

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

R.J. ZAYED, in His Capacity as Court-Appointed Receiver for the Oxford Global Partners, LLC, Universal Brokerage, FX, and Other Receiver Entities,

Plaintiff,

vs.

ASSOCIATED BANK, N.A.,

Defendant.

Case No. 13-cv-00232 (DSD-SER)

**FILED UNDER SEAL  
CONFIDENTIAL**

**RECEIVER'S RESPONSE IN OPPOSITION TO DEFENDANT ASSOCIATED BANK'S MOTION TO EXCLUDE THE EXPERT TESTIMONY OF CATHERINE GHIGLIERI**

On July 18, 2016, Catherine Ghiglieri timely filed her expert report pursuant to Federal Rule of Civil Procedure 26(a)(2)(B). Ghiglieri is an expert on how banks open deposit accounts, monitor accounts, investigate alerts, process 314(b) requests, process transactions, and comply with the Bank Secrecy Act and USA PATRIOT Act. Ghiglieri Report, ECF No. 196-2, p. 7. Ghiglieri's experience includes 40 years in the banking industry, including 25 years of regulatory experience, as the Texas Banking Commissioner, and in various capacities at the Comptroller of the Currency ("OCC"). *Id.*

In authoring her report, Ghiglieri relied on her knowledge and experience of all relevant banking regulations, and policies, including the Bank Secrecy Act, Federal Financial Institutions Examination Council guidelines, USA Patriot Act, Customer Identification Program (12 C.F.R. §21.21), and other federal bank regulations. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Defendant filed a Motion to Exclude the Expert Testimony of Catherine Ghiglieri. The most plausible reading of defendant's arguments is that Ghiglieri's testimony is irrelevant because it does not render an opinion on the Bank or its employees' actual knowledge of the Cook-Kiley Ponzi scheme. Additionally, defendant argues that Ghiglieri's testimony is inadmissible because it is unreliable, and will mislead and confuse the jury. For the reasons set forth below, the Court should deny defendant's motion.

**ARGUMENT**

**I. THE EXPERT TESTIMONY OF CATHERINE GHIGLIERI MEETS THE REQUIREMENTS OF FEDERAL RULE OF EVIDENCE 702**

The Bank misapplies the standard relating to the admissibility of expert testimony. Defendant is simply wrong that in order for Ghiglieri's testimony to be admissible, she must opine on whether or not the Bank or its employees had actual knowledge of the Ponzi scheme. Catherine Ghiglieri's testimony is admissible because she is an expert qualified to render opinion testimony on the banking industry standards in this case. Her technical knowledge about bank investigations and the Bank Secrecy Act/Anti-Money Laundering Rules are necessary to an understanding of this case and would be helpful to

a jury. Her testimony is based on facts and reliable principles, and has been reliably applied to the facts of the case. As such, the Court should deny defendant's motion because Defendant imputes requirements into Rule 702 that simply are not present.

Federal Rule of Evidence Rule 702 governs the admissibility of expert testimony:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702

Expert testimony is inadmissible if directed to lay matters which a jury is capable of understanding and deciding without the expert's help. *In Re Baycol Products Litigation.*, 532 F. Supp. 2d 1029, 1067 (D. Minn. 2007). "Expert testimony is helpful to a jury if it concerns matters beyond the knowledge of average individuals; however, it cannot supplant the jury's role in evaluating the evidence." *United States v. Shedlock*, 62 F.3d 214, 219 (8th Cir. 1995) (citing *United States v. French*, 12 F.3d 114, 116 (8th Cir. 1993)); *In re Viagra Prods. Liab. Litig.*, 658 F. Supp. 2d 950, 965 (D. Minn. 2009) (same); *Ritt v. Dingle*, 2001 U.S. Dist. LEXIS 15220, at \*32 (D. Minn. Apr. 3, 2001) (same); *United States ex rel. Dyer v. Raytheon Co.*, 2013 U.S. Dist. LEXIS 135691, at \*36 (D. Mass. Sep. 23, 2013) ("[Expert witness] Silverstone may not testify or opine on the issue of Raytheon's knowledge or intent."); *Holmes Grp., Inc. v. RPS Prods., Inc.*, 2010 U.S. Dist. LEXIS 102727, 2010 WL 7867756, \*5 (D. Mass. June 25, 2010) ("An expert may not testify to another

person's intent. No level of experience or expertise will make an expert witness a mind-reader.”).

