UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA,	)	**CRIMINAL ACTION NO.**
	)	
Plaintiff,	)	**4:12-cr-00087-RAS-DDB**
	)	
v.	)	
	)	
XXXX XXXX, XXXX,	)	
	)	
Defendant.	)	
	)	

TRIAL BRIEF

Defendant, XXXX XXXX, hereby files this Trial Brief in anticipation of issues that might arise at trial in the above referenced case.

I COUNTS 2-3 VIOLATIONS OF 18 U.S.C. § 1006

Counts 2-3 charge a violation of 18 U.S.C. § 1006. Essentially, the government must prove (1) Mr. XXXX was "connected" in some "capacity" with the Department of Housing and Urban Development (HUD); (2) Mr. XXXX knowingly and wilfully made a "false entry" into a "book, report or statement" submitted to HUD; (3) The "false entry" was material; and (4) He did so with the intent to deceive HUD. *United States v. Pettigrew*, 77 F.3d 1500, 1510-11 (5th Cir. 1996). Most case law regarding § 1006 relate to false bank document entries into bank records by bank insiders. Nevertheless, principles can be drawn from two Fifth Circuit cases dealing with analogous statutes.

First is *United States v. Hoover* 467 F.3d 496 (5th Cir. 2006). *Hoover* dealt with false statements to the government in violation of 18 U.S.C. § 1001. It held that "when the government chooses to specifically charge the manner in which the defendant's statement is false, the government should be required to prove that it is untruthful for that reason." *Id*. at 502.

Second is *Bins v. United States*, 331 F.2d 390 (5th Cir. 1964). *Bins* dealt with violations of 18 U.S.C. § 1010. Similar to the § 1006 charges in the instant case, § 1010 makes it a crime to commit fraud in connection with Department of Housing and Urban Development or Federal Housing Administration transactions. The Fifth Circuit held that each separate document submitted to HUD constitutes a separate offense. There, Bins was charged in two counts. *Id*. at 392-93. Count 1 charged him with submitting a false Verification of Employment, Supplement to Mortgagee's Application and Mortgagor's Statement in December 1960 and Count 2 charged him with submitting a false Verification of Employment, Supplement to Mortgagee's Application and Mortgagor's Statement in June-July 1960. *Id*. The Fifth Circuit concluded:

> The filing of each false document would constitute a crime, and each should be alleged in a separate and distinct count of the indictment.

Id. at 393.

Count 2 in the instant case alleges that the false statement was a statement during closing that the buyer provided "the down payment." It does not allege in which "book, report or statement" submitted to HUD this alleged false statement was made. Consequently, in accordance with *Bins*, Mr. XXXX will urge the Court to be vigilant with regard to this Count so that the government is only allowed to submit one theory to the jury regarding in which "book, report or statement" submitted to HUD this alleged false statement was made. Also, in accordance with *Hoover*, Mr. XXXX will urge the Court to be vigilant that the only false statement that the government may argue constitutes a violation of Count 2 is the false statement that the buyer provided "the down payment" in that one particular "book, report or statement."

Count 3 in the instant case alleged several false statements: (1) W-2s, (2) pay stubs and (3)

verifications of rent. Clearly count 3 is duplicitous under *Bins*. Therefore, at the close of the evidence, Mr. XXXX will move that the government be required to elect which alleged false statement will be submitted to the jury so that the parties can cogently argue the case and so that the jury can return a unanimous verdict. *See United States v* Ramirez-Martinez, 273 F.3d 903 (9th Cir. 2001); *Thomas v. United States*, 418 F.2d 567 (5th Cir. 1969) (If one of several counts charged is duplicitous, government can be required to elect charge under which it will proceed.).

II. COUNT 4 CONSPIRACY TO COMMIT BANK FRAUD

The government's bank fraud charge essentially alleges a conspiracy to defraud First Horizon Home Loans a division of First Tennessee Bank. Nevertheless, Count 4 also recounts a scheme to defraud Option One, a home mortgage lender. Significantly, there is no allegation that, at the time of the offense Option One constituted a "financial institution" for purposes of the bank fraud statute.[1] Thus, while any attempt to defraud Option One, might constitute 404(b) evidence to an alleged scheme to defraud First Horizon, it cannot support a conviction on Count 4 and the allegations surrounding Option One that are contained in Count 4 are surplusage. Mr. XXXX will ask the Court to be vigilant in explaining to the jury that a conviction on Count 4 can only be based on proof that Mr. XXXX knowingly defrauded First Horizon regardless of any evidence regarding Option One.

