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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. STUART CARSON et al., Defendants.	NO. SA CR 09-00077-JVS REPLY MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE DEFENDANTS' EXPERT WITNESSES Date: June 11, 2012 Time: 3:30 P.M. Courtroom: 10C (Hon. James V. Selna) Trial: June 26, 2012

Plaintiff United States of America, by and through its attorneys of record, the United States Department of Justice, Criminal Division, Fraud Section, and the United States Attorney for the Central District of California (collectively, "the

government"), hereby files its Reply Memorandum in Support of its Motions to Exclude Defendants' Expert Witnesses (Dkt. #746). This Reply 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 any hearing on this matter.

DATED: May 29, 2012

Respectfully submitted,

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I.

INTRODUCTION

In their Opposition, defendants assert that their minimal disclosures are sufficient under Rule 16 and that the testimony of their non-instrumentality experts is relevant and not unfairly prejudicial. They are mistaken on both counts. Defendants have failed to provide the government with more than a cursory sketch of the opinions they intend to elicit at trial, failed to sufficiently disclose the bases and reasons for these "opinions," and, with respect to the non-instrumentality experts, failed to propose relevant, probative testimony. As a result, the government respectfully requests that the Court exclude defendants' expert witnesses or, in the alternative, compel the defendants immediately to provide proper expert disclosures for any expert whose testimony will be admissible at trial.

II.

ARGUMENT

A. Defendants' Disclosures Fail To Comply With Rule 16 And Thus Their Proposed Expert Testimony Should Be Excluded

Defendants argue that their "disclosures provide sufficient information to test the merit of their experts' testimony through focused cross-examination" and that "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' Opposition ("Defts' Opposition") at 1.

Nowhere in its motion does the government suggest that

defendants should have provided a line-by-line description akin to a written deposition. Rather, the government stated that defendants' cursory disclosures were insufficient to permit the government to adequately prepare for focused cross-examination at trial and fail to set forth with the requisite specificity the bases and reasons for the experts' opinion and testimony.

For example, the defendants assert that their disclosure indicating that Mr. El-Hage "has concluded that the evidence weighs in favor of the position that KHNP was not an instrumentality of the South Korean government in and around 2004" is sufficient in light of the fact that the defendants identified the documents on which his opinion is based and that the government is familiar with the instrumentality factors and related issues. Defts' Opposition at 5.

This argument strains credulity. Defendants provided a list of internet links which total thousands of pages and indicated that these were the documents upon which Mr. El-Hage relied. No effort was made by the defendants to list any factor that led Mr. El-Hage to reach his one-sentence conclusion. Instead of setting forth the factual considerations that led Mr. El-Hage to his conclusion, the defendants would have the government review thousands of pages in an attempt to speculate as to the facts Mr. El-Hage relied upon. Such tactics do not meet the requirements or the spirit of Rule 16.

While the defendants need not provide the same level of detail provided by the government in its disclosures or provide a line-by-line recitation of its evidence, there is a large middle ground of acceptable disclosures which defendants fail to meet or

even acknowledge. An expert disclosure that "offers only a hint of [the] anticipated testimony" does not satisfy Rule 16. United States v. Cross, 113 F. Supp. 2d 1282, 1286 (S.D. Ind. 2000).

Defendants argue that the court's holding in United States v. Caputo, 382 F. Supp. 2d 1045, 1049 (N.D. Ill. 2005), provides support for the position that their minimal disclosures are sufficient. In fact, the holding provides quite the opposite. Even though the disclosures in Caputo were more detailed than those provided by the defendants in this case, the Court required the Caputo defendants to disclose additional reasons underlying the proffered opinions and made clear that the expert would not be able to testify about any undisclosed reasons that supported his opinion. Id. at 1050.

For example, the Caputo defendants disclosed that expert Ronald Johnson "will testify that it is his opinion that the deficiency letters sent to Defendants from the FDA's Office of Device Evaluation were not a final determination that a 510(k) premarket notification was required." Id. Defendants disclosed the reason for his opinion: "the Office of Compliance, not ODE, has authority to determine whether an enforcement action should be taken against a manufacturer marketing a modified device which the ODE believes requires a new 510(k) premarket notification." Id. The Court concluded that "[g]iven the complexity of this FDA regulatory regime, Defendants must, however, disclose any additional reasons, if there are any, underlying this opinion so that the Government can prepare for cross-examination. Johnson will not be able to testify about any undisclosed reasons that support this opinion." Id.

Similarly, the court's holding in United States v. Mehta, 236 F. Supp. 2d 150 (D. Mass. 2002) does not provide support for the defendants' argument. In Mehta, the defendant's original disclosures for his expert tax witness contained a general statement of methodology and indicated that the expert would testify concerning the accountant's "conduct and whether it was in compliance with 'generally accepted accounting practices.'" Id. at 154. When the government objected to the adequacy of the disclosure, the defendant supplemented his disclosure by outlining at least five specific topics and the basis for the testimony as well as stating that the expert would testify that the accountant's "conduct was not in compliance with generally accepted accounting practices, including his failure generally to follow the requisite 'due care' in preparing Mr. Mehta's tax returns." Id. The Magistrate Judge found that the disclosures were "woefully inadequate" and the defendant filed a Motion for Reconsideration with the District Court. Id.