“Expert testimony that merely states a legal conclusion is less likely to assist the jury in its determination.” *Id.* The requirement of “helpfulness” guarantees against admitting opinions which tell the fact-finder what outcome to reach. *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983). An expert “cannot testify to the legal implications of conduct [because] the court must be the jury’s only source of law.” *Montgomery v. Aetna Cas. & Sur. Co.*, 989F.2d 1537, 1541 (11th Cir. 1990).

Defendant argues that Ghiglieri should be excluded because she does not opine on whether or not the Bank or its employees had actual knowledge of, or substantially assisted the Ponzi scheme. Because Ghiglieri’s report does not address whether or not the Bank had actual knowledge of or substantially assisted the Ponzi scheme, the Bank argues her testimony is irrelevant, unreliable, and will confuse the jury. This is incorrect. Nowhere in Rule 702 or anywhere in the Federal Rules of Evidence does it state that expert testimony must opine on a question of law for it to be relevant and inadmissible.

Despite defendant’s misplaced argument, the admissibility of expert testimony does not turn on an expert’s opinion about legal questions. The only requirements are that a witness be: (1) qualified as an expert; (2) that the expert’s knowledge be helpful to the trier of fact; (3) that the testimony be based on sufficient facts or data; (4) that the testimony be a product of reliable principles, and (5); that the expert reliably apply the principles and methods to the facts of the case. Fed. R. Evid. 702. Ghiglieri meets all five of these requirements. Defendant’s motion simply ignores them.

First, Ghiglieri has over twenty-five years of regulatory experience in the banking industry, during which time she served as the Texas Banking Commissioner, roles at the Comptroller of the Currency, and as a bank consultant for many years. Ghiglieri report, p. 7-9. In total, Ms. Ghiglieri has over 40 years of experience in the banking industry. Ghiglieri report, p. 10. Defendant does not even attempt to argue that she is not qualified to render an opinion in this case.

Second, Ghiglieri's testimony would be helpful to a jury because her background, coupled with the technical knowledge of the banking industry, means she will help the jury understand the relevant rules, regulations, polices, and procedures as they relate to the Bank and the Ponzi scheme. The complexity of the banking industry rules and regulations is not something within the knowledge of ordinary people. Ghiglieri's knowledge and experience would help the jury understand the various relevant intersecting rules and regulations, and how the Bank did or did not comply with them. Defendant's preference that the jury not hear an expert testify as to the Bank's violations of federal banking regulations and its own policies is not supported by FRE 702 or by legal precedent. *See Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 929-30 (8th Cir. 2001) ("As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination. Only if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded.")

Third, Ghiglieri's report is based on sufficient facts and data. The Bank essentially concedes this point. There is no question that Ghiglieri is deeply familiar with applicable

federal banking laws and regulations, as well as regulatory guidance, and applied them to The Bank's activities. Ghiglieri report, p. 9-10. She also compared the Bank's actions with those of banks that she previously reviewed in her extensive experience. Defendant's motion takes issue mostly with what is not contained in Ghiglieri's report; mainly, the question of whether the Bank had actual knowledge of the Cook-Kiley Ponzi scheme. Defendant does not contend that Ghiglieri's report is not based on sufficient facts or data. Rather, the crux of defendant's criticism is that Ghiglieri's report is not relevant because it does not opine on the ultimate question of the Bank's actual knowledge or substantial assistance. Again, defendant misunderstands the standard for admissibility of expert testimony under Rule 702. The standard is not whether the proposed testimony answers legal questions for the trier of fact. The standard is the straightforward text set out under Rule 702.

Fourth, defendant's motion does not address whether Ghiglieri's report is a product of reliable principles. Here again, it is uncontested that Ghiglieri utilized methodology based on standards in the banking industry as determined by federal banking regulations, as well as by regulatory guidance published by federal banking regulators. Ghiglieri report, p. 9. Ghiglieri's report states that "[b]anks that do not comply with the federal banking laws and regulations, as well as the regulatory guidance published by the federal banking regulators, would be engaging in atypical banking conduct." *Id.* Just as with any other professional hired to render an opinion on whether an entity was in compliance with industry standards, a reliable starting point is the applicable industry's laws, rules, and regulations. That is precisely what Ghiglieri's

testimony is based on, as demonstrated in her report. Defendant does not focus on this prong of Rule 702, but instead on artificial requirements Defendant believes must exist for expert testimony to be admissible.

