

**IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____**

_____	:	
	:	
Plaintiff,	:	
	:	
v.	:	Case No. _____
	:	Judge _____
_____	:	
	:	
Defendant.	:	

**MOTION IN LIMINE TO BAR CERTAIN NON-BUSINESS-RECORD
HEARSAY**

_____ respectfully asks the Court to exclude from presentation in trial any "information returns" documents, such as Forms W-2 and 1099, other than by the creator whose testimony appears thereon, under oath and available for questioning. _____ also asks the Court to exclude other materials based on the content of such documents, unless and until the "information returns" have been properly admitted as outlined above.

"Information returns" are often mistakenly described as "business records", and mistakenly allowed into evidence as such without testimony. However, these forms are actually conclusory and testimonial declarations. This conclusory and testimonial character is manifest in the fact that these forms are transmitted to the government with a declaration by the creator taking personal responsibility, under

penalties of perjury, for the conclusions that the reported amounts are of "wages" as defined at 26 U.S.C. §§ 3121(a) and/or 3401(a) and therefore proper to list on a Form W-2, or of "self-employment income" as defined at 26 U.S.C. §§ 1401 and 1402, and/or paid in the course of the payer's "trade of business" as defined at 26 U.S.C. § 7701(a)(26) and proper to list on a Form 1099-MISC.

The content of these "information returns", being conclusory and testimonial, based on facts purportedly known to the creators of the forms but not in evidence, and offering no valid self-certification as to the competence or truthfulness of the creator, is thus outside the range of "hearsay exceptions" under Rule 803 and directly implicates the Sixth Amendment's Confrontation Clause. These forms and their content, and any documents or other evidence based thereon, should be barred from admission unless and until the forms are introduced by their creators, under oath and available for examination. _____ respectfully Moves the Court to so order.

Concurrence was sought from the attorneys for the United States and was refused.

**IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____**

_____	:	
	:	
Plaintiff,	:	
	:	
v.	:	Case No. _____
	:	Judge _____
_____	:	
	:	
Defendant.	:	

**BRIEF AND ARGUMENT IN SUPPORT OF MOTION *IN LIMINE* TO
BAR CERTAIN NON-BUSINESS-RECORD HEARSAY**

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ARGUMENT

"Information returns" documents, such as Forms W-2 and 1099 are often mistakenly described as "business records", and mistakenly allowed into evidence as such without testimony. But although some of the content of these forms may be drawn from records kept in the normal course of business, other content on the forms is not. Further, even that which is drawn from actual "business records" appears on the forms entirely as part of an expressly conclusory and testimonial declaration.

The conclusory and testimonial character of "information returns" is manifest in the fact that these forms are required to be transmitted to the government accompanied by a creator's declaration taking sworn personal responsibility for the conclusions that the amounts listed thereon meet the legal and factual criteria controlling whether any amount actually relates to a taxable activity and ought to be listed on such a form (see EXHIBITS 1 & 2). For instance, listing an amount on a W-2 reflects a conclusion that the amount is of "wages" as defined at 26 U.S.C. §§ 3121(a) and/or 3401(a). What is to be listed on the form, according to the relevant portion of the statute controlling its use, comprises:

- (1) the name of such person,
- (2) the name of the employee (and his social security account number **if wages as defined in section 3121(a) have been paid**),
- (3) the total amount of **wages as defined in section 3401(a)**,
- (4) the total amount deducted and withheld as tax under section 3402,

(5) the total amount of **wages as defined in section 3121(a)**,
(6) the total amount deducted and withheld as tax under section 3101,
26 U.S.C. § 6051(a) (emphasis added)

Amounts to be listed on Forms 1099-MISC are similarly specialized and reflective of the creator's conclusions concerning mixed relevant elements of law and fact dictated by provisions at 26 U.S.C. §§ 1401, 1402, and 7701(a)(26).

"Information returns" are not "records" at all, "business" or otherwise. These forms are testimonial, outside the range of "hearsay exceptions" under Rule 803. As is said by the Federal Rules of Evidence Advisory Committee discussing the meaning of Rule 803(6):

"In *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943), exclusion of an accident report made by the since deceased engineer, offered by defendant railroad trustees in a grade crossing collision case, was upheld. The report was not "in the regular course of business," not a record of the systematic conduct of the business as a business, said the Court. The report was prepared for use in litigating, not railroading."

