**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**Case No. 22-20290-CR-BLOOM(s)**

**UNITED STATES OF AMERICA**

**vs.**

**ERIC DEAN SHEPPARD**

**Defendant.**
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# UNITED STATES' MOTION TO EXCLUDE DEFENDANT'S PROPOSED EXPERT WITNESS

The United States, by and through the undersigned Assistant United States Attorney, moves to exclude Defendant Eric Dean Sheppard's ("Defendant") proposed expert witness, Scott Bouchner or, at a minimum, prohibit him from testifying to opinions not specifically articulated in Defendant's Third Amended Notice of Intent to Utilize Expert Testimony (the "Disclosure"). Defendant's Disclosure is untimely under the local rules and does not provide anything close to the requisite notice of the expert's anticipated opinions and the bases for those opinions. Defendant should not be permitted to sandbag the government at trial with opinion testimony he has had more than sufficient time to disclose.

## Factual and Procedural History

Defendant is charged by superseding indictment with wire fraud and aggravated identity theft in connection with a number of fraudulent Paycheck Protection Program ("PPP") and Economic Injury Disaster Loans ("EIDL") Defendant applied for through his various companies. (ECF No. 60). The fraudulent loan applications included false information and false documents, including forged tax forms. The case is set for trial on November 27, 2023. *See* (ECF No. 129).

The government provided its expert disclosure on August 31, 2023. *See* (ECF No. 65). On September 11, 2023, the government amended its disclosure to comply with the expert disclosure rules. (ECF No. 74).

On August 29, 2023, Defendant filed its first expert disclosure. (ECF No. 63). This disclosure did not list the name of a proposed expert or his/her anticipated testimony; it merely stated that Defendant intended to rely on a financial expert. On September 5, 2023, Defendant filed a second expert disclosure, which disclosed the proposed expert's name but stated only that he "is expected to testify about the cash flows of certain of Defendant's companies, including source of funding and use of funds." (ECF No. 67). On September 15, 2023, the government filed a motion for a disclosure deadline or to exclude the defense's expert based on this insufficient disclosure. (ECF No. 86). On September 19, 2023, Defendant filed an amended expert disclosure that included slightly more information but still nothing indicating what *opinions* the expert would offer and the bases for those opinions. The government did not renew its motion to exclude Defendant's expert in advance of the calendar call held on November 14, 2023, having received assurances from the defense that they would amend their expert disclosure that week. On November 17, 2023, ten days before trial, Defendant filed a second amended expert disclosure. (ECF No. 130).

Thereafter, the government reached out to the defense to meet and confer regarding the government's draft of a motion to exclude the expert based on the continued absence of opinions set forth in the notice, and the reference to unidentified "interviews and discussions with individuals associated with the Companies." Defense counsel advised that they would further amend their expert notice, which they did by filing a third amended expert disclosure on Friday, November 24, 2023 ("the Disclosure"). (ECF 135).

In the Disclosure, Defendant indicates that the proposed expert is expected to testify regarding cash flows, and sources and uses of funds from various accounts. The Disclosure was accompanied by several summaries, primarily of bank records. This expected testimony is within the purview of a fact summary witness. The only item in the Disclosure that even resembles an "opinion" is in paragraph 3, which states that "Mr. Bouchner is expected to testify that money is fungible and that the determination of how the government funds were used requires a broad analysis of the Companies and the Accounts, rather a narrow, account-by-account compilation of information." *Id.* However, no basis is provided for this opinion (which itself is vague).

More concerning, the Disclosure states that the proposed expert's testimony will rely on "conversations with individuals associated with the Companies." The defense disclosed to the government that the proposed expert's conversations were with the defendant and his office manager/bookkeeper, J.G., but that the expert did not take any notes of those conversations. The defense did not disclose what information was provided in those "conversations," or how those conversations affected or shaped the expert's "opinions."

**Argument**

Under the amended expert disclosure rules, Defendant must provide "a *complete* statement of *all* opinions that the defendant will elicit from the witness in the defendant's case in chief," as well as "the bases and reasons for them." Fed. R. Crim. P. 16(b)(1)(C)(iii) (emphasis added). Per Local Rule 88.10(o)(3)(B), Defendant is required to provide the "more-detailed information" required Rule 16(b)(1)(C) no later than 21 days before trial for testimony that he intends to introduce during his case-in-chief and no later than 7 days before trial for testimony he intends to use to counter the government's proposed expert. Defendant has not complied with these rules.

