No. _____

In the Supreme Court of the United States

GAYLE KILLILEA,

Petitioner,

v.

RICHARD M. COAN, SEAN DUNNE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI AND SUMMARY REVERSAL

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QUESTIONS PRESENTED

This case arises out of a fraudulent conveyance action. It concerns whether certain real estate located in Ireland was held in trust—a question of fact. Petitioner offered a duly qualified expert under Rule 702 to explain that, consistent with Irish customs and practices, the property was held in trust. The District Court concluded that the complexities involved were well beyond the ken of the average juror. Nonetheless, the court held that Petitioner's expert would not be permitted to explain the relevant customs and practices and offer his opinion on the trust issue because doing so would invade the province of the jury. The Court of Appeals affirmed. Other courts of appeals have recognized that, under Rule 704, this is not a valid reason for excluding expert testimony. The first Question Presented is:

1. Whether expert testimony may be excluded under Rules 702 and 704 because the expert offers an opinion on the relevant question of fact.

This case also involves whether the bankruptcy trustee may avoid the transfer of a second parcel of real estate even though the debtor did not own it. The relevant statute, 11 U.S.C. § 548, permits the avoidance of an interest of "the debtor" in property. The Court of Appeals affirmed the District Court's conclusion that the trustee may avoid the transfer. Other courts of appeals have concluded the opposite. The second Question Presented is:

2. Whether a trustee may avoid under 11 U.S.C. § 548 the transfer of property the debtor did not own.

PARTIES TO THE PROCEEDING

Gayle Killilea;

Richard M. Coan, Chapter 7 Trustee;

Sean Dunne, who appealed to the Second Circuit but is not participating in the proceedings in this Court.

Mountbrook USA, LLC, Molly Blossom LLC, Barclay Beattie & Brown, LLC, Wahl, LLC, defendants in the matters before the District Court but who are not participating in the proceedings in this Court.

RELATED CASES

Coan v. Dunne, No. 21-2012, U.S. Court of Appeals for the Second Circuit. Judgement entered October 27, 2023.

Coan v. Dunne, No. 3:15-CV-00050, U.S. District Court for the District of Connecticut. Judgment entered July 19, 2021. This action consolidated two respective actions:

In re Dunne, No. 14-50484, U.S. Bankruptcy Court for the District of Connecticut; and

National Asset Loan Management, LLC v. Sean Dunne, et al., Docket No. FST-CV-12-5013922-S (Judicial District of Stamford-Norwalk, CT).

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The opinion of the Court of Appeals (App.1a) is available at *Coan v. Dunne*, No. 21-2012, 2023 WL 7103275 (2d Cir. Oct. 27, 2023).[1] The opinions of the District Court are available at *Coan v. Dunne*, No. 3:15-CV-00050, 2019 WL 2169879 (D. Conn. May 17, 2019) (App.31a), and *Coan v. Dunne*, No. 3:15-CV-00050, 2022 WL 369012 (D. Conn. Feb. 8, 2022) (App.10a).

JURISDICTION

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1441. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. The Court of Appeals entered its judgment on October 27, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Federal Rules of Evidence 702 & 704, together with § 548 of the Bankruptcy Code, 11 U.S.C. § 548, are reproduced in the appendix hereto.

PRELIMINARY STATEMENT

After Sean Dunne ("Dunne") commenced his Chapter 7 bankruptcy case, Respondent, his bankruptcy trustee ("Trustee"), sought to recover

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[1] Killilea's Appendix filed in Support of this Petition is cited as "App." Dunne's Appendix filed in the Second Circuit is cited as "DA"; Killilea's Appendix filed in the Second Circuit is cited as "KA"; and Killilea's Special Appendix filed in the Second Circuit is cited as "SPA."

from Dunne's former spouse—Petitioner, Gayle Killilea ("Killilea")—the value of certain real estate ("Walford") located in Ireland and transferred before the bankruptcy filing. The Trustee also sought to recover from Killilea the value of another Irish property ("81 North Wall Quay") likewise transferred before the bankruptcy. Under § 548 of the Bankruptcy Code, 11 U.S.C. § 548, the Trustee could not succeed if the property did not belong to Dunne. *See Begier v. I.R.S.*, 496 U.S. 53 (1990) (property held in trust is not subject to avoidance).

With respect to Walford, Killilea argued that the property did not belong to Dunne because it had been placed in trust many years before. Whether Walford was, indeed, held in trust is a question of fact. *See, e.g., In re Foam Sys. Co.*, 893 F.2d 1338, 1990 WL 1415, at *2 (9th Cir. 1990). Because the transactional circumstances necessary to resolve whether Walford was held in trust were immensely complex, Killilea offered her duly qualified expert, Professor John Wylie, to explain the relevant Irish transactional customs and practices and offer his opinion. DA-94-122. Although the District Court determined that the relevant facts were, indeed, "immensely complex" and "well beyond the ken of the average juror," DA-5543; App.34a, the court nonetheless precluded Wylie's testimony. App.31a. The District Court reasoned that permitting Wylie to testify on this question of fact would trammel the jury's role as factfinder. App.37a. The Court of Appeals affirmed, adopting the District Court's reasoning. App.8a-9a.

As other courts of appeals have held, however, this is not a valid reason for rejecting the testimony of an

expert. Under Rule 704, experts are expressly permitted to testify regarding questions of fact under precisely these circumstances, especially when, as in this case, the relevant circumstances are confusingly complex. It does not matter that the expert provides his opinion on the particular question of fact the jury must decide. Rule 704(a) expressly directs that "[a]n opinion is not objectionable just because it embraces an ultimate issue." Fed. R. Evid. 704. And in complex cases such as this one, that is precisely the expert's value—to assist the jury in understanding the relevant circumstances in light of relevant customs and practices and arriving at a conclusion. Because the issue is recurring and important, certiorari is warranted to resolve the conflict among the courts of appeals over the correct interpretation of Rule 702.

With regard to 81 North Wall Quay, it is undisputed that the property did not belong to Dunne. It belonged to a corporate entity known as Page Inns. Page Inns was, in turn, owned by an entity known as DCD Builders, in which Dunne held an interest. Even though Dunne did not own 81 North Wall Quay, the District Court nonetheless permitted the Trustee in Dunne's bankruptcy case to recover from Killilea the value of the transfer of this property. Again, the Court of Appeals affirmed, adopting the reasoning of the District Court. Other courts of appeals, however, have reached the opposite conclusion on substantially identical facts. Because this issue is also recurring and important, certiorari is warranted to resolve the conflict among the courts of appeals.

Finally, this a rare case in which summary reversal is warranted. *See, e.g., Langenkamp v. Culp*,

498 U.S. 42, 45 (1990) (granting certiorari and summarily reversing decision in a bankruptcy case involving an avoidable preference when the court of appeals "overlooked the clear distinction which our cases have drawn and in so doing created a conflict among the Circuits on this issue."). The decision of the Court of Appeals in this case is unjustifiable and, as in *Langenkamp*, overlooks settled principles creating two circuit splits. Accordingly, Killilea requests that the Court grant certiorari on the questions presented and reverse the decision below.

STATEMENT

In July 2012, the National Asset Management Agency, an Irish regulatory body, commenced litigation in the Connecticut Superior Court against Dunne, Killilea, and others (the "State Court Action"). On March 29, 2013, Dunne filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code in the Bankruptcy Court for the District of Connecticut. On January 12, 2015, the Trustee moved to intervene as Plaintiff in the State Court Action and then removed the action to the District Court.

On March 27, 2015, the Trustee commenced an adversary proceeding (the "Adversary Proceeding") against Killilea and others. The Trustee consolidated the Adversary Proceeding with the removed State Court Action, resulting in the District Court action below. The District Court conducted a jury trial in May of 2019, which lasted for 14 days.

Walford

The central issue at trial was whether Dunne owned Walford, a parcel of Irish real property, when Walford was sold in 2013, or whether Dunne had placed Walford in trust for Killilea in 2005. If the latter were true, the Trustee could not recover the value of Walford as a fraudulent conveyance or hold Killilea liable for such value. *See Begier*, 496 U.S. at 53 (property held in trust not subject to avoidance).

Whether Walford was held in trust is a question of fact.[2] *See, e.g., In re Foam Sys. Co.*, 893 F.2d at *2; *Abioro ex rel. J.M.A. v. Astrue*, 296 F. App'x 866, 869 (11th Cir. 2008) ("whether a trust was created under Georgia law" was to be determined by "the trier of fact"); *In re The Lovesac Corp.*, 422 B.R. 478, 485 (Bankr. D. Del. 2010) (recognizing "a triable issue of fact as to whether an express trust was formed"); 76 Am. Jur. 2d Trusts § 617 ("the existence or establishment of a trust is a question of fact rather than a question of law"). Because Walford is Irish real estate, it is undisputed that Irish law governs whether Dunne placed Walford in trust for Killilea.

As the lower court correctly determined, the factual issue whether Walford was held in trust, consistent with Irish laws, customs, and practices, was "immensely complex" and "well beyond the ken of the average juror." DA-5543; App.34a. Among other

[2] The Trustee has never argued to the contrary and has therefore waived the issue. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 306 (2010).

things, the underlying transaction involving the property "rest[ed] on contract" so that "no stamp duty" would be levied, as permitted under Irish law, and involved the execution of numerous documents at various points in time and signed by individuals acting in various capacities. DA-4576. Killilea sought to elicit expert testimony from Wylie—an expert in Irish real property and trust transactions—to aid the jury in wading through the relevant documents and resolving the complex factual question whether those documents demonstrated that Walford was held in trust, in compliance with Irish law and custom, as permitted by Rule 702. DA-94-122.

Critically, Wylie was not proffered for the purpose of testifying about Irish laws as a general matter. That would be atypical, as *fact* experts are proffered to opine on *factual* issues and to state the bases for their opinions—not to supplant the court's obligation to instruct the jury regarding foreign law. *See* Fed. R. Civ. P. 44.1 (the court must instruct the jury on foreign law). Strangely, however, that is all the lower court permitted Wylie to testify about: in the midst of trial, the District Court granted the Trustee's motion *in limine*, allowing Wylie to discuss Irish law as a general matter but prohibiting him from opining about the central factual question at issue (whether Walford was held in trust) or stating the bases for that opinion (including the application of his expert understanding of Irish law and custom, as well his review of the relevant transaction documents).

Complex questions of fact are routinely resolved with the assistance of expert testimony. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993)

("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue an expert may testify thereto" (cleaned up) (quoting Rule 702)). Had Wylie been permitted to testify about the complex factual question of trust formation, he would have opined that Walford was placed in trust for Killilea in 2005 and explained the full bases for that opinion. App.16a. Among other things, he would have described this examination of the transactional documents from 2005 and explained why, in his opinion, they were sufficient to form a trust, based on his expert understanding of the relevant law, customs, and practices involved in the creation of an Irish real property trust, which are distinctly different from U.S. customs and practices. App.18a. He would have also explained that this 2005 transaction "rested on contract" to avoid the impact of certain taxes when the property was later transferred, which—although complex and likely a foreign concept to U.S. jurors—was perfectly consistent with Irish custom and practice. DA-4576. Additionally, he would have explained that, despite placing Walford in trust in 2005, the Debtor still needed to sign the instruments effectuating the subsequent transfer of Walford in 2013, but he did so in his capacity as trustee—consistent with Irish law, customs, and practices and perfectly consistent with the formation and handling of an Irish real property trust. *Id.*

Rule 702 directs that an expert "may testify in the form of an opinion or otherwise" if (a) the expert has specialized knowledge that "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";

(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 704(a) clarifies that "[a]n opinion is not objectionable just because it embraces an ultimate issue." As elaborated in the relevant committee note, "[t]he basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact." Adv. Cmt. Note, Rule 704 (1972).

