Appendix A

United States Court of Appeals
For the Eighth Circuit

No. 19-1263

United States of America

Plaintiff - Appellee

v.

Scott Phillip Flynn

Defendant – Appellant

Appeal from United States District Court
for the District of Minnesota

Submitted: June 17, 2020
Filed: August 13, 2020

Before GRUENDER, WOLLMAN, and KOBES, Circuit Judges.

KOBES, Circuit Judge.

Scott Phillip Flynn pleaded guilty to conspiracy to defraud the United States and filing a false tax return. *See* 18 U.S.C. § 371; 26 U.S.C. § 7206(1). He tried to withdraw his plea before sentencing, but the

district court[1] denied his motion and sentenced him to 87 months in prison—60 months for the conspiracy charge and 27 months for the false return—and ordered him to pay roughly $5.4 million in restitution. Flynn appeals, arguing that he should have been allowed to withdraw his guilty plea, his conspiracy conviction is void for vagueness, the restitution order was procedurally improper and clearly erroneous, and the district court wrongly applied an organizer or leader enhancement when it calculated his sentence. We find no error and affirm.

I.

Flynn's convictions arise out of two "reverse merger" transactions that he assisted in 2006 and 2008.[2] As payment, he received shares of stock in the resulting public companies. He transferred millions of these shares to two companies he controlled and, with the help of a co-conspirator, transferred millions more into the hands of Australian nominees. These

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[1] The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota.

[2] The Securities and Exchange Commission explains that a reverse merger offers an alternative to an initial public offering. In this transaction, an existing public "shell" company acquires the shares to a private corporation and in exchange the shareholders of the private corporation become the controlling shareholders of the public shell company. The result is the public entity takes over the private one, but the public company's business operations are "primarily, if not solely, those of the former private company." *Reverse Mergers*, Investor.gov, https://www.investor.gov/news-alerts/investors-ulletins/reverse-mergers (last visited July 2, 2020).

Australian nominees placed their shares in U.S. brokerage accounts that Flynn could access.

From 2006 to 2014, Flynn controlled these accounts and used them to sell around $15 million worth of stock and transfer the proceeds to Australian bank accounts that he also controlled. In 2007, he purchased a house with $2.7 million of that money and yet only reported $26,136 of income on his tax return. Over the course of the conspiracy, all $15 million in sales was income to Flynn and he reported none of it.

Flynn stipulated to all these facts as part of his guilty plea. At his change of plea hearing, Flynn said he knew that pleading guilty meant his case would never go to trial, he had discussed his case with his lawyers and was satisfied with their representation, and he understood the rights he was waiving by pleading guilty. The court then read portions of the indictment and Flynn stated that he had read and understood the entire document with the help of his attorneys. Finally, the court reviewed the agreed-upon sentencing calculations described in the plea, including the application of a four-point enhancement because Flynn was an organizer or leader of an otherwise extensive scheme and a two-point reduction for acceptance of responsibility. Only then did the district court accept Flynn's guilty plea.

Six months later, just over a week before he was scheduled to be sentenced, Flynn (through new counsel) moved to continue his sentencing and withdraw his guilty plea, disavowed the stipulations contained in the plea, and asserted his innocence. The district court denied that motion. At sentencing, the district court enforced the agreement as written and

Flynn received the two-point reduction for acceptance of responsibility even though the Government did not request it. It sentenced him to 87 months in prison and ordered him to pay $5,392,442.87 in restitution. Flynn timely appealed.

II.

Flynn first argues that he should have been allowed to withdraw his guilty plea because it was not knowing and voluntary, lacked a factual basis, and the Government breached the agreement. A defendant may withdraw a guilty plea after it has been accepted by the district court if "the defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). "There is no *right* to withdraw; the plea of guilty is a solemn act not to be disregarded because of belated misgivings about its wisdom." *United States v. Andolini*, 705 F.3d 335, 337 (8th Cir. 2013) (citation omitted) (emphasis in original). If a defendant establishes a fair and just reason for withdrawal, the district court must then consider "whether the defendant asserts his innocence of the charge, the length of time between the guilty plea and the motion to withdraw it, and whether the government will be prejudiced if the court grants the motion." *United States v. Heid*, 651 F.3d 850, 853–54 (8th Cir. 2011) (citation omitted). We review the denial of a motion to withdraw a plea for abuse of discretion. *Andolini*, 705 F.3d at 337.

A.

Flynn's first "fair and just" reason for withdrawal is that he was not informed of the nature of the charges against him, so his plea was not knowing and

voluntary. *See* Fed. R. Crim. P. 11(b)(1)(G). Whether a plea was knowing and voluntary presents a mixed question of law and fact that we review *de novo*. *United States v. Gray*, 152 F.3d 816, 819 (8th Cir. 1998). We assess whether Flynn understood the nature of the charges by examining the totality of the circumstances. *United States v. Marks*, 38 F.3d 1009, 1011 (8th Cir. 1994). We consider "whether the indictment gave him notice of the charge, whether he discussed the charge with his attorney or the judge, and…any other facts which are in the record." *Id.*

The record shows Flynn understood how the law related to the facts of his case. *See United States v. Johnson*, 715 F.3d 1094, 1103 (8th Cir. 2013). The district court read aloud the relevant counts of his indictment, ensured he understood and had discussed those counts with his attorneys, he was satisfied with his attorneys, and he had discussed the rights he was waiving "at some length" with them. Nevertheless, Flynn complains that the indictment did not list the elements of his conspiracy charge and suggests that circuit courts inconsistently describe those elements, to the point where it was impossible for Flynn (or seemingly anyone else) to understand the charges.

Flynn pleaded guilty under the portion of 18 U.S.C. § 371 that prohibits conspiring to defraud the United States. When such a conspiracy is specifically focused on defrauding the IRS in its efforts to assess and collect taxes, it is commonly referred to as a *Klein* conspiracy. *United States v. Fletcher*, 322 F.3d 508, 513 (8th Cir. 2003); *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958). Flynn alleges *Klein* conspiracies are uncons-

titutionally vague because federal circuit courts disagree on the elements necessary to secure a conviction.

Although the circuits subdivide the crime into different elements, all describe the same offense. We describe the crime with two elements. *Fletcher*, 322 F.3d at 513 ("To convict a defendant of a *Klein* conspiracy, the government must show the existence of an agreement to defraud the IRS and an overt act by one of the conspirators in furtherance of the agreement's objectives."). The Third Circuit has used three. *United States v. Shoup*, 608 F.2d 950, 956 (3d Cir. 1979) ("To establish a [*Klein*] conspiracy . . . . the prosecution must prove three elements: (1) the existence of an agreement, (2) an overt act by one of the conspirators in furtherance of the objectives, and (3) an intent on the part of the conspirators to agree, as well as to defraud the United States."). And the Second, four. *United States v. Coplan*, 703 F.3d 46, 61 (2d Cir. 2012, *cert. denied*, 571 U.S. 819 (2013) ("[T]o prove a *Klein* conspiracy, the Government must show (1) that the defendant entered into an agreement (2) to obstruct a lawful function of the Government (3) by deceitful or dishonest means and (4) at least one overt act in furtherance of the conspiracy.") (quotations and alterations omitted). But, in substance, each of these cases describes the same crime. And in any event, the district court properly applied the well-settled law in this circuit and the elements of Flynn's offense were laid out in his indictment and read aloud to him at his change of plea hearing.

Flynn also argues that both counts of conviction depended on a finding that he exercised dominion and

control over the $15 million and this requirement was not explained to him. But the indictment alleged that Flynn exercised dominion and control over the funds, he admitted he did in his plea agreement (and admitted to facts supporting that admission as well), and answered yes when the district court asked whether he and his co-conspirator Steven Miotti had control over the Australian nominees. The importance of that admission was clear. The district court did not abuse its discretion when it concluded, based on the totality of the circumstances, that Flynn's guilty plea was knowing and voluntary.

B.

Flynn also argues that his guilty plea should have been withdrawn because it lacks a factual basis supporting either conviction.

"To convict a defendant of a *Klein* conspiracy, the government must show the existence of an agreement to defraud the IRS and an overt act by one of the conspirators in furtherance of the agreement's objectives." *Fletcher*, 322 F.3d at 513. Flynn admitted that he had agreed with Miotti and, through Miotti, several Australian nominees, to avoid taxation by placing his income in the hands of the Australian nominees and maintaining control of accounts in their names. He agreed he had taken all the steps necessary to realize his scheme and that he intended to impair the IRS's ability to calculate his tax liability. Flynn asserts without citation that the amount of money at issue in a *Klein* conspiracy is an essential element of such a charge. It is not, so it does not matter that Flynn did not know or stipulate to the exact amount of money he hid from the government. And although

Flynn attempts to muddy the waters by claiming he never controlled the Australian nominees, exercised dominion or control over the funds in their accounts, or conspired with Miotti, any confusion on these issues arose only after Flynn tried to get out of his plea agreement. His stipulations and colloquy are clear and adequate on each of these points.

In the alternative, Flynn argues after the Supreme Court's decision in *Marinello v. United States*, 138 S. Ct. 1101 (2018), Klein conspiracies include an additional element not mentioned in his plea. In *Marinello*, the Supreme Court interpreted 26 U.S.C. § 7212(a)'s Omnibus Clause, which "forbids 'corruptly or by force or threats of force (including any threatening communication) obstruct[ing] or imped[ing], or endeavor[ing] to obstruct or impede, the due administration of [the Internal Revenue Code]." *Marinello*, 138 S. Ct. at 1105 (quoting 26 U.S.C. § 7212(a)) (alterations in original). In construing this clause, the Supreme Court held that "the due administration [of the Internal Revenue Code]" did not include things like the ordinary review of income tax returns but rather implied that there must be a "nexus" between a defendant's obstructive conduct and a "targeted administrative action" like an audit. 138 S. Ct. at 1109–10.

Flynn suggests that the same nexus requirement ought to apply in *Klein* conspiracies, despite the fact that the broad language in § 371 makes no reference to "the due administration [of the Internal Revenue Code]." *See Haas v. Henkel*, 216 U.S. 462, 479 (1910) ("The statute is broad enough in its terms to include any conspiracy for the purpose of impairing,

obstructing, or defeating the lawful function of any department of government."); *see also Dennis v. United States*, 384 U.S. 855, 861 (1966). As the Second Circuit has explained, the broad scope of *Klein* conspiracies is sanctioned in "long-lived Supreme Court decisions" and arguments aimed at narrowing it "are properly directed to a higher authority." *Coplan*, 703 F.3d at 62.

The factual basis for Flynn's false tax return conviction is similarly robust. A defendant files a false tax return when he "[w]illfully makes and subscribes any return . . . which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter." 26 U.S.C. § 7206(1). Flynn suggests that there is nothing in the record that establishes the $2.7 million used to buy his home was income to him and therefore should have been reported on his taxes. Again, Flynn's admissions in his guilty plea establish exactly what he suggests was not proven. Flynn stipulated that the $2.7 million was income to him and that he only reported a little over $26,000 of income that year.

C.

Finally, Flynn argues that he should have been able to withdraw his guilty plea because the Government breached the agreement at his sentencing by not recommending that he receive a two-level reduction for acceptance of responsibility (which the district court applied anyway).

There was no breach. The Government agreed to recommend an acceptance-of-responsibility reduc-

tion if Flynn "commit[ted] no further acts inconsistent with acceptance of responsibility." D. Ct. Dkt. 90 at 5. That did not happen. After signing the plea agreement, Flynn reversed course and disputed almost every fact he previously admitted. He argued to the district court, and reiterates to us on appeal, positions that plainly conflict with the terms of his plea. These acts are not consistent with Flynn's acceptance of responsibility. *See United States v. Rendon*, 752 F.3d 1130, 1133–34 (8th Cir. 2014).

