Reply Motion to Dismiss Notes

- argues that the USG opposition doc begins by begging the Court to "ignore the substantive defects of the prosecution and focus on procedure — falsely claiming the Ver is a 'fugitive from justice' who should be 'disentitled' from asserting his fundamental rights as a criminal defendant" (pg. 8)

- argues that on the threshold procedural question, the fugitive disentitlement doctrine is not applicable
- A fugitive is someone who flees the jurisdiction or hides away to avoid prosecution and Ver has done neither — instead, he is a foreign national who has lives outside the USA well before the alleged crimes took place and he has never fled or hidden, he has lived and worked openly.
- The government's argument is that when it chose to have Ver arrested in Spain, Ver opposed extradition (his legal right) instead of favoring a "duty to report for prosecution" that the govt posits (pg. 8)
    - Goes on to argue that this supposed "duty" rests on an unreasonable ruling
    - Even if ver was a fugitive, the provisions of the disentitlement doctrine counsel against its application in this case

Summary of defense arguments:

"The exit tax is an unconstitutional wealth tax targeting the fundamental right to expatriate; the tax treatment of bitcoin was so unconstitutionally vague in 2014 that, over a decade later, even the government is unable to correctly cite a regulation or rule that contradicted Ver's good faith efforts to comply with U.S. law; and the government hoodwinked the grand jury with a deceptive account of the underlying documents and events that pervade the indictment itself. The Court should dismiss the indictment." (Pgs. 8-9)

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A. The Exit Tax Exceeds Congressional Authority and Unconstitutionally Penalizes a Fundamental Right

1. The Exit Tax Is an Unconstitutional Direct Tax on Wealth

- "the exit tax does not tax income, nor does it tax any form of economic activity, transaction or transfer"
- "It is a direct tax on personal property — a 'wealth tax' — imposed directly on the value of that property, purely as a consequences of who owns it.
- "Argues that it does not make a difference if the IRS has tied the imposition of that tax to a triggering event (expatriation) because this event in question is still personal, not economic or commercial and has no nexus to the taxed property"
- "If the exit tax were deemed constitutional, the IRS could invent any number "triggering" events in order to single out targets of a wealth tax and the court must condemn unconstitutional overreach" (pg. 9)

- "a direct tax is one 'levied directly on property because of its ownership'"
- Goes on to cite case law, discusses apportionment
- "The Constitution imposed this apportionment requirement 'to prevent taxes on persons solely because of their general ownership of property.'" (Pg. 9)
- Argues that the exit tax is a tax on Ver's property (the USG has a different perspective)

a. Expatriation is not a taxable activity

- states the the USG quotes the supreme court case Moore v. Unites States to support that indirect taxes may be imposed on "activities or transactions" (opp motion to dismiss pg. 16)
    - However, the defense argues that "the SC never meant to suggest that a tax laid on the 'fair market value' of all of one's property — the archetypal direct tax — somehow becomes an indirect tax

simply because the tax is triggered by some personal activity unrelated to the property (pg. 10)

- the defense argues “the government’s cited cases upheld taxes on economic dealings where the amount of the tax was linked to the economic dealing in question, not to taxpayer wealth unconnected to the dealing.” (Pg. 10)

- doc discusses case law on the tax of business activity vs. the mere ownership of property

“The government erroneously cites *Sebelius* for the proposition that taxation on foregoing an activity is constitutional without regard to realization.” (Pg. 11)
- *Sebelius* does not permit taxing conduct alone where there is no realized income

- according to this doc (the defense), it states that “The government lists cases that tax “events or activities” that necessarily involve *transfers* of property and that tax the property being transferred, in sharp contrast to expatriation, where the taxpayer’s property is not transferred at all. In particular, the government asks the Court to draw a faulty analogy when it claims that death is a taxable ‘event.’” (Pg. 11)

b. Expatriation Does Not Involve a Transfer of Property

- “in contrast with death, no transfer or disposition occurs upon expatriation.” (Pg. 12)
- Claims “the govt. weakly insists otherwise by fabricating a legal fiction” by equating expatriation the death of Ver the US citizen and birth of Ver the non citizen (or St. Kittian citizen)
    - Thus, the USG claims the separate individual of Ver the non citizen inherited the wealth of the no longer existing Ver the US citizens

