UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

WELLS FARGO & COMPANY, et al.,	)	
	)	
Plaintiff	)	Civil No. 09-cv-02764-PJS-TNL
	)	
v.	)	
	)	**Report of Special Master**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant	)	

REPORT DECIDING PLAINTIFF'S MOTION TO EXCLUDE EXPERT TESTIMONY OF DR. DAVID LARUE

Plaintiff's Motion

Dr. David LaRue is one of several individuals retained by the Defendant as expert witnesses to analyze and explain various financial and other aspects of the STARS transactions that are a principal subject of this case. Plaintiff has moved (Doc 281) under Rule 702 of the Federal Rules of Evidence ("FRE") for an order excluding Dr. LaRue's participation as an expert witness. The motion is based upon a general challenge to Dr. LaRue's qualifcations and a series of specific

challenges to some of his conclusions. For the reasons set forth herein, the motion is denied.

Jurisdiction to Hear this Motion

There is a question about the authority of the Special Master to hear and decide this motion. Article A(1)(a) of the Appointment Order of June 13, 2011, authorizes the Special Master to "hear any pretrial dispositive motion." Rule 7.1(c)(6)(D) of the Local Rules for the District of Minnesota includes in a list of dispositive motions: "motions to exclude experts under Fed. R. Evid. 702 and *Daubert.*"

A possible ambiguity arises, however, because Article B(20)(a) of the Appointment Order, which deals with "pretrial discovery motions," provides that the Special Master has no authority with respect to "motions *in limine* or other evidentiary motions directly ruling on admissibility of specific evidence." The Defendant suggests at least the possibility that this provision removes Plaintiff's motion here under consideration from the scope of authority of the Special Master. In fact, Defense Counsel stated during a hearing with respect to this motion that, if the issue had been raised during the discussions leading to the development and issuance of the Appointment Order, he would have opposed ceding authority to

the Special Master to deal with the motion here raised.[1]

Having considered carefully the question of authority appropriately raised by the Defendant at this time, the better course is to rely on the explicit language of the Appointment Order and Local Rule. Therefore, the merits of the Plaintiff's motion is herein considered and determined. In so doing, it might be noted that there are almost certain to be evidentiary consequences for any decision taken with respect to dispositive motions.

Standard Applicable to Motion

FRE 702 specifies the circumstances when an expert witness may testify:

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

Basic Elements of STARS Transactions

A brief review of some of the basic elements of the STARS transactions is

[1] Hearing of May 16, 2013, Transcript ("Hearing Transcript"), page 10.

useful to an understanding of the specific assertions supporting Plaintiff's motion here under consideration. A U.K. trust (the "Trust")[2] was established which was treated as a part of the Plaintiff for U.S. income tax purposes.[3] The Trust was subject to U.K. income taxes at a rate of 22 percent. The U.K. income taxes paid by the Trust were generally eligible for foreign tax credits under Section 901 of the Internal Revenue Code (the "Code"). The Plaintiff claimed such credits in calculating its U.S. income tax liability for the tax years here in question.

There were several beneficial units in the Trust. Some units were effectively held by the Plaintiff. Other units were held by Barclays Bank ("Barclays"), a U.K. financial institution. Most of the income realized by the Trust after payment of the 22 percent U.K. tax was allocated to units held by Barclays. Barclays would then report income for U.K. tax purposes of the amount so allocated plus the 22 percent tax that had been paid in respect of that amount (an arithmetic technique often referred to as "grossing up" in income tax practice). For example, if income of $78 (though, of course, calculated and paid in British pounds), was allocated to Barclays, it would report total income of $100 for U.K. tax purposes. Barclays was then taxed in the U.K. on the total allocation (income

---

[2] The Trust was treated as a U.K. trust because the trustee was a U.K. entity.

