UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CIVIL ACTION NO. 5:16-CV-73
	§	
EDWARD S. FLUME, JR.	§	

MEMORANDUM & ORDER

The Government brought this action to collect civil penalties assessed against Edward Flume, a U.S. citizen, for failing to report his financial interest in a Swiss UBS bank account in tax years 2007 and 2008. (Dkt. 1 at 1–3.) Under 31 U.S.C. § 5314, U.S. citizens with financial interests in foreign bank accounts worth more than $10,000 must file a Report of Foreign Bank and Financial Accounts—also known as an FBAR or a form TD F 90-22.1—by June 30 of each year.[1] Failure to do so can result in a penalty of up to $10,000. 31 U.S.C. § 5321(a)(5)(B)(i). But if that failure is "willful," the violator is instead subject to a penalty of up to 50% of the balance of each account or $100,000, whichever is greater. Id. § 5321(a)(5)(C)–(D). Here, the IRS found Flume's failure to disclose his interest in the UBS account to be willful and accordingly assessed a penalty of $356,509[2] for 2007 and $100,000[3] for 2008. (Dkt. 1 at 7.) Flume did not pay, and

[1] United States v. Williams, 489 F. App'x 655, 656 & n.1 (4th Cir. 2012); 31 C.F.R. § 1010.306(c).

[2] The IRS found that on June 30, 2008, the date the FBAR form for 2007 was due, the UBS account had a balance of $713,017.01. (Dkt. 51 at 25.) Fifty percent of that amount rounded to the nearest dollar is $356,509. (Id.)

[3] On June 30, 2009, the date the FBAR form for 2008 was due, the UBS account balance was zero because by then Flume had transferred all his assets out of the account. (Dkt. 51, Attach. 27 at 12.) But he was still required to file an FBAR because the account "exceed[ed] $10,000 . . . during the previous calendar year." See 31 C.F.R. § 1010.306(c). Thus, he was subject to the $100,000 penalty.

the Government now seeks to collect those outstanding penalties plus accrued interest, late-payment penalties, and other fees. (Id. at 1.)

Now before the Court is the Government's motion for summary judgment. (Dkt. 51.) The Government asks the Court to hold as a matter of law that Flume violated 31 U.S.C. § 5314 willfully and that he therefore owes the Government $507,025.16[4] plus accrued interest. (Id., Attach. 39.) Because Flume admits that he failed to report his UBS account in tax years 2007 and 2008—and that he was required to do so—the only question is whether a reasonable factfinder could conclude that this failure was not willful. (See id., Attach. 27 at 7–8.) The Government argues that there is no genuine dispute about Flume's willfulness. Specifically, it contends that Flume was indisputably willful in one of two ways: he either (1) knowingly disregarded the FBAR reporting requirements (Dkt. 51 at 18–21); or (2) recklessly disregarded a high probability that he was breaking the law, even if he did not specifically know about his obligation to file FBARs (Id. at 21–24). Flume, by contrast, argues that there is a genuine dispute about his willfulness because he testified at his deposition that he was unaware of the FBAR filing requirements until 2010, when his tax-return preparer first told him about the requirements. (Dkt. 54 at 2–3.) In response, the Government contends that Flume's "self-serving testimony" cannot defeat summary judgment. (Dkt. 55 at 2.) Finally, although Flume contends that he did not have actual knowledge of the FBAR requirements, he does not explicitly contest the Government's assertion that he acted recklessly. (See Dkt. 54.) But he does state that he "relied on [his] professional tax preparer's advice" regarding his financial reporting requirements. (Id. at 3.)

Having reviewed the record and the applicable law, the Court agrees with Flume.

[4] This amount includes the penalties for 2007 and 2008 plus interest and a late-payment penalty. (Dkt. 51, Attach. 37.)

Flume's testimony—self-serving though it may be—creates a genuine dispute as to whether Flume knowingly disregarded his FBAR obligations in violation of 31 U.S.C. § 5314. Further, there is a genuine dispute about whether Flume acted recklessly because there is evidence he relied on his tax-return preparer to ensure he was fulfilling his reporting obligations. Thus, for the reasons discussed below, the Government's summary-judgment motion is denied.

Factual Background

Defendant Edward S. Flume, Jr. is a U.S. citizen living in Mexico. (Dkt. 51, Attach. 29 at 5, 25.) He has worked as a real-estate developer and once ran dozens of Whataburger franchises. (Id. at 6, 9.) In 2001, he and his wife founded Wilshire Holdings, Inc., a Belize corporation that Flume says he used to operate his real-estate business. (Id., Attach. 28 at 4; Id., Attach. 29 at 7.) Flume testified that he chose not to incorporate Wilshire Holdings in the U.S. so that he could "postpone" having to pay taxes on its income. (Id., Attach. 29 at 24.) According to Flume, if Wilshire Holdings had been an American company, he would have had to pay taxes on Wilshire's income "immediate[ly]." (Id.) But since it was incorporated elsewhere, he could delay having to pay taxes on Wilshire's income until the company made distributions to him and his wife. (Id.)

