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11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE DISTRICT OF ARIZONA
13

14 United States of America,
15 Plaintiff,

16 vs.

17 Thomas Mario Costanzo,
18 Defendant.
19

CR-17-00585-PHX-GMS

**GOVERNMENT'S RESPONSE TO
SUPPLEMENT [DOC. 147] TO
DEFENSE COMBINED RESPONSE**

20 The Court should overrule Costanzo's objection to Special Agent Ellsworth's
21 proposed testimony because the objection mischaracterizes the nature of the proposed
22 testimony and the objection is not supported by cases cited in the objection. Costanzo
23 specifically asks this Court to preclude "testimony regarding the Bank Secrecy Act and
24 associated regulations." (Doc. 147, at 2.) Costanzo then goes on to cite several cases that
25 are not applicable here. For the reasons set forth below, the proposed testimony is relevant,
26 necessary, and appropriate.

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1 **I. Background.**

2 Costanzo is charged in all five counts with engaging in a financial transaction with
3 the intent to avoid a transaction reporting requirement that any financial institution would
4 have been required to make, in violation of 18 U.S.C. § 1956(a)(3)(C). “To prove a
5 violation of this section, the Government must prove (1) that the defendant conducted or
6 attempted to conduct a financial transaction, (2) *with the intent to avoid a transaction*
7 *reporting requirement*, and (3) that the property involved in the transaction was represented
8 by a law enforcement officer to be the proceeds of specified unlawful activity.” *United*
9 *States v. Nelson*, 66 F.3d 1036, 1040 (9th Cir. 1995) (emphasis added) (quoting *United*
10 *States v. Breque*, 964 F.2d 381, 386-87 (5th Cir. 1992)). The government has provided
11 advanced notice of the reporting requirements that Costanzo sought to avoid during the
12 financial transactions at issue in this case. *See* Doc. 117. Those reporting requirements
13 include Currency Transaction Reporting (CTR) requirements, Suspicious Activity
14 Reporting (SAR) requirements, and Know Your Customer (KYC) requirements, among
15 others.

16 **II. Special Agent Ellsworth’s Proposed Testimony.**

17 At trial, Special Agent Ellsworth is expected to describe the types of reports, *e.g.*,
18 CTRs and SARs, that various financial institutions are required to file with the Department
19 of Treasury’s Financial Crimes Enforcement Network (FinCEN). He is also expected to
20 explain the types of situations where those reports must be filed. Additionally, Special
21 Agent Ellsworth is expected to identify the type of information that financial institutions
22 must collect from customers in order to comply with KYC requirements. That testimony
23 will be based on his training and experience as a Special Agent with the Criminal
24 Investigation Division of the Internal Revenue Service. The proffered testimony is not
25 legal opinion, nor does it suggest a “legal conclusion” to the jury. (Doc. 147, at 2.) Instead,
26 it is “technical, or other specialized knowledge will help the trier of fact to understand the
27 evidence or to determine a fact in issue.” Fed. R. Evid. 702(a).

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1 Transaction reporting requirements are subjects beyond the common knowledge of
2 the average person. In this case, if the jurors are not told what the reporting requirements
3 are, they will not be able to determine whether Costanzo “inten[ded] to avoid a transaction
4 reporting requirement” as the government is required to prove for each of the five counts.
5 *See Nelson*, 66 F.3d at 1040. If the jurors cannot make that determination, they cannot
6 properly evaluate the evidence and determine whether Costanzo intended to work around
7 or avoid transaction reporting requirements when he accepted purported drug proceeds
8 from undercover agents.

9 **III. The Cases Cited by Costanzo Are Not Applicable to Special Agent Ellsworth’s**
10 **Proposed Testimony.**

11 The cases cited by Costanzo can all be distinguished from this case and do not apply
12 to the proposed testimony here. For example, Costanzo relies on *McHugh v. United Serv.*
13 *Auto Ass’n*, 164 F.3d 451 (9th Cir. 1999) for the proposition that “expert testimony ‘cannot
14 be used to provide legal meaning,’” but the experts in that case were at odds in an insurance
15 dispute over whether a “landslide” or “mudslide” caused damage to a house. *Id.* at 453.
16 There was also a dispute over the term “mudflow,” which was a specific term defined in the
17 insurance policy. *Id.* at 455. The court’s point was that the experts could not be permitted
18 to define the legal term that was at the center of the dispute and that their testimony was
19 “only relevant for the historical facts that they observed” and “not for their legal
20 conclusions as to what conditions were covered or excluded under the terms of the policy.”
21 *Id.* at 454. In this case, Special Agent Ellsworth will not be giving legal conclusions about
22 a legal document, he will be describing the reporting requirements with which financial
23 institutions must comply. *McHugh* is inapplicable and does not support Costanzo’s
24 position.

25 Costanzo also relies on a footnote from *Elsayed Mukhtar v. California State*
26 *University, Hayward*, 299 F.3d 1053 (9th Cir. 2002), for the proposition that “an expert
27 witness cannot give an opinion as to her legal conclusion, i.e., an opinion on an ultimate
28 issue of law.” (Doc. 147, at 1.) But Special Agent Ellsworth will not be giving “an opinion

1 on an ultimate issue of law.” *Mukhtar*, 299 F.3d at 1065 n.10. He will not be “tell[ing] the
2 jury what result to reach” or “attempt[ing] to substitute [his] judgment for the jury’s,” he
3 will be providing non-opinion information to help the jury understand the evidence and
4 determine a fact in issue. *Id.* (quoting *United States v. Duncan*, 42 F.3d 97, 101 (2d Cir.
5 1994)).

6 Costanzo uses *United States v. Brodie*, 858 F.2d 492 (9th Cir 1988), to state that
7 “[e]xperts ‘interpret and analyze factual evidence. They do not testify about the law’”
8 (Doc. 147, at 2.) In *Brodie*, two defendants charged with failing to pay their taxes
9 attempted to introduce expert testimony from an accountant stating that they were not
10 required to pay taxes for the years in question. *Id.* at 495. The court held that the testimony
11 was inadmissible because that conclusion was the ultimate issue that the jury had to answer
12 in the case. *Id.* at 495-96. The defendants also attempted to call an attorney as an expert
13 in the law of trusts to testify that their foreign trust accounts were valid business entities
14 justifying their tax shelter scheme. *See id.* at 496-97. After concluding that the district
15 court properly excluded the proffered expert testimony, the court stated that, “Resolving
16 doubtful questions of law is the distinct and exclusive province of the trial judge.” *Id.* at
17 497. Special Agent Ellsworth’s testimony has nothing to do with doubtful questions of
18 law, nor will his testimony be on the ultimate issue, and *Brodie* is simply not applicable to
19 the facts of this case. The cases cited by Costanzo in his objection do not support his
20 request and the objection mischaracterizes the nature of the proposed expert testimony.

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1 **IV. Conclusion.**

2 For the reasons set forth above, the objection to Special Agent Ellsworth's testimony
3 should be denied.

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5 Respectfully submitted this 9th day of March, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to counsel of record in this case.