United States District Court
Southern District of Ohio
Western Division at Dayton

United States of America, Plaintiff, v. Brian Higgins, Defendants.	Case No. 3:18-cr-186 District Judge Thomas M. Rose

Defendant Higgins's Memorandum in Opposition to Government's Motion to Exclude Expert

Comes now Defendant Brian Higgins ("Mr. Higgins"), by and through counsel, and offers the following response in opposition to the Government's motion to exclude the testimony of the defense's proposed expert, Mr. Chris Johnson ("Mr. Johnson"). (Doc. 91) Mr. Johnson is eminently qualified to opine on insurance claims and insurance industry practices. His opinions are both reliable and relevant to central issues in this case and will certainly assist the jury in understanding the complex insurance issues at play is this matter. Mr. Johnson thus presents the requisite credentials and proffered opinions that are more than sufficient to satisfy the relatively modest standards of Evidence Rule 702 and *Daubert v. Merrell Dow*. The Government's motion must therefore be denied. Further grounds in support of the expert testimony proffered by Mr. Johnson and in opposition to the Government's motion are set forth in the memorandum below.

Memorandum in Opposition

I. Introduction

The government desperately wants to present this case as "what should be a straightforward case of mail fraud." (Doc. 91, Gov. Motion to Exclude Expert ("Gov. Motion"), pg. 9, PAGEID # 860) As Mr. Johnson's report makes clear, and as his testimony will assist the jury to understand, this case presents as anything but "straightforward." Instead, this case involves an odd series of relationships between an insurance company (Assurant), the mortgage company it sold insurance to (Nationstar), and a homeowner who is essentially a stranger to the relationship between the two institutional parties. To make matters more difficult, it is patently unclear which entity actually handled the claim, who controlled the funds at issue, and what the various obligations were between the parties.[1] These are precisely the type of complex issues which the Rules of Evidence make clear are appropriate for the input of an expert witness for the purpose of assisting the jury's understanding and consideration. Because the jury's understanding of these complex issues is critically important to Mr. Higgins's defense, and because Mr. Johnson's opinions are relevant and reliable, the Court should deny the Government's motion and permit the jury to consider this case upon a complete and accurate record.

II. Factual and Procedural Posture

On March 31, 2021, the defense provided the Government with Mr. Johnson's expert report which outlined his opinions and analysis of the insurance claim relating to the residence at 7240 Meeker Creek Dr. The defense also provided the Government with several accompanying

[1] It is worth noting that the Government seems to be struggling with these crucial distinctions as well. Counts 1 through 3 of the Second Superseding Indictment plead allegations which were all related to Assurant. (Doc. 57, 2nd Sup. Indictment, ¶¶4, 6, PAGEID 327, 335) Approximately three weeks after the *Daubert* hearing in this matter, the Grand Jury issued a Third Superseding Indictment. That indictment dramatically altered the descriptions of the relationships between the parties and changed the alleged victim in Counts 1 through 3 from Assurant to Nationstar, relying upon three different mailings. (Doc. 26, 3rd Sup. Indictment, ¶¶4, 6, PAGEID 786, 795) Defense counsel has now been notified that a fourth superseding indictment may be forthcoming with even further changes.

documents, including Mr. Johnson's curriculum vitae, a list of cases in which Mr. Johnson appeared as an expert witness, and a list of documents on which Mr. Johnson relied in drafting his report. These documents set forth Mr. Johnson's more than 30 years of experience in the insurance industry and catalogued his extensive work as an expert witness on other insurance-related cases. From this deep knowledge of insurance claims, Mr. Johnson formed and expressed multiple opinions about the present case, opinions that are explained at length in his expert report.

A *Daubert* hearing was subsequently convened, and the Government inquired of Mr. Johnson to its satisfaction. Despite Mr. Johnson's extensive experience and analysis, the Government filed its motion to exclude Mr. Johnson's testimony, seeking to fault both his qualifications, as well as the relevance and reliability of his opinions. These contentions are without merit. Mr. Johnson is undoubtedly qualified to offer expert opinion on the insurance claim in this case, his opinions are supported by his analysis and extensive experience, and a jury should be permitted to consider his opinions as they are relevant to central issues in this case.

