IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA,	)	
	)	
vs.	)	CRIMINAL NO.
	)	3:08CR014
ROBERT L. MOULTRIE, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO EXCLUDE TESTIMONY OF PUTATIVE EXPERTS WILLIAM PURDY & RALPH GERMANY

Defendants Facility Holding Corp., d/b/a The Facility Group, Facility Management Group, Inc., Facility Construction Management Inc. and Facility Design Group Inc.; and Defendant Nixon E. Cawood ("Defendants") file this Memorandum of Law in Support of their Motion to Exclude Testimony of Putative Experts William Purdy and Ralph Germany, and state as follows:

I. INTRODUCTION

William Purdy and Ralph Germany propose to offer "expert" opinions on contract interpretation, Defendants' subjective intent, and facts outside their personal knowledge. Expert testimony on each of these topics, however, is inadmissible. Moreover, even if expert testimony on such matters were permitted, it could not be delivered by Messrs. Purdy or Germany because they lack pertinent qualifications and because their proposed opinions are neither based on sufficient facts nor the product of a reliable methodology. Accordingly, for any one of numerous

reasons, Defendants respectfully request that Messrs. Purdy and Germany's putative expert testimony be excluded in its entirety.[1]

II. PROPOSED TESTIMONY

By letter dated April 9, 2008, the United States identified attorneys William Purdy and Ralph Germany as expert witnesses in this matter. Two months later, the United States provided a "summary of the expected expert testimony" of Messrs. Purdy and Germany that consists of a scant five paragraphs related to these proposed witnesses. (6/4/2008 Summary, attached hereto as Ex. A at 3-4.) Defendants are somewhat handicapped in their efforts to apprise the Court of the expected testimony of Messrs. Purdy and Germany due to the vague and conclusory summaries provided by the government. Nevertheless, as best as can be culled from the available information, Messrs. Purdy and Germany are expected to testify on a wide array of topics, including "general construction law principles." (*Id.*) Ultimately, Messrs. Purdy and Germany purport to surmise that certain alleged acts of Defendants constitute "fraud." (*Id.*)

Specifically, among the testimony to be offered by Messrs. Purdy and Germany is their claim that under "construction contract principles," "the contracts at hand" did not include the alleged use of a "multiplier." They will also testify that "based on their experience with construction and contractual matters, certain costs billed to the project, such as printers, accounting, data processing, etc, were general overhead expenses and should not have been billed to the project." Finally, without any explanation whatsoever, Messrs. Purdy and Germany propose to testify that "the schedule of billable hours generated by The Facility Group for the accounting department was fictitious and could not possibly represent actual hours worked."

[1] At the very least, Defendants request a *Daubert* hearing to determine the admissibility of the putative "expert" opinions that Messrs. Germany and Purdy propose to offer.

III. THE PROPOSED TESTIMONY VIOLATES RULE 704(B)

Rule 704(b) provides that an expert cannot state "an opinion *or inference* as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged . . . ." Fed.R.Evid. 704(b) (emphasis added). Yet, that is exactly what Messrs. Purdy and Germany intend to do. By stating that Defendants "fraudulently represented" different billings as costs or that Defendants made "fraudulent representations" in order to obtain additional profit, Messrs. Purdy and Germany are finding for the jury that Defendants possessed the requisite state of mind necessary for a conviction under Count 2. Under Fifth Circuit law, such testimony is in violation of Rule 704(b) and its inclusion in this trial would be error. *United States v. Ibarra*, 493 F.3d 526, 532 (5th Cir. 2007) (reversing conviction where DEA agent testified that courier knew he was transporting narcotics). Any such proposed testimony by Messrs. Purdy and Germany – or any other expert in this case – is inadmissible.

IV. ARGUMENT

Federal Rule of Evidence 702 authorizes expert testimony *only if* the expert is "qualified as an expert by knowledge, skill, experience, training, or education" and if "(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." Fed. R. Evid. 702. "The burden of establishing qualification, reliability, and helpfulness rests on the proponent of the expert opinion[.]" *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004). An expert's qualifications, and the reliability and helpfulness of an expert's proposed testimony, must be established by a preponderance of the evidence. *United States v. Fullwood*, 342 F.3d 409, 412 (5th Cir. 2003) ("The proponent has the burden of establishing, by

a preponderance of the evidence, that the pertinent admissibility requirements are met.); *see also United States v. Ojeikere*, 03 Cr. 581 (JGK), 2005 U.S. Dist. LEXIS 2727, at *8, 12-13 (S.D.N.Y. Feb. 18, 2005) (recognizing that, with respect to proposed expert witness testimony, "the Government[] must establish admissibility under Rule 104(a) by a preponderance of the evidence" and excluding government expert where the alleged fraud scheme at issue could be understood by a lay juror without the expert's assistance).

