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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION
13

14 UNITED STATES OF AMERICA,)	CASE NO. CR-11-0573-JSW
)	
15 Plaintiff,)	UNITED STATES' OPPOSITION TO
)	DEFENDANTS' MOTION TO EXCLUDE EXPERT
16 v.)	TESTIMONY OF DANIEL DAYTON
)	
17 WALTER LIEW, CHRISTINA LIEW,)	Date: November 14, 2013
18 ROBERT MAEGERLE, AND USA)	Time: 2:00 pm
PERFORMANCE TECHNOLOGY,)	
)	Hon. Jeffrey S. White
19 Defendants.)	
)	

20
21 **I. INTRODUCTION**

22 At trial, the United States intends to call Daniel Dayton, a chemical engineer who spent 38 years
23 working in the titanium dioxide (TiO2) business at DuPont. As set forth more fully below, during his
24 career, Mr. Dayton served in a wide-range of roles (operations, research and development, business
25 analyst, due diligence, project manager, and engineering design) that brought him into contact with each
26 and every one of DuPont's TiO2 manufacturing facilities and afforded him visibility into virtually all
27 aspects of the TiO2 business. Mr. Dayton's anticipated testimony, which was explicitly disclosed to the
28 defense, will cover a range of topics including DuPont's chloride-route TiO2 technology (including its

1 historical development and what distinguishes it from its competitors), the nature of the trade secrets
2 alleged in the indictment, and the protections taken by DuPont to safeguard its trade secrets.

3 The defense objects to the scope of Mr. Dayton's testimony on the theory that it amounts to
4 improper expert opinion testimony under Federal Rule of Evidence 702 that was not properly disclosed
5 to the defense. The Court should reject defendants' argument for two reasons. First, Mr. Dayton's
6 testimony is not *opinion* testimony at all – rather it is testimony based on his personal knowledge
7 acquired through the performance of his duties at DuPont and admissible through Federal Rule of
8 Evidence 602. It is almost identical to the non-expert testimony offered by an engineer working for a
9 victim company in another trade secret case, *United States v. Wen Chyu Liu*, 716 F.3d 159, 164-165 (5th
10 Cir. 2013). Second, even if the Court determined that portions of Mr. Dayton's testimony qualified as
11 expert opinion under Federal Rule of Evidence 702, the testimony is admissible based on the disclosures
12 made by the United States in conformity with Federal Rule of Criminal Procedure 16(a)(1)(G).

13 **II. BACKGROUND**

14 **A. Trade Secret –Related Charges**

15 Walter Liew was charged in the Second Superseding Indictment with conspiracy to commit
16 economic espionage (Count One), attempted economic espionage (Count Three), conspiracy to commit
17 theft of trade secrets (Count Two), attempted theft of trade secrets (Count Five), and possession of trade
18 secrets (Counts Six through Nine). (Dkt. No. 269). The Second Superseding Indictment describes the
19 development by DuPont of the chloride-route process for manufacturing TiO₂ and DuPont's position in
20 the global TiO₂ market, identifies the specific DuPont TiO₂ trade secrets that were the subject of the
21 misappropriation, and describes the measures DuPont takes to protect its trade secrets. *See* Second
22 Superseding Indictment at ¶¶ 1-2, 12-15.

23 The government intends to establish through the testimony of Mr. Dayton and others that DuPont
24 possessed the TiO₂ trade secrets alleged in the indictment and took reasonable measures to safeguard its
25 secrets.

26 **B. Disclosures related to Dan Dayton**

27 On August 5, 2013, the expert disclosure deadline, the United States identified Mr. Dayton as a
28 TiO₂ expert and provided a summary of his testimony pursuant to Rule 16(a)(1)(G) of the Federal Rule

1 of Criminal Procedure. *See* Disclosure Letter (Ex. B to Gasner Decl., Docket No. 480). The disclosure
2 consisted of two documents – a fifteen-page report of an FBI interview of Mr. Dayton and a nine-page
3 single spaced list of 331 documents reviewed by Mr. Dayton. *See* Gasner Decl., Ex. C (report of FBI
4 interview); Axelrod Declaration, Exhibit 1 (list of information reviewed).