As a preliminary matter, the Disclosure is untimely as it was made on the eve of trial, not at least 21 days ago, and based on its content, does not appear to be for the purpose of countering the government's expert.[1] Although Defendant has filed a number of prior "notices," none contained anything close to what is required under the rules and cannot be relied upon as having satisfied the timing requirement.

Further, the Disclosure does not at all provide the requisite notice about what opinions the expert will testify to at trial. First, Defendant repeatedly states that the proposed expert will testify generally "regarding" certain subjects without providing any details, let alone the actual *opinions* that the expert will supposedly render. If the expert merely intends to testify as to "cash flows" from the bank records, his testimony does not even rise to the level of "expert" testimony. However, if he intends to provide any opinions based on his analysis of financial records, such opinions are not contained in the Disclosure, aside from the statement that money is fungible. The rules require that the Disclosure contain a "complete statement of all opinions." Trial is, well, tomorrow, and there is no reason for Defendant to further delay complying with his discovery obligations. *See, e.g., United States v. Caldwell*, ___ F.4th __, 2023 WL 5274338 (11th Cir. 2023) (Court upheld trial court's exclusion of expert testimony that was disclosed six business days before the start of trial).

[1] Defense counsel has previously referenced a potential "rebuttal" expert but has not provided any disclosure of such expert. As it is now less than 7 days before trial, the government would move to exclude any attempt by Defendant to introduce the testimony of an additional, undisclosed expert to counter that of the government's proposed expert.

Most concerning, however, is the mention in the Disclosure that Defendant's proposed expert intends to rely upon "conversations" with Defendant and Defendant's close associate, his office manager, J.G. The Disclosure does not indicate what information Defendant and J.G. provided, or how the purported expert's "opinions" were impacted by those conversations. Further, it is not clear how witness interviews would at all bear on the expert testimony Defendant claims he intends to elicit (i.e., cash flows, sources, of funds, status of government loans, that money is "fungible"). To the extent Defendant seeks to use his expert as a way to back-door in hearsay testimony of witnesses he does not intend to call at trial, he should be prohibited from doing so.

The Eleventh Circuit decision in *United States v. Scrima*, 819 F.2d 996, 1002 (11th Cir. 1987), is instructive here. In that case, the Eleventh Circuit upheld the trial court's decision to exclude an expert accountant's testimony that relied, in part, on stricken hearsay testimony of another witness. The Court explained that Federal Rule of Evidence 703 "is not an open door to all inadmissible evidence disguised as expert opinion." A court may allow expert testimony based on hearsay, but "such hearsay must be the type of evidence reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject." *Id.* At this juncture, the government cannot argue that the expert witness is relying on inadmissible hearsay that is not the type of evidence upon which experts in his field reasonably rely upon because: (1) the defense has not disclosed precisely what opinions the witness will render; (2) the defense has not disclosed the content of the hearsay "conversations" on which he intends to rely; and (3) the defense has not disclosed how such "conversations" were used in forming his "opinions".

On November 26, 2023, the government informed the defense that its third amended disclosure was insufficient for the reasons discussed in prior "meet and confer" sessions. Defendant opposes this motion.

**Conclusion**

The government believes that Defendant seeks to introduce improper expert testimony that may not satisfy *Daubert* or is merely a back-channel for improper hearsay. The purpose of the amended rules is to avoid surprises and provide sufficient notice so that the parties can raise such issues in a motion *in limine*. The government is filing this motion to avoid surprises at trial and head off any effort by Defendant to elicit improper expert testimony that was not properly noticed. Given Defendant's failure to comply with the rules despite numerous opportunities and requests by the government, and given that trial is starting tomorrow, Defendant's proposed expert should be excluded. At a minimum, he should be precluded from testifying to any opinions that are not specifically articulated in the Disclosure.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that on November 26, 2023, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

*s/Aimee Jimenez*
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Assistant United States Attorney