Flume has maintained a personal bank account in Mexico. (Id., Attach. 27 at 7.) In 2007, the Mexican account had a balance of $39,950. (Id., Attach. 5 at 6.)

In 2005, Flume also opened a UBS bank account in Switzerland in the name of Wilshire Holdings. (Id., Attach. 27 at 3.) According to UBS records, the primary purpose of the account was to manage the Flumes' retirement funds. (Id., Attach. 18 at 2.) When opening the account, Flume signed a UBS form instructing UBS not to invest the account funds in U.S. securities. (Id., Attach. 12.) Flume testified that he did this because he was "worried about U.S. banks" being

overleveraged and possibly failing. (Id., Attach. 29 at 22.) Finally, in October 2008, Flume transferred all the money in the UBS account to a Fidelity investment account in the United States, also in the name of Wilshire Holdings. (Id. at 10; Id., Attach. 27 at 11–12.)

In the early 2000s, Flume hired Leonard Purcell, a tax-return preparer with an office in Mexico, to prepare his tax returns. (Id., Attach. 31 at 3, 5–6.) Purcell and his partner, Adriana Bautista Luna, prepared Flume's tax returns for 2007 and 2008. (Id. at 3; Id., Attach. 32 at 11.) Each tax return contained IRS form Schedule B. (Id., Attach. 2 at 3; Id., Attach. 3 at 3.) Part 7a of Schedule B stated, "At any time during [the relevant year], did you have an interest in . . . a financial account in a foreign country, such as a bank account . . . ? See Instructions for exceptions and filing requirements for Form TD F 90-22.1." Part 7a also had a "yes" box and a "no" box. Part 7b then stated, "If 'Yes,' enter the name of the foreign country." In Part 7a, Flume's returns for 2007 and 2008 had the "yes" box checked. In Part 7b, Flume's returns listed "Mexico" as the name of the foreign country but did not mention Switzerland.

Flume was required to submit FBARs for 2007 and 2008 that reported his interest in the Swiss and Mexican accounts.[5] (Id., Attach. 27 at 7–8; see id., Attach. 5 at 5–9.) For 2007, Flume's FBAR was due on June 30, 2008, and for 2008, his FBAR was due on June 30, 2009. (Id., Attach. 27 at 7–8.) But Flume did not timely file an FBAR in either year.[6] Instead, he filed overdue FBARs for both years on June 28, 2010. (Id., Attach. 5 at 5–7.) Flume does not dispute that he understated the maximum balance of the UBS account in the untimely FBARs. (See Dkt.

[5] The IRS could not assess FBAR penalties against Flume for 2005 or 2006 due to the six-year statute of limitations. See 31 U.S.C. § 5321(b)(1). The IRS first assessed FBAR penalties against Flume on April 15, 2014, nearly six years after June 30, 2008, when Flume's 2007 FBAR was due. (Dkt. 51 at 25.)

[6] The IRS did not assess penalties for Flume's failure to file FBARs reporting his Mexican account.

51 at 12; Dkt. 54.) For 2007, he reported that the account had a maximum balance of $625,000, when in fact it had a maximum balance of $857,051.85. (Dkt. 51, Attach. 27 at 11; Dkt. 51, Attach. 23 at 3.) For 2008, he reported that the maximum account balance was $182,500, when in fact it had a maximum balance of $755,345.56. (Id., Attach. 5 at 7; Id., Attach. 23 at 4.) But Flume testified that he tried to report the balances as accurately as he could and that by 2010 he no longer had any complete UBS statements or access to his UBS files. (Id., Attach 29 at 20, 31.) He thus cobbled together estimates of the maximum balances from "notes" and other records. (Id. at 31.)

Flume admits that he never gave Purcell any documents about the UBS account. (Id. at 44.) Moreover, Purcell testified at his deposition in 2017 that Flume did not tell him about the UBS account until 2013 or 2014. (Id., Attach. 31 at 7.) He added that he would have put "Switzerland" on line 7b of Flume's tax returns if Flume had told him about the UBS account. (Id.) Furthermore, Luna testified in her 2017 deposition that Flume never told her about the UBS account either. (Id., Attach. 32 at 5.) Flume, on the other hand, testified that he did in fact tell Purcell about his UBS account soon after opening it in 2005. (Id., Attach. 29 at 44.)

