

WENDY J. OLSON, IDAHO STATE BAR NO. 7634  
UNITED STATES ATTORNEY  
TRACI J. WHELAN, IDAHO BAR NO. 4416  
D. MARC HAWS, IDAHO BAR NO. 2483  
ASSISTANTS UNITED STATES ATTORNEY  
DISTRICT OF IDAHO  
6450 N. MINERAL DRIVE, SUITE 210  
COEUR D'ALENE, ID 83815  
BOISE, IDAHO 83712  
TELEPHONE: (208) 667-6568  
FACSIMILE: (208)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,	)	Cr. No. 10-148-N-BLW
	)	
Plaintiff,	)	<b>UNITED STATES'S MOTION TO</b>
	)	<b>STRIKE, OR IN THE</b>
vs.	)	<b>ALTERNATIVE MOTION TO</b>
	)	<b>COMPEL</b>
EDGAR J. STEELE,	)	
	)	
Defendant.	)	
	)	
	)	
	)	

---

The United States of America, by and through Wendy J. Olson, United States Attorney for the District of Idaho, and the undersigned Assistants United States Attorney, pursuant to FED. R. CRIM P. 16(b)(1)(B) and (c), FED. R. Evid. 702 and 703 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), move this Court to strike the notice provided by the defendant on March 17, 2011, of the proposed testimony of Dennis Walsh, or in the alternative to compel the defendant to provide the facts or data which Mr. Walsh reasonably relied upon in

coming to the conclusion contained in his March 16, 2011 report.<sup>1</sup> The United States incorporates its previous arguments which were made in its Motion to Strike Testimony of Dr. George Papcun filed on March 4, 2011. Dkt 151.

FED. R. CRIM. P. 16 (b) outlines the defendant's obligation to disclose certain information. This obligation is triggered by the defendant's request under Rule 16(a)(1) which provides that the defense must permit the government, upon request, to inspect and to copy or photograph the results or reports of any scientific test or experiment if the defendant intends to use it or intends to call the witness who prepared the report and the report relates to the witness's testimony. The United States has provided the defendant with approximately 2,500 pages of discovery as well as photographs and audio recordings. The United States now seeks the reports of any scientific tests or experiments conducted by Mr. Walsh, a disclosed defense witness.

On March 9, 2011, the United States provided defense counsel and defense witness, Dr. George Papcun, with copies of the June 9 and 10, 2010, recordings in their native format. It appears Mr. Walsh utilized two recordings which were in a wave format in conducting his analysis. If the analysis of the recordings was in wave format, there is a concern about the scientific reliability. This issue was addressed in Court on March 7, 2011, and in Docket 151. If the wave format was used, the same issues which were raised in the United States Motion to Strike the Testimony of Dr. George Papcun are at issue here. Dkt 151. The United States requests the defendant inform the United States as to what format Mr. Walsh utilized; the native or the wave file.

---

<sup>1</sup> Both of the reports which Mr. Walsh sent, one to Wesley Hoyt and Robert McAllister are dated March 16, 2010, but it appears it is a typographical error and was authored March 16, 2011.

In Mr. Walsh's March 16, 2011, report he issues two opinions regarding the recordings. While the opinions are clearly stated, the basis for his opinions are difficult to understand. Mr. Walsh indicates he annotated audio clips from relevant transcripts; however, those audio clips are not supplied and he does not explain how he used the clips and transcripts. The United States cannot prepare to explore Mr. Walsh's findings without having copies of the raw materials he reviewed. For example, there is a transcript or typed copy of a speech the defendant gave at Jekyll Island in 2009. This paper has what appears to be Dennis Walsh's initials in the margin, however, there is no indication in the report what this copy of the speech was used for. It is important to know whether Mr. Walsh utilized the actual recording. Therefore, the United States asks this Court to compel defendant to provide a copy of all raw materials which were used by Mr. Walsh in drawing his conclusion.

As the Supreme Court has advised, only relevant and reliable expert opinion testimony is admissible. *Daubert* and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). Shortly after the Supreme Court's decisions in *Daubert* and *Kumho Tire Co.*, FED. R. EVID. Rule 702 was amended to admit expert testimony where "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." "Federal judges ruling on the admissibility of expert scientific testimony face a far more complex and daunting task in a post- *Daubert* world than before. . . . we must determine nothing less than whether the experts' testimony reflects 'scientific knowledge,' whether their findings are 'derived by the scientific method,' and whether their work product amounts to 'good science.' *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995). A district court has authority to

regulate disclosure of documents which experts witnesses will rely on during its case-in-chief.

*United States v. W.R. Grace*, 493 F. 3d 1119, 1131 (9th Cir. 2007).

Where, as here, the defense's case involves the proposed testimony of technical or scientific evidence, complete expert disclosures are essential to adequate trial preparation. The United States is unable to determine from Mr. Walsh's report whether his opinion is based upon sufficient facts or data, whether his opinion is a result of reliable principles and methods and whether he applied the principles and methods reliably to the facts of the case. The United States seeks to be fully prepared both for trial, and the motions hearing date on April 20, 2011, and it is for the reasons stated the United States asks this Court to compel defendant to provide a copy of all raw materials, including but not limited to any audio clips, which were used by Mr. Walsh in drawing his conclusion. The United States further asks the defense to inform the United States whether Mr. Walsh utilized the wave or native formats.

DATED this 25th day of March 2011.

WENDY J. OLSON  
United States Attorney

/s/ \_\_\_\_\_  
D. Marc Haws  
Traci J. Whelan  
Assistants U.S. Attorney

CERTIFICATE OF SERVICE

I CERTIFY that the foregoing was electronically filed March 25, 2011, with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following person(s):

Gary Amendola  
Robert T. McAllister

And, I hereby certify that the following listed non-registered CM/ECF participants were served by:

- ☐ United States Mail, postage prepaid
- ☐ Hand-delivery
- ☐ Facsimile transmission (fax)

---

Priscilla A. Foster  
Paralegal Specialist