UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
at COVINGTON

CRIMINAL ACTION NO. 11-70-DCR

UNITED STATES OF AMERICA **PLAINTIFF**

V. **DEFENDANT'S RESPONSE TO THE UNITED STATES' SECOND MOTION IN LIMINE**

RONALD E. WEINLAND **DEFENDANT**

* * * * *

May it please the Court, Defendant Ronald E. Weinland, through undersigned counsel, for his response to the United States' Second Motion in Limine, states as follows:

INTRODUCTION

The Defendant is the minister of the Church of God – Preparing for the Kingdom of God ("the Church"). Many of the Defendant's sermons are recorded and distributed to local congregations of the Church over the internet. The United States' Second Motion in Limine asks this Court for an Order excluding a recorded copy of a 2002 sermon in which the Defendant explained his intentions to place money belonging to the Church into an account overseas. [DE #35] As noted in the United States' Motion, the reason for the Defendant's act placing of these funds into a foreign bank account is a disputed issue in this case. The United States contends that the money was placed in the foreign account for the personal benefit of the Defendant and his family. The Defendant, on the other hand, maintains that the money was held in trust for the Church and deposited into the foreign bank account by the Defendant for the Church while the Defendant was acting as an agent of the Church. This dispute presents a central issue in this case

as the United States contends that these funds were income to the Defendant, while the Defendant maintains that the funds belong to the Church and did not constitute income to the Defendant.

The United States seeks to exclude from the trial of this case a recording of a sermon by the Defendant in 2002 wherein the Defendant discussed his intention to place the funds in a foreign account. The United States contends that the Defendant's statements in the sermon are inadmissible hearsay. However, as explained below, the sermon and statements concerning the money placed in a foreign bank account are not hearsay under FRE 801, and are not subject to exclusion under FRE 802. In addition, even if the statements were hearsay, they would still be admissible at trial under the exception to the hearsay rule set out in FRE 803(3). For these reasons, the United States' Second Motion in Limine should be denied.

ARGUMENT

First, the statements at issue are not excludable under FRE 802 because they are not hearsay. "Hearsay" is an out-of-court statement offered "to prove the truth of the matter asserted in the statement." FRE 801(c). However, "when a statement is offered to prove neither the truth nor falsity, there is no need to assess the credibility of the declarant. The significance lies entirely in the fact that the words were spoken. Thus, the statement does not fall within the Rule 801(c) definition of hearsay nor would the purposes of the hearsay rule be served by treating it as hearsay." *United States v. Dandy*, 998 F.2d 1344, 1351 (6th Cir. 1993)(quoting *United States v. Hathaway*, 798 F.2d 902, 905 (6th Cir. 1986)); accord *United States v. Branham*, 97 F.3d 835, 851 (6th Cir. 1996)("if the significance of a statement 'lies solely in the fact that it was made,' rather than in the veracity of the out-of-court declarant's assertion, the statement is not hearsay because it is not offered to prove the truth of the matter asserted")(citations omitted). The

statements at issue here have independent meaning and legal significance apart from the truth of the matter asserted therein. In this way, the statements are not hearsay and are not subject to exclusion under FRE 802.

The Defendant's statements concerning the placing of Church funds into a foreign bank account constitute verbal acts that are not hearsay and not subject to exclusion under FRE 802.

> A verbal act is an utterance of an operative fact that gives rise to legal consequences. Verbal acts, also known as statements of legal consequence, are not hearsay, because the statement is admitted merely to show that it was actually made, not to prove the truth of what was asserted in it. For example, the hearsay rule does not exclude relevant evidence as to what the contracting parties said or wrote with respect to the making or the terms of an agreement.

Lorraine v. Markel American Ins. Co., 241 F.R.D. 534, 567 n.50 (D. Md. 2007). As the Sixth Circuit has explained, "[t]he verbal acts doctrine applies where 'legal consequences flow from the fact that words were said, e.g. the words of offer and acceptance which create a contract.'" *Acree v. Tyson Bearing Co., Inc.*, 128 Fed.Appx. 419, 434 (6th Cir.), *cert. denied* 546 U.S. 875 (2005)(quoting *Preferred Properties, Inc. v. Indian River Estates, Inc.*, 276 F.3d 790, 798 n.5 (6th Cir. 2002)(quoting Black's Law Dictionary 1558 (6th Ed. 1990))).

The jury will be asked to determine whether the funds placed in the foreign bank account constituted income to the Defendant upon which income taxes were to be paid. The United States contends that the funds constituted income to the Defendant and that the Defendant willfully failed to report that income on his personal tax returns. The Defendant maintains that no taxes were due because the funds belonged to the Church and were not income to the Defendant. Funds or property held in trust for another are not income to the holder. 26 U.S.C. § 671 (assets held in trust are not taxable income); *Brewery, Inc. v. United States*, 33 F.3d 589, 592 (6th Cir. 1994)("money is held in trust . . . does not belong to the taxpayer . . ."). Accordingly, any funds or property that was held or received by the Defendant in trust for the Church and used

for church purposes, as well as the interest on those funds, did not constitute income to the Defendant.