Purcell testified that he became aware of the FBAR requirements in 2001 and that he informed Flume about the requirements in around 2003 or 2004. (Id., Attach. 31 at 7, 16.) Purcell is also "pretty sure" that he sent Flume a letter every year, including 2007 and 2008, advising him of the FBAR requirements. (Id. at 11–12; Id., Attach. 34 at 3.) Additionally, Purcell testified that Flume assured him he "was going to do" the FBARs himself. (Id., Attach. 31 at 13.) Likewise, Luna testified that she "would have" advised Flume by letter and by phone every year of the need to disclose foreign bank accounts. (Id., Attach. 32 at 8.)

But Flume testified that Purcell first told him about the need to file FBARs in 2010 and

that this was when he first learned about the "possibility of the need to file FBARs." (Id., Attach. 29 at 20.) Flume also testified that he did not read his tax returns "word for word," and that he "didn't bother" reading the IRS instructions on the FBAR filing requirements. (Id. at 18–19.) Rather, he "looked at the income," saw it "seemed okay," and then signed the returns. (Id. at 19.) He did this because the tax forms were "almost Greek" to him, and he "trust[ed]" Purcell to prepare his returns correctly. (Id. at 18–19.) Nonetheless, Flume signed the returns under penalties of perjury, affirming that he "examined" them and that they were accurate to the best of his knowledge. (Id., Attach. 2 at 2; Id., Attach. 3 at 2.)

At UBS, Flume had a personal account executive named Florian Fischer. (Id., Attach. 29 at 8–9.) Fischer's records show that he and Flume corresponded frequently by email in 2006, 2007, and 2008 about Flume's UBS account. (Id., Attach. 7.) In March 2008, Flume told Fischer to make monthly disbursements from his UBS account to his personal bank account in Mexico. (Id., Attach. 26 at 15.) Fischer's records also show that on July 3, 2008 he visited Flume's home in Mexico and discussed the account with Flume and his wife. (Id., Attach. 7 at 36.) Fischer's written summary of the meeting states that Flume's "main preoccupation" during their discussion was "[i]nvestigations of UBS by the IRS."[7] (Id.) Fischer also wrote: "[Flume and his wife] have no IRS-issue (Check-the-box is done) but do not want to lose their confidentiality." (Id.) But

[7] Two days earlier, on July 1, 2008, a federal judge authorized the IRS to request information from UBS about U.S. taxpayers who might be using Swiss bank accounts to evade federal income taxes. Dep't of Justice, Federal Judge Approves IRS Summons for UBS Swiss Bank Account Records (July 1, 2008), https://www.justice.gov/archive/tax/txdv08584.htm. IRS efforts to compel UBS to disclose accounts belonging to U.S. taxpayers received widespread media attention, including in financial periodicals that Flume read (Dkt. 51, Attach. 29 at 22–23) in 2008. See, e.g., Lynnley Browning, Another Setback for UBS in Tax Inquiry, N.Y. Times, July 2, 2008, https://www.nytimes.com/2008/07/02/business/worldbusiness/02tax.html/; Evan Perez, Feds Press Swiss Bank to Name U.S. Clients, Wall St. J., July 1, 2008, https://www.wsj.com/articles/SB121486342353917387.

Flume denies that he "expressed concerns" about the IRS investigating UBS or that he sought to keep the account "confidential" from the IRS. (Id., Attach. 27 at 10.) Rather, he insists he was worried about the "situation at UBS in general" and whether UBS was a "safe alternative to Mexican banks that were appearing less than stable." (Id.)

Summary Judgment Standard

Summary judgment is proper only when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if its resolution in favor of one party might affect the lawsuit's outcome. Sossamon v. Lone Star State of Tex., 560 F.3d 316, 326 (5th Cir. 2009). A dispute as to a material fact is "genuine" if the evidence is such that a reasonable factfinder could return a verdict for the nonmoving party. Id. Thus, when a plaintiff moves for summary judgment, it must establish all the elements of its claim so conclusively that a reasonable factfinder could not return a verdict for the defendant. Chaplin v. NationsCredit Corp., 307 F.3d 368, 372 (5th Cir. 2002).

In determining whether there is a genuine dispute as to a material fact, a court must consider the evidence in the light most favorable to the nonmovant, and any reasonable inferences are to be drawn in favor of that party. Distribuidora Mari Jose, S.A. de C.V. v. Transmaritime, Inc., 738 F.3d 703, 706 (5th Cir. 2013). "It is not the role of the court to make credibility determinations, or to weigh evidence when ruling on a motion for summary judgment." McManaway v. KBR, Inc., 852 F.3d 444, 449 (5th Cir. 2017).

