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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. GARY SWANSON, Defendant.	No. CR 06-0692 PJH **GOVERNMENT'S RENEWED MOTION TO EXCLUDE TESTIMONY BY DEFENDANT'S EXPERTS HAUSMAN AND KRONE** Hearing: December 17, 2007 Time: 9:00 a.m. Court: Hon. Phyllis J. Hamilton Trial: Feb. 4, 2008

I. INTRODUCTION

The Government renews its motion in limine to exclude Defendant's proffered testimony by economist Jerry Hausman and computer forensic investigator Winston Krone.

After the Government's first *Daubert* motion, the Court permitted Defendant to fix the "moving target" of Hausman's intended testimony and to cure his insufficient Rule 16 disclosures. (Pretrial Order at 4, 6). How did Defendant respond? Asked to supplement his expert disclosures, Hausman cannot disclose the pricing data upon which re relied because he did not "keep the consulting reports," cannot disclose his work papers because he did not "retain any," and can only produce documents he still has "readily available." (Exs. 3, 5). Asked to specify a "permissible ground" for Hausman's expert testimony, Defendant specifies none, and instead rejects the Court's invitation for Hausman to rebut the existence of the conspiracy. (Pretrial Order at 5) As Defendant has failed to comply with the Pretrial Order and Rule 16, Hausman's expert testimony should be excluded under Fed. R. Crim. P. 16(d)(2).

Even if the Court determines that Rule 16 is satisfied, Hausman's expert testimony should be excluded under *Daubert* and Fed. R. Evid. 402, 403, 608, 702, and 703, in that his expert report and testimony from a 2003 ITC countervailing duty investigation are unsupported speculation, are not reliable, and are not relevant to the claims and defenses of this case. Finally, Hausman's proposed lay testimony on the "credibility" of Micron witnesses is classic "extrinsic evidence" that should be barred under Fed. R. Evid. 608(b) and 403.

As to Krone, the Government submits a rebuttal report establishing that his proffered opinion on which emails were "read" or "unread" is unreliable. (Ex. 6). *First*, an Outlook user may change the designations of emails in his mailbox from "read" to "unread" without leaving a record of the change. And *second*, it is possible to read an email through a preview pane without ever changing its "read/unread" status.

II. ARGUMENT

JERRY HAUSMAN

A. Defendant's Supplemental Disclosures for Hausman Fail to Satisfy the Court's Pretrial Order and Fed. R. Crim P. 16.

The Government previously moved to exclude Hausman's testimony because Defendant failed to disclose the "bases and reasons" for his proffered opinion. (Doc. 227 at 4). The Court gave Defendant a second chance, but Defendant's supplemental disclosures fall far short of what the Pretrial Order and Rule 16 require.

As this Court set forth in its Pretrial Order, the "rudiments of disclosure" require a party seeking to offer an expert witness to disclose:

> 1) Any reports and analyses that the expert has prepared, concerning the facts of the case;
>
> 2) Copies or a specification of all documents, writings and other information reviewed by the expert or on which the expert's opinions are based, in sufficient detail so that the opinion rendered can be tested against that upon which it is based;
>
> 3) The expert's work papers; and
>
> 4) The expert's curriculum vitae or professional resume.

(Pretrial Order at 6, citations omitted).

In response to the Court's Order, on November 21 Defendant sent the Government a letter with a one-page attachment titled "List of Documents." (Ex. 3). With the letter, Defendant also produced copies of "those documents which he [Hausman] still had readily available." Specifically, Defendant identified 16 documents or document categories, and produced copies of eight documents that Hausman has "readily available." (Cousins Declaration ¶ 3, Ex. 1).

The Government asked for clarification and production of the missing categories of documents. (Ex. 4). On November 28, Defendant offered seven more opinions from Hausman, but no further disclosure of the "bases and reasons" for the opinions. (Ex. 5).

Defendant's disclosures for Hausman are deficient for the following four reasons:

1. Defendant did not disclose the price data relied upon by Hausman. Defendant does not dispute that Hausman collected and relied upon "quarterly data from 1994 to 2002" in making his report. (Hausman Report, Doc. 209 at 32). But Defendant has not produced any of this data, or provided any details about the data, because Hausman did not keep the consulting reports from International Data Corporation which reflect the data. (Ex. 5 at 3). Instead, on November 28 Defendant directed the Government to the IDC website (a subscriber service), but did not identify any particular data to search. This is like telling the Court that the authority one is relying upon for a particular proposition "can be found in Westlaw." Consequently, the Government cannot cross-examine Hausman using the data and cannot test his analysis.