Because Flynn has failed to show fair and just reasons why he should have been allowed to withdraw his plea, we do not need to address his arguments regarding his innocence and the lack of prejudice occasioned by his attempted withdrawal. *See Heid*, 651 F.3d at 853–54. The district court did not abuse its discretion by denying Flynn's motion to withdraw his guilty plea.

III.

Flynn next argues that his *Klein* conspiracy conviction under § 371 is invalid because the offense is void for vagueness. We review whether an offense is unconstitutionally vague *de novo*. *United States v. Cook*, 782 F.3d 983, 987 (8th Cir. 2015).[3] A statute is void if it does not afford fair notice of what is prohibited to a person of ordinary intelligence or if it is so standardless it allows for or even encourages

[3] The parties dispute whether this claim was properly presented to the district court and therefore whether we should review de novo or only for plain error. *See United States v. Paul*, 885 F.3d 1099, 1105 (8th Cir. 2018). We need not decide the issue because Flynn's argument fails under any standard.

"seriously discriminatory enforcement." *Id.* (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18 (2010)).

As we have explained, § 371's "defraud clause" prohibits conspiracies "to defraud the United States," which the Supreme Court has defined as "impairing, obstructing, or defeating the lawful function any department of the Government." *Dennis,* 384 U.S. at 861; *United States v. Derezinski*, 945 F.2d 1006, 1011 (8th Cir. 1991) (same). Flynn argues that alleged disagreements between the circuit courts over the elements and a lack of uniformity as to the required mens rea has caused *Klein* conspiracies to become unconstitutionally vague.[4]

We have already discussed the elements issue and, regardless of any disagreement over the necessary mental state, Flynn stipulated to specifically intending to defraud the Government. D. Ct. Dkt. 90 at 3 ("The Defendant agrees that he took the steps described above in order to impair and impede the lawful functioning of the IRS in ascertaining his income tax liability...."). In reviewing vagueness challenges, we ask whether the offense is vague *as applied*, because a defendant "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Cook*, 782 F.3d at 987 (quoting *Holder*, 561 U.S. at 18–19). We have no trouble concluding that a person of ordinary intelligence

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[4] Flynn also argues that, if we find *Klein* conspiracies are not vague, we must do so by applying *Marinello*'s nexus requirement. For the reasons already stated, *Marinello* did not alter *Klein* conspiracies.

would understand that Flynn's conduct runs afoul of the statute.

IV.

Flynn next appeals the process the district court used to determine how much restitution he owed and the amount ultimately imposed.

A.

Flynn argues the district court erred by denying his motions to continue his sentencing or bifurcate the sentencing and restitution proceedings to give his new counsel additional time to prepare to contest restitution. We review for an abuse of discretion, giving the district court wide latitude, and will reverse only if the moving party can show prejudice from the denial. *United States v. Jones*, 643 F.3d 275, 277 (8th Cir. 2011). Flynn changed counsel late, so late in fact, the district court noted that the substitution violated the local rules. Nevertheless, it allowed the substitution and granted a continuance on the condition that no further delays result from the change in counsel. The district court did not abuse its discretion when it refused to grant yet another continuance to allow Flynn's counsel more time to prepare for the restitution hearing.

Next, Flynn argues that he was entitled to a jury trial on restitution. We have previously held that restitution may be found by a judge and that it does not implicate a defendant's Sixth Amendment rights. *United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005). Flynn argues that this precedent was undercut by the Supreme Court in *Southern Union v. United*

States, 567 U.S. 343 (2012), but as it happens, we have rejected that argument too. *United States v. Thunderhawk*, 799 F.3d 1203, 1209 (8th Cir. 2015) ("[N]othing in the *Southern Union* opinion lead[s] us to conclude that our controlling precedent in *Carruth* ….was implicitly overruled."). Undeterred, Flynn claims in reply that this precedent was undermined by the plurality opinion in *United States v. Haymond*, 139 S. Ct. 2369 (2019). Here Flynn finally lands on authority so recent we have not already considered his argument, but he fails to offer any convincing reason *Haymond*, which dealt with "an unusual provision," *id*. at 2383 (Gorsuch, J.) (plurality opinion), governing revocation proceedings for "a discrete set of federal criminal offenses," *id*. at 2386 (Breyer, J, concurring), silently overturns our precedent governing restitution. *Thunderhawk* remains the law in this circuit and we must follow it until the en banc court or the Supreme Court tells us otherwise.[5]

B.

Flynn also argues the district court erred in finding that he owed nearly $5.4 million in restitution. The Government has the burden of proving the amount of restitution by a preponderance of the evidence and we review the district court's

[5] We pause to note that because Flynn admitted to owing between $3.5 million and $9.5 million in restitution, D. Ct. Dkt. 90 at 5, any hypothetical Sixth Amendment right to a jury trial would not be violated in this case because the district court's restitution order did not exceed the "*Apprendi* maximum" of $9.5 million. *See Portalatin v. Graham*, 624 F.3d 69, 82, 88 (2d Cir. 2010) (en banc) (citing *Blakely v. Washington*, 542 U.S. 296, 303–04 (2004)).

determination for clear error. *United States v. Ellefsen*, 655 F.3d 769, 782 (8th Cir. 2011).

Flynn's arguments on this score relate to the admission by the Government and its witness that the $15 million figure that Flynn stipulated was unreported income he earned was an approximation. Because restitution is only available for actual and not intended loss, he argues his restitution award, calculated based on the $15 million figure, must be vacated. It is true that courts cannot award restitution for intended loss, *see United Statese v. Chalupnik*, 514 F.3d 748, 754 (8th Cir. 2008), but that is immaterial where the defendant stipulated that he *actually* hid $15 million of income from the IRS.

Flynn also claims that *United States v. Bagley*, 907 F.3d 1096, 1099 (8th Cir. 2018), prohibits using estimates to assess restitution. This overreads *Bagley*, which dealt with the valuation of a four-year-old Terrier named Mister, and merely held that the Government must do more to support its valuation than offer "a speculative estimate of the costs associated with raising Mister." *Id.* In this highly complex tax evasion case, by contrast, where difficulty in assessing the exact amount of actual loss is a testament to the scope of Flynn's criminal activity, both parties agreed to the $15 million figure and the Government offered evidence at the restitution hearing that showed the actual amount was likely even higher. It was not clear error for the district court to credit the loss figure that Flynn and the Government agreed upon. Nor was it clear error (as Flynn also claims) for the district court to credit the testimony of the Government's witness and calculate

the tax loss from the sale of these shares as an ordinary income event rather than a capital gains event.

Finally, Flynn argues that the district court erred because it awarded restitution on both counts of conviction when restitution is only available on his false tax return offense if it is a condition of his supervised release. *See United States v. Perry*, 714 F.3d 570, 577 (8th Cir. 2013). But the district court did order restitution as a condition of Flynn's supervised release and there was no error. D. Ct. Dkt. 139 at 5.

V.

Last of all, Flynn challenges the district court's application of a four-point enhancement to his sentence for organizing or leading a conspiracy that was "otherwise extensive." U.S.S.G. § 3B1.1. Again, this argument runs headfirst into Flynn's plea agreement where he stipulated that the network of Australian nominees, Flynn, and Miotti qualified as "otherwise extensive" and the enhancement should apply. Whether we view this as a sentencing issue raised for the first time on appeal, an invited error, or an issue Flynn expressly waived, he is not entitled to relief.

The judgment of the district court is affirmed.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

v.

MEMORANDUM OPINION
AND ORDER
Criminal No. 16-347 ADM/KMM

Scott Phillip Flynn,

Defendant.

David J. MacLaughlin and Benjamin F. Langner, Assistant United States Attorneys, United States Attorney's Office, Minneapolis, MN, on behalf of Plaintiff.

Patrick J. Egan, Esq., Fox Rothschild LLP, Philadelphia, PA, on behalf of Defendant.

I. INTRODUCTION

On December 20, 2018, the undersigned United States District Judge heard oral argument on Defendant Scott Phillip Flynn's ("Flynn") Motion to Continue Sentencing [Docket No. 113] and Motion to Withdraw Guilty Plea [Docket No. 115]. For the reasons set forth below, the Motion to Continue Sentencing is granted and the Motion to Withdraw Guilty Plea is denied.

II. BACKGROUND

On December 21, 2016, a grand jury indicted Flynn with conspiracy to defraud the United States in violation of 18 U.S.C. § 371, tax evasion in violation of 26 U.S.C.§ 7201, and filing false tax returns in violation of 26 U.S.C. § 7206(1). See generally Indictment [Docket No. 1]. Flynn retained attorney Earl Gray in 2015 and added attorney Paul Engh as co-counsel in March of 2017. Gray and Engh are two of the most experienced and well respected federal criminal defense attorneys in Minnesota.

After several continuances of the trial date, trial was set for June 11, 2018. On June 4, 2018, just one week before trial was scheduled to begin, Flynn reached a Plea Agreement with the Government and entered a plea of guilty to Count 1 (conspiracy to defraud the United States) and Count 3 (false tax return - 2007) of the Second Superseding Indictment ("SSI") [Docket No. 83]. See Plea Agreement [Docket No. 90]; Min. Entry [Docket No. 89]; Plea Tr. [Docket No. 93]. In return for Flynn's pleas of guilty, the Government agreed to dismiss the remaining five counts in the SSI. Plea Agreement ¶ 2. Because "trial [was] only one week away, and the government ha[d] expended considerable resources preparing for the trial," the Plea Agreement did not include the third point typically awarded by the Government for acceptance of responsibility. Plea Agreement ¶ 6(d).

Early in the change of plea hearing on June 4, the Court made certain Flynn understood the finality of the guilty plea:

> COURT: There is a degree of finality to today's proceedings, because if I accept your guilty plea at the end of the questioning, that closes the door to whether you ever have a trial. So one of my last questions will be do you want me to accept the plea agreement, and that's a way of saying that's the end of it then with regard to trial or no trial. Do you understand that?
>
> FLYNN: I do.
>
> COURT: There'll be issues about sentencing and other things to talk about, but not whether or not you have a trial. Do you understand that?
>
> FLYNN: Yes.

Plea Tr. at 4:11–23.

After an extensive inquiry reflected in a 29 page transcript of Flynn's understanding of his constitutional rights, his plea agreement and the factual basis for his plea, the Court made certain that Flynn understood he could not change his mind about pleading guilty and not going to trial:

> COURT: All right. Mr. Flynn, I'm up to that question I predicted, that I was telling you about, which is kind of the final one, and that is whether you want me to accept your plea agreement knowing that that's final on the issue of whether or not you will have a trial.

FLYNN: Yes, Your Honor.

COURT: Okay. Do you want me to accept it?

FLYNN: Yes.

COURT: The plea agreement is accepted.

Id. at 27:25–28:8.

Then on October 30, 2018, nearly five months after the plea hearing, Flynn filed a sentencing memorandum in which he again "agree[d] with, and reaffirm[ed], the factual basis of [his] plea agreement." Def.'s Sentencing Mem. [Docket No. 106] at 15.

Not until December 11, 2018, more than half a year after his guilty plea and just nine days before he was scheduled to be sentenced, did Flynn reverse course. Through new counsel, Flynn moves to substitute new counsel for his former counsel, continue his sentencing, and withdraw his guilty plea.

III. DISCUSSION

A. Withdrawal and Substitution of Counsel

As an initial matter, the withdrawal and substitution of counsel in this case is in contradiction of Local Rule 83.7(b), which permits substitution of counsel only if "the withdrawal and substitution will not delay the trial or other progress of the case." Flynn's change in counsel has delayed the progress of this case, and there is no legally sound basis for justifying the delay. Flynn does not assert that his

former attorneys were ineffective. His new counsel's arguments for withdrawing Flynn's plea are based on alleged deficiencies in the Plea Agreement and plea hearing, which took place half a year ago, and on a Supreme Court case decided in March of 2018, nearly three months before Flynn entered his plea. Nevertheless, substitution of counsel will be permitted based on the Court's judgment that Flynn is facing lengthy sentencing guidelines and should be able to have retained counsel of his choice represent him. No further delays will be occasioned by this change in counsel.

