IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**No. 1:19-cr-10043-STA**
	)	
JAY SHIRES, M.D.	)	
LORAN KARLOSKY, M.D.	)	

MOTION TO COMPEL THE GOVERNMENT TO SUPPLEMENT ITS EXPERT DISCLOSURE NOTICE

-AND-

INITIAL MOTION TO EXCLUDE OPINION TESTIMONY AND FOR AN EVIDENTIARY HEARING

Comes the defendant, LORAN KARLOSKY, M.D., through counsel and pursuant to Fed. R. Crim. P. 12 and 16, Fed. R. Evid. 401, 403, 702, 704, 801, and 802, U.S. Const. amends. V and VI, *Daubert v. Merrell Down Pharmaceuticals*, 509 U.S. 579 (1993), *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), *Crawford v. Washington*, 541 U.S. 36 (2004), the authorities cited in the accompanying memorandum and their progeny, and respectfully moves this Court to exclude the proposed opinion testimony indicated by the government's notice dated August 17, 2020. Dr. Karlosky further moves for an evidentiary hearing and, prior to such a hearing, for an order compelling the government to provide the defense with sufficient notice pursuant to Fed. R. Crim. P. 16(a)(1)(G).

Given that this case concerns prescribing, medical judgment, physician supervision, and related healthcare issues, the government's failure to file compliant expert disclosures significantly impairs Dr. Karlosky's ability to effectively investigate and determine potential defense experts, to engage in necessary pretrial and trial preparation, and to raise all the critical issues before the

Court concerning the admissibility of the government's proposed opinion testimony under *Daubert* and *Kumho*.

In further support, the following is submitted:

(1) The government's notice is inadequate according to the requirements of Fed. R. Crim. P. 16(a)(1)(G). The government's expert notice identified three categories of potential expert witnesses: a physician and two law enforcement officers. The government identified the physician as Dr. Stephen Loyd and stated that a supplemental report from Dr. Loyd would be forthcoming, but no such supplement has been provided. The two law enforcement officers were identified as David Roose (DEA) and Doug Pate (TBI), but the notice explicitly said that either might be replaced by agents with "similar" training and expertise, making the notice acutely deficient with respect to potential expert testimony by law enforcement. For example, by failing to provide the identity of each expert, the defense cannot challenge the unknown or substituted experts' qualifications. To the extent these experts are the ones offered at trial, Mr. Pate's background education appears unrelated to the topics upon which he will be asked to offer his opinions.

(2) The government's notice provided a summary of these three witnesses' testimony, but to varying degrees and none of which satisfies the directive of Rule 16 of the Federal Rules of Criminal Procedure to describe the basis and reasons for the witnesses' opinions. The defense is therefore unable to analyze the steps that led to the summarized conclusions provided in the government's notice. This deficiency is particularly acute with respect to Dr. Karlosky's interests because neither the report prepared by Dr. Loyd nor any of the government's expert testimony summaries reference Dr. Karlosky.

(3) Opinion testimony must be "scientific, technical, or [based on] other specialized knowledge." *See* Fed. R. Evid. 702. Here, though, the government has offered conclusory

judgments. For example, Dr. Loyd will apparently testify about the non-scientific concept of "red flags," despite the fact that such *post hoc* interpretations of conduct are not necessarily consistent with objective observations about particular patient conduct and do not meet the standards set forth in *Daubert* and *Kumho*. Dr. Loyd's opinions are also based on a selection of patient files (approximately 6 patients out of 1,700), and it is unclear how many files were provided to Dr. Loyd or the basis for selecting them. If there was a methodology to select these patient files, the methodology must be revealed and tested before Dr. Loyd's opinions can be evaluated according to *Daubert* and *Kumho*.

(4) The proposed opinion testimony of Dr. Loyd should also be excluded because it improperly includes a legal conclusion (*i.e.*, whether the conduct was within the usual course of professional practice and for a legitimate medical purpose) and because it purports to speak to the standard of practice for nurse practitioners when he was trained as a doctor, making any methodology used to arrive at the conclusions summarized in Dr. Loyd's report unreliable and unfairly prejudicial.