2. Defendant did not disclose Hausman's work papers. On November 28, Defendant informed the Government that Hausman did not "retain any work papers." (Ex. 5 at 3). Defendant has not offered any explanation as to whether work papers existed once, what happened to them, when, and why. This failure is significant because without an economist's work papers one cannot see and rebut the data, variables and assumptions that the expert relied upon in the report, and compare them to the data, variables and assumptions that the expert decided *not* to rely upon in the final report.

3. Defendant did not disclose certain documents relied upon by Hausman. Defendant's November 21 supplemental disclosure listed 16 documents or categories of documents, but produced documents in only half of the categories because the others were not "readily available." (Ex. 3 at 1). In some of the categories, the description is so vague as to be meaningless. For example, Defendant listed but did not produce or further specify "Consulting Reports from International Data Corporation" (Nov. 21 disclosure, Ex. 3, item No. 2) and "SEC filings of Micron" (No. 9). As to document No. 1, "IC Insights, Inc 2003 (The McLean Report)" Defendant did not produce a copy and the Government believes it can only be obtained through a subscription service. (Ex. 3, No. 1).

4. Hausman has not prepared a report or analysis for the facts of this case.

Defendant seeks to rely solely upon the expert report and testimony provided by Hausman in a separate ITC countervailing duty proceeding in 2003, in which Hausman opined on the effect of Korean government subsidies. Either the disclosure is insufficient, or as discussed further below, Hausman's testimony is irrelevant and its probative value is substantially outweighed by the danger of unfair prejudice and jury confusion.

B. Exclusion of Hausman's Testimony is an Appropriate Remedy Under Rule 16(d)(2) for Defendant's Failure to Comply.

In the Pretrial Order, the Court ordered that if Defendant "fails to make the above disclosures, the court will exclude Hausman's expert testimony." (Pretrial Order at 6, citing *Taylor v. Illinois*, 484 U.S. 400, 415 (1985)). The Ninth Circuit has endorsed suppression as a remedy under Rule 16(d)(2). *United States v. Burgess*, 791 F.2d 676, 681 (9th Cir. 1986). While this is a strong remedy, it is an appropriate one here, given the Government's repeated requests, the Court's unequivocal Pretrial Order, and the Defendant's willful non-compliance.

C. Hausman's Testimony Should Be Excluded Under Rules 702, 703, and 403.

This Court has previously articulated the standards under Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993), for the admissibility of expert testimony. (Pretrial Order at 9-10). Even if the Court finds that Hausman's disclosures are sufficient under Rule 16, Defendant fails to meet his burden of establishing the admissibility of Hausman's proffered testimony for four reasons.

1. Defendant has not Identified "Permissible Grounds."

In its Pretrial Order, the Court outlined "permissible grounds" for the testimony of Hausman. (Pretrial Order at 6). Specifically, the Court noted that "economic evidence may . . . be offered by the defense in order to rebut the existence of the alleged conspiracy itself or tend to negate the fact that [the alleged conspiracy] occurred." (Pretrial Order at 5, citing ABA Section of Antitrust Law, Crim. Antitrust Lit. Handbook (2d ed. 2006), at 309, and

Continental Baking Co. v. United States, 281 F.2d 137 (6th Cir. 1960)). "[E]conomic evidence introduced by the defense in a per se case must be directed at showing the absence of a conspiracy." ABA Antitrust Handbook at 309.

Yet Defendant has not proffered expert testimony by Hausman that rebuts the existence of the conspiracy, as the Court invited. Precisely to the contrary, Defendant has repeatedly stated that Hausman "will *not contest* the existence of a conspiracy." (Nov. 28 letter, Ex. 5 at 2, emphasis in original[1]). According to Defendant, "Professor Hausman has no knowledge one way or the other as to whether an illegal agreement actually existed." *Id.*

In other words, what Defendant is proposing here for Hausman is much closer to the collateral evidence excluded by the Supreme Court in a per se price fixing case, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), than to the evidence rebutting the existence of a conspiracy permitted by the Sixth Circuit in *Continental Baking Co. v. United States*, 281 F.2d 137 (6th Cir. 1960). In *Socony-Vacuum*, the Court considered evidence "aimed at establishing and evaluating other contributory causes for the price rise and market stability during the indictment period." 310 U.S. at 229. The Court concluded, "That might have confused rather than enlightened the jury." *Id.* at 230. Similarly here, Hausman's testimony from the ITC countervailing duty case in 2003 on "The Effect of Korean Government Subsidies to Hynix on the U.S. DRAM Industry" will confuse, rather than enlighten the jury, because it will not rebut the existence of the alleged conspiracy.