B. Withdrawal of Guilty Plea

Under Rule 11(d) of the Federal Rules of Criminal Procedure, a defendant may withdraw a plea of guilty "after the court accepts the plea, but before it imposes sentence if . . . the defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). "While the standard is liberal, the defendant has no automatic right to withdraw a plea." United States v. Heid, 651 F.3d 850, 853 (8th Cir. 2011). If a fair and just reason exists, a court must also consider "whether the defendant asserts his innocence of the charge, the length of time between the guilty plea and the motion to withdraw it, and whether the government will be prejudiced if the court grants the motion." Id. at 853–54. "A guilty plea is a solemn act not to be set aside lightly." United States v. Prior, 107 F.3d 654, 657 (8th Cir. 1997).

1. Fair and Just Reasons

Flynn argues that fair and just reasons exist for withdrawing his plea because: (1) he was never

advised of the specific elements of the offenses; (2) the factual basis of the plea was inadequate to support the crimes charged; (3) violations of Rule 11 of the Federal Rules of Criminal Procedure occurred during the plea hearing; and (4) the SSI did not properly state a conspiracy to defraud the United States after the Supreme Court's March 21, 2018 decision in Marinello v. United States, 138 S. Ct. 1101 (2018).

a. Nature of the Charges

Flynn argues that the plea hearing failed to comply with Federal Rule of Criminal Procedure Rule 11(b)(1)(G), which requires the Court to "inform the defendant of, and determine that the defendant understands . . . the nature of each charge to which the defendant is pleading." Flynn contends this requirement was not satisfied because the case is exceptionally complex, yet the Court did not identify the elements of the offenses.

Rule 11 does not require that the elements of each charge be reviewed with the defendant. Rather, Rule 11(b)(1)(G) is satisfied if the record as a whole reflects that the defendant possessed "an understanding of the law in relation to the facts." United States v. Johnson, 715 F.3d 1094, 1103 (8th Cir. 2013).

Here, the record provides ample evidence that the Court informed Flynn of the nature of the charges and that Flynn understood the law in relation to the facts. The Court read the first paragraph of Count 1 verbatim from the SSI before asking Flynn for his plea:

> COURT: It's alleged in Count 1 that beginning in or about 2005 and continuing through at least in or about 2015, in the State and District of Minnesota and elsewhere, the defendant, Scott Phillip Flynn, also known as Phil Flynn, and others known and unknown to the grand jury, including, but not limited to, S.M. and Phillip J. Flynn, did unlawfully and knowingly conspire, combine, confederate, and agree with each other to defraud the United States by deceitful and dishonest means by impeding, impairing, obstructing, and defeating the lawful governmental functions of the Internal Revenue Service . . . in the ascertainment, computation, assessment, and collection of revenue, that is, United States income taxes of defendant Scott Phillip Flynn, and the other members of the Flynn Group, including Integritas and Phillip J. Flynn. To that count, what is your plea?
>
> FLYNN: Guilty.
>
> COURT: Okay. And there's a number of means and a lengthy description of that I take it you've gone over with your attorneys. I'm assuming, Mr. Engh, that you waive any further reading of the overt acts or the conspiracy charge?
>
> ENGH: We do, your Honor.

Plea Tr. at 11–12.

The Court then read the entirety of Count 3 from the SSI as follows:

> COURT: And then Count 3 reads as follows: That on or about October 17th, 2008, in the State and District of Minnesota, the defendant, Scott Phillip Flynn, also known as Phil Flynn, did willfully make and file with the Internal Revenue Service a false United States Individual Income Tax Return, Form 1040, separately from his wife, for the taxable year ended December 31st, 2007, which he signed and subscribed on or about October 15th, 2008, and which was verified by a written declaration that was made under the penalties of perjury, and which said Income Tax Return he did not believe to be true and correct as to every material matter, in that line 22 reported total income of $26,136, whereas, as he then and there well knew and believed, his total income was substantially more than $26,136, in violation of Title 26, United States Code, Section 7206(1). To that count, what is your plea?
>
> FLYNN: Guilty.

Id. at 12–13.

In addition to reading the substance of the charges to Flynn, the Court reviewed the Plea Agreement with him paragraph by paragraph, id. at 11–20; advised him of the maximum penalties applicable to each charge, id. at 13–14; asked Flynn if

he'd had enough time to speak with his attorneys about his case (Flynn answered, "Yes"), id. at 5; asked Flynn if he was satisfied with his attorneys' service (Flynn answered, "I am"). Id.

Flynn argues he was not given an opportunity to testify whether counsel had thoroughly explained the elements of the charges or his available defenses. The record shows that at the beginning of the change of plea hearing, the Court expressly told Flynn that "if there's something that's concerning you, you can also take a timeout. Just tell me and I'll give some privacy to talk to [counsel] to clear up any areas of confusion, ok?" Id. at 4. After advising him of his constitutional rights, the Court again invited Flynn to raise any concerns he may have had:

> COURT: You seem to be following just fine. Is there anything you'd like to ask me about what your constitutional rights are?
>
> FLYNN: I have no questions at this point.
>
> COURT: I assume you've gone over this at some length with your counsel.
>
> FLYNN: Yes, I have.

Id. at 10.

In addition to these facially sufficient descriptions of the nature of the charges, the record includes further indicia that Flynn understood the nature of the charges to which he pled guilty. Flynn was represented by two experienced federal criminal defense attorneys, one who had represented him in

this case for more than two years, and the other who had been involved for more than 15 months.

Flynn is an intelligent individual capable of understanding sophisticated concepts and transactions. He has assisted privately held corporations in becoming publicly traded through reverse merger transactions. Plea Agreement ¶ 3. Although the crimes charged are complex, the complexity stems largely from the intricate nature of Flynn's financial affairs, including his use of nominee shareholders, overseas attorneys, bank accounts in Australia and Costa Rica, and multiple limited liability companies. Further, Flynn has prior experience with the criminal justice system, having been convicted previously by a jury of securities fraud in 1998. See United States v. Flynn, No. 98–134 MJD/JMM (D. Minn. 1998). The record thus establishes that Flynn understood the nature of the crimes to which he pled guilty.

b. Factual Basis

Flynn also argues that the factual bases for Counts 1 and 3 were inadequate to support the plea. Federal Rule of Criminal Procedure 11(b)(3) requires that "[b]efore entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea." "A guilty plea is supported by an adequate factual basis when the record contains sufficient evidence at the time of the plea upon which a court may reasonably determine that the defendant likely committed the offense." United States v. Sharp, 879 F.3d 327, 335 (8th Cir. 2018), cert. denied, 139 S. Ct. 345 (2018) (quoting United States v. Cheney, 571 F.3d 764, 769 (8th Cir. 2009)).

I. Count 1

Count 1 of the SSI charges Flynn with violating 18 U.S.C. § 371 by conspiring with others to defraud the IRS in the function of assessing and collecting taxes, also known as a Klein conspiracy. SSI ¶ 16; United States v. Fletcher, 322 F.3d 508, 513 (8th Cir. 2003); United States v. Ervasti, 201 F.3d 1029, 1037 (8th Cir. 2000); United States v. Klein, 247 F.2d 908, 916 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958). The Eighth Circuit has held that "[t]o convict a defendant of a Klein conspiracy, the government must show the existence of an agreement to defraud the IRS and an overt act by one of the conspirators in furtherance of the agreement's objectives." Fletcher, 322 F.3d at 513.

At the time of the plea, the record included ample facts supporting a reasonable determination that Flynn committed the offense charged in Count 1. Flynn stipulated in the Plea Agreement that: as compensation for assisting two privately held companies to become publicly traded, Flynn received millions of shares of publicly traded stock in those companies; Flynn titled the stock in the names of Australian nominees recruited by his co-conspirator, Steven Miotti; Miotti directed the Australian nominees to open brokerage accounts in the United States to receive the shares, but Flynn possessed the login and password data to control the accounts and shares of stock; Flynn caused the stock to be sold and the $15 million in proceeds to be transferred to accounts at National Australia Bank; Flynn exercised control and dominion over the National Australia Bank accounts; the $15 million in the Australian

accounts was unreported income; Flynn took these steps to "impair and impede the lawful functioning of the IRS in ascertaining his income tax liability during the years 2005 through 2015." Plea Agreement ¶ 3.

During the plea hearing, Flynn reaffirmed the facts in the Plea Agreement, and also testified under oath that he and Miotti were working together when Miotti recruited the nominees, Plea Tr. at 24; Flynn and Miotti controlled the Australian nominees' brokerage accounts and National Australia Bank accounts, id.; and Flynn and Miotti, working together, caused the Australian nominees to sell shares of stock that were held in the brokerage accounts and transfer the proceeds to the National Australia Bank accounts. Id. The facts in the Plea Agreement and plea colloquy provide more than a sufficient basis to determine that Flynn and Miotti agreed to defraud the IRS and that an overt act was taken in furtherance of the agreement's objectives.

Flynn disagrees, arguing that the plea lacks a factual basis because during the plea hearing he equivocated in response to the amount of money at issue in this case. This argument misstates the record. When asked about the amount, Flynn testified, "I have no way to calibrate the 15 million and I haven't seen anything of that, but I assume that's correct." Id. at 25. When asked whether he disputed the amount, Flynn testified: "I don't dispute it." Id. Moreover, Flynn stipulated to the $15 million amount in the Plea Agreement. Plea Agreement ¶ 3.

Flynn also argues that during the plea hearing he disclaimed involvement with the Australian nominees. Again, Flynn misstates the record.

Although Flynn testified that all communication with the nominees was handled through Miotti, Flynn admitted involvement with the nominees. Specifically, he admitted that he and Miotti had control over the nominees' brokerage accounts and National Australia Bank accounts; that he and "Miotti, working together caused these Australian people to sell shares of [stock] that were held in brokerage accounts here in the United States"; and that the proceeds from the sale of the stock were transferred to the National Australia Bank accounts that Flynn and Miotti controlled. Id. at 24. Thus, Flynn admitted, rather than disclaimed, involvement with the Australian nominees.

ii. Count 3

Count 3 charges Flynn with filing a false tax return in violation of 26 U.S.C. § 7206(1), which prohibits "[w]illfully mak[ing] and subscrib[ing] any return . . . which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter."

In the Plea Agreement and at the plea hearing, Flynn admitted that: in 2007, he received approximately $2.7 million of stock proceeds from the Australian nominees to buy a house in Orono, Minnesota; the $2.7 million was income to Flynn; Flynn reported $26,136 of total income on his 2007 federal income tax return; Flynn signed the return under penalty of perjury and filed it on October 17, 2008; when he filed the return, Flynn knew it materially under reported his income for 2007; and Flynn filed the return "willfully, knowing that he was violating the law when he filed it." Plea Agreement ¶

3; Plea Tr. at 25–26. These facts are more than sufficient to reasonably determine that Flynn violated 26 U.S.C. § 7206(1).

Resisting this conclusion, Flynn argues that the record does not support the Government's claim that the $2.7 million transferred in 2007 was income to him. This argument is squarely contradicted by the Plea Agreement in which Flynn admits that he "received approximately $2.7 million of the proceeds from the Australian nominees to buy a house in Orono, Minnesota, which was income to the Defendant." Plea Agreement ¶ 3 (emphasis added).