Here, the District Court did not find that Wylie failed to meet the requirements for admissibility under any traditional application of Rule 702. To the contrary, it was undisputed that Wylie was qualified as an expert in the relevant field, and the District Court found that the factual issue of trust formation was complex and beyond the ken of the juror, and that Wylie's entire testimony would have been helpful to the jury. App.34a; DA-5543. Wylie's testimony was thus admissible under Rule 702. *See Daubert*, 509 U.S. at 589 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue an expert may testify thereto" (cleaned up) (quoting Rule 702)); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) ("*Daubert*'s general holding—setting forth the trial judge's general 'gatekeeping' obligation—applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge.").

Nonetheless, the District Court excluded Wylie's fact testimony under the mistaken belief that it would intrude on the jury's fact-finding role. App.37a. But

Wylie was not opining or testifying on the *legal* question whether Dunne had made a fraudulent conveyance under § 548, which was left entirely to the jury. Rather, Wylie would have testified on the singular and critically important *factual* issue whether Walford was held in trust since 2005. Experts routinely testify on complex factual issues, and such testimony should be permitted when—as here—the requirements of Rule 702 are satisfied. That remains true even though a basis for the factual opinion is the expert's understanding of foreign law and custom, as many circuit courts have held. The District Court's decision, adopted and affirmed by the Court of Appeals, is plainly contrary to the decisions of other courts of appeals.

Exacerbating the lower court's error, the Trustee's central argument at trial was that the complex nature of the trust formation was *itself* indicative of fraud. App.34a (court observing that "the Trustee contends that this intricate transaction pattern is indicative of fraud."). Killilea's arguments in defense were silenced: while Wylie could testify generally about Irish law, he could not opine about the specific facts of the case, and he was prohibited from stating that the complex nature of the transaction was, in fact, quite typical, based on his expert understanding of trust formation and Irish laws and customs.

Worse, the Trustee argued at closing that the simple fact that Dunne had signed a deed of transfer in 2013 showed that Dunne was the beneficial owner of Walford all along and that the property had never been placed in trust. App.34a. Wylie was prepared to explain that was untrue. He would have explained

that Dunne had placed Walford in trust in 2005 (consistent with Irish custom and practice), but the transaction "rested on contract" to avoid certain taxes (consistent with Irish law and custom), and when Walford was transferred later in 2013, Dunne signed the transferring instrument as trustee—not as beneficial owner or in any other ownership capacity (consistent with Irish law and custom). Worse still, the Trustee argued reductively to the jury that the only thing that mattered was the fact that Dunne had signed the deed of transfer in 2013, and that "[n]o law professor is needed to determine when the real estate was transferred." DA-5511-5516. Once again, Wylie was prepared to explain why the Trustee's reductionist contention was wrong: when Dunne signed the deed of transfer in 2013, he did so as trustee—perfectly consistent with having placed Walford in trust in 2005.

Finally, although the Trustee argued below that Wylie's testimony was supposedly unreliable—including because, in the Trustee's opinion, he did not analyze all relevant evidence or consider all necessary considerations—such criticisms do not go to the *admissibility* of the expert testimony under Rule 702. Rather, those criticisms are the proper province of cross examination: as this Court has previously explained, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking [allegedly] shaky but admissible evidence." *Daubert*, 509 U.S. at 596.

By barring Wylie's testimony on these and other important points, the District Court negated Killilea's full and fair presentation of her legal defense.

81 North Wall Quay

81 North Wall Quay is a former pub in Dublin owned by Page Inns. The undisputed evidence at trial confirmed that Dunne did not own 81 North Wall Quay. Instead, he had an ownership interest in DCD Builders Limited ("DCD Builders"), which owned Page Inns, which, in turn, owned 81 North Wall Quay.

In 2012, Page Inns transferred 81 North Wall Quay to a company known as Amrakbo in which Killilea had an interest. The Trustee sought to set aside the transfer by Page Inns as a fraudulent conveyance. But neither Page Inns nor DCD Builders were defendants, and the Trustee did not argue that the corporate veils of those entities should be pierced, that they were simply alter egos of Dunne, or that any other legal doctrine permitted the Trustee to treat the assets of those corporations as Dunne's assets. DA-158 (listing defendants); DA-155 (not seeking veil piercing as to DCD Builders or Page Inns).

To set aside the transfer of 81 North Wall Quay under § 548 of the Bankruptcy Code, the Trustee was required to show that the transfer was of "an interest of the debtor in property." 11 U.S.C. § 548. In resolving that issue, this Court has directed a straightforward analysis: as explained in *Begier*, the applicable test is whether the property in question would be part of the debtor's bankruptcy estate if the transfer had not been made. *Begier*, 496 U.S. at 58

(the phrase is best understood to mean "property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings").

Here, if the transfer of 81 North Wall Quay had not been made, what would have become part of Dunne's bankruptcy estate is exactly what became part of his bankruptcy estate: his interest in DCD Builders (not Page Inns' separate property). While the District Court noted that Dunne held an indirect interest in 81 North Wall Quay, that is insufficient to sustain the action: § 548 applies only to property of the debtor—not property belonging to some other entity in which the debtor has some indirect interest.

Both Irish and U.S. law recognize the separateness of legal entities and their separate property. *See Salomon v A Salomon & Co Ltd* [1896] AC Ir. 22, 30 ("once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself"); *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2083 (2020) ("[A]s a matter of American corporate law, separately incorporated organizations are separate legal units with distinct legal rights and obligations"); *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (recognizing corporate separateness as "law deeply ingrained in our economic and legal system" (internal quotations removed)). Quite clearly, the property of Page Inns was not Dunne's property.

If the Trustee wished to reach the property of Page Inns and treat it as Dunne's property, he was required to pierce the corporate veils of both DCD Builders and

Page Inns or rely on some alter ego theory—as many other circuit courts and bankruptcy courts have held. *See In re Howland*, 674 F. App'x 482, 485 (6th Cir. 2017) (when debtor held an interest in an LLC, which in turned owned property, the trustee could not avoid the LLC's transfer of property under section 548(a) as a matter of law without first piercing the LLC's veil); *McCallan v. Wilkins*, 649 B.R. 893, 900 (M.D. Ala. 2023) (setting aside a transfer made by non-party entities under section 548 required the trustee to prove that "the non-party entities were [the debtor's] alter-egos"). He did not even try. Further, if the Trustee wished to avoid the transfer, he was required to show that it was avoidable as between the entities that were parties to the transfer: Page Inns and Amrakbo. He did not try that, either. *See also* SPA-58-59 (ruling that the Trustee could not bring other claims against Amrakbo because they were not pleaded and Amrakbo was not a defendant).

The Jury Instructions and Verdict

The jury was asked to determine whether the transfers of Walford in 2013 and the transfer of 81 North Wall Quay could be set aside as fraudulent conveyances under § 548. DA-148-149.

The jury found that Dunne had engaged in fraudulent transfers with respect to Walford and 81 North Wall Quay. SPA-5. As is relevant here, on Counts I and II, the jury found that Dunne had engaged in a fraudulent transfer of Walford under § 548 in the amount of €14 million, and found Killilea liable therefore because she had received the value of the sale of Walford in 2013. On Counts III and IV, the

jury found Killilea liable under § 548 for the value of the transfer of 81 North Wall Quay in the amount of €300,00.

On July 19, 2021, the District Court issued a judgment against Killilea in the amounts of €19,172,935.60 and $278,297.18. On February 8, 2022, the District Court denied Killilea's motion for a new trial and directed verdict, wherein she had raised the issues that serve the basis for this Petition. App.10a. On August 2, 2021, following the jury's verdict, Killilea renewed her previously denied requests for relief. *See* App.11a. On March 9, 2022, Killilea timely filed her notice of appeal, and the Second Circuit consolidated Killilea's appeal with one filed by Dunne. KA-685; Appellate Dkt. No. 60. On October 27, 2023, the Second Circuit affirmed the District Court's decisions, adopting the District Court's reasoning. App.8a-9a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari for four reasons. First, the decision below conflicts irreconcilably with authoritative decisions of other courts of appeals. Second, the decision below conflicts with this Court's precedent. Third, the decision below involves an important, recurring question that merits this Court's review. Finally, the decision below is wrong. And because the decision below so clearly violates settled principles, summary reversal is warranted. *See, e.g., Langenkamp*, 498 U.S. at 45 (granting certiorari and summarily reversing decision in a bankruptcy case).

I. THE DECISION BELOW CREATES A SPLIT OF AUTHORITY AMONG THE COURTS OF APPEALS.

The District Court's decision, adopted and affirmed by the Court of Appeals, conflicts with authoritative decisions of other courts of appeals. Certiorari is thus warranted. *See* Sup. Ct. R. 10.

A. The Lower Courts' Mis-interpretation of Rule 702 Creates a Circuit Split.

Other courts of appeals have consistently held that expert "customs and practice" testimony is admissible under Rule 702, and particularly helpful in cases (such as this one) involving complex factual issues well beyond the ken of the average juror. *See, e.g.*, *United States v. Carter*, 410 F. App'x 549 (3d Cir. 2011) (expert on the Bloods street gang could opine on "gang customs and practice"); *M.D. Mark, Inc. v. Kerr-McGee Corp.*, 565 F.3d 753, 767 (10th Cir. 2009) (expert testimony "in the area of custom and practice in the licensing of seismic data").

The Sixth Circuit permits experts to offer factual opinions when a basis for the proffered opinion rests in part on that expert's understanding of relevant law. For example, in *United States v. Mahoney*, the defendant was charged with submitting false tax returns. 949 F.2d 1397, 1404-07 (6th Cir. 1991). IRS agents offered expert opinions regarding whether the defendant reported all reportable income to the IRS, with one agent testifying that the disputed funds were not reported. *Id*. The defendant argued that this

testimony should have been excluded, but the Sixth Circuit disagreed. It held that the although the experts testified that the tax returns excluded reportable income, they did not "deprive the jury of its function" because they did not opine about whether the defendant filed false tax returns with requisite intent—the charged crime. *Id.* at 1406. Additionally, the expert's testimony was admissible because "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *Id.*

As in *Mahoney*, Wylie offered no opinion about the ultimate *legal* claim submitted to the jury: whether Walford should be set aside as a fraudulent conveyance. His testimony thus would not "deprive the jury of its function." *Id.* at 1046. Further, although the factual issue of trust formation was outcome determinative in this case—because, as noted, if Walford were held in trust then the claim failed as a matter of law—that could not serve as a basis to exclude the expert's *factual* testimony. As confirmed in *Mahoney*, "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *Id.*

Similarly, in *Maiz v. Virani*, 253 F.3d 641 (11th Cir. 2001), the Eleventh Circuit considered a complex factual issue governed by foreign customs and practices. The plaintiffs alleged that the defendants defrauded them, in violation of the federal civil RICO statute. Among other things, the plaintiffs alleged that one defendant made several trips to Mexico in

pursuit of the fraudulent scheme. *Id.* at 668. The defendant argued that the trips to Mexico never occurred because his passport "did not reflect any stamps by Mexican immigration authorities showing Virani's entry into Mexico around the dates in question." *Id.* at 668. In response, plaintiffs offered the testimony of an "immigration expert" who held expertise "regarding the passport-stamping practices of Mexican immigration authorities." *Id.* That expert was permitted to testify about "the passport-stamping practices of Mexican immigration officials." *Id.* He further "opined that a Canadian citizen like [the defendant] is not required to present a passport either to enter Mexico or to return to the United States" and explained "that even when a passport is presented, it is not always stamped by Mexican authorities." *Id.* The defendants challenged the admissibility of the expert's testimony, but the Eleventh Circuit affirmed, finding that their arguments "plainly go to the weight and sufficiency of [the expert's] opinions rather than to their admissibility." *Id.* at 669.

