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

19 UNITED STATES OF AMERICA,	) NO. SA CR 09-00077-JVS
20 Plaintiff,	) <u>GOVERNMENT'S NOTICE OF MOTION AND</u>
21 v.	) <u>MOTION TO EXCLUDE DEFENDANTS'</u>
22 STUART CARSON et al.,	) <u>EXPERT WITNESSES; MEMORANDUM OF</u>
23 Defendants.	) <u>POINTS AND AUTHORITIES IN SUPPORT</u>
24 _____	) <u>THEREOF</u>
25	) Date: June 11, 2012
	) Time: 3:30 P.M.
	) Courtroom: 10C (Hon. James V. Selna)
	) Trial: June 26, 2012

26 Plaintiff United States of America, by and through its
27 attorneys of record, the United States Department of Justice,
28 Criminal Division, Fraud Section, and the United States Attorney

1 for the Central District of California (collectively, "the
2 government"), hereby files its Motion to Exclude Defendants'
3 Expert Witnesses. This Motion is based upon the attached
4 memorandum of points and authorities, the files and records in
5 this matter, as well as any evidence or argument presented at any
6 hearing on this matter.

7 DATED: May 11, 2012

Respectfully submitted,

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

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

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

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

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

7 The deadline for providing adequate expert disclosures has
8 passed. For the reasons that follow, the government respectfully
9 requests that the Court exclude defendants' expert witnesses. In
10 the alternative, to the extent the Court permits the defendants
11 to cure the deficiencies with respect to any of the proposed
12 experts who will provide admissible testimony, it should compel
13 the defendants immediately to provide proper expert disclosures.

14 II.

15 BACKGROUND

16 On April 30, 2012, in accordance with the Court's scheduling
17 order, the parties each disclosed their expert witnesses. The
18 government provided expert disclosures for three witnesses: (1)
19 Derek Scissors, a Senior Research Fellow at the Heritage
20 Foundation, who will testify about the instrumentality factors
21 with respect to the Chinese entities involved in the FCPA
22 allegations in the Indictment; (2) Joongi Kim, a Visiting
23 Professor of Law at Georgetown University Law Center, who will
24 testify about the instrumentality factors with respect to KHNP
25 and KEPCO; and (3) Thomas Pepinsky, an Assistant Professor at
26 Cornell University, who will testify about the instrumentality
27 factors with respect to Petronas and Petronas Gas Berhad. See
28 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

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

7 **III.**

8 **ARGUMENT**

9 **A. Legal Standard**

10 Federal Rule of Criminal Procedure 16(b)(1)(C) provides that
 11 "[t]he defendant must, at the government's request, give to the
 12 government a written summary of any testimony that the defendant
 13 intends to use under Rules 702, 703, or 705 of the Federal Rules
 14 of Evidence as evidence at trial" Rule 16(b)(1)(C)
 15 further mandates that "the summary must describe the witness's
 16 opinions, the bases and reasons for those opinions, and the
 17 witness's qualifications." An expert disclosure that "offers
 18 only a hint of [the] anticipated testimony" does not satisfy Rule
 19 16(b)(1)(C). United States v. Cross, 113 F. Supp. 2d 1282, 1286
 20 (S.D. Ind. 2000).

21 Disclosing a mere "placeholder," or list of topic areas for
 22 which its experts will provide opinions, is insufficient. United
 23 States v. AU Optronics Corp., 2012 WL 541490, at *3 (N.D. Cal.
 24 2012) (citing United States v. Duvall, 272 F.3d 825, 828 (7th
 25 Cir. 2001) ("summary of the expected testimony, not a list of
 26 topics" is necessary)); United States v. Cerna, 2010 WL 2347406,
 27 at *4 (N.D. Cal. 2010) (disclosure inadequate when it "failed to
 28 specify what opinions [the expert] will offer, much less the

1 evidence . . . about which she will be testifying"). Courts have
2 recognized that greater disclosure should be required where the
3 proposed testimony involves a more complex subject matter. AU
4 Optronics Corp., 2012 WL 541490, at 3; United States v. Lipscomb,
5 539 F.3d 32, 38 (1st Cir 2008); United States v. Jackson, 51 F.3d
6 646, 651 (7th Cir. 1995).

