ANDRÉ BIROTTE JR.
United States Attorney
DENNISE D. WILLETT
Assistant United States Attorney
Chief, Santa Ana Branch Office
DOUGLAS F. McCORMICK (180415)
Assistant United States Attorney
GREGORY W. STAPLES (155505)
Assistant United States Attorney
411 West Fourth Street, Suite 8000
Santa Ana, California 92701
Telephone: (714) 338-3541
Facsimile: (714) 338-3564
E-mail: doug.mccormick@usdoj.gov

KATHLEEN McGOVERN, Acting Chief
CHARLES G. LA BELLA, Deputy Chief
ANDREW GENTIN, Trial Attorney
Fraud Section
Criminal Division, U.S. Department of Justice
1400 New York Avenue, N.W.
Washington, DC 20005
Telephone: (202) 353-3551
Facsimile: (202) 514-0152
E-mail: charles.labella@usdoj.gov
andrew.gentin@usdoj.gov

Attorneys for Plaintiff
United States of America

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 GOVERNMENT'S NOTICE OF MOTION AND MOTION TO EXCLUDE DEFENDANTS' EXPERT WITNESSES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF 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 Motion to Exclude Defendants' Expert Witnesses. This Motion 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 11, 2012

Respectfully submitted,

ANDRE BIROTTE JR.
United States Attorney

DENNISE D. WILLETT
Assistant United States Attorney
Chief, Santa Ana Branch Office

DOUGLAS F. McCORMICK
Assistant United States Attorney
Deputy Chief, Santa Ana Branch Office

GREGORY W. STAPLES
Assistant United States Attorney

KATHLEEN McGOVERN, Acting Chief
CHARLES G. LA BELLA, Deputy Chief
ANDREW GENTIN, Trial Attorney
Fraud Section, Criminal Division
United States Department of Justice

/s/
DOUGLAS F. McCORMICK
Assistant United States Attorney

Attorneys for Plaintiff
United States of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES(CONTINUED)

TABLE OF AUTHORITIES(CONTINUED)

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Defendants Paul Cosgrove and David Edmonds ("defendants") have noticed ten expert witnesses, who are expected to opine on a cascade of issues including, but not limited to, the following: the instrumentality factors with respect to the state-owned entities named in the indictment; e-mail transmission, receipt, recovery and related electronic data issues; the means that the United States government and private parties may use to obtain materials from foreign third parties and disparities in the efficacy of those means; various factors relating to current Department of Justice enforcement practices in Foreign Corrupt Practices Act ("FCPA") cases; and the manner in which CCI employee bonuses were calculated.

Notwithstanding the unambiguous directive in Federal Rule of Criminal Procedure 16(b)(1)(C), defendants have failed to provide the government with more than a cursory sketch of the opinions they intend to elicit at trial, providing nothing more than a summary of "opinions" that are either vague or are not opinions at all but, rather, topics of possible opinion testimony. Defendants have also failed to sufficiently disclose the bases and reasons for these opinions, particularly those that cannot rest solely on the expert's prior experience but are the product of the expert's assimilation of different facts.

To the extent the government can speculate what the experts' opinions might be, such testimony is irrelevant, overly prejudicial, will cause undue delay, and may lead to confusing

the jury instead of assisting the jury in understanding the evidence or determining a fact in issue. The sweeping yet ambiguous nature of the proposed testimony raises the possibility that it is intended to shift the jurors' focus from the issues to be presented at trial based on admissible evidence to issues that are extraneous and unrelated to the evidence.

The deadline for providing adequate expert disclosures has passed. For the reasons that follow, 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.

II.

BACKGROUND

On April 30, 2012, in accordance with the Court's scheduling order, the parties each disclosed their expert witnesses. The government provided expert disclosures for three witnesses: (1) Derek Scissors, a Senior Research Fellow at the Heritage Foundation, who will testify about the instrumentality factors with respect to the Chinese entities involved in the FCPA allegations in the Indictment; (2) Joongi Kim, a Visiting Professor of Law at Georgetown University Law Center, who will testify about the instrumentality factors with respect to KHNP and KEPCO; and (3) Thomas Pepinsky, an Assistant Professor at Cornell University, who will testify about the instrumentality factors with respect to Petronas and Petronas Gas Berhad. See Government's Expert Disclosures, attached as Exhibit A.

