UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

The United States of America and the States of North Carolina, California, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Michigan, Minnesota, New Jersey, New York, Tennessee, Texas, Virginia, and Wisconsin *ex rel.* Scarlett Lutz, Kayla Webster, Dr. Michael Mayes, and Chris Reidel, Plaintiffs, v. Berkeley Heartlab, Inc., BlueWave Healthcare Consultants, Inc., Latonya Mallory, Floyd Calhoun Dent, III, and Robert Bradford Johnson, Defendants.	:	Case No. 9:14-cv-230-RMG (Consolidated with 9:11-cv-1593-RMG and 9:15-cv-2485-RMG) Hon. Richard M. Gergel

RELATORS LUTZ AND WEBSTER'S RESPONSE IN OPPOSITION TO DEFENDANT LATONYA MALLORY'S MOTION *IN LIMINE* TO EXCLUDE RELATOR LUTZ FROM TESTIFYING AS TO CERTAIN MATTERS

Defendant LaTonya Mallory seeks to preclude Relator Scarlett Lutz from testifying (1) about "matters that she allegedly learned through her own investigation"; (2) that checks she found in a manila envelope were signed by Mallory; and (3) that the checks appeared to her to be "like kickback payments." All of the anticipated testimony that Mallory identifies is admissible. Accordingly, the Court should deny her motion *in limine*.

I. ARGUMENT

A. Testimony about the "matters" that Relator Lutz learned about "through her own investigation" is, by definition, based on personal knowledge, and Mallory has identified no inadmissible hearsay to exclude.

Mallory argues that Lutz should not be permitted to testify about information that she acquired through her own research and investigation because (1) such testimony is not based on her personal knowledge, and (2) it constitutes inadmissible hearsay. The first part of this contention is nonsensical. Under Federal Rule of Evidence 602, "[a] witness may testify to a matter only if it is introduced to support a finding that the witness has personal knowledge of the matter." The rule does not limit how a witness may obtain personal knowledge of the subject matter of testimony, nor does any other source of law. *E.g.*, *Abu-Ali v. United States*, 2013 WL 5797855, at *9 (E.D. Va. Oct. 28, 2013). Here, Mallory contends that Lutz obtained certain knowledge about Defendants from her own investigation. *Any* such facts that she learned are necessarily part of her personal knowledge and therefore pass muster under Rule 602.

Furthermore, Mallory has identified no inadmissible hearsay that the Court should exclude. Mallory suggests that any fact learned through investigation is hearsay. Of course, that is not the case. "Hearsay" is an out-of-court statement offered to "prove the truth of the matter asserted." Fed. R. Ev. 801(c).

Not all hearsay is inadmissible. *See* Fed. R. Ev. 802-804, 807. However, before the Court can assess the admissibility of hearsay, Mallory must point to an out-of-court statement that a party seeks to admit for the purpose of proving the truth of the matter asserted. She has not done so. Indeed, if Lutz were to testify at trial, as she did in deposition, that the checks she received "sparked an eventual kind of research," or that she "started kind of doing [her] own research,"

there would be no out-of-court statement for the Court to evaluate under the Federal Rules of Evidence pertaining to hearsay.

There is no evidentiary basis to exclude testimony that Lutz learned about HDL or Singulex through her own investigation. The Court should deny Mallory's motion.

B. Testimony that checks received by Lutz bore Mallory's signature is admissible.

Mallory provides no argument as to why Lutz's testimony that certain checks had Defendant Mallory's signature on them should be excluded. Indeed, there is no persuasive reason in law or logic to prohibit such testimony. Lutz received and looked at the checks at issue; her testimony as to their appearance is thus based on personal knowledge. If Mallory wants to challenge the accuracy or veracity of Lutz's perception, she is free to do so during cross-examination, should Lutz testify about this issue at trial.

C. Lutz's testimony that the checks "looked like a kickback" is not a legal conclusion.

Mallory argues that Lutz should not be permitted to testify that the checks from HDL "looked like a kickback" because such testimony would draw an impermissible legal conclusion. Not so. Courts "identify improper legal conclusions by determining whether 'the terms used by the witness have a separate, distinct and specialized meaning in the law different from that present in the vernacular.'" *Elat v. Ngoubene*, 993 F. Supp. 2d 497, 513 (D. Md. 2014) (quoting *United States v. McIver*, 470 F.3d 550, 562 (4th Cir. 2006)). Only if (1) the colloquial meaning of the term differs substantially from its legal meaning, and (2) the witness attempts to invoke the legal meaning, should a court exclude the testimony. *McIver*, 470 F.3d at 562; *see also In re Air Disaster at Lockerbie, Scotland*, 37 F.3d 804, 826-27 (2d Cir. 1994).

Here, a kickback in everyday parlance means the same thing that it means under the Anti-Kickback Statute: an improper rebate, bribe, or inducement. *Compare* 42 U.S.C. § 1320a-7b(b)

with Google Dictionary "kickback," *available at*: http://https://www.google.com/search?rlz=1C1CHBD_enUS707US707&q=google+dictionary&spell=1&sa=X&ved=0ahUKEwirvK_Xv_rVAhWGj1QKHfogB8sQvwUIJSgA&biw=1292&bih=552#dobs=kickback (last visited Aug. 25, 2017). With no difference between the legal and colloquial meaning of "kickback," there is no basis to exclude Lutz's testimony that the checks looked like kickbacks to her. *Cf. United States v. Sheffey*, 57 F.3d 1419, 1426 (6th Cir.1995) (testimony that defendant had driven "recklessly, in extreme disregard for human life," did not state legal conclusion because "recklessly" and "extreme disregard for human life" do not have a legal meaning distinct from everyday usage).

II. CONCLUSION

For the foregoing reasons, the Court should deny Defendant Mallory's motion *in limine* to exclude Relator Lutz's testimony (1) about "matters that she allegedly learned through her own investigation"; (2) that checks she found in a manila envelope were signed by Mallory; and (3) that the checks looked to her like a kickback.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2017, I filed the foregoing on the Court's Electronic Filing System which forwarded an electronic copy to all counsel of record.

Respectfully submitted,

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