

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

CRIMINAL NO. 10-20454

Plaintiff,

HON. MARIANNE O. BATTANI

v.

D-1 YU QIN,

D-2 SHANSHAN DU,

Defendants.

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**GOVERNMENT’S MOTION TO PRECLUDE QUESTIONING OF ROBERT GRAGG
REGARDING UNSUPPORTED AND FALSE ACCUSATIONS**

The United States of America respectfully moves to preclude the defense from questioning a government witness, Robert Gragg, who the defense claims was sanctioned for “deliberately destroy[ing] computer evidence” in a civil case. Not only did Mr. Gragg not destroy computer evidence, but a Michigan state trial court found that no destruction of evidence took place and did not impose sanctions – a ruling that was affirmed by the Michigan Court of Appeals. The defendants have no good faith basis to question Mr. Gragg on this topic and should therefore be precluded from doing so given its highly prejudicial nature.

BACKGROUND

The government intends to call in its case-in-chief Robert Gragg. Mr. Gragg is a computer forensic examiner who works for a company that provides computer forensic services to General Motors. Mr. Gragg created forensic images of some of the computer devices at issue in this case. Defense counsel recently provided the government with an email that stated:

Although we are not required to do so, we wanted to disclose to you that we have obtained information about Robert Gragg that we intend to use in cross-examining him. In another case, apparently Mr. Gragg deliberately destroyed computer evidence so that it could not be obtained by a party suing GM. According to the information we have received, he stated that he would rather pay sanctions than assist the plaintiff in that case. We are in the process of obtaining particulars concerning that incident, where we believe GM was, in fact, sanctioned by the court for destruction of evidence. We believe the incident is highly relevant to his credibility as a forensic computer examiner.

The case to which the defendants refer involved a General Motors employee, David Martinez, who was fired by General Motors for using company email to send sexually explicit emails. *Martinez v. General Motors Corp.*, 2007 WL 1429632, *2 (Mich. Ct. App. 2007) (unpublished) (Attached as Exhibit A). Martinez, in turn, sued General Motors in Michigan state court for national origin discrimination, among numerous other claims. *Id.* at *3. In August, 2004, the trial court entered a discovery order requiring General Motors to produce to Martinez certain emails. *Id.* In January, 2005, Martinez sought and obtained an order from the trial court authorizing Martinez's computer forensic expert, Larry Dalman (who, as it turns out, is also the defendants' computer forensic expert in the present case), to search General Motor's email server and three particular computer hard drives for certain emails. *Id.* Martinez subsequently filed a motion for sanctions against General Motors, alleging that General Motors had "caused the spoliation of digital evidence contained on 'hard drive #1' before Dalman was able to conduct his search." *Id.* General Motors responded that the trial court's previous discovery order did not require it to preserve computer hard drives, but only copies of emails (which it did). The trial court denied the plaintiff's motion for sanctions by "finding that there was no showing that GM had intentionally destroyed relevant computer evidence." *Id.* at *4.

The plaintiff appealed to the Michigan Court of Appeals, which affirmed the trial court's denial of the plaintiff's motion for sanctions. The hard drives in question were not erased by Robert Gragg (as the defendants now claim), but instead "were leased from a third party, and when the lease of those computers expired in late 2004, the computers' hard drives were erased and reformatted by the third-party leasing company in the normal course of its business." *Id.* at *7. Moreover, the Court of Appeals found that "the contents of 'hard drive #1' were irrelevant." *Id.* at *8. This is because "the digital contents of 'hard drive #1,' as those contents existed before the drive was erased, could not in any way have increased or decreased the probability that plaintiff was involved in sending the inappropriate emails at issue in this case." *Id.* The Court of Appeals held that the trial court "did not abuse its discretion by declining to sanction GM for destruction of this superfluous and irrelevant computer evidence." *Id.*

ARGUMENT

"No attorney may ask a question if he doesn't have a good-faith basis to ask it." *United States v. Beck*, 625 F.3d 410, 418 (7th Cir. 2010). The Court can enforce this rule through its own inherent trial management powers. *United States v. Gholston*, 10 F.3d 384, 388 (6th Cir. 1993) (stating that "the district court, through an exercise of its trial management powers, can control the impeaching party's line of questioning."). In this case, the defense seeks to impeach Mr. Gragg with questions about whether he destroyed computer evidence and was sanctioned by a court for doing so. The defense has no good faith basis to ask these questions because there were judicial findings that no improper destruction of evidence occurred, that there was no sanctions imposed on General Motors (let alone Robert Gragg), that the computer evidence plaintiff Martinez sought was "superfluous and irrelevant" to his civil case, and that a third party

leasing company (not Robert Gragg) was apparently involved in the incident. *Martinez*, 2007 WL 1429632 at *8.

The defendants' questioning of Mr. Gragg on this topic is also prohibited under Federal Rule of Evidence 403, which permits the court to exclude evidence if its probative value is substantially outweighed by a danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." The questions the defense wish to ask of Mr. Gragg present almost all of these dangers. The questions have no probative value because the allegations that the defendants make against Mr. Gragg have been found by a trial court and court of appeals to be untrue. In addition, the questions are unfairly prejudicial because they are designed to mislead the jury into believing that Mr. Gragg did destroy computer evidence and was sanctioned for it, when in fact these things simply did not happen. Evidence should be excluded under Rule 403 if it has an "undue tendency to suggest decision on an improper basis." Fed. R. Evid. 403, Advisory Committee Notes (1972). This line of questioning from the defense would suggest to the jury that they should judge Mr. Gragg's testimony based on events that did not happen, which is obviously improper.

CONCLUSION

For the foregoing reasons, the government requests that the Court preclude the defendants from asking Mr. Gragg or any other witness any questions pertaining to the *Martinez* case.

Respectfully submitted,

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Dated: November 1, 2012

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2012, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

Frank D. Eaman
Robert M. Morgan

s/ Vera Conti _____
VERA CONTI
Legal Assistant