Defendants provided expert disclosures for ten witnesses: (1) E. Han Kim, a Professor at the University of Michigan, who will testify about the instrumentality status of KEPCO and KHNP; (2) Jichun Shi, a Professor at the Law School of Renmin University, Beijing, China, who will testify concerning the instrumentality status of the Chinese entities involved in the FCPA allegations in the Indictment for the period 1999-2004; (3) Barry Naughton, a Professor at the University of California, San Diego, who will testify concerning the instrumentality status of the Chinese entities involved in the FCPA allegations in the Indictment for the period 1999-2004; (4) Nabil El-Hage, the Chairman of the Academy of Executive Education, who will testify about the instrumentality status of Petronas Gas Berhad and Petronas; (5) Scott Mowrey, a certified public accountant, who will testify concerning defendants' bonus calculations and the profitability of the transactions at issue; (6) Jihong Sanderson, a Professor at the Haas School of Business, University of California, Berkeley, who will testify about Chinese business practices in general; (7) S. Robert Radus, the President of ACTForensic.com, who will testify about e-mail transmission, receipt, recovery and related electronic data issues; (8) Christopher Simkins, the Co-founder of Laconia Tetra LLC, who will testify about the means that the United States government and private parties may use to obtain materials from foreign third parties and disparities in the efficacy of those means; (9) Michael Koehler, an Assistant Professor at Butler University's College of Business, who will testify about various factors related to current Department of Justice FCPA enforcement

practices and how those factors have relevance to this case; and (10) Craig Smollin, Assistant Clinical Professor, Department of Emergency Medicine, University of California, San Francisco, who will testify concerning various medical issues affecting Mr. Cosgrove during the time period of the Indictment. See Defendants' Expert Disclosures, attached as Exhibit B.

III.

ARGUMENT

A. Legal Standard

Federal Rule of Criminal Procedure 16(b)(1)(C) provides that "[t]he defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial . . . ." Rule 16(b)(1)(C) further mandates that "the summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." An expert disclosure that "offers only a hint of [the] anticipated testimony" does not satisfy Rule 16(b)(1)(C). United States v. Cross, 113 F. Supp. 2d 1282, 1286 (S.D. Ind. 2000).

Disclosing a mere "placeholder," or list of topic areas for which its experts will provide opinions, is insufficient. United States v. AU Optronics Corp., 2012 WL 541490, at *3 (N.D. Cal. 2012) (citing United States v. Duvall, 272 F.3d 825, 828 (7th Cir. 2001) ("summary of the expected testimony, not a list of topics" is necessary)); United States v. Cerna, 2010 WL 2347406, at *4 (N.D. Cal. 2010) (disclosure inadequate when it "failed to specify what opinions [the expert] will offer, much less the

evidence . . . about which she will be testifying"). Courts have recognized that greater disclosure should be required where the proposed testimony involves a more complex subject matter. AU Optronics Corp., 2012 WL 541490, at 3; United States v. Lipscomb, 539 F.3d 32, 38 (1st Cir 2008); United States v. Jackson, 51 F.3d 646, 651 (7th Cir. 1995).

The purpose of Rule 16(b)(1)(C) is to "'minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination.'" United States v. Wilson, 2006 WL 3694550, at *2 (E.D.N.Y. Dec. 13, 2006) (quoting Fed. R. Crim. P. 16 advisory committee's note, 1993 Am.); see also United States v. Rivera-Guerrero, 426 F.3d 1130, 1139 n.6 (9th Cir. 2005) (same). The rule contemplates that disclosing a "written summary" of the expert testimony will permit "more complete pretrial preparation" by the other party. United States v. Naegele, 468 F. Supp. 2d 175, 176 (D.D.C. 2007) (quoting Fed. R. Crim. P. 16 advisory comm. note, 1993 Am.). The disclosure required by the defendant to permit the government to effectively focus its cross-examination varies depending on the complexity of the proposed expert testimony. See United States v. Caputo, 382 F. Supp. 2d 1045, 1049 (N.D. Ill. 2005) (citing Jackson, 51 F.3d at 651).

A party's failure to comply with its obligations under Rule 16(b)(1)(C) stymies these objectives. Rule 16(d)(2) gives the district court the discretion to order the non-complying party to remedy the deficiencies in its expert notice or to order other

relief. See United States v. Barile, 286 F.3d 749, 758-59 (4th Cir. 2002)(district court has "discretion . . . to determine the proper remedy"). It is well settled that a court may preclude expert testimony regarding any topics or opinions not properly disclosed. Id.; United States v. Mahaffy, 2007 WL 1213738, at *2 (E.D.N.Y. 2007); United States v. Day, 433 F. Supp. 2d 54, 57 (D.D.C. 2006).

