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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

STUART CARSON et al.,

Defendants.

Case No. SA CR-09-00077-JVS

DEFENDANTS' OPPOSITION TO GOVERNMENT'S MOTION TO EXCLUDE DEFENDANTS' EXPERT WITNESSES

Hearing Date: June 11, 2012
Hearing Time: 3:30 p.m.
Courtroom: 10C
Trial Date: June 26, 2012

Defendants David Edmonds and Paul Cosgrove ("Defendants") hereby file their Opposition to the Government's Motion to Exclude Defendants' Expert Witnesses. This Opposition is based upon the attached memorandum of points and authorities, the files and records in this matter, as well as any evidence or argument presented at the hearing on this matter.

Dated: May 21, 2012

BIENERT, MILLER & KATZMAN, PLC

By: */s/ Teresa Céspedes Alarcón/s/*
Teresa Céspedes Alarcón
Attorneys for Defendant
PAUL COSGROVE

Dated: May 21, 2012

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On April 30, 2012, defendants David Edmonds and Paul Cosgrove ("Defendants") disclosed their expert witnesses to the government in which they identified 10 expert witnesses: experts El-Hage, Kim, Naughton and Shi ("instrumentality experts") and experts Koehler, Mowrey, Radus, Sanderson, Simkins and Smollin ("non-instrumentality experts"). Consistent with the requirements of Federal Rule of Criminal Procedure 16(b)(1)(C),[1] Defendants' disclosures included summaries which identified the opinions about which the experts will testify, the documents and other information upon which the experts' opinions are based, and the experts' qualifications. Rule 16 does not require that Defendants provide a line-by-line description of the experts' testimony or what would otherwise essentially be a written deposition as the government suggests. Defendants' disclosures provide sufficient information to test the merit of their experts' testimony through focused cross-examination. That is all that is required. The government cannot plausibly assert that Defendants' disclosures leave any room for "surprise" about subject matters to be covered at trial. The government is readily familiar with the instrumentality factors that are the subject matter of Defendants' instrumentality experts' testimony. The government is equally informed of the opinions of Defendants' non-instrumentality experts as evidenced by the government's own moving papers in which they articulate the substance of the very defense expert opinions they claim are too vague and general.

Moreover, as explained below, the testimony of Defendants' non-instrumentality experts is admissible as it bears directly on elements of the charges. Because the subject matter of the non-instrumentality experts' testimony is beyond the parameters of what is within a layperson's common sense, it is the proper subject of expert testimony under Rule 702 of the Federal Rules of Evidence.[2] The government's motion should be denied.

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[1] Further references to "Rule 16" are to Rule 16 of the Federal Rules of Criminal Procedure.

[2] Further references to "Rule 702" are to Rule 702 of the Federal Rules of Evidence.

II. ARGUMENT

A. Legal Standard

Federal Rule of Criminal Procedure 16(b)(1)(C) requires defendants to give the government a written summary of any expert testimony that they intend to use at trial. *United States v. Caputo*, 382 F. Supp. 2d 1045, 1049 (N.D. Ill. 2005) The summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications. *Id.* The level of detail of the summary depends on the complexity of the expert testimony. *Id.* Summaries of expert testimony concerning non-scientific or technical evidence can be much shorter and broader than testimony concerning scientific or technical evidence. *Id.* A more detailed summary is only required if the summary—in light of the complexity of the expert testimony—does not enable the government to prepare for cross-examination. *See id.*

Rule 702 governs the admissibility of expert opinion testimony. The rule consists of three distinct but related requirements: (1) the subject matter at issue must be beyond the common knowledge of the average layman; (2) the witness must have sufficient expertise; and (3) the state of the pertinent art of scientific knowledge permits the assertion of a reasonable opinion. *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002) (citation omitted). In determining whether expert testimony is admissible under Rule 702, the trial court must first make a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology can be properly applied to the facts in issue. *Id.* at 1008 (summarizing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993)). Second, the court must ensure that the proposed expert testimony is relevant and will serve to aid the trier of fact. *Id.* (citation omitted). Expert testimony assists the trier of fact when it is beyond the common knowledge of the trier of fact. *Id.* (citation omitted).

In *United States v. Caputo*, the government challenged the sufficiency of disclosures concerning two defense experts in the prosecution of a conspiracy regarding modifications made to a medical device previously approved by the Food and Drug

Administration ("FDA"). 382 F. Supp. 2d at 1050-53. The first expert, Ronald Johnson, provided an opinion regarding the government's deficiency letters, FDA enforcement policy, and manufacturer's statements as to FDA clearance. *Id.* at 1050-51. The second, expert Dr. William Rutala, opined concerning technical testing processes, and that modifications made to the device would not compromise either the safety or efficacy of the product. *Id.* at 1051-53. Summaries of these opinions, including the essential conclusions, and the fact that the opinions were based on knowledge and experience of the expert, as well as review of case documents including "internal FDA documents" were provided to the government. The government, viewing these disclosures as insufficient, sought to compel more adequate statements. *Id.* at 1049-50.

The court ordered that due to the highly technical nature of Dr. Rutala's opinions, the defendant needed to disclose the tests upon which Dr. Rutala's opinions were based, which had not been identified for the government. *Id.* at 1052. The court stated "[i]t is exceedingly difficult to cross-examine a *scientific* expert witness about the results of a scientific test without an opportunity to first review the test giving rise to the results." *Id.* (emphasis added). Johnson's opinions were not scientific, and the court concluded the disclosures were sufficient as to Johnson, so long as the defendants had disclosed the reasons for the opinion upon which the defendants intended to rely at trial. *Id.* at 1051-53.

