IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, vs. IRA ISAACS, Defendant – Appellant	C.A. No.: 13-50036 D.C. No.: 2:07-cr-00732-GHK-1 (Central Dist. Cal.) GOVERNMENT'S OPPOSITION TO APPELLANT IRA ISAACS' MOTION FOR ORDER ALLOWING DEFENDANT-APPELLANT IRA ISAACS TO REMAIN FREE ON BAIL PENDING APPEAL

Plaintiff-Appellee United States of America, by and through counsel of record, hereby opposes Defendant-Appellant Ira Isaacs' Motion for Order Permitting Defendant-Appellant Ira Isaacs to Remain Free on Bond Pending Appeal. This opposition is based on the attached memorandum of points and authorities, exhibits, and the files and records in this case.

DATED: April 3, 2013

Respectfully Submitted,

_/s/_____

DAMON A. KING
Deputy Chief
U.S. Department of Justice
Child Exploitation and Obscenity Section

_/s/_____

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I. INTRODUCTION

On April 27, 2012, defendant Ira Isaacs ("defendant"), doing business as "Stolen Car Films" and "L.A. Media," was convicted following a jury trial of: (1) one count of engaging in the business of selling or transferring obscene matter, in violation of Title 18, United States Code, Section 1466(a); (2) one count of transportation of obscene matter for sale or distribution, in violation of Title 18, United States Code, Section 1465; (3) one count of importation or transportation of obscene matter, in violation of Title 18, United States Code, Section 1462; and(4) two counts of mailing obscene matter, in violation of Title 18, United States Code, Section 1461. (CR 221).[1]

On January 16, 2013, the district court held a lengthy sentencing hearing, during which the court heard argument by the parties. After taking into consideration the defendant's advisory sentencing guidelines range of 57 to 71 months, the sentencing factors set forth in 18 U.S.C. § 3553(a), and sentences imposed in comparable cases, the district court imposed a sentence consisting of imprisonment for 48 months (a

[1] "CR" refers to the District Court's Clerk's Record and is followed by the applicable docket number. "CRA" refers to this Court's Clerk's Record and is followed by the applicable docket number. "GEX" refers to the government's exhibits filed concurrently herewith. "Mot." refers to defendant's outstanding Motion for Release Pending Appeal.

sentence below the advisory guidelines range) on each of Counts 1-5 to run concurrently, three years of supervised release to follow defendant's term of custody, and a fine of $10,000. (CR 261).

On February 8, 2013, defendant filed a Motion to Remain Free Pending Appeal with this Court (CRA 10-1). On February 15, 2013, the defendant filed a supplemental motion to Remain Free Pending Appeal with this Court. (CRA 14-1). On February 20, 2013, this Court denied defendant's motion without prejudice to renew, following presentation of a properly filed bail motion with the district court. (CRA 16). On the same day, defendant filed a bail motion with the district court. (CR 275). The defendant filed a corrected motion with the district court on March 1, 2013. (CR 285). On March 22, 2013, the district court denied the defendant's motion finding that the defendant failed to present any "substantial question" within the meaning of §3143(b)(1)(B) and ordered the defendant to surrender himself to the United States Marshal, no later than March 29, 2013. (GEX 1).

Defendant's renewed request to this Court for bail pending appeal should be denied. A defendant is entitled to bail pending appeal if, and only if, (1) he has shown by clear and convincing evidence that he is neither a flight risk nor a danger to the community; and (2) his claim on appeal raises a "substantial question" as to either his conviction or his term

of custody. 18 U.S.C. § 3143(b)(1). Defendant cannot satisfy each of these prongs. The district court found, after review of the record, that defendant failed to present a substantial question of law or fact likely to result in reversal, a new trial, or a sentence that does not include a term of imprisonment. (GEX 1). Accordingly, defendant's motion should be denied.

II. Factual Background

A. The Offense Conduct

As established at trial, beginning in or about 1999, the defendant operated a business in Los Angeles, California, wherein he engaged in the production, distribution, transportation, and sale of obscene videos which depict (1) women engaging in sex acts while eating and ingesting feces and drinking urine; (2) women engaged in sexual intercourse with animals including dogs; and (3) women being bound, beaten, and whipped during sex acts. The defendant, utilizing the Internet, websites and computers that he owned and operated, sold and shipped these videos via United Parcel Service and the U.S. Mail.

B. Evidence of Defendant's Post-Verdict Criminal Conduct

In its sentencing position papers and at sentencing, the government produced evidence showing that defendant continued to engage in criminal conduct while on bond and awaiting sentencing by the district court. (See GEX 2). Specifically, the

government proved that just two days after the defendant was convicted on five counts of violating federal obscenity laws, the defendant appeared on a Los Angeles based talk radio show, broadcast in Los Angeles, and asked the host if he could provide his website address to the listeners. The defendant then informed listeners that he could use some money and asked listeners to go to his website (the same website that he used to sell some of the obscene videos that were the subject of his conviction two days earlier) and to order and purchase videos from the website. (See id.).

After hearing that the defendant was continuing to advertise and solicit sales of obscene videos, a Los Angeles Police Department ("LAPD") detective who investigated the defendant in the obscenity case, went to the defendant's website, observed that the defendant had recently added new obscene videos after he was convicted, and conducted an undercover purchase of three videos that were similar in content to the videos that defendant had been convicted of selling. After the LAPD detective paid for the videos, the defendant shipped the videos to an undercover address used by the LAPD in Los Angeles. (See id.).

III. ARGUMENT

A. Legal Standard for Post-Conviction Bail Pending Appeal

"Once a person has been convicted and sentenced to jail, there is absolutely no reason for the law to favor release pending appeal or even permit it in the absence of exceptional

circumstances." H. Rep. No. 907, 91st Cong., 2d Sess. 186-87 (1970) (regarding model for current 18 U.S.C. § 3143, quoted in United States v. Miller, 753 F.2d 19, 22 (3d Cir. 1985) (stating that Congress enacted § 3143 "to reverse the presumption in favor of bail")); see also United States v. Handy, 761 F.2d 1279, 1283 (9th Cir. 1985) (adopting the "interpretation of the 1984 Bail Act first set forth by the Third Circuit in Miller"). To the contrary, there are compelling reasons for the law to deny release pending appeal in most cases:

> First and most important, the conviction, in which the defendant's guilt of a crime has been established beyond a reasonable doubt, is presumably correct in law, a presumption factually supported by the low rate of reversal in the Federal System. Second, the decision to send a convicted person to jail, and thereby reject all other sentencing alternatives, by its very nature includes a determination by the sentencing judge that the defendant is dangerous to the person or property of others, and dangerous when sentenced, not a year later, after the appeal is decided. Third, release of a criminal into the community, even after conviction, destroys whatever deterrent effect remains in criminal law.

Miller, 753 F.2d at 22.

Accordingly, a defendant may not be granted bond pending appeal unless: (1) the defendant proves "by clear and convincing evidence that [he] is not likely to flee or pose a danger to the safety of any other person or the community if released"; and (2) the defendant's appeal is not brought for the purpose of delay and raises "a substantial question of law or fact likely to result in (i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b)(1).[2] Unlike in the pretrial detention context, in order to obtain bail pending appeal, a convicted defendant bears the burden of establishing by clear and convincing evidence that he is not a flight risk or a danger to the community. See Fed. R. Crim. P. 46(c); 18 U.S.C. § 3143(a); see also Handy, 761 F.2d at 1283. "The burden is placed upon the defendant in the view that the fact of his conviction justifies retention in custody in situations where doubt exists as to whether he can be safely released pending disposition of his appeal." Fed. R. App. P. 9 advisory committee's note (1972 Amendment).

[2] Before the Bail Reform Act of 1984, a district court could deny bail pending appeal only if it appeared that the appeal was frivolous or was taken for purposes of delay. United States v. McCahill, 765 F.2d 849, 850 (9th Cir. 1985). The revised statute was intended to make it more difficult for a defendant to obtain bail pending appeal. Id.

