MOTION TO EXCLUDE TESTIMONY OF DOUGLAS F. X

INTRODUCTION

The government has designated Mr. X as an expert witness to provide testimony as to whether Regions Bank's decision to approve and fund two mortgage loans was based on fraudulent misrepresentations made by Ms. D.[1] Mr. X, however, is not qualified by education or experience to offer such testimony. Mr. X is not and has never been a licensed mortgage broker or loan officer, nor has he held any other position that might grant him specialized knowledge qualifying him to opine on Regions Bank's business practices. Thus, Mr. X is not qualified to testify as an expert regarding Regions Bank's mortgage loan approval policies generally nor as to how those policies were applied to the specific loans at issue in this case.

Moreover, Mr. X's testimony has no relevance to any charge or defense in this case and, therefore, must be excluded under *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) and Federal Rule of Evidence 403. In addition to being irrelevant Mr. X's testimony fails to meet the 702 requirement that expert opinion be helpful to the trier of fact (evidence failing to meet this criterion is also precluded under FRE 403 for wasting time).

Finally, the government's proposed testimony from Mr. X is based on insufficient facts and data and is not the product of any reliable principles or methods. As demonstrated below, Mr. X's opinion and reasoning consists exclusively of personal beliefs, innuendo, and speculation and must therefore be excluded under FRE 702 and *Daubert.*

[1] A copy of Mr. X's report and curriculum vitae are attached as **Exhibit A** hereto.

ARGUMENT

I. MR. X'S TESTIMONY SHOULD BE EXCLUDED BECAUSE HE IS NOT QUALIFIED TO OFFER AN EXPERT OPINION ON REGIONS BANK'S LOAN APPROVAL POLICY.

"In performing its gatekeeping function, a court must consider whether the putative expert is qualified by knowledge, skill, experience, training, or education . . . . That a testifying expert thus should have achieved a meaningful threshold of expertise seems beyond debate." *Prado Alvarez v. R.J. Reynolds Tobacco Co.*, 405 F.3d 36, 40 (1st Cir. 2005).

Mr. X's testimony regarding Regions Bank's mortgage loans to Ms. D should be excluded because Mr. X is not qualified to testify as an expert on this subject, and his opinion will not be helpful to the trier of fact. See Fed. R. Evid. 702. Mr. X possesses only a bachelor's degree in criminology from Florida State University and although he delivers periodic lectures and seminars on topics including mortgage fraud, this does not by itself qualify him to opine on Regions Bank's business practices, particularly when Regions Bank witnesses are not unavailable.

In order to become a licensed mortgage broker in the State of Florida a person must complete, "24 hours of classroom education on primary and subordinate financing transactions and the laws and rules of ss. 494.001-494.0077." FLA. STAT. § 494.0033(3) (2008). To maintain the license, a broker must demonstrate continuing competency by sitting biennially for an exam administered by the Office of Financial Regulation. FLA. STAT. § 494.0033(2)(b) (2008). He must further complete at least 14 hours biennially of professional continuing education

covering primary and subordinate mortgage financing transactions. FLA. STAT § 494.00295(1). Even loan originators (a.k.a. loan officers), who are employed by and work under the supervision of licensed mortgage brokers, are subject to the same biennial requirement of completing 14-hours of classroom education on primary and subordinate financing. *Id.*

Mr. X is not a licensed mortgage broker, nor is he qualified to be one. Furthermore, he is not employed by a licensed mortgage broker. However, even if he were employed by a mortgage broker, he would not be qualified to act as a loan officer because he has not fulfilled even the minimal educational requirements to become competent for that position. Through its licensing and educational requirements, the State of Florida has indicated a minimum threshold for becoming competent in the mortgage loan industry. It would be anomalous for Mr. X to be considered an expert in the industry when he has not met this minimum threshold or even worked within the industry in a capacity that would allow him to learn its intricacies.

His proffered testimony in this case concludes that, "Regions Bank approved and funded these two loans based upon numerous false and fraudulent representations made by the borrower, seller and settlement agency." (Exhibit A at 5) Mr. X's education and experience do not qualify him to make such a determination. "[T]o grant the status of expert to one . . . with such a variegated and unfocused record of scholarly efforts and minimal attention to analysis, would threaten the effective functioning of the gatekeeper process." *Prado Alvarez*, 405 F.3d at 40.

Nothing in Mr. X's report or curriculum vitae suggests that he is competent to conduct a rigorous and reliable analysis of Regions Bank's approval of Ms. D's loans; much less that he did so. He provides little more than a series of conclusory statements, usually failing to cite documents or evidence from which his conclusions could have been derived, or to any methodology used to analyze his alleged facts. Along with his lack of formal qualifications, the substantive deficiency of Mr. X's report demonstrates his lack of competence to provide testimony regarding Regions Bank's business dealings with Ms. D.

II. MR. X'S TESTIMONY IS NOT RELIABLE UNDER RULE 702 AND MUST BE EXCLUDED.

Expert testimony that is not reliable is not admissible. To be reliable, an expert's testimony must be, "(1) . . . based upon sufficient facts or data, (2) . . . the product of reliable principles and methods, and (3) the witness [must have] applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702. If an expert fails any of these criterions, his testimony is inadmissible. "The court, in its role as gatekeeper, must exclude expert testimony that is not reliable and not specialized." Hypertherm, Inc. v. Am. Torch
Tip Co., 2009 U.S. Dist. LEXIS 22774, *3-4 (D.N.H. Feb. 27, 2009).

