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

UNITED STATES OF AMERICA

v. **CRIMINAL NO. 3:20-CR-31-CWR-LGI**

TED BRENT ALEXANDER

GOVERNMENT'S MOTION IN LIMINE PURSUANT TO RULES 402, 403, 602, 702 AND 704 TO PRECLUDE DEFENDANT'S DESIGNATED EXPERT WITNESS

The United States, through the United States Attorney, hereby submits this Motion in Limine seeking the Court's preclusion of testimony from Defendant's designated expert witness, attorney Andrew Favret, at trial. In light of the Defense designation of Mr. Favret as an expert witness, and that designation's stated bases for the testimony and opinions of Favret, the Court should prohibit Favret from testifying as an expert witness. The proposed expert testimony of Andrew Favret is irrelevant, not probative, not properly based on firsthand knowledge, and otherwise unnecessary to aid the jury and unlawfully intends to state an ultimate conclusion in a criminal case, in violation of Federal Rule of Evidence 704(b). As set forth more fully below, for all of these reasons the Court should enter its order precluding Favret from testifying as an expert witness in this case

Defendant Ted Brent Alexander faces trial on counts charging him with Conspiracy to commit wire fraud, in violation of 18 U.S.C. §1349; and multiple counts of Wire fraud, in violation of 18 U.S.C. §1343. None of the elements at issue in the case calls for, or would benefit from, the purported expertise of Mr. Favret.

"A district court has wide latitude and broad discretion to exclude expert testimony," *United States v. Reed*, 908 F.3d 102, 117 (5th Cir. 2018) (quotation marks omitted). The Court

of Appeals will not disturb the court's ruling excluding an expert, "unless the exclusion was manifestly erroneous – that is, unless it amounts to a complete disregard of the controlling law." *Id*. (quotation marks omitted); *Snap-Drape, Inc. v. Comm'r*, 98 F.3d 194 (5th Cir. 1996) (standard of review is abuse of discretion); *see also Simpson v. United States*, 7 F.3d 186, 188 (10th Cir. 1993).

I. The Defense and Mr. Favret Misstate and Misconstrue the Allegations of the Indictment.

The defense submission on behalf of Mr. Favret discusses at length the past offenses of convicted fraudster Lamar Adams. But the focus of Alexander's trial must be on the charged conduct and offenses committed by Alexander and his co-conspirator, Jon Seawright. The frauds committed by Adams are certainly pertinent background detail and set the context in which Alexander's fraudulent scheme took place. But the Government will be trying Alexander for his own promises, his own deceptions, and his own acts or failures to act, which defrauded Alexander's investors – and not those of Adams or others who may have to answer for their own misconduct.

Favret opines that Alexander's customers misplaced their reliance on Alexander and his representations. But reliance is not an element of the crime of wire fraud. *Bridge v. Phoenix Bond & Indem. Co.,* 553 U.S. 639, 641 (2008); *In re MasterCard Int'l, Inc.,* 313 F.3d 257, 263 (5th Cir. 2002) ("reliance is not an element of statutory mail or wire fraud").

II. Because the Proposed Testimony Aims at Allegations Not Made, the Testimony is Irrelevant to the Actual Charges.

To convict Alexander at trial, the Government need only prove the elements specific to the charged offenses. For the Conspiracy count under Section 1349, that means the relevant issues are (1) agreement between Alexander and Seawright and any other conspirators, to further

an unlawful scheme or artifice to defraud the investors; (2) any one or more acts in furtherance of the agreement. For the substantive counts of wire fraud, the relevant issues are the scheme or artifice executed by Alexander and Seawright, and the individual instances of a foreseeable use of interstate wire communications in furtherance of the scheme and its execution.

The proffered opinions and statements of Mr. Favret accordingly have no tendency to make more or less probable, any fact of consequence to determining Alexander's guilt of the charges of conspiracy and wire fraud. FED. R. EVID. 402. They should therefore be excluded. *See United States v. Milton*, 555 F.2d 1198, 1203 (5th Cir. 1977) ("expert opinion evidence may still be excluded if its prejudicial impact substantially outweighs its probative value, if it wastes time, or if the trial court determines that the expert's specialized knowledge will not assist the trier of fact to understand the evidence.") (citation omitted); *see also United States v. Winermute*, 443 F.3d 993, 1001 (8th Cir. 2006) ("testimony was not relevant. If offered, the expert testimony would have served to confuse rather than assist the jury in the jury's attempt to understand the evidence on this issue.").

III. Favret's Claimed Expertise Lies in an Area Not at Issue in the Case, Therefore Unnecessary to Aid the Jury.

Federal Rule of Evidence 702 permits the opinion testimony of an expert witness only when "the expert's specialized knowledge will help a trier of fact to understand the evidence." FED. R. EVID. 702(a). The general rule is,

> that expert testimony not only is unnecessary but indeed may properly be excluded in the discretion of the trial judge if all the primary facts can be accurately and intelligently described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience or observation in respect of the subject under investigation.

Salem v. United States Lines Co., 370 U.S. 31, 35 (1962) (internal quotation marks

omitted). There is "no error, let alone manifest error, in having a jury decide without the aid of experts." *Spokane & Inland Empire R.R. Co. v. United States*, 241 U.S. 344, 351 (1916) (trial court "was clearly right in holding that the question was not one for experts, and that the jury, after hearing the testimony … were competent to decide the issue."); *Salem*, 370 U.S. at 36 (citing same).