Discussion

According to the court in United States v. McBride, 908 F. Supp. 2d 1186, 1201 (D. Utah 2012), a claim by the government to enforce penalties for a willful violation of section 5314 has seven elements: (1) the defendant was a U.S. citizen "or a resident or a person doing business in

the United States" during the relevant period; (2) the defendant "had a financial interest in, or signatory or other authority over, a bank, securities or other financial account" during the relevant period; (3) the account had a balance that exceeded $10,000 at some point during the relevant period; (4) the account was in a foreign country; (5) the defendant failed to disclose the account; (6) the failure to disclose was willful; and (7) the amounts of the penalties assessed for failing to disclose the account were proper. Here, only the sixth element—willfulness—is in dispute.

What constitutes a "willful" failure to file an FBAR appears to be an issue of first impression in the Fifth Circuit. Indeed, only a handful of cases nationwide have thoroughly analyzed the issue.[8] Bedrosian v. United States, 2017 WL 1361535, at *4 (E.D. Pa. Apr. 13, 2017). Most courts addressing the issue have held that willfulness includes both "knowingly" violating the FBAR requirements and "recklessly" doing so. Id.; see United States v. Garrity, 2018 WL 1611387, at *6 (D. Conn. Apr. 3, 2018) (listing cases). But at least one court has bucked that trend, stating that willful failure to file an FBAR requires proof that the defendant acted "with knowledge" that his conduct was unlawful—i.e., that he "intentionally violated 'a known legal duty.'" United States v. Pomerantz, 2017 WL 4418572, at *3 (W.D. Wash. Oct. 5,

[8] Until recently, FBAR enforcement was minimal. See Dep't of the Treasury, A Report to Congress in Accordance with §361(b) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT) (Apr. 26, 2002), https://www.treasury.gov/press-center/press-releases/Documents/fbar.pdf (explaining that there were "relatively few" FBAR civil-enforcement actions, in part because of the difficulty in proving willfulness). But in 2004, Congress dramatically increased the maximum penalty for willful FBAR violations from a maximum of $100,000 to a maximum of up to 50% of the balance of the account. United States v. Bussell, 2015 WL 9957826, at *7 (C.D. Cal. Dec. 8, 2015). And beginning in 2008 and 2009, the IRS stepped up FBAR enforcement in a major way after it forced UBS to disclose accounts belonging to U.S. taxpayers. Michael Sardar, What Constitutes 'Willfulness' for Purposes of the FBAR Failure-to-File Penalty?, 113 J. Tax'n 183, 184 (2010).

2017) (quoting Ratzlaf v. United States, 510 U.S 135, 142 (1994)), appeal dismissed for lack of appellate jurisdiction, 2017 WL 6879994 (9th Cir. Nov. 16, 2017).

At this stage, the Court need not decide whether willfulness includes only knowing violations or whether it also includes reckless violations, since genuine disputes of material fact remain either way. The Court will first address Flume's alleged knowing disregard of his FBAR filing obligations. It will then address his alleged reckless disregard of those obligations.

A. Flume's Alleged Knowing Disregard of His FBAR Obligations

The Government argues that Flume knowingly disregarded his FBAR reporting obligations because he had either actual knowledge or "constructive" knowledge of those obligations. (Dkt. 51 at 18–21.) But as explained below, the Government is not entitled to summary judgment on this ground because genuine disputes remain about whether Flume had actual knowledge of the FBAR requirements, and "constructive" knowledge does not suffice to show willfulness. The Court will address each argument in turn.

1. Actual Knowledge

To show willfulness based on an actual-knowledge theory, the Government must prove that Flume knew about the FBAR requirements.[9] See Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 56–57 (2007) (assuming that when willfulness is alleged, actual knowledge requires acts "known to violate" a statute); United States v. Wynn, 61 F.3d 921, 928 (D.C. Cir. 1995) ("[W]hile ignorance of the law generally is no excuse, Congress may decree otherwise . . . by requiring proof of 'willfulness' . . . ."); McBride, 908 F. Supp. 2d at 1208 (holding the defendant liable

[9] The Government must also show that Flume knew the requirements applied to him. But Flume does not dispute that he knew about the UBS account and that it had more than $10,000.

because he had "actual knowledge of his duty" to file an FBAR).[10] As set forth below, there is ample evidence that Flume knew about the FBAR requirements, but that evidence is not conclusive.

