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**

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

Comes now Defendant Ted Brent Alexander and files this Response to Government's Motion in Limine Pursuant to Rules 402, 403, 602, 702, and 704 to Preclude Defendant's Designated Expert Witness [Dkt. No. 55]. In support of this Response, 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 Government subsequently issued a superseding indictment removing charges concerning securities and commodities fraud and conspiracy to commit the same.[1] The case, however, still revolves around accredited investors, rates of return, due diligence, the definition of and materiality of terms and phrases used in subscription agreements, equity term sheets, LLC agreements, investment sales conversations, loan commitments, property deeds and liens,

[1] Prior to issuing the superseding indictment, the Government filed its motion to which the Defendant now responds.

accounting issues, evaluation and assumption of investment risk, cash flow priority, brokers, dealers, private placements, and other issues of investments and finance. Due to his training, his experience and expertise, Mr. Favret is the perfect expert to assist the jury in understanding these technical terms that are wholly foreign to the average juror.

The Government makes 5 objections to the admission of Mr. Favret's expert testimony:

1. That Mr. Favret misstates and misconstrues the allegations of the indictment
2. That Mr. Favret's testimony is irrelevant
3. That Mr. Favret's expertise would not be helpful to the jury
4. That Mr. Favret is seeking to offer legal conclusions, and
5. That Mr. Favret may not opine on an ultimate fact

The Government's First and Second Objections

The Government claims that Mr. Favret misstates and misconstrues the allegations of the indictment, and that his testimony would be irrelevant. This isn't true. To prove the allegations against Mr. Alexander in the current indictment, the Government must prove: "(1) a scheme to defraud that employed false material representations, (2) the use of mail or interstate wires in furtherance of the scheme and (3) the specific intent to defraud." *United States v. Hoffman*, 901 F.3d 523, 545 (5th Cir. 2018).[2] It is to the first and third elements which Mr. Favret, a career-long investigator and prosecutor of fraud involving investment vehicles, will offer highly experienced, learned expert testimony that will be helpful to the trier of fact in this case.

It has long been understood that "the words 'to defraud' commonly refer to wronging one in his property rights by dishonest methods or schemes and usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching." *McNally v. United States*, 483

[2] Notably, the Government downplays its burden under the law in its Motion, and avoids discussion of its requirement to prove materiality and specific intent.

U.S. 350, 358 (1987), quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924) (internal quotation marks removed). Said another way, "intent to defraud requires an intent to (1) deceive, and (2) cause harm to result from the deceit." *United States v. Jiminez*, 77 F.3d 95, 97 (5th Cir. 1996). In order to understand the difference between dishonest methods or schemes designed to cause harm and honest methods or schemes employed negligently, it logically flows that the trier of fact must understand the nature of investments and the decisions to participate in them, as well as due diligence and the impact of multiple years of positive returns on investment would have had on all parties involved.

For example, at trial the jury will hear proof that Mr. Adams provided Mr. Alexander and his business partner with voluminous evidence that the Madison Timber operation was in fact a valid concern, and that *for years* the investors received the principal and interest promised to them without fail. It is vital for the jury to hear that such a track record could have the effect of lulling someone in a position like Mr. Alexander and his business partner into a false sense of security regarding the validity of the investment, especially since the case centers upon whether Mr. Alexander devised a scheme to trick the investors and intended to do them harm.

Additionally, the Government is required to prove beyond a reasonable doubt that any misrepresentations were material. *Neder v. United States*, 119 S.Ct. 1827, 1841 (1999). Mr. Favret's testimony would greatly aid the jury in understanding what representations would be material to accredited investors. For example, one of the Government's allegations is that Mr. Alexander and his business partner failed to disclose to investors the 3% up-front fee paid to them by Mr. Adams. The Government, in seeking to exclude Mr. Favret's testimony, ignores the requirement that the jury evaluate the materiality of such an omission to these investors in making their decision, even though the Government appears poised to present such testimony at trial to the jury. The Government has also overlooked the plain language of the Equity Terms

Sheet it heralds, which states that the investors are to be paid **from the proceeds of the note**. Mr. Favret will explain to the jury that the existence of the fee was immaterial as it did not appear to come from the proceeds of the note and did not impact the security of the investment. Additionally, not a single investor inquired as to the existence of any such fees prior to their investment.

Mr. Favret has spent his entire career sifting through whether statements are material to investors. He is prepared to opine at length regarding the types of information used by accredited investors to make investment decisions. This type of knowledge, training and expertise is vital to the jury in this case, and will assist them in determining whether matters were material.

As specific intent to defraud and materiality are central to this case, Mr. Favret's expert testimony is relevant and admissible under Rules 402 and 403.

The Government's Third Objection

The Government's next objection is that Mr. Favret's experience is inadmissible because his expertise will not assist the jury in understanding the evidence. As stated above, this is no typical wire fraud case. It involves decisions made only by accredited investors[3], who by their very definition are people with presumed expertise and experience in the realm of investing, and whether or not those decisions were made based upon some nefarious "trick" or "scheme" devised by Mr. Alexander to harm them.