Finally, Ghiglieri's proposed testimony meets the requirements of Rule 702 because she reliably applies the relevant principles and methods of the banking industry to the facts of the case. That the Bank's motion is silent on this issue signals their complacency with Ghiglieri's analysis on this point. Ghiglieri's report discusses the relevant laws and regulations at length including, but not limited to, the Bank Secrecy Act, Customer Identification Program requirements, Customer Due Diligence, regulatory guidance, and red flags in the banking industry. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ghiglieri

reliably applies her principles and methods to the facts of the case. Her analysis is straightforward – she discusses her experience and what the relevant laws, rules, regulations, and policies are regarding the issues at hand, then opines [REDACTED]

[REDACTED]

The Bank's disagreement with Ghiglier's conclusion is not an appropriate basis to exclude her opinion. They can cross-examine her at trial on those issues. The only question at this juncture is whether she *reliably applied* the relevant and accepted principles and methods to the facts of the case.

Defendant's motion also erroneously asserts that Ghiglieri's testimony should be excluded because she does not render an opinion concerning the Bank's actual knowledge. Defendant is incorrect, and its argument does not comport with the fairly simple requirements established by Rule 702. None of defendant's arguments about actual knowledge have any bearing on whether or not the standards of Rule 702 have been met. There is no requirement in the Rule that the proposed expert render an opinion about the ultimate jury questions in the case. In fact, Ghiglieri cannot testify to the ultimate implications of conduct because only the court must be the jury's source of law on the ultimate jury conclusions in the case. (See *Receiver's Motion to Strike Expert Report and Bar Testimony of Charles H. Grice* for further discussion of the prohibition of experts opining on questions of law.) Defendant's motion essentially argues that because Ghiglieri does not invade the province of the Court or the finder of fact, she should not be permitted to testify. Ghiglieri is prohibited from testifying as to what the Bank argues is lacking. (See *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990) "An expert cannot testify to the legal implications of conduct [because] the court must be the jury's only source of law.") It is unsurprising that Defendant is making such an argument, since Defendant's own expert witnesses attempt to supersede the roles of the Court and the jury time and time again. That Ghiglieri does not do so is to her credit, and does not support an order barring her testimony.

## **II. CATHERINE GHIGLIERI'S TESTIMONY IS RELEVANT TO THE ISSUES IN THIS CASE**

Ms. Ghighlieri's testimony is relevant to the Receiver's claims. Whether the Bank engaged in atypical conduct and ignored red flags is admissible because it is relevant to whether the Bank had knowledge of or substantially assisted the Ponzi scheme. Ghighlieri's testimony about the details of this atypical behavior is specifically based on the facts of the case. Her analysis of the relevant banking laws, regulations, practices, and policies and how the Bank did or did not comply with them would be helpful to a jury. Defendant fails to establish that Ghighlieri's testimony is irrelevant, and the Court should deny defendant's motion to exclude.

The general test for relevancy is set out by Federal Rule of Evidence 401: "Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." The United States Supreme Court held in *Daubert* that "[e]xpert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 591 (1993). An additional consideration of relevancy is whether expert testimony is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Id.*

Here, the proposed testimony in Ghighlieri's report passes the relevancy test with ease. Ghighlieri summarized her background and considerable experience as it relates to the banking industry. [REDACTED]

[REDACTED]

[REDACTED]

The Bank fails to present any persuasive argument that Ghiglieri's testimony is irrelevant. Defendant's motion only focuses on the fact that Ghiglieri did not render an opinion as to the Bank or its employees' actual knowledge and substantial assistance of the Cook-Kiley Ponzi scheme. That, however, is not the test for relevance. Ghiglieri's testimony is relevant because it relates to issues in the case, and would therefore be helpful to a trier of fact. It is difficult to envision how else an expert could help a trier of fact to understand the issues other than: (1) discussing the relevant facts; (2) explaining the

relevant regulations and procedures; (3) applying the facts; and (4) rendering an opinion based on the expert's application of the facts to her understanding of the relevant regulations, policies and procedures. That is precisely what Ghiglieri's testimony aims to provide to a trier of fact, and Defendant cannot argue that the testimony is not relevant simply because the bank doesn't agree with an expert's conclusions.