[3] The reference to "the Plaintiff" herein includes several entities effectively treated as part of the Wells Fargo Bank for purposes of U.S. income taxes.

plus the gross up amount) at the rate of 30 percent, but received a tax credit for U.K. tax purposes of the 22 percent previously paid by the Trust. The net result was that Barclays was required to pay an additional U.K. income tax of 8 percent on the total income so allocated.

Barclays was also required immediately to invest the income allocated to it in trust units that would eventually belong to the Plaintiff. These amounts were deposited in a blocked account held by the Plaintiff. Barclays then took a deduction of the amounts so contributed in the calculation of its U.K. income taxes (imposed at the rate of 30 percent), resulting in a net U.K. tax gain to Barclays.

Barclays also made funds available to the Plaintiff at an advantageous interest rate. The amount so loaned was determined in part by reference to the U.K. income taxes saved by Barclays. The proceeds of the low-interest loan were used by the Plaintiff in its banking and other financial operations.

Dr. LaRue's Work on the Case

Dr. LaRue has devoted considerable time and effort to the analysis of the STARS transactions. He provided a lengthy report (the "LaRue Report" exceeds 200 pages) reflecting his financial analysis and his views about the characterization of the various elements of the STARS transactions.[4] He has also

[4] Plaintiff Memorandum in support of Motion, Exhibit 1.

submitted to an extensive deposition with respect to his analysis and conclusions.[5] He prepared a 19- page "Declaration" in response to aspects of the Plaintiff's motion being considered herein.[6]

Dr. LaRue's Qualifications to Serve As an Expert Witness in This Case

Dr. LaRue has earned a Bachelor of Business Administration, a Master of Science in Accountancy and a Ph.D. in accounting, taxation and economics. He is an Emeritus Professor of the University of Virginia, where for 25 years he taught courses in taxation, finance, accounting, international business and international finance. He has also taught continuing education courses, published a number of articles in various journals, testified before the Committee on Ways and Means of the U.S. House of Representatives and the Treasury Department and served on various committees of the American Taxation Association, the American Accounting Association and the Federal Tax Division of the American Institute of Certified Public Accountants. He has participated as an expert witness in four U.S. District Court cases, three cases in the U.S. Court of Federal Claims, a case in the U.S. Tax Court and two arbitration cases. His contribution to these

[5] Plaintiff Memorandum in support of Motion, Exhibit 2.

[6] Defendant's Response in opposition to Motion, Exhibit 1.

cases involved issues of accounting, finance and economics.[7]

The Plaintiff's motion herein is based upon several general and several specific objections. Plaintiff argues generally that Dr. LaRue has no first-hand knowledge of this case, no expertise in United Kingdom tax law or procedure, and no experience in banking, financial markets or fund management. These contentions are addressed in this portion of this report. The specific objections are analyzed in subsequent sections of the report.

As indicated previously, Dr. LaRue has written, lectured and testified with respect to issues of accounting, finance and taxation. While he has not participated in the formulation or implementation of the transactions here in issue, his lengthy Report, his deposition and his Declaration indicate that he has invested considerable time and effort in studying the contracts that implemented the STARS transactions and analyzing the financial consequences of those transactions, and that he has endeavored to apply his relevant experience and expertise in his work. Further, he does not purport to offer expert testimony with respect to U.K. or any other legal issues. Accordingly, Dr. LaRue clearly satisfies the general qualification standards of FRE 702 to serve as an expert witness in this case.

---

[7] LaRue Report, pages 1-2.

Dr. LaRue's Report, Deposition and Declaration

The principal issue in this case is whether the Plaintiff is entitled to the foreign tax credits and other U.S. tax benefits arising out of the STARS transactions. As indicated previously, the foreign tax credits are based upon the payment of income taxes in effect by the Plaintiff to the U.K. Government. The Defendant opposes the Plaintiff's claims in large measure on the ground that the STARS transactions were without economic substance and were arranged to exploit U.S. tax rules in an unacceptable way. The testimony of Dr. LaRue would be proffered by the Defendant in support of this position.