In its motion, the Government states that Mr. Favret's expertise comes from a lifetime spent investigating the sale of *registered* securities, and that such expertise is therefore irrelevant to sales of *unregistered* securities. The Government makes no argument as to how such a difference would therefore make the jurors "as capable of comprehending the primary facts and

[3] Each and every one of the investors in Alexander Seawright Timber Funds I and II held themselves out to Mr. Alexander and Mr. Seawright as accredited investors.

of drawing correct conclusions from them as…witnesses possessed of special or peculiar training, experience or observation in respect of the subject under investigation" like Mr. Favret. *Salem v. United States Lines Co.* 370 U.S.31, 35 (1962). As stated above, the Government's case centers around thousands of pages of property deeds, financial documents, and legal agreements that are full of legal, financial, and accounting terminology that is simply beyond the expertise of laypersons and is ripe for Federal Rule of Evidence 702 expert testimony. Mr. Favret, a lawyer, spent his career as an Enforcement Attorney and Regional Chief Counsel for the Financial Industry Regulatory Authority. He is imminently qualified by his training and his experience to assist the jury in understanding the facts of this case, and is therefore qualified under Rule 702.

The Government's Fourth and Fifth Objections

The Government's fourth and fifth objections are both based upon Rule 704, and are best addressed together. With respect to 704(a), the Government does not state with any specificity the prohibited legal conclusions Mr. Favret has drawn and would offer to the jury. Instead, the Government simply cites to the entirety of Mr. Favret's summary of opinion. Nonetheless, while experts may not give legal opinions, they may give opinion testimony on an ultimate issue as Rule 704(a) plainly states. They may even give an opinion that "embraces an ultimate issue to be determined by the trier of fact."

The Government cites *United States v. Williams* as being "directly on point," when in fact it is not. In *Williams*, the Fifth Circuit was addressing whether "reasonableness" in the context of a Fourth Amendment claim concerning use of force amounts to a legal conclusion. This case has nothing to do with reasonableness standard under the Fourth Amendment, but instead concerns whether the actions or inactions of Mr. Alexander amount to fraud. The Fifth Circuit has spoken directly to this very issue and held that government experts may properly testify that a loan scheme was "fraudulent." *United States v. Aggarwal*, 17 F.3d 737 (5th Cir. 1994). It follows

logically that if a government expert can call a scheme fraudulent that a defense expert may testify that a scheme was *not* fraudulent.

Aside from the *Aggarwal* case, the case of *United States v. Medeles-Cab* is instructive here. 754 F.3d 316 (5th Cir. 2014). A law enforcement expert in that case testified as to the general operations of drug courier operations, a topic perhaps more familiar to juries than the world of accredited investors thanks to the popularity of movies and television shows on the subject. The Fifth Circuit held that expert testimony which "help(s) a jury understand the significance and implications of other evidence presented at trial" is absolutely admissible. *Id.* at 321, citing *United States v. Gonzalez-Rodriguez*, 621 F.3d 354, 364 (5th Cir. 2010). This is exactly the type testimony that Mr. Favret seeks to offer. Mr. Favret will point the jury to factors that would be helpful to them in making a decision as to whether Mr. Alexander devised a scheme to trick the investors or otherwise engaged in fraudulent behavior, and then let the jury make their own determination.

Mr. Favret, with 31 years of experience in investigating and prosecuting fraud involving investments, has a deep understanding of the methods of operation and facts that are indicative of fraudulent schemes. He can also point the jury to the existence or nonexistence of those methods and facts in this case. For example, Mr. Favret will testify that affinity fraud cases are rare, and that typically people do not defraud their close friends and family. Additionally, he will testify that the investors in in fraudulent schemes typically do not see returns of their principal and interest for years without fail. Further, he would testify that the existence of legal documents, reports, notarized deeds, etc. increase the appearance of legitimacy. Mr. Favret will also testify that investors tend to ask about maters that are material to them, and tend to be driven by return, not fees paid. Further, Mr. Favret can explain to the jury that the terms of the Equity Terms Sheet were not in conflict with the payment of a 3% up-front fee, as that payment did not come from

the proceeds of the note.

For the foregoing reasons, Mr. Favret's testimony is admissible under Rule 704.

Conclusion

The Government's Motion in Limine Pursuant to Rules 402, 403, 602, 702, and 704 to Preclude Defendant's Designated Expert Witness should be denied in whole. Mr. Alexander has a constitutional right to call expert witnesses in his defense, and excluding Mr. Favret's testimony would impair that right. In the event the Court finds some portion of Mr. Favret's summary of opinion to be objectionable, the Defense would ask for a hearing on the matter so that the Court could hear directly from Mr. Favret what his testimony would be, and not to base its ruling on said summary. In the event the Court finds some portion of Mr. Favret's testimony inadmissible after a hearing, the Defense would ask that Mr. Favret be allowed to testify with the admonition not to present the objectionable portion of his opinion to the jury.

WHEREFORE, premises considered, Defendant Ted Brent Alexander respectfully asks this Court to deny the Government's Motion in Limine Pursuant to Rules 402, 403, 602, 702, and 704 to Preclude Defendant's Designated Expert Witness.

Respectfully submitted, this the 1st day of September, 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 1st day of September, 2022.

/s/ *J. Matthew Eichelberger*
J. MATTHEW EICHELBERGER