Flynn also cites to an October 24, 2018 email exchange between Flynn's counsel and the Government to argue that he challenged the factual basis of the plea after the plea hearing. Egan Decl. [Docket No. 117] Ex. D. However, on October 30, 2018, less than a week after the email exchange, Flynn filed a sentencing memorandum in which he "agree[d] with, and reaffirm[ed], the factual basis of [his] plea agreement." Def.'s Sentencing Mem. at 15.

c. Purported Rule 11 Violations

Flynn also argues that Rule 11(b)(1)(D) of the Federal Rules of Criminal Procedure was violated because the Court did not inform Flynn of his right to be represented by counsel at every stage of the proceeding. Rule 11(b)(1) requires the court to "inform the defendant of, and determine that the defendant understands, . . . the right to be represented by counsel–and if necessary have the court appoint counsel–at trial and at every other stage of the proceeding." Fed. R. Crim. P. 11(b)(1)(D). The Court

specifically informed Flynn that he would "have the right to have the benefit of counsel at trial." Plea Tr. at 9.

The circumstances surrounding Flynn's plea establish that his substantial rights were not affected by any claimed Rule 11 omissions. Flynn was well aware that he had the right to the assistance of counsel at all stages of the proceeding, because he had already been represented by his attorneys at the arraignment and motions hearings in this case. Additionally, Flynn is not indigent, and thus appointment of counsel was not relevant to the realities of this case.

Flynn further argues that the Court failed to advise him of the presumption of innocence. Flynn again misrepresents the record. The Court told Flynn that, "[i]f you did go forward to trial, you'd have the benefit of the presumption of innocence. That's an important part of our Constitution and it has a couple ramifications of how it plays out with regard to a criminal trial." Id. at 8. Flynn was not only told of the presumption, the Court also explained the operation of the presumption of innocence to protect his rights at trial.

There were no Rule 11 omissions to constitute a just and fair reason to withdraw Flynn's guilty plea.

d. Supreme Court's Decision in Marinello v. United States

Flynn argues that the Klein conspiracy charged in Count 1 under 18 U.S.C. § 371 did not properly state an offense after the Supreme Court's decision in

Marinello, 138 S. Ct. 1101. Because Marinello was decided in March 2018, almost three months before Flynn entered his plea and nearly nine months after he sought to withdraw the plea, this argument is in effect an untimely Rule 12 motion.

In Marinello, the Supreme Court interpreted the scope of 26 U.S.C. § 7212(a)'s Omnibus Clause, which forbids "corruptly or by force or threats of force . . . obstruct[ing], or imped[ing], or endeavor[ing] to obstruct or impede, the due administration of the [Tax Code]." Id. at 1104; 26 U.S.C. § 7212(a). The Supreme Court examined the language, statutory context, and legislative history of the clause and concluded that "'due administration of the [Tax Code]' does not cover routine administrative procedures that are near-universally applied to all taxpayers, such as the ordinary processing of income tax returns. Rather, the clause as a whole refers to specific interference with targeted governmental tax-related proceedings, such as an investigation or audit.'" Id. Based on this narrow interpretation, the Supreme Court held that to obtain an obstruction conviction under § 7212(a), the government is required to show a nexus between the defendant's conduct and a particular IRS proceeding that was pending or reasonably foreseeable at the time the defendant engaged in the obstructive conduct. Marinello, 138 S. Ct. at 1109–10.

Flynn argues that the nexus element of 26 U.S.C. § 7212(a) applies equally to a Klein conspiracy charged under 18 U.S.C. § 371 because the language used for charging Klein conspiracies is identical in scope to the language at issue in Marinello. Flynn contends that the limitation in Marinello must be

imported to Klein conspiracies to avoid an overly broad application of § 371.

The Court disagrees. Section 371 makes it a crime for "two or more persons [to] conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner for any purpose." 18 U.S.C. § 371. As the statutory text indicates, § 371 has two prongs—an "offense" prong and a "defraud" prong. Flynn is charged under § 371's defraud prong. Unlike the offense prong, the defraud prong does not require the existence of an underlying offense. See United States v. Tuohey, 867 F.2d 534, 537 (9th Cir. 1989) ("[T]he defraud part of section 371 criminalizes any willful impairment of a legitimate function of government, whether or not the improper acts or objective are criminal under another statute."); United States v. Rosengarten, 857 F.2d 76, 78 (2d Cir. 1988) ("A conspiracy to frustrate or obstruct the IRS's function of ascertaining and collecting income taxes falls clearly within the ban of section 371. This is so even though the contemplated substantive acts, standing alone, would not constitute a federal offense.") (internal citations omitted).

Additionally, the Supreme Court has long interpreted § 371's defraud prong as "broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government." Haas v. Henkel, 216 U.S. 462, 479 (1910). In recent years the Supreme Court was presented with the opportunity to clarify or narrow the scope of § 371 conspiracies, but declined to do so. Specifically, in 2012 the Second

Circuit rejected a vagueness challenge to Klein conspiracies by stating that "the Klein doctrine derives from and falls within the scope of the law . . . grounded on long-lived Supreme Court decisions," and that "such arguments are properly directed to a higher authority." United States v. Coplan, 703 F.3d 46, 62 (2d Cir. 2012), cert. denied 571 U.S. 819 (2013). The Supreme Court declined to grant certiorari in that case, thereby leaving its longstanding precedent in place. Coplan, 571 U.S. 819. Marinello does not address § 371, and the Court does not construe it as silently overturning the well-settled law governing conspiracies to defraud the United States.

For these and other reasons, the limitations on the substantive offense of 26 U.S.C. § 7212(a) do not apply to Klein conspiracies charged under the general conspiracy statute of 18 U.S.C. § 371.

2. Alternative Bases for Denial of Motion to Withdraw Plea

Flynn's decision to plead guilty was tardy,[1] just prior to trial. Now just prior to sentencing, he again makes a tardy decision. This time he seeks to withdraw the guilty plea he clearly understood resolved his right to trial on June 4, 2018. The procedural history of this case reflects the defendant's apparent effort to prolong the inevitable.

[1] So tardy was his decision that he deprived himself of a recommendation of a third point for acceptance of responsibility which would have lowered his offense level. The Government as early as June of 2018 was already asserting prejudice from Flynn's indecision about resolving his case.

Flynn states he is "asserting his innocence where the factual basis for a federal offense does not exist in the record." Def.'s Mem. Supp. Mot. Withdraw Guilty Plea [Docket No. 116] at 26. As discussed above, however, an ample factual basis does exist.

The Government would suffer substantial prejudice if Flynn were allowed to retract his plea. The Government has spent considerable time and resources preparing this complex case for trial, including three months of trial preparation, flying a witness twice from Costa Rica to Minneapolis, and paying a tax expert $8,000 to prepare for testifying. Gov't Supplemental Mem. [Docket No. 127] at 7. Were Flynn allowed to withdraw his plea, much of the trial preparation process would need to be repeated. Further, witness memories will have faded from the time Flynn entered his eleventh hour plea in June of 2018 to the time the Government could again be ready for trial in several months.

For the foregoing reasons, Flynn's request to withdraw his guilty plea is denied and the case will proceed to sentencing.

C. Materials to be Considered at Sentencing

At the Court's request, the parties briefed the issue of whether a defendant who substitutes retained counsel after pleading guilty may rely on sentencing arguments of prior counsel. The Government contends that under 18 U.S.C. § 3661, no limit exists to the information a court may consider in imposing an appropriate sentence. The Government thus states that it would not object to Flynn's new counsel "either relying on or refuting arguments made by prior

counsel, so long as the record is clear as to what arguments are now being advanced." Gov't Supplemental Mem. at 4.

Flynn states that his successor counsel is "free to adopt or not adopt the positions of prior counsel" and that he "refuses to adopt any position of prior counsel inconsistent with his current Motion to Withdraw Guilty Plea." Def.'s Supplemental Mem. [Docket No. 128] at 1. Flynn's counsel does not identify any inconsistent position beyond stating at the hearing that "a motion to withdraw the guilty plea is inconsistent with acceptance of responsibility." Plea Tr. at 28:21–23.

Based on the parties' positions, the Court will consider the entire record, including sentencing arguments advanced by prior counsel, in imposing an appropriate sentence. The Court's courtroom deputy will be in contact with the parties to select a sentencing date.

IV. CONCLUSION

Based upon the foregoing, and all of the files, records and proceedings herein, **IT IS HEREBY ORDERED** that Defendant Scott Phillip Flynn's Motion to Continue Sentencing [Docket No. 113] is **GRANTED**, and the Motion to Withdraw Guilty Plea [Docket No. 115] is **DENIED**.

BY THE COURT:
s/Ann D. Montgomery
ANN D. MONTGOMERY
U.S. DISTRICT JUDGE

Dated: January 8, 2019.

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

v. ORDER
Criminal No. 16-347 ADM/KMM

Scott Phillip Flynn,

Defendant.

David J. MacLaughlin and Benjamin F. Langner, Assistant United States Attorneys, United States Attorney's Office, Minneapolis, MN, on behalf of Plaintiff.

Ian M. Comisky, Esq,. and Patrick J. Egan, Esq., Fox Rothschild LLP, Philadelphia, PA, on behalf of Defendant.

This matter is before the undersigned United States District Judge for a ruling on Defendant Scott Phillip Flynn's ("Flynn") Motion for Continuance and/or Bifurcation of Sentencing and Restitution Hearing [Docket No. 133] and Plaintiff United States of America's (the "Government") Motion for Evidentiary Hearing [Docket No. 134].

Flynn requests that his sentencing and restitution hearing be continued and asks the Court to set a jury trial as to the amount of restitution to be

ordered. Flynn is not entitled to a jury trial on the amount of restitution. United States v. Carruth, 418 F.3d 900, 904 (8th Cir. 2005); 18 U.S.C. § 3664(e) ("Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence.").

The Government requests an evidentiary hearing at sentencing to determine the amount of Flynn's restitution. The Court agrees that an evidentiary hearing is necessary. The Government anticipates a hearing of approximately one hour.

The issues of restitution in this case are familiar to the Court. If the evidence concerning the restitution becomes more complicated than anticipated, the Court may continue the restitution after sentencing as prescribed by 18 U.S.C. § 3664(d)(5).

The Court permitted Flynn to change counsel at this late stage in the case based in part upon an understanding that the change in counsel would not cause further delays in the case. See Mem. Op. & Order [Docket No. 131] at 4. Seven months have elapsed since Flynn's plea of guilty and more than two years since the Indictment.

Based on the foregoing, as well as all the files, records, and proceedings in this case, IT IS HEREBY ORDERED that:

1. Defendant Scott Phillip Flynn's Motion for Continuance and/or Bifurcation of Sentencing and Restitution Hearing [Docket No. 133] is **DENIED**; and

2. The Government's Motion for Evidentiary Hearing [Docket No. 134] is **GRANTED**.

BY THE COURT:

s/Ann D. Montgomery
ANN D. MONTGOMERY
U.S. DISTRICT JUDGE

Dated: January 17, 2019.

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-1263

United States of America

Appellee

v.

Scott Phillip Flynn

Appellant

Appeal from U.S. District Court for the District of Minnesota
(0:16-cr-00347-ADM-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 17, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 16-347(ADM/KMM)

UNITED STATES OF AMERICA,	**SECOND SUPERSEDING INDICTMENT**
Plaintiff,	
v.	18 U.S.C. § 371 26 U.S.C. § 7201
SCOTT PHILLIP FLYNN, a/k/a Phil Flynn,	26 U.S.C. § 7206(1)
Defendant.	