7 The purpose of Rule 16(b)(1)(C) is to "'minimize surprise
8 that often results from unexpected expert testimony, reduce the
9 need for continuances, and to provide the opponent with a fair
10 opportunity to test the merit of the expert's testimony through
11 focused cross-examination.'" United States v. Wilson, 2006 WL
12 3694550, at *2 (E.D.N.Y. Dec. 13, 2006) (quoting Fed. R. Crim. P.
13 16 advisory committee's note, 1993 Am.); see also United States
14 v. Rivera-Guerrero, 426 F.3d 1130, 1139 n.6 (9th Cir. 2005)
15 (same). The rule contemplates that disclosing a "written
16 summary" of the expert testimony will permit "more complete
17 pretrial preparation" by the other party. United States v.
18 Naegele, 468 F. Supp. 2d 175, 176 (D.D.C. 2007) (quoting Fed. R.
19 Crim. P. 16 advisory comm. note, 1993 Am.). The disclosure
20 required by the defendant to permit the government to effectively
21 focus its cross-examination varies depending on the complexity of
22 the proposed expert testimony. See United States v. Caputo, 382
23 F. Supp. 2d 1045, 1049 (N.D. Ill. 2005) (citing Jackson, 51 F.3d
24 at 651).

25 A party's failure to comply with its obligations under Rule
26 16(b)(1)(C) stymies these objectives. Rule 16(d)(2) gives the
27 district court the discretion to order the non-complying party to
28 remedy the deficiencies in its expert notice or to order other

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

8 Rule 702 of the Federal Rules of Evidence provides the
9 appropriate standard for determining the admissibility of expert
10 testimony. United States v. Quinn, 18 F.3d 1461, 1464-65 (9th
11 Cir. 1994) (citing Daubert v. Merrell Dow Pharmaceuticals, Inc.
12 509 U.S. 579 (1993)). Rule 702 states: “If scientific,
13 technical, or other specialized knowledge will assist the trier
14 of fact to understand the evidence or to determine a fact in
15 issue, a witness qualified as an expert by knowledge, skill,
16 experience, training, or education, may testify thereto in the
17 form of an opinion or otherwise, if (1) the testimony is based
18 upon sufficient facts or data, (2) the testimony is the product
19 of reliable principles and methods, and (3) the witness has
20 applied the principles and methods reliably to the facts of the
21 case.”

22 Expert testimony is admissible if the party offering such
23 evidence shows that the testimony is both reliable and relevant.
24 Fed. R. Evid. 702; Kumho Tire Co. v. Carmichael, 526 U.S. 137,
25 147 (1999); Daubert, 509 U.S. at 590-91. “In determining whether
26 expert testimony will be helpful to the jury in a particular
27 case, the court is required to evaluate the state of knowledge
28 presently existing about the subject of the proposed testimony in

1 light of its appraisal of the facts of the case." United States
2 v. Brown, 7 F.3d 648, 651-52 (7th Cir. 1993). "Expert testimony
3 is not admissible under Rule 702 if it will not assist the jury
4 in understanding the evidence or determining a fact in issue or
5 it is purely speculative." United States v. Davis, 772 F.2d
6 1339, 1343 (7th Cir. 1985).

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

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

27 In United States v. Reliant Energy Services, Inc., 2007 WL
28 640839 (N.D. Cal. 2007), which involved the prosecution of a

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

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

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

27 Id. at *2. The court found that this disclosure as well as
28 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.

///

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

3 Professor Kim will testify that he has reviewed
4 the factors set forth in the Court's proposed
5 instrumentality instruction and other issues he deems
6 pertinent to the question of whether Korea Hydro &
7 Nuclear Power ("KHNP") was an instrumentality of the
8 South Korean government in and around 2004. He has
9 analyzed facts and circumstances relevant to KHNP, as
10 well as pertinent facets and history of the South
11 Korean government, economy, and legal regulations. He
12 has concluded that the evidence weights in favor of the
13 position that KHNP was not an instrumentality of the
14 South Korean government in and around 2004.

