

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

UNITED STATES OF AMERICA

PLAINTIFF

v.

CASE NO. 3:20-cr-00031-CWR-LGI

TED BRENT ALEXANDER

DEFENDANT

**Motion *In Limine*
to Exclude Expert Testimony by Government Witnesses**

Comes now Defendant Ted Brent Alexander and files this Motion *In Limine* to Exclude Expert Testimony by Government Witnesses. In support of this Motion, Mr. Alexander presents the following:

Introduction

The prosecution charged Mr. Alexander in a multi-count Indictment with conspiracy to commit securities and wire fraud in violation of 18 U.S.C. § 1349, securities and commodities fraud in violation of 18 U.S.C. § 1348, and wire fraud in violation of 18 U.S.C. § 1343 in connection with the operation of Alexander Seawright Timber Fund I (“ASTF I”). The Court requested that the parties agree upon and submit an Agreed Scheduling Order. The parties did so, and on March 15, 2022 the Court signed said Order. One of the provisions of the Agreed Scheduling Order was that the Government would make its expert disclosures by June 24, 2022.

June 24, 2022 came and went without any expert disclosures from the Government. Subsequently, at a status conference on July 14, 2022, the Court granted the Government’s request to extend their expert disclosure deadline, and allowed them until July 19, 2022 do make such disclosures. On that day, the Government advised the undersigned that they would not be calling any expert witnesses.

Argument

The Technical Nature of the Charges at Issue

Federal Rule of Evidence 701 governs the admissibility of opinion testimony by lay witnesses. Rule 701 provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) *not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.*

(Emphasis added.)

The Government's case centers around thousands of pages of property deeds, financial documents, and legal agreements that are full of legal and accounting terminology that is simply beyond the expertise of laypersons and is ripe for Federal Rule of Evidence 702 expert testimony. The 5th Circuit, however, has warned against the allowance of lay testimony which bleeds over into expert testimony. "(A)ny part of a witness's opinion that rests on scientific, technical, or specialized knowledge must be determined by reference to Rule 702, not Rule 701." *United States v. Yanez Sosa*, 513 F.3d 194, 200 (5th Cir. 2008). The following is an excerpt from *Sosa*:

"[T]he distinction between lay and expert witness testimony is that lay testimony 'results from a process of reasoning familiar in everyday life,' while expert testimony 'results from a process of reasoning which can be mastered only by specialists in the field.'" FED.R.EVID. 701, Advisory Committee Notes to 2000 Amendments (quoting *State v. Brown*, 836 S.W.2d 530, 549 (Tenn.1992)). As explained by the Second Circuit, "a lay opinion must be the product of reasoning processes familiar to the average person in everyday life." *United States v. Garcia*, 413 F.3d 201, 215 (2d Cir.2005). Moreover, any part of a witness's opinion that rests on scientific, technical, or specialized knowledge must be determined by reference to Rule 702, not Rule 701. *Id.*(citing FED.R.EVID. 701, Advisory Committee Notes to 2000 Amendments).

The evidence in this case is simply not within the everyday life of the average person. In

fact, each and every member of Alexander Seawright Timber Fund I, the purported victims of Mr. Alexander and Jon Seawright, was an accredited investor. That means they had each been granted special leeway in investing by the United States Securities and Exchange Commission due to an assumption that their wealth is evidence of an advanced understanding of finance and investing beyond that of the common citizen, or the financial ability to retain such experts to help them in understanding what is at issue. The Government, having not disclosed any expert witness or purported expert witness testimony, must not be allowed to offer such testimony now, whether under the guise of Rule 701 or through other means.

*Example of Expected Specific Expert Testimony
by a Lay Witness for the Government*

One of the allegations of fact in the Indictment is that Mr. Alexander and his business partner promised they would “inspect” the properties underlying the loans to Lamar Adams/Madison Timber when they in fact did not. The Government, having not designated any experts at all in the fields of real estate, real estate finance, investing, or transactional law, should be prohibited from having their lay witnesses testify as experts regarding industry standards or duties of care.

With respect to the allegation that Mr. Alexander and his business partner somehow failed investors by not living up to their obligations to “inspect” the properties at issue, the Government must not be allowed to have non-experts testify about any standard of care or duties imposed upon persons involved in investment transactions such as these. Without designating such a witness, the Government should not be allowed to attempt to establish some definition of the word “inspect” as used in this context or a set forth a legal standard that Mr. Alexander or his business partner failed to meet. Even more importantly, the Government must not be allowed to use its lay witnesses to allege that Mr. Alexander then criminally fell short of the very standard the witness subjectively created on the fly. To do so would be to allow a lay witness to invent his

or her own standard of care for an industry of which the witness has no expertise and then hold Mr. Alexander to it to establish criminal culpability.

The foregoing is just an example of potential expert testimony from Government lay witnesses; due to a lack of disclosure by the Government, Mr. Alexander is unable to fully predict what other Government witness testimony may violate FRE 701. Mr. Alexander therefore asks for a blanket order prohibiting such testimony.

Conclusion

As the 5th Circuit guided in *Sosa*, the Court must not allow the Government to cloak expert testimony inside of lay testimony, even if is just in part. Therefore, the Court should grant this Motion, and bar the prosecution from eliciting any expert testimony at trial.

WHEREFORE, Defendant Ted Brent Alexander respectfully asks this Court to grant his Motion *In Limine* to Exclude Expert Testimony by Government Witnesses.

Respectfully submitted, this the 22nd day of July, 2022.

/s/ J. Matthew Eichelberger
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CERTIFICATE OF SERVICE

I, J. Matthew Eichelberger, do hereby certify that I have this day caused to be filed a true and correct copy of the foregoing document using the Court's CM/ECF system, which sent a true and correct copy of the same to all counsel of record.

SO CERTIFIED, this the 22nd day of July, 2022.

/s/ J. Matthew Eichelberger
J. MATTHEW EICHELBERGER