THE UNITED STATES GRAND JURY CHARGES THAT:

OVERVIEW

1. Between 2005 and 2015, defendant SCOTT PHILLIP FLYNN evaded the assessment of millions of dollars in income taxes by fraudulently hiding millions of shares of stock that he obtained for himself, his father, and entities they controlled (collectively, the "Flynn Group") under other people's names. As described in detail below, the defendant—acting through certain of the Flynn Group entities—was a consultant who, in transactions in 2006 and 2008, assisted two privately-held client companies to become subsidiaries of publicly-traded shell companies through "stock-for-stock" transactions. As

compensation for the defendant's work on those transactions, the Flynn Group received millions of shares of corporate stock in the resulting publicly-traded companies. The shares had considerable value, and the defendant exercised dominion and control over the stock. The defendant should have, but did not, report the receipt of the shares of stock as income on his United States Individual Income Tax Returns, or on the tax returns of members of the Flynn Group, for the years when the shares were received. In order to disguise and conceal his control and ownership of the stock, and to evade paying taxes on this income, the defendant caused a portion of the stock to be transferred to "nominees" (*i.e.*, people who agreed to hold the stock in their names, but never actually owned or controlled the stock).

2. Furthermore, the defendant obtained millions of additional shares of stock in the publicly-traded shell companies prior to delivering the publicly-traded shell company to his clients by transferring those shares into the names of nominees. The defendant thereby obtained millions of shares of stock, which had a significant value.

3. Over the succeeding years, when the defendant needed money, he caused certain of the nominees to sell shares of stock and transfer the proceeds to entities in the United States controlled by the defendant, which in turn made payments to the defendant or on his behalf. These sales generated capital gains income, which the defendant purposely failed to report on his United States Individual Income Tax Returns, or on the tax returns of any member of the Flynn Group.

4. Through the techniques set forth above, defendant SCOTT PHILLIP FLYNN concealed

millions of dollars in income and capital gains from the Internal Revenue Service between approximately 2005 and 2011, and intentionally evaded the assessment of millions of dollars in income taxes owed by him and other members of the Flynn Group, which remain due and owing.

INTRODUCTORY ALLEGATIONS

At times relevant to this Second Superseding Indictment:

5. Defendant SCOTT PHILLIP FLYNN was an individual resident of the State of Minnesota.

6. Phillip J. Flynn, defendant SCOTT PHILLIP FLYNN's father, lived in Plymouth, Minnesota until his death on July 10, 2014. Phillip J. Flynn participated in the conspiracy by serving as the owner of certain companies used by him and by the defendant to carry out the scheme described herein.

7. Integritas Consulting, Inc. ("Integritas"), the primary corporate member of the Flynn Group, was a corporation primarily controlled and operated by defendant SCOTT PHILLIP FLYNN. Through Integritas, SCOTT PHILLIP FLYNN performed services for his clients, which generally involved assisting privately-held companies to become publicly-traded companies, as described in more detail below. In exchange for performing these services, SCOTT PHILLIP FLYNN arranged for Integritas to receive a fee, typically paid in the form of shares of stock in the resulting publicly-traded company.

8. In a "stock-for-stock" transaction, the share-holders of a privately-held company seek to exchange their shares in the privately-held company for shares of stock in a publicly-traded shell company. As a

result, the privately-held company becomes a subsidiary of the publicly-traded company, effectively converting the private company into a public company. Additionally, the shareholders of the private company become majority owners of the public parent company. The majority stake of stock delivered to the former owners of the privately-held company at closing is sometimes referred to as the "control group" of shares of the resulting publicly-traded company. The remaining shares, which typically continue to be owned by the individuals who previously owned stock in the publicly-traded company, are sometimes referred to as the "free-trading shares." Under certain circumstances, the Securities and Exchange Commission ("SEC") mandates that the publicly-traded company disclose the owners of more than 5% and 10% of its stock in a filing with the SEC.

9. Defendant SCOTT PHILLIP FLYNN used Integritas, and the following additional Flynn Group entities, to conceal income by receiving the proceeds of the sale of the stock sold by nominees:

- Apex Distributors, Inc. (formerly Apex Neutriceuticals);
- Desert Inn Holdings, LLP;
- Watertown Properties, LLC;
- Diversified Equities Partners, LLC;
- Diversified Marketing Partners, LLC;
- Creative Visions, LLC; and
- First Advallorem, Inc.

10. Co-conspirator S.M. was an Australian attorney who participated in the conspiracy by coordinating the recruitment of several individuals—many of them Australian citizens (hereafter the "Australian Nominees")—to "own" stocks and to receive the proceeds of stock sales, in order to conceal

the Flynn Group's beneficial ownership of the stocks and defendant FLYNN's control of the cash proceeds generated when the stock was sold.

11. A.B. was a Costa Rican attorney who, at defendant FLYNN's direction, recruited numerous Costa Rican citizens to open United States brokerage accounts, and bank accounts in Costa Rica, in order to hold, as nominees, stock that was beneficially owned by the. Flynn Group, and controlled by defendant SCOTT PHILLIP FLYNN. Additionally, at FLYNN's direction, A.B. also received millions of dollars from the proceeds of stock sales from the Australian Nominees who had been recruited by S.M., and then wired those proceeds to individuals or entities in the United States as directed by SCOTT PHILLIP FLYNN.

12. P.A. recruited numerous individuals in the United States (hereafter the "U.S. Nominees") to hold, as nominees, stock in publicly-traded shell companies.

13. R.S. was an attorney who represented the publicly-traded shell entities involved in this case during the stock-for-stock transactions.

14. Pacific Stock Transfer Company, located in Las Vegas, Nevada, acted as the transfer agent and registrar of the publicly-traded stocks which resulted from the transactions facilitated by defendant SCOTT PHILLIP FLYNN.

COUNT 1
(18 U.S.C. § 371: Conspiracy to Defraud the United States)

15. Paragraphs 1-14 are hereby realleged and incorporated by reference.

16. Beginning in or about 2005 and continuing through at least in or about 2015, in the State and District of Minnesota and elsewhere, the defendant,

SCOTT PHILLIP FLYNN,
a/k/a Phil Flynn,

and others known and unknown to the grand jury, including but not limited to S.M. and Phillip J. Flynn, did unlawfully and knowingly conspire, combine, confederate, and agree with each other to defraud the United States by deceitful and dishonest means by impeding, impairing, obstructing, and defeating the lawful governmental functions of the Internal Revenue Service, an agency of the United States, and the Treasury Department of the United States in the ascertainment, computation, assessment, and collection of revenue, that is, United States income taxes of defendant SCOTT PHILLIP FLYNN, and the other members of the Flynn Group, including Integritas and Phillip J. Flynn.

OBJECT OF THE CONSPIRACY

17. The object of the conspiracy was to evade the assessment of income taxes on millions of dollars of income received and controlled by defendant SCOTT PHILLIP FLYNN, Phillip J. Flynn, Integritas, and other members of the Flynn Group.

MANNER AND MEANS

18. Defendant SCOTT PHILLIP FLYNN, and/or others acting at his direction, carried out this conspiracy through the following manner and means, among others:

The Tower Tech Transaction

19. On or about June 7, 2005, defendant SCOTT PHILLIP FLYNN—acting through Integritas—entered into a written agreement (hereinafter referred to as the "Tower Tech Consulting

Agreement") with Tower Tech Systems, Inc. ("Tower Tech"), a privately-held Wisconsin company engaged in the design and manufacture of wind turbine extension towers that sought to become publicly traded. In the Tower Tech Consulting Agreement, Integritas represented that it had "considerable experience and expertise in the areas of mergers & acquisitions, venture capital, and marketing," and agreed to "assume responsibility for the identification, securing and payment for a suitable merger candidate." The Tower Tech Consulting Agreement provided that the original shareholders of Tower Tech would own 65 percent of the outstanding capital stock of the public entity resulting from the transaction.

20. Pursuant to the Tower Tech Consulting Agreement, defendant SCOTT PHILLIP FLYNN, with the assistance of S.M., P.A., and R.S., identified and arranged for the purchase of Blackfoot Enterprises, Inc. (hereinafter "Blackfoot"), a publicly-traded shell company, to acquire Tower Tech.

21. In connection with the acquisition of Blackfoot, the defendant also obtained control over substantially all of the free-trading shares of Blackfoot, which P.A. and others had caused to be transferred into the names of the U.S. Nominees. Thereafter, a significant portion of the free-trading shares, although nominally held by others, was beneficially owned and controlled by FLYNN and the Flynn Group.

22. At the direction of defendant SCOTT PHILLIP FLYNN and S.M., the Australian Nominees opened United States brokerage accounts in order to receive shares of stock beneficially owned and controlled by FLYNN and the Flynn Group. The Australian Nominees also opened Australian United

States dollar accounts at National Australia Bank to receive sales proceeds when the shares of stock were, from time to time after the consummation of the Tower Tech transaction, sold by and at the direction of defendant SCOTT PHILLIP FLYNN.

23. On or about October 14, 2005, in anticipation of the Tower Tech transaction, defendant SCOTT PHILLIP FLYNN and S.M. caused Pacific Stock Transfer Company to transfer the free-trading shares of Blackfoot under their control from the U.S. Nominees to the Australian Nominees.

24. On or about January 18, 2006, defendant SCOTT PHILLIP FLYNN caused Blackfoot to file with the SEC a false and misleading "Information Statement," through which Blackfoot disclosed who would be the "beneficial owners" of more than 5% and 10% of its stock after the intended transaction with Tower Tech. The filing listed Integritas as owning 2,500,000 shares, but did not disclose the substantial number of free-trading shares that the Flynn Group beneficially owned but had caused to be transferred into the names of the Australian Nominees.

25. On or about February 6, 2006, defendant SCOTT PHILLIP FLYNN, through Integritas, completed the Tower Tech transaction. As a result, Tower Tech became a wholly-owned subsidiary of Blackfoot. Blackfoot then changed its name to "Tower Tech Holdings Inc." and traded on the OTC Bulletin Board market for approximately $2.95 per share under the ticker symbol TWRT.

26. In exchange for FLYNN's work on the Tower Tech transaction, on or about February 6, 2006, Integritas received 2,500,000 shares of TWRT stock. Neither Integritas nor defendant FLYNN nor any member of the Flynn Group reported the receipt of

this in-kind fee as income on any tax return. Thereafter, the defendant provided a portion of these shares to other individuals who assisted in arranging the Tower Tech transaction, but kept at least approximately 700,000 of the shares in Integritas's name.

27. On or about March 5, 2007, defendant FLYNN caused Integritas to receive an additional 1,500,000 shares of TWRT stock as compensation for consulting work related to fundraising that the defendant performed after the Tower Tech transaction. Neither defendant FLYNN nor Integritas reported the receipt of the shares as income.

28. Thus, through the means set forth above, defendant SCOTT PHILLIP FLYNN, Integritas and other members of the Flynn Group: (a) received approximately 2,500,000 shares of TWRT stock as a fee for the services defendant FLYNN provided to Tower Tech; (b) earned another approximately 1,500,000 shares of TWRT stock through consulting work that defendant FLYNN performed after the transaction; and (c) surreptitiously took millions of additional shares of TWRT stock by causing those shares to be transferred to nominees that FLYNN controlled prior to the transaction. These shares were worth millions of dollars at the time that Integritas and the defendant received them, yet their receipt was never reported as income on FLYNN's income tax return or on the tax return of any other member of the Flynn Group.

Advanced Fiberglass Technologies Transaction

29. On or about September 7, 2007, defendant SCOTT PHILLIP FLYNN—acting through Integritas—entered into a written agreement (hereinafter referred to as the "AFT Consulting

Agreement") with Advanced Fiberglass Technologies ("AFT"), a privately-held Wisconsin company which manufactured and sold filament-wound storage tanks designed to store ethanol, water, and waste products. In the AFT Consulting Agreement, Integritas represented that it had "considerable experience and expertise in the areas of mergers & acquisitions, venture capital, and marketing." The AFT Consulting Agreement provided that (as in the Tower Tech transaction described above) Integritas would find a public "shell" corporation to acquire AFT. The AFT Consulting Agreement provided that the original owners of Advanced Fiberglass Technologies would own 60 percent of the shares of the resulting public entity.