The trial judge has a gatekeeping responsibility to "ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141, 3 L. Ed. 2d 238, 119 S. Ct. 1167 (1999). "The objective of [*Daubert*'s gatekeeping] requirement … is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 152. This Court's gatekeeping responsibility "is an important role designed to extract evidence tainted by farce or fiction." *Guillory v. Domtay Indus.,* 95 F.3d 1320, 1331 (5th Cir. 1996). "The importance of *Daubert's* gatekeeping requirement cannot be overstated." *Frazier*, 387 F.3d at 1260; *accord Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 355 (5th Cir. 2007). Because the United States has not, and cannot, establish that Messrs. Purdy and Germany are qualified and that their proposed "expert" testimony is both reliable and helpful, *Daubert's* gatekeeping mandate requires exclusion of their testimony.

A. Messrs. Purdy and Germany Are Not Qualified As Experts In The Fields Of Their Proposed Expert Testimony.

"To fulfill its role as a gatekeeper, the trial court must determine whether the expert has the requisite qualifications to offer the opinions he gives." *Bowers v. Norfolk Southern Corp.*, No. 5:06-cv-98 (CAR), 2007 U.S. Dist. LEXIS 54536, at *15 (M.D. Ga. July 26, 2007). The

expert's qualifications must concern the particular subject matter of the proposed expert testimony. *Wilson v. Woods*, 163 F.3d 935, 937 (5th Cir. 1999).[2] Here, Messrs. Purdy and Germany propose to testify about billing practices in the Design/Build industry, but they are neither accountants, cost analysts, nor process/design builders or engineers.[3] (6/4/2008 Summary, attached hereto as Ex. A.) Although they would like to offer their "expert" evaluation of The Facility Group's ("TFG's") cost allocation practices and billing methods under the Project Management Agreement ("PMA"), neither attorney has any relevant expertise. (*Id.*) And while Messrs. Purdy and Germany purportedly evaluated Defendants' insurance costs, and propose to argue that these costs were "inflated" and by what amount, they have no discernible expertise in the insurance industry and, thus, are not qualified to offer this testimony. (*Id.*) That Messrs. Purdy and Germany are attorneys who represent general contractors in the construction industry simply does not authorize their proposed expert testimony in unrelated fields.[4] *See, e.g.*, *Brevard Emergency Servs., P.A. v. Emcare, Inc.*, No. 6:04-cv-1892-Orl-28JGG, 2006 U.S. Dist.

[2] *See also Chemipal Ltd. v. Slim-Fast Nutritional Foods Int'l, Inc.*, 350 F. Supp. 2d 582, 588 (D. Del. 2004) ("A party can only elicit expert testimony from someone who has specialized knowledge or training sufficient to qualify him or her to opine on an issue within their field of expertise, and the expert's opinion must be confined to that field.")

[3] The Design/Build industry, as that term is used herein and as it applies to The Facility Group, is far more complex than the construction industry. Specifically, unlike a construction company, a Design/Build firm coordinates the integrated operation of architects, engineers, process planners, program managers, accountants, and administrators (among others), all of whom are on the Design/Build firm's permanent staff. Defendants have alternatively used the terms "Design/Build" and "process design" to refer to the more sophisticated capabilities of a firm such as The Facility Group.

[4] As discussed in greater detail below, Messrs. Purdy and Germany's proposed testimony on contract interpretation is inadmissible for the additional reason that expert testimony on questions of law is prohibited. *See, e.g.*, *Spartan Corp. v. United States*, 77 Fed. Cl. 1, 9 (Fed. Cl. 2007) ("Expert testimony is an improper mechanism for offering legal arguments to the Court."). Thus, even if Messrs. Purdy and Germany were qualified as experts on contract interpretation, and even if their legal opinions were reliable (neither of which is true), their opinions about how the PMA should be interpreted would still be inadmissible. *See, e.g.*, *Hanspard v. Otis Elevator Co.*, No. 05-1292, 2007 U.S. Dist. LEXIS 2694, at *6-7 (W.D. La. Jan. 12, 2007) (excluding expert's proposed testimony about "his understanding of [defendant's] contractual obligations" and holding that "even if [expert] was qualified …, an opinion as to the scope of [defendant's] contractual duties constitutes a legal conclusion" that may not be delivered by an expert); *cf. Berry v. City of Detroit*, 25 F. 3d 1342, 1352 (6th Cir. 1994) (warning against the dangers of qualifying experts in generic fields of purported expertise and recognizing the absence of foundation for "discipline testimony": "It is like declaring an attorney an expert in the 'law.'").

LEXIS 58479, at *16 (M.D. Fla. Aug. 21, 2006) (excluding putative expert testimony where expert's proponent failed to establish that expert, who was an attorney, "is qualified to render an expert opinion regarding such facts as insurance rates [or] how the price of insurance products are determined").[5]Because Messrs. Purdy and Germany are not qualified to offer their proposed expert testimony, their testimony must be excluded.[6]

B. Messrs. Purdy and Germany's "Methodology" Lacks Any Indicia Of Reliability.

In exercising its gatekeeping function, the trial court evaluates reliability by considering factors such as: (i) whether the expert's method is objective and can be tested; (ii) whether the method or theory has been published or subject to peer review; (iii) the known or potential rate of error; (iv) the existence and maintenance of standards and controls; and (v) whether the technique or method is generally accepted in the relevant scientific community. *Daubert v. Merrill-Dow Pharms., Inc.*, 509 U.S. 579, 593-94 (1993). "These factors are illustrative, not exhaustive" and although "[e]xactly how reliability is evaluated may vary from case to case, … what remains constant is the requirement that the trial judge evaluate the reliability of the testimony before allowing its admission at trial." *Frazier*, 387 F.3d at 1261-62. Here, there is no indication that Messrs. Purdy and Germany employed a tested, or testable, methodology. Nor is

