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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. 11-573-JSW
15 Plaintiff,)	UNITED STATES' REPLY TO DEFENDANT'S
16 v.)	OPPOSITION TO MOTION TO EXCLUDE
)	DEFENSE EXPERTS COX AND LEWIS
17)	
18 WALTER LIEW; CHRISTINA LIEW;)	Date: November 14, 2013
19 USA PERFORMANCE TECHNOLOGY,)	Time: 2:00 p.m.
INC.; AND ROBERT MAEGERLE,)	
20)	
21 Defendants.)	

22 The United States submits this reply to defendant Walter Liew's arguments regarding the
23 admissibility of expert testimony from Gerald Cox and Gordon Klein.

24 **A. Cox's Testimony Should Be Excluded In Part**

25 Although irrelevant and a waste of the Court's and jury's time, the first two topics of Cox's
26 testimony – regarding defendant's QuickBook records and the connection of those records to the filed
27 tax returns – do no harm to the truth, and the government's objection to this testimony is not strenuous.

1 However, third area of testimony is unreliable and misleading. Cox proposes to testify that the
2 funds that Walter Liew directed from Mega Bank to the six Singapore companies with which he was
3 involved, were “consistent with an arrangement similar to a trust or escrow account, where the funds are
4 held temporarily and disbursed to third parties.” Def. Opp. at 3:4-5.

5 Cox does not anywhere state what this opinion is based upon and defendant does not rescue him
6 in his opposition to the government’s motion. Cox’s report is devoid of supporting references and
7 defendants do not identify any in their opposition memorandum. This is not surprising, for it would be
8 surprising to be able to reach this conclusion *without being able to reference the documents that create*
9 *these supposed trusts or escrow accounts*. Cox cannot explain what is unique about these transfers that
10 gives them the appearance of trusts or escrow transfers. Indeed, Cox cannot say whether they are trust
11 or escrow transfers – trusts and escrow accounts are different, as are trustees and escrow agents.

12 There is no evidence of trust or escrow agreements. If there were such agreements, Mega Bank
13 presumably would have them. But Mega Bank does not have any such agreements and neither do
14 defendants, as none exist.

15 Cox is not an expert on trusts or escrow accounts. He has not examined any trust or escrow
16 agreements in this case. His “expert” testimony on this subject is based entirely on the existence of
17 hypothetical agreements. It is, as such, neither reliable nor helpful to the jury and should be excluded to
18 the extent that it concerns the transfers to the Singapore entities.

19 **B. Klein’s Testimony Should Be Excluded Under Rules 702 And 403**

20 Klein’s testimony is fundamentally misleading and designed to subvert the truth.

21 1. Defendant first says that the motion to exclude Klein is premature because we don’t
22 know whether there will actually be any evidence that there was a joint venture or a trust relationship.
23 But the truth is that *there is no evidence of a joint venture or trust relationship* or defendants would have
24 directed the court’s attention to that evidence.

25 a. Defendants suggest that some evidence might be produced in reciprocal discovery. The
26 government requested reciprocal discovery on February 14, 2013. (See Attachment A).

27 None has been provided. Defendant, incredibly, presents this as basis for denying the motion
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1 to exclude Klein. He argues that “[t]here is no way at this juncture to predict reliably what
2 evidence will or will not be admitted by the time Mr. Klein testifies... The government has
3 yet to receive reciprocal discovery from the defense, which will be provided at the time of
4 exchange of exhibit and witness lists.” Def. Opp. at 8:8-17. Far from providing a basis for
5 denying the motion to exclude Klein, withholding relevant reciprocal discovery until after the
6 *Daubert* motions are briefed should be deemed a violation of defendant’s reciprocal
7 discovery obligations under Rule 16.

- 8 b. Nor did Klein cite as a basis for his opinion a single piece of evidence that a joint venture or
9 trust relationship existed. If such evidence exists in some future reciprocal discovery, it was
10 not identified as a basis for Klein’s opinions, as required by Rule 16.
- 11 c. Defendant’s contention that he is struggling to collect such evidence is worth exploring.
12 Defendant claims that the evidence he needs is all in Singapore and China and he cannot
13 obtain any help from people there – including his wife’s relatives – to obtain that evidence.
14 But to believe this, one must believe that (a) that the Liews, Performance Group, and
15 USAPTI were actually involved in partnerships, joint ventures, or trust relationships and (b)
16 they did not maintain *any records* – financial statements, accounting records, disclosure
17 statements, contracts, agreements, receipts, records, correspondence, etc. – of these vehicles
18 in the United States; that all of the records that demonstrate the existence of joint ventures or
19 trust relationships between two U.S. citizens and their two U.S. companies, on one hand, and
20 six Singapore companies to whom they funneled over \$22 million, on the other, exist entirely
21 off-shore. This is not a reasonable assumption.
- 22 d. The Court can and should hold that *as of now* there is no reliable basis for Klein’s opinion
23 testimony and that to allow him to testify would present a risk of misleading the jury that
24 vastly outweighs his probative value.