The defendant bears the burden of establishing that he meets the statutory requirements for bail pending appeal. See United States v. Montoya, 908 F.2d 450, 451 (9th Cir. 1990); Handy, 761 F.2d at 1283. With regard to the requirement that the defendant establish "a substantial question of law or fact," this Court has explained that the word "substantial" in the bail statute "defines the level of merit required in the question raised on appeal, while the phrase 'likely to result in reversal' defines the question that must be presented." Handy, 761 F.2d at 1281. A "substantial question" refers to a legal issue that is "fairly debatable" or "fairly doubtful," and is of more substance than would be necessary to a finding that it is not frivolous. Id. at 1283. "Fairly debatable" questions are those that are novel or not readily answerable, or that pose issues "'debatable among jurists of reason.'" Id. at 1281-82 (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)). A court may find that such a substantial question is likely to result in reversal or an order for a new trial only if it concludes that the question is so integral to the merits of the conviction on which defendant is to be imprisoned that a contrary appellate holding is likely to require reversal of the conviction or a new trial. Miller, 753 F.2d at 23. While the "substantial question" standard does not require the Court to find that reversal is more likely than not, Handy, 761 F.2d at 1280-81, neither is it so toothless that it eviscerates

Congress' intent to "tighten[] the standards for bail pending appeal." Id. at 1283.

In reviewing a district court's denial of release under 18 U.S.C. § 3143, this Court reviews the district court's factual determination for clear error. United States v. Garcia, 340 F.3d 1013, 1015 (9th Cir. 2003). Specifically, the determination that a defendant poses a flight risk or is a danger to the community are reviewed for clear error. See, e.g., United States v. Hir, 517 F.3d 1081, 1086 (9th Cir. 2008); United States v. Fidler, 419 F.3d 1026, 1029 (9th Cir. 2005). Under the "significantly deferential" clear-error standard, this Court can only reverse if there is a single permissible view of the evidence, and that view is contrary to the district court's findings. United States v. Bragg, 582 F.3d 965, 972 (9th Cir. 2009). A finding is clearly erroneous only "if it is illogical, implausible, or without support in the record." United States v. Richey, 632 F.3d 559, 563 (9th Cir. 2011).

B. Defendant Has Not Raised a Substantial Question of Law or Fact Likely to Result in Reversal, a New Trial, or a Sentence of No Confinement

Defendant does not meet the standards for bail pending appeal since his claims do not raise a "substantial question" such that it is "fairly doubtful" that this Court will uphold the trial verdict or uphold the 48 month, below advisory guidelines range,

term of imprisonment imposed by the district court. Handy, 761 F.2d at 1283; see also Montoya, 908 F.2d 450-51 (9th Cir. 1990).

Here, defendant asserts four arguments that he intends to make on appeal: (1) the district court erred in excluding defendant as an art expert; (2) the district court improperly limited defendant's lay testimony; (3) the district court improperly limited defense counsel's closing argument; and (4) the district court erred in changing the definition of [prurience][3] after the jury was previously instructed and after closing argument.

i. Exclusion of the Defendant as an Art Expert

Defendant's claim that the judge abused his discretion by precluding defendant from offering expert testimony is without merit and contrary to existing Supreme Court and Ninth Circuit law. The district court addressed this issue by holding an extensive Daubert hearing on January 19, 2011. The defendant testified at the hearing and was questioned at length to determine if he met the qualifications necessary to testify as an expert. See Fed. R. of Evid. 703; see also Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 148-49 (1999); Perry v. Schwarzenegger, 704 F.Supp 2d 931 (N.D. Cal 2010). After examination of the defendant's purported qualifications, the

[3] The issue relates to the instruction given by the district court to the term "Prurient Interest".

district court held that the defendant's proposed testimony did not meet the required standards for expert testimony. (GEX 3).

Trial courts have "wide discretion in [their] determination to admit [or] exclude evidence, and this is particularly true in the case of expert testimony." Hamling v. United States, 418 US. 87, 108 (1974). Moreover, it is well-established that a district court's decision to exclude expert testimony is committed to its broad discretion and reviewed for abuse of discretion. See United States v. Redlightening, 624 F.3d 1090, 1110 (9th Cir. 2010).[4] If expert testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue," such testimony is admissible so long as "(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. of Evid. 702. The trial judge must perform a gatekeeping function to ensure that the expert's proffered testimony is both reliable and relevant. See United States v. Freeman, 498 F.3d 893, 901 (9th Cir. 2007). The gatekeeping function requires that the judge assess whether "the reasoning or methodology underlying the testimony is scientifically valid," and "whether that reasoning or

[4] In his motion, defendant wrongly interprets Redlightening. This Court did not expressly hold that Redlightening could have testified as an expert. This Court held that the defendant had the right to testify, like always, as a fact witness to dispute the government's agent. See Redlightening, 624 at 1111. Redlightening does not stand for the assertion that all defendants should be allowed to provide expert testimony based on status as a defendant.

methodology properly can be applied to the facts in issue." Daubert, 509 U.S. at 592-93; see also Redlightning, 624 F.3d at 1111.

Thus, the question that must be "fairly debatable" to entitle defendant to a finding of a "substantial question" is whether the district court abused its discretion in precluding the defendant from testifying as an expert.

The district court's application of the expert-testimony standard was logical, plausible, and supported by inferences that may be drawn from the record. As discussed in the district court's Daubert ruling, the judge determined that the defendant's proposed testimony was inadmissible under Daubert because defendant failed to demonstrate that his proposed opinion was supported by any reliable methodology. (See GEX 3, at 3-4). The district court held that the defendant only provided vague and self-serving (and at time circular) descriptions, such as "art is what an artist does." (Id. at 3). Defendant also failed to provide any explanation for how one can determine that a work has transformed from obscenity into art. (Id. at 3-4). Defendant was unable, upon questioning, to provide any examples of what is obscene or provide examples of any characteristics that would make some images obscene. (Id. at 4). To the extent that the defendant attempted to offer a methodology, he provided insufficient qualifications to support his testimony. (Id.).

The defendant has failed to provide this Court with any evidence that would establish that the district court misapplied existing Supreme Court and Ninth Circuit law and erred in ruling that the defendant did not meet the requirements to provide expert testimony. He only provides unsubstantiated assertions and relies on vague assumptions. He does not offer any evidence on how the defendant qualifies, under law, to provide expert opinion. The defendant was given the opportunity, during the Daubert hearing, to explain how his proposed expert testimony would be the product of reliable principles and methods, and how he would apply those principles and methods reliably to the facts of the case. Defendant was unable to meet the terms and the district court, performing its gatekeeper function, correctly determined that the defendant was not qualified to testify as an expert.

Additionally, the defendant states that he had an expert psychiatrist hired for the first trial in front of Judge Kozinski. (Mot. at 6). He states that because the defense ran out of money, Dr. Nair was not called as a witness but would have testified as an expert and did testify at a Daubert hearing in front of Judge Kozinski. (Id.). It is unclear if defendant is suggesting that this is also an issue for this Court. However, to be clear, the defendant was not precluded from presenting expert testimony by a psychiatrist at trial.

Prior to the Daubert hearing, the defendant indicated that he intended to call other expert witnesses. However, in his Daubert motion, he only proposed to call himself as an expert. The district court inquired into this decision at the Daubert hearing and the defendant reiterated his intent during the hearing to only call himself as an expert. (GEX 3 at n. 1). Also, at a pre-trial conference before the district court, the defense stated it would not be calling expert witnesses at trial.

ii. Defendant's Lay Testimony

Defendant claims that the district court interfered with and improperly limited defendant's lay testimony and that the district court, "fearing another hung jury", "obviously conscientiously cut down Isaacs' testimony regarding the movies". (Mot. at 15). This accusation is based on conjecture and without merit and the defendant cannot identify for this Court one such instance where the defendant's lay testimony was improperly limited.

Similar to the decision to exclude expert testimony, a district court's determination of whether evidence is relevant is reviewed for abuse of discretion. See United States v. Alvarez, 358 F.3d 1194, 1205 (9th Cir. 2004). Thus, the relevant inquiry is whether it is "fairly debatable" that the district court abused its discretion in limiting defendant's lay testimony to what the court determined to be relevant.

Prior to trial, the district court ruled that defendant's intent in creating his movies was relevant to the legal inquiry of whether a reasonable person would think the work has serious artistic value, and thus, the district court concluded that defendant could testify to his "goals, inspirations, and intended meaning" in creating any of the movies at issue. (See GEX 3 at 5). At the same time, the district court concluded that defendant's general opinion regarding the works' artistic value for movies he did not create was irrelevant. (Id.).

