

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
NORTHERN DIVISION  
COVINGTON**

**CRIMINAL ACTION NO. 11-70-DCR**

**UNITED STATES OF AMERICA**

**PLAINTIFF**

**V.                    RESPONSE TO DEFENDANT’S MOTION CONCERNING  
THE TRIAL TESTIMONY OF SPECIAL AGENT PALMISANO**

**RONALD WEINLAND**

**DEFENDANT**

\* \* \* \* \*

Comes now the United States of America, by and through counsel, and responds to the Defendant’s Motion in Limine Concerning the Trial Testimony of Special Agent Susan Palmisano. *See* R. 31: Defendant’s Motion in Limine Concerning the Trial Testimony of Special Agent Palmisano. The Court should deny the Defendant’s Motion because it is without merit, and because the remedy the Defendant’s seeks directly contradicts this Circuit’s well-established “least severe sanction necessary” doctrine. *See United States v. Ganier*, 468 F.3d 920, 927 (6th Cir. 2006) (quoting *United States v. Maples*, 60 F.3d 244, 247-48 (6th Cir. 1995)).

In his Motion, the Defendant seeks to preclude Case Agent Susan Palmisano from testifying as a summary witness. *See* R. 31: Defendant’s Motion in Limine, at p. 1. The Defendant moves to exclude Special Agent Palmisano’s testimony on the grounds that she seeks to “present expert opinion testimony” as a “lay or summary witness” and that she seeks to base her summary testimony on “inadmissible hearsay.” *See id.* at pp. 2, 8.

In support of his position that Special Agent Palmisano's proposed testimony is properly classified as expert rather than lay or summary testimony, the Defendant largely relies on the Sixth Circuit's opinions in *United States v. White*, 492 F.3d 380 (6th Cir. 2007) and *United States v. Ganier*, 468 F.3d 920 (6th Cir. 2006). See R. 31: Defendant's Motion in Limine, at pp. 3-5. The Defendant cites these cases, among others, as standing for the proposition that lay opinion testimony is improper when it encompasses opinions that call for specialized skill or expertise, and concludes that Special Agent Palmisano's analysis of credit card statements and bank records calls for specialized skill or expertise and therefore is admissible only as expert testimony. See *id.* at p. 4.

The Defendant's reliance on *White* and *Ganier* is misguided, as both cases are easily distinguished from the case at bar. In *White*, a case arising "from a complex scheme to defraud Medicare," the Sixth Circuit held that the district court improperly allowed several Medicare auditors to testify as lay witnesses regarding their understanding of "Medicare regulations" relating to reimbursement procedures, "reporting requirements applicable to related-party transactions," and various technical terms. See *White*, 492 F.3d at 388, 400. The Circuit explained that "a lay opinion must be the product of reasoning processes familiar to the average person in everyday life," and that the Medicare auditors' testimony was improper because it was derived from specialized knowledge about Medicare reimbursement procedures that the average lay person would not understand. See *id.* at 402-04 (citations omitted).

In *Ganier*, the Sixth Circuit held that an IRS forensic computer specialist's testimony regarding forensic software searches he conducted to recover search terms and deleted files applied "knowledge and familiarity with computers and the particular forensic software well beyond that of the average layperson," and thus, fell outside the proper bounds of Federal Rule of Evidence 701. *See Ganier*, 468 F.3d at 925-26. In reaching its decision, the Circuit analogized the computer forensic searches to "specialized medical tests run by physicians," and concluded that such testimony constituted "scientific, technical, or other specialized knowledge" within the scope of Federal Rule of Evidence 702. *Id.* at 926.

Here, Special Agent Palmisano is expected to testify as a fact witness regarding the summary analyses she prepared as part of her investigation. Special Agent Palmisano created these analyses by reviewing the credit card and bank statements of the Defendant and the Church of God ("COG"). From this review, Special Agent Palmisano created a spreadsheet listing, among other information, expenditures, the dates they were made, and the third-parties who received payment. She then interviewed numerous COG employees, members, and elders who have firsthand knowledge of the church's operations and expenses. Special Agent Palmisano asked COG employees and elders to review the spreadsheet and differentiate those expenses they knew to be COG expenses from those they knew to be non-COG expenses. Finally, Special Agent Palmisano reviewed the spreadsheet with the Defendant's daughter, Audra Little, who maintains the books and records for COG. Based on the knowledge she has developed in her role with

COG, Little informed Special Agent Palmisano which expenses were incurred on behalf of the church.

Special Agent Palmisano's factual review of financial documents and analyses based on interviewing key church employees and elders does not involve specialized knowledge and is a far cry from the expert testimony of Medicaid auditors and IRS computer forensic specialists in *White* and *Ganier*. Rather, her anticipated testimony is more readily analogous to that of a DEA agent who provides summary testimony describing his factual analysis of the actions of participants in a drug conspiracy, derived from reviewing bank and phone records and interviewing witnesses with firsthand knowledge of the criminal enterprise.