Rule 702 of the Federal Rules of Evidence provides the appropriate standard for determining the admissibility of expert testimony. United States v. Quinn, 18 F.3d 1461, 1464-65 (9th Cir. 1994) (citing Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579 (1993)). Rule 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

Expert testimony is admissible if the party offering such evidence shows that the testimony is both reliable and relevant. Fed. R. Evid. 702; Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999); Daubert, 509 U.S. at 590-91. "In determining whether expert testimony will be helpful to the jury in a particular case, the court is required to evaluate the state of knowledge presently existing about the subject of the proposed testimony in

light of its appraisal of the facts of the case." United States v. Brown, 7 F.3d 648, 651-52 (7th Cir. 1993). "Expert testimony is not admissible under Rule 702 if it will not assist the jury in understanding the evidence or determining a fact in issue or it is purely speculative." United States v. Davis, 772 F.2d 1339, 1343 (7th Cir. 1985).

Daubert and Kumho Tire assign to district courts a general "gatekeeping" obligation. This obligation applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge. Kumho Tire, 526 U.S. at 141. This is consistent with the language of Rule 702, which makes no relevant distinction between "scientific" knowledge and "technical" or "other specialized" knowledge.

Even if the proffered testimony satisfies the relevance and reliability requirements of Rule 702, it must also satisfy the balancing test of Rule 403, which provides that "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." See id. at 595; United States v. Scholl, 166 F.3d 964, 971 (9th Cir. 1999). A district court has broad discretion in assessing the relevance and reliability of expert testimony. United States v. Murillo, 255 F.3d 1169, 1177-78 (9th Cir. 2001).

In United States v. Reliant Energy Services, Inc., 2007 WL 640839 (N.D. Cal. 2007), which involved the prosecution of a

complex scheme to manipulate the California energy markets, the government moved to exclude all defendants' experts for failure to comply with Rule 16. The government argued that the defense had produced only "vague summaries . . . bereft of any of the methodologies, bases or reasons underlying these opinions." Id. at *1. The defendants argued that their disclosures met and exceeded the requirements of Rule 16 and that the rules do not require "defense reciprocal discovery." Id. The Court found that the defendants' first argument was incorrect and their second a misconstruction of the rules. Id. The court stated that "it cannot be that Rule 16 requires detailed discovery by the government of proposed expert testimony and only a vague and general disclosure by a defendant." Id.

The court provided several examples of inadequate defense disclosures to illustrate the shortcomings. One of the illustrative examples is as follows:

> It is expected that Mr. Hamal will testify regarding the structure and performance of the California wholesale markets, the physical characteristics and supply-demand conditions of the Western power markets, and the price caps and other rules in place regulating bidding leading up to and during the energy crisis. . . . It is further expected that Mr. Hamal will testify that in his opinion Reliant's bidding during the week of June 19, 2000 fell within the range of bidding patterns and practices of other market participants.

Id. at *2. The court found that this disclosure as well as similar ones were "altogether too general and vague to meet the basic disclosure requirements for opinion testimony" and ordered the defendants to make additional disclosures to meet the requirements of Rule 16. Id. at *2-*3.

B. Defendants' Disclosures With Respect To Experts El-Hage, Kim, Naughton, And Shi Fail To Comply With Rule 16 And Thus Their Testimony Should Be Excluded

Defendants' disclosures for 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. No bases and reasons for these opinions are given and, with respect to three of the Chinese entities, do not even cover the year of the payment at issue. As a result, their testimony should be excluded. See Barile, 286 F.3d at 758-59; Mahaffy, 2007 WL 1213738, at *2.

Defendants' disclosure with respect to Mr. El-Hage is as follows:

> Mr. El-Hage will testify that he has reviewed the factors set forth in the court's proposed instrumentality instruction and other issues he deems pertinent to the question of whether Petronas Gas Berhad (PGB) and its parent company Petronas were instrumentalities of the Malaysian Government in and around 2003-2004. He has analyzed facts and circumstances relevant to each entity, as well as pertinent facets and history of the Malaysian government, economy, and legal regulations. He has concluded that the evidence weighs in favor of the position that Petronas and PGB were not instrumentalities of the Malaysian Government in and around 2003-2004.
>
> In addition to those documents the government already possesses, Mr. El-Hage's opinions will be based on the documents set forth on the attached list and any other information that may become available before or during trial in this matter, including evidence brought out through witness testimony. Mr. El-Hage's analysis is continuing and we reserve the right to supplement this summary and list of documents if necessary.
>
> Mr. El-Hage's opinions are based on his education, knowledge, and experience that is set forth on the accompanying Curriculum Vitae.