The LaRue Report, his deposition and his Declaration set forth his detailed analysis of the various elements of the STARS transactions and a description of the cash flows resulting therefrom. The Plaintiff does not contest the arithmetic calculations set forth in the LaRue Report. However, Dr. LaRue's analysis in his Report leads to a number of conclusions that are sharply contested by the Plaintiff. They include:

1. That the effect was to create circular cash flows that were from a non-tax perspective, "economically meaningless."
2. That the U.S. Treasury funded 100 percent of the STARS benefits.
3. That the Plaintiff claimed a double U.S. tax benefit for certain

elements of the STARS transactions.

4. That there were no material non-tax economic effects from the formation and capitalization of the entities used in the STARS transactions.

These conclusions are offered, inter alia, in support of Dr. LaRue's overall view that the U.K. income taxes paid by the Trust (and which served as the basis for Plaintiff's entitlement to foreign tax credits) were "effectively rebated" to the Plaintiff as a result of the benefits provided by Barclays to the Plaintiff. The Defendants intends to proffer these conclusions and others in support of its overall position that the STARS transactions had no "economic substance" and that, therefore, the Plaintiff was not entitled to foreign tax credits in the United States or to other U.S. tax benefits arising from the transactions.

Application of the Standards of FRE 702

The Supreme Court has authorized the trial court to serve as an effective gatekeeper to avoid circumstances when the proffered expert testimony does not satisfy the standards of FRE 702.[8] The courts have, however, made it clear that this function is to be performed flexibly and is not intended to remove from the decision maker (a jury in this case) appropriate authority simply because the court

[8] Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).

prefers the views of one expert over the views of another.[9] Consequently, the question at this point is not to determine whether Dr. LaRue's disputed analyses and conclusions are correct. Rather, the question is whether the analysis and conclusions in his Report, deposition and Declaration come within the criteria set forth in FRE 702 so that he may proffer evidence as an expert witness (that can, of course, be challenged in cross-examination, by documentary evidence and by other witnesses).

Specific Bases for Plaintiff's Motion

As indicated earlier, the Plaintiff's suggestion that Dr. LaRue fails in general to satisfy the qualification requirements of FRE 702 is rejected. We turn now to the specific arguments offered in support of the motion to disqualify Dr. LaRue as an expert witness that arise from his Report, deposition and Declaration.

The Plaintiff asserts that Dr. LaRue's analysis is not based upon reliable principles and methods and that it ignores statutory, administrative and judicial authorities that are crucial to an understanding of the Plaintiff's entitlement to the foreign tax credits that it has claimed. As a result, the Plaintiff believes that any testimony by Dr. LaRue would not only be unhelpful, but is likely to confuse the jury. Finally, the Plaintiff contends that Dr. LaRue's conclusions, particularly the

[9] See Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1998).

view that an "effective rebate" of U.K income taxes was paid by Barclays to the Plaintiff so as to nullify the Plaintiff's entitlement to foreign tax credits, has no analytical basis and is in effect *ipse dixit* amounting to "pure advocacy."

The Defendant responds that Dr. LaRue is a well-respected expert in financial analysis, accounting and taxation and that his conclusions derive from an independent analysis that is based upon his extensive experience with the issues that are at the heart of this portion of the case.

Analysis of Plaintiff's Specific Challenges

The Parties agree that the contractual and financial arrangements taken together to implement the STARS transactions are quite complex. Moreover, although it is assumed that a great deal of evidence that has been accumulated through discovery thus far is not yet available to the court, there seems to be substantial agreement between the Parties about much of the factual substance of the contractual arrangements and the magnitude of various cash flows resulting from them in the sense of payments made and received by the Plaintiff and Barclays and the characterization of them by the Plaintiff and Barclays at the time they occurred.[10] The principal target of the Plaintiff's motion herein derives from the characterization of those financial consequences by Dr. LaRue.