Kentucky state law determines the nature of the Defendant's interest in the funds and property at issue. *Spotts v. United States*, 429 F.3d 248, 251 (6th Cir. 2005)("[I]n application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property.")(quoting *United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 722 (1985)). Under Kentucky law, an agreement to hold funds or property in trust for another does not have to be in writing. *Huff v. Byers*, 272 S.W. 897, 898 (Ky. 1925); *Hale v. Hale*, 313 Ky. 344, 353, 231 S.W.2d 2, 7 (Ky. 1950). Four elements are required to create an oral trust under Kentucky law: (1) an intent to create a trust; (2) an ascertainable property or *res* to be held in trust; (3) a sufficiently certain beneficiary of the trust; and (4) a trustee who holds and administers the *res* for the benefit of the beneficiary. *Acuity, a Mut. Ins. Co. v. Planters Bank, Inc.*, 362 F.Supp.2d 885, 892 (W.D.Ky. 2005)(citing *In re: Smith*, 238 B.R. 664, 670 (Bankr.W.D.Ky.1999)).

Likewise, funds or property held or received by an agent for a principal are not income to the agent. *Rogers v. C.I.R.*, T.C. Memo 2011-277, 2011 WL 5885083, *5 (U.S. Tax Ct. 2011)("money a taxpayer receives in his or her capacity as a fiduciary or agent does not constitute income to that taxpayer"); *Bollinger v. C.I.R.*, 807 F.2d 65 (6th Cir. 1986)(property held by an agent for a principal is not income to the agent), aff'd *C.I.R. v. Bollinger*, 485 U.S. 340 (1988). Accordingly, any funds received or held by the Defendant as the agent of the Church, as well as any interest and/or income on those funds, do not constitute income to the Defendant. Again, Kentucky state law determines the nature of the Defendant's interest in the funds at issue, and no formal or written contract is required to create an agency relationship

between the Defendant and the Church. *Terbovitz v. Fiscal Court of Adair County*, 825 F.2d 111, 116 (6th Cir. (Ky.) 1987). Under Kentucky law, an agency relationship results from the manifestation of consent by one person, the principal (in this case, the Church) to another, the agent (in this case, the Defendant) that the agent shall act on behalf of the principal and subject to his control, and consent by the agent so to act. *McAlister v. Whitford*, 365 S.W.2d 317, 319 (Ky. 1962)("Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.")(citations omitted).

The statements of the Defendant that the United States seeks to exclude as hearsay have independent legal significance because they show the existence of a trust and/or agency relationship between the Defendant and the Church in relation to the funds that were placed in the foreign bank account. As such, they are not hearsay under FRE 801. *See, e.g., Creaghe v. Iowa Home Mut. Cas. Co.*, 323 F.2d 981, 984 (10th Cir. 1963)("The hearsay rule does not exclude relevant testimony as to what the contracting parties said with respect to the making or the terms of an oral agreement."). The statements also constitute verbal acts creating or confirming the trust and/or agency relationship between the Defendant and the Church. And they are not hearsay subject to exclusion under FRE 802. *See, e.g., King v. Hartford Packing Co., Inc.*, 189 F.Supp.2d 917, 924 (N.D. Ind. 2002)(rejecting a hearsay objection to statements offered to show the existence of an agency relationship, and noting "one element of the agency inquiry is whether the agent accepted the authority of the principal. . . . these statements show [the paties'] states of mind with respect to their relationship . . . rather than the truth of the matter asserted. The statements are not hearsay.").

In addition, the statements at issue are admissible statements of the Defendant's intent. FRE 803 provides an exception to the hearsay rule for then-existing mental, emotional or physical conditions:

> A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

FRE 803(3). The statements at issue demonstrate the Defendant's intent (as well as that of the Church) in relation to the placing of funds into a foreign bank account. The statements also show the Defendant's state of mind (as well as that of the Church) concerning the ownership of the funds at issue. Accordingly, even if the statements were offered for the truth of the matter asserted, they are nevertheless admissible as evidence of the Defendant's state of mind and intent under FRE 803(3). Finally, the sermons are also admissible for the nonhearsay purpose of showing the Church's awareness of the Defendant's intent to place Church funds into a foreign bank account. *See, e.g.*, *Biver v. Saginaw Tp. Community Schools*, 1986 WL 18062, *8 (6th Cir. 1986)(rejecting a hearsay objection to a statement that showed both the speaker's intent and the audience's awareness of that intent).

CONCLUSION

For each of these reasons, the Court should deny the United States' Second Motion in Limine.

A proposed order is submitted herewith.

Respectfully submitted,

/s/ J. Christopher Coffman
Robert C. Webb
J. Christopher Coffman
Frost Brown Todd LLC
400 W. Market Street, Floor 32
Louisville, KY 40202-3363
Phone: (502) 589-5400
Fax: (502) 581-1087
E-mail: bwebb@fbtlaw.com
ccoffman@fbtlaw.com
Counsel for Ronald E. Weinland

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2012, I electronically filed this document with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to Robert K. McBride, Robert.McBride@usdoj.gov.

By: /s/ J. Christopher Coffman
J. CHRISTOPHER COFFMAN
Counsel for Ronald E. Weinland