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

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

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

19 Professor Naughton will testify that he has
20 reviewed the factors set forth in the court's proposed
21 instrumentality instruction and other issues he deems
22 pertinent to the question of whether the Chinese
23 companies identified in the Indictment were
24 instrumentalities of the Chinese Government in and
25 around 1999-2004. He has analyzed facts and
26 circumstances relevant to each entity, as well as
27 pertinent facets and history of the Chinese Government,
28 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.

29 In addition to those documents the government
30 already possesses, Professor Naughton's opinions will
31 be based on the documents set forth on the attached
32 list and any other information that may become

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

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

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

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

26 Professor Shi will testify regarding Chinese laws
27 applicable to government employees and non-government
28 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.

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

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

1 Defendants' disclosures with respect to El-Hage, Kim,
2 Naughton, and Shi are too general and vague and do not permit the
3 government "to test the merit of the expert's testimony through
4 focused cross-examination." United States v. Rivera-Guerrero,
5 426 F.3d at 1139 n.6. Especially where the testimony will be
6 fairly complex and involves "facets and history of the Malaysian
7 government, economy, and legal regulations," "facets and history
8 of the South Korean government, economy, and legal regulations,"
9 and "facets and history of the Chinese government, economy, and
10 legal regulations," defendants' disclosure must contain the
11 specific factual bases on which the experts are relying.

12 While defendants list numerous articles and publications
13 upon which the experts' testimony will supposedly be based, they
14 fail to list any specific factors that lead the experts to reach
15 their conclusions. For example, in order to conduct cross-
16 examination of Mr. El-Hage, the government is entitled to know at
17 least some of the specific facts and circumstances relevant to
18 each entity that Mr. El-Hage will testify about, as well as the
19 specifics concerning the history of the Malaysian government,
20 economy, and legal regulations upon which he will rely. As was
21 the case in Reliant Energy Services, the disclosure is too
22 "general and vague to meet the basic disclosure requirements for
23 opinion testimony." 2007 WL 640839, at *2-*3.

24 In United States v. Barile, a false statements case, the
25 defendant disclosed that his expert "expected to testify about
26 the lack of materiality of alleged misrepresentations in the
27 510(k)s for the devices in the indictment." 286 F.3d at 758.
28 The Fourth Circuit upheld the exclusion of the testimony on this

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

9 Defendants' minimal disclosures, especially where the
10 testimony will be complex and wide-ranging, are insufficient to
11 permit the government to adequately prepare for focused cross-
12 examination at trial and fail to set forth with the requisite
13 specificity the bases and reasons for the experts' opinion and
14 testimony, apart from bare references to the fact that they have
15 analyzed "facts and circumstances relevant to each entity" and
16 information regarding each country's "government, economy, and
17 legal regulations."

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

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

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

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

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

27 **1. Michael Koehler**

28 The defendants' disclosure with respect to Professor Koehler

1 is as follows:

2 Professor Koehler will testify regarding the
3 history of enforcement of the Foreign Corrupt Practices
4 Act ("FCPA"), the lack of guidance regarding the FCPA
5 issued by the United States Department of Justice (the
6 "DOJ"), recent efforts by the DOJ to specifically
7 target individuals for prosecution as well as the types
8 of individuals prosecuted, and the DOJ's reliance on
9 outside law firm internal investigations in bringing
10 prosecutions. Professor Koehler will also render an
11 opinion regarding how each of these factors may have
12 influenced the investigation and prosecution of
13 Defendants in the present case.