In *United States v. Mehta*, 236 F. Supp. 2d 150 (D. Mass. 2002), the trial court presiding over a tax evasion case similarly found that the disclosure concerning a non-scientific expert, in that case an accountant, need not be more than a summary. The *Mehta* court noted that Rule 16(b)(1)(C) requires "(1) the expert witnesses' opinions, (2) the bases for those opinions, and (3) the expert's qualifications." *Id.* at 155. The defendant's disclosure "described the expert's methodology, the particular type of [accounting] entries that he will emphasize, . . . and indicated that the . . . expert would also rely on the 'records and schedules' the government had produced as well as the expert's own factual investigation." *Id.* at 156. Finding that the defense had generally described the methods it would use to attack plaintiff's case, the *Mehta* court held that the

defense need not go further, or provide what would essentially be a written deposition by requiring a line-by-line assessment of the government's evidence in the disclosure. *Id.* at 156-57. Rather, "this would result in grossly incongruent and inequitable disclosure obligations, which are surely not required under the rules." *Id.* at 157-58. The court found that "Mehta's disclosure . . . provides the government with a 'fair opportunity to test the merit of the expert's testimony through focused cross-examination.' Rule 16 (b)(1)(C) requires nothing more." *Id.* at 157 (internal citation omitted).

While courts have upheld the notion of reciprocal criminal discovery on the theory that a defendant can waive privilege to obtain government discovery, constitutional limits surely remain. *Id.* at 156 (citing *Wardius v. Oregon*, 412 U.S. 470, 475 n. 9 (1973) (noting prosecution discovery advantages and concluding that if there is to be any discovery imbalance, it should work in defendant's favor.")). A defendant is under no obligation to create a competing disclosure of the subject matter of his expert's testimony; it simply needs to attack the government's case. *Mehta*, 236 F. Supp. 2d at 157. Any incongruence in disclosure is simply a function of the burdens of proof in a criminal case. *Id.*

B. Defendants' Expert Disclosures Comply With Rule 16 And Provide The Government With A Fair Opportunity To Test The Merit of Their Testimony Through Focused Cross-Examination

1. The Instrumentality Experts

The government claims that Defendants' disclosures relating to their instrumentality experts "fail to provide any information aside from the fact that the experts will testify that the evidence weighs in favor of the position that the entities were not instrumentalities of the specified country" and fail to provide the bases or reasons for these opinions. Motion at 9. According to the government, Defendants' disclosures are too general and vague and do not permit the government to test the merit of their testimony through focused cross-examination. *Id.* at 12. Not so.

Consistent with Rule 16, Defendants' disclosures apprise the government of the

experts' opinions, identified the bases of those opinions, and provided their qualifications. For example, as to expert El-Hage, Defendants disclosed that Mr. El-Hage will opine that the evidence relating to the instrumentality factors set forth in the court's instrumentality instruction weighs in favor of finding that Petronas and PGB were not government instrumentalities in and around the time period at issue in the Indictment. *See* Defendants' Disclosures attached to the declaration of Michael Weinbaum ("Weinbaum Dec.") as Exhibit ("Exh.") A. Defendants also specifically identified the several documents on which Mr. El-Hage's opinion is based, something the government failed to do in its own expert disclosures. The government cannot plausibly argue unfair surprise given its familiarity with the instrumentality factors and related issues in this case and the fact that Defendants disclosed the documents forming the basis of Mr. El-Hage's opinion.

Although Defendants provided the requisite information in their disclosures for the government to test the merit of their testimony through focused cross-examination, the government posits that it is "entitled to know at least some of the specific facts and circumstances relevant to each entity that Mr. El-Hage will testify about, as well as the specifics concerning the history of the Malaysian government." Motion at 12. But Rule 16 does not require that Defendants provide what would essentially be a written deposition by requiring a line-by-line assessment of the evidence in the disclosure. *See Mehta*, 236 F. Supp. 2d at 156-58 (noting that the defense generally described the methods it would use to attack the government's case and that requiring a line-by-line assessment of the government's evidence in the disclosure "would result in grossly incongruent and inequitable disclosure obligations, which are surely not required under the rules"). Nor does it require that Defendants summarize the content of the documents that form the basis of Mr. El-Hage's opinion, such as "the specifics concerning the history of the Malaysian government, economy, and legal regulations," as the government suggests, when this is available to the government in the documents Defendants identified in their disclosures. Defendants described generally the subject matter of their experts' testimony and specifically identified the bases of their testimony. Nothing more is

required.

Notably, even if they look different, the government's disclosures are qualitatively the same as Defendants', and in some instances provide even less than Defendants and what Rule 16 requires. That the government elected to provide in line item format its experts' testimony does not obligate Defendants to do so and does not provide the government a basis to secure more information from Defendants than is required by Rule 16. *See Mehta*, 236 F. Supp. 2d at 156 (noting that although the government's disclosures were quantitatively larger, each side's disclosures were qualitatively similar, and the government could not rely on the quantity of paper in its disclosures to flush out more information from the defendant that was required by Rule 16). While Defendants specifically identified documents and information upon which their experts' opinions are based, the government's disclosure identified no such documents or specificity. For example, as to government expert, Thomas Pepinsky, the government's disclosure regarding the basis of his opinion was limited to stating that it is based on is training, education and experience and "his review of relevant material including, but not limited to, Malaysian laws and regulations, scholarly articles and books, and Petronas Annual Reports." *See* Motion, Exh. B at 8. The government did not, however, specifically identify the "Malaysian laws and regulations, scholarly articles and books, and Petronas Annual Reports" referenced in their disclosure. The government should not be permitted to object to the sufficiency of Defendants' disclosures when it has provided the same or less information. In any event, Defendants' disclosures, when viewed in relation to the government's familiarity with the instrumentality factors, provides "a fair opportunity to test the merit of the expert's testimony through focused cross-examination." Defendants' expert testimony is not going to take the government by surprise.