At trial, the defendant was allowed to testify about his goals, inspirations, and intended meaning for the videos that he created. He was further allowed to testify, extensively, about his background and influences. He presented numerous examples through photographic evidence of artistic work that he claimed was controversial and which inspired the work he created. (See GEX 4). He was permitted to discuss, at length, how "shock art" influenced him and how he intended for his work to have the same artistic appeal. He was also allowed to discuss shock artists who were criticized for their work and how those people influenced him and the similarities in what he was trying to accomplish with his videos. As such, the defendant was given wide latitude to present lay opinion and testimony relevant in this case and the judge's determination that any general lay opinion by defendant regarding the artistic value for videos the

defendant did not create was irrelevant, was not clearly erroneous.

iii. Limitations on Defense Counsel's Closing Argument

Defendant claims that the district court placed undue limitations on his closing argument and that these limitations therefore present a "substantial question." Defendant does not, however, point to any specific instances where permissible argument was limited by the district court. (See GEX 1 at 3). In the defendant's motion to the district court, based on defense counsel's memory, defendant asserts that the court unduly limited the closing argument in the following manner: (1) admonishing counsel "even when the Government did not object"; (2) disallowing arguments relating to "psychological interest of an obvious nature that sexually explicit movies provide,"; and (3) disallowing arguments regarding the First Amendment value of the movies. (Id. at 4).

The district court reviewed a draft transcript of defense counsel's closing argument and rejected the defendant's argument that any of the identified limitations presented a "substantial question." (Id.) As outlined in the district court's order, at no time did the district court interrupt defense counsel in the absence of the government's objection. (See id.). Moreover, on several occasions the district court overruled the government's objections. (Id.). Regarding "psychological interests" of the movies, the court assumed based on its reading of the

transcripts that the defendant was referring to the argument related to the movies' alleged "therapeutic value." Because there was no evidence before the court of a therapist's opinion regarding the movies, the court disallowed defense counsel's argument that the movies at issue are therapeutic to some people because they "make them feel that they are not alone in the universe…." (Id.). Although, this specific argument was disallowed, the court did allow defense counsel to argue, in the context of arguing therapeutic value, that "it's a safe inference to say, that [some people who think about sex in a different way'] do get something of value" from defendant's movies. (Id.). Thus, the court in fact permitted the defense counsel to argue the movies "psychological interest of an obvious nature." The defendant has not shown that the district court's determination of when defense counsel crossed the line from permissible common sense inference to impermissible expert opinion not in evidence was an abuse of discretion.

Regarding the First Amendment value of the movies, a review of the transcripts by the district court showed that the court sustained the government's objections when (1) defense counsel veered into instruction on what the First Amendment provides; (2) when Counsel discussed whether most other countries have the equivalent of the First Amendment, a fact not in evidence; and (3) when defense counsel stated that in some countries, one can

get executed for exercising freedom of speech, another fact not in evidence. (Id.).

The Supreme Court has long held that obscene material is not protected by the First Amendment. See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 53 (1973); Miller v. California, 415 U.S. 15, 23-25 (1973); Kois v. Wisconsin, 408 U.S. 229, 230 (1972); United States v. Reidel, 402 U.S. 351, 354 (1971); United States v. Roth, 354 U.S. 476, 485 (1957). Defendant's arguments regarding the First Amendment contradicted existing law, were wholly irrelevant and only offered to confuse the jurors. Furthermore, any mention of other countries and their equivalent of the First Amendment or their purported executions for exercising freedom of speech were also irrelevant and not based on facts in evidence. The district court properly required the defense counsel to limit his arguments to relevant issues and facts in evidence, thereby limiting the opportunity for the jury to be confused or distracted by irrelevant and improper arguments.

iv. Clarification of the Meaning of "Prurient Interest" Upon Question from Jury

The defendant argues that the district court's clarification of the meaning of "prurient interest" upon a jury question during deliberations presents a "substantial question." Specifically, defendant argues, without being able to articulate what precisely occurred, that he relied on the conjunctive

reading of the jury instruction. However, as the district court articulates in its ruling, upon review of the trial transcript of defense counsel's closing argument, the only time defense counsel mentioned the phrase "morbid, degrading, and unhealthy" was when he quoted the jury instruction. (GEX 1 at 5). Furthermore, at no point did defense counsel specifically argue or emphasize to the jury that they must find that the movies meet all three descriptive terms before they find that the videos appealed to a "prurient interest." (Id.).

In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. See Quercia v. United States, 289 U.S. 466, 469 (1933). This Court has held that the district court has the responsibility to eliminate confusion when a jury asks for clarification of a particular issue. See United States v. Hayes, 794 F.2d 1348, 1352 (9th Cir. 1986); United States v. McCall, 592 F.2d 1066, 1068 (9th Cir. 1979)(per curiam), cert. denied, 441 U.S. 936, 99 S.Ct. 2061, 60 L.Ed.2d 665 (1979). The ultimate question is "whether the charge taken as a whole was such as to confuse or leave an erroneous impression in the minds of the jurors." Powell v. United States, 347 F.2d 156, 158 (9th Cir. 1965).

There can be no dispute that the court's instruction here was a correct statement of law. The district court, in response

to the jury question: "Under 'prurient' interest, must all 3 criteria be met? 'morbid, degrading and unhealthy interest in sex'?", conducted further research on the issue and found that this Court had approved an instruction of prurient interest that construed the descriptive terms in the disjunctive. See Polykoff v. Collins, 816 F.2d 1326, 1336 (9th Cir. 1987). (GEX 1 at 5). In Polykoff, the plaintiffs challenged Arizona's obscenity statute as overbroad based on the Arizona Supreme Court's construction of the term "prurient interest" in State v. Bartanen, 121 Ariz. 454 (1979). 816 F.2d at 1334-35. In Bartanen, a jury instruction defined "prurient interest" as "an unhealthy, unwholesome, morbid, degrading, or shameful interest in sex, a leering or longing interest." Id. at 1336. As was in our case, the jury in Bartanen requested clarification on whether all of the adjectives had to apply. Id. The Bartanen trial judge "replied that the descriptive terms in the instructions are set forth in the alternative, and noted that the instructions were to be considered as a whole." Id. This Court, in Polykoff, upheld the disjunctive construction, concluding that the "prurient interest" definition in Bartanen is [not] unconstitutionally overbroad." Id. at 1336-37. Additionally, in Ripplinger v. Collins, 868 F.2d 1043, 1054 (9th Cir. 1989), this Court expressly recognized that it had "approved the Bartanen Instruction." (GEX 1 at 5).

Based on these authorities and the district court's view that the instruction, as written, clearly set forth the terms as a group of examples rather than as separate conjunctive criteria in order to distinguish a "prurient interest" in sex from a "candid interest" in sex, the district court clarified for the jury that the phrase "morbid, degrading, and unhealthy" did not list separate criteria; instead, they are "descriptive terms that describe what is a prurient interest" as opposed to a mere candid interest in sex, and therefore, the jury need not find that the movies satisfy all three descriptive terms to be "prurient." (Id.).

The district court had a responsibility to assure the proper conduct of the trial and that the jury was not confused when determining questions of law. Also, the court had the responsibility to eliminate confusion when the jury asked the question clarifying the instruction. The district court met its responsibility by researching the issue and ultimately following this Court's precedent by clarifying that the instruction regarding "prurient interest" clearly set forth the terms as a group of examples rather than as separate conjunctive criteria. The district court clarified the issue, by providing legally sound explanation, and thereby ensuring that the instruction did not confuse or leave an erroneous impression in the minds of the jurors.

IV. CONCLUSION

For the foregoing reasons, defendant's motion for bail pending appeal should be denied.

Respectfully Submitted,

____/s/_____
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_____/s/_____
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CERTIFICATE OF SERVICE

I, Michael W. Grant, Trial Attorney with the United States Department of Justice, Criminal Division, hereby certify that the Government's Opposition to Appellant Ira Isaacs' Motion for Order Permitting Appellant to Remain Free Pending Appeal was filed on April 3, 2013 by CM/ECF which will send electronic copies to counsel for the defendant, Roger Jon Diamond, 2115 Main Street, Santa Monica, California 90405. Also, on April 3, 2013, the Government mailed a paper copy to the counsel of defendant, Roger Jon Diamond, at 2115 Main Street, Santa Monica, California 90405.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

E-Filed

CRIMINAL MINUTES - GENERAL

Case No.	CR 07-732(A)-GHK	Date	March 22, 2013

Present: The Honorable **GEORGE H. KING, CHIEF UNITED STATES DISTRICT JUDGE**

Interpreter N/A

Beatrice Herrera	Not Reported	Michael Grant/Damon King – N/P
Deputy Clerk	*Court Reporter/Recorder, Tape*	*Assistant U.S. Attorney*

U.S.A. v. Defendant(s):	Present	Cust.	Bond	Attorneys for Defendants:	Present	App.	Ret.
IRA ISAACS	NO	X		ROGER DIAMOND	NO	X	

Proceedings: **(In Chambers) Order re:** Defendant's Motion for Bond (Dkt. No. 275)

This matter is before us on Defendant's Motion for Bond ("Motion"). We have considered the papers filed in support of and in opposition to this Motion and deem this matter appropriate for resolution without oral argument. L.R. 7-15. As the Parties are familiar with the facts in this case, we will repeat them only as necessary. Accordingly, we rule as follows.

