

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE**

UNITED STATES OF AMERICA,

Plaintiff

V.

NO. 2:19-CR-00014-JRG

XIAORONG YOU,

Defendant

DEFENDANT'S RESPONSE TO GOVERNMENT'S TRIAL BRIEF

Pursuant to the Court's Order [Doc. 186], defendant, through the undersigned counsel, respectfully submits the following Response to the Trial Brief submitted by the Government [Doc. 185].

I. Audio-Video Recordings of Interview of the Defendant that Occurred on February 14, 2019

With regard to the Government's intent to offer the audio-video recording of the defendant that occurred on February 14, 2019, defendant has no objection to the video being played for the jury and being introduced as evidence at trial. However, defendant objects to the Government playing only clips of the interview. Defendant submits that these clips could be taken out of context, and in order to allow the jury to have a complete understanding of the case, it is necessary to play the entire video.

The "rule of completeness" allows a party to correct a misleading impression created by the introduction of part of a writing or conversation by introducing additional parts

necessary to put the admitted portions in proper context. *United States v. Holden*, 557 F.3d 698, 705 (6th Cir.2009). The common-law doctrine of completeness is partially codified in Rule 106: “If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.” Fed. R. Evid. 106; see *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171–72, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988).

Throughout the interview of the defendant, the FBI agents often refer to “trade secrets” and confidential information.” Obviously, the determination of whether the documents at issue constitute trade secrets or confidential information is key in the resolution of this case. Therefore, defendant would respectfully request a special jury instruction that the jury should not presume that the documents are trade secrets or confidential based solely on the statements of the FBI agents.

II. The Transcript of the Interview of the Defendant that Occurred on February 14, 2019

The defendant objects to the transcript of the recorded interview that occurred on February 14, 2019 being introduced into evidence. As an initial matter, the defendant submits that the transcript is not necessary to aid the jury in understanding the dialogue between the defendant and the FBI agents. As noted in the Government’s Trial Brief, “the audio is intelligible throughout substantially all of the approximately two hours interview. It appears as though no substantive comments are intelligible.” (Brief, p. 3).

Defendant submits that the transcript, while it may accurately reflect the

conversation between defendant and the FBI agents, could be misleading to the jury and prejudicial to the defendant. Specifically, throughout her conversation with FBI agents, the defendant often says “Yeah” after one of the agents makes a statement. Defendant submits that when viewing the recording of the interview, it is clear that she is not agreeing to the accuracy of the statement or admitting the statement, but she is instead acknowledging that the statement was made, in order to maintain the conversation with the agent. If the transcript were to be admitted as evidence, the jury could read the defendant’s affirmative responses as admissions, which they are not.

The defendant also objects to the Government playing the video with captions of the transcript language. As noted above, the captions are not necessary because the audio is intelligible. Furthermore, having the text on the video would be a distraction for the jury.

III. Summary Chart Depicting Translated WeChat Audio and Text Messages Sent to and from the Defendant.

Defendant has no objection to the Government’s use of a summary chart of the WeChat messages and their corresponding translations by Mr. Churchill, and acknowledges that such a summary is permissible under the *Federal Rules of Evidence*. Defendant submits that her counsel has also had the messages translated, and that a few of those translations differ slightly from the Government’s translations. In an effort to resolve this issue, counsel for defendant will provide counsel for the Government with her translations.

IV. Summary Charts Depicting Locations and Time Stamps of More than One Hundred Trade Secret and Confidential Files Found on Electronic Devices Belonging to Defendant

Defendant submits that several of the documents that are contained on the

Government's proposed summary charts are items which have only been accessible to defendant and counsel at the FBI office, as they constitute "Highly Confidential Information" pursuant to the Protective Order. The Government has advised defendant's counsel that said material marked as Exhibits will be available to counsel on Monday in printed form. As noted above, defendant acknowledges that the use of a summary chart is permissible under the *Federal Rules of Evidence*. However, Defendant would reserve making an objection, if any, to the Government's proposed summary until counsel can review the information on Monday.

V. Use of Summary Timeline During Opening Statement and Witness Testimony and to Admit as Substantive Evidence

The parties, through counsel, have discussed the Government's proposed timeline and have been able to come to a resolution regarding certain revisions to the same. Also, counsel for the Government has advised that they no longer intend to use the timeline during opening statement. Defendant has no objection to the use of the timeline as agreed upon by counsel for the parties.

VI. Use of Demonstrative Aids During Opening Statement and Testimony

The parties, through counsel, have discussed the Government's proposed demonstrative aids. Defendant has no objection to the Government's use of the demonstrative aids during its case in chief.

VII. Dual Fact-Expert Witness Testimony

Defendant acknowledges and agrees that certain witnesses can testify as both an

expert witness and a fact witness, and has no objection to the Government offering such dual fact-expert witness testimony. However, as noted by the Government in its Trial Brief, defendant would respectfully request that the jury be given an appropriate instruction prior to the witness' testimony. As noted by the Sixth Circuit Court of Appeals, when a witness gives both fact and expert testimony, the district court must give "a 'cautionary jury instruction regarding the witness's dual witness roles' or there must be a clear demarcation between the witness's fact testimony and expert opinion testimony. *United States v. Smith*, 601 F.3d 530, 540 (6th Cir.2010) (quoting *Lopez-Medina*, 461 F.3d 724, 745 (6th Cir. 2006)).

Respectfully submitted,

s/Thomas C. Jessee

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of July 2020, a true and exact copy of this Response to Government's Trial Brief was filed electronically. Notice of this filing will be sent by operation of the court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

s/ Thomas C. Jessee

Thomas C. Jessee