///

Defendants' disclosure with respect to Professor Kim is as follows:

> Professor Kim will testify that he has reviewed the factors set forth in the Court's proposed instrumentality instruction and other issues he deems pertinent to the question of whether Korea Hydro & Nuclear Power ("KHNP") was an instrumentality of the South Korean government in and around 2004. He has analyzed facts and circumstances relevant to KHNP, as well as pertinent facets and history of the South Korean government, economy, and legal regulations. He has concluded that the evidence weights in favor of the position that KHNP was not an instrumentality of the South Korean government in and around 2004.
>
> In addition to those documents the government already possesses, Professor Kim's opinions will be based on the documents set forth on the attached list and any other information that may become available before or during trial in this matter, including evidence brought out through witness testimony. Professor Kim's analysis is continuing, and we reserve the right to supplement this summary and list of documents if necessary.
>
> Professor Kim's opinions are based on his education, knowledge, and experience that is set forth on the accompanying Curriculum Vitae.

Defendants' disclosure with respect to Professor Naughton is as follows:

> Professor Naughton will testify that he has reviewed the factors set forth in the court's proposed instrumentality instruction and other issues he deems pertinent to the question of whether the Chinese companies identified in the Indictment were instrumentalities of the Chinese Government in and around 1999-2004. He has analyzed facts and circumstances relevant to each entity, as well as pertinent facets and history of the Chinese Government, economy, and legal regulations. He has concluded that the evidence weighs in favor of the position that the Chinese companies identified in the Indictment were not instrumentalities of the Chinese Government in and around 1999-2004.
>
> In addition to those documents the government already possesses, Professor Naughton's opinions will be based on the documents set forth on the attached list and any other information that may become

available before or during trial in this matter, including evidence brought out through witness testimony. Professor Naughton's analysis is continuing and we reserve the right to supplement this summary and list of documents if necessary.

Professor Naughton's opinions are based on his education, knowledge, and experience that is set forth on the accompanying Curriculum Vitae.

The defendants' disclosure with respect to Professor Shi is as follows:

Professor Shi will testify that he has reviewed the factors set forth in the court's proposed instrumentality instruction, along with other issues he deems pertinent to the question whether the Chinese entities identified in the Indictment were instrumentalities of the Chinese government in and around 1999-2004, and has analyzed the facts and circumstances relevant to each entity, as well as pertinent facets and history of the Chinese government, economy, and legal regulations. He has concluded that the evidence weighs in favor of the position that the Chinese companies identified in the Indictment (and related companies as appropriate to the analysis) were not instrumentalities of the Chinese Government in and around 1999-2004.

Professor Shi will testify regarding Chinese laws applicable to government employees and non-government enterprise employees, including China's Labor Law, Labor Contract Law, company Law and Civil Servant Law; and the scope of Chinese criminal bribery statutes, and how those laws support his opinion that the Chinese companies identified in the Indictment (and related companies as appropriate in the analysis) were not considered instrumentalities of the Chinese Government in and around 1999-2004.

In addition to those documents the government already possesses, Professor Shi's opinions will be based on the documents set forth on the attached list and any other information that may become available before or during trial in this matter, including evidence brought out through witness testimony. Professor Shi's analysis is continuing and we reserve the right to supplement this summary and list of documents if necessary.

Professor Shi's opinions are based on his education, knowledge, and experience that is set forth on the accompanying Curriculum Vitae.

Defendants' disclosures with respect to El-Hage, Kim, Naughton, and Shi are too general and vague and do not permit the government "to test the merit of the expert's testimony through focused cross-examination." United States v. Rivera-Guerrero, 426 F.3d at 1139 n.6. Especially where the testimony will be fairly complex and involves "facets and history of the Malaysian government, economy, and legal regulations," "facets and history of the South Korean government, economy, and legal regulations," and "facets and history of the Chinese government, economy, and legal regulations," defendants' disclosure must contain the specific factual bases on which the experts are relying.

While defendants list numerous articles and publications upon which the experts' testimony will supposedly be based, they fail to list any specific factors that lead the experts to reach their conclusions. For example, in order to conduct cross-examination of Mr. El-Hage, the government 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, economy, and legal regulations upon which he will rely. As was the case in Reliant Energy Services, the disclosure is too "general and vague to meet the basic disclosure requirements for opinion testimony." 2007 WL 640839, at *2-*3.

In United States v. Barile, a false statements case, the defendant disclosed that his expert "expected to testify about the lack of materiality of alleged misrepresentations in the 510(k)s for the devices in the indictment." 286 F.3d at 758. The Fourth Circuit upheld the exclusion of the testimony on this

subject matter, holding that the disclosure was inadequate because it "lacked specificity," "failed to give a proper summary of [the expert's] opinions on materiality," and "failed to give the bases and reasons for his opinions." Id. at 758-59; see also Cross, 113 F. Supp. 2d at 1286 (disclosure inadequate where it "wholly fails to describe the bases and reasons for [the expert's] opinions, and offers only a hint of his anticipated testimony - that the video gambling devices are not illegal").