III. Argument

A. Standard of review

The Government's motion is essentially a motion *in limine* couched in terms of *Daubert* and Evidence Rule 702. "A ruling on a motion *in limine* is no more than a preliminary, or advisory, opinion that falls entirely within the discretion of the district court." *United States v. Yannott,* 42 F.3d 999, 1007 (6th Cir. 1994) (citations omitted). "Motions *in limine* are generally used to ensure evenhanded expeditious management of trials by eliminating evidence that is clearly inadmissible for any purpose." *Ind. Ins. Co. v. Gen. Elec. Co.*, 326 F. Supp. 2d 844, 846 (N.D. Ohio 2004) (citing *Jonasson v. Lutheran and Family Serv.*, 115 F.3d 436, 440 (7th Cir. 1997)). However, "[o]rders *in limine* which exclude broad categories of evidence should rarely be employed."

Sperberg v. Goodyear Tire & Rubber Co., 519 F.2d 708, 712 (6th Cir. 1975). Rather, motions *in limine* are "generally confined to very specific evidentiary issues of an extremely prejudicial nature." *Brown v. Oakland Cnty.*, No. 14-CV-13159, 2015 WL 5317194, at *2 (E.D. Mich. Sept. 10, 2015).

With respect to the admissibility of opinion testimony, "[t]he Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), set forth the standard for admission of expert scientific testimony, holding that Rule 702 of the Federal Rules of Evidence governs the admissibility of such expert testimony. Rule 702 admits expert testimony if the evidence will assist the trier of fact and if the witness is qualified." *Glaser v. Thompson Medical Co., Inc.*, 32 F.3d 969, 971 (6th Cir. 1994). "*Daubert* explained that Rule 702 must be read in the context of the liberal thrust of the Federal Rules of Evidence and must be interpreted consistently with the 'general approach of relaxing the traditional barriers to 'opinion' testimony'". *Id.*

The Government has lodged a challenge to the admissibility of Mr. Johnson's testimony. Therefore, the defense bears the burden of meeting the three threshold requirements by a preponderance of the evidence: (1) that Mr. Johnson is a qualified expert; (2) that his opinions are relevant, meaning that the testimony will help the trier of fact to understand the evidence or to determine a fact in issue, and (3) that his testimony is reliable. Fed.R.Evid. 702; *see also In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 529 (6th Cir.2008). As discussed below, Mr. Higgins easily satisfies all three of these requisite findings.

B. Mr. Johnson is properly qualified to offer expert opinions on the insurance claim at issue

Mr. Johnson's expertise cannot legitimately be at issue. He has more than 30 years of experience in the insurance industry, working at every level from a boots-on-the-ground claims handler to claims counsel providing legal advice on the obligations and relationships created by

insurance agreements, the very topics at issue in this case. Federal Rule of Evidence 702 provides that an expert may be qualified by "knowledge, skill, experience, training, or education." Although the Rule only requires a background in only one of these five bases, Mr. Johnson possesses qualifications under all five. Most notably, Mr. Johnson has spent his entire professional career, starting in 1982, in the insurance field. (Doc. 76-2, Curriculum Vitae of Chris Johnson, pg. 2, PAGEID # 744). Mr. Johnson began as a Field Claims Representative before working as a Corporate Claims Counsel, at two different companies, for more than 15 years. (Id. at pg. 2-3, PAGEID # 744-745). Mr. Johnson then served as Senior Vice President of Claims Operations at XL Insurance Company before creating an insurance consulting company in 2014. (Id. at pg. 3, PAGEID # 745). Mr. Johnson has obtained extensive skills by virtue of his experience and has supplemented his practical work experience with continuing legal education related to various insurance issues. (Id. at pg. 5, PAGEID # 747)

These credentials have led to the rightful recognition of Mr. Johnson as an expert on insurance claims and the insurance industry. On several occasions, the Central Ohio Association for Justice has hosted Mr. Johnson as a speaker on insurance issues and Mr. Johnson has served as an expert witness in 24 cases. (Doc. 76-3, Case List of Chris Johnson, PAGEID # 748-752).

The Government makes two arguments on the issue of Mr. Johnson's qualifications to testify in this case. Both are equally terse and unsupported by either citation or precedent. The Government's first argument is, essentially, that Mr. Johnson is somehow unqualified to testify as an expert in insurance matters in this case because the 24 previous times he has been called upon to render an expert opinion have all been in civil cases, whereas this is a criminal case. (Doc. 91, Gov. Motion, pg. 10, PAGE ID 861). This distinction is without legal support or significance, and the government fails to provide any. If a witness was an expert in handwriting analysis and was

called to the stand to opine as whether a signature was genuine, would it be grounds for the exclusion of otherwise cogent testimony that the case was a criminal matter as opposed to a civil one? The insurance industry does not distinguish between insurance provided to criminal defendants and insurance provided to civil defendants. Neither does the law.

