

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ASSOCIATION TO PRESERVE AND)
PROTECT LOCAL LIVELIHOODS, et al.,)

Plaintiffs,)

Civil Action No. 1:22-cv-416

PENOBSCOT BAY AND RIVER PILOTS)
ASSOCIATION,)

Plaintiff-Intervenor,)

v.)

TOWN OF BAR HARBOR, a municipal)
corporation of the State of Maine,)

Defendant,)

CHARLES SIDMAN,)

Defendant-Intervenor.)

**DEFENDANT-INTERVENOR CHARLES SIDMAN’S RESPONSE IN OPPOSITION TO
PLAINTIFFS’ MOTION TO EXCLUDE DEFENDANT-INTERVENOR’S EXPERT
WITNESS, CHARLES SIDMAN**

Defendant-Intervenor Charles Sidman (“Mr. Sidman”), by and through undersigned counsel, responds in opposition to Plaintiffs’ Motion to Exclude Defendant-Intervenor’s Expert Witness, Charles Sidman (the “Motion”) (Dkt. No. 125) and respectfully states as follows:

INTRODUCTION

While Mr. Sidman will be primarily a fact witness, some of the testimony he is expected to offer may include combined fact and opinion testimony. With respect to the opinion testimony that Mr. Sidman may offer, Mr. Sidman has more than sufficient knowledge, education, and experience to qualify as an expert in those areas. His expected rebuttal expert

testimony is based on reliable scientific methodology and business acumen and is necessary to rebut and properly understand the testimony of Plaintiffs' expert, Todd Gabe ("Gabe").

Accordingly, Plaintiffs' Motion should be denied in its entirety.

FACTUAL BACKGROUND

Mr. Sidman has been designated as Defendant-Intervenor's *rebuttal* expert witness. Specifically, Mr. Sidman "will offer opinion evidence to rebut Plaintiffs' designated expert witness Mr. Todd Gabe's opinion, to the extent admissible, as to the economic benefits and pedestrian impacts of cruise ship passengers visiting Bar Harbor." Ex. A (Sidman Expert Designation) at 2.

At the time of Mr. Sidman's designation, it was not clear what opinions Gabe would offer.¹ Plaintiffs' multiple-day deposition of Mr. Sidman asked him to opine as an expert on several topics concerning the impact of the Ordinance, which were included in Mr. Sidman's designation to counter any opinions Gabe might proffer on these subjects. Gabe has only offered his flawed studies, which conclude that (a) in 2016, cruise ship passengers contributed \$14.9 million annually in local spending (\$20.2 million including multiplier effect), Ex. B (Gabe Dep.) 161:25-162:7; (b) cruise ships contribute to increased pedestrian traffic and slower walking speeds, but these effects decrease the further one goes from the port, Ex. B (Gabe Dep.) 76:1-9; and (c) cruise passengers spend an average of \$21.83 at Bar Harbor restaurants, Ex. B (Gabe Dep.) 150:13-151:24. Mr. Sidman is prepared to use his considerable knowledge of scientific

¹ Gabe's designation listed three studies authored by Gabe and vaguely explained that "Plaintiffs expect Dr. Gabe will testify consistent with his studies on the economic benefits of and pedestrian impacts from cruise ship passengers visiting Bar Harbor." Ex. C (Plaintiffs Expert Witness Designation) at 2. In fact, Gabe stated during his deposition that he was not going to be offering any opinions at trial and no opinions during his deposition. Ex. B (Gabe Dep.) 15:5-9.

research principles, business economics, and the Town of Bar Harbor to directly rebut Gabe's methodologies and conclusions. *See* Ex. H (Expert Rebuttal Deposition by CS).

LEGAL STANDARD

“The touchstone for the admission of expert testimony in federal court litigation is Federal Rule of Evidence 702.” *Crowe v. Marchand*, 506 F.3d 13, 17 (1st Cir. 2007). Rule 702 allows “[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education [to] testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.”

Rule 702 requires district courts to act as gatekeepers to the admission of expert testimony. However, “the trial court's role as gatekeeper is not intended to serve as replacement for the adversary system,” and rejection of expert testimony is the exception rather than the rule. Fed. R. Evid. 702 Advisory Committee Notes to 2000 Amendments (quoting *United States v. 14.38 Acres of Land, More or Less Situated in Leflore County, Miss.*, 80 F.3d 1074, 1078 (5th Cir. 1996)); *see also Levin v. Dalva Bros., Inc.*, 459 F.3d 68, 78 (1st Cir. 2006) (“Rule 702 has been interpreted liberally in favor of the admission of expert testimony.”).