Just so, forms W-2 and 1099 are not made "for railroading". Instead, they are made for submission to governments for use as testimonial declarations in legal proceedings by which tax liabilities will be determined. They are often created, as in this case, by private-sector companies which do not ever complete government forms of any variety "in the normal course of their business".

Further, the courts have consistently held that mere "information returns" such as W-2s and 1099s are insufficient without supporting evidence:

"Defendants are correct that the 1099s, on their own, do not create tax liability. Form 1099 is an informational return, filed by a third party to the relationship between the IRS and the taxpayer, which reports income as that third party believes it to be. The Internal Revenue Code makes it clear that a Form 1099 is not the final word on what a taxpayer's taxable income is. As provided in 26 U.S.C. § 6201(d):

"In any court proceeding, if a taxpayer asserts a reasonable dispute with respect to any item reported on an information return ... by a third party ... the [IRS] shall bear have [sic] the burden of producing reasonable and probative information concerning such deficiency in addition to such information return."

The Tax Court has held that a Form 1099 is insufficient, on its own, to establish a taxpayer's taxable income. See *Estate of Gryder v. Commissioner*, T.C. Memo. 1993-141, 1993 WL 97427, 65 T.C.M. (CCH) 2298, T.C.M. (RIA) 93,141 (1993), citing *Portillo v. Commissioner*, 932 F.2d 1128 (5th Cir.1991). See also *Portillo v. Commissioner*, 988 F.2d 27, 29 (5th Cir. 1993) (a Form 1099 is "insufficient to form a rational foundation for the tax assessment against the [taxpayers in this case]."). Thus, while a Form 1099 can serve as the basis for the inception of an IRS investigation, it cannot and does not, on its own, create tax liability or establish how much income the taxpayer actually received."

Daines v. Alcatel, S.A., 105 F.Supp.2d 1153, 1155 E.D. Washington, 2000

"That which is not in fact the taxpayer's income cannot be made such by calling it income."

Hooper v. Tax Comm'n of Wis., 284 US 206, 215 (1931)

Also see *Mason v. Barnhart*, 406 F.3d 962 (8th Cir., 2005); *Rendall v. CIR*, 535 F.3d 1221 (10th Circ., 2008) and cases cited; and *Perez v. CIR*, T.C. Summary Opinion 2009-94.

Further still, being *explicitly* testimonial statements of belief sworn under penalties of perjury by way of the W-3 and/or 1096 verification forms under the mantle of which they are submitted to the government, forms W-2 and 1099

directly implicate the Sixth Amendment's Confrontation Clause and the doctrine laid down by the United States Supreme Court in a consistent series of rulings from *Crawford v. Washington*, 541 U.S. 36 (2004) through at least *Bullconning v. New Mexico*, 131 S.Ct. 2705 (2011). These rulings uphold the requirement of an opportunity of confrontation by an accused pursuant to the Sixth Amendment.

In one of these rulings, for instance-- *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009)-- a conviction for distributing cocaine was overturned by the Supreme Court because a document was submitted to the jury as evidence that the defendant possessed cocaine without the person responsible for that conclusion being made available to be questioned by the defendant and possibly proven wrong, dishonest, misrepresented or misunderstood. It is just as much a violation of the Confrontation Clause to allow Forms W-2 and/or 1099 to be submitted as evidence that a Defendant received what qualifies as "wages" as defined at 3401(a) or 3121(a) of Title 26, or "non-employee compensation" paid in the course of a "trade or business"-- or as evidence of a payer's conclusion to that effect, or of the correctness, competence and honesty of such a conclusion-- without the declarant being made available for challenge on the witness stand.

CONCLUSION

Forms W-2 and/or 1099 simply do not constitute evidence that anyone received what qualifies as "wages" as defined at 3401(a) or 3121(a) of Title 26, or

"non-employee compensation" paid in the course of a "trade or business"-- or as evidence of a payer's conclusion to that effect, or of the correctness, competence and honesty of such a conclusion or assertion-- without the declarant being made available for challenge on the witness stand.