[10] Hearing Transcript, page 53.

The Plaintiff's position is that income taxes were paid in effect by the Plaintiff to the United Kingdom and that such taxes are generally creditable for U.S. tax purposes. The Defendant does not contest this assertion.[11] While it is not the sole basis for this motion, a principal concern expressed by the Plaintiff is Dr. LaRue's characterization of financial benefits in the form of the relatively low-cost loan provided by Barclays Bank to the Plaintiff as an "effective rebate" of the U.K. income taxes back to the Plaintiff. As indicated previously, the Defendant cites this conclusion in support of its view that the STARS transactions do not have economic substance and must, therefore, be disregarded for U.S. income tax purposes. The Plaintiff asserts that the Defendant is using such an argument to substitute a legal theory for established law as reflected in the Code, Treasury regulations and judicial decisions.

The Plaintiff contends that Dr. LaRue's analysis and conclusions are inconsistent with applicable legal authority largely because it is focused on the incidence of the foreign income tax. It argues that Dr. LaRue's analysis that the Plaintiff "did not actually pay" the income tax to the U.K. government is inconsistent with the so-called "technical tax rule" established by the Supreme Court in Biddle v. Commissioner, 302 U.S. 573 (1938). In that frequently cited

[11] Hearing Transcript, pages 30-31.

case,[12] the Supreme Court held that a U.S. shareholder of a U.K. corporation was not entitled to a foreign tax credit even though the U.S. shareholder bore the incidence of U.K. income taxes paid by the U.K. corporation.

The Plaintiff also argues that the technical taxpayer rule has been ensconced in the regulations. Treas. Regs. §§ 1.901-2(f)(1)[13] and -2(f)(2)(i).[14] The Plaintiff notes as well that this line of analysis (emphasizing a technical tax approach) has in fact been asserted by the Government in other tax cases. See Doyon , Ltd. V. United States, 37 Fed. Cl. 10 (1996), rev'd 214 F. 3d 1309 (Fed.Cir. 2000). Taken together, the Plaintiff is asserting that Dr. LaRue's analysis is contrary to established law as reflected in the Code, regulations and judicial opinions.

The Defendant responds that neither the *Biddle* case nor the cited regulations clearly contravenes Dr. LaRue's charachtertization. In *Biddle,* the taxpayer was asserting entitlement for a foreign tax credit for taxes that he had not paid. The regulations speak to the same issue. In this case, the Plaintiff has paid a

---

[12] See, e.g., PPL Corp. v. Commissioner, U.S. Sup. Crt. No. 12-43, decided May 20, 2013, at page 4 of the Slip Opinion.

[13] "The person by whom tax is considered paid for purposes of sections 901 and 903 is the person on whom foreign law imposes legal liability for such tax . . . . [T]he person on whom foreign law imposes such liability is referred to as the 'taxpayer.'"

[14] "Tax is considered paid by the taxpayer even if another party to a direct or indirect transaction with the taxpayer agrees, as a part of the transaction, to assume the taxpayer's foreign tax liability."

U.K. income tax. The LaRue analysis will be proffered in support of the argument that foreign tax credits are not available *even though* the Plaintiff has paid foreign taxes. In other words, *Biddle* and the regulations support the proposition that no foreign tax credit is available if the taxpayer has not paid, directly or indirectly, foreign income taxes.[15] They do not support the proposition that entitlement to foreign tax credits deriving from actual payments by the taxpayer are immune from challenge when the transaction is without economic substance.