In sum, while this Court has found that the Defendant *may* use economic evidence to rebut the existence of the conspiracy, Defendant has not properly disclosed expert testimony that fits this permissible use.

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[1] "The defense expert witness [Hausman] will not contest the existence of a conspiracy, and the Government should not be permitted to shoehorn the plea and amnesty agreements through the defense's expert witness." (Defendant's Brief, Doc. 223 at 7).

2. Hausman's Testimony is Unsupported Speculation.

In applying Fed. R. Evid. 702, the Court is required to determine that Hausman's conclusions "were not mere subjective beliefs or unsupported speculation." *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 502 (9th Cir. 1994), citing *Daubert*. Where, as here, the expert has not retained his work papers and underlying data, the Court cannot make the finding required by Rule 702 and exclusion is proper. *See id.* (experts excluded where they did not explain the "reasoning and methods underlying their conclusions").

3. Hausman's Testimony is Not Reliable.

At the outset, Hausman admits that at the time of his ITC analysis he did not consider that Micron had engaged in and reported price-fixing conduct violative of the Sherman Act. (Hausman Report ¶ 2, Doc. 209). He has not considered the guilty pleas by four DRAM manufacturers and fifteen DRAM employees. He has not talked with any of the employees of Hynix who fixed prices with their competitors. And he has not talked with the Defendant to see if he conspired to fix prices too. Furthermore, the economic data that Hausman relied on in his 2003 ITC report does not appear to be the same data underlying the charge in this case. For his report, Hausman "used the worldwide average selling price (ASP), measured on a dollars per megabit basis" from 1994 to 2002. (Hausman Report at Appendix p. 1, Doc. 209). Here, the Indictment charges a conspiracy affecting sales to six OEM customers in the United States.

4. Hausman's Testimony is not Relevant.

Hausman's proffered testimony is not relevant under Rule 401. Here, Hausman's 2003 report was on "*The Effect of Korean Government Subsidies to Hynix on the U.S. DRAM Industry.*" (Hausman Report at p. 18, Doc. 209). Korean government subsidies are not at issue in this case. (*See* Pretrial Order at 2-3). And given that Hausman's testimony is not relevant, its probative value is substantially outweighed by risk of unfair prejudice, jury confusion, and undue consumption of time. Fed. R. Evid. 403.

D. Hausman's "Lay Witness" Testimony Also Should Be Excluded Under Fed. R. Evid. 608(b) and 403.

Defendant now proposes that Hausman will provide percipient lay testimony "about the concealment by Mr. Sadler and Micron of their role in and knowledge of the price-fixing conspiracy alleged against Mr. Swanson, bearing on the Micron witnesses' credibility and bias." (Nov. 28 letter, Ex. 5 at 1).

The proffered lay testimony by Hausman should be excluded as inadmissible "extrinsic evidence" under Fed. R. Evid. 608(b), and as confusing and cumulative under Fed. R. Evid. 403.[2] Under Rule 608(b), Defendant may attack Sadler's credibility directly, but specific instances of conduct "for the purpose of attacking or supporting the witness' character for truthfulness . . . may not be proved by extrinsic evidence." Fed. R. Evid. 608(b); *Brown v. Gutierrez*, 2006 WL 3065574, *3 (N.D. Cal. Oct. 27, 2006) (excluding extrinsic evidence of witness's past use of force and conflicting statements to investigators); *see United States v. Chu*, 5 F.3d 1244, 1249 (9th Cir. 1993) (affirming witness exclusion, where defense had a full opportunity to cross-examine the witness who it sought to impeach). Consequently, this Court should exclude Hausman as a lay witness, as well as excluding him as an expert witness.

WINSTON KRONE

The Government opposes the admission of any evidence from Winston Krone on the following grounds articulated here and in a rebuttal report by Adam Bendell of Strategic Discovery, attached as Ex. 6: Krone's proffered testimony is inherently unreliable, the data he relied on is incomplete and also from outside the conspiracy period, and Krone purports to testify on subjects not contained in his report based on additional undisclosed "investigation and research." (Krone ¶ 4, Doc. 210).

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[2] Additionally, as the Court has already noted, "much of the above proffered non-expert testimony is actually hearsay." (Pretrial Order at 4).