In finding that the subsequent disclosures were adequate, the District Court relied heavily on the fact that Mehta's prior counsel had sent letters to the government providing a detailed description of the accountant's alleged misconduct and thus the government would not be taken by surprise. Id. at 157. "Mehta's disclosure, when viewed in relation to the information set forth in the previous letters, provides the government with a fair opportunity to test the merit of the expert's testimony through focused cross-examination." Id.

Defendants' disclosures provide even less information than Mehta's original disclosures and far less than the disclosures

after Mehta supplemented them. Further, the government does not have a detailed description of the expert's testimony as was provided in letter form by Mehta's prior counsel. Thus, Mehta provides no support for defendants' position.

Because defendants' disclosures do not come close to meeting the requirements of Rule 16, their proposed expert testimony should be excluded. See United States v. Barile, 286 F.3d 749, 758-59 (4th Cir. 2002); United States v. Mahaffy, 2007 WL 1213738, at *2 (E.D.N.Y. 2007).

B. The Testimony Of Defendants' Non-Instrumentality Experts Is Irrelevant, Unhelpful, And Unfairly Prejudicial And Thus Should Be Excluded

1. Michael Koehler

Citing to United States v. Morales, 108 F.3d 1031 (9th Cir. 1997), defendants argue that Professor Koehler should be allowed to testify about the absence of public guidance issued by the Justice Department concerning the FCPA. Morales provides no support for this proposition. In Morales, the appeals court found that it was error for the trial court to exclude an accounting expert who would testify regarding the defendant's level of knowledge and understanding of bookkeeping principles. Id. at 1034. The accounting expert had interviewed the defendant regarding her bookkeeping methods and had reviewed the records the defendant maintained. Id. at 1039.

Defendants attempt to extend this holding to the context of absence of public guidance under the theory that both are relevant to mens rea issues. Absent some showing that defendants were somehow misled by such lack of guidance, any such testimony would be irrelevant. See, e.g., United States v. De Cruz, 82

F.3d 856, 867 (9th Cir. 1996) (mistake or ignorance of law is not a valid defense).

Defendants then argue that they should be permitted to present 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." Defts' Opposition at 14. Defendants cite to United States v. Sager, 227 F.3d 1138 (9th Cir. 2000) in support of their position. Sager, however, involved the testimony of the investigating agent, not an expert witness. There is nothing in Sager that addresses whether an expert should be permitted to testify about the broad topic areas proposed by the defendants with respect to Professor Koehler. Sager, in fact, provides support for the notion that examination of fact witnesses is the proper means to raise specific issues regarding flaws in the government's investigation that may raise doubt about the defendant's guilt.

Courts have held that expert testimony is not proper where the same evidence can be gathered from fact witnesses. In United States v. Olender, 338 F.3d 629 (6th Cir. 2003), the defense attempted to introduce the expert testimony of a criminologist who had reviewed the investigation and was prepared to comment adversely on the conduct of the investigation. The trial court stated: "I don't think we need an expert to say we took these interviews and that's what the investigation would have shown because those witnesses can be called and are the best evidence of that in fact. And so, I don't think an expert opinion is

needed in that regard." Id. at 638. The trial court further indicated that "I don't think that there is anything that the expert's going to show that is of a fact nature or of an expertise that is not able to be shown by a lay witness or by cross examination of police witnesses. . . . [T]he expert testimony will not assist the trier of fact in pointing out the loop holes in the Government's case in this particular case." Id. The appeals court upheld the trial court's ruling excluding the witness. Id.

In order to be admissible, an "expert opinion must be supported by an adequate basis in relevant facts or data." Morford v. Wal-Mart Stores, Inc., 2011 WL 2313648, at *7 (D. Nev. Jun. 9, 011). Here, there is no basis for Professor Koehler to opine on the Justice Department's alleged over-reliance on CCI's internal investigation. He has no personal knowledge of the investigation, no insight into the decisions made by the prosecutors or agents (especially when he has never served as either), and no frame of reference to provide any such opinion. Any such opinion would be entirely speculative, devoid of any factual basis, and entirely improper in that the expert would be serving as a means to make defense counsel's arguments rather than providing proper expert testimony. See Guillery v. Domtar Indus., Inc., 95 F.3d 1320, 1331 (5th Cir. 1996) (expert testimony properly excluded where it was not based on facts in the record, but based on speculation designed to bolster one party's position); Damon v. Sun Co., 87 F.3d 1467, 1474 (1st Cir. 1996) (expert should not be permitted to give an opinion based on conjecture or speculation from an insufficient evidentiary

foundation).