---

[5] *See also Frazier*, 387 F.3d at 1260 (making "the unremarkable observation that an expert may be qualified by experience does not mean that experience, standing alone, is a sufficient foundation rendering reliable any conceivable opinion the expert may express"); *Bowers*, 2007 U.S. Dist. LEXIS 54536, at *17 (recognizing that "the salient inquiry is whether the expert has the requisite skill, experience, training, and education to offer the testimony he intends to introduce"); *Birge v. Dollar Gen. Corp.*, No. 04-2531 B/P, 2006 U.S. Dist. LEXIS 97195, at *11 (W.D. Tenn. Sept. 29, 2006) (recognizing that, "[a]lthough a witness may be qualified as an expert in one area of expertise, the expert may be precluded from offering opinions beyond that area of expertise").

[6] *See, e.g.*, *In re Apollo Group Inc. Sec. Litig.*, 527 F. Supp. 2d 957, 960 (D. Ariz. 2007) ("The question of admissibility only arises if it is first established that the individuals whose testimony is being proffered are experts in a particular . . . field." (internal citation omitted)); *Gentieu v. Tony Stone Images/Chicago, Inc.*, 214 F. Supp. 2d 849, 851 (N.D. Ill. 2002) ("But the fact that someone possesses experience on the basis of which it may be legitimate to derive certain opinions is only the beginning, rather than the end, of the *Kumho* inquiry: What instead controls the admissibility or nonadmissibility of [expert's] opinion evidence depends on whether his claimed expertise qualifies him to opine on the specific matters that he seeks to address.").

there any evidence that their methodology (assuming they even applied one) has been published or subject to peer review. No objective standards or controls appear to have guided their purported "analysis," and there is nothing to so much as suggest that their methodology has been generally accepted. Because Messrs. Purdy and Germany's "methodology" lacks any indicia of reliability, *Daubert's* gatekeeping mandate requires exclusion of their proposed testimony. *See Am. Gen. Life & Accident Ins. Co. v. Ward*, 530 F. Supp. 2d 1306, 1314 (N.D. Ga. 2008) (excluding opinions of purported forensic document examiner where there was no "identifiable 'methodology' to which the Court can apply the *Daubert* factors").

1. Messrs. Purdy and Germany's Say-So Is Inadmissible.

Experts who supply nothing but bottom line conclusions do not pass *Daubert* muster. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (explaining that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert"); *Lippe v. Bairnco Corp.*, 288 B.R. 678, 686 (S.D.N.Y. 2003) (excluding expert and holding that "an expert basing his opinion solely on experience 'must do more than aver conclusorily that his experience led to his opinion,' and he must do more than 'propound a particular interpretation of [a party's] conduct"). Nevertheless, Messrs. Purdy and Germany propose to offer bare, bottom-line conclusions. For instance, while Messrs. Germany and Purdy seek to tell the jury "that The Facility Group overbilled the Mississippi Beef Processors project for at least .7 of the 2.0 of the alleged multiplier used by The Facility Group to recoup labor costs" (6/4/2008 Summary, Ex. A), no bases or reasons for such testimony exist. Likewise, Messrs. Germany and Purdy propose to testify that "the schedule of billable hours generated by The Facility Group for the accounting department was fictitious and could not possibly represent actual hours worked," but these bald conclusions are without any reasoning or support. (*Id.*) And while these attorneys intend to

argue "that The Facility Group grossly inflated their costs of insurance and to the specific dollar amounts," the sole support for this conclusion is the conclusion itself. (*Id.*) Because Messrs. Purdy and Germany propose to offer nothing but conclusory bottom line opinions, their proposed testimony is inadmissible.[7]

2. *Messrs. Purdy And Germany's Failure to Consider Alternative Cost Allocation Standards And Billing Practices Is Unreliable.*

Proposed expert testimony does not meet *Daubert's* reliability standard if the expert reaches a particular conclusion without accounting for obvious alternative explanations. *See, e.g.*, Fed. R. Evid. 702 advisory committee's note (identifying "[w]hether the expert has adequately accounted for obvious alternative explanations" as one of the "factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact"); *Bickerstaff v. Vassar College*, 196 F.3d 435, 439-40 (2d Cir. 1999) (affirming exclusion of expert whose "analysis failed to account for the major factors that [defendant] considers" in performing its own evaluation and holding that "[w]ithout attempting to control for such other causes, [expert's] assumption … is untenable"). Here, Messrs. Purdy and Germany seek to offer their "expert" arguments that particular billing standards and cost allocation practices are followed in the Design/Build industry, but their proposed arguments fail to account for numerous, alternative billing standards and cost allocation practices available to process