Maiz is in direct conflict with the decision below. In *Maiz*, the court permitted the expert to testify not only about general practices of immigration officials, but also about the specific documents in the case and whether, in his factual opinion, individuals like the defendant would not have been required to present a passport to immigration officials. The expert was not confined to abstract testimony on Mexican customs and practice or precluded from discussing the evidence in the case. Nor was he erroneously accused of opining on the ultimate *legal* issue in the case—whether the defendants were liable under the civil RICO statute.

Here, in contrast, the District Court held that Wylie could not provide his factual opinion that Walford was held in trust, comment in any way on the evidence, or articulate the full bases for his opinion, including Irish law and customs. Instead, Wylie was required to discuss Irish law in a vacuum, completely untethered to the complex facts of the case. That conclusion, adopted by the Court of Appeals, is plainly inconsistent with the decisions of other circuit courts. *See also McGhee v. Arabian Am. Oil Co.*, 871 F.2d 1412 (9th Cir. 1989), *as amended on reh'g* (Apr. 28, 1989) (permitting expert testimony on Saudi law and custom regarding when employees may be validly terminated). Certiorari is warranted.

B. The Decision Below Creates a Split of Authority Regarding Whether an "Interest of the Debtor in Property" under § 548 of the Bankruptcy Code Includes Property Not Owned by the Debtor.

The second issue on appeal is also narrow: when a bankruptcy trustee does not assert legal theories permitting him to treat corporate assets as the debtor's assets (such as veil-piercing, reverse veil-pierce, or alter ego theories), may the trustee set aside as a fraudulent conveyance the transfer of property held by a non-debtor corporate entity under § 548?

The lower courts answered "yes." However, the Sixth, Seventh, and Ninth Circuits have plainly answered "no," holding instead that the trustee must prevail in asserting veil piercing or alter ego theories (or similar theories under applicable state law), and if

the trustee fails to do so, then the property was not "an interest of the debtor" and is not avoidable under section 548, as a matter of law.

For example, in *In re Fisher*, 296 F. App'x 494, 497 (6th Cir. 2008), the trustee sought to avoid a company's sale of inventory, under § 548. The company was founded and managed by the debtor, but the bankruptcy court "recognized that [the company] was a separate legal entity from its sole shareholder, [the debtor]." *Id*. at 505. Accordingly, to permit the avoidance of the transfer, the bankruptcy court was required to, and did, find that the company was the debtor's "alter ego and that [the debtor's] transfer of the inventory . . . could be avoided." *Id.* at 499. The court explained, "[b]ased on [documentary] evidence and the total lack of evidence regarding [the debtor's] treatment of [the company] as a separate entity, the court finds that [the company] was [the debtor's] alter ego." *Id*. at 507 (emphasis removed). The Sixth Circuit affirmed. *Id*. In contrast, when property was *not* owned by the debtor, but rather by a corporate entity, and the trustee's veil-piercing theories failed, the trustee could *not* avoid the transfer. *See In re Howland*, 674 F. App'x at 485.

The Ninth Circuit has reached the same result. *See In re Wardle*, No. ADV.S-03-01467, 2006 WL 6811026 (B.A.P. 9th Cir. Jan. 31, 2006). In *Wardle*, the trustee sought to avoid transfers made from a sole proprietorship that was run by the debtors, under § 548 and another provision of the Bankruptcy Code, both of which require the trustee to prove a "transfer of an interest of the debtor in property." *Id*. at *4. To do so, the trustee asserted a "matrix of multiple alter

ego claims." *Id.* Those alter ego claims failed for many reasons, and as a result, the Ninth Circuit held that the transfers could not be set aside as fraudulent conveyance. The court explained that the trustee could not assert avoidance "actions under . . . § 548 to recover for the benefit of the [debtor's] estate transfers made by [the corporation], which is a separate legal entity that is not a debtor." *Id.* at *5. *See also In re Stout*, 649 F. App'x 621 (9th Cir. 2016) ("[w]hile the transfer of assets owned by a corporation normally does not constitute a transfer by a debtor of his or her own property, property owned by a corporation may be considered a debtor's property where the corporation was the debtor's alter ego.")

Similarly, *In re Wolf*, 2023 WL 6564882 (7th Cir. Oct. 10, 2023), the court considered facts substantially similar to those here. The trustee sought to set aside as a fraudulent conveyance the transfer of one entity (owned by the debtor) to another entity (owned by the debtor's son). The Seventh Circuit held that the transfer was properly set aside *because* the entity that made the transfer was the alter ego of the debtor and such transfers could be reached under the "reverse veil-piercing" theory—whereby creditors attempt to satisfy the debtor's debt with business assets—which is recognized under Illinois law.

Finally, the decision below is also in conflict with bankruptcy courts across the country. *See, e.g.*, *In re Teague*, No. 08-51088, 2014 WL 911861, at *2 (Bankr. W.D.N.C. Mar. 7, 2014) ("section 548 allows trustees to avoid transfers from debtors, not transfers from a separate corporate entity that a debtor owns"); *In re Agriprocessors, Inc.*, 490 B.R. 374, 388 (Bankr. N.D.

Iowa 2013) ("Trustee can only avoid transfers of the debtor's property . . . . [and] lacks standing to avoid transfers from separate entities"); *Ries v. Firstar Bank Milwaukee (In re Spring Grove Livestock Exch.)*, 205 B.R. 149, 156 (Bankr. D. Minn.1997) (holding that the trustee sought "relief to which he is not entitled" because he "lacks standing to recover transfers from [debtor's corporation]"); *Miller v. Barenberg (In re Bernard Techs., Inc.),* 398 B.R. 526, 529 (Bankr. D. Del. 2008) (trustee could not avoid transfers made from a "separate and distinct" non-debtor subsidiary because "the transferred assets were not property of the [d]ebtor"); *In re Chicago Truck Ctr., Inc.*, 398 B.R. 266, 278 (Bankr. N.D. Ill. 2008) ("The only way the Trustee can pin this obligation on [debtor] is to prove that [debtor's affiliate] and [debtor] were alter egos"); *In re Castillo*, 549 B.R. 916, 919 (Bankr. D. Utah 2016) (trustee could not challenge the debtor's conveyance of a truck's legal title under section 548 because the debtor did not "own" the truck); *In re Star Mountain Res., Inc.*, No. 2:18-BK-01594-DPC, 2020 WL 6821721 (Bankr. D. Ariz. Sept. 30, 2020) (permitting the trustee to seek avoidance under section 548 of certain property if he is able to prove veil-piercing under Nevada law); *In re Bal Harbour Quarzo, LLC*, 634 B.R. 827, 834 (Bankr. S.D. Fla. 2021) (collecting cases for support that "a trustee can seek to avoid transfers from an alter ego of a debtor"); *In re Lorenz*, No. 09-31913, WL 13281776, at *6 (Bankr. S.D. Ohio Mar. 8, 2011) (veil-piercing was necessary because the "transfers sought to be recovered by the Trustee were those of a non-debtor, a limited liability company, and cannot be recovered by the Trustee using her avoidance powers"); *In re Wittmer*, 2011 WL 2551023,

at *2 (Bankr. N.D. Ohio June 27, 2011) (debtor "did not own property" transferred by non-party entities and the transfer "cannot be an interest in property of the estate under 11 U.S.C. § 548(a)" unless the trustee alleged that the entities were "alter egos" of the debtor).

This case presents an ideal vehicle to resolve the circuit split identified above. The issues are clearly presented and arise in a manner typical of their presentation generally. Certiorari is warranted.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT.

A. The Second Circuit's Decision Conflicts with This Court's Test for the Admissibility of Expert Testimony under *Barefoot* and *Daubert*.

In *Barefoot*, this Court granted certiorari to address whether psychologists properly testified not only about various factors demonstrating whether a person is likely to act dangerously in the future, but also whether the specific defendant in that case "would probably commit further acts of violence and represent a continuing threat to society." *Barefoot v. Estelle*, 463 U.S. 880 (1983). Petitioner argued that the experts' testimony should be excluded. This Court disagreed and declined the invitation to "excise[] [the expert testimony] entirely from all trials," particularly where, as here, the party opposing the expert testimony "has the opportunity to present his own side of the case," either by calling his own expert

witness to present "contrary evidence" or simply by "cross examination." *Id.* at 898-900.

The lower court in this case reached a different and plainly conflicting result. Just like the expert in *Barefoot*—who testified not only about general psychology principles but also *applied* those principles to the specific facts in the case—the expert here should have been permitted to discuss Irish law and customs generally, and then apply that expert understanding to the complex factual evidence in the case.

This Court's seminal decision in *Daubert* is also instructive. *Daubert*, 509 U.S. 579. In that case, the petitioner proffered the testimony of eight well-credentialed experts, but the district court refused to admit their testimony because it was not based on epidemiological evidence and thus, according to the court, it was not generally accepted. This Court reversed. It reaffirmed that the focus of a court's inquiry must remain on whether the expert is qualified and whether his testimony is reliable. *Id.* at 595. Although respondent argued that admitting the expert testimony would result in a "free-for-all" and "befuddle[] juries," the Court admonished respondent for being "overly pessimistic about the capabilities of the jury" and reminded litigants that if they are concerned about the accuracy of expert testimony, "[v]igorous 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." *Id.* at 596. So, too, in this instance: to the extent the Trustee did not believe Wylie's testimony was correct

or credible, the Trustee should have engaged in a vigorous cross-examination of the expert or, alternatively, offer his own expert testimony on the complex question of trust formation. The entire exclusion of Wylie's factual testimony was improper.

Because the lower courts resolved the first question presented in a manner that conflicts with this Court's precedent, certiorari is warranted.

B. The Second Circuit's Decision Conflicts with This Court's Test for What Constitutes an 'Interest of the Debtor' under *Begier*.

As explained above, to determine if an asset is "an interest of the debtor in property" under § 548, this Court has directed a straightforward test: whether the property in question would be part of the debtor's bankruptcy estate if the transfer had not been made. *Begier*, 496 U.S. at 58. For over thirty years, *Begier* has been faithfully applied by the courts of appeals. *See* Section I.B *supra* (collecting cases).

In this case, the Court of Appeals did not faithfully adhere to and apply the test announced in *Begier*. This Court has granted certiorari in similar circumstances. In *Merit Management Group, LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018), the Court considered whether the trustee could set aside as a fraudulent conveyance the sale of stock from the debtor to the petitioner where financial institutions facilitated the transaction by transferring and receiving the funds at issue. The trustee argued that the transaction was a sale "of an interest of the debtor

in property" under § 548, but the petitioner argued that the transaction should be spared from avoidance because it was "made by or to (or for the benefit of)" a financial institution and thus satisfied the "securities safe harbor." *Id.* This Court granted the petition and ruled that the safe harbor did not apply because the "only relevant transfer" was the one that the "trustee seeks to avoid"—not any intermediary transfers between financial institutions. *Id.* at 888, 892. In doing so, this Court clarified the type of transaction that is avoidable by a trustee under § 548.

As in *Merit Management Group LP*, Killilea seeks this Court's review on an issue that will further define the scope of transactions avoidable under § 548. Because the lower court failed to adhere to this Court's precedent on the second question presented, certiorari is warranted.

III. THE DECISION BELOW INVOLVES IMPORTANT QUESTIONS OF LAW.

Since *Daubert*, the Court has consistently acknowledged the "importance of *Daubert*'s gatekeeping requirement" as it applies to testimony "based on 'technical' and 'other specialized' knowledge." *Kumho Tire Co.*, 526 U.S. at 141. Indeed, "judges have increasingly found in the Rules of Evidence and Civil Procedure ways to help them overcome the inherent difficulty of making determinations about complicated scientific, or otherwise technical, evidence." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 149 (1997) (Breyer, J., concurring).

Likewise, the proper scope of the avoidance power under § 548 is also vitally important. *See Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1663, (2019) (recognizing importance that a bankruptcy estate "cannot possess anything more than the debtor itself did outside bankruptcy"); *see also Merit Mgmt. Grp., LP*, 583 U.S. at 369 (recognizing trustee's "powers, referred to as 'avoiding powers,' are not without limits").