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

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

26 Aside from failing to meet the basic requirements of Rule
27 16, Professor Koehler's proposed testimony is irrelevant,
28 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

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

3 The topics on which Professor Koehler would testify have no
4 logical bearing on whether the government has met its burden in
5 this case and venture far afield from assisting the jury to
6 determine a fact in issue. See Davis, 772 F.2d at 1343 (expert
7 testimony not admissible where it will not assist the jury in
8 understanding the evidence). Defendants are not permitted to
9 criticize the Justice Department's FCPA enforcement program in
10 the hopes that the jury will, either out of confusion or
11 prejudice toward the Justice Department, nullify the verdict.
12 See United States v. Merrill, 2010 WL 3981158, at *6 (S.D. Fla.
13 2010) (expert excluded where proposed testimony "carrie[d] with
14 it the danger of unfair prejudice to the government and only
15 support[ed] a jury nullification argument").

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

24 **2. Scott Mowrey**

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

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

1 participated in a conspiracy to offer payments to
2 foreign officials and private employees ("Indictment
3 Period"). He will also explain the net profits
4 realized on each CCI sale the government will present
5 at trial, factoring in the effect of CCI's Sales,
6 General, and Administrative (SG&A). Mr. Mowrey will
7 then describe how these profits influenced Defendants'
8 annual bonuses during the Indictment period.

9 Mr. Mowrey's opinions will be based on his review
10 of documents describing Defendants' bonus calculations,
11 those portions of the Revised Payment Chart Cost Data
12 prepared by Steptoe & Johnson on behalf of CCI that
13 relate to the transactions that the government intends
14 to present at trial, documents reflecting the SG&A
15 expenses at CCI during the Indictment Period, IMI's
16 Annual Reports for the years 2001-2007, all of which
17 are in the government's possession, and any other
18 information that may become available before or during
19 trial in this matter, including evidence brought out
20 through witness testimony. Mr. Mowrey's analysis is
21 continuing and requests for documents pertinent to his
22 analysis are outstanding. Therefore, Defendants will
23 supplement this summary and list of documents as
24 necessary and appropriate.

25 Mr. Mowrey's opinions are based on his knowledge,
26 experience, and training as a Certified Public
27 Accountant, his academic background, his review of the
28 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.

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

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

12 **3. S. Robert Radus**

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

15 Mr. Radus will testify regarding email
16 transmission and receipt, email recovery, and related
17 matters concerning information contained on email
18 servers. His testimony will be based on his review of
19 documents in the government's possession. His review
20 and analysis is continuing and, to the extent his
21 testimony will be based on documents not already in the
22 government's possession, Defendants will supplement
23 this summary as necessary and appropriate.

24 Mr. Radus' testimony will be based on his
25 knowledge, experience and training, his professional
26 background and certifications, his review of documents
27 as mentioned above, and his analysis of information
28 available in the public domain. Mr. Radus' curriculum
vitae is attached hereto and incorporated by this
reference.

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

1 contained on email servers" does not provide the government with
2 a "fair opportunity to test the merit of the expert's testimony
3 through focused cross-examination." United States v. Wilson,
4 2006 WL 3694550, at *2 (E.D.N.Y. 2006).

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

15 **4. Jihong Sanderson**

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

18 Professor Sanderson will testify about various
19 Chinese business practices, including business
20 etiquette and the role of third-parties, including
21 consultants and trading companies, to assist in
22 commercial transactions. The subject areas Professor
23 Sanderson will address include the importance of
24 personal relationships to business development,
25 including gift giving and entertainment; the process
26 for licensing businesses in china and the documentary
27 evidence supporting properly registered businesses; the
28 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

1 Chinese word often has multiple meanings.

2 In addition to those documents the government
3 already possesses, Professor Sanderson's testimony will
4 be based on her book "Doing Business in China" and on
5 any other information that may become available before
6 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.

7 Professor Sanderson's opinions are based on her
8 education, knowledge, and experience that is set forth
on the accompanying Curriculum Vitae.

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

15 While not stated explicitly, Professor Sanderson's proposed
16 testimony would suggest to the jury the improper inference that
17 because bribery is widespread in China, defendants were simply
18 going along with local custom. For example, the defendants
19 indicate that Professor Sanderson will testify about the
20 importance of gift giving and entertainment to business
21 development and the prevalence of unique financial arrangements
22 in China.