Defendants' minimal disclosures, especially where the testimony will be complex and wide-ranging, are 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, apart from bare references to the fact that they have analyzed "facts and circumstances relevant to each entity" and information regarding each country's "government, economy, and legal regulations."

In addition, the testimony of Professors Naughton and Shi will be incomplete and more prejudicial than probative because each expert's disclosure only refers to the 1999-2004 time frame. The indictment in this matter alleges a conspiracy from in or around 1998 through in or around August 2007. More specifically, the charged FCPA payments involving the Chinese entities are alleged to have occurred in 2003 (Count 9), 2004 (Counts 2, 3, and 4), and 2005 (Counts 5, 6, and 8).

Although it is impossible to know the bases of the experts' testimony given the lack of specificity in the disclosure, the government surmises that Professors Naughton and Shi will make

claims that certain factors existed in the 1999-2004 time frame (that presumably did not exist during other times in the conspiracy or with respect to the 2005 charged payments) that support their opinions. Limiting their testimony to this time frame would likely lead to juror confusion in that jurors might be led to believe that the 1999-2004 factors apply to the entire conspiracy. Given that defendants have not designated an expert who will testify concerning the instrumentality factors regarding the three Chinese entities where the charged payments are alleged to have occurred in 2005, the government surmises that it is likely defendants' intent that the jurors will improperly apply the testimony concerning 1999-2004 to the 2005 alleged corrupt payments. In addition, the government notes that the defendants make no attempt to list any specific bases for how the various Chinese laws listed support Professor Shi's opinion.

C. Defendants' Disclosures With Respect To Experts Koehler, Mowrey, Radus, Sanderson, Simkins, and Smollin Fail To Comply With Rule 16 And Are Irrelevant, Unhelpful, and Unfairly Prejudicial And Thus Their Testimony Should Be Excluded

Defendants' disclosures with respect to their non-instrumentality experts are similarly deficient under Rule 16 and thus the testimony should be excluded. See United States v. Barile, 286 F.3d at 758-59. Even if proper notice was provided, their testimony would be irrelevant, overly prejudicial, lead to juror confusion, would not assist the jury in determining a fact in issue, and should be excluded pursuant to Rules 402, 403, 702, and Daubert.

1. Michael Koehler

The defendants' disclosure with respect to Professor Koehler

is as follows:

> Professor Koehler will testify regarding the history of enforcement of the Foreign Corrupt Practices Act ("FCPA"), the lack of guidance regarding the FCPA issued by the United States Department of Justice (the "DOJ"), recent efforts by the DOJ to specifically target individuals for prosecution as well as the types of individuals prosecuted, and the DOJ's reliance on outside law firm internal investigations in bringing prosecutions. Professor Koehler will also render an opinion regarding how each of these factors may have influenced the investigation and prosecution of Defendants in the present case.
>
> In addition to those documents the government already possesses, Professor Koehler's opinions will be based on the documents set forth on the attached list and any other information that may become available before or during trial in this matter, including evidence brought out through witness testimony. Professor Koehler's analysis is continuing, and we reserve the right to supplement this summary and list of documents if necessary.
>
> Professor Koehler's opinions are based on his education, knowledge, and experience that is set forth on the accompanying Curriculum Vitae.

Aside from failing to meet the basic requirements of Rule 16, Professor Koehler's proposed testimony is irrelevant, prejudicial, and will only serve to confuse the jury and unnecessarily protract the trial. The testimony should therefore be excluded pursuant to Rules 402, 403, 702, and Daubert and its progeny. The defense does not have carte blanche to introduce free-standing expert testimony, unconnected to any evidence or testimony presented by the government, about Professor Koehler's views on the Justice Department's FCPA enforcement program. While defendants do not indicate Professor Koehler's opinions (and thus violate Rule 16), given Professor Koehler's routine, public criticism of the Justice Department, the government surmises that Professor Koehler will likely attempt to critique

the Justice Department's FCPA enforcement program in an attempt to show that defendants in this case were unfairly prosecuted.

The topics on which Professor Koehler would testify 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. See Davis, 772 F.2d at 1343 (expert testimony not admissible where it will not assist the jury in understanding the evidence). Defendants are not permitted to criticize the Justice Department's FCPA enforcement program in the hopes that the jury will, either out of confusion or prejudice toward the Justice Department, nullify the verdict. See United States v. Merrill, 2010 WL 3981158, at *6 (S.D. Fla. 2010) (expert excluded where proposed testimony "carrie[d] with it the danger of unfair prejudice to the government and only support[ed] a jury nullification argument").