"*Daubert* requires that an opinion be supported by something more than subjective belief; it must be grounded 'in the methods and procedures of science.'" *Snyder ex rel. Snyder v. Secretary of Health and Human Services* 88 Fed.Cl. 706 (2009) (citing *Daubert)*. The district court's screening obligation, "applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical'

and 'other specialized' knowledge." *Kumho Tire Co., Ltd. V. Carmichael,* 526 U.S. 137 (1999).

Mr. X's report consists of nothing more than a recitation of alleged facts, presented as true, followed by a perfunctory conclusion. He has left the methodology he used to reach his conclusion entirely to the imagination of the Court. As a result, Mr. X's conclusion cannot be tested or falsified or otherwise assessed for reliability. Such testimony clearly fails to meet the *Daubert* requirements and, moreover, must be excluded under FRE 403 as cumulative and certain to waste time.

III. MR. X'S TESTIMONY WASTES TIME AND IS NEITHER RELEVANT UNDER RULE 403 NOR HELPFUL TO THE JURY UNDER RULE 702 AND MUST BE EXCLUDED.

A. Mr. X's opinion is irrelevant

To establish fraud, the "facts" on which Mr. X relied are only relevant to the extent that any alleged misrepresentations were material. The materiality of any misrepresentations is a determination that neither Mr. X nor any other expert is qualified to make. "[A]llowing an expert to give his opinion on [such] legal conclusions . . . both invades the court's province and is irrelevant." See *Owen v. Kerr-McGee Corp.* 698 F.2d 236, 240 (1983). "A district court should be especially cautious when experts comment upon the materiality or fraudulence of disputed misstatements." *In re Stratosphere Corp. Securities Litigation* 66 F.Supp.2d 1182, 1188 (9th Cir. 1999). The government may not skirt the court's materiality determination by using its "expert" as a conduit to put inadmissible prejudicial evidence before the jury.

Moreover, Mr. X's report is made up of two components, (1) a recitation of the government's alleged facts, and (2) Mr. X's conclusion. Since Mr. X has no first-hand knowledge of the transactions between Regions Bank and Ms. D, he would be an inappropriate witness through which to introduce evidence of the facts alleged by the government. Thus his only potential contribution to this trial is his conclusion. However, since he is not qualified to provide an expert opinion on this matter, and since he has not provided this court with any indication that his conclusion is the product of reliable principles and methods, much less that those methods were reliably applied to the facts of this case, his conclusion amounts to no more than his subjective opinion. Mr. X's personal opinion of the Regions Bank mortgage loans at issue in this case is irrelevant and must be excluded under Rules 403 and 702.

B. Mr. X's opinions are not helpful

"[E]xpert testimony must be relevant not only in the sense that all evidence must be relevant, but also in the incremental sense that the expert's proposed opinion, if admitted, likely would assist the trier of fact to understand or determine a fact in issue." *Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.,* 161 F.3d 77, 81 (1st Cir. 1998) (citing Daubert, 509 U.S. at 591-93).

Even if Mr. X's opinion were relevant, it fails to meet the Rule 702 threshold requirement that expert testimony be helpful to the jury. Rule 702 allows an expert to testify, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." Fed. R. Evid 702.

As noted above, however, Mr. X's report is nothing more than a recitation of alleged facts followed by his personal opinion that Ms. D's loans were the product of fraudulent misrepresentations. (Exhibit A at 5). Neither of these components to his opinion have any possibility of assisting the jury to understand evidence or to determine a fact in issue. See Fed. R. Evid 702.

Not only does Mr. X's report fail to describe Regions Bank's normal loan approval procedures and formulas, it does not even describe or purport to be based on general industry customs and practices. Mr. X gives no indication that he has specialized knowledge or expertise regarding the procedures followed by Regions Bank in the process of approving Ms. D's mortgage loans. Neither does he provide evidence that any alleged misrepresentations caused Regions Bank to deviate from its normal business practices.

In short, Mr. X's opinion provides no scientific, technical, or other specialized knowledge whatsoever that would assist the jury. Expert testimony must be excluded whenever, "the normal life experiences of the jury would permit it to draw its own conclusions ..., based upon the lay testimony of eyewitnesses." *See Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1124 (10th Cir.1995), cert. denied, 516 U.S. 1146, 116 S.Ct. 1017; see also Thompson v. State Farm Fire & Cas. Co., 34 F.3d 932, 941 (10th Cir.1994) (holding that when expert testimony is offered to explain a question the jury is capable of assessing for itself, the trial court may exclude the testimony because it would not assist the trier of fact). As the Supreme Court noted, "[N]othing in either Daubert or the Federal Rules of Evidence requires a district

court to admit opinion Evidence that is connected to existing data only by the ipse dixit of the expert." *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

Since the jury is capable of understanding without expert assistance each of the government's alleged facts, and since Mr. X's conclusion is not reliable, his proffered testimony cannot assist the jury to understand the evidence or to determine a fact in issue, and should therefore be excluded.

CONCLUSION

The party offering expert witness evidence bears the burden of establishing that:

> "(1) the expert is qualified to testify competently . . . (2) the methodology by which the expert reaches his conclusions is sufficiently reliable; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand or to determine a fact in issue.

Corwin v. Walt Disney World Co., 475 F.3d 1239, 1250 (11th Cir. 2007) (citing Maiz v. Virani, 253 F.3d 641 (11th Cir. 2001). The government has not carried its burden of establishing even one of these three requirements.

The government's attempt to introduce Mr. X's testimony amounts to an impermissible effort to lend weight to unsupported and irrelevant evidence by presenting it to the jury from the mouth of an "expert". The government should not be allowed to offer Mr. X as a conduit for information that, if admissible, should come from unpaid fact witnesses.

For the above reasons, Defendant respectfully requests that this Court exclude the testimony and opinions of Mr. X from the trial of this matter.

Respectfully submitted this 30th day of May, 2010.