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

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

12 **5. Christopher Simkins**

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

15 Mr. Simkins will testify regarding the methods and
16 means by which prosecutors for the U.S. Government may
17 obtain evidence located in foreign countries for use in
18 criminal investigations and prosecutions. He will
19 contrast those methods and means available to the U.S.
20 Government with those available to criminal defendants.
21 His testimony will include explanations of the informal
22 methods of obtaining such evidence that are most often
23 used by prosecutors and the typical contexts in which
24 prosecutors will use these informal methods, which are
25 not available to criminal defendants. His testimony
26 will also explain the process used by the U.S.
27 Department of Justice, through its Office of
28 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.

25 In addition to those documents the government
26 already possesses, Mr. Simkins's opinions will be based
27 on his review of material set forth on the attached
28 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

1 reserve the right to supplement this summary and list
2 of documents if necessary.

3 Mr. Simkins's opinions are based on his education,
4 knowledge, and experience that is set forth on the
5 accompanying Curriculum Vitae.

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

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

23 **6. Craig Smollin**

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

26 Dr. Smollin will testify regarding various acute
27 and chronic medical issues affecting Mr. Cosgrove
28 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

1 possible side-effects, including those that may have
2 impacted his physical and cognitive abilities at
specific times within the Indictment Period.

3 Dr. Smollin's opinions will be based on his review
4 of Mr. Cosgrove's medical and prescription records. A
5 copy of Mr. Cosgrove's records relevant to Dr.
6 Smollin's testimony is provided herewith. Dr.
7 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.

8 Dr. Smollin's opinions are based on his knowledge,
9 experience, and training as a medical doctor, his
10 academic background, his review of the documents
11 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.

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

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

1 Congress chose to eliminate any form of legal excuse based upon
2 psychological impairment that does not come within the carefully
3 tailored definition of insanity in section 17(a)." United States
4 v. Cameron, 907 F.2d 1051, 1060-61 (11th Cir. 1990). In enacting
5 the statute, Congress sought to prohibit the introduction of
6 psychiatric testimony for certain purposes but did not
7 categorically preclude the use of psychiatric evidence "to negate
8 specific intent or other mens rea, which are elements of the
9 offense." United States v. Pohl, 827 F.2d 889, 890 (3d Cir.
10 1987).¹

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

19 Further, since Dr. Smollin did not examine Mr. Cosgrove
20 during the course of the time period of the Indictment, his
21 testimony would be highly speculative. Most medications have a
22 whole host of side effects, most of which are never experienced
23 by users. Any testimony regard Cosgrove's medical or
24 psychological condition that does not directly address specific
25

26
27 ¹ The Ninth Circuit has indicated that such expert testimony
28 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).

1 intent is highly prejudicial and could easily mislead the jury
2 into thinking that such evidence ameliorates or excuses the
3 offense, that is, that it provides the very kind of defense that
4 Congress has expressly disallowed. See United States v. Scholl,
5 166 F.3d 964, 970-71 (9th Cir. 1999) (expert on compulsive
6 gambling properly excluded where expert's proffered testimony
7 that pathological gamblers have distortions in thinking and
8 denial which impacts their ability and emotional wherewithal to
9 keep records could be confusing, inconsistent, and misleading to
10 the jury); United States v. Schneider, 111 F.3d 197, 200-01 (1st
11 Cir. 1997) (proffered evidence that drugs defendant was taking
12 would impair intellectual functioning by producing black-outs,
13 roller coaster highs and lows and permit misperception and
14 delusion properly excluded because of its tendency to confuse and
15 mislead the jury); United States v. Agnello, 158 F. Supp. 2d 285,
16 289-90 (E.D.N.Y. 2001) (proffered testimony regarding defendant's
17 bipolar disorder could mislead the jury into thinking such
18 evidence excused the offense).

19 IV.

20 CONCLUSION

21 For the foregoing reasons, the government respectfully
22 requests that the Court exclude defendants' expert witnesses. In
23 the alternative, to the extent the Court permits the defendants
24 to cure the deficiencies with respect to any of the proposed
25 experts who will provide admissible testimony, it should compel
26 the defendants immediately to provide proper expert disclosures.
27
28