This dovetails into the Government's second argument that Mr. Johnson does not opine on "whether the alleged perpetrator had lied to the alleged victims." (Id.) This argument stems from the Government's unshakable belief that this case ought to be tried according to the "Government's theory [] that Higgins lied to the mortgage and insurance companies and took steps to conceal from them that he was misappropriating insurance funds intended for use in repairing his water-damaged house." (Id. at pg. 9, PAGE ID 860) The defense's position, not surprisingly, runs contrary to the Government's view of this case and is supported by the opinions of Mr. Johnson. For example, in his expert report, Mr. Johnson concluded that the estimate of property repairs followed industry practice, and that the repairs had been completed to the satisfaction of Assurant and Nationstar. Mr. Johnson also concluded that the Certification of Intent to Repair, the only document which purportedly required Mr. Higgins to use every single dollar of the insurance proceeds to repair the property, was "null, void, defective, and unauthorized" because Mr. Higgins was not a party to the insurance claim as either a Borrower or an Additional Insured. The question of whether Mr. Higgins "lied" to the institutional parties can certainly be an area for cross-examination of Mr. Johnson. His opinions regarding the context in which those misstatements were purportedly made are, however, at the heart of any full and fair trial of this matter.

Further, Mr. Johnson does not need to be versed in the "elements of, or defenses to, the offense of mail fraud" to render his proffered opinions regarding the complex relationships and obligations between the various parties to this insurance matter. Moreover, Mr. Johnson is no less

qualified to offer these opinions in a criminal case than he would be in a civil case. The Government offers no reason why this distinction matters—because it simply does not. Most critically, this distinction will not diminish Mr. Johnson's ability to assist the jury. "Under the Federal Rules of Evidence, the only thing a court should be concerned with in determining the qualifications of an expert is whether the expert's knowledge of the subject matter is such that his opinion will likely assist the trier of fact in arriving at the truth." *Mannino v. International Mfg. Co.*, 650 F.2d 846, 851 (6th Cir. 1981). Mr. Johnson's experience in the insurance industry undoubtedly renders him qualified to opine on several insurance-related issues, such that his opinion will assist a jury comprised of laypeople. The Government's attempt to discredit Mr. Johnson's extensive experience is unavailing and this Court should find as such and deem Mr. Johnson qualified to testify in this matter.

C. Mr. Johnson's opinions are relevant and should be considered by a jury

The Government argues that "[Mr.] Johnson's proposed testimony should be excluded as unhelpful because his opinions . . . are irrelevant to the questions that will confront the jury in this mail fraud case." (Doc. 91, Gov. Motion, pg. 11, PAGE ID 862). The Government then leans heavily into the elements of mail fraud and asserts that Mr. Johnson's testimony would not assist the jury in understanding "any disputed facts related to these elements." (Id. at pg. 12, PAGE ID 863) These assertions again telegraph the Government's myopic view that anything which conflicts with their theory of the case is "irrelevant." But Mr. Higgins is entitled to prevent a defense and intends to do so. Mr. Johnson's report is clearly critical to this defense in that it seeks to untangle the complicated web of relationships between the various parties, place the case withing the context of how insurance claims such as this are typically handled, and walk the jury through how this claim was handled. In this way, his opinions are directly relevant and probative

on the issues of whether a "material" misrepresentation was made and, with particularly regard to Assurant, whether there was any actual deprivation of property sufficient for the fraud statute.

Rather than address the defense theories of relevance, the Government points the Court to *United States v. Rathburn* for the principle that "[]Contract law is irrelevant to the federal charge of wire fraud." *United States v. Rathburn*, 771 F. App'x 614, 626 (6th Cir. 2019)(Doc. 91, Gov. Motion, pg. 12, PAGEID # 863) As an initial matter, *Rathburn* is not a case involving the proposed testimony of experts and, as such, contains no relevant analysis of the issue at hand. Rather, *Rathburn* involves a defendant who ran a business importing cadavers and other body parts for re-sale to the medical education community. Mr. Rathburn issued paperwork to each customer claiming that all specimens had been "screened" for highly infectious diseases such as HIV and hepatitis. He then knowingly sold and transfered samples which he knew to have tested positive for the very diseases he assured they were screened for. At trial, Mr. Rathburn sought to have all witnesses barred from testifying that they reasonably believed that the specimens having been "screened" meant that were disease-free. Mr. Rathburn sought to rely upon Michigan contract law for his novel argument that since "screened" was "plain language" state law ought to prohibit any witness from testifying as to their interpretation of what that meant. This is in no way analogous to the expert testimony at hand and therefore has no precedential import in this case.