[7] *See, e.g.*, *Ankuda v. R.N. Fish & Son, Inc.*, No. 07-95-P-H, 2008 U.S. Dist. LEXIS 14567, at *10-11 (D. Me. Feb. 26, 2008) (excluding expert whose opinion was based on "experience and common sense" where the expert "construct[ed] no bridge from his experience to his conclusions" and instead "offer[ed] only his say-so"); *Superior Aluminum Alloys, LLC v. United States Fire Ins. Co.*, No. 1:05-CV-207, 2007 U.S. Dist. LEXIS 46691, at *22 (N.D. Ind. June 25, 2007) (excluding putative industry expert who "provides no explanatory link between the facts that he reviewed and his opinions, making them inadmissible 'bottom lines'"); *Advanced Med. Optics, Inc. v. Alcon Labs., Inc.*, No. 03-1095-KAJ, 2005 U.S. Dist. LEXIS 580, at *25 (D. Del. Apr. 7, 2005) (excluding expert opinions to the extent that expert could not identify any support for his opinion other than the opinion itself); *Lake Michigan Contractors, Inc. v. Manitowoc Co.*, 225 F. Supp. 2d 791, 803 (W.D. Mich. 2002) (excluding putative expert who, "other than citing his extensive experience…, [could not] explain the methodological basis for his conclusions": "It was my professional judgment -- and I've done it so long, I just have it in my head"); *Lantec, Inc. v. Novell, Inc.*, No. 2:95-CV-97-ST, 2001 U.S. Dist. LEXIS 24816, at *27-28 (D. Utah Feb. 13, 2001) (excluding expert who, "in effect, supplied a bottom line, but no more" and finding that expert was "clearly a hired gun and any semblance of objectivity is lacking")

Design/Build firms. (*See, e.g.*, Declaration of Charles M. Phillips, attached as exhibit to Robert L. Moultrie's Daubert Motion and Motion in Limine Together with Supporting Memorandum, which Defendants incorporate by reference.) Because Messrs. Purdy and Germany's purported "expert" arguments do not account for alternative billing practices and cost allocation methods, their proposed testimony lacks the reliability that *Daubert* requires. *See, e.g.*, *Freeland v. AT&T Corp.*, 238 F.R.D. 130 (S.D.N.Y. 2006) (rejecting putative expert testimony where expert's "analysis does not permit attribution of the differences between his predicted … price and actual … price to any cause other than defendants' [allegedly wrongful conduct]"). Accordingly, their proposed expert testimony must be excluded.

3. Messrs. Purdy and Germany's Lack Of Objectivity Is Disqualifying.

"One very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) (on remand); *see also Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1166 (10th Cir. 2000) (affirming exclusion of expert whose "opinions were formed specifically for [the subject] litigation"); *Naugle v. Allstate Ins. Co.*, No. 99-107, 2001 U.S. Dist. LEXIS 22684, at *9-10 (E.D. Ky. July 16, 2001) (excluding biased expert and recognizing that "the district court is charged with the 'gatekeeping' function of assessing whether a proposed expert's testimony is the result of the intellectual rigor of a professional or whether the proposed expert is simply a hired gun"). Here, Messrs. Purdy and Germany represent Carothers Construction, Inc., the general contractor on the Mississippi Beef Processors project at issue in this case. Far from serving as detached, objective experts, Messrs. Purdy and Germany have threatened civil litigation against Defendants on behalf of Carothers Construction to recover a purported claim in

connection with the Mississippi Beef Project. (10/24/2004 Letter, attached hereto as Ex. B; 11/11/2004 Letter, attached hereto as Ex. C; 11/16/2004 Letter, attached hereto as Ex. D.) Thus, Messrs. Purdy and Germany have professional and ethical obligations to present contract interpretation and other legal arguments to further their client's position in a civil matter closely connected to the present litigation. In fact, during the government's investigation in this case, while representing Carothers Construction, Messrs. Purdy and Germany went so far as to meet with the government to advocate their interpretation of the PMA and to persuade the government to initiate charges against TFG based on that interpretation. Having apparently so convinced the government, they now propose to do likewise with the jury. Their status as such zealous advocates undermines the reliability of their putative expert testimony. Because Messrs. Purdy and Germany's proposed opinions lack the reliability that *Daubert* demands, their testimony must be excluded at trial. *See, e.g.*, *Naugle*, 2001 U.S. Dist. LEXIS 22684, at *11 (holding that expert's "testimony should be excluded because the evidence strongly suggests that [expert] is biased against [defendant] and is functioning in this particular case as a hired gun rather than an objective, unbiased [expert]"); *see also Johnson v. Manitowoc Boom Trucks, Inc.*, 406 F. Supp. 2d 852, 865-66 (M.D. Tenn. 2005) (excluding expert whose "opinions were conceived, executed, and invented solely in the context of this litigation" where expert "appears in many ways to be the quintessential expert for hire").

C. Messrs. Purdy and Germany's Proposed Testimony May Not Be Delivered By Experts.

1. Messrs. Purdy and Germany May Not Offer Legal Opinion Testimony.

"The principle that legal opinion evidence concerning the law is inadmissible is 'so well-established that it is often deemed a basic premise or assumption of evidence law -- a kind of axiomatic principle.'" *Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037,

1042 (D. Ariz. 2005) (internal citation omitted); *see also Brevard Emergency Servs.*, 2006 U.S. Dist. LEXIS 58479, at *16 ("An attorney may not testify regarding the meaning of a law or the legal implications of conduct."). Nonetheless, Messrs. Purdy and Germany's proposed testimony consists of legal opinions and arguments about contract interpretation. It is axiomatic, however, that Messrs. Purdy and Germany's legal opinion testimony is inadmissible.