The government also challenges the testimony of Professors Naughton and Shi as unfairly prejudicial because their testimony only covers the 1999 to 2004 time frame, while three of the counts relating to China charge payments made in early 2005. According to the government, limiting Professors Naughton's and Shi's testimony to this

time frame might lead jurors to believe that pre-2005 evidence relating to the instrumentality factors apply to the entire conspiracy. Motion at 14. The government's concerns regarding prejudice are without merit and do not warrant exclusion.

Preliminarily, although three of the counts charge Defendants with FCPA violations for payments made in the first quarter of 2005, the Indictment identifies as overt acts the approval of those payments which occurred in March 2004 (*see* Indictment, Doc. No. 101 at 22, Overt Acts 37-38 relating to Count 8), the same time period covered by Professors Naughton's and Shi's testimony. One charge that is years after the 2004 time period is Count 7 which only names Flavio Ricotti. If the government intends to introduce evidence about a Ricotti only Count, a Count that defendants currently understand is not in play, the defense will seek leave to amend their expert analysis to include that particular entity and time frame. Likewise, if the government believes consideration of the first quarter of 2005 or later is needed to make instrumentality determinations, even though the payment authorizations are earlier, then the defense will likewise seek leave to extend their expert analysis to cover the later period.

2. The Non-Instrumentality Experts

The government's challenge to the sufficiency of Defendants' disclosures relating to their non-instrumentality experts is equally unavailing. The disclosures do not simply contain a list of the subject areas as the government asserts. Rather, like the disclosures for the instrumentality experts and consistent with Rule 16, the disclosures for experts Koehler, Mowrey, Radus, Sanderson, Simkins and Smollin provide their opinions, the bases of those opinions, and their qualifications. Weinbaum Dec., Exh. A.

For example, as to Professor Koehler, Defendants specifically identified his opinions to be that the DOJ fails to provide adequate guidance regarding the FCPA, targets certain types of individuals for prosecution and relies on outside law firms in bringing prosecutions, and that these factors may have influenced the prosecution of Defendants in this case. Consistent with Rule 16, Defendants further identified the bases of Koehler's testimony as "his education, knowledge, and experience" and provided the

government with a list of specific documents on which Koehler's opinion relies. *Id.*

As to expert Mowrey, his opinions cannot be definitively set forth at this time because the underlying data used to calculate profits and bonuses have not been provided and will be dependent upon facts gleaned at trial. For example, while CCI prepared a chart for the government, which was later provided to Defendants, listing the purported profit margin on jobs where an alleged improper payment was made ("Payments Chart"), *see* Revised Payment Chart Cost Data, Weinbaum Dec., Exh. B, the foundation for the columns in this chart have not been sufficiently explained by CCI. The Payments Chart prepared by CCI and its counsel has several columns, the last of which seems to indicate CCI's net sales profit on each transaction. However, none of the columns seem to reflect a deduction for Selling, General and Administrative expenses ("SG&A"), which would further diminish profits on each transaction. Another document produced on April 2, 2012 indicates the annual SG&A percentages at CCI. *See* document bates-numbered CCITR0041085, Weinbaum Dec., Exh. C.

To the extent the persons who prepared those charts verify that SG&A was not incorporated into the Payments Chart, Mr, Mowrey will be able to more fully opine of the profit calculations. Similarly, while Defendants have been provided partial information regarding Defendants' bonus calculations and believe that it confirms that bonus compensation was based on net profits, this information is incomplete. Thus, Defendants expect to confirm profit and bonus calculation information from both government and defense witnesses at trial. Until that time, Mr. Mowrey cannot render a final opinion. However, his expert testimony is necessary to explain to the jury how Defendants' bonus' work, and the calculations used to determine net profits. As an accountant, Mr. Mowrey has knowledge and training that can assist the jury in understanding the relevant profit and bonus calculations. *See Finley*, 301 F.3d at 1013 (expert testimony appropriate when information beyond that of an ordinary person). In any event, it is clear from the government's response that they are aware of that his testimony will suggest that Defendants had no motive to engage in bribery related to sales that earned little or no

profit because this would negatively impact their bonuses. *Id.* at 18.

The same is true for defense experts Radus, Sanderson and Simkins. Defendants followed the same format with their disclosures and provided their opinions, the bases of those opinions, and the experts' qualifications as required by Rule 16. The government has the requisite information to test the testimony of these experts through focused examination and there surely will be no surprise to the government as a result of the disclosures concerning the testimony of experts Radus, Sanderson and Simkins.

As to defendant Cosgrove's disclosures relating to Dr. Smollin, the defense specifically identified the bases of his testimony by providing an electronic copy of his pertinent medical records from which Dr. Smollin intends to opine. *See* Paul Cosgrove's disclosure of Dr. Smollin attached to the Weinbaum Dec., Exh. D. The defense also supplemented this disclosure with records the defense subsequently identified. Dr. Smollin will address the specific time periods the government may present at trial, which at this time are not fully known to defendant Cosgrove. For example, if a witness indicates that he had a conversation with defendant Cosgrove on a certain date, then Dr. Smollin's testimony may be helpful to explain what medical issues and medications are indicated by defendant Cosgrove's medical records on that date, which information is available in the records produced to the government.

