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 UNITED STATES OF AMERICA

11 UNITED STATES DISTRICT COURT

12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 THOMAS VINCENT GIRARDI,

17 Defendant.

No. CR 23-00047-JLS-1

GOVERNMENT'S REPLY BRIEF FOR ORDER
 FINDING DEFENDANT THOMAS V.
 GIRARDI COMPETENT TO STAND TRIAL

19 Plaintiff United States of America, by and through its counsel
 20 of record, the United States Attorney for the Central District of
 21 California and Assistant United States Attorneys Scott Paetty and Ali
 22 Moghaddas, hereby files its reply brief for order finding defendant
 23 Thomas Vincent Girardi competent to stand trial.

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1 **II. ARGUMENT**

2 **A. Both Government Experts Are Qualified and Experienced**

3 Defendant claims that Drs. Goldstein and Darby are unqualified
4 to opine on competency, yet this is precisely what they have done for
5 years. Dr. Goldstein testified that she has conducted close to 200
6 competency evaluations in her career. (Dkt. 143 at 9:5-6.) She is a
7 respected professional with decades of experience and has been
8 praised by at least one district court that called her report
9 "comprehensive" and "one of best I have seen in a long time." See
10 United States v. Vallone, 698 F.3d 416, 509 (7th Cir. 2012).

11 Moreover, far from being "biased for the government," Dr. Goldstein
12 testified that she has actually been retained more by the defense
13 than the government. (Dkt. 143 at 230:16-20.) Defendant's
14 suggestion that she is also unqualified because of her limited
15 gerontology experience is similarly misguided. The government is
16 unaware of any requirement that only geriatric specialists conduct
17 senior defendants' neuropsychological evaluations and, in fact,
18 experts with no such specialty in this district routinely evaluate
19 senior defendants. And of all the experts, Dr. Goldstein has the
20 most forensic training and experience - both of which Dr. Wood
21 admittedly lacks. (See generally Dkt. 60 at Exhibit A (Wood CV).)

22 Likewise, Dr. Darby also has had ample experience in conducting
23 competency evaluations, including through being the court's appointed
24 expert in a recent case in this district. See United States v.
25 Valiente, CR 18-59-DMG (C.D. Cal.). In Valiente, the court appointed
26 Dr. Darby as its expert to opine on defendant's competency, which was
27 subsequently adopted. (Dkt. 134 and 156.) Dr. Darby's opinion was
28 also adopted in United States v. Brockman, another contentious

1 competency proceeding which dragged out for over a year. 604 F.
2 Supp. 3d 612, 632 (S.D. Tex. 2022) (“The Court finds Dr. Darby's
3 testimony regarding Brockman’s “cognitive reserve” clear, credible
4 and reliable”).¹ He has also routinely been retained by the defense
5 as demonstrated in his CV and case list. (See Exs. 49 and 51.)

6 Defendant’s opposition also heavily focuses on cutoff scores
7 applied to performance validity tests (“PVTs”) and argues for cutoffs
8 based on an a priori determination of dementia. (Dkt. 146 at 7-10.)
9 But defendant’s own court filings and the testimony of his own expert
10 contradict this circular approach and instead support Dr. Goldstein’s
11 approach, which relies on context in evaluating cognitive test scores
12 in a forensic setting. “Until the empirical literature and test
13 developers establish better methods for assessing data validity in
14 older adults using quantitative measures, the best approaches at this
15 time will rely on a process approach including qualitative
16 integration of clinical judgment, strong working knowledge of disease
17 characteristics and comparisons with known clinical groups,
18 behavioral observations, and careful scrutiny of the contextual
19 factors surrounding a particular case.” Defense Ex. 47. “In other
20 words, if clinical judgment raises sufficient suspicion, further
21 investigation and more careful scrutiny of relevant contextual
22 factors may be necessary.” Id. Even Dr. Wood ascribes to this
23 approach. (See Dkt. 139 at 254:14-255:5.)

