UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA v. MICHAEL L. BABICH et al., Defendants.	)	Criminal No. 16-CR-10343-ADB

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISQUALIFY DR. CHRISTOPHER GILLIGAN

On August 1, 2018, the government disclosed to Defendants the expert witnesses it may call at trial. In particular, the government disclosed five pain management experts, in addition to several other types of experts. (Ex. A. at 3 (redacted pursuant to Protective Order).) The government indicated that it "anticipates calling at least one" of the five pain management experts to testify at trial. (*Id.*) To Defendants' great surprise, Dr. Christopher Gilligan was one of the five pain management experts disclosed by the government.

Prior to being retained by the government, Dr. Gilligan repeatedly met with *defense counsel* and discussed confidential case strategy with them. Dr. Gilligan informed defense counsel that he had not discussed this case with the government and that he was open to serving as an expert for the defense. Defense counsel held privileged calls and meetings with Dr. Gilligan on March 21, 2018; March 30, 2018; April 13, 2018; and April 25, 2018. During these calls and meetings defense counsel explained to Dr. Gilligan their theory of the case, possible defenses to the charges made by the government, and the subject areas Defendants might ask Dr. Gilligan to address. Defense counsel took contemporaneous notes of each of these calls and meetings and subsequently adapted those notes into meeting summaries.

After these consultations, Defendants were preparing a formal engagement letter to Dr. Gilligan. However, on May 11, 2018, Dr. Gilligan regretfully informed defense counsel in writing that his employer would not allow him to serve as an expert witness in this case. In particular, Dr. Gilligan wrote:

> I am afraid that I just got guidance from leadership in our department that I cannot serve as an expert witness on the case. I apologize for the loss of time, etc., for your team. Unfortunately, it was very clear guidance that was not open to discussion. I would be happy to try to help you find someone who would be appropriate and could take on the role.

(Email C. Gilligan to A. Croner, May 11, 2018). On May 18, 2018, defense counsel had a final call with Dr. Gilligan, during which he suggested other experts Defendants could use.

Once the government disclosed Dr. Gilligan as a potential expert, Defendants tried to find out what happened. On August 13, Defendants disclosed the basic facts represented herein to the government, in writing, and sought certain information and assurances—including that the government would withdraw Dr. Gilligan and cease communications with him. (Ex. B.) Initially, the government told Defendants that it had "informed Dr. Gilligan that we have agreed to not communicate with him until the matter is resolved." (Ex. C.) Then, on Friday, August 17, the government sent a letter disclosing that AUSA Nathanial Yeager first spoke with Dr. Gilligan on July 27, 2018—five days before the government's expert disclosure deadline—and that Dr. Gilligan informed AUSA Yeager that he had previously "met with defense counsel about serving as an expert in the field of pain management." (Ex. D at 1.)

Despite being notified of this fact, neither AUSA Yeager nor anyone else on the prosecution team reached out to Defendants to inquire whether they had confidential conversations with Dr. Gilligan. Instead, in an apparent rush to meet its expert disclosure deadline, the government relied on the descriptions and understandings of Dr. Gilligan—who is not an

attorney—to assess the incomplete background of the conflict issue in a vacuum. As explained herein and in the *ex parte* attachments, those descriptions and understandings were not accurate. Indeed, based on the representations in the government's letter of August 17, Dr. Gilligan appears to have misrepresented: (1) the substantive, confidential nature of his communications with the defense; (2) the number and length of those communications; and (3) his desire to serve as a defense expert prior to the prohibition issued by his employer.

Based on these inaccurate descriptions and understandings, the government apparently conducted legal research and vetted the issue with the USAO's professional responsibility officer and the Justice Department's Professional Responsibility Advisory Office—all during the five-day period between its initial conversation with Dr. Gilligan and its expert disclosure deadline. (*Id.* at 2.) The government continued to communicate with Dr. Gilligan, but represents that it instructed him not to reveal the substance of his conversations with the defense. (*Id.*) Despite such instructions, the government admits that, on at least two occasions to date, Dr. Gilligan disclosed to prosecutors some substance from his prior conversations with defense counsel. (*Id.*)

Ultimately, in its letter of August 17, the government did not agree to unilaterally withdraw Dr. Gilligan. Instead, it sought more information from Defendants to assess "the discrepancy" between Dr. Gilligan's description of his interactions with the defense and those of defense counsel. (*Id.*). And it inquired whether, if it "agree[d] to withdraw Dr. Gilligan as an expert," Defendants would "assent to this office adding a new expert regarding similar subject matter"—beyond the four other pain management experts already disclosed. (*Id.* at 3.) Defendants informed the government that they were not willing to further discuss their communications with Dr. Gilligan with the government or to agree to the late disclosure of yet another pain management expert in exchange for Dr. Gilligan's withdrawal. (Ex. E.)

For these reasons, and as further explained below, Defendants respectfully ask this Court to disqualify Dr. Gilligan, to order the government to permanently cease substantive communications with him about this case, and to order any other relief necessary to ensure protection of Defendants' confidences. Defendants also oppose the government's apparent desire to replace Dr. Gilligan with a new, untimely-disclosed expert.