"Information returns" should not be admitted into evidence except by the person whose testimony appears thereon, under oath and available to be questioned as to the factual basis and reasoning that led to any given amount being listed, and as to other explicit and implicit assertions or allegations expressed by the use of the form and the content entered thereon. Otherwise the danger exists that the appearance of amounts on such forms will be presumed to be evidence of the payment of tax-relevant "wages", "self-employment income", "non-employee compensation" or the like. Documents, testimony or other material based on "information returns" should be barred unless and until the returns themselves have been properly admitted, for the same reason. _____ Moves the Court to so order.

Respectfully submitted this __th day of _____, 201__

Attachments

Exhibit 1: Form W-3 Transmittal of Wage and Tax Statement

Exhibit 2: Annual Summary and Transmittal of U.S. Information Returns

EXHIBIT 1

Form W-3 Transmittal of Wage and tax Statements

DO NOT STAPLE

33333		a Control number		For Official Use Only ▶ OMB No. 1545-0008				
b Kind of Payer (Check one)	941 <input type="checkbox"/>	Military <input type="checkbox"/>	943 <input type="checkbox"/>	944 <input type="checkbox"/>	Kind of Employer (Check one)	None apply <input type="checkbox"/>	501c non-govt. <input type="checkbox"/>	Third-party sick pay (Check if applicable) <input type="checkbox"/>
	CT-1 <input type="checkbox"/>	Hshld. emp. <input type="checkbox"/>	Medicare govt. emp. <input type="checkbox"/>			State/local non-501c <input type="checkbox"/>	State/local 501c <input type="checkbox"/>	
c Total number of Forms W-2		d Establishment number		1 Wages, tips, other compensation		2 Federal income tax withheld		
e Employer identification number (EIN)				3 Social security wages		4 Social security tax withheld		
f Employer's name				5 Medicare wages and tips		6 Medicare tax withheld		
g Employer's address and ZIP code				7 Social security tips		8 Allocated tips		
				9		10 Dependent care benefits		
				11 Nonqualified plans		12a Deferred compensation		
h Other EIN used this year				13 For third-party sick pay use only		12b		
15 State	Employer's state ID number			14 Income tax withheld by payer of third-party sick pay				
16 State wages, tips, etc.		17 State income tax		18 Local wages, tips, etc.		19 Local income tax		
Employer's contact person				Employer's telephone number		For Official Use Only		
Employer's fax number				Employer's email address				

Under penalties of perjury, I declare that I have examined this return and accompanying documents and, to the best of my knowledge and belief, they are true, correct, and complete.

Signature ▶ Title ▶ Date ▶

Form **W-3 Transmittal of Wage and Tax Statements** **2014**

Department of the Treasury
Internal Revenue Service

Send this entire page with the entire Copy A page of Form(s) W-2 to the Social Security Administration (SSA). Photocopies are not acceptable. Do not send Form W-3 if you filed electronically with the SSA. Do not send any payment (cash, checks, money orders, etc.) with Forms W-2 and W-3.

Reminder

Separate instructions. See the 2014 General Instructions for Forms W-2 and W-3 for information on completing this form. Do not file Form W-3 for Form(s) W-2 that were submitted electronically to the SSA.

Purpose of Form

A Form W-3 Transmittal is completed only when paper Copy A of Form(s) W-2, Wage and Tax Statement, is being filed. Do not file Form W-3 alone. All paper forms **must** comply with IRS standards and be machine readable. Photocopies are **not** acceptable. Use a Form W-3 even if only one paper Form W-2 is being filed. Make sure both the Form W-3 and Form(s) W-2 show the correct tax year and Employer Identification Number (EIN). Make a copy of this form and keep it with Copy D (For Employer) of Form(s) W-2 for your records. The IRS recommends retaining copies of these forms for four years.

E-Filing

The SSA strongly suggests employers report Form W-3 and Forms W-2 Copy A electronically instead of on paper. The SSA provides two free e-filing options on its Business Services Online (BSO) website:

- **W-2 Online.** Use fill-in forms to create, save, print, and submit up to 50 Forms W-2 at a time to the SSA.
- **File Upload.** Upload wage files to the SSA you have created using payroll or tax software that formats the files according to the SSA's *Specifications for Filing Forms W-2 Electronically (EFW2)*.