30. Pursuant to the AFT Consulting Agreement, defendant SCOTT PHILLIP FLYNN, with the assistance of S.M., P.A., and R.S., identified and arranged for the purchase of Las Palmas Mobile Estates (hereinafter "Las Palmas"), a publicly-traded shell company, to acquire AFT.

31. In connection with the, acquisition of Las Palmas, defendant SCOTT PHILLIP FLYNN also obtained a significant portion of the free-trading shares of Las Palmas, which had previously been transferred into the names of the U.S. Nominees. Thereafter, a significant portion of the free-trading shares was, although nominally held by others, beneficially owned and controlled by FLYNN and the Flynn Group.

32. On or about November 15, 2007, in anticipation of the AFT transaction; defendant SCOTT PHILLIP FLYNN and S.M. caused Pacific Stock Transfer Company to transfer the free-trading shares of Las Palmas under their control from the U.S.

Nominees to the Australian Nominees (many of whom were previously utilized in the Tower Tech transaction).

33. On or about September 24, 2008, defendant SCOTT PHILLIP FLYNN caused Las Palmas to file with the Securities and Exchange Commission a false and misleading statement which purported to disclose who would be the "beneficial owners" of more than 5% and 10% of its stock after the intended transaction with AFT. The filing listed Integritas as owning 4,500,000 shares, but did not disclose the substantial number of free-trading shares that the Flynn Group beneficially owned but had caused to be transferred into the names of the Australian Nominees.

34. On or about October 14, 2008, defendant SCOTT PHILLIP FLYNN, through Integritas, completed the AFT transaction. As a result, AFT became a wholly-owned subsidiary of Las Palmas. Las Palmas then changed its name to Energy Composites Corporation ("Energy Composites"). It thereafter traded under the symbol ENCC on the OTC Bulletin Board, which traded at approximately $1.50 per share immediately after the transaction.

35. In exchange for defendant FLYNN's services to AFT, on or about October 14, 2008, Integritas received 4,500,000 shares of Las Palmas/ENCC. The defendant provided a portion of the shares to other individuals who assisted in arranging the AFT transaction, but kept at least approximately 2,000,000 ENCC Shares, including approximately 550,000 shares which he transferred to one of the Australian nominees. Neither FLYNN, Integritas, nor any other member of the Flynn Group reported the in-kind fee of ENCC shares as income.

36. On or about August 24, 2010, FLYNN caused Diversified Equities Partners ("DEP") to enter into an additional consulting agreement with Energy Composites Corporation, pursuant to which DEP received 3,375,000 shares of ENCC as compensation for consulting work. The defendant, or Phillip J. Flynn at the defendant's request, purported to transfer all of those shares to A.B. or nominees recruited by A.B. Neither DEP nor any other member of the Flynn Group reported the receipt of these ENCC shares on any income tax returns.

37. Thus, through the means set forth above, defendant SCOTT PHILLIP FLYNN, Integritas, DEP and Phillip J. Flynn: (a) received approximately 4,500,000 shares of ENCC stock as a fee for the services FLYNN provided to AFT; (b) earned another 3,375,000 shares of ENCC stock through consulting work that FLYNN performed after the transaction; and (c) acquired millions of shares of ENCC stock by causing those shares to be transferred to nominees that FLYNN controlled prior to the transaction. These shares were worth millions of dollars at the time that the FLYNN and the Flynn Group received them, yet their receipt was never reported as income on FLYNN's income tax return or on the tax return of any other member of the Flynn Group.

Defendant Realizes Capital Gains From the Australian Nominees' Sale of Stock

38. As set forth above, defendant SCOTT PHILLIP FLYNN caused millions of shares of TWRT and ENCC stock to be transferred to the Australian nominees. Thereafter, defendant SCOTT PHILLIP FLYNN and S.M. carefully tracked and controlled the Australian Nominees' brokerage and bank accounts.

39. Using the user names and passwords associated with the Australian Nominees' accounts, defendant SCOTT PHILLIP FLYNN and S. M. caused the Australian Nominees to sell the TWRT and ENCC shares at various prices during the years 2006 through 2013. The defendant then transferred, or caused the transfer of, the sales proceeds, in the aggregate amount of approximately $10 million, to the United States dollar accounts of the Australian Nominees at National Australia Bank. Defendant FLYNN later directed a large portion of these funds back to the United States, as described below, and caused them to be spent for defendant FLYNN's personal benefit or at his direction.

40. When the shares of TWRT and ENCC were sold by the Australian Nominees, the defendant should have, but did not, report the resulting capital gains on his United States income tax returns, or on any tax return of any member of the Flynn Group for the years when the sales occurred.

Money Returned to the United States
to the Flynn Group for the Benefit of
Defendant SCOTT PHILLIP FLYNN

41. In some cases, S.M. wired, or caused the Australian Nominees to wire, the proceeds generated by the sale of the TWRT and ENCC stock directly from Australia to persons or entities specified by defendant SCOTT PHILLIP FLYNN in the United States. For example, defendant SCOTT PHILLIP FLYNN recruited an individual named B.N. to receive approximately $104,500 in TWRT stock sales proceeds directly from Australia, and instructed B.N. to transfer the funds to defendant SCOTT PHILLIP FLYNN, or to defendant SCOTT PHILLIP FLYNN's wife, upon receipt.

42. In addition, defendant SCOTT PHILLIP FLYNN directed S.M. to wire the proceeds of TWRT and ENCC stock sales to A.B., whom defendant SCOTT PHILLIP FLYNN then directed to wire the funds, in the aggregate amount of at least $3,620,000, to one or more members of the Flynn Group in the United States.

43. During the taxable years 2006 through 2011, various members of the Flynn Group paid approximately $405,000 directly to defendant SCOTT PHILLIP FLYNN. The Flynn Group paid at least another $624,000 on the defendant's behalf during this time. Despite receiving significant funds directly and indirectly from entities he controlled, defendant SCOTT PHILLIP FLYNN failed to report most of these amounts as income in any year, instead falsely claiming that a portion of the monies he received directly from Integritas, Apex Distributors, Diversified Marketing Partners, and other members of the Flynn Group, was a nontaxable loan.

Watertown Properties House

44. On or about July 25, 2007, defendant SCOTT PHILLIP FLYNN caused Watertown Properties to purchase a home in Orono, Minnesota (the "Orono Home") for $2.7 million. Defendant SCOTT PHILLIP FLYNN has utilized the Orono Home as his personal residence since its acquisition by Watertown Properties. Defendant SCOTT PHILLIP FLYNN used funds transferred to Desert Inn Holdings by Costa Rican attorney A.B. to pay for the Orono Home. These funds originated from the Tower Tech transaction and were never reported on any tax return of any member of the Flynn Group.

45. On or about July 19, 2007, defendant SCOTT PHILLIP FLYNN caused Desert Inn Holdings to file

a sham mortgage with the Hennepin County Recorder's Office as purported evidence of Watertown Properties' indebtedness to Desert Inn Holdings for the funds used to purchase the Orono Home.

46. In approximately early 2008, defendant SCOTT PHILLIP FLYNN purported to cause a transfer of a 98 percent stake in Desert Inn Holdings to a Guatemalan shell company owned by A.B., Burlington, S.A., in order to create the appearance that Burlington, S.A. had loaned Desert Inn Holdings the funds defendant SCOTT PHILLIP FLYNN utilized to buy the Orono Home.

47. Between 2007 and 2015, defendant SCOTT PHILLIP FLYNN caused various members of the Flynn Group to transfer more than $600,000 to a bank account in the name of Watertown Properties at Wells Fargo Bank, which defendant SCOTT PHILLIP FLYNN used to improve and maintain the Orono Home. Despite the fact that defendant SCOTT PHILLIP FLYNN has lived in the Orono Home since its purchase, and that the house improvements benefitted only him, defendant SCOTT PHILLIP FLYNN never reported any portion of the more than $600,000 he received to improve the Orono Home on his personal income tax return during any year.

48. During the taxable years 2007 through 2011, defendant SCOTT PHILLIP FLYNN listed his address as the address of Phillip J. Flynn on his tax returns, rather than the address of the Orono Home, in order to conceal his ownership of the Orono Home from the IRS.

OVERT ACTS

49. In furtherance of the conspiracy and to achieve the object thereof, defendant SCOTT PHILLIP FLYNN, and/or others acting at their

direction, committed the following overt acts, among others, in the District of Minnesota:

a. On. or about October 13, 2005, defendant SCOTT PHILLIP FLYNN caused Pacific Stock Transfer Company to transfer millions of shares of Blackfoot to the Australian Nominees in anticipation of the Tower Tech transaction.

b. On or about March 10, 2006, S.M. wired $15,000 to B.N., whom defendant SCOTT PHILLIP FLYNN instructed to transfer the fun& to defendant SCOTT PHILLIP FLYNN or his wife.

c. On or about July 18, 2007, defendant SCOTT PHILLIP FLYNN caused Australian Nominee J.S. to transfer TWRT sales proceeds in the amount of $870,008 from Terra Nova Financial to a United States dollar account at National Australia Bank in the name of Nominee J.S.

d. On or about July 18, 2007, defendant SCOTT PHILLIP FLYNN caused Australian Nominee B.S. to transfer TWRT sales proceeds in the amount of $1,390,000 from Terra Nova Financial to a United States dollar account at National Australia Bank in the name of Nominee B.S.

e. On or about July 20, 2007, defendant SCOTT PHILLIP FLYNN caused Australian Nominees J.S. and B.S. to transfer $2,259,000 to Costa Rican bank accounts controlled by A.B.

f. On or about July 24, 2007, defendant SCOTT PHILLIP FLYNN caused Costa Rican attorney A.B. to transfer $2,250,000 to Desert Inn Holdings to be used by defendant SCOTT PHILLIP FLYNN to purchase the Orono Home.

g. On or about November 15, 2007, defendant SCOTT PHILLIP FLYNN caused Pacific Stock Transfer Company to transfer millions of shares of

Las Palmas to the Australian Nominees in anticipation of the Energy Composites transaction.

h. On or about October 17, 2008, defendant SCOTT PHILLIP FLYNN filed a materially false United States income tax return for the year 2007 in which he reported in line 22 that he had total income of only $26,136 when, as he well knew, his income was substantially higher than $26,136, and in which he reported that his "home address" was the address of Phillip J. Flynn when, as he well knew, he lived in the Orono Home.

i. On or about July 26, 2013, defendant SCOTT PHILLIP FLYNN caused Australian Nominee K.P. to sell 12,700 shares of Broadwind Energy for $63,500.

j. On October 15, 2013, defendant SCOTT PHILLIP FLYNN filed a materially false United States income tax return for the year 2011 in which he reported in line 22 that he had total income of only $32,094 when, as he well knew, his income was substantially higher than $32,094, and in which he reported that his "home address" was the address of Phillip J. Flynn when, as he well knew, he lived in the Orono Home.

All in violation of Title 18, United States Code, Section 371.

COUNT 2

(Tax Evasion – 2005-2011)

50. The Grand Jury restates and incorporates by reference the allegations set forth in paragraphs 1 through 49 above.

During the years 2005, 2006, 2007, 2008, 2009, 2010 and 2011, defendant SCOTT PHILLIP FLYNN had and received a substantial amount of taxable income, upon which there was a substantial amount of income tax due and owing.