To aid the Court's consideration of the matter, Defendants have submitted, *ex parte*, a declaration describing the substance of their discussions with Dr. Gilligan, as well as correspondence and summaries documenting the same.

ARGUMENT

Courts within the First Circuit are "compel[ed]" to "disqualif[y]" an expert who has switched sides if "(1) it was objectively reasonable for the moving party to believe that it had a confidential relationship with the expert; and (2) . . . the moving party disclosed confidential information to the expert that is relevant to the current litigation." *Lacroix v. BIC Corp.*, 339 F. Supp. 2d 196, 199–200 (D. Mass. 2004); *see also Koch Ref. Co. v. Jennifer L. Boudreau M/V*, 85 F.3d 1178, 1181-83 (5th Cir. 1996) (applying same test to affirm district court's disqualification of an expert witness); *Wang Labs., Inc. v. Toshiba Corp.*, 762 F. Supp. 1246, 1248-49 (E.D. Va. 1991) (applying same test to disqualify an expert witness). In determining whether a party had a confidential relationship with an expert witness, "the emphasis 'is not on whether the expert was retained per se but whether there was a relationship that would permit the litigant reasonably to expect that any communications would be maintained in confidence.'" *Lacroix*, 339 F. Supp. 2d at 200 (quoting *Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087, 1093 (N.D. Cal. 2004)). Factors supporting such an expectation include "that work product was discussed" and "the number of meetings between the expert and the attorneys." *Id.*

Here, those factors weigh overwhelmingly in favor of disqualification. The information that defense counsel shared with Dr. Gilligan was "particular[ly] significan[t]" and "can be readily identified as either attorney work product or within the scope of the attorney-client privilege." *Id.* at 200-01 (quoting *Hewlett–Packard*, 330 F.Supp.2d at 1094). Indeed, defense counsel's conversations with Dr. Gilligan encompassed Defendants' "strategy in the litigation, the kinds of experts [Defendants] expected to retain, [Defendants'] view of the strengths and weaknesses of each side, [and] the role of . . . the [Defendants'] experts to be hired and anticipated defenses." *Id.* at 201 (quoting *Hewlett–Packard*, 330 F.Supp.2d at 1094); *see also Stencel v. Fairchild Corp.*, 174 F. Supp. 2d 1080, 1084-85 (C.D. Cal. 2001) (where attorney had shared his "opinions and impressions" of a case with an expert, he had shared "work product" constituting "confidential information"); *Liger v. New Orleans Hornets NBA Ltd. P'ship*, No. CIV.A. 05-1969, 2008 WL 2435840, at *2 (E.D. La. June 12, 2008) (disqualifying expert where moving counsel had "discussed strategy and mental impressions" with expert).

The number of discussions that defense counsel held with Dr. Gilligan and the attorney time devoted to his anticipated retention also weigh strongly in favor of disqualifying him. As noted above, defense counsel met or spoke with him on five separate occasions spanning three months. Four defense counsel participated in those discussions, including the two partners leading the representation of Dr. John Kapoor. Disqualification is eminently proper in such circumstances.

Defendants cannot fully assess, based on the government's letter, the specific confidential communications that Dr. Gilligan disclosed to the government. For purposes of Dr. Gilligan's disqualification, however, it does not matter what he has shared with the government. Even if Dr. Gilligan had not disclosed any confidential communications, by his continued retention the government "would still obtain the benefit of this confidential information because it would shape

or effect, either consciously or unconsciously," his testimony. *Conforti & Eisele, Inc. v. Div. of Bldg. & Const., Dep't of Treasury*, 405 A.2d 487, 492 (N.J. Sup. Ct. Law Div. 1979).

Were that common sense principle of protecting confidences not sufficient to disqualify Dr. Gilligan, "fundamental fairness" also requires the government to terminate its relationship with him. *Lacroix*, 339 F. Supp. 2d at 200. Indeed, as to "the public's interest in determining whether a motion for disqualification should be granted[,] . . . [a]ny doubt is to be resolved in favor of disqualification." *Marvin Lumber & Cedar Co. v. Norton Co.*, 113 F.R.D. 588, 592 (D. Minn. 1986); *see also Trustees of Boston Univ. v. Everlight Elecs. Co.*, No. CIV. 12-11935-PBS, 2014 WL 345241, at *2 (D. Mass. Jan. 17, 2014) ("Judges may 'consider the court's interest in preventing conflicts of interest and maintaining judicial integrity.'"). The approach of favoring disqualification is especially important where, as here, the government could have, but "did nothing to discover the real relationship" between Dr. Gilligan and Defendants in advance of the disclosure deadline. *Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575, 584 (D.N.J. 1994) (disqualifying side-switching expert and counsel responsible for retaining side-switching expert where counsel's conduct was thus "wanting"). The government should have known that additional diligence was required in this instance, that it "cannot rely on [a] non-attorney expert[] with pecuniary incentives to discharge an attorney's ethical duties," and that "[a] 'simple phone call' to [defense] counsel would have obviated the need for the instant motion." *Kane v. Chobani, Inc.*, No. 12-CV-02425-LHK, 2013 WL 3991107, at *14-15 (N.D. Cal. Aug. 2, 2013) (disqualifying expert where counsel's behavior could likewise be "justly criticized").

