IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

OPINION and ORDER

DIDION MILLING, INC., DERRICK CLARK, SHAWN MESNER, JAMES LENZ, JOSEPH WINCH, ANTHONY HESS, and JOEL NIEMEYER,

22-cr-55-jdp

Defendants.

The court has already indicated that it will apply newly amended Federal Rule of Criminal Procedure 16(a)(1)(G) governing expert disclosures in this case. The most basic change is that the new rule requires a complete disclosure of all opinions with the bases and reasons for them, and not just a summary of the expert's testimony. The court welcomes earlier and more complete disclosure of expert testimony, which provides a fairer opportunity to impeach or rebut the proffered evidence, and it gives the court a better opportunity to evaluate any challenges to the admissibility of expert testimony.

But the court recognizes that requiring full-blown expert reports for every witness whose testimony might somehow touch on specialized knowledge or expertise could require effort and expense that does not meaningfully advance the purposes of the new rule. So, at the court's invitation, the government has asked for relief from the report requirement for some of its witnesses. Dkt. 154. Defendants Didion Milling, Inc. and James Lenz oppose the request in part. Dkt. 159; Dkt. 161. Didion has submitted a sur-reply, Dkt. 165, which the court accepts.

The government's motion addresses four categories of experts.

Retained experts. The government accepts it obligation to provide full expert reports for its four retained experts. And the government plans to file rebuttal reports in response to defendant's experts. All this complies with new Rule 16 and the court's scheduling order, Dkt. 153.

Extensions of time for non-retained experts. The government asks for additional time—to March 3—to provide expert reports for four government witnesses: Knezovich, Kraj, Letuchy, and Hill. Some of these witnesses will provide factual testimony about inspections of Didion's facility. But they will also provide expert testimony about the "workplace safety and environmental regulatory frameworks related to the events in the indictments." Dkt. 154, at 3. The government acknowledges its obligation to provide reports for the expert portion of these witness's testimony, although the government says it will not disclose in the reports the factual testimony of Knezovich and Hill. Dkt. 154 at 3 n.3. The basis for the extension request is that these witnesses are not experienced litigation experts, but government enforcement personnel with ongoing job duties that prevent them from devoting themselves full-time to expert report writing.

Didion does not oppose the request (although it attempts to condition its consent on the government agreeing to extend its own deadlines if needed). But the court has its own concerns with the requested extension, given that motions challenging the admissibility of expert testimony are due on May 15, and there isn't room in the schedule to move that date. The government disclosed a summary of its proposed experts on December 22, 2022, so that means, with the full requested extension, the government would have ten weeks to prepare these expert reports, leaving defendants only four weeks to prepare responsive reports. A request for extension from defendants seems almost inevitable. Also inevitable is a defense

challenge to the admissibility of the testimony as legal instruction that usurps the function of the court.

I'll grant the extension but only in part. The court will extend the deadlines for the Knezovich, Kraj, Letuchy, and Hill reports to February 20, 2023. Both sides are warned that the question of expert testimony about regulatory regime applicable to the case has been on the table since at least December 22, 2022. Defendants should not wait until February 20 to start working on their response, and the court expects motions related to the regulatory experts to be made by the May 15 deadline for challenges to expert evidence.

Experts with prior reports. The government asks to be excused from providing further expert reports for two witnesses: Agnieska Rogalska, medical examiner, and Ben Harrison, Chemical Safety Board inspector. The basis for the request is that reports of the autopsies and site inspection were created contemporaneously, and the government has provided those reports to defendants. This situation is partly anticipated by Rule 16(a)(1)(G)(iv), which allows the government to cite, rather than repeat, information previously disclosed in a report of an examination or test. But the government's request is broader, asking that these witnesses be excused from any further report requirement, which means that these witnesses would not have to provide a list of publications or previous testimony, as required by Rule 16(a)(1)(G)(iii).

Defendants do not oppose the request, with the understanding that the testimony of Rogalska and Harrison will be limited to explaining the findings in the previously disclosed reports. I will grant the government's request on that same understanding.

Private sector auditors. The government expects to present the testimony of four food safety auditors (Biesterveld, Hopper, Feidt, and Breitenwischer) and one environmental auditor (Gebhart). The government contends that, for these five witnesses, no reports should

be required because the witnesses are predominantly fact witnesses and the government has already provided reports of the interviews of these witnesses to the defense. Dkt. 155-3 through 155-7.

Didion opposes a blanket exception for "private sector witnesses," and it contends that even fact witnesses must make the required Rule 16 disclosure for any testimony that draws on specialized knowledge. Dkt. 161, at 7. Lenz objects more specifically to a part of Gebhart's expected testimony, where he opines that Didion's pressure drop logs were likely falsified. Dkt. 159. Lenz argues that this particular opinion is inescapably expert testimony requiring disclosure.

The government's request regarding the private sector auditors provides a good opportunity to clarify a few points about the court's approach to testimony from hybrid witnesses who offer fact testimony that involves specialized knowledge. The basic problem is not a new one. Courts have been dealing with dual-role testimony from law enforcement officers for years, and in *United States v. Jett*, the court of appeals spelled out procedures to be used to prevent jury confusion between expert and lay testimony. 908 F.3d 252, 269–70 (7th Cir. 2018).

