IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
v.	:	**CRIMINAL No. 15-398-3**
WAYDE MCKELVY,	:	
Defendant	:	

DEFENDANT'S MOTION FOR RULING ON APPLICABLITY OF DISCOVERY PROVISION IN SCHEDULING ORDER

Defendant Wayde McKelvy, by his attorneys, Walter S. Batty, Jr. and William J. Murray, Jr., submits this Motion for Ruling on Applicability of Discovery Provision in Scheduling Order, and states as follows:

1. Counsel are familiar with the Court's scheduling Order, Doc. No. 160 (5/1/18), in which the Court granted McKelvy's unopposed continuance motion, setting in ¶ 1 the trial date at 9/24/18; setting in ¶ 2 the due date for motions at 7/31/18; setting in ¶ 2 the date for any necessary Starks or Daubert hearing at 8/23/18; setting in ¶ 3 the due date for proposed jury instructions and voir dire at 9/14/18 and stating in ¶ 3 the manner in which proposed instructions are to be filed; setting in ¶ 4 the due date for the government's trial memo at 9/14/18; and setting in ¶ 6 the due date for any motion for continuance of the trial as no later than 14 days before the scheduled trial date.

2. In addition, the scheduling Order also stated in ¶ 5 that, "In the event a party intends to call an expert witness at trial, the party shall deliver to the opposing party the expert's curriculum vitae and the expert report no later than twenty (20) days before trial." Accordingly, the due date of any such "expert's curriculum vitae and the expert report" is today, 9/4/18.

3. McKelvy has retained an accounting firm and an attorney as experts, specifically (a) three forensic accountants at the

Marcum firm, to examine and analyze Mantria's books and records, to advise counsel on meritorious points to make during cross-examination of government witnesses and during direct examination of defense witnesses, and to provide expert testimony in the defendant's case, as to such issues as the defendant's statute of limitations defense and his lack of criminal intent, and (b) Alan Lieberman, Esq., to advise counsel on a variety of issues on federal securities law and practice, as to meritorious points to make during cross-examination and/or rebuttal of government witnesses.

4. In retrospect, it is clear to co-counsel Walter Batty, who during the pre-trail stage has had primary responsibility on the research and writing regarding the procedural aspects of the expert witness issues, that counsel should have previously filed a motion similar to this one, out of respect for the Court and fairness to government counsel. Instead, McKelvy reasoned that the only source of any requirement of disclosures of information as to expert witnesses would be Fed.R.Crim.P.16, which, for the reasons set out below, does not mandate any such disclosure here. McKelvy interpreted ¶ 5 of the scheduling Order, Doc. No. 160 – which may have been drawn from a scheduling Order in civil cases – not as a generalized determination of necessary disclosures, in all cases, under Fed.R.Crim.P. 16, but rather as a part of a scheduling Order which set the timing for compliance with the requirements of reciprocal discovery under Rule 16.

5. As McKelvy learned this past week, the government (a) contends that Rule 16 requires the defense to furnish CVs and expert reports for its witnesses; (b) reads ¶ 5 as a "standing Order" which independently supports the government's position; and (c) states that unless the defense furnishes the CVs and reports by 9/4/18, the government will move to suppress any expert evidence and/or file a Daubert motion. McKelvy disagrees on all three points.

6. McKelvy asks the Court to interpret the scheduling Order, Doc. No. 160, at issue here, as well as the prior scheduling Orders in this case, to read that, "If a party intends to call an expert witness at trial and if that party is required to disclose information about the expert's expected testimony to the opposing party under Fed.R.Crim.P. 16, the party shall

deliver to the opposing party the expert's curriculum vitae and a summary of the expert's expected testimony no later than twenty (20) days before trial." If the Court agrees that this is the correct reading of Doc. No. 160, then McKelvy asks that the Court also rule, for the reasons set out below, that the defendant is not required by Rule 16 to provide information about the witness's expected testimony or exhibits.[1]

7. Because, as discussed below, the government never advised McKelvy that it intended to call an expert witness in its case, the defendant has not invoked Rule 16 as to obtaining any expert report from the government. As set out below, from this it is clear that Rule 16 has no applicability to McKelvy's experts.

8. At this point, counsel have determined to call one of the Marcum experts (we have not decided which one) in the defense case, but they have also determined that they do not currently intend to call Mr. Lieberman as a defense witness and that he would be called to testify on rebuttal, only if government witnesses gave unexpected answers on cross-examination.

9. The government has not made any showing of a duty on McKelvy to disclose information on experts under Rule 16. After McKelvy belatedly notified the government on August 29, 2018, that he planned to offer expert witness testimony, the parties discussed this issue via emails. In his initial email to AUSA Livermore on the substance of any disclosure requirement under Rule 16, co-counsel Batty stated that his focus was on "the pertinent parts of Rule 16 (Rule 16(b)(1)(G), Rule 16(b)(1)(C))…." Co-counsel Batty further stated that he "could not find any basis for our being required to give you notice of our intention to call expert witnesses in our case. Please let me know if I am mistaken on this."

10. In his response, AUSA Livermore first took the position that, "You are very much mistaken. Rule 16 requires you to 'describe the witness's opinions, the bases and reasons for

[1] McKelvy, in the interest of an expeditious trial, will furnish copies of the CVs of the three Marcum accountants and of Mr. Lieberman by no later than 9/7/18.

those opinions, and the witness's qualifications.'" The government also relied on the language of the scheduling Order, without making any reference to support for his implicit argument that a scheduling Order could trump the reciprocal discovery provisions of Rule 16.

