UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

CRIMINAL ACTION NO. 4:17CR-00012-GNS

UNITED STATES OF AMERICA **PLAINTIFF**

v.

RICHARD G. MAIKE, DOYCE BARNES, et al. **DEFENDANTS**

MOTION IN LIMINE AND INCORPORATED MEMORANDUM OF LAW TO EXCLUDE EXPERT DR. WILLIAM W. KEEP'S STATEMENTS AND OPINIONS REGARDING THE CREDIBILITY AND TRUTHFULNESS OF STATEMENTS MADE OR ALLEGEDLY MADE BY DEFENDANTS

Now come Defendants Richard G. Maike ("Mr. Maike") and Doyce Barnes ("Mr. Barnes"), by and through undersigned counsel, and respectfully request that the Court enter an order prohibiting the United States of America ("the Government") from discussing or attempting to admit into evidence Dr. William W. Keep's ("Dr. Keep") opinion that certain claims or statements made by the defendants were false, deceptive, or misleading. Expert testimony is not required for the jurors to determine whether defendants' statements were untrue, nor whether defendants intended to be false, deceptive, or misleading. In support of their Motion, Mr. Maike and Mr. Barnes state as follows.

On March 30, 2018, Dr. William W. Keep submitted an Expert Report containing a discussion of the business plan and marketing/promotional materials used by Infinity 2 Global (later renamed as Global 1 Entertainment) (the "Original Expert Report"). Since then, Dr. Keep submitted a Supplemental Expert Report dated June 15, 2022 (the "Supplemental Expert Report"). Dr. Keep states on page 1 that the Supplemental Expert Report's purpose is to "address not only how the company was set up and promoted … but how it played out in practice." However, the

Original and Supplemental Expert Reports go beyond the scope of permissible expert testimony under Federal Rules of Evidence 702 (a), 704(b), 607, 608, and 403 by improperly asserting opinions that Defendants made false, deceptive, conflated, or misleading statements (the "Opinions"). For example, the Supplemental Expert Report purports to opine regarding "misrepresentation of the nature of the [MLM] opportunity and the possibility of earning rewards." Keep Supp. Rep. at 2. It is replete with phrases such as "deceptive claims", "deceptive messaging", "misrepresent", "misleading", "unverifiable", "grossly overstated", "conflated" and "without foundation" in reference to I2G and the MLM business. *Id.* at 2-3.

"It is a well-recognized principle of our trial system that "determining the weight and credibility of [a witness's] testimony.... belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men...." Nimely v. City of New York, 414 F.3d 381, 397-398 (2d Cir. 2005), quoting Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88, 11 S.Ct. 720, 35 L.Ed. 371, 398 (1891); *accord*, United States v. Scop, 846 F.2d 135, 142 (2d Cir.1988) ("The credibility of witnesses is exclusively for the determination by the jury, and witnesses may not opine as to the credibility of the testimony of other witnesses at the trial.") (internal citation omitted). In other words, jurors do not typically require "the expert's scientific, technical, or other specialized knowledge" to help them determine if a witness or a defendant has lied. *See* Fed. R. Evid. 702(a); Halcomb v. Wash. Metro. Area Transit Auth., 526 F. Supp. 2d 24, 29 (D.D.C. 2007) (expert's statements were held inadmissible where expert stated he was "inclined to accept the Plaintiff's version of events" and implied that the defendant was untruthful).

Indeed, the Second Circuit, "echoed by our sister circuits, has consistently held that expert opinions that constitute evaluations of witness credibility, even when such evaluations are rooted in scientific or technical expertise, are inadmissible under Rule 702. *See, e.g.*, United States v.

Lumpkin, 192 F.3d 280, 289 (2d Cir.1999); Scop, 846 F.2d at 142–43; *see also, e.g.*, United States v. Charley, 189 F.3d 1251, 1267 (10th Cir.1999); Westcott v. Crinklaw, 68 F.3d 1073, 1076–77 (8th Cir.1995)." Nimely, at 397-98. *Accord*, United States v. Hill, 749 F.3d 1250, 1258-61 (10th Cir. 2014) (and cases cited therein) (the credibility of another, including a defendant, is not an appropriate subject for expert testimony and this rule applies to credibility assessments of out of court statements); United States v. Toledo, 985 F.2d 1462, 1470 (10th Cir.1993) ("The credibility of witnesses is generally not an appropriate subject for expert testimony.")

The Sixth Circuit and the Western District of Kentucky agree. *See* Greenwell v. Boatwright, 184 F.3d 492, 496 (6th Cir. 1999) ("Regardless of the intent or motivation of the expert in commenting on the eyewitness testimony, we agree ... that the testimony regarding the credibility of eyewitness testimony was improper."); Waters v. Kassulke, 916 F.2d 329, 335 (6th Cir. 1990) (finding that, under Kentucky law, the credibility of child witnesses was for the jury to decide and, therefore, expert testimony that he found them to be credible should have been excluded); Johnson v. Baker, 2009 WL 3486000, at *6 (W.D. Ky. Oct. 23, 2009) ("allowing experts to testify as to credibility removes that role from the jury…. This issue becomes especially important when, as here, the credibility of witnesses weighs heavily on the outcome of the trial.") (citing Aetna Life, 140 U.S. at 88 (1891), EEOC v. Ford Motor Co., 98 F.3d 1341, 1996 WL 557800, at *11 (6th Cir. Sept. 30, 1996) ("The credibility of witnesses has historically been the sole function of the fact finder.") and Nimely, 414 F.3d at 398 (2d Cir. 2005)).