Contrary to defendant's argument, there is no requirement that Ghiglieri opine as to the Bank's actual knowledge or substantial assistance, as *Daubert* only requires that expert testimony relate to issues in the case, and that the expert testimony proffered in the case be sufficiently tied to the facts. It is not the job of the expert to determine actual knowledge; that function belongs to the trier of fact. Ghiglieri has offered expert testimony that is sufficiently tied to facts in the case. Therefore, her testimony is relevant.

### **III. CATHERINE GHIGLIERI'S TESTIMONY IS RELIABLE, AND WOULD NOT CONFUSE OR MISLEAD A JURY**

Defendant's motion also argues that Ghiglieri's testimony should be excluded because it is not reliable. Defendant argues that Ghiglieri's testimony is based on "unreliable, outcome-drive methodology that is in no way probative of whether the Bank aided and abetted any tort." Defendant's Motion to Exclude, p. 18. Again, defendant's argument is based on a flawed belief that Ghiglieri must opine as to whether the Bank had actual knowledge in order for any of her testimony to be reliable.

In determining whether proffered expert testimony is reliable, *Daubert* sets forth four factors to guide district courts in resolving admissibility questions: (1) whether the expert's methodology has been tested; (2) whether the technique has been subjected to

peer review and publication; (3) whether the technique has a known or knowable rate of error; and (4) whether the technique has been generally accepted in the proper scientific community. *Daubert*, 509 U.S. at 589.

Defendant's motion does not address any of the four factors established in *Daubert*. Rather, defendant relies on the same argument as before, that Ghiglieri's testimony is unreliable because it does not offer an opinion as to actual knowledge or substantial assistance. Despite the repetition of this argument, it is just as incorrect here as it was throughout defendant's motion. The lack of an opinion about the Bank's actual knowledge does not equate to unreliability.

Defendant's motion only cites deposition testimony from questions where Ghiglieri was asked regarding her opinion about actual knowledge. Her testimony is consistent in that she does not know if the Bank, or its employees, had actual knowledge of the Ponzi scheme. Despite defendant's stance that this renders her testimony unreliable and thus inadmissible, this actually enhances Ghiglieri's reliability as an expert witness. Ghiglieri did not disclose that she was a qualified expert in mind reading. Her function is plain: to render expert testimony on the Bank's compliance with the relevant regulations and procedures as it relates to the Ponzi scheme, based on her knowledge and experience of 40 years in the banking industry.

Defendant's reliance on *Concord Boat Corporation v. Brunswick Corporation*, 207 F.3d 1039, 1057 (2000) to argue that expert testimony must differentiate between lawful and unlawful conduct to be reliable is unpersuasive. In that case, the Court was analyzing an antitrust action for violations of the Sherman Act. Specifically, the Court held that

because the plaintiffs filed its complaint more than four years after the accrual of their cause of action under the Clayton Act, and there was no exception to the running of the limitations, their claims should be dismissed. The passage that Defendant cites<sup>1</sup>, out of context, relates to testimony as to very specific facts about the nuanced differences in the “stern drive engine market.” *Concord Boat*, 207 F.3d at 1057. Under the Federal Rules of Evidence, as well as *Daubert*, there is not any requirement that an expert separate lawful from unlawful conduct in order for her testimony to be deemed reliable.

Tellingly, defendant does not take issue with Ghiglieri’s summary of the facts of the case. Defendant does not attack her discussion of the relevant laws, regulations, procedures, or policies. Defendant does not argue that Ghiglieri has not sufficiently tied her expertise to the facts of the case. Nor does defendant take issue with Ghiglieri’s comments about the Bank’s compliance with federal banking statutes and regulations. Defendant does not argue that Ghiglieri’s report relied upon materials are outdated, nor does defendant take issue with her analysis of the regulatory guidance set forth in the OCC Handbook or the FFIEC BSA/AML Examination Manual. Rather, Defendant hangs its hat on a imaginary rule that expert testimony is unreliable if it does not opine as to “actual knowledge,” an element of aiding-and-abetting torts that is reserved to the finder of fact.