Flume's tax-return preparer testified that he became aware of the FBAR requirements in 2001 and that he informed Flume about the requirements in around 2003 or 2004. (Dkt. 51, Attach. 31 at 16.) He is also "pretty sure" that he sent Flume a letter every year, including 2007 and 2008, advising him of the FBAR requirements. (Id. at 11–12; Id., Attach. 34 at 3.) Additionally, the preparer testified that Flume assured him he "was going to do" the FBARs himself. (Id., Attach. 31 at 13.) Likewise, the preparer's partner testified that she "would have" advised Flume by letter and by phone every year of the need to disclose foreign bank accounts. (Id., Attach. 32 at 8.) Further, on Flume's 2007 and 2008 tax returns, line 7 of Schedule B says to "[s]ee Instructions for . . . filing requirements for Form TD F 90-22.1." (Id., Attach 2 at 3; Id., Attach. 3 at 3.) There is evidence that Flume read this because he signed the returns, affirming under penalties of perjury that he did, in fact, read them. (Id., Attach 2 at 2; Id., Attach. 3 at 2.)

There are also at least eight pieces of evidence tending to show that Flume tried to hide his UBS account, which in the Government's view shows that Flume knew he was supposed to report the account to the IRS. First, Flume "checked the box" in line 7a of his Schedule B forms indicating he had a foreign account, but in line 7b he stated only that he had an account in Mexico, not Switzerland. (Id., Attach. 2 at 3; Id., Attach. 3 at 3.) Second, Flume's tax-return preparer testified at his deposition that Flume never disclosed the UBS account to him until 2013 or 2014 despite disclosing his account in Mexico years earlier. (Id., Attach. 31 at 7.) Third, the

[10] Outside of the willfulness context, "the knowledge requisite to [a] knowing violation of a statute is factual knowledge as distinguished from knowledge of the law." Bryan v. United States, 524 U.S. 184, 192 (1998).

preparer's partner testified that Flume never told her about the UBS account either. (Id., Attach. 32 at 5). Fourth, Flume's UBS account executive reported that Flume's "main preoccupation" during their discussion in July 2008 was "[i]nvestigations of UBS by the IRS" and ensuring that he and his wife did not "lose their confidentiality." (Id., Attach. 7 at 36.) In the Government's view, this statement shows that Flume was concerned an IRS investigation might expose his "hidden" UBS account. (Dkt. 51 at 5.) Fifth, the UBS account executive's July 2008 statement that the "[c]heck-the-box [wa]s done" suggests that he spoke with Flume about the importance of "checking the box" on line 7a of his Schedule B to disclose that he had a foreign account. (See id., Attach. 7 at 36.) Thus, the Government argues, Flume must have known that he needed to mention Switzerland in line 7b, and his failure to do so was a deliberate attempt to hide the UBS account. (See Dkt. 51 at 20.) Sixth, the Government argues that Flume's decision not to invest the UBS account funds in U.S. securities somehow shows that he tried to avoid IRS scrutiny. (Id.) Seventh, the Government argues that Flume's decision to open the UBS account in the name of Wilshire Holdings, a foreign corporation, also shows he tried to hide his interest in the account from the IRS. (Id. at 23.) Lastly, the Government notes that when Flume finally filed his FBARs for the UBS account in 2010, he underreported the value of the account. (Id. at 12.) The Government argues that this is "further evidence of Flume attempting to conceal the . . . significant amounts in the UBS Account." (Id. at 24.)

But despite all this evidence, a reasonable factfinder could conclude that Flume did not know about his FBAR reporting obligations. Critically, Flume testified that he only learned about the "possibility of the need to file FBARs" in 2010, when he claims that his tax-return preparer first told him about the requirement. (Id., Attach. 29 at 20.) Indeed, Flume filed untimely FBARs for 2007 and 2008 on June 28, 2010. (Id., Attach. 5 at 5–7.) Additionally, there

is evidence that Flume never saw the Schedule B instruction about filing an FBAR form—and that even if he did, he assumed he was not required to file the form because his tax-return preparer did not prepare one for him. Specifically, Flume testified at his deposition that he did not read his tax returns "word for word." (Id., Attach. 29 at 18.) Instead, he claims his review was cursory: he "looked at the income," saw it "seemed okay," and then signed the returns. (Id. at 19.) He did this because the tax forms were "almost Greek" to him, and he "trust[ed]" his tax-return preparer to prepare his returns correctly. (Id. at 18–19.)