Well knowing and believing the foregoing facts, the defendant,

SCOTT PHILLIP FLYNN,

did willfully attempt to evade and defeat the assessment of individual income taxes due and owing by him to the United States of America for those calendar years, by committing various affirmative acts of evasion, including, but not limited to:

a. In September 2005, defendant SCOTT PHILLIP FLYNN transferred millions of shares of Blackfoot to the Australian nominees.

b. In July 2006, defendant SCOTT PHILLIP FLYNN received $102,450 in cash from S.M. which he hid from the United States, and did not report as income on his United States Individual Income Tax Return for the year 2006, by causing it to be routed through the bank account of B.N. and then sent to him or his wife.

c. On October 17, 2007, defendant SCOTT PHILLIP FLYNN filed a United States Individual Income Tax Return for the year 2006 which materially underreported his total income and falsely listed his home address as that of Phillip J. Flynn.

d. In November 2007, defendant SCOTT PHILLIP FLYNN transferred millions of shares of ENCC stock to the Australian Nominees.

e. In approximately mid 2007, defendant SCOTT PHILLIP FLYNN hid substantial capital gains income from the IRS by i) causing two Australian Nominees to sell approximately $2.3 worth of TWRT stock; ii) instructing S.M. to wire approximately $2.3 million to Costa Rican attorney A.B.; and iii) instructing A.B. to wire the approximately $2.3 million to Dessert Inn Holdings, which defendant SCOTT PHILLIP FLYNN then used

to purchase the Orono Home, which has served no purpose other than being defendant SCOTT PHILLIP FLYNN's personal residence.

f. On July 10, 2008, defendant SCOTT PHILLIP FLYNN caused a Form 1099 to be issued to him and submitted to the IRS, showing income earned of $33,400 from Apex Distributors in 2007, when he well knew he earned substantially more than that amount.

g. On October 17, 2008, defendant SCOTT PHILLIP FLYNN filed a United States Individual Income Tax Return for the year 2007 which materially underreported his total income and listed his home address as that of Phillip J. Flynn.

h. During 2007, defendant SCOTT PHILLIP FLYNN caused Watertown Properties to pay approximately $160,000 in expenses associated with living in the Orono Home, including his personal bills for electricity, satellite television, natural gas, and property taxes, as well as bills for landscaping, repairs, a pool table, a sound system and other luxury items which were acquired exclusively for his personal use, which he did not report on his 2007 income tax return.

i. On May 29, 2009, defendant SCOTT PHILLIP FLYNN caused a Form 1099 to be issued to him and submitted to the IRS, showing income earned of $28,400 from Apex Neutriceuticals in 2008, when he well knew he earned substantially more than that amount.

j. On October 18, 2009, Defendant SCOTT PHILLIP FLYNN filed a United States Individual Income Tax Return for the tax year 2008 which materially underreported his total income and listed his home address as that of Phillip J. Flynn.

k. During 2008, defendant SCOTT PHILLIP FLYNN had substantial capital gains income from the sale of TWRT and ENCC stock, which he did not report on his United States Individual Income Tax Return for 2008.

1. On July 8, 2010, defendant SCOTT PHILLIP FLYNN caused a Form 1099 to be issued to him and submitted to the IRS, showing income earned of $17,000 from Diversified Marketing Partners in 2009, when he well knew he earned substantially more than that amount.

m. On October 15, 2010, defendant SCOTT PHILLIP FLYNN filed a United States Individual Income Tax Return for the year 2009 in which he materially underreported his total income and listed his home address as that of PHILLIP J. FLYNN.

n. During 2009, defendant SCOTT PHILLIP FLYNN caused Watertown Properties to pay approximately $104,000 in expenses associated with living in the Orono Home, including his personal bills for electricity, repairs, trash services and satellite television, natural gas, and property taxes, as well as bills for landscaping, repairs which were acquired exclusively for his personal use, which he did not report on his 2009 tax return.

o. On October 10, 2011, defendant SCOTT PHILLIP FLYNN filed a United States Individual Income Tax Return for the tax year 2010 which materially underreported his total income and listed his home address as that of Phillip J. Flynn.

p. During 2010, defendant SCOTT PHILLIP FLYNN caused Watertown Properties to pay approximately $182,000 in expenses associated with living in the Orono Home, including his personal bills for electricity, repairs, trash services, satellite

television, natural gas, and property taxes, as well as bills for landscaping, repairs, and other luxury items which were acquired exclusively for his personal use, which he did not report on his 2010 tax return.

q. During 2011, defendant SCOTT PHILLIP FLYNN caused Watertown Properties to pay approximately $90,000 in expenses associated with living in the Orono Home, including his personal bills for electricity, repairs, trash services, satellite television, natural gas, insurance, and property taxes, as well as bills for landscaping, repairs, painting, and the construction of an outdoor kitchen, which were acquired exclusively for his personal use, which he did not report on his 2011 tax return.

r. On or about July 26, 2013, defendant SCOTT PHILLIP FLYNN caused Australian Nominee K. P. to sell 12,700 shares of Broadwind Energy for $63,500.

s. On October 15, 2013, defendant SCOTT PHILLIP FLYNN filed a United States Individual Income Tax Return for 2011 which materially underreported his total income and listed his home address as that of Phillip J. Flynn.

All in violation of Title 26, United States Code, Section 7201.

COUNT 3

(False Tax Return – 2007)

51. On or about October 17, 2008, in the State and District of Minnesota, the defendant,

SCOTT PHILLIP FLYNN,

a/k/a Phil Flynn,

did willfully make and file with the Internal Revenue Service a false United States Individual Income Tax Return, Form 1040, separately from his wife, for the taxable year ended December 31, 2007, which he

signed and subscribed on or about October 15, 2008, and which was verified by a written declaration that it was made under the penalties of perjury, and which said Income Tax Return he did not believe to be true and correct as to every material matter, in that line 22 reported total income of $26,136 whereas, as he then and there well knew and believed, his total income was substantially more than $26,136.

All in violation of Title 26, United States Code, Section 7206(1).

COUNT 4

(False Tax Return – 2008)

52. On or about October 18, 2009, in the State and District of Minnesota, the defendant,

SCOTT PHILLIP FLYNN,

a/k/a Phil Flynn,

did willfully make and file with the Internal Revenue Service a false United States Individual Income Tax Return, Form 1040, separately from his wife, for the taxable year ended December 31, 2008, which he signed and subscribed on or about October 12, 2009, and which was verified by a written declaration that it was made under the penalties of perjury, and which said Income Tax Return he did not believe to be true and correct as to every material matter, in that line 22 reported total income of $20,597 whereas, as he then and there well knew and believed, his total income was substantially more than $20,597.

All in violation of Title 26, United States Code, Section 7206(1).

COUNT 5

(False Tax Return – 2009)

53. On or about October 15, 2010, in the State and District of Minnesota, the defendant,

SCOTT PHILLIP FLYNN,

a/k/a Phil Flynn,

did willfully make and file with the Internal Revenue Service a false United States Individual Income Tax Return, Form 1040, separately from his wife, for the taxable year ended December 31, 2009, which he signed and subscribed on or about October 6, 2010, and which was verified by a written declaration that it was made under the penalties of perjury, and which said Income Tax Return he did not believe to be true and correct as to every material matter, in that line 22 reported total income of $19,289 whereas, as he then and there well knew and believed, his total income was substantially more than $19,289.

All in violation of Title 26, United States Code, Section 7206(1).

COUNT 6

(False Tax Return – 2010)

54. On or about October 10, 2011, in the State and District of Minnesota, the defendant,

SCOTT PHILLIP FLYNN,

a/k/a Phil Flynn,

did willfully make and file with the Internal Revenue Service a false United States Individual Income Tax Return, Form 1040, separately from his wife, for the taxable year ended December 31, 2010, which he signed and subscribed on or about October 10, 2011, and which was verified by a written declaration that it was made under the penalties of perjury, and which said Income Tax Return he did not believe to be true and correct as to every material matter, in that line 22 reported total income of $37,053 whereas, as he then and there well knew and believed, his total income was substantially more than $37,053.

All in violation of Title 26, United States Code, Section 7206(1).

COUNT 7

(False Tax Return – 2011)

55. On or about October 15, 2013, in the State and District of Minnesota, the defendant,

SCOTT PHILLIP FLYNN,

a/k/a Phil Flynn,

did willfully make and file with the Internal Revenue Service a false United States Individual Income Tax Return, Form 1040, separately from his wife, for the taxable year ended December 31, 2011, which he signed and subscribed on or about October 14, 2013, and which was verified by a written declaration that it was made under the penalties of perjury, and which said Income Tax Return he did not believe to be true and correct as to every material matter, in that line 22 reported total income of $32,094 whereas, as he then and there well knew and believed, their total income was substantially more than $32,094.

All in violation of Title 26, United States Code, Section 7206(1).

A TRUE BILL

UNITED STATES ATTORNEY FOREPERSON

Appendix F

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 16-347 (ADM/KMM)

UNITED STATES OF AMERICA,
Plaintiff,

v.

PLEA AGREEMENT AND SENTENCING STIPULATIONS

SCOTT PHILLIP FLYNN,
a/k/a PHIL FLYNN,
Defendant.

The United States of America and SCOTT PHILLIP FLYNN (hereinafter referred to as the "Defendant") agree to resolve this case on the terms and conditions that follow. This plea agreement binds only the Defendant and the United States Attorney's Office for the District of Minnesota. This agreement does not bind any other United States Attorney's Office or any other federal or state agency.

1. **Charges**. The Defendant agrees to plead guilty to Counts 1 and 3 of the Second Superseding Indictment, which charge the Defendant with conspiring to defraud the United States by impairing and impeding the lawful functioning of the IRS, and filing a materially false United States Income Tax Return on form 1040 for the calendar year 2007, respectively, in violation of 18 U.S.C. Section 371 and 26 U.S.C. Section 7206(1).

2. In return for Defendant's pleas of guilty to Counts 1 and 3 of the Second Superseding Indictment, the United States agrees to move the Court to dismiss

the remaining counts in the Second Superseding Indictment at sentencing.

3. **Factual Basis**. The Defendant stipulates and agrees to the following facts and further agrees that the stipulated facts constitute relevant conduct for purposes of this case:

In 2006, the Defendant assisted a Wisconsin company called Tower Tech Systems, Inc. in becoming publicly traded through a stock-for-stock "reverse merger" transaction. In 2008, the Defendant assisted a second Wisconsin company, Advanced Fiberglass Technologies, in becoming publically traded in the same manner. As compensation for the Defendant's assistance in connection with these transactions, millions of shares of publicly-traded stock in the resulting public companies were transferred to a company called "Integritas, Inc." and to another company called "Diversified Equities Partners," over both of which the Defendant exercised control.

In addition, the Defendant received millions of additional shares in the resulting public companies, which he caused to be put in the names of Australian nominees recruited by the Defendant's co-conspirator, Steven Miotti. At Miotti's direction, the Australian nominees opened brokerage accounts in the United States to receive the shares, but the Defendant possessed login and password data with which he controlled the accounts and the shares of stock.

During the period from 2006 through 2014, the defendant caused the stock discussed above to be sold and the proceeds, in the amount of approximately $15 million, to be transferred to United States Dollar accounts held by the Australian nominees at National Australia Bank. The Defendant exercised dominion and control over these funds. The parties agree that

this number – the aggregate amount of money transferred to the Australian nominees' United States Dollar accounts in Australia from the sale of stock – is the amount of unreported income for purposes of this criminal case.

The Defendant agrees that he took the steps described above in order to impair and impede the lawful functioning of the IRS in ascertaining his income tax liability during the years 2005 through 2015.

In 2007, the Defendant received approximately $2.7 million of the proceeds from the Australian nominees to buy a house in Orono, Minnesota, which was income to the Defendant. That year, the Defendant reported $26,136 of total income on line 22 of his United States Individual Income Tax Return.