Further, the issues presented will undoubtedly reoccur. For these additional reasons, certiorari is warranted.

IV. THE DECISION BELOW IS WRONG.

Finally, for all the reasons addressed above, the decision below is wrong. Given the conflict of authority on these important federal issues, this Court's prior decisions, and the importance of the questions presented, certiorari is warranted.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant certiorari to review the decision of the Court of Appeals in this case and grant summary reversal.

December 29, 2023

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APPENDIX

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APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED OCTOBER 27, 2023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

21-2012 (Lead),
21-2013 (Con),
22-494 (Con)

RICHARD M. COAN,

Plaintiff-Appellee,

v.

SEAN DUNNE, GAYLE KILLILEA,

Defendants-Appellants.[1]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of October, two thousand twenty-three.

Present:

PIERRE N. LEVAL,
SUSAN L. CARNEY,
WILLIAM J. NARDINI,
Circuit Judges.

1. The Clerk of Court is respectfully directed to amend the official case caption as set forth above.

Appendix A

Appeal from a judgment of the United States District Court for the District of Connecticut (Jeffrey A. Meyer, *District Judge*).

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Defendants-Appellants Sean Dunne and Gayle Killilea appeal from a judgment of the United States District Court for the District of Connecticut (Jeffrey A. Meyer, *District Judge*), entered on July 19, 2021, following trial, in which the jury returned a split verdict and found, in relevant part, that Dunne engaged in several fraudulent transfers of assets to his former spouse, Killilea, in violation of the U.S. Bankruptcy Code, Irish law, and Connecticut law.

This complex consolidated case involves the bankruptcy of Dunne, a prominent real estate developer from Ireland, whose business suffered after the financial crisis in 2008. The financial difficulties experienced by Dunne's business prompted efforts by creditors and bankruptcy trustees in United States and Ireland to recover from him. As for the efforts in Ireland, Dunne consented to a stipulated judgment against him and in favor of a government-related entity—the National Asset Loan Management, Ltd. ("NALM")—for about $235 million for personal guarantees that he provided to secure debt for his companies. However, in 2012, suspecting that

Dunne had concealed assets from his creditors, NALM sued Dunne, Killilea, and several corporate entities (collectively, "Defendants") in Connecticut state court, alleging that Dunne had fraudulently transferred assets to others including Killilea.

In March 2013, while the state court action was pending, Dunne filed for bankruptcy in the U.S. Bankruptcy Court in the District of Connecticut. In January 2015, Plaintiff-Appellee Richard M. Coan, the bankruptcy trustee, moved to intervene in the state court action and removed it to the district court. The district court granted Coan's motion to intervene and denied Defendants' motion to remand. A few months later, Coan initiated an adversary proceeding in the bankruptcy court against Killilea and others premised on Dunne's allegedly fraudulent transfer of assets. In 2018, the state court action and the bankruptcy adversary proceeding were consolidated before the district court. Coan was subsequently substituted for NALM as the plaintiff.

In May 2019, the consolidated case proceeded to trial before the district court. In total, the district court instructed the jury on eighteen counts of fraudulent transfers, both intentional and constructive, under the U.S. Bankruptcy Code, Irish law, and Connecticut law. With respect to the U.S. Bankruptcy Code, the district court instructed the jury that a bankruptcy trustee may avoid a debtor's transfer of assets if the trustee proves by a preponderance of the evidence that (i) the debtor transferred the property that he owned to another party within two years before his bankruptcy filing (the "look

back period"), and (ii) the debtor did so with the actual intent to hinder, delay, or defraud his creditors. *See* 11 U.S.C. § 548(a)(1). Likewise, the jury instructions for fraudulent transfers under Connecticut law and Irish law set forth similar elements as the U.S. Bankruptcy Code but with a few differences concerning, for example, the standard of proof and look back period. For each count of fraudulent transfer, the jury was instructed that if it found that Dunne engaged in a fraudulent transfer, it should also determine which of the Defendants, if any, was liable for damages and provide the amount of damages owed.

During trial, the jury heard evidence regarding various assets that Coan claimed that Dunne fraudulently transferred including: (i) an estate in Ireland known as "Walford," (ii) an Irish property located at 81 North Wall Quay, (iii) funds called the "Lucy Partnership Payments," (iv) funds in Dunne's and Killilea's joint Credit Suisse account, and (v) interest in a property named the "IGB Lands." Dunne advanced several theories for why these assets were not eligible for avoidance of transfer. First, Dunne claimed that he did not own Walford at the time of the transfer because he had, in fact, placed the property in a trust for Killilea when he purchased it in 2005. Coan contended that the trust was a sham. Second, Dunne claimed that he did not own the North Wall Quay property at the time of the transfer because it was owned by Page Inns Limited, a company in which Dunne held some kind of interest. Third, Dunne asserted that he was required to transfer the Lucy Partnership Payments to Killilea pursuant to a Swiss court order concerning Dunne's and Killilea's separation agreement. Fourth, Dunne argued

that he had no claim to the funds in the joint Credit Suisse account because Killilea treated the account as her own. Lastly, with respect to the IGB Lands, Dunne claimed that his 2005 post-nuptial agreement with Killilea compelled him to transfer his interest in the property to Killilea.

The jury returned a split verdict. Relevant to this appeal, the jury made the following findings:

- Dunne engaged in an intentionally fraudulent transfer of Walford, in violation of the U.S. Bankruptcy Code, and Killilea was liable for €14,000,000 in damages;

- Dunne engaged in a constructively fraudulent transfer of Walford, in violation of the U.S. Bankruptcy Code, but none of the Defendants were liable for the transfer;

- Dunne engaged in an intentionally fraudulent transfer of the North Wall Quay property, in violation of the U.S. Bankruptcy Code, and Killilea was liable for €100,000 in damages;

- Dunne engaged in a constructively fraudulent transfer of the North Wall Quay property, in violation of the U.S. Bankruptcy Code, and Killilea was liable for €200,000 in damages;

- Dunne engaged in three constructively fraudulent transfers of Lucy Partnership Payments, in violation of U.S. Bankruptcy

Code, and Killilea was liable for €258,000 in damages;

- Dunne engaged in two intentionally fraudulent transfers of Lucy Partnership Payments, in violation of Irish law, and Killilea was liable for €192,706 in damages;

- Dunne engaged in an intentionally fraudulent transfer of funds from his joint Credit Suisse account with Killilea to Killilea's individual account, in violation of Irish law, and Killilea was liable for €3,015,000 in damages; and

- Dunne engaged in an intentionally fraudulent transfer of his interest in the IGB Lands to Killilea, in violation of Irish law, but none of the Defendants were liable for the transfer.

After trial concluded, Dunne and Killilea each moved for post-trial relief including a new trial under Fed. R. Civ. P. 59 ("Rule 59") and judgment as a matter of law under Fed. R. Civ. P. 50 ("Rule 50"). The district court denied those motions. *See Coan v. Dunne*, No. 3:15-CV-00050, 2021 U.S. Dist. LEXIS 132386, 2021 WL 3012678 (D. Conn. July 15, 2021); *Coan v. Dunne*, No. 3:15-CV-00050, 2022 U.S. Dist. LEXIS 22062, 2022 WL 369012 (D. Conn. Feb. 8, 2022).

While the consolidated case was ongoing, a dispute between Yesreb Holding Limited—the entity to which Walford was transferred—and the Irish Revenue Commissioners arose related to the stamp duty for the

transfer of Walford. The protracted dispute led to a decision by the Irish High Court issued on May 6, 2021. In its decision, the Irish High Court stated that "Dunne ceased to have any interest in Walford . . . as of 9 October 2006" and that Dunne "entered into a contract dated 28 March 2013 (purporting to be a trustee for . . . [Killilea]) with Yesreb for the sale of Walford." Dunne App'x at 5721. The Irish High Court noted that the parties to the case did "not take issue now with the existence of the trust [for Walford] . . . , despite the belief expressed by the Commissioner [of the Irish Tax Appeals Commission] in her determination that insufficient evidence was adduced in support of the existence of a trust between . . . Dunne and his wife from 1 July 2005." *Id.* at 5711 (internal quotation marks omitted).

Now, on appeal, Killilea and Dunne make a number of challenges to the jury verdict. First, Killilea and Dunne argue that the district court erred by limiting the testimony of their expert on Irish trust law and by failing to grant post-trial relief for the purportedly inconsistent jury verdict for Walford and the North Quay Wall property. Second, they argue that the district court erred by failing to grant a new trial and/or direct the verdict on the claims involving the North Quay Wall property and the joint Credit Suisse account. Furthermore, Dunne claims that the district court erred by permitting the jury to decide matters of foreign law when Fed. R. Civ. P. 44.1 demands that the district court do so, failing to give the findings from the Irish High Court regarding Walford a preclusive effect as the principles of comity require, and failing to grant a new trial based on Coan's closing statement.

We review *de novo* the district court's denial of a Rule 50 motion for judgment as a matter of law. *MacDermid Printing Sols. LLC v. Cortron Corp.*, 833 F.3d 172, 180 (2d Cir. 2016).[2] "A Rule 50 motion may be granted only when, considering the evidence in the light most favorable to the non-moving party and drawing all reasonable evidentiary inferences in that party's favor, there was no legally sufficient evidentiary basis for a reasonable jury to find in favor of the non-moving party." *Nimely v. City of New York*, 414 F.3d 381, 390 (2d Cir. 2005). In contrast, we "review a district court's denial of a Rule 59 motion for a new trial for abuse of discretion." *Ali v. Kipp*, 891 F.3d 59, 64 (2d Cir. 2018). In doing so, we "view the evidence in the light most favorable to the nonmoving party, and we will reverse a judgment only if the district court (1) based its decision on an error of law, (2) made a clearly erroneous factual finding, or (3) otherwise rendered a decision that cannot be located within the range of permissible decisions." *Id.* We "will order a new trial only if the district court abused its discretion in deciding that the verdict was not seriously erroneous or a miscarriage of justice." *Id.* at 65. Furthermore, we review "a district [court's] exclusion of evidence from an expert witness for abuse of discretion," *Sarkees v. E. I. Dupont De Nemours & Co.*, 15 F.4th 584, 588 (2d Cir. 2021), and a district court's interpretation of the Federal Rules of Civil Procedure *de novo, Williams v. Beemiller, Inc.*, 527 F.3d 259, 264 (2d Cir. 2008).

After an independent review of the record and the applicable law, we affirm the judgment entered in the

2. Unless otherwise indicated, case quotations omit all internal quotation marks, alteration marks, footnotes, and citations.

case for substantially the same reasons as those set forth by the district court in its thorough and exceptionally well-reasoned rulings on Dunne's and Killilea's post-trial motions. *See Coan*, 2021 U.S. Dist. LEXIS 132386, 2021 WL 3012678, at *4-35; *Coan v. Dunne*, 2022 U.S. Dist. LEXIS 22062, 2022 WL 369012, at *2-7.

* * *

We have considered Dunne's and Killilea's arguments and find them unpersuasive. For the reasons stated above, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
/s/ Catherine O'Hagan Wolfe

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, FILED FEBRUARY 8, 2022

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

No. 3:15-cv-00050 (JAM)

RICHARD M. COAN,

Plaintiff-Trustee,

v.

SEAN DUNNE *et al.*,

Defendants.

February 8, 2022, Decided;
February 8, 2022, Filed

ORDER DENYING POST-TRIAL MOTION OF DEFENDANT KILLILEA FOR DIRECTED VERDICT OR NEW TRIAL

This is a case about international bankruptcy fraud. A jury returned a trial verdict against the defendant Gayle Killilea concluding that she took part in multiple fraudulent transfers of the assets of her former husband, Sean Dunne, who had declared bankruptcy.