In principle, there's a clear distinction between expert testimony (based on specialized knowledge not available to the ordinary juror) and fact testimony (based on the sensory perceptions of the witness and understandable based on knowledge generally known to the ordinary juror). *United States v. Jones*, 739 F.3d 364, 369 (7th Cir. 2014). But in practice, the line is not always easily drawn because lots of testimony that would be considered factual requires some specialized knowledge to understand it. Consider the testimony of a railroad engineer describing his operation of the train before an accident: the engineer would report

what he saw and heard and did, but for the jury to understand those actions, the engineer would have to explain a bit about the operation of a locomotive. Despite the inclusion of some specialized knowledge, I would regard that to be factual testimony that did not have to be disclosed in an expert report.

But testimony that interprets or evaluates what the witness has perceived in light of specialized knowledge usually crosses the line into expert territory. When a law enforcement agent says that "whip" means "car" in the language of drug dealers, that's expert testimony. *Jett*, at 266. But, being practical about it, the analytical content of that testimony is minimal, and it would take little to explain it. So, although the government would be obligated to disclose the agent's drug jargon testimony before trial, a full-blown expert report might not be necessary to serve the purposes of Rule 16. Newly amended Rule 16 doesn't provide a separate procedure for such expert-ish fact testimony, but if asked, I would allow the expert disclosure for a predominately fact witness to be made in a summary, so long as the summary was adequate to allow the other side a fair opportunity to meet that evidence and, perhaps, challenge its admission. Old Rule 16 required only a summary of opinions, which in practice meant the government would provide a list of topics to be covered by the witness. But that's not enough: a fair summary would have to include all the opinions and the reasons for them. In many cases, that wouldn't take much, and a succinct summary would suffice.

The government's motion also suggests that non-retained experts should be treated differently from retained ones. The distinction is recognized under the Federal Rules of Civil Procedure. Rule 26(a)(2) requires that non-retained experts provide only "a summary of the facts and opinions to which the witness is expected to testify," whereas a full expert report is required only of experts retained or specially employed to provide expert testimony. The logic

of the rule is that retained (and specially employed) experts can be expected to devote themselves to writing expert reports, whereas non-retained experts are non-party witnesses whose inconvenience should be minimized. New Rule 16 doesn't distinguish between retained and non-retained experts. The court presumes that this is because many experts in criminal cases are government employees, and, more important, regardless of the status of the witness, the other side is entitled to the information necessary to meet any expert evidence. Still, the advisory committee notes to the 2022 amendments recognize that sometimes non-retained experts pose special problems that might warrant adjustments to the report requirements. So, the court would consider requests to allow a specific expert to provide a summary of their opinions and the reasons for them rather than a full expert report.

With these principles in mind, I turn now to the government's private sector auditors, starting with the four food safety auditors. I agree with the government that they are predominately fact witnesses, but it's also clear, based on their interview summaries, that they will offer some expert testimony. *See* Dkt. 155-3 through 155-6. Each of them was asked how they would have responded to conditions shown in photographs of the Didion plant, and they said that, had they seen those conditions, they would have reported them in their audit reports. This testimony calls upon the auditors to assess the conditions in the photograph and apply the auditing standards. This is plainly expert testimony, although there is minimal analytical content beyond the description of the auditing standards. Based on my initial review, the interview reports of the food safety auditors adequately disclose the opinions of these witnesses and the reasons for them, giving the defense enough information to meet this evidence.

Gebhart, the environmental auditor, is different. He opined in a supplemental interview that some of Didion's bag pressure readings were falsified. *See* Dkt. 155-7. This assessment is

analytically more complex than those made by the food safety auditors. But Gebhart's explanation of the reasons for his opinion is meager and not entirely clear. Defendants could mount a strong *Daubert* challenge the admissibility of Gebhart's opinion on the ground that it was not based on reliable methods.

I won't require the government to provide anything more for Gebhart or the food safety auditors; the government can rely on the interview summaries if it chooses. But if defendants challenge the admissibility of the testimony of the auditors, the government will have to defend the testimony on the basis of the information in the interview summaries. It wouldn't be fair to allow the government to provide additional reasons to support an opinion in response to *Daubert* challenge when it would be too late for defendants to develop evidence to counter the new reasons. I'll allow the government to disclose and rely on summary disclosures for the five private sector auditors, but those summaries must include a succinct statement of the witnesses' opinions and the reasons for those opinions. I'll give the government until February 20 to supplement its disclosures for any of the five auditors.

ORDER

IT IS ORDERED that:

1. Didion Milling, Inc.'s motion to file a sur-reply brief, Dkt. 165, is GRANTED.

2. The government's motion to limit the requirement to submit expert reports, Dkt. 154, is GRANTED IN PART as provided in the opinion.

3. The government may have until February 20, 2023, to serve expert reports for Knezovich, Kraj, Letuchy, and Hill and to serve any supplemental disclosure for auditors Biesterveld, Hopper, Feidt, Breitenwischer, or Gebhart.

Entered January 26, 2023.

BY THE COURT:

/s/

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JAMES D. PETERSON
District Judge