Moreover, Professor Koehler's plan to "render an opinion regarding how each of these factors may have influenced the investigation and prosecution of Defendants in the present case" (an opinion which is not revealed) is beyond speculative, devoid of any factual basis, and entirely improper, even more so where the expert has never been a prosecutor and has no basis for his opinion. Defendants make clear through this disclosure their intent to argue nullification to the jury.

2. Scott Mowrey

Defendants' disclosure with respect to Mr. Mowrey is as follows:

> Mr. Mowrey will testify regarding the factors CCI used to calculate each Defendants' annual bonus during the time periods in which the government alleges they

> participated in a conspiracy to offer payments to foreign officials and private employees ("Indictment Period"). He will also explain the net profits realized on each CCI sale the government will present at trial, factoring in the effect of CCI's Sales, General, and Administrative (SG&A). Mr. Mowrey will then describe how these profits influenced Defendants' annual bonuses during the Indictment period.
>
> Mr. Mowrey's opinions will be based on his review of documents describing Defendants' bonus calculations, those portions of the Revised Payment Chart Cost Data prepared by Steptoe & Johnson on behalf of CCI that relate to the transactions that the government intends to present at trial, documents reflecting the SG&A expenses at CCI during the Indictment Period, IMI's Annual Reports for the years 2001-2007, all of which are in the government's possession, and any other information that may become available before or during trial in this matter, including evidence brought out through witness testimony. Mr. Mowrey's analysis is continuing and requests for documents pertinent to his analysis are outstanding. Therefore, Defendants will supplement this summary and list of documents as necessary and appropriate.
>
> Mr. Mowrey's opinions are based on his knowledge, experience, and training as a Certified Public Accountant, his academic background, his review of the documents mentioned above, and his analysis of information available in the public domain. Mr. Mowrey's curriculum vitae is attached hereto and incorporated by this reference.

Defendants' disclosure with respect to Mr. Mowrey simply lists the topics about which he may testify without indicating Mr. Mowrey's opinions, and is thus deficient under Rule 16. Defendants indicate that Mr. Mowrey will testify regarding the factors CCI used to calculate bonuses (without revealing what those factors were) and describe how profits from each of CCI's sales influenced the defendants' annual bonuses (without describing his opinion of how the profits in fact influenced the bonuses). Disclosing a mere "placeholder," or list of topic areas for which its experts will provide testimony, is insufficient. AU Optronics Corporation, 2012 WL 541490, at *3.

A disclosure is inadequate when it fails "to specify what opinions [the expert] will offer, much less the evidence . . . about which [the expert] will be testifying. Cerna, 2010 WL 2347406, at *4.

While it is unclear what opinion Mr. Mowrey will render, any argument that the defendants did not engage in bribery because their annual bonuses did not depend entirely on company profits is irrelevant, more prejudicial than probative, speculative, and not the proper subject of expert testimony where any actual effect is best tendered by a witness with actual knowledge of the bonus payment calculations at CCI.

3. S. Robert Radus

Defendants' disclosure with respect to Mr. Radus is as follows:

> Mr. Radus will testify regarding email transmission and receipt, email recovery, and related matters concerning information contained on email servers. His testimony will be based on his review of documents in the government's possession. His review and analysis is continuing and, to the extent his testimony will be based on documents not already in the government's possession, Defendants will supplement this summary as necessary and appropriate.
>
> Mr. Radus' testimony will be based on his knowledge, experience and training, his professional background and certifications, his review of documents as mentioned above, and his analysis of information available in the public domain. Mr. Radus' curriculum vitae is attached hereto and incorporated by this reference.

Defendants' disclosure with respect to Mr. Radus is deficient in that it lists a few very broad possible topic areas without indicating the expert's opinions. Simply stating that Mr. Radus will testify "regarding email transmission and receipt, email recovery, and related matters concerning information

contained on email servers" does not provide the government with a "fair opportunity to test the merit of the expert's testimony through focused cross-examination." United States v. Wilson, 2006 WL 3694550, at *2 (E.D.N.Y. 2006).

The government is left to guess that Mr. Radus may offer testimony that the defendants did not read, or even perhaps receive, inculpatory e-mails that were sent to them. Such testimony is improper in that it would be speculative and would tend to confuse and mislead the jury, especially where only the defendants can provide first-hand knowledge of whether they read or received certain e-mails. Similarly, any testimony regarding e-mail recovery and/or information contained on e-mail servers in this case is best provided by individuals who were directly involved in such efforts.