11. There were additional emails between counsel. The two nubs of the disagreement between the parties in the emails were: First, McKelvy argues that the government has not even hinted as to how it meets the pre-requisites for its satisfying the "if" clause of Rule 16(b)(1)(C), which the parties agree is the starting point of the proper analysis. Second, McKelvy argues that the government has not made any reference to one or more of its witnesses as being experts and the defense has not made a request for disclosure of a summary of an expert's expected testimony, under Rule 16(b)(1)(G).

12. Rule 16(b)(1)(C) states as follows:

> (C) Expert Witnesses. The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if -
>
> (i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or
>
> (ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications[.]

Id. (emphasis added).

13. The government did not allege or show a request by McKelvy under subsection (i), pursuant to Rule 16(b)(1)(G). Their having been no attempt by the government to meet its burden of showing a request by McKelvy under subsection (i), pursuant to Rule 16(b)(1)(G) – which would have required an allegation that "the defendant [had] request[ed] disclosure under subdivision (a)(1)(G) and the government [had] complie[d]" (or notice by the defendant of an attention to raise a mental

health defense under subsection (ii)), the reciprocal discovery obligations of Rule 16(b)(1)(C) have not been triggered.[2]

14. In the last email of the exchange between counsel on 8/29/18, co-counsel Batty stated,

> We, of course, are not raising a mental condition defense under the last clause [subsection (ii)]. Under the only remaining provision which relates to your point, subsection (i), it is apparent that we did not request disclosure under subdivision (a)(1)(G), which I set out in my last e-mail – that subdivision concerns requests by a defendant for disclosure of the government's expert testimony. You have never advised us that any of your witnesses is being offered as an expert witness, and we did not make any request, under subdivision (a)(1)(G), for any information about your witnesses. The volumes of documents which you have produced were required, as you know, as a matter of course, and we treated it as such.

There was no reply to this email.

15. Today, counsel received from the government a letter setting out some of the expected testimony of three of its witnesses - Kurt Gottschall, Chris Flannery, and Joseph Piccione. The government stated that "we believe these witnesses will provide factual testimony that is not subject to F.R.E. 702." McKelvy concurs with the government's assessment. The government's letter seemingly confirms the accuracy of the defendant's position, in the above paragraph, that "You have never advised us that any of your witnesses is being offered as an expert witness, and we did not make any request, under

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[2] See 1997 Advisory Committee Notes to Rule 16: "Under rule 16(a)(1)(E) [now renumbered], as amended in 1993, the defense is entitled to disclosure of certain information about expert witnesses which the government intends to call during the trial. And if the government provides that information, it is entitled to reciprocal discovery under (b)(1)(C) [now renumbered]. This amendment is a parallel reciprocal disclosure provision which is triggered by a government request for information concerning defense expert witnesses as to the defendant's mental condition, which is provided for in an amendment to (b)(1)(C), infra.

subdivision (a)(1)(G), for any information about your witnesses."

16. The government also argued that "[the defense] requested disclosure of the information [under Rule 16(b)(1)(C)] from [the government] on numerous occasions by letter and e-mail. Therefore, you must comply with Rule 16(b)(1)(C)." In fact, McKelvy never once made any pertinent requests, in a letter, in any emails, or otherwise, under subsections (i) or (ii), which would trigger reciprocal discovery. While it is true that the government has provided a stupendous number of documents as part of its discovery obligations, it is simply not true that McKelvy made a pre-requisite request for information under either of the above-referenced subsections.

17. While the government's representation, in the exchange of emails, that it has shown consideration to the defense in its production of discovery is largely accurate – for which the defense is grateful – that is not one of the pre-requisites for reciprocal discovery under Rule 16.

18. Just because the government has turned over stupendous volumes of documents – arguably putting this case in the Enron category - that does not mean that the government has automatically qualified for reciprocal discovery provisions of Rule 16. Without doing any research on this point, McKelvy is confident that the drafters of Rule 16 selected its reciprocal discovery provisions by the discrete types of discovery involved – expert witnesses and mental health defenses – as a way to avoid otherwise apparent issues under the Fifth Amendment.

19. The government asserted that this Court's scheduling Order on discovery of expert witness reports was a valid ground, independent of Rule 16, for the government's position that disclosure is required. McKelvy has done no research on this point, but argues that a local scheduling Order cannot pre-empt the carefully crafted provisions of Rule 16.

WHEREFORE, McKelvy requests this Court to rule that he has no reciprocal discovery obligations, under Rule 16 or otherwise, to the government regarding a summary of the expected testimony and other evidence from the defendant's experts.

Respectfully submitted,

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Dated: September 4, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have served by electronic mail a true and correct copy of the foregoing Motion for Ruling on Applicability of Discovery Provision in Scheduling Order, upon Assistant U.S. Attorneys Robert J. Livermore and Sarah Wolfe:

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/s/ Walter S. Batty, Jr.
Walter S. Batty, Jr.

Dated: September 4, 2018

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UNITED STATES OF AMERICA	:	
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Defendant	:	

ORDER

AND NOW, this day of September, 2018, upon consideration of defendant McKelvy's Motion for Ruling on Applicability of Discovery Provision in Scheduling Order, and of any response thereto, it is hereby

ORDERED

that, pursuant to Fed.R.Crim.P. 16, the defendant has no duty to disclose any aspect of the expected testimony or exhibits from the expert witnesses referred to in this Motion, notwithstanding any possible indication to the contrary in ¶ 5 of the scheduling Order, Doc. No. 160.

BY THE COURT:

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JOEL H. SLOMSKY, J.