At the core of the government's case is the legal interpretation of the PMA, including the definition of "costs" as used therein. (*See, e.g.*, Indictment, Count I ¶ 33; Count II ¶¶ 4, 9, 12-14, 19, 22-23.) The government proposes to offer Messrs. Purdy and Germany to provide "expert" legal opinions about how the PMA should be construed. (6/4/2008 Summary, Ex. A.) Specifically, Messrs. Purdy and Germany propose to sway the jury, and displace this Court, by offering their "expert" opinion that, "based on the contractual language" of the PMA, "[t]he Facility Group was only permitted to bill for actual costs incurred." (*Id.*) If permitted, Messrs. Purdy and Germany will argue that, as a matter of law, the government's position about what "costs" Defendants were permitted to bill under the PMA is the correct -- and only -- interpretation. (*Id.*) But the right to interpret contracts, including the PMA, is vested exclusively in this Court.[8] Because Messrs. Purdy and Germany can neither commandeer this Court's role nor otherwise supplant this Court's function, their proposed "expert" testimony must be excluded.[9]

---

[8] *See, e.g.*, *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997) ("Each courtroom comes equipped with a 'legal expert,' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards."); *see also Berry*, 25 F.3d at 1353 (holding that district court erred in admitting expert testimony couched in legal terminology and reaffirming the rule that "[i]t is the responsibility of the court, not testifying witnesses, to define legal terms"); *United States v. Eyerman*, 660 F. Supp. 775, 781 (S.D.N.Y. 1987) (rejecting putative expert declarations "on how, as a matter of law, the Court should decide the pending motion" and noting that submission of such sworn legal conclusions "seems rather presumptuous, considering that the affiants have not been asked by the Court for their views on the law and how the motion should be decided").

[9] *See, e.g.*, *United States v. Brodie*, 858 F.2d 492, 496 (9th Cir. 1988) (holding that attorney's expert testimony was correctly excluded and noting that "[t]he law would be in a curious state if jurors received their

2. Messrs. Purdy and Germany May Not Argue The Government's Case.

"An expert's role is to assist the trier of fact by providing information and explanations; the expert's role is not to be an advocate." *Lippe*, 288 B.R. at 687. "[T]he trial judge ought to insist that a proffered expert bring to the jury more than the lawyers can offer in argument." *In re Air Crash Disaster at New Orleans*, 795 F.2d 1230, 1233 (5th Cir. 1986). Yet, here, in addition to instructing this Court and the jury on the law, Messrs. Purdy and Germany seek permission to serve as advocates to argue about how the law should be applied to the facts as they assume them to be. (6/4/2008 Summary, Ex. A.) Specifically, they propose to testify that, "based on their observations of the records," the Facility Group's billing "could not possibly represent actual hours worked." (*Id.*) They intend to communicate their "expert" conclusion that TFG overbilled the Mississippi Beef Processors. (*Id.*) If permitted, they will argue that TFG "billed items from a budget that they produced at the beginning of the project rather than billing actual costs" and that "the schedule of billable hours generated by the Facility Group for the accounting department was fictitious." (*Id.*) They even propose to "testify that the above constitutes fraud" and that TFG "grossly inflated their costs of insurance," which "also constitutes fraud." (*Id.*) In essence, Messrs. Purdy and Germany, mindful of the interest of their client, Carothers Construction, Inc., seek to dispose of the case by directing their "expert" verdict in the government's favor. But their proposed testimony is essentially an "expert" closing argument that they are not authorized to deliver. *See, e.g.*, *Yancey v. Carson*, No. 3:04-CV-556, 3:04-CV-610, 2007 U.S. Dist. LEXIS 78289, at *13 (E.D. Tenn. Oct. 19, 2007) (excluding expert whose "report is more in the nature of an attorney's closing argument than expert

---

instructions on the law from an expert witness as well as from the trial judge"); *Brevard Emergency Servs.*, 2006 U.S. Dist. LEXIS 58479, at *16 (excluding proposed expert opinions by lawyer-expert because "[i]t is the judge, not an expert, who 'decides the content of the law, and instructs members of the jury on the applicability of the law to the facts of the case'" (internal citation omitted)); *In re Initial Pub. Offering Sec. Litig.*, 174 F. Supp. 2d 61, 64 (S.D.N.Y. 2001) (excluding expert legal opinion testimony and recognizing that "every circuit has explicitly held that experts may not invade the court's province by testifying on issues of law")

testimony"); *Brevard Emergency Servs.*, 2006 U.S. Dist. LEXIS 58479, at *17 (excluding proposed expert testimony where expert-attorney proposed to offer legal opinions and opinions in fields in which he lacked expertise where "the primary purpose of his testimony appears to be to bolster counsel's closing arguments"); *In re Rezulin*, 309 F. Supp. 2d at 544 (S.D.N.Y. 2004) (excluding expert because "[i]t is for counsel to make the arguments about the significance of [an entity's] conduct or omissions"); *accord Frazier*, 387 F.3d at 1262-63. Because Messrs. Purdy and Germany cannot vouch for the correctness of the government's position any more than they can serve as advocates on the government's behalf, their proposed "expert" testimony must be excluded.[10]