The Defendant denies that Dr. LaRue's analysis fails to take into account applicable statutory and regulatory standards and asserts that Dr. LaRue's analysis and expected testimony are appropriate reflections of the use of his experience and expertise that cannot be correctly characterized as advocacy. It notes that courts have on many occasions applied the economic substance test and other judicially created standards to deny tax benefits even when transactions have been designed

---

[15] Doyon, Ltd. V. United States involved an interpretation of the alternative minimum tax. The taxpayer, an Alaska Native Corporation, entered into permissible contracts in which it sold certain loss carryforwards for a percentage of the income taxes that would be saved by the other party in the transaction. The alternative minimum tax applies to income. The taxpayer argued that the payments received from the private party were effective rebates of income taxes that were not subject to the alternative minimum tax. The Government successfully argued that the payments were not tax rebates and noted that the income "was simply received as consideration from private parties . . . pursuant to a private contract, and unquestionably does not reflect any payment made to or imposed by the "Government." 39 Fed.Cl at 21. The issue was, however, not addressed by the Federal Circuit, which determined the case on other grounds. Doyon, Ltd. v. United States, 214 F. 3d 1309 (Fed.Cir 2000)

to fit within statutory rules.[16]

It seems clear that the technical tax rule must be satisfied for a taxpayer to enjoy foreign tax credits.[17] However, that interpretation does not serve to deny the possible applicability of an economic substance standard in some cases where the taxpayer has actually paid the foreign tax in question. Thus, the technical tax rule does not itself nullify the potential viability of Dr. LaRue's analysis and conclusions.

The Plaintiff argues further that the Congress and Treasury have considered and determined when foreign tax credits otherwise available are to be denied because a subsidy has been provided by the foreign government. Code § 901(i) and Regs §§ 1.901-2(e)(3)(ii) and -2(e)(3)(i)(A). These provisions and a number of judicial decisions make it clear that foreign tax credits are not available when the taxpayer or other party to the transaction has received a benefit that should be regarded as a subsidy from the foreign government in return for the tax payment.

---

[16] Defendant's Memorandum in opposition to the motion, pages 11 et seq.

[17] The technical tax requirement can be satisfied in some circumstances even though the taxpayer itself does not pay the foreign tax. For example, in international lending transactions, a borrower may be required to pay any withholding taxes imposed on interest payments by the borrower's country so that the lender receives payments net of the withholding tax. The lender is the foreign taxpayer in such circumstances, and the withholding tax is likely to be creditable even though the lender did not actually pay it. See, e.g., Riggs National Corp. V. Commissioner, 295 F.3d 16 (D.C. Cir. 2002).

However, because the U.K. government has provided no subsidy to the Plaintiff, these provisions do not apply in this case. Therefore, the Plaintiff argues that it would be unfair and inappropriate to invoke the subsidy analysis with respect to the STARS transactions.

The Defendant responds that these regulations are not even relevant to an analysis of this case because it is not contending that the Plaintiff received a subsidy from the U.K. Government. As a result, the Defendant contends that it would be inappropriate to infer that the Congress and Treasury (through the subsidy regulations) have determined that the transactions undertaken in the STARS situation are clearly safe from challenge on the grounds asserted here.

Unless a contention is raised here that there is a subsidy present in the STARS transaction that denies the availability of foreign tax credits to the Plaintiff, the subsidy analysis does not appear to apply to this motion.

As indicated previously, Dr. LaRue's conclusions are based in part upon the proposition that taxes paid in effect by the Plaintiff have been rebated by Barclays as part of tax benefits provided by the U.K. Government. The Plaintiff argues that Barclays was obligated to provide benefits to the Plaintiff in the form of low-interest loans even if it had not enjoyed any tax benefits in the U.K. The Plaintiff vigorously contends that Dr. LaRue's analysis, as reflected in his deposition, is

particularly unreliable because of his conclusion that an "effective rebate" would still obtain even if Barclays' U.K. tax advantages had not materialized. Put simply, the Plaintiff argues that the "effective rebate" conclusion could not possibly be sustained in such an event because there would be no taxes to rebate. The Plaintiff asserts that this conclusion demonstrates that Dr. LaRue's conclusions are "so fundamentally unsupported that it can offer no assistance to the jury [that] it must be excluded," a formulation used in a decision of the Court of Appeals for the 8th Circuit.[18]