- “But the corporate reorganization cases (like *Cottage Saving Ass’n v. Comm’r*) are not on point because Ver’s expatriation did not change his legal relationship to his bitcoin: ownership of bitcoin is recognized internationally.” (Pg. 12)
- Goes on to argue that Ver and his bitcoin were in Japan before and after expatriation, so there wasn’t a jurisdictional change at all
- "Ver’s expatriation and the corresponding status shift of his corporations from S-corp to C-corp status—a tax election—did not alter his ownership of the companies or his indirect ownership of their bitcoin.” (Pg. 12)
- The govt is claiming that because the expatriation changes Ver’s relationship to the US, thus his relationship to his property changed
  - But the defense argues that this is not the case, as Ver owned his bitcoin on March 2, 20214 and March 3, 2014.

- “the government suggests that the change in the ability to tax property after expatriation is a relevant change, as if expatriation necessarily entails a transfer of property out of the government’s reach” (pg. 13)
  - The defense argues against this stating that expatriation is not a transfer of the expatriate’s assets out of the country as Ver and his bitcoin were outside of the US well before he expatriated (semi-quote)

“There is no necessary connection between an individual’s loss of U.S. citizenship and any change in the government’s power to tax dispositions of his property. The exit tax cannot be justified by the transfer of property because no such transfer occurs during expatriation.” (Pg. 13)

c. The Exit Tax Is Not an Income Tax
(1)Supreme Court Precedent Imposes a Realization Requirement

- the govt. claims that “the exit tax can be construed as an income tax, even though it patently a tax on personal property, and there is no realization of income” (pg. 13)
- The doc (the defense) argues that the govt puts a greater weight in the 9th circuits opinion on Moore rather than the supreme court decision
    - From footnote: “The majority in *Moore* found that income had been realized—not that realization is unnecessary. Although the government cites Justice Jackson’s concurring opinion, the majority declined to find unrealized income can be taxed. If a majority of the Court believed that unrealized income can be taxed, the majority opinion would simply have said so.” (Pg. 13)

“*Macomber* remains the governing Supreme Court authority on realization as a constitutional requirement, and its holding can only be overturned by the Supreme Court, which has repeatedly refused to do so.” (pg. 14)

(2) The Government’s Statutory Examples Are Consonant with Macomber (part of c)

- discusses requirement of realization

(3)The “Deferral” Provision Does Not Save the Tax (part of c)

“The government insinuates that the exit tax actually *does* satisfy the realization requirement because § 877A(b) permits the taxpayer to ‘elect[]’ to ‘defer’ ‘the time for payment’ of the tax until the property is disposed of —and disposal of property is ‘a quintessential realization event.’” (Pg. 15)
    - the defense argues that this is a red herring

- the defense claims “The exit tax is based on *the value of the property at the time of expatriation*. Even if the taxpayer can defer *payment* of that tax until he ultimately disposes of the property, that does not transform the

tax into a constitutional tax *on the income realized from that disposition*." (Pg. 15)

"Regardless of timing, the exit tax is unconstitutional because it purports to tax unrealized, imaginary income."

2. The Exit Tax Is an Unconstitutional Burden on the Fundamental Right to Expatriate

- the government gives three arguments against this its in opp of the motion to dismiss, however the defense says its arguments lack merit

a. The Exit Tax Burdens the Right to Expatriate

- the govt claims that the exit tax is constitutional because it only applies to a small subset of high net worth or wealthy individuals. However, the defense argues that every american has a right to expatriate
- according to the defense, "conditioning the right to expatriate on a massive tax that may never be applied to similarly situated individuals remaining in the US imposes a substantial burden on the exercise of that right" (pg. 15)

"Importantly, the exit tax does not make expatriation merely "tax-neutral." Consider again the person who buys a baseball card for $1 and, years later, sells it for $2. If he remained a U.S. citizen, he would owe tax on the realized income of $1. But if he expatriated when the card had a temporary market value of $100, then he would owe tax on that never-realized $99 gain, even though his *actual* gain would still be just $1. And while a tax on $99 might not be a *substantial* burden, the tens of millions of dollars that the government says Ver should have paid surely would be." (Pg. 16)

b. The Right to Expatriate Is Fundamental

- the USG is arguing that Americans do not have a fundamental right to expatriate

