No. 17-12042

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

SAM J. GOLDMAN,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida
No. 0:11-cv-61072-RNS
Hon. Robert N. Scola, Jr.

ANSWERING BRIEF OF THE FEDERAL TRADE COMMISSION

DAVID C. SHONKA
Acting General Counsel

JOEL MARCUS
Deputy General Counsel

MICHAEL BERGMAN
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-3184
mbergman@ftc.gov

Of Counsel:
MIRIAM R. LEDERER
Attorney

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

No. 17-12042, *FTC v. Sam Goldman* (11th Cir.)

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1-2, the Federal Trade Commission (FTC) certifies to the best of its knowledge that the following is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal:

American Precious Metals, LLC (APM) – Defendant

Bergman, Michael, D. – Attorney, FTC

Bolton, Barbara E. – Attorney, FTC

Brown, Dama J. – Director, Southwest Regional Office, FTC

Chase, David – Liquidating Receiver

Chriss, Sana Coleman – Attorney, FTC

Davis, Melissa – Partner, KapilaMukamal, LLP

Federal Trade Commission – Plaintiff-Appellee

Goldman, Rosalind – Defendant-Appellant Goldman's wife

Goldman, Sam J. – Defendant-Appellant

Global Asset Management Inc. – clearing firm for APM

KapilaMukamal, LLP – accounting firm retained by the Receiver and by the FTC

No. 17-12042, *FTC v. Sam Goldman* (11th Cir.)

Kirtz, Harold, E. – Attorney, FTC

Lederer, Miriam R. – Attorney, FTC

Levine Kellogg Lehman Schneider & Grossman LLP –
Law firm for the Liquidating Receiver

Marcus, Joel – Deputy General Counsel, FTC

Rengstl, Patrick J. – Former attorney for the Receiver

RJG Group Inc. – corporate entity controlled by Def.-App. Goldman

Rosenthal, Jonathan H. – Former attorney for Def.-App. Goldman

Rushing, Ernest – Defendant-Appellant Goldman's stepson

Schneider, Jeffery C. – Attorney for the Liquidating Receiver

Scola, Jr., Robert N. – United States District Judge

Shonka, David C. – Acting General Counsel, FTC

Sweetapple, Robert A. – Attorney for Defendant-Appellant Goldman

Sweetapple, Broeker & Varkas, P.L.– Law firm for Def.-App. Goldman

Tanner, Andrea – Defendant

Tanner, Jr., Harry R. – Defendant

Tanner Enterprises Group, Inc. – management company for APM

Varkas III, Alexander D. – Attorney for Defendant-Appellant Goldman

To the best of the FTC's knowledge, no publicly traded company or corporation has an interest in the outcome of this case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

The FTC does not believe that oral argument will materially assist the Court in its consideration of this appeal because the facts and legal arguments are adequately presented in the briefs such that the decisional process would not be significantly aided by argument. The FTC therefore does not request it.

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES*

* Cases and other authorities principally relied upon are marked with an asterisk.

STATE CONSTITUTIONS

STATUTES

RULES AND REGULATIONS

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1337(a), and 1345, and under 15 U.S.C. §§ 45(a), 53(b), and 1692*l*. The final post-judgment order now before the Court was entered on April 10, 2017, and Goldman timely appealed on May 2, 2017. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The FTC sued Goldman, his company American Precious Metals, and other defendants for violating the Federal Trade Commission Act and the FTC's Telemarketing Sales Rule by deceptively marketing a precious metals investment scheme. In 2012, the district court ordered Goldman to pay $24,372,491 in equitable monetary relief, but to date he has paid only a small fraction of that judgment. Instead, he has invested tainted proceeds derived from his deceptive scheme into his homestead. The FTC therefore asked the district court to place an equitable lien on the property for the amount of the money traceable to his fraudulent activities. The FTC's motion was supported by the declaration of an expert forensic accountant and other supporting materials. Goldman provided no evidence in response. In the order on appeal, the district court granted the FTC's motion and placed an equitable lien on Goldman's homestead.

The issues on appeal are:

1. Whether the district court properly admitted the declaration of the FTC's forensic accountant as expert testimony under Fed. R. Evid. 702 and 703;

2. Whether the FTC was required to provide Goldman with the materials supporting the expert's testimony;

3. Whether expenditures to "maintain" the homestead were properly included in the equitable lien placed on Goldman's homestead; and

4. Whether an evidentiary hearing was required where Goldman provided no evidence to rebut the FTC's expert's testimony.

STATEMENT OF THE CASE

Appellant Sam J. Goldman operated a deceptive precious metals investment scheme that bilked consumers out of more than $24 million. The FTC sued Goldman and his co-defendants to shut down the illegal enterprise and secure monetary redress for Goldman's victims. The parties settled, and in November 2012, the district court entered a final order against Goldman enjoining the scheme and ordering him to pay $24.4 million in equitable relief. By January 2017, due in no small part to Goldman's spending to support his lavish lifestyle, the FTC had been able to collect only a small portion of that judgment. The FTC learned, however, that Goldman had used money derived

from his investment scam to make payments on his house. Employing the services of an expert forensic accountant who analyzed Goldman's bank records, the FTC traced money from the investment scam to his homestead. It then asked the district court to place an equitable lien on Goldman's homestead for the amount of the tainted money. Goldman provided no evidence in response to the FTC's accountant's testimony, even though he sought and received additional time to prepare a response and had the opportunity to obtain records from the FTC. The district court imposed an equitable lien on Goldman's homestead, which he now appeals.