25 2. Klein wishes to testify about the tax treatment that would apply in circumstances that
26 have been invented by the defense. It is possible to close one’s eyes and imagine a flying pig, but it
27 would be absurd to allow a professor of agriculture to opine hypothetically about how high a fence
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1 would be needed to contain said pig. And so it is here. Defendant wishes the jury to imagine that he
2 entered into partnerships, joint ventures, or trust relationships of some sort with six Singapore
3 companies, but did not keep documentation of those relationships in the United States and cannot get his
4 former business partners to send him any records. He is free to do that. What he cannot do is call a
5 professor to lend credence to a fanciful theory for which there is not an iota of factual support.

6 3. Klein does not and cannot say that there was a joint venture or trust relationship. He
7 freely hypothesizes about what things might look like *if* such a thing existed, but *whether* such a thing
8 exists is beyond his ability to say.

9 4. Klein also cannot say what these hypothetical partnerships and joint ventures did to earn
10 the money in question. He does not explain how Singapore companies that are not mentioned in the
11 contracts with the Chinese customers or in the letters of credit or in the wire transfers were the legal
12 recipients of the money.

13 5. Without knowing exactly what the hypothetical partnership agreements, joint venture
14 agreements, and trust documents say, Klein cannot speculate as to what the tax treatment for these
15 various vehicles should be. The reality is that there were no such agreements or documents, so such
16 knowledge is impossible. But it is not appropriate under Rule 702 to allow an expert to hypothesize the
17 terms of such agreements to reach a pre-ordained conclusion.

18 6. At least some of Klein's opinions are legal opinions. Defendant argues that Klein will
19 testify that *if* the jury finds that the money was earned by a joint venture or *if* the jury finds that
20 Performance Group and USAPTI were simply acting as trustees for Singapore companies that actually
21 earned the money, then these monies were not gross receipts to Performance Group or USAPTI. For
22 example, defendant asserts that Klein will testify that "mere physical possession or receipt of money
23 does not make it reportable income or part of 'gross receipts,' nor does money transferred by an agent,
24 nominee or other representative party; nor does money that a joint venturer merely distributes to his
25 other partners according to their share." Def. Opp. at 10:7-10. If this is accurate as a legal matter, and
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1 there is evidence of a partnership or joint venture, the Court can give a jury instruction to this effect.
2 There is no need to have a professor instruct the jury on the law.¹

3 7. Defendant argues that the government's argument regarding the reliability of Klein's
4 testimony is really just a disagreement over the way the evidence should be characterized. That is not
5 the case at all. Defendant concedes that, as of today, there is *no* evidence of a joint venture or trust
6 relationship, but says he is still trying to gather such evidence. Neither Klein in his disclosure statement
7 nor defendants in their memorandum address the substantial evidence recited in Special Agent Ho's
8 declaration regarding the Singapore companies. This is not "disagreement" over how evidence is
9 characterized, it is an absolute failure to articulate a reliable evidentiary basis for the *raison d'être* of
10 Klein's testimony: the tax treatment of money for a joint venture or trust relationship. For example,
11 defendant claims that, in his "view, there are other alternatives, such as transfers pursuant to a joint
12 venture agreement – one that includes family members as joint venturers -- that certain proceeds of the
13 relevant contracts be apportioned in a certain way." Def. Opp. at 9:14-16. While that may be
14 defendant's "view" – there is no evidence of a joint venture agreement. Klein's testimony is not helpful
15 to the jury under Rule 702 because his opinions are built on the supposition of something that there is no
16 reason to believe exists.

17 8. Klein's primary bankruptcy-related opinions fail for the same reason as his tax opinions.
18 The premise for the opinion is that the money paid by Performance Group did not actually belong to
19 Performance Group. But Klein has no way of knowing that, and defendant points to no source on which
20 Klein could rely for that conclusion. It is simply invented as a pedestal for speculation that if everything
21 were different, defendant would not have been required to declare Performance Group's receipts as an
22 asset.

23 9. Finally, Klein's opinion that filing for bankruptcy opens up one's books to a searching
24 investigation is not the proper subject of expert testimony. Defendant wishes to be able to argue that he
25 would not file for bankruptcy, if he had been committing fraud, because he would be afraid that his other

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27 ¹ The case defendant cites, *United States v. Stadtmayer*, 620 F.3d 238, 269 (3d Cir. 2010), is distinguishable.
28 In that case, the tax expert was testifying regarding the "proper tax consequences" of the transactions that
were the subject of the case. Here, Klein proposes to announce a general rule for the jury to apply *if* it finds
the existence of other facts. This is the role of the Court, not a law professor.

1 conduct would be discovered. This is just a thinly-veiled attempt to present defendant's state of mind to
2 the jury through an expert. There is no evidence that defendant knew, before filing bankruptcy, what
3 Klein purports to know about bankruptcy proceedings in general. Whether Klein, as an expert, believes
4 that bankruptcy proceedings expose a person's books and records to scrutiny has no relevance
5 whatsoever to whether defendant had that belief in 2009 when he filed for bankruptcy. Indeed, the fact
6 is that the 2009 bankruptcy proceeding *did not* result in any scrutiny of defendant's books and records
7 and did not reveal his other crimes and frauds.

8 The motion to exclude the testimony of Klein should be granted. The motion to exclude the
9 testimony of Cox should be granted to the extent that he purports to testify regarding the nature of the
10 funds that were directed by Walter Liew to Singapore.

11 DATED: November 1, 2013

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