- The footnote: “To be clear, Ver is not arguing that there is a fundamental right “to expatriate tax-free.” Opp. 24. He is arguing that there is a fundamental right to expatriate and that the exit tax unconstitutionally burdens the exercise of that right.” (Pg. 16)

- the USG cites the “perpetual allegiance” doctrine in its arguments that expatriation is not a fundamental right
- The defense argues that the doctrine has not been incorporated into US law and that there is a right to expatriate (pg. 16 and 17)

"The government also argues that there is no constitutional limit to the burden that Congress may place on fundamental rights through taxation, quoting the Supreme Court’s statement in *Brushaber* that the Due Process Clause ‘is not a limitation upon the taxing power.’" (Pg. 17)
- the defense argues that Brushaber was not addressing burdens on fundamental rights

c. The Exit Tax Does Not Withstand Any Level of Scrutiny

- The exit tax was not enacted in furtherance of “[m]aintaining a sound tax system,” Opp. 29, or to avoid “incentiviz[ing] U.S. citizens to expatriate to evade their U.S. taxes,” Opp. 29-30, and it is not tailored (narrowly or otherwise) to those interests. (quote, pg. 18)

Until 2004, the Internal Revenue Code imposed a tax on those people who expatriated with a “principal purpose” of tax avoidance. E.g.,26 U.S.C. § 877(a) (1999).

- but then congress was under pressure to make expatriation more costly
- the result was amendments that removed the limitation to expatriates motivated by tax avoidance and instead applied to high income and high net worth expatriates regardless of intent (“In amending the exit

tax, Congress removed the nexus to tax avoidance, making clear that its purpose was not preventing tax avoidance.")

The result: "Expatriates who seek to avoid U.S. taxes may do so as long as they are not sufficiently wealthy. Expatriates who have no intent to avoid U.S. taxes and have been living outside the United States for years are subjected to massive taxes on hypothetical transactions that never occurred and may never occur. Congress could have mandated a tax on property when it is sold (*e.g.*, § 877(a))—but Congress did not do so here. The exit tax, as amended, does not withstand scrutiny."

- the defense argues that even if the law did scrutiny, it would still be unconstitutional

"Even the Joint Committee on Taxation Staff conceded that applying the exit tax to "the present value of a *possible* future distribution that the beneficiary may or may not ever receive," might be unconstitutional. J. Comm. on Taxation, *Issues Presented by Proposals to Modify the Tax Treatment of Expatriation* 84 (June 1, 1995)."(pg. 18-19)

"Although the Staff was considering contingent interests, ownership of bitcoin in March 2014 was equivalent to a contingent interest. After Mt. Gox collapsed earlier in 2014, there was no guarantee or even likelihood that Ver would ever receive income from the bitcoins."

- argues the exit tax violates the fifth amendment as applied

B. The Indictment Rests on Impermissibly Vague Legal Foundations

- claims that the government's response to the defense claim that the indictment rests on vague legal foundations is to pretend it has charged ver with a different crime
- No law or regulation required ver to disclose how many bitcoins he held at the time of his expatriation

- The laws cited by the USG as examples of clarity required that expatriating citizens pay taxes based on hypothetically liquidated property deemed "sold" the day before expatriation
    - Instead of the USG acknowledging that this task was and still is impossible with regard to the hypothetical sale of bitcoin on march 2, 2014, the govt argues that Ver should have disclosed the amount of that property (btc) in his possession (which was/is also an impossible task, mentioned in MTD para 2) rather than pay the appropriate amount of taxes that resulted from that hypothetical

- according to the defense, the USG goes to great lengths to recast the exit tax as a kind of asset declaration rule rather than what it is — a rule requiring the payment of taxes based on the hypothetical liquidation of property (pg. 20)

"The problem that the government simply ignores—understandably, as the Tax Code provides no guidance on this point—is that there is no ground in the Tax Code to understand how that liquidation is to apply to digital assets when selling any substantial portion of them would have crashed the price." (Pg. 20)

- the government makes the point that bitcoin is a kind of property, but it makes no effort "to state the kind of property or the relevant tax implications for a hypothetical sale as of 2014."
    - This is unsurprising given that there was no clarity regarding the manner of accounting or valuation for this type of asset
    - Nor does the IRS's unfounded notice provide any relevant guidance