In sum, Defendants' disclosures do more than provide a "mere placeholder" and are not bereft of any of the methodologies, bases or reasons for the opinions as the government suggests. For these reasons, *United States v. Barile*, 286 F.3d 749, (4th Cir. 2002), in which the defendant's expert was excluded for failing to specifically identify the expert's opinion and failing to identify the bases and reasons for it, is inapposite. The government's other cited cases are equally inapplicable. *See, e.g., United States v. Reliant Energy Services, Inc.*, 2007 WL 640839, *1-2 (N.D. Cal. 2007) (requiring supplementation of disclosures where disclosures were only vague summaries and did not specify the bases or reasons for the opinions); *United States v. Wilson*, 493 F. Supp. 2d 484, 487 (E.D.N.Y. 2006) (precluding expert because disclosure made no attempt at all to

describe the bases and reasons for the expert's opinions); *United States v. Cross*, 113 F. Supp. 2d 1282, 1286 (S.D. Ind. 2000) (precluding expert where disclosure wholly failed to describe the bases and reasons for the expert's opinions and offered only a hint of the anticipated testimony); *United States v. Mahaffy*, 2007 WL 1213738, *3 (E.D.N.Y. 2007) (precluding expert because the disclosure statement did not describe any opinions that would be offered by the witness). Unlike the government's cited cases, Defendants disclosed each of their experts' opinions, the specific documents upon which the opinions are based, and the experts' qualifications. There is no deficiency warranting exclusion. Moreover, any deficiency can be remedied with supplemental disclosures, if warranted, well before the witness' testimony so that there will be no prejudice to the government.

C. The Testimony Of Defense Experts Koehler, Mowrey, Sanderson, Simkins, Smollin And Radus, Is Relevant To Material Issues In The Case, Is Not Unfairly Prejudicial, And Is The Proper Subject Of Expert Testimony

The government does not contest that defense experts Koehler, Mowrey, Radus, Sanderson, Simkins and Smollin possess the qualifications to testify under Rule 702. Nor does it challenge the reliability of their testimony. Rather, the government claims that the testimony of the non-instrumentality experts is not relevant to issues in the case and is unfairly prejudicial, or that the testimony is not the proper subject of expert opinion and therefore subject to exclusion under Rules 402, 403, 702 and *Daubert*. Motion at 16, 18-19, 21, 23. As to each of these contentions the government is mistaken.

As explained more fully below, the testimony of defense experts Koehler, Mowrey, Radus, Sanderson, Simkins and Smollin is relevant and admissible as the proposed testimony will directly address evidence relating to elements of the charges against Defendants and therefore has the tendency to make certain facts at issue in this case more or less probable than they would be without the non-instrumentality experts' testimony. *See* Fed. R. Evid. 401 (providing that evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action); Fed. R. Evid. 402 (providing that relevant evidence is admissible). Such evidence is admissible even if prejudicial to the opponent's

case so long as it is not unfairly prejudicial. *See United States v. Cruz-Garcia*, 344 F.3d 951, 956 (9th Cir. 2003) (where Ninth Circuit concluded that district court had abused its discretion by excluding evidence of a prosecution witness's prior crimes, applying a Rule 403 analysis and reasoning that while the evidence "might have harmed the government's case, it would not have harmed it *unfairly*. Parties always introduce evidence that will do damage to the other side's case; that's the very point of a trial. That evidence may decimate an opponent's case is no ground for its exclusion under 403. The rule excludes only evidence where the prejudice is 'unfair' – that is, based on something *other* than its persuasive weight") (emphasis in original); *United States v. Hankey*, 203 F.3d 1160, 1172 (9th Cir. 2000) (district court did not abuse its discretion in ruling that the probative value of police gang expert's testimony was not substantially outweighed by unfair prejudicial impact, citing *United States v. Mills*, 704 F.2d 1553, 1559 (11th Cir. 1983) for the proposition that "[r]elevant evidence is inherently prejudicial; but it is only unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant matter under Rule 403. Unless trials are to be conducted as scenarios, or unreal facts tailored and sanitized for the occasion, the application of Rule 403 must be cautious and sparing. Its major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect").

Moreover, Ninth Circuit case law recognizes the importance of expert testimony when an issue appears to be within the parameters of a layperson's common sense, but in actuality, is beyond their knowledge. *United States v. Finley*, 301 F.3d 1000, 1013 (9th Cir. 2002). In *Finley*, the Ninth Circuit noted the proper Rule 702 inquiry to be "whether the untrained layman would be qualified to determine intelligently and to the best degree, the particular issue without enlightenment from those having a specialized understanding of the subject matter involved." 301 F.3d at 1013 (citation omitted).

In this case, the average layperson is not qualified to assess the subject matter about which the non-instrumentality experts intend to testify without the assistance of the experts' specialized understanding. Because the subject matter of the non-instrumentality

experts' testimony is beyond the parameters of a layperson's common sense, it is the proper subject of expert testimony and is therefore admissible under Rule 702.

1. Michael Koehler

The government argues that Professor Koehler's testimony is irrelevant because his views about the DOJ's FCPA enforcement program to show that Defendants were unfairly prosecuted have "no logical bearing on whether the government has met its burden in this case and venture far afield from assisting the jury to determine a fact in issue." Motion at 16. According to the government, "Defendants are not permitted to criticize the Justice Department's FCPA enforcement program in the hopes that the jury will nullify the verdict." *Id.* The government is wrong on the first point and mischaracterizes the nature of Professor Koehler's testimony on the second.[3]

Professor Koehler's testimony will address two areas: (1) the absence of public guidance issued by DOJ concerning the FCPA; and (2) the history and evolution of DOJ's enforcement approach to the FCPA, including (a) how DOJ has only in the relatively recent past begun seriously enforcing the FCPA; (b) how, in order to ramp up its FCPA enforcement with very limited resources, DOJ has chosen to rely on corporations self-reporting FCPA violations (effectively outsourcing its investigations); and (c) how this enforcement approach has created unfair incentives for corporations to lay blame at the feet of purported rogue employees, with the support of DOJ. Professor Koehler will offer opinions about these practices, their propensity to lead to gaps in investigations and their import in evaluating the quality and fairness of the investigation which led to this case.