I. Background

On April 27, 2012, Defendant was convicted following a jury trial of: (1) one count of engaging in the business of producing and selling obscene matter, in violation of 18 U.S.C. § 1466(a); (2) one count of using a facility and means of interstate and foreign commerce and interactive computer service to sell and distribute obscene material, in violation of 18 U.S.C. § 1465; (3) one count of using an express company common carrier and interactive computer service to transport obscene material, in violation of 18 U.S.C. § 1462(a); (4) two counts of mailing obscene matter, in violation of 18 U.S.C. § 1461. (*See* Dkt Nos. 235, 231). On January 16, 2013, we sentenced Defendant to 48 months imprisonment, three years of supervised release, and a fine of $10,000. On February 8, 2013, Defendant filed a motion for bond with the Ninth Circuit. On February 20, 2013, the motion was denied without prejudice to renewal, following presentation of a properly filed bail motion to us. On the same day, Defendant filed the instant Motion.

II. Analysis

18 U.S.C. § 3143(b)(1) controls the release of a defendant pending his or her appeal. It provides, in relevant part, that we "shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal . . . , be detained," unless we find that (1) the person is not likely to flee or pose a danger to the safety of any other person or the community by clear and convincing evidence; (2) the appeal is not for the purposes of delay; and (3) the appeal raises a substantial question of law or fact likely to result in reversal, a new trial, or a sentence that does not include a term of imprisonment. The Government disputes only whether Defendant is a danger to the community and whether Defendant has made a

sufficient showing that the appeal raises substantial questions of law or fact likely to result in reversal or a new trial.

A. Danger to the Community

The "danger" contemplated by § 3143(b)(1)(A) includes physical and economic harm. *See United States v. Reynolds*, 956 F.2d 192, 192-93 (9th Cir. 1992). The Government argues that Defendant's post-conviction criminal misconduct, i.e., his continued sale and distribution of obscene materials after his conviction and stipulation to forfeiture, demonstrates "unequivocally that he is a continued threat to the community." (Opp'n 13-14). The Government, however, cites no authority to support the proposition that exposure to obscene materials constitutes a relevant "danger" within the meaning of § 3143(b)(1)(A). Defendant asserts that he is not a threat to the safety of the community, as evidenced by the nature of the charged crime, his conduct during the proceedings, and his background as presented in the pre-sentence report. The Government does not counter Defendant's assertion with any showing that Defendant poses a danger to the community by way of physical or economic harm. We find that Defendant has demonstrated by clear and convincing evidence that he does not pose a danger to the community within the meaning of 18 U.S.C. § 3143(b)(1)(A).

B. Substantial Questions of Law or Fact Likely to Result in Reversal, a New Trial, or a Sentence that Does Not Include a Term of Imprisonment

To prevail on the instant Motion, Defendant must also demonstrate that his appeal presents a substantial question of law or fact that is likely to result in one of the conditions set forth under § 3143(b)(1)(B). This requirement has two prongs. First, Defendant must show that his appeal presents a "substantial question." *United States v. Handy*, 761 F.2d 1279, 1280-81 (9th Cir. 2003). "A 'substantial question' is one that is fairly debatable or fairly doubtful; it is one of more substance than would be necessary to a finding that it was not frivolous." *United States v. Montoya*, 908 F.2d 450, 450 (9th Cir. 1990). Second, Defendant must also show that the question, if decided in his favor, is the type of question that is "likely to result in reversal or an order for a new trial" (or other relevant conditions under § 3143(b)(1)(B)). *Handy*, 761 F.2d at 1280-81.

Defendant argues that his appeal will raise the following four questions: (1) whether he should have been permitted to testify as an expert on the artistic nature of the movies, (Reply 8); (2) whether we unduly limited the scope of his lay testimony by not giving him enough "leeway to explain the artistic nature of the movie," (Reply 9); (3) whether we substantially interfered with Defense Counsel's closing argument; and (4) whether we impermissibly modified the definition of prurient interest upon a question from the jury during their deliberation.

1. Exclusion of Defendant as An Art Expert

Defendant argues that the admissibility of his expert testimony on the artistic nature of his movies is a "fairly debatable" question, given that (1) Judge Kozinski, when presiding over the first trial, had deemed Defendant an expert following a *Daubert* hearing; and (2) no binding authority has specifically addressed this issue, and "an appellate court could conclude that when material presumptively protected by the First Amendment is the subject of an obscenity case[,] expert testimony should be encouraged, not discouraged, even where the defendant himself proposes to be the expert." (Reply 8).

Defendant's argument misses the mark. In arguing that the admissibility of his proposed art expert testimony is a fairly debatable question, Defendant implicitly assumes that this issue would be reviewed anew on appeal. However, it is well-established that a district court's decision to exclude expert testimony is committed to its broad discretion and reviewed for abuse of discretion, *United States v. Redlightening*, 624 F.3d 1090, 1110 (9th Cir. 2010). Thus, the question that must be "fairly debatable" to entitle Defendant to a finding of a "substantial question" is whether we abused our discretion in precluding Defendant's proposed art expert testimony. Defendant has offered no argument to this end – indeed, Defendant does not even address the basis of our *Daubert* ruling, in which we concluded that Defendant's proposed testimony is inadmissible under *Daubert* because he failed to demonstrate that his proposed opinion was supported by any reliable methodology. (*See* Dkt. No. 140, at 3-4). Instead, Defendant merely states that "it would be enlightening for the jury to at least know what the opinion is of an expert." (Reply 8). Such assertion does not address the basis of our evidentiary ruling, much less show that it is "fairly debatable" that we had abused our discretion. Accordingly, we conclude that the exclusion of Defendant's proposed expert testimony does not present a "substantial question."

2. Limitation on Defendant's Lay Testimony

Defendant's argument that there is a "substantial question" regarding whether we "unnecessarily and improperly restricted [Defendant]'s testimony as a layman explaining his own movies," (Reply 9), is unavailing for the same reason. As with the decision to exclude expert testimony, our determination of whether evidence is relevant is reviewed for abuse of discretion. *United States v. Alvarez*, 358 F.3d 1194, 1205 (9th Cir. 2004). Thus, the relevant inquiry, on this Motion, is whether it is "fairly debatable" that we abused our discretion in limiting Defendant's lay testimony to what we determined to be relevant.

Prior to trial, we had ruled that Defendant's intent in creating the movies is relevant to the legal inquiry at issue, i.e., whether a reasonable person would think the work has serious artistic value, and thus, we concluded Defendant may testify to his "goals, inspirations, and intended meaning" in creating any of the movies at issue. (Dkt. No. 140, at 5). At the same time, we concluded that Defendant's general opinion regarding the works' artistic value for movies he did not create is irrelevant. (*Id.*). On this Motion, Defendant does not address the basis of our relevance determination, and therefore makes no showing that suggests that we abused our discretion in our determination, or that we failed to follow our ruling at trial. Instead, Defendant merely asserts that "[a] defendant in an obscenity case who is the producer and director of the subject movie ought to be given some leeway to explain the artistic nature of the movie." (Reply 9). Defendant's conclusory assertion does not make it "fairly debatable" that our relevance ruling was an abuse of discretion. Accordingly, we conclude that Defendant has failed to demonstrate that our limitations on his lay testimony present a "substantial question."