"Indeed, even despite Notice 2014-21, the government appears equally confounded with its own indictment, failing to identify the nature of Ver's bitcoin, the bitcoin's value accounting for a one-day fire-sale at multiples of the worldwide bitcoin daily trading volume on March 2, 2014, or the amount

of exit tax purportedly still owed by Ver (given the millions he undisputedly paid).” (Pg. 20)
Footnote: “The government says that it has accused Ver of failing to pay $48 million in taxes, Opp. 7 n.5, but it refuses to say what portion of this total constituted an exit tax and on what basis. The government alleges bitcoin worth $102.4 million “absent discounts,” Opp. 1, but stops short of asserting that there should have been no discounts. Common sense dictates that if only 2% of an asset can be sold, then that asset’s fair market sale value is (at most) 2% of what it would be if the entire asset could be sold.”

- the defense claims that in its opp to the MTD, the govt is attempting to rewrite its charges by claiming that it is not Form 8854 (the IRS exit tax reporting form) that formed the basis for the charges against Ver (contrary to the language of the indictment)
  - Form 8854 requires the disclosure of income tax liability as well as a list of fair market value and adjusted basis for various asset categories
  - The indictment alleges that ver’s Form 8854 was false
    - As a side note, the doc states that at least one court has found that Form 8854 is itself an unlawfully issued IRS form based on a failure to comply with the Administrative Procedure Act. Aroeste v. United States, No. 22-cv-00682, 2023 WL 8103149, at *6 (S.D. Cal. Nov. 20, 2023).

“The lack of meaningful guidance regarding how an expatriating filer could report the value of digital assets where no market existed for the disposition of large volumes placed people like Ver in an untenable situation. That the government runs away from its own allegations is fatal to its case and is an indication that it, too, cannot ascertain Ver’s actual obligations.” (Pg. 21)

Footnote: “Indeed, the instructions for Form 8854 state: “You can use good-faith estimates of FMV and basis. Formal appraisals are not required.” After nearly a decade, the government *still* will not assert the true value of Ver’s bitcoins, apparently finding a good-faith estimate to be either inconvenient or impossible to provide.” (Pg. 21)

- goes on to argue case law and counter those related points from the USG opp. MTD doc (pgs. 21-22)

Final point on this issue (summary): “As the government’s continued failure to allege or identify the manner in which Ver’s Form 8854 purportedly violated the Tax Code makes plain, the Code’s rules and regulations as applied to bitcoin in 2014 provided no “guidelines to govern law enforcement,” *Kolender v. Lawson*, 461 U.S. 352, 358 (1983), and provided nothing like “fair warning about what the law demand[ed].” *United States v. Davis*, 588 U.S. 445, 448 (2019).” (Pg. 23)

C. The Government’s Selective Quotation and Disregard of Exculpatory Evidence Warrants Dismissal

- the government’s selective quotation and suppression of exculpatory evidence deprived Ver of the right to a “grand jury of autonomous and unbiased judgment,” which merits dismissal. (Quote, pg. 23)

- the govt. does not deny that the exhibits underlying the indictment state that 1) Ver knew he would be audited and emphasized he needed to comply 2) expert advisors told Ver that for exit tax purposes, the fair market value of bitcoin assets meant the value he could obtaining a pretend one-day sale, not the spot price of a single unit 3) Ver tried in good faith to comply with his advisors’ guidance and answer their questions, but doing so was often impossible due to lack of data regarding who owned which

bitcoin. Instead of disputing these facts, the government makes two meritless arguments (the exhibits underlying the indictment were exculpatory and the govt was not entitled to mislead the grand jury regarding the exhibits' content). (Quote pg. 23)

1. The Exhibits Underlying the Indictment Were Exculpatory

- the USG argues that Ver's exhibits only demonstrate the accuracy of the USG's indictment
- Claims the govt is wrong as Ver's opening brief includes three examples of evidence that preclude any conclusion of intent to defraud
    - The govt tries to argue that two emails in the same email chain are not part of the same conversation

- the govt's case theory is that Ver should have known that his companies (MD and AG) were undervalued when he submitted his 2014 tax returns because his advisors told him that he was "legally required" to use the spot price of bitcoin (approx. $800) as the fair market value (pg. 24) (also in the opp. 4-5 and ind. para 27e vi)

- if ver was required to use the spot price of bitcoin then the company valuations would have looked too low (and thus Ver should have known it was off) (opp. 5) but that is not what Ver's advisors told him

- according to the statues and what Ver's advisors told him, Ver was required to use the fair value he could have obtained if the property was "sold on the day before the expatriation date" not the spot price.