Appendix B

Killilea has filed a post-trial motion for a directed verdict or new trial pursuant to Fed. R. Civ. P. 50 and 59. She repeats many of the same arguments that I have previously rejected when they were raised by Dunne. *See Coan v. Dunne*, 2021 U.S. Dist. LEXIS 132386, 2021 WL 3012678, at *9-23 (D. Conn. 2021) ("Omnibus Ruling"). I will deny Killilea's motion.

BACKGROUND

This case was initiated by the bankruptcy Trustee seeking to recover assets that the debtor Sean Dunne allegedly transferred to Gayle Killilea and others in order to avoid the claims of creditors. After a nineteen-day trial in May 2019 including five days of deliberations, the jury returned a split verdict, including findings that Dunne had engaged in fraudulent transfers under nine of the counts submitted to it and that Killilea bore liability for some of those transfers. *Ibid.*

Relevant here are the jury's findings with respect to seven of those counts:

- In Count 1, the jury found that Dunne engaged in an intentionally fraudulent transfer of an Irish property known as Walford in violation of the U.S. Bankruptcy Code, and that Killilea was liable for the transfer in the amount of €14,000,000 in damages.[1]

1. Doc. #509 at 1.

- In Count 2, the jury found that Dunne engaged in a constructively fraudulent transfer of Walford in violation of the U.S. Bankruptcy Code, but that no defendants were liable for the transfer.[2]

- In Count 3, the jury found that Dunne engaged in an intentionally fraudulent transfer of an Irish property located at 81 North Wall Quay in violation of the U.S. Bankruptcy Code, and that Killilea was liable for the transfer in the amount of €100,000 in damages.[3]

- In Count 4, the jury found that Dunne engaged in a constructively fraudulent transfer of the North Wall Quay property in violation of the U.S. Bankruptcy Code, and that Killilea was liable for the transfer in the amount of €200,000 in damages.[4]

- In Count 10, the jury found that Dunne engaged in three constructively fraudulent transfers between August 2011 and April 2012 of a stream of payments known as the Lucy Partnership payments in violation of the U.S. Bankruptcy Code, and that Killilea was liable for the transfers in the amount of €258,000 in damages.[5]

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2. *Id.* at 1-2.

3. *Id.* at 2.

4. *Id.* at 2-3.

5. *Id.* at 4-5.

- In Count 11, the jury found that Dunne engaged in two intentionally fraudulent transfers of other Lucy Partnership payments between October 2010 and March 2011 in violation of Irish law, and that Killilea was liable for the transfers in the amount of €192,706 in damages.[6]

- In Count 21, the jury found that Dunne engaged in an intentionally fraudulent transfer of €3,015,000 from his joint Credit Suisse account with Killilea to her individual account in violation of Irish law, and that Killilea was liable for the transfers in the amount of €3,015,000 in damages.[7]

Following the jury verdict and after unsuccessful efforts to settle the matter, the parties asked me to adjudicate a variety of post-trial motions. In particular, Sean Dunne moved for post-verdict relief in the form of a new trial or, in the alternative, judgment as a matter of law.[8] I denied Dunne's motion in my Omnibus Ruling. 2021 U.S. Dist. LEXIS 132386, 2021 WL 3012678, at *9-23. Killilea has now filed her own motion for post-trial relief.[9]

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6. *Id.* at 5-6.

7. *Id.* at 8.

8. Doc. #570.

9. Doc. #705.

Appendix B

DISCUSSION

Killilea has moved for a new trial on Counts 1 and 2 (concerning the Walford transfer), Counts 3 and 4 (concerning the North Wall Quay transfer), Counts 10 and 11 (concerning various Lucy Partnership payments), and Count 21 (concerning the Credit Suisse transfers).

Rule 59(a) of the Federal Rules of Civil Procedure allows a court to grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1). "Rule 59 is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a second bite at the apple." *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998).[10] The Court may only grant a motion for a new trial "if the jury has reached a seriously erroneous result or [its] verdict is a miscarriage of justice," or "if substantial errors were made in admitting or excluding evidence." *Stampf v. Long Island R.R. Co.*, 761 F.3d 192, 202 (2d Cir. 2014); *see also Lore v. City of Syracuse*, 670 F.3d 127, 155 (2d Cir. 2012) ("an erroneous evidentiary ruling warrants a new trial only when a substantial right of a party is affected, as when a jury's judgment would be swayed in a material fashion by the error").

In considering a motion for a new trial, the Court "may weigh the evidence and the credibility of witnesses and

10. Unless otherwise indicated, this ruling omits internal quotation marks, alterations, citations, and footnotes in text quoted from court decisions.

need not view the evidence in the light most favorable to the verdict winner," but the Second Circuit has nonetheless emphasized "the high degree of deference [that should be] accorded to the jury's evaluation of witness credibility, and that jury verdicts should be disturbed with great infrequency." *Raedle v. Credit Agricole Indosuez*, 670 F.3d 411, 418 (2d Cir. 2012); *see also DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 134 (2d Cir. 1998) ("the court should only grant [a Rule 59] motion when the jury's verdict is egregious").

In the alternative, Killelea also renews her motions for judgment as a matter of law on Counts 3 and 4 and Counts 10 and 11.[11] The standard for a Rule 50 motion for judgment as a matter of law is even higher than the standard for a new trial. *See Jennings v. Town of Stratford*, 263 F. Supp. 3d 391, 405 (D. Conn. 2017). Under Rule 50, a motion for judgment as a matter of law will be granted only if "a reasonable jury [did] not have a legally sufficient evidentiary basis to find for the party" that prevailed at trial. Fed. R. Civ. P. 50(a)(1). A party seeking judgment as a matter of law bears a "heavy burden," and will succeed only if "the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached." *Matusick v. Erie Cnty. Water Auth.*, 757 F.3d 31, 52 (2d Cir. 2014).

I will consider the issues in turn.

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11. *See* Docs. #491, #617.

Appendix B

Walford

Killilea argues first that the Court should grant a new trial on Counts 1 and 2 because the Court improperly precluded her expert witness on Irish property and conveyancing law, Professor John Wylie, from referencing specific facts or evidence relevant to the Walford transaction in his testimony. In order to prove Counts 1 and 2, the Trustee needed to show, *inter alia*, that Dunne transferred the Walford property within two years of his 2013 bankruptcy filing, and in order to show that, the Trustee had to establish that Dunne owned Walford at the time of any purported transfer.[12] By Killilea's account, Wylie's testimony would have "made it clear that Sean Dunne's contract to purchase Walford . . . ultimately was transferred into a trust for Killilea by October 2006 and that thereafter Sean Dunne had no ownership interest in Walford."[13] She argues that it was manifestly erroneous for the Court to preclude aspects of Wylie's proposed testimony.[14]

I have already ruled on this issue, first when I granted in part and denied in part the Trustee's motion to preclude Wylie's testimony altogether, *see Coan v. Dunne*, 2019 U.S. Dist. LEXIS 83536, 2019 WL 2169879 (D. Conn. 2019), and more recently when I denied Dunne's motion for a new trial on the Walford transfer as part of my Omnibus Ruling, *see*

12. *See* Doc. #511 at 7-10.

13. Doc. #706 at 4.

14. *Id.* at 6-15.

2021 U.S. Dist. LEXIS 132386, 2021 WL 3012678, at *15. As I explained in both rulings, expert testimony, though often helpful when introduced in a manner consistent with Federal Rule of Evidence 702, "must be carefully circumscribed to assure that the expert does not usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it." *U.S. v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991).

Because of the particular dangers posed by expert testimony about the law (as distinct from expert testimony on a fact issue), a court may permissibly prevent an expert on the law from testifying about what legal conclusions he believes that the jury should draw from the specific evidence in the case. *See, e.g., Specht v. Jensen*, 853 F.2d 805, 807-10 (10th Cir. 1988); *see also Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 508-10 (2d Cir. 1977) (expert attorney testimony permissible on "the ordinary practices of those engaged in the securities business" but not permissible when attorney "gave his opinion as to the legal standards which he believed to be derived from the contract and which should have governed [the defendant's] conduct" and when the attorney "repeatedly gave his conclusions as to the legal significance of various facts adduced at trial").

Despite her several pages of briefing on the issue, Killilea, like Dunne before her, fails to explain either how allowing Wylie to offer his legal opinion about the particular facts and evidence in this case would not have intruded into the Court and the jury's roles or why the

Court's limitation on Wylie's testimony was a "substantial error." The Federal Rules of Evidence make clear that an opinion must be *helpful* to the trier of fact if it is to be admitted. *See SLSJ, LLC v. Kleban*, 277 F. Supp. 3d 258, 267-68 (D. Conn. 2017); Fed. R. Evid. 704 advisory committee notes.

Killilea asserts that Wylie should have been allowed to refer to specific documents "so that he could opine on whether those documents . . . met the standard under Irish law to create a trust for Walford for Killilea's benefit,"[15] but she fails to explain why the jury, with the benefit of both Wylie's testimony and the Court's instructions on background principles of Irish property law, was not fully capable of applying the law to the facts before them. Killilea was not prevented from eliciting from Wylie any of the critical legal-opinion predicates about Irish property law that she may have believed were necessary for her to argue for her version of how the jury should view the Irish legal instruments and practices at issue.[16] Therefore, Killilea's argument that the Court erred in limiting the

15. *Id.* at 14.

16. For example, Killilea argues that "the jury was not adequately informed about Irish law that even though a clause in the Walford conveyance contract prevented the contract itself being ***signed*** in trust, Irish law did not prevent the beneficial equitable interest in Walford created by that contract being put in a trust." Doc. #706 at 19 (emphasis in original). But there was nothing to prevent Killilea from asking Wylie to explain this Irish law concept without having Wylie testify about the Walford contract itself and to further testify that this particular contract created a trust notwithstanding its own prohibitory language to the contrary.

scope of Wylie's testimony does not provide grounds for granting a new trial with respect to Walford.

Killilea argues next that she is entitled to a new trial on the Walford counts because the Trustee's closing arguments "misled the jury and misstated Irish law" as it applied to the Walford transaction.[17] Because Killilea failed to raise any objection to the Trustee's closing arguments at trial, I review her belated objection only for plain error. *See Chopra v. GE*, 527 F. Supp. 2d 230, 249 (D. Conn. 2007).

Even when an objection has been properly preserved, a trial court enjoys broad discretion to determine whether the conduct of counsel is "so improper as to warrant a new trial." *Patterson v. Balsamico*, 440 F.3d 104, 119 (2d Cir. 2006). A court should order a new trial on the basis of attorney misconduct when, *inter alia*, "the conduct of counsel in argument causes prejudice to the opposing party and unfairly influences a jury's verdict." *Pappas v. Middle Earth Condo. Ass'n*, 963 F.2d 534, 540 (2d Cir. 1992). "Not every improper or poorly supported remark made in summation irreparably taints the proceedings." *Patterson*, 440 F.3d at 119. "Rather, because attorneys are given wide latitude in formulating their arguments to the jury, rarely will an attorney's conduct so infect a trial with undue prejudice or passion as to require reversal." *Ibid.*

Killilea takes issue with the Trustee's closing arguments as they related to the Walford purchase

17. *Id.* at 15.

contract, the Matsack nominee agreement, and the Yesreb deed. First, with respect to the Walford purchase contract, Killilea objects to the Trustee's argument that "defendants' own expert testified that you couldn't put a document, a contract right into trust if the contract itself prohibited that."[18] But setting aside this Court's clear instructions to the jury that counsel's closing arguments did not constitute evidence,[19] and that the Court alone would instruct the jury on the law to be applied,[20] Killilea has not shown that this argument misrepresented Wylie's testimony. Although Wylie testified on direct examination that "the general law is you can put any sort of interest in any sort of property into a trust,"[21] on cross examination he conceded that "if a contract has a restriction on placing the interest in that contract in trust . . . that [would] prevent it from being placed in trust."[22] The jury was of course free to weigh for itself the evidence of whether the Walford purchase contract embodied any such restriction, but it does not appear to me that the jury was unfairly influenced by the Trustee's closing argument on the issue.