3. Limitation on Defense Counsel's Closing Argument

Next, Defendant argues that the limitations we placed Defense Counsel's closing argument present a "substantial question." Defendant concedes that he cannot point to specific instances where permissible argument was limited by us because he has not yet obtained a copy of the transcript, but urges that we review the transcript in considering this Motion. Based on Defense Counsel's memory, Defendant asserts that we unduly limited the closing argument in the following manner: (1) admonishing counsel "even when the Government did not object," (Reply 13); (2) disallowing arguments relating to"psychological interests of an obvious nature that sexually explicit movies provide," (Reply 12); and (3) disallowing arguments regarding the

First Amendment value of the movies, e.g., that "[i]t is no coincidence that countries that behead their citizens for blasphemy are probably less likely to allow sexually explicit materials to be exhibited to adults," and that "a country that allows pornography gains respect of all of its citizens and the people of the world because as distasteful as some pornography may be or certainly is, that a country would allow it is a reflection of the country's values in terms of freedom," (Reply 12-13).

Having reviewed a draft transcript of Defense Counsel's closing argument, we reject Defendant's argument that any of the identified limitations present a "substantial question." First, the transcript shows that at no point during Defense Counsel's closing argument did we interrupt him in the absence of the Government's objection. Moreover, on several occasions, we overruled the Government's objections. Thus, Defendant's first basis for undue limitations on his Counsel's closing argument is based on an inaccurate recollection. Second, as to the "psychological interests" of the movies, we assume that Defendant is referring to the argument relating the movies' alleged therapeutic value. Because there was no evidence of a therapist's opinion regarding the movies, we disallowed counsel's specific argument that the movies at issue are therapeutic to some people because they "make[] them feel that they are not alone in the universe, that other people have and share the same bizarre or weird sexual feelings that they do," providing "comfort to these people." Although we disallowed this specific argument, we allowed Defense Counsel to argue, in the context of arguing therapeutic values, that "it's a safe inference to say, that [some people who think about sex in a different way] do get something of value" from Defendant's movies. Thus, we in fact permitted Counsel to argue the movies' "psychological interest of an obvious nature." Defendant has made no showing that our determination of when Defense Counsel crossed the line from permissible common sense inference to impermissible expert opinion not in evidence was an abuse of discretion. Thus, Defendant has failed to bear his burden in showing that it is "fairly debatable" that we abused our discretion in limiting the scope of Defense counsel's argument relating to the purported therapeutic value of the movies.

Finally, as to Defense Counsel's argument relating to the purported First Amendment value of the movies, a review of the transcript shows that we sustained the Government's objections under the following circumstances: (1) when Defense Counsel veered into instruction on what the First Amendment provides; (2) when Counsel discussed whether most other countries have the equivalent of the First Amendment, a fact not in evidence; and (3) when Counsel stated that in some countries, one can get executed for exercising freedom of speech, another fact not in evidence. Defendant has made no showing that it is "fairly debatable" that we abused our discretion in making these rulings.

Accordingly, we conclude that our limitations on Defense Counsel's closing argument do not present a "substantial question."

4. Clarification of the Meaning of "Prurient Interest" Upon Question from Jury

Finally, Defendant argues that our clarification of the meaning of "prurient interest" upon a jury question during deliberation presents a "substantial question." Defendant concedes that he does not recall what precisely occurred, but asks that we review the transcript in considering this Motion.

Having reviewed the draft transcript, we believe that Defendant is referring to Jury Note No.2, wherein the jury asked the following question: "Under 'prurient' interest, must all 3 criteria be met? 'morbid, degrading, and unhealthy interest in sex'?" (*See* Dkt. No. 206). In Jury Instruction No. 29, we instructed that "[a]n appeal to 'prurient' interest is an appeal to a morbid, degrading, and unhealthy interest in sex, as

distinguished from a mere candid interest in sex." The Parties had agreed on this instruction, which is based on § 2.63 of the Fifth Circuit Pattern Criminal Jury Instructions (2001). In response to the jury's question, we conducted further research on the issue and found that the Ninth Circuit had approved an instruction of prurient interest that construed the descriptive terms in the disjunctive. *See Polykoff v. Collins*, 816 F.2d 1326, 1336 (9th Cir. 1987). In *Polykoff*, the plaintiffs challenged Arizona's obscenity statute as overbroad based on the Arizona Supreme Court's construction of the term "prurient interest" in *State v. Bartanen*, 121 Ariz. 454 (1979). 816 F.2d at 1334-35. In *Bartanen*, a jury instruction defined "prurient interest" as "an unhealthy, unwholesome, morbid, degrading, or shameful interest in sex, a leering or longing interest." *Id.* at 1336. As was the case here, the *Bartanen* jury requested clarification on whether all of the following adjectives had to apply: unhealthy, unwholesome, morbid, degrading, and shameful." *Id.* The *Bartanen* trial judge "replied that the descriptive terms in the instructions are set forth in the alternative, and noted that the instructions were to be considered as a whole." *Id.* The Ninth Circuit, in *Polykoff*, upheld this disjunctive construction, concluding that the "'prurient interest' definition in *Bartanen* is [not] unconstitutionally overbroad." *Id.* 1336-37. Furthermore, in *Ripplinger v. Collins*, 868 F.2d 1042, 1054 (1989), the Ninth Circuit expressly recognized that it had "approve the *Bartanen* instruction." Based on these authorities and our view that the instruction, as written, clearly set forth the terms as a group of examples rather than as separate conjunctive criteria in order to distinguish a "prurient interest" in sex from a "candid interest" in sex, we clarified for the jury that the phrase "morbid, degrading, and unhealthy" does not list separate criteria; instead, they are "descriptive terms that describe what is a prurient interest" as opposed to a mere candid interest in sex, and therefore, the jury need not find that the movies satisfy all three descriptive terms to be "prurient."

Because Defendant does not articulate why our clarification presents a "substantial question" in the instant Motion, we look to his objection during the trial proceeding regarding Jury Note No.2. At the time, Defendant argued that "morbid, degrading, and unhealthy" are separate criteria that must be met, but did not dispute that relevant Ninth Circuit authorities construed these descriptive terms in the disjunctive. Instead, he argued only that the Parties had agreed on the instruction, which set forth the descriptive terms in the conjunctive, and that Defense Counsel had made closing argument in reliance upon the instruction as provided. We rejected this argument because other than general reminders to the jury to read and follow the instruction carefully, Defense Counsel could point to no instance during his closing argument in which he specifically relied on a conjunctive reading of the phrase "morbid, degrading, and unhealthy." Indeed, a review of Defense Counsel's closing argument shows that the only time he mentioned the phrase "morbid, degrading, and unhealthy" was when he quoted the jury instruction. At no point did Defense Counsel specifically argue or emphasize to the jury that they must find that the movies meet all three descriptive terms before they find that the movies appeal to a "prurient interest." We find that it is not "fairly debatable" that his Counsel had in fact relied on a conjunctive reading of the relevant jury instruction. Our clarification of the meaning of "prurient interest" therefore does not present a "substantial question."

In sum, we conclude that Defendant has failed to present any "substantial question" within the meaning of § 3143(b)(1)(B).

III. Conclusion

Based on the foregoing, Defendant's Motion is **DENIED**. Defendant shall surrender himself to the United States Marshal **within seven (7) days hereof**.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CRIMINAL MINUTES - GENERAL

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. IRA ISAACS, Defendant.	**CR-07-732-GHK** **GOVERNMENT'S RESPONSE TO COURT ORDER REGARDING DEFENDANT'S POST-VERDICT SALES OF OBSCENE VIDEOS**

Pursuant to the Court's Order, dated August 30, 2012, Plaintiff United States of America, through the undersigned counsel, submits the following information and evidence concerning post-verdict sales of obscene videos by defendant, Ira Isaacs.

On April 27, 2012, the defendant, Ira Isaacs, was convicted of multiple violations of federal obscenity laws to include engaging in the business of selling and transferring obscene matter in violation of 18 U.S.C. § 1466(a) for operating a

business in which he engaged in the distribution, transportation, and sale of obscene videos which depict women engaging in sex acts while eating and ingesting feces, and engaging in sexual intercourse with animals including dogs.

On April 29, 2012, the defendant and his attorney appeared on a morning talk radio show hosted by David Cruz, which was broadcast in Los Angeles, California on KFI AM 640. A CD/DVD containing a copy of the broadcast has been lodged with the Court. During the broadcast at [15:12], the defendant asks Mr. Cruz if he may provide the URL of his website to the listeners, and stated: "I could use the money, I could use the money, so please order, go check out the site, it's www.scatmoviez, with a "z", s-c-a-t-m-o-v-i-e-z dot com, scatmoviez, with a z, dot com. Please go." The defendant's post-conviction statements make it clear that just two days after being convicted of engaging in the business of transferring, distributing, and selling obscene videos, he knowingly continued to engage in the same business and continued to knowingly violate federal obscenity laws by selling and distributing obscene videos.

