

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Case No. 09-cr-00266-CMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. DAVID A. BANKS,
2. DEMETRIUS K. HARPER,
a/k/a Ken Harper,
3. GARY L. WALKER,
4. CLINTON A. STEWART,
a/k/a C. Alfred Stewart,
5. DAVID A. ZIRPOLO,
and,
6. KENDRICK BARNES,

Defendants.

GOVERNMENT'S MOTION *IN LIMINE*

The United States of America (the government) moves this Court for an Order excluding from the trial of this matter references to alleged facts or events which occurred after February, 2005, the end of the conduct charged in the Indictment. Evidence related to such alleged facts or events is irrelevant and has a high potential to confuse, mislead, and unduly prejudice the jury in this matter.

A fundamental premise of the Federal Rules of Evidence is that only relevant evidence is admissible. Fed. R. Evid. 401, 402. To be admissible, evidence must, "at minimum, advance the inquiry of some consequential fact." *United States v. Oldbear*, 568 F.3d 814, 821 (10th Cir. 2009). Rule 403 of the Federal Rules of Evidence

provides that even relevant evidence should be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” Fed. R. Evid. 403. These circumstances can arise when evidence suggests that a jury should render its findings on an improper basis, such as emotion, or when “circumstantial evidence would tend to sidetrack the jury into consideration of factual disputes only tangentially related to the facts at issue in the current case.” *United States v. Jordan*, 485 F.3d 1214, 1218 (10th Cir. 2007) (quoting *United States v. McVeigh*, 153 F.3d 1166, 1191 (10th Cir. 1998)).

The conspiracy and the scheme to defraud charged in the Indictment was in place from in or around October, 2002, through in or around February, 2005. (Ind. ¶ 4 [# 1].) The Defendants, however, in various pre-trial motions and in their proffer of expert testimony, have seemingly ignored the time period charged in the indictment and have instead made repeated references to the alleged status and capabilities of the software after February, 2005, and up to the present. See, e.g., Defs’ Joint Expert Disclosure, Attach B. [# 298-2], at 3-4 (referring to testing of 2010 version of Defendants’ software and the alleged existence of a current market for that software); The Defendants have also made allegations of interference by the government with their attempts to sell their software after February, 2005. See, e.g., Defs’ Joint Mot. Dismiss [# 190], at 8-9. The preliminary exhibit list provided by the Defendants suggests that they intend to make reference to some of these same alleged events during the trial; their exhibit list includes videos from the website they have established in relation to the prosecution, (Defs’ Proposed Ex. cccccc, “Just Cause videos”), as well as documents related to their attempts to sell their software to the city of

Philadelphia in 2008 and 2009, (Defs' Proposed Ex. zzzzzzz, "IRP's interactions with the City of Philadelphia").

The Defendants have not once explained how allegations of conduct occurring after February, 2005, or the status of their software after that time, even if true, advance the inquiry of a fact of consequence for any of the charges in the indictment. The conspiracy and scheme to defraud charged in the Indictment involved misrepresentations by the Defendants about "current or impending contracts with one or more large government agencies," (Ind. ¶ 6), and "the number of hours worked by employees, the times of day during which employees worked, and/or the nature of the work performed by employees," (*Id.* ¶ 7). The conspiracy and scheme alleged also involved fraudulent acts by the Defendants, including "making fraudulent representations about slow government payment cycles, taking steps to prevent staffing companies from learning that employees paid through payrolling transactions had previously worked for LT, IRP, and/or DKH through other staffing companies, refusing to meet with staffing companies representatives to discuss payments of monies owed to staffing companies, and refusing entry at the business premises at 7350 Campus Drive to staffing company representatives," (*Id.* ¶ 8). All of these representations and actions necessarily relate to the time period charged in the Indictment, and the government does not intend to offer evidence in its case-in-chief from after February, 2005, pursuant to Rule 404(b) of the Federal Rules of Evidence or otherwise. Neither the capabilities of the Defendants' software after February, 2005, the status of their efforts to market their software, nor any other conduct after that time have any bearing on the allegations in the Indictment and are therefore not consequential facts. *Oldbear*, 568 F.3d at 821.

Even if the Defendants could establish how evidence relating to events or information after February, 2005, was relevant, any such evidence should be excluded based on Rule 403. Evidence of the capabilities and the status of the Defendants' software after February, 2005, will only sidetrack the jury on issues which, at best, are tangentially related to the facts at issue. *Jordan*, 485 F.3d at 1218.

The Defendants have also repeatedly suggested that they are struggling entrepreneurs whose continued efforts achieve their business dreams have been frustrated by the existence of the criminal investigation and the Indictment. If these suggestions are repeated at trial, they would constitute improper invitations to the jury to decide the case based on sympathy, not based on the evidence, and any evidence supporting such suggestions should be excluded on that basis. *Id.*

THEREFORE, the government respectfully requests that the Court exclude evidence at trial related to conduct, events, or the status or capabilities of the Defendants' software after February, 2005, because such evidence is irrelevant and has a high potential to confuse, mislead, and unduly prejudice the jury in this matter.

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Respectfully submitted this 25th day of August, 2011,

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on this 25th day of August, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. I also mailed hard copies to:

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