The first area of testimony by Professor Koehler is directly relevant to mens rea issues in this case. In *United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997), the Ninth Circuit considered the conviction of a bookkeeper of two misdemeanor counts of willfully

[3] As Professor Koehler's CV makes clear, his scholarly writings and related commentary have addressed far more about the FCPA than just the DOJ's enforcement approaches. Last year, former Attorney General of the United States Michael B Mukasey quoted one of Professor Koehler's law review articles about the FCPA in testimony before the House Judiciary Committee. *See* http://judiciary.house.gov/hearings/pdf/Mukasey06142011.pdf

making false entries in a union ledger in violation of federal law. At trial, the district court excluded defendant's expert accountant from testifying about defendant's lack of knowledge and understanding of bookkeeping principles, to buttress her defense that she lacked the intention to make false entries and had acted out of ignorance of proper procedures. In an en banc decision, the Ninth Circuit held that the expert accounting testimony should have been admitted to assist the jury in assessing whether defendant had willfully made false entries. The Court concluded that Fed. R. Evid. 704(b), which forbids an expert witness from stating an opinion or inference as to whether a criminal defendant has the mental state required for the crime charged, did not apply because the jury might infer defendant had not acted willfully, but the inference was not required. *Id.* at 1037. The Court rejected an approach that would "exclude an expert's opinion on any matter from which the fact finder might infer a defendant's mental state." *Id.*

The reasoning of *Morales* applies here. The absence of public education about the FCPA and its strictures, in conjunction with evidence Defendants will introduce about the failure of CCI to train its employees about the FCPA's proscriptions (*see* document bates-numbered CCI_2956, 2960, Weinbaum Dec., Exh. E) is relevant both as to whether either Defendant : (1) had the requisite corrupt intent; or (2) knew a payment or gift at issue was to "a person the defendant knew or believed was a foreign official ...." *See* Order on Select Jury Instructions, Doc. No. 549. Evidence about the availability of information about FCPA principles and their complexities certainly bear on these state of mind issues. As to knowledge of foreign official status, this is clearly so. It is unimaginable that the Court would preclude evidence about the absence of FCPA training at CCI; indeed the government certainly knows this is part of the defense in this case. Professor Koehler's testimony about the absence of FCPA guidance by DOJ is cut from the same cloth.[4]

[4] Defendants have discussed Congress' directive to the DOJ to issue guidelines to assist the public in complying with the FCPA. *See* Defendants' Motion to Dismiss the Indictment, Doc. No. 574, at 10-11; *see also Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1029-30 (6th Cir. 1990) (Discussion of Congress' preference "for compliance in lieu of prosecution" in amending FCPA in 1988).

The second area of Professor Koehler's testimony about how the DOJ has utilized the work product of company counsel in the DOJ's overall FCPA enforcement approach, the consequences of that choice generally, and the application and significance of those consequences to this case, is relevant to the reliability and thoroughness of DOJ's investigation of Defendants. The government's objection to this evidence makes clear that it does not want to have to address Defendants' theme that the government over-relied on CCI's internal investigation. The government no doubt will attempt to paint a picture of its responsible reliance on CCI's assistance and the government's own objectivity and fairness. So be it. But Defendants are entitled to pursue, and pursue aggressively, that this is not the only interpretation the evidence supports.

United States v. Sager, 227 F.3d 1138 (9th Cir. 2000), is particularly instructive. The defendant was charged with theft and possession of stolen mail. At trial, the district court intervened during defense cross-examination of the postal inspector to prevent testimony about various aspects of his investigation, including whether he had checked various stores' surveillance tapes, spoken to various individuals or looked into the defendant's explanation for why he had frequented the area near where the alleged thefts had occurred. *Id.* at 1143. The court then told the jury that "you are not here to grade the investigation...[guilt or innocence] doesn't depend on how well you think this agent conducted his investigation. What's important is what's before you by way of evidence." *Id.* The Ninth Circuit found this instruction plain error, and exacerbated by the lower court making clear to the jury as well that it should not consider possible defects in the investigation. *Id.* at 1145. As the Court further observed: "To tell the jury that it may assess the product of an investigation, but that it may not analyze the quality of the investigation that produced the product, illogically removes from the jury potentially relevant information." *Id.*

Here, with the integrity of the government's investigation clearly in play, and given the complexities of the underlying statutes, the transactions at issue and the investigative process itself, Defendants should be given latitude to introduce expert evidence relevant to

the quality of the investigation and the reasons why the DOJ orchestrated the investigative process as it did.

2. Scott Mowrey

The government is expected to introduce Defendants' bonus potential as motive for the alleged offenses. Mowrey will testify that (1) several of the sales with which the alleged acts of bribery were associated resulted in little or no profit for CCI and (2) because Defendants' bonuses were based on net profit rather than mere bookings, these sales did not enhance their earnings. This evidence is directly relevant to whether the Defendants' had a motive to approve the payments. For example, if defendant Edmonds approved a commission payment for a sale that resulted in little or no profit, and his bonus was based on profit, this evidence would weigh against a finding that he was motivated to approve an improper payment for personal financial gain.

