”* See
16 United States v. Rusega-Martinez, 534 F.2d 1367 (9th Cir. 1976); See also, United States v. Burt,
17 619 F.2d 831 (9th Cir. 1980); United States v. Griffin, 617 F.2d 1342.
18

19 24. The facts provided in Paragraphs 15 to 19, above, easily meet the test of a *“mere*
20 *appearance of vindictiveness.”* Therefore, unless the government meets its burden to refute these
21 facts with objective evidence, and further shows by objective evidence a basis justifying its
22 action, the Defendant is entitled to have the indictment dismissed with prejudice.
23
24

1 **Change of Venue**

2
3 25. As described in Paragraph 16, above, the intentional exclusion of exculpatory evidence
4 from the Grand Jury by AUSA Devine is the reason that this case is in the Southern District of
5 California and not in Idaho. Additionally, venue in the Southern District of California is
6 contrary to Department of Justice Policy regarding venue of tax cases:

7
8 “6.01[2] **Policy Considerations.** It is the policy of the Department of Justice generally to
9 attempt to establish venue for a criminal tax prosecution **in the judicial district of the**
10 **taxpayer’s residence or principal place of business**, because prosecution in that
11 judicial district usually has the most significant deterrent effect.”

12
13 At the time the indictment was sought, both Jacquot’s residence and principal place of business
14 were in Idaho and the government was well aware of that based on the 2003 and 2004 tax returns
15 and visit by IRS CID agents to Jacquot’s Idaho residence in the summer of 2004.

16
17 26. Federal Rules of Criminal Procedure Rule 21(b) states:

18
19 “Upon the defendant’s motion, the court may transfer the proceeding, or one or more counts, against
20 that defendant to another district for the convenience of the parties and witnesses and in the interest of
21 justice.”

22
23 The purpose of Rule 21(b) is to **secure a fair trial to the defendant when circumstances in the**
24 **district where the action is brought would place an undue risk of unfairness** upon the
25 defendant if tried within that district. Sheppard v. Maxwell, 384 U.S. 333 (1965); Jones v. Gasch,
26 404 F.2d 1231; United States v. Marcello, 280 F. Supp. 510; United States v. Hinton, 268 F.
27 Supp. 728.

28
29 Based on the fact that venue was only obtained via the improper and intentional exclusion of
30 exculpatory Grand Jury evidence by the government; the vindictive actions of the government in
31 this case as described herein; and the fact that the AUSA that has committed the bulk of the

1 improper acts, AUSA Devine, is still handling this matter, the Defendant argues that he meets the
2 purpose of Rule 21(b). Specifically, the District where this action has been brought poses an
3 undue risk of unfairness and transfer to the District of Idaho would allow the Defendant to secure
4 a fair trial.

5
6
7 **PRAYER FOR RELIEF**

8
9 The Defendant urges the Court to:

- 10
11 • Dismiss the indictment with prejudice for Selective Prosecution.
12 • Dismiss the indictment with prejudice for Vindictive Prosecution.
13 • Order the case to be transferred to the Federal District Court of Idaho
14 • Impose other such relief that the Court feels is appropriate.

15
16 Respectfully Submitted,

17
18
19 /s/ David Jacquot

20 David Jacquot

21 Defendant
22
23
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27
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29