With respect to the Matsack nominee agreement, Killilea appears to take issue first with the Trustee's statement at closing argument that certain emails from

18. Doc. #605 at 80-81 (Tr. 2776-77).

19. Doc. #511 at 32, 35.

20. *Id.* at 3, 7.

21. Doc. #598 at 39 (Tr. 1931).

22. *Id.* at 53 (Tr. 1945).

Dunne "don't even come close" to establishing a trust in Walford and second with the Trustee's argument that, as a result, Killilea "ha[d] nothing to put in the Matsack Nominees agreements."[23] Killilea asserts that these comments misstate both Irish law and Wylie's testimony, but she does not explain how. Instead, she argues only that Wylie would have offered an alternative opinion on the significance of the emails and the effect of the Matsack nominee agreement, had he been allowed to testify with reference to specific documents. Yet it is for the jury, not Wylie, to apply the law to the facts, and it was not improper for the Trustee's counsel to urge in closing arguments that the jury apply the law or construe the facts in a manner favorable to his client. Therefore, the Trustee's counsel's summations about the Matsack nominee agreement do not provide a basis for granting a new trial.

Finally, with respect to the Yesreb deed, Killilea takes issue with the Trustee's argument that Dunne's signature on the deed was probative of the fact that he remained the beneficial owner of Walford in his individual capacity until he transferred it to Killilea in March 2013. Specifically, the Trustee argued that "[i]f this wasn't true, he never would have signed the [Yesreb] deed."[24] Killilea asserts that the argument was improper because Wylie, had he been allowed, would have testified that there were other reasons Dunne's signature might have appeared on the Yesreb

23. Doc. #605 at 85-86 (Tr. 2781-82).

24. *Id.* at 87 (Tr. 2783).

deed.[25] But again, it is uncontroversial that an attorney may use closing argument as an opportunity to marshal the evidence and present it to the jury in the light most favorable to their client. *See, e.g.*, Larsen, Navigating the Federal Trial § 12:1 (2021 ed.); *see also* 4 Lane, Goldstein Trial Technique § 23:6 (3d ed.) ("As long as the argument has an evidentiary basis or may be reasonably inferred from the evidence, it is proper."). The Trustee's closing arguments were not improper, let alone prejudicial.

Killilea's final argument with respect to Walford is that the Court's jury instructions were inadequate. She does not point to any allegedly erroneous instruction, but she complains that after precluding Wylie from testifying with reference to the relevant documents and facts, the Court had a duty to "more fully and accurately instruct[]" the jury on Irish conveyancing law.[26]

"A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." *Lore*, 670 F.3d at 156. The movant's burden is "especially heavy" where she points to no specifically erroneous instruction, since "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Henderson v. Kibbe*, 431 U.S. 145, 155, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977). Moreover, because Killilea has failed to preserve her

25. Doc. #706 at 18; *see also* Doc. #385-1 at 24-25 (Professor Wylie's expert report); Doc. #440 at 7 (summary of Wylie's expected testimony).

26. Doc. #706 at 19.

argument by objecting to the jury instructions in a timely manner, I will review the jury instructions for plain error and grant relief only if the purported error has affected the party's substantial rights. *See* Fed. R. Civ. P. 51(d)(2); *see also Benson v. Family Dollar Operations, Inc.*, 755 Fed. App'x 52, 58 (2d Cir. 2018).

Killilea has shown no error in the jury instructions, much less one that affects her substantial rights. She complains that the instructions "did not give the jury any guidance on the documents about which Wylie was precluded from testifying" and that instead the instructions "merely summarized a couple of basic points of Irish law . . . and did not relate those general principles to the facts or documents that came into evidence."[27] Killilea did not object at the time to any such lack of guidance. And in so arguing, Killilea misunderstands the role of the Court and that of the jury. The Court's role is to instruct the jury on the principles of applicable law, and as long as facts remain in dispute, it is for the jury to decide the facts. A court is not obliged to tailor the jury instructions so that they marshal the evidence in one party's favor.

In sum, Killilea has demonstrated neither error nor prejudice in relation to the Court's limitation on Wylie's testimony, the Trustee's closing arguments, or the Court's jury instructions. I will deny her motion for a new trial on the Walford counts.

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27. *Id.* at 20.

Appendix B

North Wall Quay

Pursuant to Rule 50(b), Killilea renews her prior Rule 50(a) motion and requests either judgment as a matter of law or a new trial on Counts 3 and 4. She argues that the Court should grant post-verdict relief on Counts 3 and 4 because, due to the fact that the property at 81 North Wall Quay was formally owned by an entity known as Page Inns, the Trustee did not have standing to avoid the property's transfer, and no reasonable jury could find that Dunne fraudulently transferred the property to Killilea.[28] Because I conclude that Killilea is not entitled to relief even under the "lower" standard for a new trial, *see Jennings*, 263 F. Supp. 3d at 405, I need not separately consider Killilea's request for judgment as a matter of law.

Killilea's arguments with respect to Counts 3 and 4 are materially identical to those already raised by Dunne and resolved in the Omnibus Ruling. There, I noted that "Dunne undisputedly had an interest in North Wall Quay, even if it was formally owned by Page Inns Limited," and "[t]he jury could have reasonably concluded that Killilea was liable for damages for the transfer because Dunne transferred the property to her company, supporting an inference that Dunne did so for her benefit, and she in fact realized the benefit." 2021 U.S. Dist. LEXIS 132386, 2021 WL 3012678, at *19. Killilea makes no substantial showing why this was wrong.

28. *Id.* at 20-23.

I therefore conclude that the jury's verdicts on Counts 3 and 4 were not seriously erroneous and would not result in a miscarriage of justice. Accordingly, for the reasons already detailed in my Omnibus Ruling, Killilea is not entitled to judgment as a matter of law or a new trial with respect to the North Wall Quay transfer.

Lucy Partnership payments

Killilea similarly seeks either judgment as a matter of law or a new trial on Counts 10 and 11, both concerning the Lucy Partnership payments. In support of her motion, she argues that the Lucy Partnership payments were made not to defraud Dunne's creditors but rather to perform his obligations to Killilea under a 2010 Swiss family law order concerning the couple's separation agreement.[29] This is the same argument that I considered and rejected in the Omnibus Ruling, in part based on the evidence that the Swiss court order was nonbinding. *See* 2021 U.S. Dist. LEXIS 132386, 2021 WL 3012678, at *20-21. Killilea now argues that only *parts* of the Swiss court order—specifically, those related to "equity planning and settlement of the marital property"—were nonbinding, and that the Lucy Partnership income relates to portions of the order on monthly and annual spousal maintenance, which were "explicitly enforceable."[30]

As I noted in my Omnibus Ruling, the Trustee introduced substantial evidence to show that the Swiss

29. *Id.* at 23-24.

30. *Id.* at 24.

court order that Dunne and Killilea relied on was not binding. The Swiss court order was placed into evidence,[31] and the jury was free to come to its own conclusions on the significance of that document.

Moreover, the jury could have reasonably reached its verdict even without finding that the Swiss order was nonbinding. The jury could have relied, for example, on the evidence adduced by the Trustee showing that the Lucy partnership payments began *before* the Swiss court order came into effect. *See* 2021 U.S. Dist. LEXIS 132386, 2021 WL 3012678, at *21. Accordingly, I cannot conclude—even under the lower standard for a new trial—that the jury reached a seriously erroneous result, or that the jury's verdicts on Counts 10 and 11 would amount to a miscarriage of justice. I will deny post-verdict relief on Counts 10 and 11.

Credit Suisse transfers

Finally, Killilea argues that the Court should grant a new trial on Count 21 because "the evidence refutes" the jury's conclusion that Dunne intentionally fraudulently transferred €3,015,000 from the couple's joint Credit Suisse account to Killilea's individual account on October 28, 2008.[32] In support of her motion, Killilea rehashes Dunne's prior arguments that there was no transfer because Killilea already owned the money and because on October 28, 2008, she merely transferred her own

31. *See* Pl. Ex. 235.

32. Doc. #706 at 25-26.

money from one account to another.[33] As discussed in the Omnibus Ruling, however, the Trustee adduced substantial evidence from which a reasonable jury could conclude that the funds in question initially belonged to Dunne, and that the transfer on October 28, 2008 was the culmination of efforts to hinder, delay, or defraud Dunne's creditors. *See* 2021 U.S. Dist. LEXIS 132386, 2021 WL 3012678, at *21-22.

None of Killilea's remaining arguments are grounds to alter my conclusion that the jury's verdict with respect to the Credit Suisse transfers was neither seriously erroneous nor a miscarriage of justice. Accordingly, I will deny Killilea's motion for a new trial with respect to Count 21.

CONCLUSION

For the reasons set forth above, the Court DENIES Killilea's post-trial motion (Doc. #705).

It is so ordered.

Dated at New Haven this 8th day of February 2022.

/s/*Jeffrey Alker Meyer*
Jeffrey Alker Meyer
United States District Judge

33. *Compare id*. at 25 *with* Doc. #571 at 30.

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, FILED JULY 19, 2021

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. 3:15-cv-00050-JAM

RICHARD M. COAN,

Plaintiff-Trustee,

v.

NATIONAL ASSET LOAN MANAGEMENT LIMITED, SEAN DUNNE, GAYLE KILLILEA, MOUNTBROOK USA, LLC, MOLLY BLOSSOM LLC, BARCLAY BEATTIE & BROWN, LLC, WAHL, LLC, THOMAS HEAGNEY, ESQ., THOMAS HEAGNEY, ESQ., JOHN SLANE, ESQ., HEAGNEY LENNON & SLANE, LLP, and JOHN DUNNE,

Defendants.

JUDGMENT

This case came on for consideration by a jury trial before the Honorable Jeffrey A. Meyer, United States District Judge. On June 4, 2019 the jury reached a verdict (Doc. #509). The verdict found in part in favor of the plaintiff Trustee Richard M. Coan. The jury awarded the Trustee damages on certain counts against defendant Gayle Killilea in a total amount of €17,765,706 and $278,297.18. The jury did not find in favor of the Trustee

with respect to additional counts and did not find in favor of the Trustee with respect to any of the counts against additional defendants including John Dunne, Mountbrook USA, LLC, WAHL, LLC, and TJD21, LLC. There was no appearance by or proceedings that advanced against two of the named defendants Molly Blossom, LLC and Barclay Beattie & Brown, LLC.

The Trustee moved for an award of prejudgment interest on the jury verdict (Doc. #627) which the Court granted in part on July 15, 2021 (Doc. #698). The Court awarded the Trustee prejudgment interest in the total amount of €1,407,229.60 against Killilea. The Court otherwise denied the Trustee's request for relief on equitable claims including claims for unjust enrichment, an accounting, and a constructive trust against all defendants including defendant Sean Dunne

On March 27, 2019, defendants Heagney Lennon & Slane, LLP, Thomas Heagney, and John Sloane moved to dismiss counts III, IV and VI of the verified complaint. (Doc. #335). \On April 12, 2019, the Trustee filed a motion to be substituted as plaintiff in this action for National Asset Loan Management Ltd. (Doc. #351). The Court granted these motions (Docs. #415 and #416), and these defendants were dismissed from this case.

Therefore, it is hereby ORDERED, ADJUDGED, and DECREED that judgment enter in accordance with the jury verdict and the Court's award of prejudgment interest in favor of plaintiff Trustee Richard M. Coan and against defendant Gayle Killilea in the total amount

of €19,172,935.60 and $278,297.18. All other counts for which the jury found neither liability nor damages against defendant Gayle Killilea and all other claims against other defendants are dismissed. The case is closed.

Dated at New Haven, Connecticut this 19th day of July 2021.