Dr. LaRue has in fact responded in different ways as to whether the rebate analysis would apply if Barclays had not enjoyed U.K. tax benefits, but finally concludes that it would not be affected.[19] The Plaintiff emphasizes with respect to this issue that Dr. LaRue corrected a number of admitted mistakes in his deposition, further suggesting that the validity of his analysis and conclusions were clearly dubious.[20]

First, the Defendant argues that the corrections made by Dr. LaRue in the final verison of his deposition are specifically authorized by the Federal Rule of

---

[18] Nebraska Plastics, Inc. v. Holland Colors Americas, Inc. 408 F.3d 410 (8th Cir. 2005).

[19] Hearing Transcript, pages 22 et seq.

[20] Plaintiff Memorandum in support of Motion, Exhibit 3; Hearing Transcript, page 82 et seq.

Civil Procedure 30(e)(1)(B), that it would be wrong for him to fail to make necessary corrections to his testimony and that the corrections are not a basis for disqualifying him as an expert witness.

Secondly, The Defendant argues that the basis for Dr. LaRue's reference to an "effective rebate" derives from the perspective that he brought to bear in his report. That is to say, Dr. LaRue was analyzing the transaction as it appeared to be at the time of its establishment (referred to repeatedly in Defendant's submissions as an "*ex ante*" analysis). From that perspective the possibility that U.K. tax benefits would be unavailable to Barclays was viewed as a "remote possibility" and was not an important factor in the analysis, particularly as the treasury of the U.K. Government enjoyed a net benefit from the transactions. Further, if Barclays did not obtain the benefits contemplated from the structure of the transactions, it was entitled to terminate the arrangement on fairly short notice.

The impact of the possibility that U.K. tax benefits would be denied and that Barclays would nevertheless continue to make payments to the Plaintiff is certainly appropriate for argument at trial. It is assumed that the Plaintiff's expert witness will have a contrary view. However, in the context of the STARS agreements, Dr. LaRue's conclusion should not be regarded as disqualifying him from testifying as an expert witness.

Finally, the Plaintiff contends that Dr. LaRue's conclusions are simply conclusory, i.e., *ipse dixit* and "nothing more than advocacy." If so, they should be rejected under the authority of the Supreme Court decision in Gen. Elec. Co. v. Joiner: " . . .nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytic gap between the data and opinion proffered."[21]

The Defendant contends that the bases for Dr. LaRue's conclusions are adequately reflected in the Report, deposition and Declaration, which tend to focus on the timing of the various financial transactions and the relationships among the U.K. taxes paid and the calculation of the benefits provided by Barclays to the Plaintiff.

The Defendant opposes the motion directed to Dr. LaRue's participation as an expert witness on the ground that all of the requirements of FRE 702 have been satisfied. It emphasizes that Dr. LaRue, as an expert witness, has not been asked to render and has not purported to render a legal opinion. Rather, he has simply analyzed transactional consequences from a factual perspective. That analysis is based upon his expertise and experience in finance, accounting and taxation and

---

[21] 522 U.S. 136 (1997) at 146.

is, therefore, consistent with the role of expert witnesses in complex litigation and clearly satisfies all of the elements of FRE 702. The Defendant notes that the terms "rebate" and "effective rebate" are not legal conclusions, but simply a way of articulating Dr. LaRue's views about the cash flow effect of the transactions involved.

The Defendant argues further that the Plaintiff's position effectively rejects the applicability of the economic substance doctrine as it has evolved over the years and emphasizes that Dr. LaRue's analysis (which includes an extensive explanation of financial flows that has not been challenged by the Plaintiff) has much more substance than the conclusion that there was a "rebate" or "effective rebate" of U.K. income taxes paid by the Plaintiff.

