UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION
CIVIL ACTION NO. 4:17-CR-00012-GNS-CHL

UNITED STATES OF AMERICA PLAINTIFF

v.

RICHARD G. MAIKE, et al. DEFENDANTS

ORDER

The United States moves to exclude the expert testimony of Manning Gilbert Warren III ("Warren"), a University of Louisville law professor retained by Defendants Richard Maike and Doyce Barnes (collectively "Defendants"). (Pl.'s Mot. Exclude Expert Test., DN 381; Defs.' Expert Witness Discl. 1, DN 381-1). After the motion became ripe, an updated expert disclosure for Warren was provided by Defendants. (DN 433). This order addresses the remaining relevant concerns.

Fed. R. Evid. 702 permits testimony relating to technical or specialized knowledge where it will assist the trier of fact to determine a fact in issue. The admissibility of expert testimony is governed by Fed. R. Evid. 702, which provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702; *see also* Fed. R. Evid. 702 advisory committee's note to 2000 amendment ("[N]o single factor is necessarily dispositive of the reliability of a particular expert's testimony").

The trial judge is the gatekeeper to ensure that expert testimony satisfies the requirements of reliability and relevance under this rule. *Mike's Train House Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 407 (6th Cir. 2006) (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999)). As the Sixth Circuit has further noted:

> Parsing the language of [Fed. R. Evid. 702], it is evident that a proposed expert's opinion is admissible, at the discretion of the trial court, if the opinion satisfies three requirements. First, the witness must be qualified by "knowledge, skill, experience, training, or education." Second, the testimony must be relevant, meaning that it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Third, the testimony must be reliable.

In re Scrap Metal Antitrust Litig., 527 F.3d 517, 528-29 (6th Cir. 2008) (internal citation omitted) (citation omitted). "Experts are permitted wide latitude in their opinions, including those not based on firsthand knowledge, so long as 'the expert's opinion [has] a reliable basis in the knowledge and experience of the discipline.'" *Jahn v. Equine Servs., PSC*, 233 F.3d 382, 388 (6th Cir. 2000) (alteration in original) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993)).

When evaluating testimony for admissibility, "Rule 702 directs courts to focus on the reliability of expert testimony, rather than the 'credibility and accuracy' of that testimony." *Superior Prod. P'ship v. Gordon Auto Body Parts Co.*, 784 F.3d 311, 323 (6th Cir. 2015) (quoting *Scrap Metal*, 527 F.3d at 529). Although the U.S. Supreme Court in *Daubert* identified a non-exhaustive list of factors a trial court may consider in evaluating an expert's proposed testimony, "the four specific factors utilized in *Daubert* may be of limited utility in the context of non-scientific expert testimony." *First Tenn. Bank Nat'l Ass'n v. Barreto*, 268 F.3d 319, 334 (6th Cir. 2001) (citing *United States v. Jones*, 107 F.3d 1147, 1158 (6th Cir. 1997)).

"It is the proponent of the testimony that must establish its admissibility by a preponderance of proof." *Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244, 251 (6th Cir. 2001) (citing *Daubert*, 509 U.S. at 592 n.10). Nevertheless, "[a]ny doubts regarding the admissibility of

an expert's testimony should be resolved in favor of admissibility." *In re E. I. Du Pont de Nemours & Co. C-8 Personal Injury Litig.*, 337 F. Supp. 3d 728, 739 (S.D. Ohio 2015) (citations omitted); *see also Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 758 (8th Cir. 2006) ("Courts should resolve doubts regarding the usefulness of an expert's testimony in favor of admissibility."). "[R]ejection of expert testimony is the exception, rather than the rule . . . ." *Scrap Metal*, 527 F.3d at 530 (citation omitted).

The United States avers that Warren is not qualified to offer an opinion on the subject of pyramid schemes, arguing Warren's Curriculum Vitae does not include any proffered experience sufficient to qualify him as an expert on the issue of pyramid schemes. (Pl.'s Mot. Exclude Expert Test. 1-3). Warren has written and co-authored books and law review articles on topics largely focusing on securities regulation with no specific mention of pyramid schemes or multilevel marketing issues. (DN 381-2 at PageID # 2936-37). Warren teaches law school courses in Business Organizations, Comparative Company Law, Securities Regulation, Entrepreneurial Law, European Union Law, and International Law. (DN 381-2 at PageID # 2932). The supplemental expert disclosure states that Warren's classes "include the definition of a 'security,' including illegal pyramid schemes. [He] has addressed illegal pyramid schemes . . . and related textual material in every securities law school course he teaches. These cases address legal principles arising from illegal pyramid schemes (including application to multilevel marketing companies)." (Def.'s Supplemental Expert Witness Discl. 2). Defendants further contend that Professor Warren "has also provided enforcement training on Ponzi schemes to securities regulators." (Def.'s Supplemental Expert Witness Discl. 2). In support, Defendants included an agenda from a two-day securities enforcement training program in 2012 listing Warren as one of three speakers on a

one-hour panel presentation titled "Getting Over the Hurdle: Proving the Ponzi." (Def.'s Supplemental Expert Witness Discl., Ex. 1, at 2, DN 433-1).

The Court's role is to examine "not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question." *Smelser v. Norfolk S. Ry. Co.*, 105 F.3d 299, 303 (6th Cir. 1997) (internal quotation marks omitted) (quoting *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994)). As the United States contends, Warren is an expert in securities law and makes no allegations that he may not testify with regard to that topic. (Pl.'s Reply Mot. Lim. 1, DN 405). Warren is not, however, qualified to testify as an expert on the subject of pyramid schemes specifically and what qualifications I2G did or did not possess which would exempt it from being categorized as such. The foundation for Warren's testimony, as offered by Defendants, comes from his teaching law school courses, which at times involves discussion or application of illegal pyramid schemes, and Warren's brief appearance on a panel discussing Ponzi schemes over a decade ago, which did not warrant any mention in his C.V. (Def.'s Supplemental Expert Witness Discl. 2, Def.'s Supplemental Expert Witness Discl., Ex. 1, at 2). This is simply not sufficient. [A] law professorship does not make one an expert on a subject, especially where there is no information as to whether the witness maintained up-to-date expertise in the subjects." *Amber Reineck House v. City of Howell*, No. 20-10203, 2021 WL 6881861, at *22 (E.D. Mich. Sept. 29, 2021) (citation omitted). Furthermore:

> One need not be an expert in a particular subject to teach it in law school, though that is certainly desirable; the minimum requirement is only that one have enough familiarity with the subject to capably impart the necessary amount of it to students. This is not to say that [the expert] does *not* possess such expertise, only that the court has been provided with insufficient information to make that determination

Cicero v. Borg-Warner Auto., Inc., 163 F. Supp. 2d 743, 748 (E.D. Mich. 2001). While Warren's scholarship shows his current knowledge and expertise on the issue of securities law, there is no

indication that he maintains a current expertise in the subject of pyramid schemes. In the most basic terms as applied to Warren on the subject of pyramid schemes, "[e]xpert testimony may be excluded where the expert's opinions exceed the expert's area of expertise." *Moore v. Univ. of Memphis*, No. 2:10-CV-02933-JPM-tmp, 2014 WL 12585683, at *1 (W.D. Tenn. Sept. 2, 2014) (citation omitted). As a result, Warren is not qualified to give expert testimony regarding pyramid schemes and his testimony is limited to exclude his testimony on the subject.

CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** that United States' Motion in Limine (DN 381) is **GRANTED**.

Greg N. Stivers, Chief Judge
United States District Court
July 11, 2022

cc: counsel of record