5 The FBI report identified Mr. Dayton’s professional qualifications in the TiO₂ industry, which
6 encompass his entire career at DuPont (between 1973 and his retirement in 2011) and include the
7 following:

- 8 • He received a Bachelor of Science in Chemical Engineering from Oregon State University in
9 1973.
- 10 • He started at DuPont in 1973 supervising operators at the DuPont TiO₂ plant in the New
11 Johnsonville, Tennessee.
- 12 • From 1974 through 1978, he worked at DuPont’s Edgemoor TiO₂ plant in Delaware. At
13 Edgemoor, Mr. Dayton worked on redesigning a portion of the plant. During that time, he
14 also worked on the design team for a DuPont TiO₂ plant in Delisle, Mississippi.
- 15 • He moved to the Delisle plant, which was still under construction when he arrived, and
16 worked on design issues. In 1980, he became a research and development supervisor at
17 Delisle. During that time, he also worked on the technology transfer to DuPont’s TiO₂ plant
18 at Altamira in Mexico.
- 19 • In 1984, he returned to Delaware to work as a business analyst at DuPont’s Business Center.
20 There, he focused on determining what DuPont’s competitors were doing and provided
21 economic analysis of DuPont plants, including Altamira and the plant at Kuan Yin in
22 Taiwan.
- 23 • In 1990, he served as a project manager for a DuPont project in Korea. He also worked on
24 issues related to the start-up of DuPont’s Kuan Yin plant including engineering, costs, and
25 supplies.
- 26 • From 1992 to 1996, he worked at the Edgemoor plant in charge of the project group where he
27 supervised all of the engineers and ensured appropriate handling of engineering design
28 performed by contractors.

- 1 • He then worked on a team to purchase a TiO₂ plant from a competitor, TiOxide, a process
2 that provided him with the opportunity to visit that plant and review its design.
3 Subsequently, he worked on another potential DuPont acquisition.
- 4 • From 1997 to 2009, he worked as an engineering consultant at DuPont's Business Center.
5 • During the course of his work, he worked on engineering design for all of DuPont's sites,
6 which included almost all pieces in DuPont's TiO₂ process. He also worked on best
7 practices manuals for putting together a Basic Data Document and ethical competitive
8 collection.

9 *See* FBI Report (Gasner Decl., Ex. C) at 1-3. The report also provides information on the following
10 topics: background on the development of chloride-route TiO₂, including DuPont's role, the history and
11 characteristics of DuPont's plants, identification of DuPont's competitors and differences in DuPont's
12 TiO₂ technology, DuPont's trade secret protection measures, review of the trade secrets identified in the
13 second superseding indictment and evidence collected in the course of the investigation, and Robert
14 Maegerle and his role at DuPont.

15 The Dayton disclosures included a list entitled, "Dayton Disclosure Statement, Exhibit A:
16 Information Reviewed, August 5, 2013," that identified by file path name 331 documents reviewed by
17 Mr. Dayton. Axelrod Decl., Ex. 1.

18 **III. ARGUMENT**

19 **A. Mr. Dayton's Proposed Testimony is not Expert Opinion Testimony Under Federal** 20 **Rule of Evidence 702**

21 Defendants argue that portions of Mr. Dayton's proposed testimony should be excluded as
22 improper expert opinion testimony. Def. Mot. at 4 (Docket No. 480). While the defendants identified
23 certain areas of Mr. Dayton's proposed testimony as objectionable, such as the history of TiO₂, practices
24 of DuPont's competitors, and analysis of the evidence relative to DuPont's trade secrets, they overlook
25 the fact that Mr. Dayton's testimony on those subjects is drawn from personal knowledge gained during
26 his professional life and is proper under Federal Rule of Evidence 602, which permits testimony where
27 there is a sufficient foundation "to support a finding that the witness has personal knowledge of the
28 matter."

1 In *United States v. Wen Chyu Liu*, 716 F.3d 159, 164-65 (5th Cir. 2103), a prosecution involving
2 a conspiracy to steal trade secrets from Dow Chemical Company, the United States called a Dow
3 engineer, James Akers, to offer the same type of testimony that Mr. Dayton is expected to provide in this
4 trial – Mr. Akers testified that: the Dow process was “absolutely not” publically available; Dow
5 employees such as the defendants would have understood that the process was secret; certain flow sheets
6 introduced into evidence contained Dow technologies and those technologies were kept secret by Dow;
7 certain plans, drawings, equipment lists, and defendant’s hand calculations were “very similar” to the
8 Dow process; and it would “‘surprise’ him that others could duplicate Dow’s results in their own work
9 and/or mimic these same numeric temperatures and percentages on their own.” *Id.* Mr. Akers was
10 neither noticed nor qualified as an expert in conjunction with that testimony. Axelrod Decl. at ¶ 6.
11 There is no reason to treat Mr. Dayton any differently. It is appropriate for witnesses to testify based on
12 personal knowledge acquired through their positions and performance of their job duties. *See Stuart v.*
13 *UNUM Life Ins. Co. of America*, 217 F.3d 1145, 1155 (9th Cir. 2000) (finding Vice President of
14 Corporate Services had sufficient personal knowledge of company procedures to testify that his
15 employer contributed directly to its employee insurance plan); *United States v. Thompson*, 559 F.2d 552,
16 554 (9th Cir. 1977) (finding manager of a restaurant had ample personal knowledge to testify about
17 normal company procedures on a date prior to his employment).