A far more relevant analysis can be found in *United States v. Litvak*, 808 F.3d 160 (2d Cir. 2015). *Litvak* involved claims of securities fraud in the context of the sale of mortgage-backed securities. Mr. Litvak defended the case, in part, by challenging whether his alleged misstatements were "material" for purpose of the fraud allegations. He proffered an expert who intended to testify "about the process investment managers use to evaluate a security, and the irrelevance of the broker-dealer's acquisition price to that process, [which] was directly probative of whether Mr.

Litvak's misstatements would have been material to a reasonable investor." *Id.* at 181. The district court granted the government's motion to exclude the testimony of the proffered expert on the grounds of "relevance" and Mr. Litvak was subsequently convicted by the jury. *Id.* at 182.

On appeal, the Second Circuit found the exclusion of the expert to be reversible error, even under the stringent abuse of discretion standard. *Id.* at 180. Importantly, the Court held that, without the expert's testimony, "[T]here are few ways in which Litvak could put forth evidence to rebut the alleged victims' testimony that Litvak's misstatements were important to them, or otherwise counter the government's argument that a reasonable investor would have found Litvak's statements material." *Id.* at 183. Mr. Litvak was therefore ". . . left only with the 'victims' of his conduct as sources of potential testimony on this issue, an odd limitation where the jury is to evaluate materiality in an objective manner." *Id.* at 183-184 (citing to See *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 459 (2013) ("[M]ateriality is judged according to an objective standard....")). As stated above, this error was found not to be harmless and a new trial was ordered with Mr. Litvak being able to present his defense. This court should follow the guidance of the Second Circuit and allow Mr. Johnson to testify subject, of course, to stringent cross-examination by the Government.

Mr. Johnson's testimony is also critically important to the issue of the insurance obligations which exist between the parties, a complex issue which certainly benefits from the input of those with specialized experience in the field. Take the position of Assurant for example. Mr. Johnson explains that the insurance obligation owed by Assurant was owed to Nationstar as the insured listed on the policy declaration page. (Doc. 76-1, Johnson Report at pg. 2, PAGEID 733). Mr. Johnson goes on to explain that the policy in question was a 'replacement cost" policy which required the insurance company to pay the "actual cash value" of the loss *to its insured*. Assurant

did that and paid the full amount of the loss to its insured, Nationstar, by way of a check in the amount of $124,181.76. (Id. at pg. 2-3, PAGEID 733-734) The Government has conceded that a loss occurred and that amount fairly represents the value of the loss. Assurant had therefore fulfilled its role under the contract when it paid the funds to its insured. Unless the insurance claim itself was fraudulent (and the Government concedes that it was not), no amount of misstatements, material or otherwise, are capable of depriving Assurant of money or property.

This issue was addressed by the Sixth Circuit in *United States v. Sadler*, 750 F.3d 585 (6th Cir. 2014). Ms. Sadler ran a medical clinic specializing in pain management which the government deemed to be a "pill mill." Among other charges related to the narcotics conspiracy involved in the operation of the clinic, Ms. Sadler was charged with wire fraud for making material misstatements to a pharmaceutical wholesaler in order to purchase substantial quantities of controlled substances. The matter proceeded to trial and Ms. Sadler was convicted of all charges, including the wire fraud related to the pharmaceutical wholesaler. On appeal, the Sixth Circuit reversed her conviction on that charge noting, quite adroitly, that Ms. Sadler had, in fact, paid in full for all the narcotics which were ordered. As the pills had been paid for, the company she bought them from had not been deprived of any money or property as required by the statute. *Id.* at 590. The government sought to save its conviction by arguing that "[Ms. Sadler's] lies convinced the distributors to sell controlled substances that they would not have sold had they known the truth. [Ms. Sadler] in other words deprived the companies of what might be called a right to accurate information before selling the pills." *Id.* at 590-591. The Sixth Circuit analyzed the issue before holding that such deception, in the absence of actual pecuniary harm fell outside of the federal fraud statute and was a matter best left for the states to regulate. *Id.* Issues similar

to those analyzed in *Sadler* are at play in this case, and those issue are inexorably intertwined with Mr. Johnson's proffered testimony.