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26 ¹ Defendant suggests that Dr. Darby and the court’s competency
27 determination was wrong given the defendant’s subsequent death months
28 later. (Dkt. 146 at 3.) Not so. The court’s thorough opinion more
than sufficiently outlined defendant’s competency to proceed to trial
and his intentional efforts to avoid trial. That the defendant, an
81-year-old, subsequently died of natural causes in no way negates
either the court’s determination or Dr. Darby’s opinions.

1 Setting aside defendant's circular argument that an a priori
2 diagnosis must be made before administering PVTs, Dr. Goldstein
3 ultimately reached the opinion that defendant is not suffering from
4 dementia and, therefore, traditional cut-offs are appropriate. (Dkt.
5 143 at 211:4.) As a result, defendant failed a majority of the PVTs
6 she administered, indicating less than optimal effort during testing.
7 But Dr. Goldstein's malingering opinion is based on more than
8 defendant's PVT scores. She testified, among other things, that
9 defendant's clinical presentation was inconsistent with his claimed
10 symptoms. For example, defendant's purported amnesia past the
11 Vietnam War is inconsistent with his familiarity with recent events
12 including the pandemic and current president. (Id. at 218:5-13.)
13 Dr. Goldstein also identified the inconsistency of defendant's claim
14 that he did not have a third wife, yet he took calls from her
15 multiple times during their examination. (Id.) Ultimately, Dr.
16 Goldstein found these, and other examples, were illustrative of
17 defendant's malingering and his abilities to make and retain new
18 memories. (Id. at 219:6-13.)² Given Dr. Goldstein's extensive
19 experience, including through nearly 200 evaluations across the
20 country, her testing and clinical observations should be credited.³

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² Defendant's interactions with police responding to a break-in
23 at his residence in 2021 is likewise illuminating. In body camera
24 footage provided to the Court, defendant is observed conversing with
25 the officers and providing details of the break-in with little to no
26 difficulty. (See exhibits lodged at Dkt. 129, 130.) Indeed, this is
27 the same break-in that defendant recounted for his former secretary,
Kim Cory, months later in April 2021, (Dkt. 109 at 9), clearly
evidencing his ability to form and retain memories over a long period
of time.

³ In any event, as discussed below, the Court can base its
28 determination of defendant's malingering on evidence beyond just
defendant's failing PVT scores. See *infra* Section B.

1 In stark contrast to Drs. Darby and Goldstein, defendant's
2 retained experts either completely lacked experience in conducting
3 competency evaluations or conducted an evaluation without real
4 scrutiny of defendant's claims. Indeed, Dr. Wood's CV completely
5 omits any reference to forensic work or forensic certifications,
6 which has given at least two courts "concern as to Dr. Wood's
7 credibility." See, e.g., United States v. Montgomery, No. 2:11-CR-
8 20044-JPM-1, 2014 WL 1516147, at *18 (W.D. Tenn. Jan. 28, 2014) ("Dr.
9 Wood is not board certified in clinical neuropsychology or forensic
10 psychology."); United States v. Jones, No. 6:10-CR-03090-DGK, 2017 WL
11 4231511, at *2 (W.D. Mo. Sept. 22, 2017) ("Although a licensed
12 psychologist, she is not board certified in . . . neuropsychology or
13 forensic psychology."). Given her inexperience in forensic work, it
14 is no surprise that Dr. Wood completely ignored the most important
15 evidence of defendant's malingering, i.e., the fact that defendant
16 led and managed his law firm without any challenge to his mental
17 capacity from anyone in his inner circle (including defendant's
18 collateral witnesses)⁴ and his unnatural, precipitous decline at the
19 end of 2020 once the Lion Air allegations were made public. When
20 confronted with defendant's own voicemails and letters during this
21 time period when he was claiming incompetence, Dr. Wood refused to

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24 ⁴ Contrary to defendant's claim, the government provided ample
25 information from collateral witnesses regarding defendant's mental
26 state. While it could have called witnesses to testify at the
27 hearing, including former Girardi Keese employees and other legal
28 professionals with first-hand knowledge of defendant's mental acuity
(see Dkt. 109 at 17), the Court ultimately believed that was not
necessary given their inclusion in the record. (See Dkt. 141 at
265:22 ("I don't think I need anything further. . . . I have what I
need in terms of evidence").) Should the Court decide it wants to
hear from them, these collateral witnesses have been and remain
available to testify.