Flume's sworn statements also provide evidence that Flume did not try to hide the UBS account. Flume testified that he did in fact tell his tax-return preparer about his UBS account soon after opening it in 2005. (Id. at 44.) Thus, a reasonable factfinder could conclude that Flume's failure to disclose the UBS account in his tax returns stemmed from his preparer's negligence rather than a desire to hide the account. A factfinder could also reasonably believe Flume's testimony that he did his best to accurately report the amount of money in the UBS account based on the records that he had available. Moreover, Flume denied that he expressed concern about the "confidentiality" of his account at his meeting with his UBS account executive. (Id., Attach. 27 at 10.) Additionally, the fact that Flume opted not to invest in U.S. securities is not conclusive evidence that Flume thought he was hiding his account from the IRS. Flume had an innocent explanation for why he signed the UBS form instructing UBS not to invest in U.S. securities: he was worried about the possibility of bank failure in the U.S. (Id., Attach. 29 at 22.) Finally, the fact that Flume placed the UBS account in the name of a foreign corporation is also not conclusive. Flume testified that he placed his money in a foreign corporation in order to legally postpone paying taxes on the corporation's income, not to avoid IRS scrutiny altogether. (Id. at 24.)

The Government argues that the Court should disregard Flume's testimony because it is "self-serving." But courts are not permitted to make credibility determinations in ruling on summary-judgment motions. McManaway, 852 F.3d at 449. Thus, testimony "based on personal knowledge and containing factual assertions suffices to create a fact issue," even if it is "arguably self-serving." C.R. Pittman Constr. Co. v. Nat'l Fire Ins. Co. of Hartford, 453 F. App'x 439, 443 (5th Cir. 2011) (per curiam); see Rushing v. Kan. City S. Ry., 185 F.3d 496, 513 (5th Cir. 1999) ("[M]erely claiming that . . . evidence is self-serving does not mean we cannot consider it or that it is insufficient."). Here, Flume's sworn statements that he did not know about the FBAR requirements until 2010 and that he told his preparer about the UBS account in 2005 are specific factual assertions based on personal knowledge. Thus, it would be improper to ignore this testimony. See United States v. Williams, 489 F. App'x 655, 661 (4th Cir. 2012) (Agee, J., dissenting) (arguing that it is proper to consider a defendant's self-serving testimony that he was unaware of his FBAR obligations). Indeed, it would be especially inappropriate to ignore Flume's testimony, since his mental state is what is in dispute.

Even if the Court disregarded Flume's testimony, there would still be a genuine dispute about Flume's actual knowledge, for several reasons. First, a factfinder could infer that Flume learned of the FBAR requirements in 2010 from the fact that Flume filed overdue FBARs on June 28, 2010. Flume's freely disclosing his UBS account to the IRS in 2010 suggests that he did not try to hide it from the IRS in 2008 and 2009.[11] Although it is possible that Flume knowingly

[11] Further, finding willfulness even where the defendant acted promptly to rectify his error would create a perverse incentive. It would encourage taxpayers who have not filed FBARs on time to never file them at all in the hope that the IRS does not discover their foreign accounts. See Bedrosian v. United States, 2017 WL 4946433, at *7 (E.D. Pa. Sept. 20, 2017), appeal docketed, No. 17-3525 (3d Cir. Nov. 21, 2017) (stating that a defendant who took steps to "rectify" his FBAR violation "prior to learning that the government was investigating him" was not the sort of person Congress intended to punish for a willful violation).

hid the account in 2008 and 2009 and then had a change of heart in 2010, the Government does not identify any event that happened in 2010 that might have prompted this change of heart.[12] Second, a factfinder could infer that Flume did not know about the FBAR requirements from the fact that he did not file FBARs for his bank account in Mexico either, even though he told the IRS he had an account in Mexico. Third, a factfinder could reasonably discredit the testimony of Flume's tax-return preparer and the preparer's partner. Their testimony is also arguably self-serving: they may fear that admitting they failed to warn Flume about his FBAR obligations would expose them to legal liability. (See Dkt. 51, Attach. 29 at 16.) Also, their depositions were taken in 2017—about eight years after Flume's 2008 FBAR was due, and 13 years after the preparer alleges he first told Flume about the FBAR requirements. A factfinder could reasonably doubt that they remember what they said to Flume, or what he said to them, years earlier. Lastly, the fact that Flume transferred all the money from the UBS account to an account in the United States is evidence that he was not trying to hide the money in the account from the IRS.

Accordingly, with or without Flume's testimony, there is a genuine dispute as to Flume's actual knowledge of his FBAR reporting obligations.