"Because Ver had enough bitcoins to overwhelm the market and crash the price, he was not required to use the spot price, and instead, the value should reflect the inability to sell the asset. Ex. 4 (Dkt. 21-4)." Pg. 24

- it goes on to state that it is insignificant that Appraiser 2's company valuation's diverged from the spot price because it was not the way to determine his holdings' value

- There was no reason to disregard appraiser 2's independent valuation which was also reviewed without objection by accountants and lawyers advising Ver

- and thus, the government's response makes no sense: ""[t]he fact that the advice Ver received from his advisors changed over time does not render the indictment's allegation either incomplete or inaccurate." Opp. 38." (Pg. 24)
    - the defense argues that to the contrary, when an advisor corrects incorrect advice that does reflect that the earlier advice was both incomplete and inaccurate

"[T]he mere fact that the statements were restated at all supports ... an inference" that the original statements were false). The government— by causing the grand jury to rely on that incomplete and inaccurate statement[7] — undermined the grand jury's independent judgment and impartiality."

- Ver and his advisors openly discussed that the bitcoin market was illiquid and shared market depth information that would help facilitate the hypothetical one day sale of bitcoin.
- Meanwhile, the USG paints these discussions as Ver responding in an evasive and non responsive way, but the context makes it clear that these were good faith attempts to share information about the maximum amount that a seller could obtain for their bitcoin on a single day
    - The defense argues that when presented in context, these communications exculpate Ver

- Ver was asked to do the impossible: "to value assets that could not be sold for more than nominal amounts in a fire-sale, and then to guess at how many of those assets were owned by his companies and how many he owned himself." (Pg. 25)

- Ver attempted to work with his advisors to find an accurate way to calculate and pay taxes on the maximum bitcoin sale one could accomplish in march 2014, Ver believed that by doing so, he was complying with the law

- according to the defense, in the opp. Doc, the govt. misrepresents the exculpatory contents of key documents and in this case it is exhibit 14 (emails from Aug. 2018)

- Exhibit 14 shows that Law Firm 1 was assisting with the wind down of MD and AG and preparing Ver's corresponding 2017 tax return
- Ver informed Law Firm 1 that he made substantial trades on US crypto currency exchanges selling bitcoin owned by MD US and AG. Law Firm 1 advised Ver (quote)

"Law Firm 1 advised Ver that the resulting profits were not taxable because bitcoin was intangible property, and the resulting gain was therefore not U.S. income. Law Firm 1, despite knowing that Ver's U.S. bitcoins were owned by MemoryDealers U.S. and Agilestar, did not advise him that the transfer upon shutdown would constitute a distribution and instead told Ver it did not need further detail on the transactions." (Pg. 26)

- the USG claims that this conversation ^ (from exhibit 14 — emails from Aug. 2018) took place later and that the fact that Law Firm 1 knew that the US companies bitcoins had been sold was irrelevant Opp. 7. n.4

"Law Firm 1 knew that Ver's companies had dissolved and that Ver had sold bitcoin they owned. Based on Law Firm 1's advice that the resulting proceeds were not taxable, it is utterly incomprehensible that Ver would or could have figured out that his lawyers were supposedly wrong,[8] and urged them to report a transaction that he had no way to know was taxable by the U.S. government."