The Government next argues that Mr. Johnson's proffered testimony seeks to somehow "blame" Nationstar and Assurant for the disbursement of the insurance proceeds and that a fraud victim's negligence is not a defense to criminal charges under the federal fraud statutes. (Doc. 91, Gov. Motion, pg. 13, PAGEID # 864) This argument mischaracterized Mr. Johnson's testimony and, just as importantly, how the defense intends to utilize it. As discussed several times, *infra*, the defense in this case will rely, in part, upon arguments that (1) any misstatements made by Mr. Higgins were not "material" as required by the mail fraud statute, and (2) the various victims were not deprived of any money or property as contemplated by those statutes. A critical analysis of the manner in which this insurance claim was handled by the "victims" to this offense raises questions that are absolutely critical to the full and fair trial of this matter. Was Assurant even out any money after it paid off its obligation to Nationstar? Who was handling the claim and, regardless of the institutional identity, was it reasonable for them to rely on statements made by Mr. Higgins? Who did Mr. Higgins actually make statements to? Was the handling of the funds in this case even improper given the standards of the insurance and construction injury? How has any "victim" in this case been deprived of money of property when the inspector of their choosing confirmed that 65% of the work had been performed to her satisfaction? It is these highly relevant questions which Mr. Johnson will assist the jury with at trial. The Court is directed to *United States v. Poulsen* for an analysis of this issue by a Court of this District. *United States v. Poulsen*, 543 F. Supp. 2d 809 (S.D. Ohio 2008)(Marbley, J.) In that case, Mr. Poulson found himself accused of healthcare fraud and proffered as an expert witness an FBI agent experienced in healthcare fraud cases. Mr. Paulson proffered him as an "expert about the Government's

investigatory practices and techniques in connection with such cases." *Id.* at 810. The government challenged his relevance of the proffered opinions arguing that any testimony on the manner in which the investigation was conducted would not assist the jury in resolving any fact in issue. Judge Marbley disagreed writing:

> The Court disagrees. Although the jury will not be called upon to directly assess the competence of the Government's investigation, evidence tending to show that the Government failed to follow up on fruitful leads, misinterpreted information in a material way, or employed faulty investigative techniques, *could be probative of whether the Government has made its case against Defendants*. True, Defendants can attack the Government's investigation through effective cross-examination of the Government's law-enforcement witnesses, but just because Defendants can achieve their objectives in one way-e.g., cross-examination of the Government's witnesses-does not mean that they should be precluded from pursuing that objective in other ways as well-e.g., putting on their own expert witnesses.

Id. at 811-812 (emphasis added). The manner in which the insurance claim in this case was handled is relevant for precisely the same reason. For all the foregoing reasons, the testimony of Mr. Johnson is not only relevant, but highly probative, and must be allowed at trial.

Before closing on this issue, the Government makes the final argument that the mortgage and insurance documents are "straightforward and susceptible to commonsense construction" by the jurors who should simply read and interpret the documents on their own. (Doc. 91, Gov. Motion, pg. 14-15, PAGEID 865-866). Quite to the contrary, the average juror has little or no understanding of the intricacies of insurance relationships and the handling of damage claims. Undersigned counsel himself had no idea what a "replacement cost policy" was or what in the world "actual cash value" payments were before consulting with Mr. Johnson, more less any understanding of how that policy language affected the legal obligations and responsibilities of the parties involved. Expert witnesses are particularly well suited for cases such as this where laypeople simply lack the experience and understanding necessary to allow them to fully understand and weight the facts of a particular case. Mr. Johnson's testimony will be critical to

educating the jury as to the world of insurance it will find itself thrust into, and that education will allow the jury to do its job on a complete and accurate factual record.