3. *Messrs. Purdy and Germany Cannot Testify That Defendants Committed Fraud.*

Expert testimony as to what someone else believed, felt, or intended is inadmissible because it is not based on any expertise beyond the ken of an ordinary juror. *Depaepe v. Gen. Motors Corp.*, 141 F.3d 715, 720 (7th Cir. 1998); *see also In re Rezulin Prods. Liab. Litig.*, 309

---

[10] *See, e.g.*, *Feinberg v. Katz*, 01 Civ. 2739 (CSH), 2007 U.S. Dist. LEXIS 94967, at *26 (S.D.N.Y. Dec. 21, 2007) (excluding proposed expert testimony that "manages in a single sentence to both usurp the trial judge's function of instructing the jury on the law and tell the jury what result to reach on the facts: a breathtaking *tour de force* of inadmissibility"); *Yancey*, 2007 U.S. Dist. LEXIS 78289, at *13 (excluding expert whose "opinions are merely based on the use of selective testimony, drawing biased inferences therefrom, and then making what are essentially legal arguments as to the conclusions that should be drawn"); *Fisher v. Ciba Specialty Chems. Corp.*, 238 F.R.D. 273, 281 (S.D. Ala. 2006) (excluding expert where "the Court does not perceive [expert's] report as an 'expert report' at all, but rather as written advocacy by a lawyer, akin to a supplemental brief on the facts presented by another attorney representing plaintiffs"); *Bouchard v. New York Archdiocese*, 04 Civ. 9978 (CSH), 2006 U.S. Dist. LEXIS 77032, at *23 (S.D.N.Y. Oct. 24, 2006) (excluding expert and holding that, even if he were qualified, his "opinion about what [a third party] knew, did not know, or should have known" was inadmissible because it "impermissibly usurps the power of the jury to find the facts"); *DiBella v. Hopkins*, 01 Civ. 11779 (DC), 2002 U.S. Dist. LEXIS 20856, at *10 (S.D.N.Y. Oct. 30, 2002), (excluding expert whose "report is largely a factual one that seeks to advocate for [a party's] version of the facts"); *Lantec, Inc.*, 2001 U.S. Dist. LEXIS 24816, at *23 (excluding expert whose proposed testimony "was simply his adoption (or vouching for), plaintiff's view of the case" and reasoning that the jury "is in a better position to evaluate the testimony on these matters and to decide which view of the parties to accept"); *Tokio Marine & Fire Ins. Co. v. Grove Mfg. Co.*, 762 F. Supp. 1016, 1017 (D.P.R. 1991) (excluding putative expert and recognizing that "[a]n expert witness should never become solely one party's expert advocate nor a 'gun for hire'" and should instead "be an advocate of the truth with testimony to help the jury and the Court reach the ultimate truth"); *see also Specht v. Jensen*, 853 F.2d 805, 808 (10th Cir. 1988) (holding that it was an abuse of discretion and prejudicial error to admit expert who "was improperly allowed to instruct the jury on how it should decide the case"); *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 508-11 (2d Cir. 1977) (holding that the trial court erred in permitting lawyer to offer opinions concerning federal securities law and the application of that law to the facts)

F. Supp. 2d 531, 546 (S.D.N.Y. 2004) (excluding expert opinions "on the intent, motives or states of minds of corporations" because they "have no basis in any relevant body of knowledge or expertise"); *Robinson v. Hartzell Propeller Inc.*, 326 F. Supp. 2d 631, 648 (E.D. Pa. 2004) (concluding that "intent is not a proper subject for expert testimony" and that "the question of intent is a classic jury question and not one for experts" (internal citation omitted)); *Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.*, 410 F. Supp. 2d 417, 423 (W.D. Pa. 2006) (excluding putative expert opinion "as to what he believes another individual 'thought,' 'believed,' or 'felt'"). Such testimony is neither helpful nor necessary to the jury's understanding of the evidence or to the determination of any fact at issue. *See* Fed. R. Evid. 702; *Depaepe*, 141 F.3d at 720 (excluding expert and holding that "he could not testify *as an expert* that [a company] had a particular motive" and that he could not testify as a fact witness because he "did not participate in the deliberations"). Quite the opposite, one of the fundamental roles of a jury is to assess the motivations and subjective intentions of witnesses. *Gallatin Fuels*, 410 F. Supp. 2d at 423 (recognizing that "[a]n expert simply is not in any better position than the jury to assess another's subjective intent"). Moreover, in criminal cases, experts are expressly prohibited from stating opinions or inferences "as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged." Fed. R. Evid. 704(b); *United States v. Gutierrez-Farias*, 294 F.3d 657, 662 (5th Cir. 2002) (recognizing that "[a]n expert in a criminal case may not … offer 'an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged'" (citing Fed. R. Evid. 704(b))).