(5) The government should be prohibited from eliciting testimony that extrapolates from Dr. Loyd's review of approximately six patients (those in Counts 2–8[1] and unknown others) to general prescribing practices of Ms. Bond and/or supervisory review by Dr. Karlosky and/or the general standard of care provided at Downtown Medical Clinic. Having relied on only six charts, the government should also be prohibited from eliciting testimony about observable patterns or practice-wide data, which would likely be confusing and mislead the jury. After all, both Dr. Loyd and Mr. Pate are anticipated to testify about the "'red flags' in the *prescribing patterns* at the Downtown Medical Clinic during the timeframe of the indictment." Testimony about alleged

[1] There is no Count 6 in the indictment.

patterns would be consistent with the allegation in Count 1 (*i.e.*, that the defendants were engaged in a conspiracy) but inconsistent with the government's witness reviewing only six charts. If the government takes the position that not all prescriptions issued by Ms. Bond were outside the scope of professional practice or lacked a legitimate medical purpose, the witness must still have reviewed the balance of patient charts to make that determination.

(6) Mr. Roose's proposed testimony is not summarized by the government, which again makes the notice deficient, but the notice's reference to Practice Fusion records also suggests that when the government discloses Mr. Roose's methodology, this Court should evaluate both the reliability of the methodology used to reach any conclusions and the reliability of the underlying records themselves.

(7) Mr. Pate's proposed testimony includes subject areas and conclusions but contains no methodology that can be evaluated, but the materials provided suggest that his opinions would not satisfy *Daubert* and *Kumho*.

(8) To the extent the opinions of any of these witnesses are based on statements included in the patient records, the government's proposed testimony contravenes Fed. R. Evid. 702 and 803 because hearsay in this fashion would violate the Confrontation Clause, U.S. Const. amend. VI.

(9) One of the hurdles facing Dr. Karlosky in challenging the sufficiency of the government's expert disclosures is that no defense investigation was conducted by his prior counsel concerning researching, identifying, contacting, vetting, engaging, and working with either consulting or testifying experts. Only after current counsel's involvement did that work begin, and it could not begin effectively until the defense preparation was at a point to strategically determine the type and nature of potential consulting and testifying experts that could be necessary,

coupled with the ability to effectively understand and piece together the Practice Fusion medical records extractions.

(10) Another of the hurdles in challenging the sufficiency of the government's expert disclosure is that the indictment itself is vague. The indictment's insufficiency caused Dr. Karlosky to move for a bill of particulars. That motion is not yet ripe for the Court's review given the government has not responded to it. In the meantime, and in the absence of a detailed explanation of the charges against Dr. Karlosky, he must prepare for trial as if all 1,700 patient files provided in discovery, and all controlled substances prescriptions written by nurse practitioner Mary Ann Bond, are at issue. This Court has stated that, "The fact remains that the indictment charges Dr. Karlosky with aiding and abetting his Co-Defendants in the distribution of Schedule II controlled substances as to only three specific patients, each a violation of 21 U.S.C. § 841(a)….In other words, while the defense is certainly free to conduct a complete review of the 1,700 patients seen at the Downtown Medical Clinic during the period alleged in the indictment, Dr. Karlosky is accused of aiding and abetting Bond in the distribution of specific controlled substances to specific patients…on specific dates." (Doc. 235 at PageID 2365). The Court acknowledged that Dr. Karlosky is also charged with conspiracy to violation 21 U.S.C. § 841(a), but that did not alter its analysis on trial preparation. *Id.* at 2366. Therefore, to the extent that the Court does not interpret the charges to include the need to review patient charts beyond the three specific patients identified in the indictment, any expert or opinion testimony about patterns or practices at Downtown Medical Clinic would be unfairly prejudicial.

(11) As more fully described in the memorandum, the proposed opinion testimony clearly fails the test for opinion testimony enunciated in *Daubert* and *Kumho*.

WHEREFORE, Dr. Karlosky moves to exclude the expert testimony, for an evidentiary

hearing on this motion, and to compel the government to supplement its expert notice.

Respectfully submitted this 1st day of September 2021, by:

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CERTIFICATE OF SERVICE

I certify that on September 1, 2021, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

/s/Stephen Ross Johnson
STEPHEN ROSS JOHNSON

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CERTIFICATE OF CONSULTATION

The accompanying motion requests an Order compelling the government to provide compliant expert or opinion testimony disclosures under Federal Rule of Criminal Procedure 16. Undersigned counsel for the defendant, LORAN KARLOSKY, M.D., pursuant to LCrR 12.1(a), certify that prior to filing the accompanying motion, counsel for defendant conferred with counsel for the government and with counsel for co-defendant Jay Shires, M.D., and undersigned counsel are authorized to represent that the government objects to the motion and Dr. Shires agrees with the relief requested.

Respectfully submitted this 1st day of September, 2021.

RITCHIE, DAVIES, JOHNSON & STOVALL, P.C.

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