With respect to his 2007 United States Income Tax Return, the Defendant acknowledges:

a. that the Defendant made, subscribed and filed the said return with the Internal Revenue Service in the State of Minnesota on October 17, 2008;

b. that the Defendant signed the said return under the penalties of perjury;

c. that the Defendant knew that the said return materially underreported his income for 2007 when he filed the return; and

d. that the Defendant filed the said return willfully, knowing that he was violating the law when he filed it.

The defendant acknowledges that his conduct violated Title 18, United States Code, Section 371, and Title 26, United States Code, Section 7206(1).

4. **Statutory Penalties**. The parties agree that Count 1 of the Second Superseding Indictment carries statutory penalties of:

a. a maximum of 5 years of imprisonment;

b. a maximum supervised release term of 3 years;

c. a fine of up to $250,000;

d. a mandatory special assessment of $100; and

e. payment of mandatory restitution in an amount to be determined by the Court, as agreed to in paragraph 9 below.

The parties agree that Count 3 of the Second Superseding Indictment carries statutory penalties of:

a. a maximum of 3 years of imprisonment;

b. a maximum supervised release term of 1 year;

c. a fine of up to $250,000;

d. a mandatory special assessment of $100; and

e. payment of mandatory restitution in an amount to be determined by the Court, as agreed to in paragraph 9 below.

5. **Revocation of Supervised Release**. The Defendant understands that, if he were to violate any condition of supervised release, he could be sentenced to an additional term of imprisonment up to the length of the original supervised release term, subject to the statutory maximums set forth in 18 U.S.C. § 3583.

6. **Guideline Calculations**. The parties acknowledge that the Defendant will be sentenced in accordance with 18 U.S.C. § 3551, et seq. Nothing in this plea agreement should be construed to limit the

parties from presenting any and all relevant evidence to the Court at sentencing. The parties also acknowledge that the Court will consider the United States Sentencing Guidelines in determining the appropriate sentence and stipulate to the following guideline calculations:

a. Base Offense Level. The parties agree that the base offense level for the Klein conspiracy charged in Count 1 and for filing the false tax return as charged in Count 3 in this case is 24 based upon a tax loss that exceeds $3,500,000, but is less than or equal to $9,500,000 (U.S.S.G. §§ 2T1.1(a)(1), 2T1.1(c)(1)(A) and; 2T4.1(J)).

b. Specific Offense Characteristics. The parties agree that the offense involved sophisticated means, resulting in a 2-level increase pursuant to U.S.S.G. § 2T1.1(b)(2).

c. Chapter 3 Adjustments. The parties agree that the defendant was an organizer of a criminal activity that was "otherwise extensive" within the meaning of U.S.S.G. §3B1.1(a), resulting in a 4-level increase.

d. Acceptance of Responsibility. The government agrees to recommend that the Defendant receive a 2-level reduction for acceptance of responsibility and to make any appropriate motions with the Court. However, the Defendant understands and agrees that this recommendation is conditioned upon the following: (i) the Defendant testifies truthfully during the change of plea and sentencing hearings, (ii)

the Defendant provides complete and truthful information to the Probation Office in the pre-sentence investigation, and (iii) the Defendant commits no further acts inconsistent with acceptance of responsibility. (U.S.S.G. §3E1.1). The government will decline to move the Court to award the third point for acceptance of responsibility because trial is only one week away, and the government has expended considerable resources preparing for the trial.

The parties agree that other than as provided for herein, no other Chapter 3 adjustments apply.

Based upon the foregoing, the parties stipulate that the Defendant's offense level in this case is 28.

c. Criminal History Category. Based on information available at this time, the parties believe that the Defendant's criminal history category is II. This does not constitute a stipulation, but a belief based on an assessment of the information currently known. The Defendant's actual criminal history and related status will be determined by the Court based on the information presented in the Presentence Report and by the parties at the time of sentencing.

d. Guideline Range. If the offense level is 28, and the criminal history category is II, the Sentencing Guidelines range is 87-108 months of imprisonment. Thus, given the

statutory cap, the guidelines range of imprisonment in this case is 87-96 months.

g. Fine Range. If the adjusted offense level is 28, the fine range is $25,000 to $250,000. (U.S.S.G. § 5E1.2(c)(3)).

h. Supervised Release. The Sentencing Guidelines suggest a term of supervised release of one to three years (U.S.S.G. §§ 5D1.1, 5D1.2(a)(2)).

i. Sentencing Recommendation and Departures. The Defendant reserves the right to make a motion for departures from the applicable Guidelines range and is free to argue for any sentence. The government agrees to recommend a sentence at the low end of the guidelines range, in this case 87 months of imprisonment.

7. **Discretion of the Court**. The foregoing stipulations are binding on the parties, but do not bind the Court. The parties understand that the Sentencing Guidelines are advisory and their application is a matter that falls solely within the Court's discretion. The Court may make its own determination regarding the applicable Guidelines factors and the applicable criminal history category. The Court may also depart from the applicable Guidelines range. If the Court determines that the applicable guideline calculations or Defendant's criminal history category are different from that stated above, the parties may not withdraw from this agreement, and Defendant will be sentenced pursuant to the Court's determinations.

8. **Special Assessment**. The Guidelines require payment of a special assessment in the amount of $100.00 for each felony count of which Defendant is convicted. U.S.S.G. § 5E1.3. Defendant agrees to pay the special assessment (amounting in this case to $200) prior to sentencing.

9. **Restitution**. The Defendant agrees to cooperate fully with the IRS to determine the Defendant's correct tax liabilities. The Defendant agrees that the IRS may use the tax loss contemplated by this Plea Agreement to assess income tax liability to him. The defendant further agrees, pursuant to this plea agreement, that the Court should order him to pay restitution to the IRS.

10. **Complete Agreement**. This, along with any agreement signed by the parties before entry of plea, is the entire agreement and understanding between the United States and Defendant.

Date: June 4, 2018

GREGORY G. BROOKER
United States Attorney

/s/ David J. MacLaughlin
BY: DAVID J. MACLAUGHLIN
BENJAMIN F. LANGNER
Assistant U.S. Attorneys

Date: June 4, 2018

/s/ Scott Flynn
SCOTT PHILLIP FLYNN
Defendant

Date: June 4, 2018

/s/ Paul Engh & Earl Gray
PAUL C. ENGH
EARL P. GRAY
Counsel for Defendant

Appendix G

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,
Plaintiff,
v.

SCOTT PHILLIP FLYNN,
Defendant.

File No. 16-CR-347 (ADM/KMM)
Minneapolis, Minnesota
January 23, 2019
2:00 PM

BEFORE THE HONORABLE ANN D. MONTGOMERY
UNITED STATES DISTRICT COURT JUDGE
(SENTENCING)

APPEARANCES

For the Plaintiff: U.S. ATTORNEY'S OFFICE
DAVID MACLAUGHLIN, AUSA
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300 S. 4th St., #600
Minneapolis, MN 55415

For the Defendant: FOX ROTHSCHILD LLP
PATRICK EGAN, ESQ.
2000 Market St., 20th Floor
Philadelphia, PA 19103

* * * * *

[46]

Q [Mr. MacLaughlin]. Do we know what happened to the funds after they got there?

A [Ms. Korpela]. Some of the funds, yes.

Q. Okay. What happened to some of the funds?

A. Some of the funds went directly from the nominee accounts to an attorney in Costa Rica who then transferred it up to Mr. Flynn. Some of the money went directly from the nominee accounts to Mr. Flynn's company accounts here. And some of the money, I believe, went to Mr. Miotti, who then transferred the money out of his own account.

Q. Have you compared the amount of money that went over there to the amount of money that came out of Australia either to Costa Rica or to the United States?

A. Yes.

Q. And is there still money in Australia that Mr. Flynn transferred over there?

A. Yes.

Q. Do you have an idea of how much?

A. Out of that 15 million I want to say there's maybe 6 million left.

Q. Left over there?

A. I believe. I'm not certain on those numbers.

Q. Okay. But are they close? Are you ballparking it?

A. Yes.

Q. Okay. Now, topic of cross-examination that I want to get to before cross-examination: Normally when stock is sold -- the 15 million is from the sale of stock, right?

A. Yes.

Q. Normally isn't that a capital gain scenario?

A. Or loss, yes.

Q. And aren't capital gains taxed at a lower rate than ordinary income?

A. Yes.

Q. Your analysis here in Government Exhibit 4 that we're going to talk about in a second deems the $15 million to be ordinary income, doesn't it?

A. It does.

Q. Why?

A. Because in the plea agreement that 15 million was a proxy number that we used kind of as a compromise between the largest tax loss that it could be and what Mr. Flynn probably wanted. So the 15 million was a compromise number that stood instead of the actual income.

Q. A proxy for what?

A. For all of Mr. Flynn's income.

* * * * *

[58]

Q [Mr. Egan]. And what your number is based on is all of the sales that those Australian nominees made in these U.S. brokerage accounts?

A [Ms. Korpela]. Not all of the sales, just the proceeds that were sent to Australia.

Q. So, in other words, there were proceeds that didn't go to Australia?

A. There may be some proceeds still sitting in the accounts, and there is still stock sitting in the accounts.

Q. And the theory of the case, as I understand it, is that these proceeds went to Australia, right?

A. Correct.

Q. And then those proceeds went into the various -- were in the accounts of the various nominees, correct?

A. Correct.

Q. And those nominees then distributed those proceeds to a number of different places, correct?

A. Correct.

Q. And you are attributing all of that money to Mr. Flynn, correct?

A. Yes.

Q. Okay. Thank you.

So in order for that to be an accurate attribution, Mr. Flynn would have to essentially be the beneficial owner of all of those shares, correct?

A. No. We're not contending that this is a completely accurate number. As I already testified to, it's a proxy number for the income that Mr. Flynn did receive.

Appendix H

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,
Plaintiff,
v.

SCOTT PHILLIP FLYNN,
Defendant.

File No. 16-CR-347 (ADM/KMM)
Minneapolis, Minnesota
January 23, 2019
2:00 PM

BEFORE THE HONORABLE ANN D. MONTGOMERY
UNITED STATES DISTRICT COURT JUDGE
(SENTENCING – CONTINUED)

APPEARANCES

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* * * * *

[125]

THE COURT: All right. Thank you.

The argument is of record, of course, with regard to the 28 percent. In reviewing the guideline analysis and the materials of yesterday, I think a 28 percent benchmark is applicable in the context of assessing a guideline analysis and loss amount. It does not apply, to my understanding, in restitution, which is assessed to make victims whole, and no discounting of that by a particular percentage seems to make rational sense to me.

I have spent some time thinking about the testimony of Agent Korpela and the defense witness, Mr. Fairchild, and I think under the circumstances in evaluating the testimony there clearly are potential multiple ways of methodology and computation of the appropriate restitution amount, which could, as the Government's exhibits indicate, amount to and could result in a number of different restitution figures.

I think the methodology the government used that results in a figure of $5,392,442.87 Mr. MacLaughlin has spoke of it as conservative, and whether it's conservative isn't as important to me as to whether or not it's a fair amount. And I think the government certainly could make an argument for a $15 million figure. And I think under the circumstances the $5,392,442.87 figure is fair and an appropriate one for restitution in this case and it will be the restitution amount. As we know, that amount

is determined not beyond a reasonable doubt but by a preponderance of the evidence standard. And I won't pretend that I think it is mathematically precise in any way to reflect the amount that should actually be paid back, but it certainly satisfies in my mind the preponderance of the evidence standard and, more importantly, I think it is fair under the circumstances.

* * * * *

[144]

[THE COURT]

…

I do also impose mandatory restitution in the prior announced amount of $5,392,442.87, which is due immediately to the Internal Revenue Service at an address that will be listed in the Judgment and Commitment. Payments are to be made payable to the Clerk of the United States District Court for disbursement to the victim. The interest requirement is waived in accordance with Title 18, United States Code Section 3612(f)(3).