2. The Government Was Not Entitled to Mislead the Grand Jury Regarding the Exhibits' Content

- the govt also argues that while the evidence may be exculpatory, the prosecution is free to hide exculpatory evidence from the grand jury (oppo. 38)
- But "the govt. is not free to to mislead grand jurors about critical communications between the defendant and his lawyer while hiding the exculpatory contents of the actual communications"
- The doc goes on to argue that the prosecution cannot misrepresent the communications to the grand jury (pg. 27)

"Allowing prosecutors to misrepresent the contents of the communications between Ver and his lawyers undermined the grand jury's very purpose: to serve as a bulwark between the prosecution and the accused." (Pg. 27)

- cites legal precedent that the purpose of a grand jury is to protect the innocent against oppressive prosecution and unfounded accusations

"The Court may exercise its supervisory power to dismiss an indictment where 'the grand jury's function has been so subverted as to compromise the integrity of the judicial process.' Id. (citation omitted)." (Pg. 27)

- the defense argues "that a grand jury cannot fulfill its duty to defend the accused if it is precluded from reviewing the evidence" (then goes on to cite *Samango*)

- then draws a parallel between agent testimony in Samango, which led to the case being dropped (pg. 27-28)

"It is clear from the indictment and the Opposition that the grand jury did not review the exculpatory contents of the exhibits cited in the indictment.[9] Had the grand jury been permitted to evaluate the exhibits

underlying the indictment with independent judgment and impartiality, it would not have returned the indictment. That merits dismissal." (Pg. 28)

III. VER IS NEITHER A FUGITIVE NOR SUBJECT TO DISENTITLEMENT (pg. 28)

- the govt is asking to apply the fugitive disentitlement doctrine but the doctrine only applies if a) Ver is a fugitive AND b) disentitling Ver would serve the doctrine's objectives
    - Defense argues that neither of these requirements is met in this case
- defense claims ver is a not a fugitive it is also severe sanctions that courts do not just lightly impose

Traditional fugitive = "flees from the jurisdiction of the court where a crime was committed or departs from his usual place of abode and conceals himself." (Cites Bescond)

Constructive flight fugitive = "a person who allegedly committed crimes while in the United States," then left the country and refused to return in order to avoid prosecution.

- the refusal to return must be specifically motivated by an avoidance of prosecution not merely because the person resides outside of the US for reasons unrelated to the prosecution

- Ver is not either type of fugitive as he was not in the US at the time of the alleged crime nor at the time of the indictment and he has not lived in the US since around 2006. Also, ver has not evaded or hidden from anyone and has worked openly at all times

Footnote (pg. 29): "Indeed, at the time of his arrest, Ver was traveling to attend cryptocurrency conferences on behalf of Saint Kitts. Ver's defense team is in the process of obtaining additional documentation regarding

Ver's status in Spain, and, if warranted, may file a separate motion to dismiss on this basis."

- the government's argument is that Ver has not reported for prosecution
- The defense argues that no such duty exists and that the 9th circuit has repeatedly declined to apply the fugitive disentitlement doctrine to litigants who have neither hidden nor fled
- The doc goes on to argue technically surrounding the case of *US vs. Martirossian and Bescond* (pgs. 29-30)

"As in *Bescond*, Ver is not a U.S. citizen, does not reside in the United States, did not flee, and is not evading the indictment." (Pg. 30)

B. Even If Ver Is a Fugitive, Disentitlement Is Unjustified

"Disentitlement serves four purposes:

1) assuring the enforceability of any decision that may be rendered against the fugitive;
2) imposing a penalty for flouting the judicial process;
3) discouraging flights from justice and promoting the efficient operation of the courts; and
4) avoiding prejudice to the other side caused by the defendant's escape." Id. at 773-74. The court considers the "countervailing prejudice" to the defendant: "[d]isentitlement enables the government to coerce [a defendant]'s presence in court by imposing financial, reputational, and family hardship regardless of her guilt or innocence." Id. at 775. (Pg. 31)

- the defense argues that the motion to dismiss will not create an unenforceable judgment, Ver is not flouting the judicial process, the motion does not encourage flight or cause inefficiency in the operation of the courts, and lastly, the government is not prejudiced by this Court

deciding Ver's motion to dismiss. (From the final page 32 about why the fugitive disentitlement doctrine should not be enforced)

"There is no reason to expend untold resources, time, and money litigating extradition on an indictment that is fatally flawed. The costly extradition process can be avoided if the Court grants Ver's motion to dismiss." (Pg. 32)

"Ver, however, is prejudiced by the Court refusing to decide his motion by continued "financial, reputational, and family hardship." *See Bescond*, 24 F.4th at 775." (Pg. 32)