The defendants have listed several FBI Special Agents and Steptoe attorneys on their witness list. To the extent they can demonstrate that an investigatory lapse is relevant to the defendants' guilt, the appropriate means to introduce such evidence is through examination of fact witnesses who have actual knowledge of any alleged over-reliance on CCI's internal investigation by the government.

2. Scott Mowrey

Defendants reveal that Mr. Mowrey will testify that several of the relevant sales resulted in little or no profit and that these sales did not enhance their earnings. Any such testimony is best tendered by a witness with actual knowledge of the bonus payment calculations at CCI. There is no need for expert testimony on this topic where it can be provided by a fact witness. See United States v. Olender, 338 F.3d at 638 (expert testimony not appropriate where it can be provided by a fact witness).

3. S. Robert Radus

Defendants argue that they should be allowed to call Mr. Radus as an expert witness to explain to the jury any deficiencies in the government's authentication of an email at trial, and that the Court will be in a far better position to assess whether Mr. Radus should be allowed to testify at trial, rather than now. Defts' Opposition at 20. It may be the case that the Court will be in a better position to make this assessment at trial, but it is hard for the government to envision a situation at trial where Mr. Radus's testimony would

be helpful to the jury.

Under Rule 901, the proponent of a document need only offer a prima facie showing that the document is what it purports to be. Once that minimal threshold is met, authenticity is a question for the jury. United States v. Workinger, 90 F.3d 1409, 1415 (9th Cir. 1996). The format of an email may be sufficient by itself to meet authenticity. See Fed. R. Evid. 901(b)(4); United States v. Safavian, 435 F. Supp. 2d 36, 40 (D.D.C. 2006), rev'd on other grounds, 528 F.3d 957 (D.C. Cir. 2008). No particularized showing that a defendant in fact received and opened an email is required once authenticity has been shown. See Advisory Committee Notes to Rule 104.

The burden of proof for the authentication of emails is "slight." See United States v. Vaghari, 2009 WL 2245097, at *8 (E.D. Pa. July 27, 2009). In light of the low burden of proof, it is difficult to envision a situation where an expert witness with no first-hand knowledge of the e-mails in question would be able to provide any helpful, relevant testimony.

4. Jihong Sanderson

The government has addressed Professor Sanderson's proposed testimony in its prior motion in limine. See Dkt. No. 717 at 4-7. To briefly reiterate, it is uncontroverted that "custom, involving criminality, cannot justify a criminal act." Smith v. United States, 188 F.2d 969, 970 (9th Cir. 1951). "Even a universal industry practice may still be fraudulent." Newton v Merrill, Lynch, Pierce, Fenner & Smith, Inc., 135 F.3d 266, 274 (3d Cir. 1998).

Defendants argue that common custom and practice may be

relevant as to scienter or state of mind and cite to United States v. Kozeny, 582 F. Supp. 2d 535, 540 (S.D.N.Y. 2008). Kozeny, however, is not applicable as it dealt with extortion. As indicated in the government's motion in limine reply brief (Dkt. # 753 at 3-4), to make evidence of custom or industry practice admissible under defendants' theories, the defendants would need to make a showing of reliance. Without such reliance, the jury will believe that such evidence is admissible for what defendants concede is an impermissible purpose: to show that "everyone does it."

5. Christopher Simkins

Defendants reveal that the purpose of Mr. Simkins expert testimony is 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 shed considerable relevant light on the transactions." Defts' Opposition at 17. Once again, defendants seek to elicit evidence through an expert when such evidence should be elicited from fact witnesses, such as one of the FBI Special Agents on defendants' witness list. See United States v. Olender, 338 F.3d at 638 (expert testimony not appropriate where the evidence can be provided by a fact witness).

The government is under no legal obligation to use any particular investigative technique in preparing its case. United States v. Cheung Kin Ping, 555 F.2d 1069, 1073-74 (2d Cir. 1977). The Second Circuit has upheld a court's instruction that "the fact that particular techniques were not used is not an issue to enter into your deliberations." United States v. Zapata, 1998 WL

681311, at *6 (2d Cir. Jan. 30, 1998); see also Morris v. Burnett, 319 F.3d 1254, 1272-73 (10th Cir. 2003) ("For an investigatory lapse to be relevant, there must be some specific reason why it raises doubt about the defendant's guilt."). As a result, the proposed testimony of Mr. Simkins is improper, irrelevant, and not the proper subject of expert testimony.[1]

III.

CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court exclude defendants' expert witnesses. In the alternative, to the extent the Court permits the defendants to cure the deficiencies with respect to any of the proposed experts who will provide admissible testimony, it should compel the defendants immediately to provide proper expert disclosures.

[1] In light of the fact that Craig Smollin's proposed testimony only relates to Cosgrove, who pleaded guilty on May 29, 2012, the government does not address Dr. Smollin's testimony.