ROBIN D. TABORA, Clerk

By: /s/ Donna Barry
Deputy Clerk

EOD: 07/19/2021

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, FILED MAY 17, 2019

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

May 17, 2019, Decided;
May 17, 2019, Filed

No. 3:15-cv-00050 (JAM)

Adv. Proc. No. 15-5019 (JAM) (consol.).

RICHARD M. COAN,

Plaintiff-Trustee,

v.

SEAN DUNNE *et al.*,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO PRECLUDE EXPERT TESTIMONY OF JOHN WYLIE

This is a case principally involving allegations that a debtor named Sean Dunne engaged in numerous fraudulent transfers of property in order to evade his obligations to creditors. *See Coan v. Dunne*, 2019 U.S. Dist. LEXIS 10368, 2019 WL 302674, at *1-*2 (D. Conn.

2019) (generally describing the history of this case). The plaintiff is the U.S. Bankruptcy Trustee, and the defendants include Sean Dunne, his spouse Gayle Killilea, his son John Dunne, and various corporate entities. The trial of this case is now in progress.

The largest of the alleged fraudulent transfers at issue in this case is that of a very expensive home known as "Walford" in Dublin, Ireland. The Court has already received into evidence numerous documents reflecting and relating to a purchase transaction for Walford in 2005 and its later disposition in 2013 on the same that day Sean Dunne filed for bankruptcy. There are related documents that purportedly reflect an intent of Sean Dunne to purchase Walford in trust for Gayle Killilea, as well as documents reflecting Dunne's payments for the property in 2006, the use of nominee companies (Matsack Nominees Ltd. and Yesreb), and many more additional documents written by various parties relating to the purpose and nature of Dunne's and Killilea's dealings with Walford.

Defendants have proposed to call an expert witness, Professor John Wylie, who has authored books on Irish property law. Defendants propose that Wylie testify as an expert "to cover general principles of Irish law and practice relating to land law, trust law and conveyancing and in particular their application to the conveyancing and ownership of the property known as Walford on Shrewsbury Road, Dublin between the years 2005 and 2013." Doc. #440 at 1. The Trustee in turn has moved *in limine* to preclude Wylie's testimony. Doc. #361. After the Court required defendants to amend their expert

disclosure to narrow the proposed scope of Wylie's testimony, Doc. #426, defendants filed an amended disclosure notice, Doc. #440, and the Trustee in turn has filed a supplemental memorandum raising continuing objections to Wylie's proposed testimony, Doc. #475.

Discussion

The Federal Rules of Evidence provide that expert testimony is admissible if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue." Fed. R. Evid. 702. "Testimony is properly characterized as 'expert' only if it concerns matters that the average juror is not capable of understanding on his or her own." *United States v. Mejia*, 545 F.3d 179, 194 (2d Cir. 2008).

When a court is faced with a request to allow expert testimony about the law (as distinct from expert testimony about scientific or other non-legal concepts), the court must consider the request very carefully because of the danger that the expert's testimony may intrude on the court's own role to instruct the jury about the law that applies to the case. It is obvious, however, that many cases may require a jury to have some understanding of background legal concepts and related practices in order for the jury to make its ultimate factual assessments. This is especially true where there are background or subsidiary principles of law that may govern or influence the parties' conduct but that are not directly at issue with respect to the law that will form the basis for final jury instructions. *See, e.g., SLSJ, LLC v. Kleban*, 277 F.

Supp. 3d 258, 268 (D. Conn. 2017) (discussing how expert may testify in corporate fraud case about background corporate governance concepts such as "the respective roles of a corporation's directors and officers, the nature of an officer's fiduciary duties to the corporation, or the concept of parent-subsidiary corporate separateness"). Thus, such "expert testimony may help a jury understand unfamiliar terms and concepts" and is permissible if "carefully circumscribed to assure that the expert does not usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it." *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991) (opinion of Cardamone, J.).

The Trustee does not challenge Wylie's expert qualifications with respect to Irish real estate law, and it is readily evident to me that the legal requirements and ordinary practices for Irish real estate transactions are well beyond the ken of the average juror. Moreover, I think that expert testimony about these requirements and practices would be helpful to the jury's ultimate consideration of whether the Walford transaction was fraudulent (an issue that Wylie will not testify about).

The jury has been confronted with a bewildering array of transaction documents spanning several years from 2005 to 2013. On the one hand, the Trustee contends that this intricate transaction pattern is indicative of fraud. On the other hand, defendants insist that the pattern reflects customary trust and conveyancing practices that are not indicative of fraud.

In my view, it is appropriate to allow defendants to call Wylie to explain the underlying legal requirements for Irish real estate transactions and to explain, for example, how parties may lawfully use trust and/or nominee arrangements, how parties may engage in a practice referred to by the defendants as "resting on the contract," and how Irish law and practice in general recognizes the formal passing or conveyance of legal title.

Such testimony about the legal requisites and practices under Irish law would not usurp or intrude on the jury's ultimate role to decide if the Walford transaction was fraudulent. Indeed, regardless whether the Walford transaction complies on its face in all respects with Irish real estate law, it is a separate issue whether an otherwise lawful transaction was nonetheless engaged in with a fraudulent intent to defeat the interests of Dunne's creditors. Still, to the extent that the Trustee would argue directly or by implication that the intricacies or particulars of the Walford transaction (such as the use of a trust and nominee arrangement) suggest fraudulent intent, defendants have a legitimate interest in responding to this argument by means of expert testimony about the underlying requisites and practices for real estate transactions in Ireland.

All that said, I am not convinced that Wylie should be permitted to testify about or with reference to the actual documents and evidence in this case (unless the Trustee's cross-examination opens the door to such testimony). Defendants' revised disclosure for Wylie's testimony reveals multiple ways in which Wylie could

explain the requirements and practices for Irish real estate transactions without the need to comment on whether any particular document in this case is consistent with the law or standard practices.

For example, Wylie may permissibly testify that "there is no legal requirement that a reference to a purchaser entering into a contract as a trustee should be in a contract to purchase real property in order to create a trust." Doc. #440 at 4. He may further testify that "the creation of a trust under Irish law of an interest in land in favor of another party does not require a formal declaration or trust deed," and that all the law "requires is that there is some written evidence of the existence of a trust signed by the person creating it." *Ibid.*

He may further testify, in the context of a purchase of real estate by a trustee, that "[b]y virtue of the payment of the full purchase price, under Irish law as it was understood at that time, the purchaser becomes the full equitable or beneficial owner of the real property," while "[t]he vendors h[o]ld the legal title as bare trustees for him." *Ibid.* Likewise, by way of background, he may explain any lawful functions and purposes of trust and nominee arrangements. He may further testify about any lawful functions and purposes for "resting on a contract." And he may explain how title to real property does not pass until there is a conveyance of title, such that the acceptance of a tender or entry into a purchase-and-sale contract does not alone suffice to convey title from a seller to a buyer. All this testimony may prove useful to the jury's ultimate evaluation of who owned Walford at what

time and whether any part of the Walford transaction was intended to evade Sean Dunne's obligations to his creditors.

If Wylie testifies about background legal concepts and practices, then the jury can decide how these concepts and practices apply, if at all, to the documents and fact testimony in this case. But if Wylie were permitted to base his testimony by reference to the particular documents and other evidence in this case, this would create an unnecessary risk of intrusion on both this Court's instructional role and the jury's fact-finding role.

Defendants' revised disclosure proposes to allow Wylie to comment on the evidence in ways that exceed his expertise and amount to little more than a marshaling of the evidence in defendants' favor. For example, defendants propose that Wylie testify how "the lack of a reference to a trust [in the purchase contract] is understandable" in light of the separate provision of the "tender documentation [which] provided that no document signed in trust would be accepted." *Ibid.* Similarly, based on non-transactional documents such as later emails, defendants propose that Wylie be permitted to "opine that there is further recognition in writing by the involved parties that appears to acknowledge that GD [Gayle Killilea Dunne] (and not SD [Sean Dunne]) was the beneficial owner of Walford." *Id.* at 5. This type of testimony involving Wylie's reference to and commentary on the evidence in this case will not be permitted at trial.

Appendix D

Conclusion

For the foregoing reasons, the Trustee's motion *in limine* to preclude the testimony of John Wylie (Doc. #361) is GRANTED IN PART insofar as Wylie may not offer testimony that refers to or comments on the evidence in this case, and is DENIED IN PART insofar as Wylie may testify to the general background principles of Irish property, trust, and conveyancing law consistent with those legal principles stated in defendants' revised disclosure.

It is so ordered.

Dated at New Haven this 17th day of May 2019.

/s/ ***Jeffrey Alker Meyer***
Jeffrey Alker Meyer
United States District Judge

APPENDIX E — STATUTORY PROVISIONS AND RULES INVOLVED

11 U.S.C.A. § 548

§ 548. Fraudulent transfers and obligations

(a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in

business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which—

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title [11 USCS § 544, 545, or 547], a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section—

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency that receives a margin payment, as defined in section 101, 741, or 761 of this title [11 USCS § 101, 741, or 761], or settlement payment, as defined in section 101 or 741 of this title [11 USCS § 101 or 741], takes for value to the extent of such payment;

(C) a repo participant or financial participant that receives a margin payment, as defined in section 741 or 761 of this title [11 USCS § 741 or 761], or settlement payment, as defined in section 741 of this title [11 USCS § 741], in connection with a repurchase agreement, takes for value to the extent of such payment;

(D) a swap participant or financial participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer; and

(E) a master netting agreement participant that receives a transfer in connection with a master netting agreement or any individual contract covered thereby takes for value to the extent of such transfer, except that, with respect to a

transfer under any individual contract covered thereby, to the extent that such master netting agreement participant otherwise did not take (or is otherwise not deemed to have taken) such transfer for value.

(3) In this section, the term "charitable contribution" means a charitable contribution, as that term is defined in section 170(c) of the Internal Revenue Code of 1986 [26 USCS § 170(c)], if that contribution—

(A) is made by a natural person; and

(B) consists of—

(i) a financial instrument (as that term is defined in section 731(c)(2)(C) of the Internal Revenue Code of 1986) [26 USCS § 731(c)(2)(C)]; or

(ii) cash.

(4) In this section, the term "qualified religious or charitable entity or organization" means—

(A) an entity described in section 170(c)(1) of the Internal Revenue Code of 1986 [26 USCS § 170(c)(1)]; or

(B) an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986 [26 USCS § 170(c)(2)].

(e)(1) In addition to any transfer that the trustee may otherwise avoid, the trustee may avoid any transfer of an interest of the debtor in property that was made on or within 10 years before the date of the filing of the petition, if—

(A) such transfer was made to a self-settled trust or similar device;

(B) such transfer was by the debtor;

(C) the debtor is a beneficiary of such trust or similar device; and

(D) the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted.

(2) For the purposes of this subsection, a transfer includes a transfer made in anticipation of any money judgment, settlement, civil penalty, equitable order, or criminal fine incurred by, or which the debtor believed would be incurred by—

(A) any violation of the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47))), any State securities laws, or any regulation or order issued under Federal securities laws or State securities laws; or

(B) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*l* and 78*o*(d)) or under section 6 of the Securities Act of 1933 (15 U.S.C. 77f).

Appendix E

Federal Rules of Evidence Rule 702, 28 U.S.C.A.

Rule 702. Testimony by Expert Witnesses [Rule Text & Notes of Decisions subdivisions I, II]

Effective: December 1, 2023

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

(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's opinion reflects a reliable application of the principles and methods to the facts of the case.

ADVISORY COMMITTEE NOTES
1972 Proposed Rules

An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it.

Appendix E

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference. The use of opinions is not abolished by the rule, however. It will continue to be permissible for the experts to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts. See Rules 703 to 705.

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "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." Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 418 (1952). When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time. 7 Wigmore § 1918.

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the

"scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education." Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.