1 acknowledge that such evidence would be relevant -- let alone
2 contradictory to her opinion. (See Dkt. 141 at 98:10-99:3 ("Q: . . .
3 Is it your testimony, Dr. Wood, that the claims that this defendant
4 [] w[as] making in December 2020 that mirror the claims here in this
5 case, that those are not relevant to your determination? A: I -- I
6 don't think they are.")) Dr. Wood's conclusion that defendant's
7 "lack of insight" renders him incapable of making rational choices is
8 plainly contradicted by defendant's statements to Dr. Goldstein that
9 outline a reasonable and perceptive defense to hypothetical charges,
10 modeled after the same charges he currently faces (Dkt. 109 at 37)⁵,
11 and his telling statement to Dr. Darby that he would consider a
12 guilty plea to negligence (see id. at 14 (citing Dkt. 91 at 29)).

13 Dr. Chui fared no better. While she is undoubtedly qualified in
14 the field of neurology, she is defendant's treating neurologist
15 (raising questions of bias), has never conducted a competency
16 examination, and previously misdiagnosed defendant with Alzheimer's.
17 (Dkt. 139 at 84:6-85:3, 86:14-87:14, 132:10-18.) Furthermore, she
18 did not apply any forensic techniques or PVTs to evaluate defendant's
19 effort, nor did she question whether defendant could be exaggerating
20 or feigning his condition. (Id. at 115:9-116:12, 142:6-143:10.) And
21 while she spoke of academic research exploring the correlation
22 between hippocampal atrophy and dementia, she also conceded that the
23 link between brain imaging and the severity of dementia is not one to
24 one (id. at 126:2-127:7), a view echoed by Dr. Darby. (Dkt. 91 at
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28 ⁵ Citations to page numbers of docket entries, including briefs
and expert reports, refer to the documents themselves rather than the
pagination in the ECF header.

1 26.)⁶ Thus, defendant's argument that his diminished hippocampal
2 volume necessitates a finding of incompetence should be rejected.
3 Defendant's verified capabilities between 2017 and 2020 demonstrate
4 that he can still independently function notwithstanding his
5 hippocampal atrophy. Indeed, Dr. Chui admitted that defendant's
6 "severe atrophy of the anterior temporal lobes and the hippocampus"
7 dated all the way back to 2017. (Dkt. 139 at 48:4-7.)⁷ Given the
8 overwhelming evidence of defendant's normal functioning up to the
9 demise of his law firm, including television footage of defendant
10 entertaining guests at his home in 2019 (Ex. 22 and Dkt. 139 at
11 127:8-128:19), it is clear that his atrophy has not meaningfully
12 impaired his ability to understand and function.⁸

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18 ⁶ Defendant mischaracterizes Dr. Darby's position regarding the
19 correlation of hippocampal atrophy to cognitive impairment. (Dkt.
20 146 at 2.) Dr. Darby's statement that the relationship is not "one
21 to one" refers merely to the undisputed fact that brain imaging alone
22 cannot determine the extent of cognitive impairment. A point to
23 which Dr. Chui agreed. (Dkt. 139 at 44:8-9.)

24 ⁷ Furthermore, Dr. Chui's comparison of defendant to other
25 patients she has treated with similar levels of brain atrophy is
26 unreliable because she admitted that her clinical experience is
27 limited to patients who were all cognitively impaired. (Id. 124:15-
28 125:9.) Thus, her opinion is skewed because her comparison does not
account for persons with similar levels of atrophy who are not
experiencing cognitive dysfunction.

⁸ Defendant cites late-produced records from Sunrise,
defendant's current residence, purportedly showing that defendant's
care level has increased from one to two. (Dkt. 146 at 19 n.53.)
Setting aside the late production, which prevented the government's
ability to address such materials at the hearing, as well as
Margarita Munoz's conflicting testimony that defendant was and
remained a level one (Dkt. 141 at 254:14-255:6), defendant ignores
that the applicable scale is out of five and, thus, he still remains
relatively independent compared to other Sunrise residents.