“There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.” Fed. R. Evid. 702 Advisory Committee Notes (quoting Ladd, *Expert Testimony*, 5 Vand. L. Rev. 414, 418 (1952)). An expert's opinion may be useful to a finder of fact even when it is not generally accepted by

experts in the field, *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993), so long as the opinion has “a reliable basis in the knowledge and experience of [the expert’s] discipline.” *Id.* at 592. When an expert is “qualified by knowledge, skill, experience, training, or education, he need not have had first-hand dealings with the precise type of event that is at issue.” *Microfinancial, Inc. v. Premier Holiday Intern., Inc.*, 385 F.3d 72, 80 (1st Cir. 2004). “Nothing in [Rule 702] is intended to suggest that experience alone—or experience in conjunction with other knowledge, skill, training or education—may not provide a sufficient foundation for expert testimony.” Fed. R. Evid. 702 Advisory Committee Notes to 2000 Amendments.

ARGUMENT

1. *Mr. Sidman is a qualified expert who will help the trier of fact understand Gabe’s studies.*

Mr. Sidman is eminently qualified to testify as an expert regarding Gabe’s methodologies and conclusions. To be sufficiently qualified to testify as an expert, a witness needs to have “knowledge, skill, experience, training, or education in the specific subject for which his testimony is offered.” *Sutera v. Perrier Group of America, Inc.*, 986 F.Supp. 655, 661 (D. Mass. 1997) (quoting *Whiting v. Boston Edison Co.*, 891 F.Supp. 12, 24 (D. Mass. 1995)). Mr. Sidman has experience as a research scientist, professor, published academic, journal editor and frequent reviewer of academic publications, and businessman, all of which he will use to rebut Gabe’s studies.

Mr. Sidman has over fifty years of experience as a research scientist. He received his bachelor’s degree, Master’s Degree, and Ph.D. from Harvard University in biochemistry and immunology. Ex. F (Sidman CV). He received his M.B.A. in business management, and has over thirty years of experience as a professor of molecular genetics, biochemistry, and

microbiology in the College of Medicine at the University of Cincinnati and other universities, and as a professor of management in the College of Business at the University of Cincinnati. Ex. F (Sidman CV); Ex. D (May 30 Sidman Dep.) 8:7-10 (“I’ve been an expert and teacher on the scientific and research methodology specifically.”). He currently is managing partner of an investment firm which focuses on early-stage businesses globally, and is an active member of numerous organizations pertaining to corporate, financial, and business networks. Ex. F (Sidman CV). He has taught and published extensively on scientific research methodology, business ethics, and corporate responsibility. Ex. F (Sidman CV) at 2-3. He serves as an article reviewer and editor for many top-ranked research-based journals, and a grant reviewer for multiple research-based foundations and governments. Ex. F (Sidman CV) at 4. He has raised over \$500,000,000 in funding for research and other projects. Ex. F (Sidman CV) at 9. As part of his position as an investor, he reviews hundreds of business proposals annually. Ex. E (June 6 Sidman Dep.) 91:9-22. He has also operated three tourist businesses in Bar Harbor and has lived in Bar Harbor for over 40 years. Ex. H (Expert Rebuttal Deposition by CS).

Mr. Sidman’s knowledge of scientific research methodologies are necessary to help the trier of fact to identify the shortcomings of Gabe’s methodologies, characterizations of evidence, and conclusions. *See Neural Magic, Inc. v. Meta Platforms, Inc.*, No. 20-cv-10444-DJC, 2023 WL 2383172 * 10 (D. Mass. Mar. 6, 2023) (describing purpose of rebuttal expert report was “to respond directly to the opinions and conclusions of [expert], critique [his] methodology and characterization of the evidence, and draw conclusions favorable to the Defendants”). Additionally, Mr. Sidman’s background and experience in business and finance provides him with the expertise to testify about the weaknesses of Gabe’s economic impact studies.

2. *Mr. Sidman's testimony is based on sufficient facts and is the product of reliable principles and methods, as applied to this case.*

Mr. Sidman's rebuttal testimony is derived from proven best practices and methodologies of conducting research, evaluating the products of research, and evaluating business plans, projections, and economics. *See* Ex. H (Expert Rebuttal Deposition by CS) (citing Park, Robert L., *Voodoo Science: The Road from Foolishness to Fraud*, Oxford University Press (2000)); *see also Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 156 (1999) (stating that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience."). The First Circuit has recognized experts on scientific methodology to explain the reliability of other experts' opinions across different disciplines. *See, e.g., Milward v. Acuity Specialty Products Group, Inc.*, 639 F.3d 11, 13, 17-18 (1st Cir. 2011) ("expert on scientific methodology" and professor of philosophy describing steps for toxicologist to make "inference to the best explanation"). Mr. Sidman's expertise in methodology applies to all scientific studies – whether they be medical, economic, or business studies. Ex. E (June 6 Sidman Dep.) 180:20-23 ("[G]ood science is good science. It's universal principles."). Specifically, Mr. Sidman's testimony rebuts Gabe's use of cruise passenger surveys, data collection, underlying assumptions, use of arbitrary pedestrian-counts, non-reproducible and unconfirmable observations and statistical models, failure to consider economic and non-economic costs/liabilities, and extrapolation of anecdotal data to reach conclusions. Ex. H (Expert Rebuttal Deposition by CS). If given the opportunity at trial, Mr. Sidman will aid the trier of fact with weighing the reliability of Gabe's reasoning and methodology. *See, e.g.,* Ex. E (June 6 Sidman Dep.) 28:14-29:16, 45:12-47:25 (explaining Gabe's use of survey responses flawed because they could have come from single large ship).