Moreover, Ghiglieri’s opinion [REDACTED] is not unreliable because it allows the jury to consider the atypical conduct that occurred in this

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<sup>1</sup> “Dr. Hall’s expert opinion should not have been admitted because it did not incorporate all aspects of the economic reality of the stern drive engine market and because it did not separate lawful from unlawful conduct.” *Concord Boat*, 207 F.3d at 1057.

case, which is highly relevant circumstantial evidence. In the Eighth Circuit actual knowledge may be shown by circumstantial evidence, or by reckless conduct. *K & S Partnership v. Continental Bank, N.A.*, 952 F.2d 971, 977 (8th Cir.1991). “Such knowledge may be proved by and inferred from circumstantial evidence, including facts available to the defendant's employees.” *Id.* In *FDIC v. First Interstate Bank*, a factually analagous case in which a bank also sought to defend itself against aiding and abetting fraud, the Eighth Circuit held that “a defendant’s general awareness of its overall role in the primary violator's illegal scheme is sufficient knowledge for aiding and abetting liability.” *FDIC v. First Interstate Bank of Des Moines, N.A.*, 885 F.2d 423, 429 (8th Cir. 1989). The principles of aiding and abetting applied in *First Interstate Bank* were not limited to specific facts of that case, but are “grounded in common law aiding and abetting.” *Id.*

Defendant’s contention that Ghiglieri’s test will be “satisfied nearly 100% of the time,” is misplaced in arguing for her exclusion. They are free to cross-examine her on that argument at trial. [REDACTED]

[REDACTED] She provides building blocks for the jury to make its own conclusions in light of all of the other evidence in the case, and leaves the ultimate conclusion in the case to the finder of fact – as she must.

Defendant fails to attack any of Ghiglieri’s dozens of individual conclusions, and only concentrates on a bare-bones argument that her “test” will yield the same results 100% of the time. Defendant’s motion does not contradict Ghiglieri’s interpretation of

statutes or regulations, or how these interpretations are applied to the facts. Defendant's attack on Ghiglieri's "test" is therefore a red herring.

Lastly, defendant argues that Ghiglieri's testimony should be excluded under Rule 403 on the grounds that it would confuse the issues and mislead the jury. Defendant contends that "Ms. Ghiglieri's testimony invites a jury to conclude that the Bank must have aided and abetted a tort because it allegedly violated BSA/AML regulations or internal BSA/AML policies." Defendant's Motion to Exclude, p. 21. Defendant does not state how Ghiglieri's report would mislead a jury to conclude that the Bank must have aided and abetted a tort, nor does it identify exactly what is misleading about Ghiglieri's discussion of BSA/AML regulations or policies. The fact that the Bank does not like Ghiglieri's testimony does not make it misleading. Defendant also does not state that Ghiglieri misinterpreted, or misrepresented how the laws or regulations operate. Because of the lack of identification of what defendant takes issues with, it is plausible that defendant is arguing that mere discussion of the relevant laws, regulations, and policies in this case is improper. By Defendant's flawed logic, the Court should disallow any discussion of federal banking statutes or regulations because that would inevitably cause a jury to conclude that the Bank must have violated them. This logic is not only flawed and unfair to the intelligence of jurors, it also is inconsistent with Defendant's presentation through expert testimony that the Bank was in compliance with some or all laws and regulations.

Defendant cannot establish that Ghiglieri's testimony would confuse the issues for a jury or mislead a jury. Ghiglieri's proposed testimony is straightforward: she

summarized her experience, her understanding of the relevant facts, then applied the facts to her knowledge of the relevant laws, regulations, policies, and procedures in the opening of bank accounts. Ghiglieri's testimony would be helpful to a jury because her knowledge, experience, and training in the banking industry would explain difficult and highly relevant concepts for the trier of fact. Her testimony would assist the jury in making a determination for itself on the ultimate question of whether the Bank or its employees had actual knowledge of the Ponzi scheme.

### **CONCLUSION**

The Court should deny defendant's motion to exclude the testimony of Catherine Ghiglieri because her testimony is relevant, admissible, and reliable under the Federal Rules of Evidence and under the Supreme Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579(1993). There is no additional requirement that expert testimony encompass an opinion on questions of law. In fact, an expert cannot testify to the legal implications of conduct because it would undermine the court as the jury's source of law.

Dated: November 18, 2016

Respectfully submitted,

/s/ William W. Flachsbart

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**CERTIFICATE OF SERVICE**

The undersigned attorney of record certifies that on November 18, 2016, copies of the foregoing document were served upon counsel for Defendant via e-mail to the following addresses:

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