A. Goldman's deceptive scheme and the resulting judgment

In May 2011, the FTC sued American Precious Metals, LLC (APM) and two of its principals for operating a deceptive precious metals investment scheme in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the FTC's Telemarketing Sales Rule (TSR), 16 C.F.R. pt. 310. D.1 [App. 048-63].[1] The agency later amended the complaint to add Goldman as a defendant.

[1] "D.__" refers to entries on the district court docket by number. Page numbers for "D.__" entries refer to numbers in the ECF-added headers, where available. "App." refers to Goldman's Appendix. Because Goldman did not separately paginate his Appendix, the FTC refers to Appendix pages as indicated in the ECF-added headers. "FTC App." refers to the FTC's Supplemental Appendix provided pursuant to 11th Cir. R. 30-1(b). "Ex." refers to exhibits to the FTC's motion for an equitable lien on Goldman's homestead (D.339), and to exhibits to the supporting Declaration of Melissa Davis (D.339-4), as appropriate.

D.155 [App. 065- 81]. The FTC alleged that between June 2007 and May 2011, the defendants, through APM, promised consumers large profits from low-risk investments in precious metals. They failed to disclose, however, that they invested not in the precious metals themselves, but in risky, highly leveraged derivatives. Goldman and his co-defendants also failed to tell their victims that about 40% of the investment went straight into the defendants' pockets as fees or commissions. *Id*. at 5-15 ¶¶ 11-52 [App. 069-79].

Goldman decided not to contest the FTC's charges, and on November 16, 2012, the district court issued a Stipulated Final Judgment and Permanent Injunction as to Goldman ("Final Order"). D.300 [App. 098- 112]. Goldman "agree[d] that the facts" alleged in the amended complaint "were to be taken as true without further proof" in any subsequent collection proceeding. *Id*. at 8 § V.B. [App. 105]. The Final Order required Goldman (jointly and severally with his co-defendants) to pay $24,372,491 in equitable monetary relief. *Id*. at 6 § IV.A. [App. 103].

B. The FTC's motion for an equitable lien and the supporting testimony of its expert forensic accountant

By January 2017, the Commission had collected only $372,573.79—less than two percent of the judgment. D.339 at 2 n.1 [App. 115]. Goldman and his wife had dissipated much of the money due consumers through their lavish

lifestyle, including vacations, expensive clothes, and casino visits. D.339-1 (Ex. 1, Goldman dep.) at 21 (133:8-11); *id*. at 22 (141:9-13); *id*. at 28 (181:22-184:24); *id.* at 32 (246:3-7) [App. 154-55, 161, 165]. To track down Goldman's assets, the FTC obtained his bank records and had them analyzed by an expert forensic accountant, Melissa Davis. Her analysis showed that Goldman attempted to shield his fraudulently obtained assets by investing money in his $1.5 million house in Delray Beach, Florida. D.339-4 at 4-12 ¶¶ 16-50; D.339 at 2 [App. 115, 198-206].

On January 6, 2017, to help collect on its judgment, the FTC asked the district court to place an equitable lien on Goldman's homestead and force its sale. D.339 [App. 114-32]. The FTC showed that Goldman had used money derived from the APM scheme to purchase, invest in, or improve his homestead. *Id*. Under long-established law, such evasion justified a lien.

The FTC supported its motion with the declaration and supporting exhibits of its expert forensic accountant Davis, D.339-4 [App. 194-335], as well as deposition transcripts of Goldman and his two co-defendants. D.339-1 (Ex. 1, Goldman dep.) [App. 133-66]; D.339-2 (Ex. 2, Harry R. Tanner, Jr. dep.) [App. 167-78]; D.339-3 (Ex. 3, Andrea Tanner dep.) [App. 179-90]. Davis, who is a Certified Public Accountant and a Certified Fraud Examiner and has testified on financial fraud and asset tracing issues in many cases, was

initially hired by the court-appointed Receiver to reconstruct the accounts of the fraudulent APM business. She reviewed Goldman's bank records and traced deposits from three entities connected with the APM scheme, through multiple bank accounts Goldman controlled, to payments Goldman made on his homestead. D.339-4 at 1-12 [App. 195-206].