The Sixth Circuit repeatedly has held that lay witnesses may provide opinion testimony in cases like this one. *See, e.g., United States v. Valdez-Reyes*, 165 F. App'x 387, 391-93 (6th Cir. 2006) (not selected for publication) (government agents allowed to opine as lay witnesses that defendant acted as lookout during drug transaction, pursuant to FED. R. EVID. 701); *United States v. Fawaz*, 881 F.2d 259, 266-67 (6th Cir. 1989) (accountant in tax case allowed to opine as fact witness as to whether information on defendant's tax returns was likely false based on his knowledge of defendant's financial condition, pursuant to FED. R. EVID. 701); *United States v. Graham*, 856 F.2d 756, 759 (6th Cir. 1988) (government agent may testify as a fact witness about his understanding of another person's statement, pursuant to FED. R. EVID. 701). One panel in this Circuit has instructed district courts, that, in applying Rule 701, "the modern trend among courts

‘favors the admission of opinion testimony, provided it is well founded on personal knowledge and susceptible to specific cross-examination.’” *United States v. Booth*, No. 90-5748, 1991 WL 119530, \*4 (6th Cir. July 3, 1991) (unpublished) (quoting *Teen-Ed, Inc. v. Kimball Intern., Inc.*, 620 F.2d 399, 403 (3d Cir. 1980)).

Moreover, Special Agent Palmisano’s analyses and anticipated testimony are based entirely on factual observations well within the knowledge of the average layperson, as required by Rule 701. Special Agent Palmisano built her analyses through interviews conducted with laypeople, including church employees and elders, who clearly understood COG’s business. Special Agent Palmisano, and the church elders and employees she interviewed, will offer the same factual observations that every small business owner makes on a daily basis when he decides whether an expense is associated with operating his business or whether it is of a personal nature.

The Defendant also seeks to exclude Special Agent Palmisano’s testimony because he claims it “is based at least in part on inadmissible hearsay.” *See* R. 31: Defendant’s Motion in Limine, at p. 8. In support of this position, the Defendant states, “According to the United States, ‘SA Palmisano interviewed members of the church, including Mr. Darlymple and Ms. Little to identify church expenditures made by the Weinlands and reimbursed by the [c]hurch.’” *See id.* Because the United States intends to call Darlymple and Little to testify prior to offering Special Agent Palmisano’s summary testimony, Special Agent Palmisano’s testimony is not hearsay pursuant to Federal Rule of Evidence 801. Accordingly, the Defendant’s argument is rendered moot.

Special Agent Palmisano may testify regarding out of court statements made by other COG members who will not be testifying at trial. With respect to this narrow area of testimony, Special Agent Palmisano is expected to testify about how her interviews with these church members impacted her investigation. Thus, this testimony is not hearsay under Rule 801 because it is not being offered “to prove the truth of the matter asserted.” *See* FED. R. EVID. 801.

Finally, even if this Court were to agree with the positions the Defendant advances in his Motion, this Court should follow the Sixth Circuit’s well-established “least severe sanction necessary” doctrine. *See Ganier*, 468 F.3d at 927 (quotations omitted). This longstanding rule stands for the proposition that, when faced with an issue like the Federal Rule of Criminal Procedure 16 violation the Defendant alleges here, “District courts should embrace the ‘least severe sanction necessary’ doctrine, and hold that suppression of relevant evidence as a remedial device should be limited to circumstances in which it is necessary to serve remedial objectives.” *Id.* (quoting *Maples*, 60 F.3d at 247-48). The *Maples* Court made clear that in deciding whether suppression of evidence is an appropriate remedy, a district court must consider:

- (1) the reasons for the government’s delay in producing the materials, including whether it acted intentionally or in bad faith;
- (2) the degree of prejudice, if any, to the defendant;
- and (3) whether the prejudice to the defendant can be cured with a less severe course of action, such as granting a continuance or a recess.

*Maples*, 60 F.3d at 244-47.

In this case, the United States has a good faith basis to believe that Special Agent Palmisano can testify as a lay or summary witness. The United States produced a summary of Special Agent Palmisano's qualifications and proposed testimony in writing to the Defendant on May 7, 2012. The Defendant will have had nearly one month to prepare for Special Agent Palmisano's testimony prior to trial. Accordingly, any prejudice the Defendant may have suffered is minor and is not properly remedied through suppression.

**WHEREFORE**, based on the foregoing, the United States respectfully submits the Court should deny the Defendant's Motion in Limine Concerning the Trial Testimony of Special Agent Palmisano.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2012 the foregoing was electronically filed through the CM/ECF system, which will send notice of the filing to counsel of record.

s/ Christopher L. Nason  
Assistant United States Attorney