W-2 Online fill-in forms or file uploads will be on time if submitted by March 31, 2015. For more information, go to www.socialsecurity.gov/employer and select "First Time Filers" or "Returning Filers" under "BEFORE YOU FILE."

When To File

Mail Form W-3 with Copy A of Form(s) W-2 by March 2, 2015.

Where To File Paper Forms

Send this entire page with the entire Copy A page of Form(s) W-2 to:

**Social Security Administration
Data Operations Center
Wilkes-Barre, PA 18769-0001**

Note. If you use "Certified Mail" to file, change the ZIP code to "18769-0002." If you use an IRS-approved private delivery service, add "ATTN: W-2 Process, 1150 E. Mountain Dr." to the address and change the ZIP code to "18702-7997." See Publication 15 (Circular E), Employer's Tax Guide, for a list of IRS-approved private delivery services.

For Privacy Act and Paperwork Reduction Act Notice, see the separate instructions.

EXHIBIT 2

Form 1096 Annual Summary and Transmittal of U.S. Information Returns

Form 1096 Department of the Treasury Internal Revenue Service	Annual Summary and Transmittal of U.S. Information Returns	OMB No. 1545-0108 2013
FILER'S name Street address (including room or suite number) City or town, province or state, country, and ZIP or foreign postal code		
Name of person to contact		Telephone number
Email address		Fax number
1 Employer identification number		2 Social security number
3 Total number of forms		4 Federal income tax withheld \$
5 Total amount reported with this Form 1096 \$		For Official Use Only
6 Enter an "X" in only one box below to indicate the type of form being filed.		
7 If this is your final return , enter an "X" here <input type="checkbox"/>		
W-2G 32	1097-BTC 50	1098 81
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
1098-C 78	1098-E 84	1098-T 83
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
1099-A 80	1099-B 79	1099-C 85
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
1099-CAP 73	1099-DIV 91	1099-G 86
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
1099-H 71	1099-INT 92	1099-K 10
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
1099-LTC 93	1099-MISC 95	1099-OID 96
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
1099-PATR 97	1099-Q 31	1099-R 98
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
1099-S 75	1099-SA 94	3921 25
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3922 26	5498 28	5498-ESA 72
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5498-SA 27	<input type="checkbox"/>	

Return this entire page to the Internal Revenue Service. Photocopies are not acceptable.

Under penalties of perjury, I declare that I have examined this return and accompanying documents, and, to the best of my knowledge and belief, they are true, correct, and complete.

Signature **Title** **Date**

Instructions

Future developments. For the latest information about developments related to Form 1096, such as legislation enacted after they were published, go to www.irs.gov/form1096.

Reminder. The only acceptable method of filing information returns with Internal Revenue Service/Information Returns Branch is electronically through the FIRE system. See Pub. 1220, Specifications for Filing Forms 1097, 1098, 1099, 3921, 3922, 5498, 8935, and W-2G Electronically.

Purpose of form. Use this form to transmit paper Forms 1097, 1098, 1099, 3921, 3922, 5498, and W-2G to the Internal Revenue Service. Do not use Form 1096 to transmit electronically. For electronic submissions, see Pub. 1220.

Caution. If you are required to file 250 or more information returns of any one type, you must file electronically. If you are required to file electronically but fail to do so, and you do not have an approved waiver, you may be subject to a penalty. For more information, see part F in the 2013 General Instructions for Certain Information Returns.

Who must file. The name, address, and TIN of the filer on this form must be the same as those you enter in the upper left area of Forms 1097, 1098, 1099, 3921, 3922, 5498, or W-2G. A filer is any person or entity who files any of the forms shown in line 6 above.

Enter the filer's name, address (including room, suite, or other unit number), and TIN in the spaces provided on the form.

When to file. File Form 1096 as follows.

- With Forms 1097, 1098, 1099, 3921, 3922, or W-2G, file by February 28, 2014.
- With Forms 5498, file by June 2, 2014.

Where To File

Send all information returns filed on paper with Form 1096 to the following:

If your principal business, office or agency, or legal residence in the case of an individual, is located in

Use the following three-line address

Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Texas, Vermont, Virginia, West Virginia

Department of the Treasury
Internal Revenue Service Center
Austin, TX 73301