3. Jihong Sanderson

Professor Sanderson is an expert in Chinese business culture and practice and is the author of "*Doing Business in China*." This book was disclosed to the government with Defendants' expert disclosures and directly contradicts the government's suggestion that Professor Sanderson will testify that bribery is the way business is done in China. The government seeks to exclude Professor Sanderson, arguing that her "proposed testimony would suggest to the jury the improper inference that because bribery is widespread in China, defendants were simply going along with local custom." Motion at 20. The government made this argument in its motions *in limine*. *See* Doc. No. 717 at 4-6. In Defendants' Opposition to the Government's Motions *In Limine*, Defendants made clear that "Defendants do not intend to introduce custom or practice evidence to establish that bribery is widespread in some country, and then argue that bribery in that country therefore cannot be deemed illegal." *See* Doc. No. 737 at 5.

Rather, Defendants made clear that Professor Sanderson will testify about Chinese business practices, including the role of third-parties, including consultants and trading companies, to assist in commercial transactions. She will testify about China's customary

practice of using, and practical need for, third-party agents in any business transaction to assist in introduction, training, education or other services; the role of design institutes; the role of import export trading companies; and the confusion present by Chinese language in business situations because Chinese words often have multiple meanings. *See* Doc. No. 737 at 5-6. Further, Defendants already cited the applicable law supporting why Professor Sanderson's proposed testimony is relevant and admissible and Defendants accordingly incorporate that legal authority herein. *Id.* at 4-7. The government does not challenge the Defendants' explanation of Professor Sanderson's proposed testimony in its current motion to exclude her as an expert. Instead, the government makes the same argument as it raised in its motions *in limine*. The government has accordingly conceded that Professor Sanderson's proposed testimony is admissible.

The government appears now to only challenge Professor Sanderson's proposed testimony "about the importance of gift giving and entertainment to business development and the prevalence of unique financial arrangements in China." Motion at 20. Again, this testimony is not offered to show that bribery is widespread custom in China and therefore cannot be illegal. As addressed in Defendants' Opposition to the Government's Motions *In Limine*, Defendants should be permitted to introduce all evidence relevant to the issue of whether they had the requisite *scienter* to violate the FCPA. *See United States v. Kozeny*, 582 F. Supp. 2d 535, 540 (S.D.N.Y. 2008) (court recognized defendant should not be precluded "from arguing that he cannot be guilty of violating the FCPA by making a payment to an official who extorted the payment because he lacked the requisite corrupt intent to make a bribe."). Defendants should not be precluded from introducing evidence of gift giving and entertainment in China, which directly relates to their state of mind and whether they had the requisite *scienter* to violate the FCPA. *See* Doc. No. 737 at 7.

4. Christopher Simkins

Simkins will, as his disclosure states, testify about the informal and formal methods available to the government to obtain foreign evidence relevant to criminal cases. Simkins will opine that those methods are far more efficacious than the only formal, and

essentially futile, discovery method—the letters rogatory process—available to criminal defendants. In addition to a summary along these lines, the disclosure materials for Simkins include references to the pertinent sources regarding how the government obtains foreign evidence (*see* "List of Materials Relied Upon by Christopher P. Simkins").[5]

The government advances two arguments to preclude Mr. Simkins' testimony. First, the government argues that because certain due process arguments have not been accepted by the courts, Simkins' evidence is irrelevant. Motion at 22. Second, the government argues that "[a]ny expert testimony opining that the process for obtaining overseas evidence is easier for the government than for defendants will not assist the jury in determining a fact in issue." *Id.* Both arguments show that the government comprehends what the substance and tenor of Simkins' testimony will be. That said, neither provides a legitimate basis to exclude Simkins as an expert witness in this case.

As to the former argument, the issue at trial is not that the government was obligated to obtain foreign evidence, but that the government chose not to so. As in the *Sager* case discussed above, defendants seek to put before the jury relevant evidence about the quality of the government's investigation and the investigative steps the government could have taken, but chose not to, that may well have shed considerable relevant light on the transactions. Unlike in *Sager*, expert testimony is needed here to explain what those available investigative steps were. It is utterly relevant to the jury's assessment of the government's theories and evidence that it did not utilize an available, effective tool to obtain additional relevant information about the transactions at issue.

As to the latter argument, the jury should not be led to believe that they have heard and seen all the information relevant to the transactions at issue. Defendants could not disagree more with the government's assertion that Simkins' testimony "is not relevant to whether the government has met its burden." The government wants the jury to weigh only the minimal evidence it has chosen to run with in deciding whether the defendants

[5] Inadvertently, the Treaty on Mutual Legal Assistance between the United States and South Korea was not listed.

violated the law. With additional relevant facts, the jury's weighing might be different.

The other side of the coin also is true and supports the inclusion of Simkins' testimony. The jury should not be left to wonder why Defendants do not have more information available to address the government's accusations and version of relevant transactions. If the defense is to be permitted to attack the quality, reliability, and fairness of the investigation -- as is their constitutional right—then surely they must be permitted to introduce Simkins' testimony so the jury understands one of the key reasons why Defendants have not augmented the limited information the government will present.

Finally, the government's allusion to Mr. Simkins being a jury nullification witness is makeweight. His testimony may very well cause the jury to view the government's investigation and evidence with a more critical eye. No doubt the government would prefer the jury not do so. But that risk is a result of how the government conducted its investigation, and the nature and quality of its evidence, not of potential jury nullification.

5. Craig Smollin

The government argues that the testimony of Dr. Smollin should be excluded because "any opinions concerning Cosgrove's cognitive abilities are irrelevant and highly prejudicial." Motion at 23. Dr. Smollin will not testify that defendant Cosgrove was impaired during particular periods in time nor does his expert disclosure attempt to lay the foundation for a diminished capacity defense. Instead, as reflected in Defendants' disclosures, Dr. Smollin will summarize and explain certain health conditions reflected in defendant Cosgrove's medical records and their common signs and symptoms, along with his prescribed medications and common side effects. Such testimony is relevant to the jury's determination of defendant Cosgrove's knowledge and intent.