1 **B. Defendant's Presentation, Including Compelling**
2 **Inconsistencies During Clinical Evaluations, Support a**
3 **Finding of Competency**

4 Throughout defendant's interviews with the experts, he presented
5 contradictory and noncredible behavior consistent with malingering.
6 While each expert -- for both the government and defense -- agreed
7 that historical facts are not typically affected in the early stages
8 of dementia, defendant routinely provided bizarre responses to
9 questions about U.S. and world history. For example, while defendant
10 was able to name Biden as the current president, he inexplicably
11 claimed that the Vietnam War is ongoing. (Dkt. 64 at 21.) Two weeks
12 later, in his interview with Dr. Wood, defendant claimed that George
13 Bush was the current president, notwithstanding his correct answer
14 weeks ago. (Dkt. 60 at 15; see also Dkt. 109 at 33-35.) Likewise,
15 when Dr. Darby asked who the president during the Civil War was,
16 defendant responded, "It wasn't Lincoln, it wsn't old man Bush . . .
17 pass." (Dkt. 91 at 20.) Dubbed as a "near miss," this answer is
18 telling as it demonstrates that defendant knows the correct answer
19 but intentionally provided an incorrect answer. (Id. at 28.)

20 As Dr. Darby noted in his report, the foregoing examples of
21 noncredible responses relate to overlearned facts, i.e., basic
22 factual information that patients with genuine memory impairment
23 nonetheless retain. (See id. ("In patients with genuine memory
24 impairment, confabulation relates to personal memories and not
25 factual information.")) Accordingly, defendant's responses can only
26 be attributed to malingering rather than genuine memory impairment.
27 Even Dr. Wood conceded that historical facts such as this are
28 examples of crystallized knowledge not typically affected in early
 stages of dementia. (Dkt. 141 at 124:19-22, 123:7-10 ("I did find

1 that to be unusual"; see also Dkt. 139 at 129:8-16 (Dr. Chui likewise
2 admitting crystallized knowledge should stay unimpaired).) "Outside
3 of delirium, coma, intoxication, or end-stage dementia, no
4 neurological disorder should cause an educated patient" to confuse
5 such over-learned historical facts. (Dkt. 91 at 28.)

6 Defendant's claimed ignorance of his current counsel is also
7 incredible. As Dr. Goldstein testified, if defendant truly was
8 unaware of his counsel's identities, his dementia would be "so
9 profound that he would not be capable of talking about these things
10 that happened in the recent past," such as the pandemic and his co-
11 defendant. (Dkt. 143 at 227:1-13.) Moreover, not once during the
12 three-day competency hearing did defendant ever question where he
13 was, who his counsel was, or what we were doing. To the contrary,
14 defendant was relatively stoic during the proceedings, standing when
15 appropriate, conversing with his counsel at breaks, and never
16 interrupting except for the single expletive directed at the
17 prosecutor during cross-examination, but even that comment was made
18 under his breath such that no one in the courtroom other than his
19 counsel and the prosecutor heard it. Far from demonstrating severe,
20 or even moderate dementia, defendant demonstrated an understanding of
21 the limits of acceptable courtroom etiquette. United States v. Heth,
22 338 F. App'x 489, 497 (6th Cir. 2009) (finding that although
23 defendant was somewhat difficult, the court did not observe him
24 exhibit any behavior in the courtroom that would suggest he was not
25 capable of being competent "if [he] choose[s] to do so.").