D. Mr. Johnson's opinions are reliable and properly supported by experience

The Government next argues that Mr. Johnson's entire report and testimony should be excluded "based on reliability concerns." (Doc. 91, Gov. Motion, pg. 15, PAGEID # 866) The Government specifically argues that the analysis ought to be, "[W]hether the testimony is based upon 'sufficient facts or data,' whether the testimony is the 'product of reliable principles and methods,' and whether the expert 'has applied the principles and methods reliably to the facts of the case.'" Citing to *Scrap Metal Antitrust Litig.*, 527 F.3d at 529. But Mr. Johnson's proffered testimony is not based upon scientific evidence as would be that of a traditional scientific expert. His testimony, rather, falls into the category of "other specialized knowledge." Fed.R.Evid. 702(a). A specialized knowledge witness qualifies as an expert witness so long as (1) the testimony content is relevant and (2) the method by which the specialized testimony was developed is reliable. *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir.1994). When a witness presents information that is outside the working knowledge of an average lay person, then the need for an expert exists. *United States v. White*, 492 F.3d 380, 403 (6th Cir.2007). How a court assesses the reliability of an individual specialized knowledge expert "depend[s] on the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Kumho Tire Co.*, 526 U.S. 137, 150 (quotation omitted). Any weakness in the underlying factual basis of the challenged opinion therefore bears on the weight, as opposed to admissibility, of the evidence proffered. *In re Scrap Metal Antitrust Litig.*, 527 F.3d at 530.

Judge Marbley's decision in *Poulson* is instructive on this issue as well. In *Poulsen*, Judge Marbley found that the reliability of a proposed expert's testimony "grows out of the knowledge

and experience he acquired as an FBI agent, not out of any procedures he has employed-or should be expected to have employed-in forming his opinions" *Poulsen*, 543 F.Supp.2d at 811–812; citing *First Tennessee Bank National Association v. Barreto*, 268 F.3d 319, 333 (6th Cir.2001) (Daubert factors related to a reliable methodology inapplicable where expert's testimony was derived from his practical experience in the banking industry)

The Government's challenges to the reliability of Mr. Johnson's opinions all go the facts and evidence which he considered, while purporting to do so as a challenge to the methodologies which he employed. For example, the Government states that, "By focusing solely on the documents in the claim record, [Mr.] Johnson has necessarily viewed an incomplete (and unreliable) picture, a methodological deficiency that he compounded by failing to consider the elements of, and defenses to, the federal crime of mail fraud." (Doc. 91, Gov. Motion, pg. 15, PAGEID 866) This is not a proper challenge to the reliability of Mr. Johnson's proposed testimony, however. As in *Poulson*, Mr. Johnson's testimony is based upon his extensive experience evaluating insurance claims and it is well established that experience-based testimony satisfies Daubert's reliability requirements. *Poulsen*, 543 F. Supp. 2d at 811. "[W]here the opinion has a reasonable factual basis, it should not be excluded…any weaknesses in the factual basis of an expert witness' opinion, including unfamiliarity with standards, bear on the weight of the evidence rather than on its admissibility." *United States v. L.E. Cooke Co.*, 991 F.2d 336, 342 (6th Cir. 1993). The reliability challenge offered by the government is therefore not a basis for the exclusion of Mr. Johnson's testimony but, rather, is a matter for cross examination and ultimately consideration by the jury.

E. Mr. Johnson's opinions speak to the legal obligations between the various parties and say nothing as to whether Mr. Higgins possessed the requisite *mens rea* to commit the offense

Federal Rule of Evidence 704(b) requires that, "[i]n a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone." The Government argues that "[Mr.] Johnson's core opinion – that the record does not support an inference that [Mr.] Higgins engaged in fraud – is improper pursuant to Rule 704, which limited the permissible subject matter of expert testimony." (Doc. 91, Gov. Motion, pg. 16, PAGE ID 867). The Government, however, takes Mr. Johnson's opinion out of context and conflates its meaning in order to make this argument. Far from being Mr. Johnson's "core opinion," the language in question comes near the end of Mr. Johnson's 11-page report. More importantly, the opinion in no way seeks to opine that Mr. Higgins did not possess the intent to defraud, but rather addresses only the fact that Assurant illogically treated him as such.