Analytical Framework

Defendant's Counsel argues generally that, because there are other individuals that it intends to offer as expert witnesses who use similar forms of analysis, the motion here under consideration is in effect a motion for partial summary judgment that would deny Defendant the ability to litigate the applicability of the economic substance doctrine. As such, the Defendant contends, the motion here under consideration asks the court to go beyond its proper gatekeeping role as defined by FRE 702 and as prescribed by the Supreme

Court decision in the *Daubert* case.[22] That view is not embraced by this decision, which is restricted to the criteria relevant to the motion under FRE 702 directed to the participation specifically of Dr. LaRue as an expert witness in this case.

The *Daubert* decision effectively charges trial courts with managing the use of expert witnesses to assure that qualified experts might assist in the determination of relevant factual questions and to assure that their testimony will not be confusing to fact-finders, particularly jurors who may have less experience with the issues in dispute. The Court of Appeals for the Eighth Circuit has on a number of occasions made it clear that the *Daubert* analysis is not intended to remove from the fact-finders issues about the credibility and effectiveness of expert opinion,[23] but has also affirmed the authority of a trial court to exercise discretionary authority to reject the proffer of expert testimony when its application of the FRE 702 criteria so warrants. [24]

As previously indicated, the question is whether Dr. LaRue is qualified and whether his analysis and testimony may be of value with respect to relevant issues in the case and to consider whether it would be so confusing as to impair the

---

[22] Hearing Transcript, pages 40-41.

[23] See, e.g., United States v. Finch, 630 F.3d 1057 (8th Cir. 2011).

[24] Nebraska Plastics, Inc. v. Holland Colors Americas, Inc., 408 F.3d 410 (8th Cir. 2005).

validity of the fact-finding process or prejudice the Plaintiff in an unacceptable way. The Court of Appeals for the Eighth Circuit explained the task of the trial court in this way:

> "Neither Rule 702 nor *Daubert . . . permits a district court to invade the province of the jury. Rule 702 does not permit* a judge to weigh conflicting expert testimony, admit the testimony that he or she personally believes, and exclude the testimony that he or she does not personally believe. Nor does Rule 702 permit a judge to exclude expert testimony just because it seems doubtful or tenuous. The Supreme Court has been clear about how infirmities in expert testimony should be exposed: '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.' [citing *Daubert*]."[25]

It should be noted that the specific challenges to Dr. LaRue's analysis and conclusions arise in a somewhat different context than in many other cases involving the application of FRE 702. In cases where truly scientific testimony is being proffered, it is common, indeed required, for the court to examine and

---

[25] Olson v. Ford Motor Company, 481 F.2d 619 (8th Cir. 2007).

evaluate in detail relevant scientific research and conflicting scientific authorities.[26] In this instance, Dr. LaRue has primarily analyzed the flow of payments arising from the STARS transactions, reached certain conclusions based upon that analysis and explained in general terms the rationale for his conclusions and characterizations. The arithmetic analysis, the conclusions and the characterizations are very complex, and the transactions are not likely to be familiar to many lay jurors. However, Dr. LaRue's analysis, conclusions and characterizations are not of the kind of scientific technicality that are likely to be beyond the ability of lay jurors to understand in the context of contrary evidence and argumentation and effective jury instructions.

Summary of Conclusions

Dr. LaRue's academic and professional experience qualify him as an expert by knowledge, skill, experience, training and education, as required by FRE 702.

Dr. LaRue's analysis and conclusions are clearly open to challenge by the

---

[26] See, e.g., Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)(effect of Benedicton on birth defects); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1998) (aspects of steel-belted radial tires; Weitz Company v. MH Washington, 631 F.3d 510 (8th Cir. 2011)(construction engineer in techniques); U.S. v. Finch, 630 F3d 1057 (8th Cir. 2010)(quantity of crack cocaine consumed during chemical laboratory testing); Polski v. Quigley Corporation, Doc No. 07-3350 (8h Cir., 2008)(techniques for applying nasal spray and probability of medical harm therefrom); Nebraska Plastics v. Holland Colors Americas, 408 F.3d 410 (8th Cir. 2005)(analysis of deterioration effects of colored fencing produced with calcium carbonate); Schober v. Coleman Company, Case No. 08-CV-5993 (D. Minn 2010) (design of space heater).