2. Constructive Knowledge

Alternatively, the Government seems to argue that Flume was willful because he "constructively" knew about his FBAR reporting obligations. (Dkt. 51 at 18–20.) The Government relies on Williams (from the Fourth Circuit) and McBride (from the District of Utah), the first two cases analyzing willfulness in the FBAR context. In those cases, both courts held that taxpayers are "charged with constructive knowledge" of the contents of their tax returns

[12] The IRS only began investigating Flume in 2012. (See Dkt. 51, Attach. 28 at 5.) Thus, the Government cannot argue that Flume disclosed the account in response to IRS pressure.

because by signing them, they declare under penalties of perjury that they have "examined" the returns. Williams, 489 F. App'x at 659; McBride, 908 F. Supp. 2d at 1206–07. Both courts also held that Schedule B's directions to "[s]ee Instructions for . . . filing requirements for Form TD F 90–22.1" put every taxpayer on "inquiry notice" of the FBAR requirements, effectively making every taxpayer who fails to follow those requirements a "willful" violator. Williams, 489 F. App'x at 659; McBride, 908 F. Supp. 2d at 1206. Thus, the Government contends that Flume was willful because he constructively knew about the FBAR requirements by signing his 2007 and 2008 tax returns, which contained instructions to consult those requirements.

But the Court declines to follow the holdings of Williams or McBride. The constructive-knowledge theory is unpersuasive for at least three reasons.

First, it ignores the distinction Congress drew between willful and non-willful violations of section 5314. If every taxpayer, merely by signing a tax return, is presumed to know of the need to file an FBAR, "it is difficult to conceive of how a violation could be nonwillful."[13]

Second, the Court would be exceeding its summary-judgment authority if it presumed that Flume "examined" his returns, and thus knew about the FBAR requirements by 2008, merely because he signed the returns under penalties of perjury. Flume later testified under penalties of perjury—in front of Department of Justice lawyers—that he did not know about the FBAR requirements until 2010. It is the factfinder's role, not the Court's at summary judgment, to decide which of the two sworn statements carries more weight.

Third, the theory is rooted in faulty policy arguments. When courts use the word "constructive," it "indicate[s] that something will for reasons of policy be treated as if it were

[13] Kyle Niewoehner, Comment, Feigning Willfulness: How Williams and McBride Extend the Foreign Bank Accounts Disclosure Willfulness Requirement and Why They Should Not Be Followed, 68 Tax Law. 251, 257 (2014).

something else." Bean v. Wis. Bell, Inc., 366 F.3d 451, 453 (7th Cir. 2004). Thus, to have "constructive knowledge" of something "means you don't have [knowledge] of it but the law will pretend you do" for policy reasons. See id. at 454. Here, the Government argues that a ruling in Flume's favor would "encourage taxpayers to sign tax returns without reading them in the hope of avoiding any negative consequences from inaccurate reporting." (Dkt. 51 at 18). It argues that a taxpayer could "escape liability by simply claiming he did not read what he was signing." (Id. at 18–19.) But this is incorrect. The law still imposes a penalty of up to $10,000 for each non-willful violation. Moreover, a taxpayer who tried to escape liability in this way might be found willful on a recklessness theory. See infra Part B. Recklessness, like constructive knowledge, can be "substitute[d] for . . . actual knowledge" on policy grounds. See J.I. Case Credit Corp. v. First Nat'l Bank of Madison Cty., 991 F.2d 1272, 1278 (7th Cir. 1993). Thus, there is no policy need to treat constructive knowledge as a substitute for actual knowledge.

Accordingly, the Court will not hold that Flume had constructive knowledge[14]—and that he owes the Government more than half a million dollars—merely because he signed his tax returns under penalties of perjury. The Government has thus failed to conclusively establish that Flume was willful on the ground that he knowingly disregarded his FBAR obligations.

B. Flume's Alleged Reckless Disregard of His FBAR Obligations

The Government also argues that even if Flume did not actually or constructively know that he was required to file FBARs, he recklessly disregarded a risk that he was breaking the law.

[14] The Government's case would be more persuasive if it were the nonmovant trying to defeat summary judgment. A taxpayer's signature may be "prima facie" evidence that the taxpayer knew the contents of his return. Williams, 489 F. App'x at 659. Although it is not decisive proof, it may be enough to sustain a jury's finding that the taxpayer knew the return's contents. See McBride, 908 F. Supp. 2d at 1208 (explaining that a jury "may" infer that a taxpayer read his return and knew its contents from the fact that he signed it).

In civil cases, recklessness means conduct posing "an unjustifiably high risk of harm that is either known or so obvious that it should be known."[15] Safeco, 551 U.S. at 68. It requires "a risk of violating the law substantially greater than the risk associated with . . . merely careless" behavior. Id. at 69.