Notwithstanding these well-established principles, Messrs. Purdy and Germany propose to testify that, "in their opinion," Defendants' billing practices and cost allocation methods

"constitute fraud." (6/4/2008 Summary, Ex. A.) But even if the government could establish that Messrs. Purdy and Germany were qualified to offer such testimony (which it cannot do), the government cannot show that their proposed testimony is admissible because it concerns Defendants' subjective intent and purports to tell the jury that Defendants had the mental state constituting an element of the crime charged.[11] Accordingly, Messrs. Purdy and Germany's proposed "expert" testimony must be excluded.

4. Messrs. Purdy and Germany May Not Testify To Facts Outside Their Personal Knowledge.

Expert witnesses may not testify to facts outside of their personal knowledge. *See In re Citric Acid Litig.*, 191 F.3d 1090, 1102 (9th Cir. 1999) ("The law is clear … that an expert report cannot be used to prove the existence of facts set forth therein."); *Yancey*, 2007 U.S. Dist. LEXIS 78289, at *11, 13 (excluding expert who "essentially marshaled the facts in the record which support the plaintiff's position" where there was no "indication these opinions derive from any generally accepted principles, methodology, or independently conducted research"). Nevertheless, Messrs. Purdy and Germany propose to testify to facts about which they lack personal knowledge. For instance, they propose to inform the jury "that The Facility Group billed items from a budget that they produced at the beginning of the project rather than billing actual costs." (6/4/2008 Summary, Ex. A.) But Messrs. Purdy and Germany were not personally involved in TFG's billing and they lack personal knowledge about when any such budgets were

[11] *See, e.g.*, *United States v. Amador-Velasco*, 236 Fed. App'x 919, 924 (5th Cir. 2007) (affirming exclusion of putative expert testimony that "skirts too close to the ultimate issue" of defendant's mental state in violation of Rule 704(b) and where expert relied on information outside his personal knowledge and "never corroborated or verified any of his information"); *see also Yancey*, 2007 U.S. Dist. LEXIS 78289, at *11-12 (excluding expert whose "proffered opinions simply do not relate to, or benefit from, his expertise … , nor does [expert's] experience … provide any special insight in this case that would allow him to opine as to the thought processes and motivations of a third party"); *Taylor v. Evans*, 94 Civ. 8425 (CSH), 1997 U.S. Dist. LEXIS 3907, at *5 (S.D.N.Y. Apr. 1, 1997) (excluding expert and holding that the expert's "musing as to defendants' motivations would not be admissible if given by any witness – lay or expert"); *Edmonds v. State*, 955 So.2d 787, 792 (Miss. 2007) (holding that it was reversible error to admit expert where "[t]here was no showing that [expert's] testimony was based, not on opinion or speculation, but rather on scientific methods and procedures" and where expert's "testimony impermissibly (because it was not empirically proven) bolstered the State's theory of the case").

prepared or the purposes for which any such budgets were used. Because an expert witness cannot testify to facts outside of his personal knowledge, Messrs. Purdy and Germany's proposed factual narrative is inadmissible. *See, e.g.*, *Fisher*, 238 F.R.D. at 281 (excluding expert where "[t]he vast majority of [expert's] report simply summarizes and states her advocacy-based interpretation of documents in the record concerning [defendant's] historical conduct"). Messrs. Purdy and Germany's proposed testimony, therefore, must be excluded.

D. Messrs. Germany And Purdy's Proposed Opinions Are Irrelevant.

"Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *In re Apollo Group*, 527 F. Supp. 2d at 961 (internal citation omitted). Here, Messrs. Germany and Purdy propose to offer opinions about the legal interpretation of the PMA. They seek to argue that Defendants' billing under the PMA would have been fraudulent had Defendants agreed with their contract interpretation. But because there is no evidence that Defendants shared Messrs. Germany and Purdy's legal opinions, their proposed "expert" testimony is simply irrelevant. *See, e.g.*, *United States v. Ortland*, 109 F.3d 539, 544-45 (9th Cir. 1997) (affirming exclusion of expert on grounds that expert's proposed "testimony would not assist the jury because the relevant question was not what an expert thought the agreement said, but what [defendant] thought and said the agreement allowed him to do"). Accordingly, Messrs. Germany and Purdy's proposed testimony must be excluded at trial. *See, e.g.*, *In re Apollo Group*, 527 F. Supp. 2d at 959-60 (recognizing that "the court must determine whether the proffered expert testimony is relevant, 'i.e., that it logically advances a material aspect of the proposing party's case'" (internal citation omitted)); *Lake Michigan Contractors*, 225 F. Supp. 2d at 802 (excluding putative expert whose "opinions do not sufficiently account for the specific facts of the case" where expert "makes general observations about what should normally occur in

the course of a [project in a particular industry], [but] does not tailor those considerations to what actually occurred between the parties").