After hearing the defendant make these statements on the radio show, Detective Kyle Lewison of the Los Angeles Police Department (LAPD), while acting in an undercover capacity, accessed the website www.scatmoviez.com. Det. Lewison knew this website was operated by the defendant based on his prior investigation of the defendant and his companies LA Media and

Stolen Car Films. Screenshots of the defendant's website, captured on May 17, 2012, demonstrate that the defendant continued to actively operate this website following his conviction on April 27, 2012. (*See* Website Screenshots at Attachment 1).

Moreover, Det. Lewison discovered that twenty-eight new videos were advertised, posted, and available for purchase on April 30, 2012, just three days following the defendant's conviction. The defendant's website advertised "28 New Arrival[*sic*] Monday April 30th, All DVDs now $14.95." (*See* Attachment 1 at p. 1). The titles and descriptions of some of the newly posted videos, including "EURO Scat Girls," "My Pony Lover," and "Violet: Dog and Pig Fuckers," suggested that these videos depict women engaged in sex acts while eating and ingesting feces, and sex acts depicting women engaged in sexual intercourse with animals, including dogs, which is the exact same type of conduct depicted in the videos deemed obscene by the jury and resulting in the defendant's conviction on April 27, 2012. (*See* Attachment 1 at pgs. 2-4).

On May 17, 2012, in order to verify that the defendant was still selling and distributing obscene videos, Det. Lewison conducted a controlled undercover purchase of three of the defendant's post-verdict newly advertised and released videos. The videos purchased were "EURO Scat Girls (#10377)," "My Pony Lover (#576)," and "Violet: Dog and Pig Fuckers (#564)." The

defendant accepted payment for the videos and subsequently shipped the videos, postmarked May 24, 2012, using the United States Postal Service (USPS) to an undercover address in Los Angeles, California. (*See* LAPD Investigation Report by Det. Lewison at Attachment 2).

On May 29, 2012, Det. Lewison received a package containing the purchased videos. The return address on the package was from "CW" at "7119 Sunset Blvd, LA, CA 90046," which Det. Lewison recognized as an address associated with the defendant and his company "LA Media." (*See* Attachment 2 at p. 1). Det. Lewison opened the package, which contained four videos inside, the three videos he ordered and purchased and another video with the number "592" written on the DVD. (*See* Attachment 2 at p. 1). Also, inside the package was a receipt which stated "Thank you for ordering from ScatMoviez.com or CinemaScat.com. Your credit card will be billed from 'Cosmetic Warehouse'… PLEASE, IF EVER ASKED ABOUT PURCHASE, PLEASE BE DISCREET…" The receipt was signed "Thanks, Sara." (*See* Receipt at Attachment 3). From the investigation and trial, Det. Lewison knew that the defendant operated both the websites scatmoviez.com and cinemascat.com. Furthermore, the defendant admitted, both by stipulation and during his testimony at trial, that he owned and operated scatmovies.com, cinemascat.com, and other variations of the sites. Det. Lewison also knew that the defendant used the name "Sara" when corresponding with customers and that the defendant

identified all of his movies with a number designation, just as he did with the May 2012 purchase (*e.g.*, "592" and "10377").

Det. Lewison reviewed the four videos and found that the videos depict women engaging in sex acts while eating and ingesting feces, and depict men and women engaging in sexual intercourse with animals, which is the same type of conduct depicted in the videos deemed obscene by the jury and resulting in the defendant's conviction on April 27, 2012. (*See* Attachment 2 at pgs. 2-3). A DVD copy of each video has been lodged with the Court.

The government filed a letter concerning the post-conviction sales by the defendant with the United States Probation Officer handling this case, and copied the defense. After the defense was on notice that the government was aware of the defendant's post-verdict sales, the defendant's websites no longer advertised, nor made available for sale, obscene videos.

The information and evidence set forth above demonstrate that the defendant, Ira Isaacs, continued to violate federal obscenity laws by engaging in the business of transferring, distributing, and selling obscene videos within two days of having been convicted of that very same conduct. The Government submits that the defendant's post-conviction ongoing criminal conduct belies his profession of acceptance of responsibility for the offense of conviction.

As such, the government respectfully requests the Court follow the recommendation of the probation officer, outlined in the Pre-Sentencing Investigation Report, and refuse to apply a reduction for acceptance of responsibility under U.S.S.G. § 3E1.1.

Respectfully Submitted,

__/s/_____
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CERTIFICATE OF SERVICE

I, Michael W. Grant, Trial Attorney with the United States Department of Justice, Criminal Division, hereby certify that the foregoing Government's Response to Court Order Regarding Defendant's Post-Verdict Sales of Obscene Videos was filed on September 12, 2012 by CM/ECF which will send electronic copies to counsel for the defendant, Roger Jon Diamond, 2115 Main Street, Santa Monica, California 90405. Also, on September 12, 2012, the Government mailed a paper copy, including all attachments, to the counsel of defendant, Roger Jon Diamond, at 2115 Main Street, Santa Monica, California 90405.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No.	CR 07-732-GHK	Date	March 2, 2011

Present: The Honorable **GEORGE H. KING, UNITED STATES DISTRICT JUDGE**

Interpreter N/A

Beatrice Herrera	Mary Riordan Rickey	Brent D. Ward
Deputy Clerk	*Court Reporter/Recorder, Tape*	*United States Department of Justice*

U.S.A. v. Defendant(s):	Present	Cust.	Bond	Attorneys for Defendants:	Present	App.	Ret.
Ira Isaacs			√	Roger Diamond			√

Proceedings: ***Daubert*** **Motions**

This matter is before the Court on Defendant Ira Isaacs's ("Defendant") Motion to Designate himself as an expert and the Government's Motion to Preclude Expert Testimony of Defendant Ira Isaacs.[1] The Court held a *Daubert* hearing on January 19, 2011, at which Defendant testified. The Parties each filed supplements to their original papers, which the Court has reviewed. Having reviewed all filings and testimony in support of and in opposition to the Motions, we hereby rule as follows.

I. Background

Defendant faces three criminal charges for his involvement with allegedly obscene videos. Defendant has asserted his intention to raise a defense that the videos at issue have serious artistic value. Defendant lists several qualifications. Defendant graduated from the State University of New York in 1977, where he received a B.A. in Communications arts. He has directed over sixty films, some of which do not involve nude images. Defendant claims that his film-making experience gives him insight into the three charged films' artistic value. He also claims that he is presently working on a gallery installation art exhibit featuring the audience's reaction to one of the charged films. Defendant also asserts that he has been in the traditional art world for more than 25 years, including producing marketing campaigns featuring fine art imagery in a commercial art setting. He and his company have produced over a 100 hand-painted works to be used in a variety of commercial applications.

Defendant proposes to testify on the distinction between postmodernism (characterized as the use of disturbing imagery) versus modernism (aesthetically pleasing images) and the value of both. Defendant

[1]Defendant earlier had indicated that he intended to call other expert witnesses. His *Daubert* motion, however, only proposed to call himself as an expert witness. (Dkt. No. 133). He also reiterated this intent during the January 19, 2011 hearing. The Government had earlier indicated that it too planned to solicit expert testimony, specifically to respond to any argument that the videos have scientific value. However, in response to Defendant's filings, the Government has dropped any such request. Thus, the only *Daubert* issue before the Court is whether Defendant can testify as an expert.

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explains that when most people think of art, they think of a beautiful painting in a museum or a sculpture in an art gallery. However, he explains that art does not have to be beautiful; rather it can utilize disturbing imagery and ideas (such as war and taboos). If qualified as an expert, Defendant will testify that the work has artistic value because it has shock value and works that have shock value also have artistic value because they provoke people who witness them. Defendant will testify that much of postmodern art relies on a gut emotional reaction -- to shock the viewer into thinking and questioning what they are looking at. Defendant also proposes to testify about how part of what characterizes his works as art is the response they have received and the emotions they have evoked.

Defendant proposes to discuss works by other artists that help to explain his own work. Among these are "The Fountain", a famous piece of art by Marcel Duchamp, "Nude Descending a Staircase", also by Duchamp, a work by Piero Mannzoni, a work by Kiki Smith entitled "Trail", a work by Chris Ofili entitled "Madonna", and Robert Rauschenberg's "White Painting". Some of these works involve feces, although none involve the precise combination of images that are present in the videos at issue in this case.