Plaintiff. However, an exhaustive consideration of the arguments and examination of the exhibits submitted by both sides in connection with this motion, and in particular the LaRue Report and his deposition, does not adequately support a decision at this time that his potential testimony cannot be helpful, that it would be excessively confusing to a jury, that the basis for his analysis so disregards relevant legal authority as to be absolutely incorrect in all respects or that it necessarily amounts to pure advocacy.

First, there are elements of Dr. LaRue's analyses that are not challenged. His work contains extensive arithmetic calculations of the payments and other financial transfers that were part of the STARS transactions and that would contribute to the jury's understanding of the elements of the arrangement.

Secondly, the kind of expertise reflected in Dr. LaRue's work does not require deep scientific knowledge to understand. Cash flow analysis may be complex, but the evidence with respect thereto and arguments about their consequences when presented effectively should be within the power of jurors to comprehend without undue confusion.

Thirdly, the principal target of this motion is the conclusion that the net effect of the transactions was to create an "effective rebate" of taxes paid by the Plaintiff. That term is used by Dr. LaRue to convey his view of the net effect of

the elements of the STARS transaction. It should be noted that "rebate" and "effective rebate" are not legally defined terms for these purposes. Dr. LaRue may assert his conclusion to the jury. The Plaintiff will likely argue, inter alia, that there can't possibly be a "rebate" from the U.K. Government to the Plaintiff in these circumstances where no payment from the U.K. Government to the Plaintiff has been made. Both sides will argue the characterization as part of their overall presentation with respect to the economic substance doctrine, and the jury will be in a position to consider the weight of competing expert testimony and other evidence. The Court of Appeals for the Eighth Circuit, in approving the exercise of discretion by a trial court to allow certain expert witness testimony, noted that the difference between ". . . a fact that bears more on the weight of . . . testimony, rather than the fundamental reliability of his analysis."[27] In this case, many of the arguments made by the Plaintiff in support of its motion seem more appropriately to address the weight of Dr. LaRue's potential testimony.

The Plaintiff contends that Dr. LaRue's conclusons are *ipse dixit*. However,

---

[27] The Weitz Company. V MH Washington, et al, 631 F.3d 510, 529 (2011)(citing *Daubert).* See also U.S. v. Finch, 630 F.3d 1057 (8th Cir. 2011), which quotes a number of decisions by the Circuit Court of Appeals for the 8th Circuit affirming the proposition that FRE 702 is not intended to replace the usual litigation processes of disputation unless the testimony of an expert witness is "so fundamentally unsupported that it can offer no assistance to the jury." (quoting Arkwrithy Mut. Ins. Co, 125 F3d 1176 at 1183(8th Cir. 1997) *cert denied,* 131 S.Ct 413 (2010)).

the bases for them are quite explicit as Dr. LaRue emphasizes the complex structure of the transactions and the timing of their implementation. His conclusions are not without doubt; but his reliance on timing and connectedness does not constitute "pure advocacy."

In this instance, much of the Plaintiff's challenge is appropriately directed to the weight of any evidence proffered by Dr. LaRue. Accordingly, the Plaintiff's motion asking for the exercise of discretion under the *Daubert* procedures to disqualify Dr. LaRue as an expert witness is denied.

It should be emphasized that the foregoing conclusions are necessarily based only upon the argumentation and materials presented to the court at this time. As the time for trial approaches, it is expected that further evidence will be developed with respect to the issues that are addressed by Dr. LaRue's report and potential testimony and the evidence proffered by other expert witnesses.

Order

A copy of the Order denying Plaintiff's Motion is being transmitted herewith.

Dated: June 14, 2013

Charles H. Gustafson
Special Master