III. THE "BUSINESS DUTY" REQUIREMENT FOR THE INTRODUCTION OF BUSINESS RECORDS

Many of the loan files in this case contain statements or documents that were not created by the party producing the loan file. An easy example is a HUD loan file which contains a letter it sent to the bank which the bank returned stating the balance in a person's account. While Mr. XXXX

[1]"A mortgage lending business" was not added to 18 U.S.C. § 20's definition of a "financial institution" until 2009.

will not dispute that this letter is in HUD's file and is "authentic," it is *not* a business record of HUD and, therefore, cannot be introduced through a HUD custodian for the truth of the matter asserted therein.[2]

An excellent discussion of the principle can be found in Judge Payne's opinion in *Rambus v. Infineon Technologies*, 348 F. Supp. 2d 698 (E.D. Va. 2004.). *Rambus* explains that, when a company that keeps a document is not the source of the information in the document, the proponent of the evidence must show that Fed. R. Evid 803(6) applies to each participant in the chain of communication. Where the proponent fails to do so, the document must be excluded. *Id.* at 707 (Excluding documents "where the original source is an 'outsider,' there are no declarations from the outside entities and none of the proffered declarations otherwise recite any fact that shows qualification by the participant in the chain who actually supplied the information."). *Rambus* also cited Weinstein's Federal Evidence treatise:

> To satisfy Rule 803(6), each participant in the chain which created the record—from the initial observer—reporter to the final entrant—must generally be acting in the course of the regularly conduct business. If some participant is not so engaged, some other hearsay exception must apply to that link of the chain.

5 Weinstein's Federal Evidence, § 803.08[8][2].

Moreover, in *United States v. Irvin*, 682 F.3d 1254, 1261 (10th Cir. 2012), the government attempted to introduce a summary chart summarizing various loan files under Fed. R. Evid. 1006.

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[2]That is not to say that documents, or portions of a document, in a HUD file cannot be introduced to show that they contain *false* information because then they are not being introduced for the truth of the matters asserted in the documents. Likewise, Mr. XXXX would not contest that the documents produced by HUD were, in fact, contained in their file if the government attempts to introduce them merely to show they were in HUD's file and not for the truth of the matters asserted therein. Nevertheless, the only documents that can be introduced, through a HUD custodian, as business records for the truth of the matters asserted therein are documents created by HUD employees.

The defendants argued that the underlying loan files were hearsay and not themselves admissible and, therefore, a summary chart could not be based on the loan files. *Id*. The government offered a mortgage broker to show that the loan files were business records. *Id*. Nevertheless, the broker "testified the loan files were largely maintained by various title companies for whom he had not worked and under circumstances of which he had no personal knowledge." *Id*. at 1262. The United States Court of Appeals for the Tenth Circuit held that introduction of the summary chart without the proper foundation was reversible error. *Id.* at 1264.

In sum, where a document is introduced by a records custodian, the document must be one created by the business with which the custodian is associated or the government should be required to indicate that it is not introducing the document for the truth of any matters asserted therein.

IV IT IS IMPERMISSIBLE TO CROSS-EXAMINE CHARACTER WITNESSES WITH GUILT ASSUMING HYPOTHETICALS

In counsel's experience, prosecutors often attempt to cross examine character witnesses, who testify as to a defendant's good character, by asking the witnesses if it would change their opinion if they learned that the defendant committed the acts for which they are on trial. Such guilt assuming hypotheticals are improper. Nevertheless, in *United States v. Shawyder*, 312 F.3d 1109 (9th Cir. 2002), the United States Court of Appeals for the Ninth Circuit concluded:

> Following almost every other circuit that has addressed the question, we now hold that the use of guilt assuming hypotheticals undermines the presumption of innocence and thus violates a defendant's right to due process. The prosecution's use of guilt-assuming hypothetical questions on cross-examination of Shawyder's character witnesses therefore constituted error

Id. at 1121.[3]

[3]The *Shawyder* Court cited:

Indeed, as noted in *Shawyder*, the United States Court of Appeals for the Fifth Circuit reached the same conclusion in *Candelaria-Gonzalez*. The Fifth Circuit noted that such questions, "struck at the very heart of the presumption of innocence which is fundamental to Anglo-Saxon concepts of fair trial." *Candelaria-Gonzalez,* 547 F.2d at 294. It then reversed the conviction in the case for "grossly prejudicial cross-examination of the appellants' character witnesses." *Id*. at 298.

Respectfully submitted,

/s/ F. Clinton Broden
F. Clinton Broden
TX Bar No. 24001495
Broden & Mickelsen
2600 State Street
Dallas, Texas 75204
214-720-9552
214-720-9594 (facsimile)

Attorney for Defendant
XXXX XXXX

United States v. Guzman, 167 F.3d 1350, 1352 (11th Cir.1999) ("The government may not ... pose hypothetical questions that assume the guilt of the accused in the very case at bar."); *United States v. Oshatz*, 912 F.2d 534, 539 (2d Cir.1990) ("The jury might infer from the judge's permission to ask a guilt-based hypothetical question that the prosecutor has evidence of guilt beyond the evidence in the record."); *United States v. McGuire*, 744 F.2d 1197, 1204 (6th Cir.1984) ("It would be error to allow the prosecution to ask the character witness to assume defendant's guilt of the offenses for which he is then on trial."); *United States v. Williams*, 738 F.2d 172, 177 (7th Cir.1984) (Guilt-assuming hypotheticals "allow[ ] the prosecution to foist its theory of the case repeatedly on the jury and to force an unsuspecting witness to speculate on the effect of a possible conviction."); *United States v. Candelaria-Gonzalez*, 547 F.2d 291, 294 (5th Cir.1977) ("These hypothetical questions [strike] at the very heart of the presumption of innocence which is fundamental to Anglo-Saxon concepts of fair trial.")

Id. at 1121

CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on January ____, 2014, I caused the foregoing document to be served by electronic means on all counsel of record.

/s/ F. Clinton Broden
F. Clinton Broden