The Government correctly cites to *United States v. Harris* for the principle that a "crucial inquiry is whether the expert actually referred to the intent of the defendant." *United States v. Harris*, 393 F. App'x 314, 319 (6th Cir. 2010), citing to *United States v. Combs,* 369 F.3d 925 (6th Cir.2004)(internal quotations removed). *Harris* itself, however, shows clearly the type of opinion testimony which the Sixth Circuit has forbidden. That case involved a charge of possession of a firearm in furtherance of felony in violation of 18 U.S.C. § 924(c) where the critical question at issue was the specific mental state of the defendant in terms of his purpose in possessing the guns. The government witness in that matter was allowed to opine, "I believe the guns were used to protect drugs and their proceeds." *Id.* The Government also directs the Court to *United States v. Warshack* in support of its argument. *United States v. Warshak,* 631 F.3d 266 (6th Cir. 2010). A

review of *Warshack*, however, again reveals how its application to the case as hand is inapposite. In that case, the testimony of the government's witness was summarized as follows:

> At trial, Agent Simpson made three statements that the defendants contend violated this rule. First, Simpson stated that "the business dealings of TCI Media were commingled with the personal dealings of Mr. Warshak[,] and ... it was done with *an intent to conceal* the true nature and disposition of the funds that came in and out of the TCI Media account." Second, on cross-examination, Simpson testified that certain cash transactions "were *designed to conceal* money laundering." Finally, during redirect, Simpson stated that the defendants had made "transfers among ... various business and personal accounts that were multi-layered transactions that, in [his] opinion, were *designed to conceal* the true source and application of the funds."

Id. at 324.

The Government argues that the opinions rendered by Mr. Johnson somehow equate to opining on the issue of "whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense" as prohibited by Evidence Rule 704(b) and as seen in *Harris* and *Warshack*. A review of Mr. Johnson's proffered testimony on this issue quickly shows that opinion he is offering is different in like and kind. (Doc. 76-1, Johnson Opinion, pg. 8-9, PAGEID 739-740) Mr. Johnson is not attempting to opine that Mr. Higgins lacked the intend to defraud but, rather, that it was improper for Assurant to send him a letter accusing him of such. Mr. Johnson points out that the letter in question refers to Mr. Higgins as an "insured" under the certificate, which he was not. Mr. Johnson goes on to point out the absurdity of Assurant writing such a denial of coverage letter to a non-insured individual. Id. at pg. 9, PAGEID 740).

Counsel agrees that it would be improper for Mr. Johnson to opine that, "I do not believe that Mr. Higgins intended to defraud Nationstar or Assurant" and no such testimony will be sought or elicited. Short of that however, Mr. Johnson can and should be able to testify as to the basis for his opinion – that Assurant elected to deal with an uninsured individual as though he were someone

capable of defrauding it. In the final analysis, this narrow issue is best addressed at trial after the government has once and for all settled upon its theory of the prosecution of this case.

F. Mr. Johnson's opinions are undoubtedly relevant and have no legitimate danger of confusing of misleading the jury

The Government would very much like the defense to get out of its way so it can present ". . . what should be a straightforward case of mail fraud." ((Doc. 91, Gov. Motion, pg. 9, PAGE ID 860). Unfortunately for the Government, the sophisticated financial entities in this case, an insurance company and a mortgage lender, have muddied the waters by failing to properly acknowledge the insured interests of the relevant parties and throwing industry standards out the window regarding their handling of the claim at issue. Hopefully the Fourth Superseding Indictment, if one in facts is forthcoming, will settle once and for all the Government's position on who was defrauded and exactly what it was that Mr. Higgins allegedly did to defraud them. In the meantime, Mr. Johnson's report takes 11 pages to critically analyze the failures by these institutional players and how they impact Mr. Higgins and the allegations brough against him in this case, all through the lens of his more that 30 years in the insurance industry. Yet the government would have the Court believe that these opinions, and likely the entire defense itself, are "needless details" and "a swarm of minutia." To the contrary, and far from being unduly prejudicial, Mr. Johnson's testimony may be the only chance the jury has to understand this case.

IV. Conclusion

Mr. Johnson is impeccably qualified, his report sets forth considerable analysis supporting his expert opinions, and his opinions are relevant to the central issues of this case. Accordingly, the Mr. Higgins respectfully requests that the Court deny the Government's motion in its entirety. In the alternative, any issues related to areas of testimony or specific opinions sought to be elicited are much better addressed on an as-needed basis at trial.

Respectfully submitted,

Paul M. Laufman (0066667)
LAUFMAN NAPOLITANO, LLC
4310 Hunt Road
Cincinnati, OH 45242
(513) 621-4556
(513) 621-5563 Fax
plaufman@LN-lawfirm.com
gnapolitano@LN-lawfirm.com
Counsel for Defendant, Brian Higgins

Certificate of Service

I hereby certify that a copy of the foregoing pleading was electronically filed on the 13th day of December 2021. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's electronic filing system.

Paul M. Laufman