Because relevant evidence is any evidence that tends to make a fact in issue more or less probable, and a main issue in the case is whether defendant Cosgrove knowingly and corruptly approved improper payments, Dr. Smollin's testimony is relevant. He is a medical doctor and, as such, his testimony will be helpful to the jury's understanding of defendant Cosgrove's medical issues during the Indictment period. Dr. Smollin's

testimony is the proper subject of expert testimony because his specialized knowledge will assist the jury in understanding defendant Cosgrove's medical conditions and medications, which are beyond the understanding of an ordinary layperson. *See Finley*, 301 F.3d at 1013 (recognizing the "importance of expert testimony when an issue appears to be within the parameters of a layperson's common sense, but in actuality, is beyond their knowledge"). The jury can weigh whether and to what extent this evidence affects the jury's findings with regards to knowledge and intent. Dr. Smollin's testimony, combined with evidence that will be offered through lay witnesses and CCI records, is necessary and helpful to the jury's determination of whether Mr. Cosgrove knowingly and willfully participated in alleged acts of bribery. *See Morales*, 108 F.3d at 1037 (it is proper for the jury to hear expert testimony on evidence it could use in determining whether defendant had the requisite mental state necessary to commit the offense).

At trial, the defense will offer evidence suggesting that defendant Cosgrove was coping with matters related to significant health issues and absent from the office and/or on medications during periods the government may allege he was involved in approving unlawful payments. For example, several of the transactions the government may present at trial relate to conduct in 2003 and 2004 when defendant Cosgrove was on medication for back pain. He also underwent back surgery in June 2003 and April 2004. In addition, defendant Cosgrove suffered from coronary artery disease and was hospitalized in April 2003 for a bleeding gastric ulcer. Thus, to the extent the government offers evidence that defendant Cosgrove engaged in communications surrounding an improper payment on a date where he was on medication, hospitalized or undergoing surgery, these facts should be considered by the jury in determining whether defendant Cosgrove had the requisite knowledge and intent required under the laws he is charged with violating.

6. S. Robert Radus

The government seeks to exclude Mr. Radus, an expert in forensic computer investigation and analysis. As everyone knows, this case turns to a significant extent on emails, a handful or fewer per transaction at issue. The government has argued in the

motion in limine context that there are multiple ways to authenticate emails. *See* Government's Opposition to Defendants' Motion *In Limine*, Doc. No. 738, at 12-13. Accepting that for argument's sake, Defendants do not have any idea how the government plans to authenticate any particular email. Similarly, the government's assertion that "testimony regarding e-mail recovery and/or information contained on email servers in this case is best provided by individuals who were directly involved in such efforts" (Motion at 19) ignores that Defendants have no information about who those people are. In the case of defendants or co-defendants' hard drives it may be necessary for a witness to testify regarding their contents in the event that the parties cannot stipulate to this.

To address what Defendants would view as a deficiency in the government's authentication of an email at trial, Defendants believe it is essential that they be able to call as a witness someone with relevant expertise who can explain to the jury why the government's showing is deficient. Radus would be such a witness. As has been recognized "[i]t is necessary…that the authenticating witness provide factual specificity about the process by which the electronically stored information is created, acquired, maintained, and preserved without alteration or change, or the process by which it is produced if the result of a system or process that does so...." *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534, 545 (D.Md. 2007). It is unfair to say that because Defendants cannot know at this point what deficiency would identify and testify about, his testimony could not be relevant or that Defendants have not adequately disclosed the subject matter of his potential testimony.

If the government believes it has adequately authenticated an email and Radus provides contrary testimony, the government should be in a position to test the merits of his testimony through focused cross-examination. Defendants should be permitted to designate Mr. Radus as they have, and call him as a witness if Defendants believe the government's evidence raises issues about which Mr. Radus' testimony would assist the jury to understand the evidence. The Court will be in a far better position to assess whether Mr. Radus should be allowed to testify in that context, rather than now.

D. Defendants Should Be Permitted To Supplement Their Disclosures To The Extent The Court Finds Them Deficient Because Any Deficiency Was Not Willful And Defendants' Experts Are Essential To The Defense

To the extent that the Court determines that Defendants' expert disclosures are insufficient in their current state, Defendants request the opportunity to supplement their disclosures to cure any deficiencies. *See* Fed. R. Crim. P 16(d)(2) (allowing the district court to "order [a violating party] to permit the discovery or inspection," grant a continuance, prohibit that party from introducing the undisclosed evidence, or enter such other order that it deems "just under the circumstances"); *see also United States v. Birks*, CRIM. 07-153 (JBS), 2009 WL 1702030, at *2 (D.N.J. June 16, 2009) (where the court concluded that the government's Rule 16 letter describing an expert's expected testimony did not "sufficiently summarize [the expert's] expected opinions, and the bases and reasons for those opinions," the court determined that exclusion was not the appropriate remedy and instead gave the government an additional seven days from the entry of the order to supplement its letter).