Additionally, to the extent that Dr. Keep is opining as to Mr. Maike and Mr. Barnes' credibility and *mens rea*, the Opinions violate Federal Rules of Evidence 704(b) by opining on mental states that constitute elements of, and defenses to, the crime charged. Scienter is a critical issue in each count of the Second Superseding Indictment, and the scienter required for each count

in this case is high. Opining that Defendants made false and misleading claims effectively opines that they acted with fraudulent intent. This the Government cannot do. The Government seems insistent on removing intent from the jury's consideration – and obtaining the equivalent of a directed verdict on all intent-related elements. They cannot do this either, consistently with bedrock constitutional principles.

An illegal pyramid scheme may be inherently fraudulent under Sixth Circuit case law,[1] but even if the Government establishes beyond a reasonable doubt that an illegal pyramid scheme existed, it still must prove beyond a reasonable doubt that the Defendants knew they were participating in or forming such a scheme and that they had an intent to defraud. Maike and Barnes contest both points. It does not matter that Dr. Keep's credibility determination is masked as a subsidiary point within his overall opinion that I2G was a pyramid scheme. This makes his projected testimony on Defendants' credibility even more pernicious, precisely because it is masked and because his Supplemental Expert Report identifies false and misleading statements as characteristic of "successfully prosecuted" pyramid schemes. But neither the Government's proposed jury instruction on the definition of a pyramid scheme, nor the one given by the court in United States v. Gold Unlimited, Inc., 177 F.3d 472, 478 (6th Cir. 1999), references false or misleading statements. Moreover, the Government has already represented that it does not intend to elicit testimony about companies that were successfully prosecuted as pyramid schemes.

The Government long-ago told this Court that it does not intend to elicit testimony about specific companies that were successfully prosecuted as pyramid schemes, and this Court long ago ruled, based on that representation, that Dr. Keep cannot tie his opinions to specific companies that

[1] Even this proposition is questionable in light of the U.S. Supreme Court's scienter jurisprudence in the intervening years since United States v. Gold Unlimited, Inc., 177 F.3d 472 (6th Cir. 1999) was decided. See Xiulu Ruan v. United States, Slip Op. No. 20-410 (U.S. June 27, 2022). and cases cited therein.

were "successfully prosecuted." *See* November 18, 2019 Order, Dkt. 238, at p. 9. Yet Dr. Keep's Supplemental Expert Report continues to describe characteristics that I2G had in common with "MLM companies successfully prosecuted as illegal pyramid schemes." The Government apparently plans to tie Keep's expert opinion to companies that "generally" have been successfully prosecuted for operating pyramid schemes, without naming individual cases. This must be excluded too. It is wholly improper, because the error lies in Keep telling the jury that his opinion is based on his study of individuals (or companies) who have been criminally convicted of the same conduct with which Defendants are charged. It is irrelevant to the analysis whether he names specific cases. Again, the Government is clearly desperate to relieve itself of its Constitutional obligation to prove all of the elements of the charged offenses, including scienter, beyond a reasonable doubt. Dr. Keep should restrict his testimony to the characteristics of a multi-level marketing company that can render it an illegal pyramid scheme.

WHEREFORE, Mr. Maike and Mr. Barnes respectfully request that the Court GRANT this Motion and ORDER that the United States of America is prohibited from admitting into evidence Dr. William W. Keep's testimony and parts of his expert report opining that certain claims or statements made by defendants were false, deceptive, and/or misleading.

Dated: July 5, 2022.

Respectfully submitted,

/s/ Solomon L. Wisenberg

SOLOMON L. WISENBERG (*admitted pro hac vice*)
101 Constitution Avenue, N.W., Suite 900
Washington, D.C. 20001
(202) 689-2922 (Telephone)
(202) 689-2940 (Facsimile)
sol.wisenberg@nelsonmullins.com

Reed J. Hollander (*admitted pro hac vice*)
Nelson Mullins Riley & Scarborough LLP
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612
Phone: 919-329-3816
Fax: 919-877-3149
reed.hollander@nelsonmullins.com

Counsel for Defendant Richard G. Maike

R. Kenyon Meyer
Dinsmore & Shohl LLP
101 South Fifth Street, Suite 2500
Louisville, Kentucky 40202
Phone: (502) 540-2300
Fax: (502) 581-8111
kenyon.meyer@dinsmore.com
Counsel for Defendant Doyce Barnes

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on all counsel of record via the CM/ECF system on this 5th day of July, 2022.

/s/ Solomon L. Wisenberg
SOLOMON L. WISENBERG