A. Background

On October 26, 2007, Defendant declared his intention to call Krone as an expert witness on electronic discovery as it relates to Swanson's business emails. (Doc. 210). Specifically, Krone intends to testify on the read/unread status of some 23,557 emails dating from June 29, 2001 through July 1, 2003 he asserts were in Swanson's mailbox at the time backup tapes were made. Krone will testify that approximately forty-five percent of the emails examined were unopened. Krone intends to opine on the read/unread status of emails he examined that range in date from June 2001 through July 2003. No explanation is given as to why Krone seeks to opine on the read/unread status of emails received after the government's investigation became overt and the conspiracy period closed on June 15, 2002.

Because Defendant's Rule 16 Summary gave no indication of any opinion Krone had formed as to the read/unread status of particular emails, the Government asked Defendant to "identify by individual email in the Government's witness list which emails Krone will opine were read, and which unread." (Letter to Def. Counsel, Oct. 29, 2007).

On November 7, Defendant's counsel declared they had "requested Mr. Krone to consider certain of the government's exhibits about which we had some questions whether they were read by Swanson. I enclose a chart of the exhibits about which we asked Mr. Krone and his conclusion." (Ex. 2). The chart does not opine as to whether Defendant read the emails in question, but instead employs a field designated "Opened/Unopened." The chart indicates that defense counsel asked Krone about the read/unread status of just 24 emails and that of these 24 government exhibits only one had been opened.[3]

[3] The November 7 letter gives no indication as to why counsel selected these 24 exhibits from the close to 100 government email exhibits either sent or copied to Defendant. Of the emails selected by counsel, it is not clear why Krone was asked to opine on several, such as Exhibit 253, which does not have Swanson's name on its face. (Ex. 7 here).

B. Krone's Methodology is Inherently Unreliable and Misleading.

The Government has engaged its own expert, Adam Bendell of Strategic Discovery, to assess Krone's methodology and, should Krone be allowed to testify, for use as a rebuttal witness. As set forth more fully in Bendell's report, Krone's methodology cannot reliably be employed to demonstrate the percentage of emails in Defendant's mailbox that were read by Defendant, let alone whether Defendant read any particular email in his mailbox. (Ex. 6).

First, a user may change the designations of emails in his mailbox from "read" to "unread." This can be done either email-by-email or folder-by-folder.

Second, it is possible to read an email through a preview pane without ever changing its opened status.

Third, a user can change the opened/unopened status of an email by reading it after the email was archived for analysis on a backup tape.

Fourth, under certain circumstances an email server can change the read/unread status of an email without any action taken by the user, including instance in which there is a migration from one form of software to another as occurred in this case. For these reasons and others Krone cannot reliably testify as to what percentage of his emails Defendant read, let alone as to whether Defendant read a particular email.

Krone's methodology is flawed for the additional reason that more than half of the time period examined by Krone falls after the conspiracy period ended and Defendant became aware of the Government's investigation. Moreover, Krone's analysis is incomplete because his report contains (i) no particularized analysis of about three quarters of the emails on the government's initial exhibit list and (ii) no analysis whatsoever of any emails dated from April 1, 1999 through June 29, 2001, a period of more than two years while the conspiracy was ongoing and during which Defendant was sent 47 emails on the Government's exhibit list.

III. CONCLUSION

Jerry Hausman's testimony should be excluded for three reasons. *First*, Defendant's Rule 16 disclosures are still insufficient and Defendant has failed to fix the "moving target" that troubled the Court. *Second*, even if properly disclosed, Hausman's testimony is unreliable, irrelevant, and confusing to the jury. *Third*, Hausman's lay witness testimony about Mike Sadler's credibility is "extrinsic evidence" that should be excluded under Fed. R. Evid. 608(b) and 403.

As to Winston Krone, his testimony should be excluded under *Daubert* because his opinion on which emails were "read" and "unread" is inherently unreliable and its admission would confuse the jury and unfairly prejudice the Government.

The Government's rebuttal expert, Adam Bendell, will be present at the hearing on this motion, as requested by the Court. (Pretrial Order at 7).

DATED: December 3, 2007

Respectfully submitted,

/s/ Nat Cousins
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CERTIFICATE OF SERVICE

I certify under penalty of perjury that I filed this document electronically on December 3, 2007, through the Electronic Case Filing portal of the U.S. District Court, Northern District of California. Under N.D. Cal. Local Rule General Order 45, all parties appearing in this matter will receive an electronic copy of this filing.

Dated: December 3, 2007 /s/ Nat Cousins