E. Purdy and Germany's Proposed Testimony Fails Rule 403.

Alternatively, Defendants move to exclude the testimony of Purdy and Germany pursuant to Federal Rule of Evidence 403. Even if the Court concludes that the government has shown that the proposed testimony satisfies Rule 702 and *Daubert*, the government cannot escape the safety net set out in Rule 403. As this Court recently noted, "[i]n a Daubert analysis context, Rule 403 may play an enhanced role, particularly when the scientific or technical knowledge proffered is novel or controversial." *United States v. Moultrie*, ---F.Supp.2d---, 2008 WL 2020497 (N.D.Miss. May 13, 2008) (citing *United States v. Posado*, 57 F.3d 428, 435 (5th Cir. 1995)). Throughout this brief, Defendants have demonstrated the controversial nature of the proffered expert evidence. Defendants also have amply demonstrated that any probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading of the jury. *See Foradori v. Harris*, 523 F.3d 447, 509 (5th Cir. 2008) (holding district court did not abuse its discretion in excluding expert testimony under Rule 403). Additionally, much of the evidence is cumulative; thus, under Rule 403, it may be excluded because its introduction at the trial of this matter would be nothing but a waste of time. For all of these reasons, Defendants move to exclude the evidence.

IV. CONCLUSION

Messrs. Purdy and Germany propose to offer legal opinion testimony, but such testimony cannot be delivered by experts. They also seek to present opinions about accounting and cost allocation in the Design/Build industry, but these are fields in which these attorneys lack any qualifying expertise. Moreover, even if Messrs. Purdy and Germany were qualified to offer their proposed "expert" testimony, it would still be inadmissible because it is based on unreliable facts

and derived from a biased methodology that does not display the reliability that *Daubert* demands. Accordingly, Defendants respectfully request that Messrs. Purdy and Germany's proposed expert testimony be excluded in its entirety. In the alternative, although Defendants submit that the overwhelming deficiencies in Messrs. Purdy and Germany's proposed testimony render a *Daubert* hearing unnecessary, Defendants request that such a hearing be scheduled to address further whether the government can meet its burden to establish the admissibility of Messrs. Purdy and Germany's proposed testimony by a preponderance of the evidence.

Respectfully submitted this 9th day of July 2008.

THE FACILITY GROUP

By: /s/ James B. Tucker
James B. Tucker (MSB # 8297)
BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC - Jackson

BUTLER, SNOW, O'MARA, STEVENS &
CANNADA, PLLC - Jackson
James B. Tucker
Amanda B. Barbour
Post Office Box 22567
Jackson, MS 39225-2567
AmSouth Plaza – 17th Floor
210 East Capitol Street
Jackson, MS 39201
(601) 948-5711/Telephone
(601) 985-4500/Facsimile

BUTLER, SNOW, O'MARA, STEVENS &
CANNADA, PLLC –Memphis
Kari Foster Sutherland
P. O. Box 171443
Memphis, TN 38187-1443
(901) 680-7200/Telephone

JONES DAY
Richard H. Deane, Jr.
Jean-Paul Boulee
1420 Peachtree Street, N.E.
Suite 800
Atlanta, Georgia 30309-3053
(404) 521-3939/Telephone
(404) 581-8330/Facsimile

Attorneys for Defendants

By: /s/ Craig A. Gillen
Craig A. Gillen
GILLEN WITHERS & LAKE, LLC

Lawrence L. Little
829 North Lamar Blvd. Suite 6
Oxford, MS 38655

Craig A. Gillen
GILLEN WITHERS & LAKE, LLC
One Securities Centre, Suite 1050
3490 Piedmont Road, NE
Atlanta, Georgia 30305

Attorneys for Defendant Nixon E. Cawood

CERTIFICATE OF SERVICE

I hereby certify that on this day I have caused a copy of this "**DEFENDANTS' MEMORANDUM IN SUPPORT OF ITS MOTION TO EXCLUDE TESTIMONY FROM PUTATIVE EXPERTS WILLIAM PURDY & RALPH GERMANY** " to be electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following CM/ECF participant attorneys of record:

William Chadwick Lamar
James D. Maxwell, II
U.S. ATTORNEY'S OFFICE
900 Jefferson Avenue
Oxford, MS 38655-3608

Anthony L. Cochran
Thomas D. Bever
CHILIVIS, COCHRAN, LARKINS & BEVER
3127 Maple Drive, N.E.
Atlanta, GA 30305-2503

Thomas H. Freeland, IV
FREELAND & FREELAND
P.O. Box 269
Oxford, MS 38655-0269

Craig A. Gillen
GILLEN WITHERS & LAKE LLC
One Securities Centre
3490 Piedmont Road, N.E.
Suite 1050
Atlanta, GA 30305

Lawrence L. Little
LAWRENCE L. LITTLE & ASSOCIATES
829 N. Lamar Suite 6
Oxford, MS 38655

Thomas A. Withers
GILLEN, WITHERS & LAKE, LLC
P.O. Box 11064
8 East Liberty Street
Savannah, GA 31401

Jerome J. Froelich, Jr.
MCKENNEY & FROELICH
1349 W. Peachtree Street, Suite 1250
Atlanta, GA 30309

John M. Colette
JOHN M. COLETTE & ASSOCIATES
P.O. Box 861
Jackson, MS 39205-0861

THIS 9th day of July 2008.

/S/ JAMES B. TUCKER

Jackson 3071297v.1