Critically, and contrary to a representation in the government's letter, Dr. Gilligan did not "decide[] against serving" as a defense expert. (Ex. D. at 1-2). Rather, according to Dr. Gilligan's representations to both the defense and the government, his employer caused him to decline the

engagement despite his personal interest to the contrary. Allowing an expert who was prevented by his employer from serving on behalf of a criminal defendant to switch sides and testify on behalf of the government would undermine "public confidence in the fairness and integrity of the judicial system." *Lacroix*, 339 F. Supp. 2d at 200 (quoting *Koch Ref. Co.*, 85 F.3d at 1181.). Whether Dr. Gilligan's employer expressly forbade him from testifying on behalf of the defense—*see* Ex. D. at 2 (government's letter representing that, "after conferring with his supervisor, [Dr. Gilligan] could not serve as an expert for the defense")—or couched the prohibition in more general terms—*see* Gilligan Email to Croner ("I just got guidance from leadership in our department that I cannot serve as an expert witness on the case")—it is clear the prohibition only applies to the defense. The government risked precisely this kind of unfair prejudice through a press release equating Defendants to a "cartel," calling them "no better than street-level drug dealers," and accusing them of exacerbating "the opioid crisis."[1] Such press tactics have the effect of ostracizing Defendants and chilling potential defense witnesses. Under these circumstances, it would be fundamentally unfair to allow the government to scoop up an expert who was barred by his employer from testifying for the defense.

Moreover, fundamental fairness may require disqualification even where—unlike here—the expert was not exposed to confidential information. *Veazey v. Hubbard*, No. CIV. 08-00293 HG-LEK, 2008 WL 5188847, at *7-8 (D. Haw. Dec. 11, 2008) (disqualifying expert where failure to do so "would undermine public confidence in the judicial process and be unfair," notwithstanding that the moving party had not "disclose[d] confidential information" to the expert); *Simons v. Freeport Mem'l Hosp.*, No. 06 C 50134, 2008 WL 5111157, at *5 (N.D. Ill.

[1] Press Release, United States Attorney's Office, District of Massachusetts, Founder and Owner of Pharmaceutical Company Insys Arrested and Charged with Racketeering (Oct. 26, 2017), https://www.justice.gov/usao-ma/pr/founder-and-owner-pharmaceutical-company-insys-arrested-and-charged-racketeering.

Dec. 4, 2008) ("[E]ven if this court were to conclude that defendants have not met their burden to show confidential information was exchanged, the third overriding factor requires that [the expert] be disqualified. Courts have an obligation to protect and preserve the integrity of the judicial proceedings before them."); *Am. Empire Surplus Lines Ins. Co. v. Care Centers, Inc.*, 484 F. Supp. 2d 855, 857 (N.D. Ill. 2007) (disqualifying expert whose retention "appear[ed] unfair and unseemly," notwithstanding that the expert had not received any confidential information when previously retained for the benefit of the moving party). When combined with the confidential communications described in the *ex parte* exhibits accompanying this motion, considerations of fundamental fairness here plainly call for Dr. Gilligan's disqualification.

Balancing the "fundamental fairness" question, the government has "access to"—and indeed has already disclosed—four other pain management experts, and therefore will not be prejudiced by Dr. Gilligan's disqualification. *Lacroix*, 339 F. Supp. 2d at 200 (quoting *Koch Ref. Co.*, 85 F.3d at 1182.). By the government's own admission, two of these experts are expected to testify "consistent with the opinion of Dr. Gilligan." (Ex. A. at 3.) Thus, the government has already disclosed experts who overlap with Dr. Gilligan's intended testimony. More fundamentally, prosecutors should not be excused for waiting until the last moment to conduct their expert search, or for failing to timely consult with Defendants about the conflict issue. The government has had plenty of time to identify and consult with experts, having investigated this case for over five years and presented two indictments to the grand jury alleging life-altering charges against defendants that have caused irreparable damage to their reputations and livelihood. In this instance, were a *fifth* pain management expert necessary to the government's case, the government had ample means and opportunity to resolve the question of Dr. Gilligan's retention

with defense counsel by a "simple phone call" or by "proactively appl[ying] to the Court for relief" *before* the expert disclosure deadline. *Kane*, 2013 WL 3991107, at *14-15.

Finally, the government "should not be able to . . . garner [Defendants'] possible strategies" from a side-switching expert. *See Simons*, 2008 WL 5111157, at *6. To prevent such an outcome, the Court should order the government to have no further communication with Dr. Gilligan about this case, other than to notify him of his disqualification. In addition, the Court should order any other relief it deems necessary to ensure that "fundamental fairness" is maintained or restored. *See Lacroix*, 339 F. Supp. 2d at 200.

CONCLUSION

For the foregoing reasons, the Defendants respectfully request that this Court grant their motion. A proposed order is submitted herewith.

Dated: August 20, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document will be served on all counsel of record through the ECF system.

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