18 Here, the defense seeks to circumscribe Mr. Dayton’s testimony on the grounds that his
19 testimony amounts to improper lay opinion testimony under Federal Rule of Evidence 701. Def. Mot. at
20 4. Yet, through his 38 years at DuPont, he has gained the requisite direct knowledge of certain practices
21 of DuPont’s competitors, particularly where his work responsibilities at times included competitive
22 analysis and due diligence for prospective acquisitions. To the extent the defense challenges his ability
23 to provide background on the basic history of chloride-route TiO₂, the defense seems to ignore the fact
24 that Mr. Dayton directly participated in a good deal of that history and where he did not, it is akin to the
25 restaurant manager who testified about procedures that pre-dated his time of employment at the
26 restaurant in *Thompson*.¹

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28 ¹ The defense cites *United States v. Skeet*, 665 F.3d 983, 985 (9th Cir. 1982) to address the contours of lay opinion testimony under Rule 701. However, *Skeet* addressed a problem of a different nature – whether an eye witness to a shooting could opine as to whether the shooting was accidental or

1 **B. Mr. Dayton's Testimony Was Properly and Prophylactically Disclosed as Expert**
2 **Opinion Testimony Under the Federal Rules**

3 Even if the Court finds that portions of Mr. Dayton's testimony qualify as expert opinion under
4 Federal Rule of Evidence 702, the United States has met its disclosure obligations under Federal Rule of
5 Criminal Procedure 16(a)(1)(G) and thus the Court should deny the defendants' motion. The crux of the
6 defendants' claim is that Mr. Dayton was not properly noticed as an expert. This contention is without
7 merit. Rule 16 requires the government to provide a "written summary of any testimony that the
8 government intends to use," which must "described the witness's opinions, the bases and reasons for
9 those opinions, and the witness's qualifications." Rule 16(a)(1)(G).

10 On August 5, 2013, the United States squarely met that obligation by providing the defense with
11 written notice of its designation of Mr. Dayton as an expert and the disclosure of a written summary (in
12 the form of a summary FBI report) that described Mr. Dayton's "opinions, the bases and reasons for
13 those opinions, and the witness's qualifications." Gasner Decl. (Docket No. 480), Ex. B and C.
14 Contrary to defendants' claim that "the government has failed to provide a specification of the
15 documents reviewed by Mr. Dayton," the United States also provided a detailed identification of the
16 materials Mr. Dayton reviewed as part of his expert disclosure on August 5, 2013. Axelrod Decl., Ex.1.

17 Instead of challenging Mr. Dayton on the merits of his expertise, which the defendants implicitly
18 and understandably concede they cannot do, they focus instead on pre-disclosure communications
19 related to Mr. Dayton's testimony. There is nothing in the communications between government
20 counsel and the defense that would warrant exclusion of Mr. Dayton's testimony and the defense cites
21 no authority to the contrary. In fact, the communications are consistent with the United States' position
22 throughout. We believe that Mr. Dayton's testimony is admissible in its entirety as percipient witness
23 testimony related directly to matters observed and experienced by Mr. Dayton. However, in an
24 abundance of caution, the United States made the requisite expert disclosures. The defense cannot
25 identify any prejudice associated with the government's disclosures and, in fact, the defense TiO2
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28 was limited to his/her percipient witness observations. It has no bearing on whether a long-term
employee of a business can testify about what he learned in the course of the execution of his duties.

1 expert, Mr. Cooper, dedicates several pages of his report to confronting Mr. Dayton's anticipated
2 testimony. *See* Lovett Decl. (Docket No. 482), Ex. C (Cooper Disclosure) at 75-79.

3 Moreover, neither of the two district court cases cited by the defense – *United States v. Lieng*,
4 2012 WL 1569810 (E.D. Cal. April 30, 2012) and *United States v. Reliant*, 2007 WL 640839 (N.D. Cal.
5 February 27, 2007) – impose any greater obligation on the government than Rule 16. In fact, a brief
6 discussion of *Lieng* underscores the timely and fulsome nature of the disclosures here. In *Lieng*, the
7 government began identifying its expert witnesses to the defense less than three weeks before trial and
8 continued to provide information about the expert qualifications of those witnesses until several days
9 before the start of the trial. 2012 WL 1569810 at *1-2. Here, the United States made its expert
10 disclosure on the date it was due, five months before the trial is set to begin. In *Lieng*, the government
11 failed to provide a discrete Rule 16 summary but rather argued that it complied with Rule 16 because the
12 information to satisfy Rule 16 was discernible by looking at various pieces of discovery. *Id.* In this
13 case, the government made its disclosures in a single transmittal through a fifteen-page summary report
14 and a nine-page identification of documents.

15 **IV. CONCLUSION**

16 The Court should deny in its entirety defendants' motion to exclude or limit the testimony of Mr.
17 Dayton.

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19 DATED: October 25, 2013

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