Supplementation is appropriate here because the government's request for the exclusion of the proffered expert testimony is "a too harsh remedy" and, in any event, exclusion is only appropriate where "the omission was willful and motivated by a desire to obtain a tactical advantage." *See Finley*, 301 F.3d at 1018, citing *Taylor v. Illinois*, 484 U.S. 400, 415 (1988) and *United States v. Peters*, 937 F.2d 1422, 1426 (9th Cir. 1991) (district court erred in excluding testimony of forensic pathologist because no willful or blatant discovery violation occurred); *see also United States v. Fuentes*, 203 F. App'x 804, 807-08 (9th Cir. 2006) (because the district court abused its discretion by precluding testimony of defendant's expert witnesses, the Ninth Circuit reversed the defendant's conviction and remanded for a new trial, noting that the alleged discovery violation "was not shown to be willful and motivated by a desire to obtain a tactical advantage," the testimony of the expert witnesses was of "substantial importance," and its absence "severely hampered" the defendant's efforts to present his defense). Even assuming that an alleged omission occurred, it was not done willfully so that Defendants could gain a

tactical advantage. There is no set format dictated by Rule 16, and Defendants believed in good faith that their disclosures, including the documents on which the experts have relied, satisfy Rule 16's requirements. Accordingly, supplementation rather than exclusion is the appropriate remedy.

Moreover, the Court should permit such supplementation since it would be error to exclude testimony that is "essential to the defense." *See Finley*, 301 F.3d at 1018 (where the Ninth Circuit reversed and remanded the case after determining that the prejudice resulting from the district court's exclusion of expert testimony was not harmless error and concluding that the testimony was "essential to the defense"). Here, each of the defense experts is essential to the defense because their expected testimony will directly address evidence relating to elements of the charges against Defendants. For example, the instrumentality experts will testify concerning the facts relevant to the instrumentality factors relating to the state-owned entities in the Indictment. This testimony is essential to the defense as it bears directly on elements of the charges and will present evidence from which the jury can infer that the entities are not in fact instrumentalities or that Defendants could not have known or believed that they were dealing with foreign officials.

Defendants' financial expert, Scott Mowrey, is equally essential as he will explain that several projects associated with the alleged corrupt payments at issue made no profit, thereby refuting that Defendants were motivated to pay bribes. Defendants' Chinese business practices expert, Jihong Sanderson, is essential to the defense as his testimony will explain to the jury that gifts and entertainment are customary and essential business practice in China, thereby refuting Defendants' alleged corrupt intent with respect to the authorization and provision of gifts or entertainment by CCI to its customers in China. So too, defendant Cosgrove's medical expert, Craig Smollin, is essential to his defense because Mr. Smollin will explain to the jury in layman's terms the severity of the health issues and treatment defendant Cosgrove underwent during various time periods covered by the Indictment, which will provide context for the jury regarding the circumstances under which defendant Cosgrove was carrying out his duties at CCI, from which the jury

can infer a lack of corrupt intent or knowledge for the crimes charged against him.

Furthermore, as noted by the Ninth Circuit in *Finley*, "[b]ecause the Supreme Court has recognized that few rights are more fundamental than that of an accused to present witnesses in his own defense, courts should use particular caution in applying the drastic remedy of excluding a witness altogether." 301 F.3d at 1018, citing *Taylor*, 484 U.S. at 408 (internal quotations omitted). Defendants' fundamental rights to present their defense would be protected if this Court would permit supplementation of the expert disclosures to the extent they are found wanting. This course of action is especially appropriate here since the government will suffer no prejudice if they receive supplemental disclosures two weeks before trial starts and likely a month or more before Defendants begin their case-in-chief and present the subject expert testimony. *See, e.g., Finley*, 301 F.3d at 1018 ("The severe sanction of total exclusion of the testimony was disproportionate to the alleged harm suffered by the government"); *see also United States v. Brock*, 3:06-CR-73, 2007 WL 1041309, at *3 (E.D. Tenn. Apr. 2, 2007) (in denying defendant's motion to exclude expert testimony, the court noted that the defendant failed to state how she had been prejudiced by the government's expert disclosure, either from inadequacy of the information disclosed or from receiving the disclosure two weeks before trial, concluded that the "matter can best be resolved by the government supplementing its expert disclosures in a timely fashion," and observed that it "does not believe that the defendant will be sufficiently prejudiced to the extent that the expert should be disqualified, if the above actions are promptly taken"). For these reasons, the Court should permit Defendants to supplement their expert disclosures if it finds them to be deficient.

III. CONCLUSION

Based on the foregoing, Defendants respectfully request that the Court deny the government's Motion to Exclude Defendants' Expert Witnesses. Alternatively, if the Court finds Defendants' disclosures to be inadequate, Defendants respectfully request that they be permitted to supplement their expert disclosures within 7 days of the hearing on

the government's Motion to cure any deficiencies.

Dated: May 21, 2012

BIENERT, MILLER & KATZMAN, PLC

By: */s/ Teresa Céspedes Alarcón/s/*
Teresa Céspedes Alarcón
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PAUL COSGROVE

Dated: May 21, 2012

LAW OFFICES OF DAVID W. WIECHERT

By: */s/ David W. Wiechert /s/*
David W. Wiechert
Attorneys for Defendant
DAVID EDMONDS

CERTIFICATE OF SERVICE

I, Danielle Dragotta, declare,

That I am a citizen of the United States and am a resident or employed in Orange County, California; that my business address is 115Avenida Miramar, San Clemente, California 92672; that I am over the age of 18 and not a party to the above-entitled action.

That I am employed by a member of the United States District Court for the Central District of California and at whose direction I caused service of: DEFENDANTS' OPPOSITION TO GOVERNMENT'S MOTION TO EXCLUDE DEFENDANTS' EXPERT WITNESSES on the interested parties as follows:

X BY ELECTRONIC MAIL: by electronically filing the foregoing with the Clerk of the District Court using its ECF System pursuant to the Electronic Case Filing provision of the United States District Court General Order and the E-Government Act of 2002, which electronically notifies said parties in this case:

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This certificate was executed on May 21, 2012, at San Clemente, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Danielle Dragotta /s/
Danielle Dragotta