4. Jihong Sanderson

Defendants' disclosure with respect to Professor Sanderson is as follows:

> Professor Sanderson will testify about various Chinese business practices, including business etiquette and the role of third-parties, including consultants and trading companies, to assist in commercial transactions. The subject areas Professor Sanderson will address include the importance of personal relationships to business development, including gift giving and entertainment; the process for licensing businesses in china and the documentary evidence supporting properly registered businesses; the prevalence of unique financial arrangements in China, including the use of alternative payment arrangement to avoid common difficulties inherent in China's banking system and closed currency market; the 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 and export trading companies; the role and purpose of business delegations; and confusion presented by Chinese language in business situations because one

> Chinese word often has multiple meanings.
>
> In addition to those documents the government already possesses, Professor Sanderson's testimony will be based on her book "Doing Business in China" and on any other information that may become available before or during trial in this matter, including evidence brought out through witness testimony. Professor Sanderson's analysis is continuing and we reserve the right to supplement this summary and list of documents as appropriate.
>
> Professor Sanderson's opinions are based on her education, knowledge, and experience that is set forth on the accompanying Curriculum Vitae.

Like several of defendants' other disclosures, Professor Sanderson's proposed testimony does not indicate her specific opinions but, rather, contains a list of the subject areas she will address. As a result, it does not meet the requirements of Rule 16. See Duvall, 272 F.3d at 828 ("summary of the expected testimony, not a list of topics" is necessary).

While not stated explicitly, Professor Sanderson's 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. For example, the defendants indicate that Professor Sanderson will testify about the importance of gift giving and entertainment to business development and the prevalence of unique financial arrangements in China.

United States courts do not recognize the widespread nature of an illegal act as a defense to a criminal charge. "Custom, involving criminality, cannot justify a criminal act." Smith v. United States, 188 F.2d 969, 970 (9th Cir. 1951). The argument that bribery is so common in China that individuals and businesses cannot reasonably be expected to view such a practice

as illegal was rejected by the Fifth Circuit in United States v. Kay, 513 F.3d 432, 439 (5th Cir. 2007). In Kay, the Court acknowledged that payments to Haitian officials were widespread among importers conducting business in Haiti but concluded that any "man of common intelligence would have understood that [the company], in bribing foreign officials, was treading close to a reasonably-defined line of illegality." Id. at 442. As a result, Professor Sanderson's testimony would be more prejudicial than probative and would serve to mislead the jury into believing that Chinese custom may serve as a justification for defendants' alleged involvement in corrupt payments.

5. Christopher Simkins

Defendants' disclosure with respect to Mr. Simkins is as follows:

> Mr. Simkins will testify regarding the methods and means by which prosecutors for the U.S. Government may obtain evidence located in foreign countries for use in criminal investigations and prosecutions. He will contrast those methods and means available to the U.S. Government with those available to criminal defendants. His testimony will include explanations of the informal methods of obtaining such evidence that are most often used by prosecutors and the typical contexts in which prosecutors will use these informal methods, which are not available to criminal defendants. His testimony will also explain the process used by the U.S. Department of Justice, through its Office of International Affairs, of seeking evidence under bi- and multi-lateral mutual legal assistance treaties and how that differs from the process of seeking evidence through letters rogatory, both in terms of effectiveness of the process and time frames in which evidence is typically returned.
>
> In addition to those documents the government already possesses, Mr. Simkins's opinions will be based on his review of material set forth on the attached list and any other information that may become available before or during trial in this matter, including evidence brought out through witness testimony. Mr. Simkins's analysis is continuing and we

> reserve the right to supplement this summary and list of documents if necessary.
>
> Mr. Simkins's opinions are based on his education, knowledge, and experience that is set forth on the accompanying Curriculum Vitae.

Mr. Simkins' proposed testimony is irrelevant, does not assist the jury in determining a fact in issue, and is more prejudicial than probative. Defendants have previously made claims in their motion to dismiss on due process grounds that, because of the means available to defendants, they have been unable to obtain documents overseas. Such due process claims have been made and uniformly rejected by courts. See United States v. Clarke, 767 F. Supp. 2d 12, 70-72 (D.D.C. 2011); United States v. Mejia, 448 F.3d 436, 444-45 (D.C. Cir. 2006).

Any expert testimony opining that the process to obtain overseas evidence is easier for the government than for defendants will not assist the jury in determining a fact in issue. Any such testimony is not relevant to whether the government has met its burden and is likely to mislead the jury into thinking that the government has an unfair advantage and thus nullify the verdict. Further, such testimony should be excluded as inadmissible under Rule 702 and Daubert.