2000 Amendments

Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999). In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. *See also Kumho*, 119 S.Ct. at 1178 (citing the Committee Note to the proposed amendment to Rule 702, which had been released for public comment before the date of the *Kumho* decision). The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Consistently with *Kumho*, the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that

Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171 (1987).

Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are (1) whether the expert's technique or theory can be or has been tested--- that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. The Court in *Kumho* held that these factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending upon "the particular circumstances of the particular case at issue." 119 S.Ct. at 1175.

No attempt has been made to "codify" these specific factors. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony. In addition to *Kumho*, 119 S.Ct. at 1175, *see Tyus v. Urban Search Management*, 102 F.3d 256 (7th Cir. 1996) (noting that the factors mentioned by the Court in *Daubert* do not

neatly apply to expert testimony from a sociologist). *See also Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 809 (3d Cir. 1997) (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge"). The standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate.

Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include:

(1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995).

(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered").

(3) Whether the expert has adequately accounted for obvious alternative explanations. *See Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994)

(testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition). *Compare Ambrosini v. Labarraque*, 101 F.3d 129 (D.C. Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).

(4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) (*Daubert* requires the trial court to assure itself that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field").

(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct.1167, 1175 (1999) (*Daubert's* general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability, as for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy."), *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir. 1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); *Sterling v. Velsicol Chem. Corp.*, 855

F.2d 1188 (6th Cir. 1988) (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended. Other factors may also be relevant. *See Kumho*, 119 S.Ct. 1167, 1176 ("[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."). Yet no single factor is necessarily dispositive of the reliability of a particular expert's testimony. *See, e.g., Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 155 (3d Cir. 1999) ("not only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules."); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317, n.5 (9th Cir. 1995) (noting that some expert disciplines "have the courtroom as a principal theatre of operations" and as to these disciplines "the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration.").

A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996). As the Court in *Daubert* stated: "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." 509 U.S. at 595. Likewise, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct.1167, 1176 (1999) (noting that the trial judge has the discretion "both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.").

When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. *See, e.g., Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 160 (3d Cir. 1999) (expert testimony cannot be excluded simply because the expert uses one test rather than another, when both tests are accepted in the field and both reach reliable results). As the court stated in *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 744 (3d Cir. 1994), proponents "do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable.... The evidentiary requirement of reliability is lower than the merits standard of correctness." *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1318 (9th Cir.

1995) (scientific experts might be permitted to testify if they could show that the methods they used were also employed by "a recognized minority of scientists in their field."); *Ruiz-Troche v. Pepsi Cola*, 161 F.3d 77, 85 (1st Cir. 1998) ("*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance.").

The Court in *Daubert* declared that the "focus, of course, must be solely on principles and methodology, not on the conclusions they generate." 509 U.S. at 595. Yet as the Court later recognized, "conclusions and methodology are not entirely distinct from one another." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Under the amendment, as under *Daubert*, when an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. *See Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case. As the court noted in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994), "*any* step that renders the analysis unreliable ... renders the expert's testimony inadmissible. *This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.*"

If the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case.

As stated earlier, the amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeping function applies to testimony by any expert. *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1171 (1999) ("We conclude that *Daubert's* general holding--setting forth the trial judge's general 'gatekeeping' obligation--applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge."). While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm

of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist. *See Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997) ("[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique."). Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded. *See, e.g.*, American College of Trial Lawyers, Standards and Procedures for Determining the Admissibility of Expert Testimony after *Daubert*, 157 F.R.D. 571, 579 (1994) ("[W]hether the testimony concerns economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the 'knowledge and experience' of that particular field.").

The amendment requires that the testimony must be the product of reliable principles and methods that

are reliably applied to the facts of the case. While the terms "principles" and "methods" may convey a certain impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical or other specialized knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted.

Nothing in this amendment 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. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. *See, e.g., United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail); *Tassin v. Sears Roebuck*, 946 F.Supp. 1241, 1248 (M.D.La. 1996) (design engineer's testimony can be admissible when the expert's opinions "are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link

between the information and procedures he uses and the conclusions he reaches"). *See also Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1178 (1999) (stating that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.").

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it." *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."). The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable. *See O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (expert testimony based on a completely subjective methodology held properly excluded). *See also Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) ("[I]t will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.").

Subpart (1) of Rule 702 calls for a quantitative rather than qualitative analysis. The amendment requires

that expert testimony be based on sufficient underlying "facts or data." The term "data" is intended to encompass the reliable opinions of other experts. See the original Advisory Committee Note to Rule 703. The language "facts or data" is broad enough to allow an expert to rely on hypothetical facts that are supported by the evidence. *Id.*

When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on "sufficient facts or data" is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

There has been some confusion over the relationship between Rules 702 and 703. The amendment makes clear that the sufficiency of the basis of an expert' s testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the sufficiency of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. In contrast, the "reasonable reliance" requirement of Rule 703 is a relatively narrow inquiry. When an expert relies on inadmissible information, Rule 703 requires the trial court to determine whether that information is of a type reasonably relied on by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question whether the expert is relying on a *sufficient* basis of information--whether admissible information or not--is governed by the requirements of Rule 702.

The amendment continues the practice of the original Rule in referring to a qualified witness as an "expert." This was done to provide continuity and to minimize change. The use of the term "expert" in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an "expert." Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. Such a practice "ensures that trial courts do not inadvertently put their stamp of authority" on a witness's opinion, and protects against the jury's being "overwhelmed by the so-called 'experts'." Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537, 559 (1994) (setting forth limiting instructions and a standing order employed to prohibit the use of the term "expert" injury trials).

GAP Report--Proposed Amendment to Rule 702

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 702:

1. The word "reliable" was deleted from Subpart (1) of the proposed amendment, in order to avoid an overlap with Evidence Rule 703, and to clarify that an expert opinion need not be excluded simply because it is based on hypothetical facts. The Committee Note was amended to accord with this textual change.

2. The Committee Note was amended throughout to include pertinent references to the Supreme Court's decision in *Kumho Tire Co. v. Carmichael*, which was rendered after the proposed amendment was released for public comment. Other citations were updated as well.

3. The Committee Note was revised to emphasize that the amendment is not intended to limit the right to jury trial, nor to permit a challenge to the testimony of every expert, nor to preclude the testimony of experience-based experts, nor to prohibit testimony based on competing methodologies within a field of expertise.

4. Language was added to the Committee Note to clarify that no single factor is necessarily dispositive of the reliability inquiry mandated by Evidence Rule 702.

2011 Amendments

The language of Rule 702 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

2023 Amendments

Rule 702 has been amended in two respects:

(1) First, the rule has been amended to clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule. *See* Rule 104(a). This is the preponderance of the evidence standard that applies to most of the admissibility requirements set forth in the evidence rules. *See Bourjaily v. United States*, 483 U.S. 171, 175 (1987) ("The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration."); *Huddleston v. United States*, 485 U.S. 681, 687 n.5 (1988) ("preliminary factual findings under Rule 104(a) are subject to the preponderance-of- the-evidence standard"). But many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).

There is no intent to raise any negative inference regarding the applicability of the Rule 104(a) standard of proof for other rules. The Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have failed to apply correctly the reliability requirements of that rule. Nor does the amendment require that the court make a finding of reliability in the absence of objection.

Appendix E

The amendment clarifies that the preponderance standard applies to the three reliability-based requirements added in 2000-- requirements that many courts have incorrectly determined to be governed by the more permissive Rule 104(b) standard. But it remains the case that other admissibility requirements in the rule (such as that the expert must be qualified and the expert's testimony must help the trier of fact) are governed by the Rule 104(a) standard as well.

Some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds it more likely than not that an expert has a sufficient basis to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert's basis always go to weight and not admissibility. Rather it means that once the court has found it more likely than not that the admissibility requirement has been met, any attack by the opponent will go only to the weight of the evidence.

It will often occur that experts come to different conclusions based on contested sets of facts. Where that is so, the Rule 104(a) standard does not necessarily require exclusion of either side's experts. Rather, by deciding the disputed facts, the jury can decide which side's experts to credit. "[P]roponents 'do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate

by a preponderance of evidence that their opinions are reliable... The evidentiary requirement of reliability is lower than the merits standard of correctness.'" Advisory Committee Note to the 2000 amendment to Rule 702, quoting *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 744 (3d Cir. 1994).

Rule 702 requires that the expert's knowledge "help" the trier of fact to understand the evidence or to determine a fact in issue. Unfortunately, some courts have required the expert's testimony to "appreciably help" the trier of fact. Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict.

(2) Rule 702(d) has also been amended to emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology. Judicial gatekeeping is essential because just as jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reliably support.

The amendment is especially pertinent to the testimony of forensic experts in both criminal and civil cases. Forensic experts should avoid assertions of absolute or one hundred percent certainty--or to a reasonable degree of scientific certainty--if the methodology is subjective and thus potentially subject to error. In deciding whether to

admit forensic expert testimony, the judge should (where possible) receive an estimate of the known or potential rate of error of the methodology employed, based (where appropriate) on studies that reflect how often the method produces accurate results. Expert opinion testimony regarding the weight of feature comparison evidence (i.e., evidence that a set of features corresponds between two examined items) must be limited to those inferences that can reasonably be drawn from a reliable application of the principles and methods. This amendment does not, however, bar testimony that comports with substantive law requiring opinions to a particular degree of certainty.

Nothing in the amendment imposes any new, specific procedures. Rather, the amendment is simply intended to clarify that Rule 104(a)'s requirement applies to expert opinions under Rule 702. Similarly, nothing in the amendment requires the court to nitpick an expert's opinion in order to reach a perfect expression of what the basis and methodology can support. The Rule 104(a) standard does not require perfection. On the other hand, it does not permit the expert to make claims that are unsupported by the expert's basis and methodology.

Appendix E

Federal Rules of Evidence Rule 704, 28 U.S.C.A.

Rule 704. Opinion on an Ultimate Issue

(a) In General--Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

(b) Exception. In 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.

ADVISORY COMMITTEE NOTES
1972 Proposed Rules

The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called "ultimate issue" rule is specifically abolished by the instant rule.

The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 Wigmore §§ 1920, 1921; McCormick § 12. The basis usually assigned for the rule, to prevent the witness from "usurping the province of the jury," is aptly characterized as "empty rhetoric." 7 Wigmore §

1920, p. 17. Efforts to meet the felt needs of particular situations led to odd verbal circumlocutions which were said not to violate the rule. Thus a witness could express his estimate of the criminal responsibility of an accused in terms of sanity or insanity, but not in terms of ability to tell right from wrong or other more modern standard. And in cases of medical causation, witnesses were sometimes required to couch their opinions in cautious phrases of "might or could," rather than "did," though the result was to deprive many opinions of the positiveness to which they were entitled, accompanied by the hazard of a ruling of insufficiency to support a verdict. In other instances the rule was simply disregarded, and, as concessions to need, opinions were allowed upon such matters as intoxication, speed, handwriting, and value, although more precise coincidence with an ultimate issue would scarcely be possible.

Many modern decisions illustrate the trend to abandon the rule completely. *People v. Wilson*, 25 Cal.2d 341, 153 P.2d 720 (1944), whether abortion necessary to save life of patient; *Clifford-Jacobs Forging Co. v. Industrial Comm.*, 19 Ill.2d 236, 166 N.E.2d 582 (1960), medical causation; *Dowling v. L. H. Shattuck,* Inc., 91 N.H. 234, 17 A.2d 529 (1941), proper method of shoring ditch; *Schweiger v. Solbeck,* 191 Or. 454, 230 P.2d 195 (1951), cause of landslide. In each instance the opinion was allowed.

The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time.

These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed. McCormick § 12.

For similar provisions see Uniform Rule 56(4); California Evidence Code § 805; Kansas Code of Civil Procedure § 60-456(d); New Jersey Evidence Rule 56(3).

2011 Amendments

The language of Rule 704 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.