The most recent—and arguably the most factually similar—case to address recklessness in the FBAR context suggests that recklessness is a high bar. Bedrosian v. United States, 2017 WL 4946433 (E.D. Pa. Sept. 20, 2017), appeal docketed, No. 17-3525 (3d Cir. Nov. 21, 2017). In Bedrosian, the Government alleged that a taxpayer (Bedrosian) had recklessly failed to file an accurate FBAR for tax year 2007. Id. at *3, *5. In the early 1970s, Bedrosian opened a Swiss bank account. Id. at *1. For twenty years, he did not tell his accountant about the account. Id. When he finally told his accountant about the account in the mid-1990s, the accountant told him he had been breaking the law every year for more than twenty years by not reporting the account. Id. In 2005, the bank converted his account into two separate accounts. Id. And it was not until 2008 that he finally reported that he had a Swiss account and filed an FBAR. Id. at *2. But despite the fact that he had two Swiss accounts by that time, he only reported one of them. Id. The one he reported had roughly $240,000; the other had roughly $2 million. Id. He denied that his failure to report the other account was willful, insisting he thought he had only one account. Id. at *2–3. The court not only denied summary judgment to the government but also found after a bench trial that Bedrosian was not reckless. Id. at *1, 7. The court concluded that Bedrosian

[15] The Government, citing Williams, states that recklessness includes situations when a person is subjectively "aware of a high probability that he has a [legal] liability" but "purposefully avoids learning facts that would confirm the liability." (Dkt. 51 at 22.) But that is the standard for "willful blindness," not for recklessness. Williams, 489 F. App'x at 658. A willfully blind defendant "surpasses" a reckless defendant in culpability. Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 769 (2011).

had at most been negligent even though he (1) had annual meetings with a UBS representative and "easily" could have discovered he had two accounts; (2) was on notice of the importance of filing proper FBARs because his accountant had warned him he had been breaking the law; (3) filed an FBAR for the other account; and (4) sent two letters to UBS closing the two accounts just weeks after he signed his inaccurate FBAR. Id. at *5–6.

Here, the Government argues that there is no genuine dispute about Flume's recklessness for two main reasons. First, the Government again points to the evidence that Flume tried to hide the account. (Dkt. 51 at 23.) In the Government's view, Flume must have known "there was a significant risk that he was violating the law . . . because he took active steps to conceal the account." (Id.) Second, the Government points to Flume's admission that he "didn't bother" consulting the FBAR instructions even though Schedule B said to do so. (Id.) The Government argues that this "conscious decision" to avoid reading the instructions "clearly means he knew he was not going to like what those instructions required."[16] (Id.)

The Court disagrees on both counts. First, as explained above, there is a genuine dispute as to whether Flume actually tried to hide the account. See supra Part A.1. Second, because Flume had a tax-return preparer, it was arguably not reckless for him to not "bother" reading the FBAR instructions. Indeed, Flume testified that he relied on his tax preparer's competence in preparing the return. If he did, then it is not "so obvious" that he took an "unjustifiably high risk" in doing so. The warning to "[s]ee Instructions for . . . filing requirements for Form TD F 90-22.1" also says that there are "exceptions" to the duty to file an FBAR. (Id., Attach. 3 at 3.)

[16] Flume's "sophistication as a businessman" may also be evidence that his failure to timely file FBARs was reckless. See Bedrosian, 2017 WL 4946433, at *6. But the Government does not make this argument. And it would not be a strong argument because Flume attests that he relied on his tax-preparer's sophistication, not his own, to ensure he was in compliance with IRS reporting requirements.

Flume might understandably have reasoned that he did not have to file an FBAR because his preparer had determined that one of those exceptions applied.[17]

Thus, because a reasonable factfinder could conclude that Flume neither knowingly nor recklessly disregarded his FBAR obligations, there is a genuine dispute as to Flume's willfulness in failing to file timely FBARs reporting his UBS account. Accordingly, because there is a genuine dispute as to an essential element of the Government's claim, the Court cannot enter summary judgment in its favor.[18]

Conclusion

For the foregoing reasons, the Government's motion for summary judgment (Dkt. 51) is hereby DENIED.

IT IS SO ORDERED.

SIGNED this 22nd day of August, 2018.

Diana Saldaña
United States District Judge

[17] The Court also notes an ambiguity in line 7b of Schedule B. That line says to enter the name of the "foreign country"—in the singular—where the taxpayer has an account. (Dkt. 51, Attach. 3 at 3.) Thus, Flume might reasonably have thought that he was not required to list both Mexico and Switzerland.

[18] Because the Court holds that there is a genuine dispute as to the willfulness element, the Court need not analyze the other elements, such as whether the IRS properly calculated the penalty amounts.