In his filings and during his testimony at the *Daubert* hearing, Defendant offered several theories on what makes something art and why his works qualify. These include: "Art is created by the artist and should be free from definitions, categories and pre-conceived ideas," "the venue is more important than the art work itself," and "the point of art [is] to get people to think, question and discuss."

II. Legal standards

A work is obscene if the jury determines (1) "that the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest"; (2) that the average person applying contemporary community standards would find that "the work depicts or describes, in a patently offensive way, sexual conduct"; and (3) that a reasonable person would find that "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 25 (1973). "[S]ex and obscenity are not synonymous. . . . The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972) (quoting *Roth v. United States*, 354 U.S. 476, 487 (1957)). "A reviewing court must, of necessity, look at the context of the material, as well as its content." *Id.*

Because films "are the best evidence of what they represent," the Supreme Court has noted that the task of judging whether a particular film is obscene "is not a subject that lends itself to the traditional use of expert testimony. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 (1973). "Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand, . . . [n]o such assistance is needed by jurors in obscenity cases . . . . The materials are sufficient in themselves for the determination of the [obscenity] question." *Id.* (internal quotation marks omitted). Expert testimony is not per se inadmissible in all obscenity cases, as the Supreme Court made clear that the "defense should be free to introduce appropriate expert testimony." *Kaplan v. California*, 413 U.S. 115, 121 (1973).

Trial courts have "wide discretion in [their] determination to admit [or] exclude evidence, and this is particularly true in the case of expert testimony." *Hamling v. United States*, 418 U.S. 87, 108 (1974). Federal Rule of Evidence 702 provides that:

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> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, 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.

Daubert v. Merrell Dow Pharmaceuticals, Inc., established a framework to guide trial courts in performing their "gatekeeping" function. 509 U.S. 579 (1993). Under *Daubert*, if a party proffers expert testimony that is scientific in nature, it is admissible only if the trial court concludes: (1) that the reasoning or methodology underlying the testimony is scientifically valid, and (2) that the reasoning or methodology will assist the trier of fact to understand or determine a fact in issue. *Id.* at 592-93. The focus is "solely on principles and methodology, not on the conclusions that they generate." *Id.* at 595. The *Daubert* framework applies equally to any testimony that is based on technical or specialized knowledge. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 148-49 (1999). In *Perry v. Schwarzenegger*, 704 F. Supp. 2d 931 (N.D. Cal. 2010), the district court provided a good summary of the factors relevant to an expert's reliability:

> (1) whether [a method] can be (and has been) tested; (2) whether the [method] has been subjected to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the [method's] operation; (5) a degree of acceptance of the method within a relevant community, (6) whether the expert is proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, (7) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion, (8) whether the expert has adequately accounted for obvious alternative explanations, (9) whether the expert employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field, and (10) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

Id. at 947 (internal quotation marks and citations omitted).

III. Defendant's Proposed Expert Testimony

Defendant proposes to provide expert testimony concluding that these videos have serious artistic value. Admittedly, deciding who is qualified as an expert in art is a difficult task. An expert in art (for example, a world-recognized artist) may not have the formal training that an expert in another field would likely possess. Distinguishing art from obscenity also does not lend itself to a definitive test like those that experts in other fields may employ.

Here, Defendant's proposed testimony does not meet the required standards for expert testimony. First, the Court is concerned that Defendant could provide no methodology in determining whether something qualifies as art or has serious artistic value. Instead, Defendant only provided vague and self-serving (and at times circular) descriptions, such as art is what an artist does. He also describes that a work may become art when it is commented on or receives the attention of art critics. By this logic a work that did not start as art may later crystallize into art. However, Defendant provides no explanation for how one can determine that a

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work has transformed from obscenity into art. Defendant also points to the articles that have been written about the prosecution of him as evidence that his work has received the requisite amount of attention to distinguish it as art. (Exh. No. 137). This cannot be a proper methodology because prosecution for obscenity cannot have the legal affect of shielding the work from prosecution for the offense. Finally, Defendant does not provide any examples of what is obscene or characteristics that would make some images obscene (short of some film director declaring his own work obscene).

Moreover, to the extent Defendant offers a methodology, he provides insufficient qualifications to support his testimony. A methodology from any layperson is irrelevant -- the methodology needs to be backed by expertise or qualifications for it to be considered "expert" testimony. Defendant declares that he knows about art, but does not demonstrate sufficient expertise to qualify as an expert. An individual can read a book about the human heart but that does not make him or her an expert in the methods of heart surgeries. Defendant does not possess sufficient qualifications to show that he has the type of expertise necessary to make his methodology reliable, and not just an ad hoc opinion about what constitutes art.

A district court in the District of Colombia recently faced a similar situation in deciding whether to certify a professor of film studies at the University of California, Santa Barbara as an expert. *United States v. Stagliano*, 729 F. Supp. 2d 222 (D.D.C. 2010). Although that decision is not binding on this court, it is informative. That court ruled that although the professor possessed impressive credentials to discuss film studies, those credentials were not directly relevant to the task of distinguishing art from obscenity, and she had never written or lectured on the topic. *Id.* at 229. The professor in that case possessed much stronger credentials than Defendant. More importantly, the district court, similarly to our situation, relied upon the absence of methodology to determine if a work has serious artistic value. For example, "[w]hen asked again whether she had ever seen pornography that she would not consider to be art, the most she would say is: 'I certainly have seen some films that weren't to my taste.' She went on to explain that '[a]rt as a practice, a creative practice, . . . is a matter of taste.'" *Id.* The court concluded that "the defendants failed to meet their burden of demonstrating that the methodology underlying her opinion was reliable and would truly assist the jury in evaluating the serious artistic value of the charged works." *Id.* at 230.

Based on the defects in Defendant's proposed expert testimony as set forth above, we conclude that Defendant may not testify as an expert about the alleged artistic value of the videos.

IV. Layperson testimony

Even if he cannot testify as an expert, Defendant may still be able to testify as a lay witness about his films. The Supreme Court has explained, "it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." *Rock v. Arkansas*, 483 U.S. 44, 49 (1987). The right stems from several provisions of the Constitution, including the Fourteenth Amendment's Due Process Clause, the Sixth Amendment's Compulsory Process Clause, and the Fifth Amendment's privilege against self-incrimination. *United States v. Pino-Noriega*, 189 F.3d 1089, 1094 (9th Cir. 1999). However, the Ninth Circuit has also ruled that a defendant's proposed testimony must be relevant. *United States v. Moreno*, 102 F.3d 994, 998 (9th Cir. 1996). If testifying as a nonexpert, Defendant would purportedly testify about his intentions in creating the video. The applicable legal standard here is whether a reasonable person, applying a nationwide standard, would think the work has serious artistic value. Thus, the Court must decide whether Defendant's testimony would be relevant given the objective standard to be applied by the jury for determining

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what has serious artistic value.

Although the standard is objective, one of the considerations a reasonable person might want to take into account is the intent of the creator in making the work. The reasonable person, in assessing the nature of a work of art, might find the intent of its creator highly relevant. In this respect, art is unique. Given its inherent subjectivity, and the vast range of considerations a viewer of art might consider determinative in assessing a work of art, testimony concerning the artist's goals, inspirations, and intended meaning is at least relevant. Of course, this rationale does not extend to any videos which Defendant did not play a role in creating. For these, Defendant's opinion of the artistic nature of the work is irrelevant.

V. Conclusion

For the foregoing reasons, Defendant's proposed expert testimony is hereby deemed **INADMISSIBLE**. As to any of the videos that he created, Defendant may testify about what he aimed to achieve in creating the works.

Within **thirty (30) days** hereof, the Parties shall meet and confer regarding any motions in limine and shall file any such motions in a single fully integrated joint brief. To the extent the Parties still dispute the definition of the relevant community they shall include this issue in this joint brief. The joint brief shall then be calendared for hearing at the final pre-trial conference to be held on **May 2, 2011 at 3:30 p.m.** The matter is hereby **set for trial on May 17, 2011 at 9:30 a.m.** Prior to trial, the Parties shall meet and confer and in a joint brief, to be filed **thirty (30) days before trial**, propose a jury questionnaire. In this joint brief, the Parties shall list each proposed question and then whether the Parties stipulate to it or, if there are objections, the grounds for those objections. The Parties shall file separate proposed voir dire questions no later than **fourteen (14) days before trial**. No later than **ten (10) days before trial** the Parties shall file a joint proposed statement of the case.