To the extent Mr. Sidman will also speak to the observable realities of cruise ship passengers' impact on congestion in Bar Harbor and the local economy, these are the type of mixed fact and opinion matters that fall within the ordinary observations and insights of someone with Mr. Sidman's experience and background. This sort of testimony is admissible under Rules 701 and 702. *See United States v. Valdivia*, 680 F.3d 33, 50 (1st Cir. 2012) (a given witness may be qualified to provide both lay and expert testimony).

3. *Plaintiffs' objections to Mr. Sidman's expert testimony are frivolous.*

Plaintiffs desperately claim that Mr. Sidman is unable to provide expert testimony because he did not conduct a study about congestion in Bar Harbor or cruise ship passenger spending. Motion (Dkt. No. 125) at 7-8. But experts "need not have had first-hand dealings with the precise type of event that is at issue." *Microfinancial*, 385 F.3d at 80 ("Rule 702 is not so wooden as to demand an intimate level of familiarity with every component of a transaction or device as a prerequisite to offering expert testimony."). Rather, "[t]he test under Rule 702 is whether the proposed expert has 'scientific, technical, or other specialized knowledge' that will 'assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Morin v. E. Maine Med. Ctr.*, 780 F. Supp. 2d 84, 90 (D. Me. 2010) (quoting Fed. R. Evid. 702); *see also Milward*, 639 F.3d at 15 ("The object of *Daubert* is 'to make certain that an expert, whether basing testimony on professional studies *or personal experience*, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.") (emphasis added) (quoting *Kumho Tire*, 526 U.S. at 152).

Plaintiffs also argue that Mr. Sidman does not have the requisite qualifications because he is not an economist. Motion (Dkt. No. 125) at 10-11. Despite his substantial experience in business and finance, Mr. Sidman is indeed not an economist. But he is an experienced research

scientist with specialized knowledge to help explain the flaws in Gabe’s scientific research methodologies. Indeed, it is odd that Plaintiffs attack Mr. Sidman for not being an economist, when their own expert’s pedestrian-count study, which involved walking the sidewalk and counting pedestrians, cannot fairly be construed as an economic study. Ex. B (Gabe Dep.) 74:21-75:6. Rather, it is a traffic engineering study, for which Gabe has no qualifications. Ex. B (Gabe Dep.) 74:1-20. The Court should decline Plaintiffs’ invitation to apply their proposed double standard for who can testify as an expert in their fields.

Plaintiffs also complain that Mr. Sidman “did not review the sources Dr. Gabe relied on to develop his methodology.” Motion (Dkt. No. 125) at 12. But these sources are not relevant to Gabe’s studies because he did not use the sources to develop his methodology, but rather just cited them as red herrings. Ex. G (Pedestrian Study) at 1634 (“Sidewalk congestion is often analyzed in terms of pedestrian level-of-service (LOS) (Dixon, 1996; Polus et al., 1983; Zacharias, 2001)); Ex. B (Gabe Dep.) 82:25-84:1 (admitting Gabe study did not analyze pedestrian level of service), 89:4-12 (admitting Gabe study did not take into account sidewalk capacity, a key focus of the Mori and Tsukaguchi 1987 study of congestion). Gabe also admits that his study’s “focus on congestion in neighborhoods is novel” and claims that “[t]his paper is also one of the first econometric-based studies to analyze the determinants of sidewalk pedestrian traffic, and how congestion translates into slower walking speeds.” Ex. G (Pedestrian Study) at 1635. Therefore, Mr. Sidman’s focus on Gabe’s own, unique methodology he used in his study is entirely appropriate. Ex. D (May 30 Sidman Dep.) 15:16-16:1.

Simply put, the concerns that Plaintiffs complain about are meant to be resolved through cross-examination of Mr. Sidman, not exclusion. *See Daubert*, 509 U.S. at 596 (“Vigorous

cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”).

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs’ Motion (Dkt. No. 125) to exclude Mr. Sidman from testifying as an expert witness.

Respectfully submitted,

Dated: June 16, 2023

/s/Robert Papazian

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2023, the foregoing was electronically filed with the Clerk of this Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: June 16, 2023

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