6. Craig Smollin

Defendants' disclosure with respect to Dr. Smollin is as follows:

> Dr. Smollin will testify regarding various acute and chronic medical issues affecting Mr. Cosgrove during the time periods he is alleged to have participated in a conspiracy to offer unlawful payments to public and private employees in exchange for business ("Indictment Period"). He will also testify regarding certain medications Mr. Cosgrove was prescribed during the Indictment Period and their

> possible side-effects, including those that may have impacted his physical and cognitive abilities at specific times within the Indictment Period.
>
> Dr. Smollin's opinions will be based on his review of Mr. Cosgrove's medical and prescription records. A copy of Mr. Cosgrove's records relevant to Dr. Smollin's testimony is provided herewith. Dr. Smollin's analysis and our collection of pertinent records is continuing and requests for documents pertinent to Dr. Smollin's analysis are outstanding. Therefore, Mr. Cosgrove will supplement this summary and list of documents as necessary and appropriate.
>
> Dr. Smollin's opinions are based on his knowledge, experience, and training as a medical doctor, his academic background, his review of the documents mentioned above, and his analysis of information available in the public domain. Dr. Smollin's curriculum vitae is attached hereto and incorporated by this reference.

Defendant Cosgrove's disclosure with respect to Dr. Smollin is deficient in that it fails to indicate the opinions Dr. Smollin will provide. Further, Cosgrove has not provided notice pursuant to Federal Rule of Criminal Procedure 12.2 that he will be relying on an insanity defense. As a result, any opinions concerning Cosgrove's cognitive abilities are irrelevant and highly prejudicial.

In the Insanity Defense Reform Act of 1984 ("IDRA"), Congress limited the defense of insanity to where "the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts." 18 U.S.C. § 17(a). Congress further provided that "mental disease or defect does not otherwise constitute a defense." Id. "It is clear that Congress meant to eliminate any form of legal excuse based upon one's lack of volitional control. This includes a diminished ability or failure to reflect adequately upon the consequences or nature of one's actions . . . .

Congress chose to eliminate any form of legal excuse based upon psychological impairment that does not come within the carefully tailored definition of insanity in section 17(a)." United States v. Cameron, 907 F.2d 1051, 1060-61 (11th Cir. 1990). In enacting the statute, Congress sought to prohibit the introduction of psychiatric testimony for certain purposes but did not categorically preclude the use of psychiatric evidence "to negate specific intent or other mens rea, which are elements of the offense." United States v. Pohlot, 827 F.2d 889, 890 (3d Cir. 1987).[1]

Dr. Smollin, who is not a psychiatrist and did not examine Cosgrove, does not opine that Cosgrove lacked the requisite intent to engage in criminal acts. Rather, it appears that he will testify that Cosgrove's physical and mental abilities were impaired during the time of the alleged criminal activity. It is precisely this sort of evidence - diminished capacity, diminished responsibility, mitigation, and justification - that Congress excluded via IDRA. See Cameron, 907 F.2d at 1061-62.

Further, since Dr. Smollin did not examine Mr. Cosgrove during the course of the time period of the Indictment, his testimony would be highly speculative. Most medications have a whole host of side effects, most of which are never experienced by users. Any testimony regard Cosgrove's medical or psychological condition that does not directly address specific

[1] The Ninth Circuit has indicated that such expert testimony is admissible where it directly addresses whether the defendant could have formed the requisite mens rea. See United States v. Cohen, 510 F.3d 1114, 1122-27 (9th Cir. 2007).

intent is highly prejudicial and could easily mislead the jury into thinking that such evidence ameliorates or excuses the offense, that is, that it provides the very kind of defense that Congress has expressly disallowed. See United States v. Scholl, 166 F.3d 964, 970-71 (9th Cir. 1999) (expert on compulsive gambling properly excluded where expert's proffered testimony that pathological gamblers have distortions in thinking and denial which impacts their ability and emotional wherewithal to keep records could be confusing, inconsistent, and misleading to the jury); United States v. Schneider, 111 F.3d 197, 200-01 (1st Cir. 1997) (proffered evidence that drugs defendant was taking would impair intellectual functioning by producing black-outs, roller coaster highs and lows and permit misperception and delusion properly excluded because of its tendency to confuse and mislead the jury); United States v. Agnello, 158 F. Supp. 2d 285, 289-90 (E.D.N.Y. 2001) (proffered testimony regarding defendant's bipolar disorder could mislead the jury into thinking such evidence excused the offense).

IV.

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.