IT IS SO ORDERED.

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LIST OF EXHIBITS AND WITNESSES

Case Number	2:07-cr-00732-GHK-1	**Title**	USA v. Ira Isaacs
Judge	GEORGE H. KING, UNITED STATES DISTRICT JUDGE		
Dates of Trial or Hearing	April 24, 25, 26 and 27, 2012		
Court Reporters or Tape No.	Mary Rickey and Pamela Batalo		
Deputy Clerks	Chris Silva and Beatrice Herrera		

Attorney(s) for Plaintiff(s) / Petitioner(s)	**Attorney(s) for Defendant(s) / Respondent(s)**
Michael W. Grant	Roger Jon Diamond
Damon A. King	

Plaintiff(s) or Petitioner(s)			**Defendant(s) or Respondent(s)**			**EXHIBIT DESCRIPTION / WITNESS**	**Called By**
Ex. No.	**Id.**	**Ev.**	**Ex. No.**	**Id.**	**Ev**		
						SEE ATTACHED LISTS	

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LIST OF EXHIBITS AND WITNESS - CONTINUED

Plaintiff(s)		Defendant(s)		Witness	Called By
Wit. #	Date	Wit. #	Date		
1.	4/24/2012			James Myrick	Plaintiff
2.	4/25/2012			Marlayna Jones Tricket	Plaintiff
3.	4/25/2012			Matthew Goward	Plaintiff
4.	4/25/2012			Kyle Lewison	Plaintiff
		1.	4/26/2012	Ira Isaacs	Defendant

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LIST OF EXHIBITS AND WITNESS - CONTINUED

Plaintiff(s)			Defendant(s)			Exhibit Description	Called By
Ex. #	Id.	Ev.	Ex. #	Id.	Ev.		
1.	4/24/12	4/24/12				Fictitious Business Name Statement, LA Media	Plaintiff
2.	4/24/12	4/24/12				Network Solutions Business Records	Plaintiff
3.	4/24/12	4/24/12				Intercosmos Media Group Business Records	Plaintiff
4.	4/24/12	4/24/12				Wild West Domain Business Records	Plaintiff
5.	4/24/12	4/24/12				The Planet Business Records	Plaintiff
6.	4/24/12	4/24/12				Fictitious Business Name Statement, Stolen Car Films	Plaintiff
7.	4/25/12	4/25/12				Application for Delivery of Mail Through Agent, dated 10/20/00	Plaintiff
8.						LA Media Website Movie Descriptions/Adverts for Charged Movie - “Gang Bang Horse ‘Pony Sex Game’”	
9.	4/25/12	4/25/12				“Mako’s First Time Scat” Video	Plaintiff
10.	4/24/12	4/24/12				“Mako’s First Time Scat” Packaging Envelope	Plaintiff
11.	4/24/12	4/24/12				LA Media Website Movie Descriptions/Adverts for Charged Movie - “Mako’s First Time Scat”	Plaintiff
12.	4/25/12	4/25/12				“Mako’s First Time Scat” English Translation Transcript	Plaintiff
13.	4/24/12	4/24/12				LA Media Website Movie Descriptions/Adverts for Charged Movie - “Hollywood Scat Amateur No. 7”	Plaintiff
14.	4/24/12	4/24/12				Web Page Screen Shots of 2006 Purchase - “Hollywood Scat Amateur No. 7”	Plaintiff
15.	4/24/12	4/24/12				Confirmation Email from LA Media to SA Myrick	Plaintiff
16.	4/24/12	4/24/12				“Hollywood Scat Amateur No. 7” 2006 Purchase Packaging Envelope	Plaintiff
17.	4/24/12	4/24/12				Flyer for www.megascatshow.com included in “Hollywood Scat Amateur No. 7” 2006 Purchase Packaging Envelope	Plaintiff
18.	4/24/12	4/24/12				United Parcel Service Tracking Report	Plaintiff
19.	4/25/12	4/25/12				“Hollywood Scat Amateur No. 7” Video purchased in January 17, 2007	Plaintiff
20.	4/24/12	4/24/12				Photos from the execution of 2006 search of LA Media’s Office	Plaintiff
21.	4/25/12	4/25/12				LA Media Website Movie Descriptions/Adverts for Charged Movie - “Japanese Doggy Three Way”	Plaintiff

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LIST OF EXHIBITS AND WITNESS - CONTINUED

Plaintiff(s)			Defendant(s)			Exhibit Description	Called By
Ex. #	Id.	Ev.	Ex. #	Id.	Ev.		
22.	4/25/12	4/25/12				LA Media Website Movie Descriptions/Adverts for Charged Movie - “Hollywood Scat Amateur No. 10"	Plaintiff
23.	4/25/12	4/25/12				Exported Data DEHQ17	Plaintiff
24.	4/25/12	4/25/12				Exported Data DEHQ16	Plaintiff
25.	4/25/12	4/25/12				Exported Data DEHQ14	Plaintiff
26.	4/25/12	4/25/12				Exported Data DEHQ13	Plaintiff
27.	4/25/12	4/25/12				Exported Data DEHQ12	Plaintiff
28.	4/25/12	4/25/12				Goward Report with Attachments A-O	Plaintiff
29.	4/25/12	4/25/12				LA Media Website Movie Descriptions/Adverts for Charged Movie - “Hollywood Scat Amateur No. 38”	Plaintiff
30.	4/25/12	4/25/12				Web Page Screen Shots of 2011 Buy - “Hollywood Scat Amateur No. 7”	Plaintiff
31.	4/25/12	4/25/12				Packaging Material for Detective Lewison’s January 2011 Purchase	Plaintiff
32.	4/25/12	4/25/12				Packaging Material for Detective Lewison’s Second January 2011 Delivery	Plaintiff
33.	4/26/12	4/26/12				Application for Delivery of Mail Through Agent, dated 1/8/09	Plaintiff
34.	4/25/12	4/25/12				California Department of Motor Vehicles, Image Record for Ira Isaacs	Plaintiff
35.	4/25/12	4/25/12				LA Media Secure DVD Order Form for March 2001 Buy	Plaintiff
36.	4/25/12	4/25/12				Packaging Material for Detective Lewison’s March 2011 Purchase	Plaintiff
37.	4/26/12	4/26/12				“Hollywood Scat Amateur No. 10” Video purchased in 2011	Plaintiff
38.	4/26/12	4/26/12				“Japanese Doggie Three Way” Video purchased in 2011	Plaintiff
39.	4/26/12	4/26/12				“Japanese Doggie Three Way” English Translation Transcript	Plaintiff
40.	4/26/12	4/26/12				April 15, 2011 Email between LA Media and Detective Lewison	Plaintiff
41.	4/24/12	4/25/12				Stipulation of Facts 4/24/2012	Plaintiff
42.	4/25/12	4/25/12				Stipulation of Facts 4/25/2012	Plaintiff
43.	4/27/12					Powerpoint presentation of Closing Argument DVD	Plaintiff

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LIST OF EXHIBITS AND WITNESS - CONTINUED

Plaintiff(s)			Defendant(s)			Exhibit Description	Called By
Ex. #	Id.	Ev.	Ex. #	Id.	Ev.		
			100.	4/26/12	4/27/12	Noah's Arc Ad	Defendant
			101.	4/26/12	4/27/12	Photograph of Painting of Madonna with feces thrown on it	Defendant
			102.	4/26/12	4/27/12	Photograph of can fill with artist's shit	Defendant
			103.	4/26/12	4/27/12	Photograph of sculpture by Riki Smith of woman deficating	Defendant
			104.	4/26/12	4/27/12	Photograph of artist Robert Rauschenberg sitting in front of white canvas	Defendant
			105.	4/26/12	4/27/12	Photograh of urinal	Defendant
			106.	4/26/12	4/27/12	Photograph of sculpture by Riki Smith of woman urinating	Defendant
			107.	4/26/12	4/27/12	Nude Dissenting Stairs painting	Defendant
			108.	4/26/12	4/27/12	Father and son alligator ad	Defendant
			109.	4/26/12	4/27/12	Rusty Pizza ad	Defendant
			110.			Photocopy of Family Chicken Restaurant Coupon	
			111.	4/26/12	4/27/12	Family Chicken Restaurant Coupon	Defendant