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15 UNITED STATES DISTRICT COURT
 16 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 17 SOUTHERN DIVISION

18 UNITED STATES OF AMERICA,) NO. SA CR 09-00077-JVS
 19)
 Plaintiff,) REPLY MEMORANDUM IN SUPPORT OF
 20) MOTION TO EXCLUDE DEFENDANTS'
 v.) EXPERT WITNESSES
 21)
 STUART CARSON et al.,) Date: June 11, 2012
 22) Time: 3:30 P.M.
 Defendants.) Courtroom:10C (Hon. James V. Selna)
 23) Trial: June 26, 2012
 24)

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

1 government"), hereby files its Reply Memorandum in Support of its
2 Motions to Exclude Defendants' Expert Witnesses (Dkt. #746).
3 This Reply is based upon the attached memorandum of points and
4 authorities, the files and records in this matter, as well as any
5 evidence or argument presented at any hearing on this matter.

6 DATED: May 29, 2012

Respectfully submitted,

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

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

17 **II.**

18 **ARGUMENT**

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

21 Defendants argue that their "disclosures provide sufficient
22 information to test the merit of their experts' testimony through
23 focused cross-examination" and that "Rule 16 does not require
24 that Defendants provide a line-by-line description of the
25 experts' testimony or what would otherwise essentially be a
26 written deposition as the government suggests." Defendants'
27 Opposition ("Defts' Opposition") at 1.

28 Nowhere in its motion does the government suggest that

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

7 For example, the defendants assert that their disclosure
8 indicating that Mr. El-Hage "has concluded that the evidence
9 weighs in favor of the position that KHNP was not an
10 instrumentality of the South Korean government in and around
11 2004" is sufficient in light of the fact that the defendants
12 identified the documents on which his opinion is based and that
13 the government is familiar with the instrumentality factors and
14 related issues. Defts' Opposition at 5.

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

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

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

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

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

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

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

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

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

5 Because defendants' disclosures do not come close to meeting
6 the requirements of Rule 16, their proposed expert testimony
7 should be excluded. See United States v. Barile, 286 F.3d 749,
8 758-59 (4th Cir. 2002); United States v. Mahaffy, 2007 WL
9 1213738, at *2 (E.D.N.Y. 2007).

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

13 **1. Michael Koehler**

14 Citing to United States v. Morales, 108 F.3d 1031 (9th Cir.
15 1997), defendants argue that Professor Koehler should be allowed
16 to testify about the absence of public guidance issued by the
17 Justice Department concerning the FCPA. Morales provides no
18 support for this proposition. In Morales, the appeals court
19 found that it was error for the trial court to exclude an
20 accounting expert who would testify regarding the defendant's
21 level of knowledge and understanding of bookkeeping principles.
22 Id. at 1034. The accounting expert had interviewed the defendant
23 regarding her bookkeeping methods and had reviewed the records
24 the defendant maintained. Id. at 1039.

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

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

3 Defendants then argue that they should be permitted to
4 present Professor Koehler's testimony "about how the DOJ has
5 utilized the work product of company counsel in the DOJ's overall
6 FCPA enforcement approach, the consequences of that choice
7 generally, and the application and significance of those
8 consequences to this case." Defts' Opposition at 14. Defendants
9 cite to United States v. Sager, 227 F.3d 1138 (9th Cir. 2000) in
10 support of their position. Sager, however, involved the
11 testimony of the investigating agent, not an expert witness.
12 There is nothing in Sager that addresses whether an expert should
13 be permitted to testify about the broad topic areas proposed by
14 the defendants with respect to Professor Koehler. Sager, in
15 fact, provides support for the notion that examination of fact
16 witnesses is the proper means to raise specific issues regarding
17 flaws in the government's investigation that may raise doubt
18 about the defendant's guilt.

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

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

10 In order to be admissible, an "expert opinion must be
11 supported by an adequate basis in relevant facts or data."
12 Morford v. Wal-Mart Stores, Inc., 2011 WL 2313648, at *7 (D. Nev.
13 Jun. 9, 011). Here, there is no basis for Professor Koehler to
14 opine on the Justice Department's alleged over-reliance on CCI's
15 internal investigation. He has no personal knowledge of the
16 investigation, no insight into the decisions made by the
17 prosecutors or agents (especially when he has never served as
18 either), and no frame of reference to provide any such opinion.
19 Any such opinion would be entirely speculative, devoid of any
20 factual basis, and entirely improper in that the expert would be
21 serving as a means to make defense counsel's arguments rather
22 than providing proper expert testimony. See Guillery v. Domtar
23 Indus., Inc., 95 F.3d 1320, 1331 (5th Cir. 1996) (expert
24 testimony properly excluded where it was not based on facts in
25 the record, but based on speculation designed to bolster one
26 party's position); Damon v. Sun Co., 87 F.3d 1467, 1474 (1st Cir.
27 1996) (expert should not be permitted to give an opinion based on
28 conjecture or speculation from an insufficient evidentiary

1 foundation).

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

9 **2. Scott Mowrey**

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

19 **3. S. Robert Radus**

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

1 be helpful to the jury.

2 Under Rule 901, the proponent of a document need only offer
3 a prima facie showing that the document is what it purports to
4 be. Once that minimal threshold is met, authenticity is a
5 question for the jury. United States v. Workinger, 90 F.3d 1409,
6 1415 (9th Cir. 1996). The format of an email may be sufficient
7 by itself to meet authenticity. See Fed. R. Evid. 901(b)(4);
8 United States v. Safavian, 435 F. Supp. 2d 36, 40 (D.D.C. 2006),
9 rev'd on other grounds, 528 F.3d 957 (D.C. Cir. 2008). No
10 particularized showing that a defendant in fact received and
11 opened an email is required once authenticity has been shown.
12 See Advisory Committee Notes to Rule 104.

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

19 **4. Jihong Sanderson**

20 The government has addressed Professor Sanderson's proposed
21 testimony in its prior motion in limine. See Dkt. No. 717 at 4-
22 7. To briefly reiterate, it is uncontroverted that "custom,
23 involving criminality, cannot justify a criminal act." Smith v.
24 United States, 188 F.2d 969, 970 (9th Cir. 1951). "Even a
25 universal industry practice may still be fraudulent." Newton v
26 Merrill, Lynch, Pierce, Fenner & Smith, Inc., 135 F.3d 266, 274
27 (3d Cir. 1998).

28 Defendants argue that common custom and practice may be

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

11 **5. Christopher Simkins**

12 Defendants reveal that the purpose of Mr. Simkins expert
13 testimony is to "put before the jury relevant evidence about the
14 quality of the government's investigation and the investigative
15 steps the government could have taken, but chose not to, that may
16 well shed considerable relevant light on the transactions."
17 Defts' Opposition at 17. Once again, defendants seek to elicit
18 evidence through an expert when such evidence should be elicited
19 from fact witnesses, such as one of the FBI Special Agents on
20 defendants' witness list. See United States v. Olender, 338 F.3d
21 at 638 (expert testimony not appropriate where the evidence can
22 be provided by a fact witness).

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

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

7 **III.**

8 **CONCLUSION**

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

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