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1 **C. Defendant is Competent Even if He Has Dementia**

2 There is no agreement amongst the testifying experts regarding
3 the true diagnosis of defendant's mental condition.⁹ In any event, a
4 competency evaluation does not hinge on any such diagnosis. Although
5 defendant attempts to conflate dementia and competency, the two are
6 not mutually exclusive. "Although medical professionals properly
7 determine whether a defendant has a disorder or is malingering,
8 competency is a legal concept," and "even if the experts' medical
9 conclusions of impaired ability are credited, the judge must
10 independently decide if the particular defendant was legally capable
11 of reasonable consultation with his attorney and able to rationally
12 and factually comprehend the proceedings." United States v. Rothman,
13 No. 8-20895, 2009 WL 426282, at *6 (S.D. Fla. Feb. 19, 2009)
14 (internal marks omitted) (quoting United States v. Markis, 535 F.2d
15 899 (5th Cir. 1976)). Thus, even if defendant has dementia, this
16 Court can and should still find him competent based on the facts
17 before it. Indeed, numerous courts have found defendants suffering
18 from dementia and other neurocognitive disorders competent to proceed
19 to trial. See, e.g., United States v. Brockman, No. 21-CR-9, Dkt.
20 263, (S.D. Tex. filed May 23, 2022) (finding an 80-year old defendant
21 with Parkinson's disease and cognitive impairment to be competent due
22 to malingering); United States v. Dreyer, No. 08-41-VAP, Dkt. 279
23 (C.D. Cal. filed Apr. 19, 2014) (finding a defendant with a brain
24 hemorrhage and previous dementia diagnosis competent); United States

25 _____
26 ⁹ This is not surprising given that defendant's actual medical
27 condition cannot be known until post mortem. (Dkt. 139 at 111:15-
28 23.) The four expert opinions are as follows: Dr. Goldstein (mild
cognitive impairment, or "MCI"); Dr. Darby (MCI or maybe mild
dementia); Dr. Wood (likely mild dementia); Dr. Chui (moderate
dementia). (Dkt. Nos. 64 at 51; 91 at 26; 60(A) at 33; 60(B) at 10.)

1 v. Kight, No. 16-99-AT-LTW, Dkt. 118 (N.D. Ga. filed Feb. 2, 2018)
2 (same); United States v. Bradley, No. 05-CR-59-JRH-CLR, Dkt. 349
3 (S.D. Ga. filed Jan. 24, 2006) (defendant with dementia and memory
4 issues found competent); United States v. Benson, No. 12-CR-00480-
5 YGR-1, 2015 WL 1869476 (N.D. Cal. Apr. 22, 2015) (defendant with
6 alleged dementia and evidence of malingering found competent); United
7 States v. Patel, 524 F. Supp. 2d 107 (D. Mass. 2007) (defendant with
8 memory issues, alleged dementia, and evidence of malingering found
9 competent); United States v. Chun, No. 17-CR-204510-VAR-MKM, Dkt. 87
10 (E.D. Mich. filed Dec. 6, 2019) (finding a malingering defendant with
11 MCI competent); United States v. Kasim, No. 07-CR-56-PPS-APR, 2010 WL
12 339084 (D. Ind. Jan. 21, 2010) (finding a likely malingering
13 defendant competent after previous order found defendant incompetent
14 with dementia); see also United States v. Vallone, 698 F.3d 416, 508-
15 511 (7th Cir. 2012) (finding defendant with Alzheimer's and dementia
16 competent).

17 Even if this Court took defendant's test scores at face value,
18 it still shows relatively average performance in most domains. (Dkt.
19 141 at 118:4-22.) And while defendant claims to have trouble with
20 forming new memories (despite multiple examples to the contrary),
21 even Dr. Wood testified that an individual with mild to moderate
22 dementia can still retain new information with repetition. (Dkt. 141
23 at 144:10-20.) Moreover, when questioned about whether such tactics
24 could be used with defendant, again, Dr. Wood testified that it could
25 be helpful to use that strategy. (Id. at 149:15-24.) Accordingly,
26 even the defense expert agrees that repetition, cueing,¹⁰ and other
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28 ¹⁰ Dr. Chui admitted that defendant is at least "partially responsive to cueing." (Dkt. 139 at 71:15-19.)

1 strategies can be used with defendant to assist him in this case.
2 While the government maintains that such assistance is unnecessary
3 given his clear ability to track the proceedings in real-time, it is
4 nonetheless amenable to such aids during further proceedings.

5 **III. CONCLUSION**

6 For the foregoing reasons, the government respectfully requests
7 that this Court find defendant competent and set this matter for
8 trial.

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