"The touchstone of admissibility under Rule 702 is helpfulness to the jury." *United States v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991) (excluding expert's "testimony consist[ing] of nothing more than drawing inferences from the evidence that he was no more qualified than the jury to draw."). Favret's proffered expertise lies in the realm of securities regulation and violations of the rules of the regulated and registered securities market, with emphasis on the operations of FINRA. None of these is pertinent or relevant to the issues to be decided by the jury in deciding Alexander's guilt of the wire fraud charges. Accordingly, Favret's opinions would provide no special insight or understanding of necessary assistance to the jury in deciding the elements of the offenses charged at trial. There is therefore no basis or qualification for Favret to testify as an expert witness, devoid of personal and firsthand knowledge otherwise necessary to deem him a competent witness. FED. R. EVID. 602. *See Steinberg v. Indemnity Ins. Co. of N. Am.,* 364 F.2d 266, 274 (5th Cir. 1966) ("If the question is one for which the layman is competent to determine for himself, the opinion testimony is excluded").

IV. Rule 704 Bars Favret's Proposed Expert Testimony.

A. Favret may not offer legal conclusions

Favret is offered to provide legal conclusions.[1] He should be excluded outright because experts cannot offer legal conclusions or "expert" testimony on the law.

Federal Rule of Evidence 704(a)[2] "'does not allow a witness to give legal conclusions.'" *United States v. Williams*, 343 F.3d 423, 435 (5th Cir. 2003) (quoting *United States v. Izydore,* 167 F.3d 213, 218 (5th Cir. 1999)); *United States v. Daggs*, 448 F. App'x 504, 507 (5th Cir. 2011); see also *Owen v. Kerr-McGee Corp.,* 698 F.2d 236, 240 (5th Cir. 1983) (same); *United States v. Milton*, 555 F.2d 1198, 1203 (5th Cir. 1977) ("[C]ourts must remain vigilant against the admission of legal conclusions, and an expert witness may not substitute for the court in charging the jury regarding the applicable law."). The Fifth Circuit has "long recognized that determinations of guilt or innocence are solely within the province of the trier of fact." *Izydore*, 167 F.3d at 218. Other circuits are in accord.

The Fifth Circuit's decision in *Williams* is directly on point. Williams was a deputy sheriff who had shot an apprehended, unarmed suspect in the back. 343 F.3d at 429. At trial, the government called three officers who had been involved in the apprehension of the suspect. *Id.* at 435. The prosecutor asked each whether, based on his experience and training as a law enforcement officer, he believed the shooting was reasonable. *Id.* Each testified that the shooting was unreasonable. *Id.* The Fifth Circuit concluded that the trial court had erred in admitting this

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[1] A copy of Favret's expert designation will be provided to the Court separately via e-mail for review.

[2] Rule 704(a) provides, in pertinent part, that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

testimony, emphasizing that "Rule 704(a) does not allow a witness to give legal conclusions. Reasonableness under the Fourth Amendment or Due Process Clause is a legal conclusion." *Id.* (quotation marks and citations omitted); see also *United States v. Rich*, 145 Fed. Appx. 486, 488 (5th Cir. 2005) (holding that trial court "plainly erred" in permitting IRS agent "to state his legal conclusions as to ultimate issues—that the conduct underlying the money-laundering counts was bank fraud and money laundering").

Other circuits have taken the same view and prohibited just the sort of expert testimony the defendant seeks to introduce here. In *United States v. Scholl*, the Ninth Circuit held that "testimony concerning the reasonableness of Scholl's belief that he could net out [gambling] wins and losses" for tax purposes called for a legal conclusion and was therefore an "inappropriate matter for expert testimony." 166 F.3d 964, 973 (9th Cir. 1999). In *Andrews v. Metro North Commuter Railroad Co.,* the Second Circuit held that the reasonableness of the plaintiff's actions was not a proper topic for expert testimony. 882 F.2d 705, 708 (2d Cir. 1989). That court took a similar position in *United States v. Stewart*, 433 F.3d 273, 311 (2d Cir. 2006). There, the trial court prevented a securities law expert offered by Stewart from testifying about the legality of Stewart's ImClone trade. *Id.* The Second Circuit affirmed, as "[g]enerally, the use of expert testimony is not permitted if it will usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it." *Id.* (quotation marks omitted).

B. Favret may not opine on an ultimate fact.

Rule 704(b) of the Federal Rules of Evidence forbids an expert witness to opine on an ultimate fact concerning elements of the offense, which are reserved for determination by the jury alone. FED. R. EVID. 704(b). Favret is offering his opinion on ultimate conclusions of law,

such as offense elements of reliance; materiality; and definition of fraud. Each of these is an ultimate matter for the jury, on the basis of the factual evidence, to decide. To the extent there is any need for instruction on the legal aspects of each of these elements, that instruction properly should come only from the presiding judge, who is the sole legal expert for the jury in the courtroom.

The Court of Appeals has "repeatedly held that [Rule 704] does not allow an expert to render conclusions of law." *Snape-Drape*, 98 F.3d at 198 & n.8 "Expert testimony of this type is often excluded on the grounds that it states a legal conclusion, usurps the function of the jury in deciding the facts, or interferes with the function of the judge in instructing the jury on the law." *Simpson*, 7 F.3d at 188. *See also, Owen v. Kerr-McGee Corp*., 698 F.2d 236, 240 (5th Cir. 1993) ("Rule 704, however, does not open the door to all opinions. … Nor is the rule intended to allow the witness to give *legal* conclusions.") (emphasis original).

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court grant the Government's motion and preclude the expert testimony of Andrew Favret as a defense witness at trial.

Date: July 22, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, DAVID H. FULCHER, Assistant U.S. Attorney, hereby certify that I have this date electronically filed the foregoing motion with the Clerk of the Court using the ECF system which sent notification to all counsel of record.

Dated: July 22, 2022

/s/ Dave Fulcher
David H. Fulcher
Assistant United States Attorney