Ms. Davis's Declaration described how she reviewed and analyzed Goldman's bank accounts on a consolidated basis, an accounting principle permitted by Florida courts when fraudulent money has flowed through various accounts under the control of one person. *Id*. at 6-7 ¶¶ 23-29 [App. 200-01]. She also determined that Goldman commingled "dirty money" from the APM scheme with "clean money" from other sources. She then applied two well-accepted and reliable tracing principles—the "lowest intermediate balance rule" and the "replenishment rule"—to trace money from the APM scheme, through Goldman's commingled bank accounts, to his house payments. *Id*. at 7-12 ¶¶ 30-49 [App. 201-06]. Both rules are described in greater detail at pp. 19-21 below and allow an accountant to trace funds in commingled accounts to determine how much tainted money was ultimately paid to a particular source. After conducting the analysis, Ms. Davis concluded that Goldman used $428,604.95 of APM-derived funds to pay down his mortgage and invest in his homestead. *Id*. at 12 ¶ 50 [App. 206]; D.339-4 at 141 (Ex. I at 88) [App. 335].

Goldman did not respond immediately to the FTC's motion. Instead, he requested additional time to allow him to retain his own forensic accountant and to prepare affidavits and documents to rebut Ms. Davis's testimony. *See* D.346/347 at 2-3 ¶ 8 [FTC App. 04-06]; D.351 at 2 ¶ 7 [FTC App. 14]. The district court granted Goldman 32 additional days to respond, D.350, D.353, D.354, but although Goldman ultimately opposed the FTC's motion, he never provided any factual evidence or an expert opinion that disputed the FTC's Davis Declaration. *See* D.355 [App. 337-55].

C. The Order on review

On April 10, 2017, the district court granted the FTC's motion and placed an equitable lien on Goldman's house. D.357 [App. 357-66]. First, based on Goldman's agreement not to contest the facts alleged in the FTC's underlying complaint, the court found that the APM scheme was fraudulent, that its victims lost more than $24 million, and that Goldman played a central role in the fraud. *Id.* at 2 [App. 358].

Next, the court determined that Goldman's undisputed bank records showed that he had invested in, purchased, or improved his homestead with funds traceable to the APM scheme. *Id*. at 3 [App. 359]. Although Goldman had commingled tainted funds from the fraudulent APM scheme with funds from other sources, the court relied on the Davis Declaration and supporting

materials, and applied recognized legal presumptions to trace fraudulently obtained funds to his commingled bank accounts and then to payments for his homestead. *Id.* The court noted that Goldman had failed to identify any flaw in Ms. Davis's analysis and had provided no evidence that rebutted Ms. Davis's Declaration, even though the court had granted him additional time to prepare such materials. *Id*. at 3-4 [App. 359-60].

Under well-established Florida law, the district court explained, that record justified an equitable lien on Goldman's homestead. *Id*. at 1, 3-5 (citing *In re Financial Federated Title and Trust, Inc.*, 347 F.3d 880, 887-88 (11th Cir. 2003) (per curiam); *Palm Beach Sav. & Loan Ass'n, F.S.A. v. Fishbein*, 619 So. 2d 267, 270 (Fla. 1993)) [App. 357, 359-61].

The court denied Goldman's request for an evidentiary hearing on fund tracing because Goldman had failed to show there were any material factual disputes that required a hearing. *Id*. at 4 [App. 360]. The court also rejected as legally unfounded Goldman's argument that the FTC improperly included in its tracing analysis funds used to "maintain" (as opposed to "improve") his homestead. *Id*. The court concluded that Goldman had used $428,604.95 from the APM scheme "for the investment, purchase or improvement of his homestead," imposed an equitable lien in that amount on his homestead, and

appointed a Liquidating Receiver to sell the property and collect its proceeds. *Id*. at 3, 5-8 [App. 359, 361-64]. This appeal followed.

SUMMARY OF THE ARGUMENT

Goldman's case rests almost entirely on the mistaken premise that the Davis Declaration was a "summary, chart, or calculation" under Federal Rule of Evidence 1006. He devotes the vast bulk of his brief to arguments that the district court improperly considered the Declaration and its supporting materials under that rule. In reality, the Davis Declaration was expert testimony governed by Rules 702 and 703, which Goldman does not address. His arguments are thus largely beside the point. The district court properly considered the Declaration under the evidentiary rules governing expert testimony. Goldman has identified no error in the district court's judgment.

1. The Davis Declaration was offered and admitted as expert testimony under Fed. R. Evid. 702 and 703, not as a summary under Fed. R. Evid. 1006. The Declaration bears every hallmark of an expert report: it provides Ms. Davis's qualifications, a summary of the data on which she relied, and a description of the methodologies she used to conduct her analysis. After the FTC submitted it, Goldman then asked for additional time to hire his own forensic accountant to rebut Ms. Davis's Declaration. Because the Davis Declaration was an expert report, Goldman's argument that it was inadmissible

hearsay is misplaced. Under Fed. R. Evid. 703, an expert may properly rely on hearsay to form an opinion. In any event, the materials on which Ms. Davis principally relied—Goldman's own bank records—were admissible under Fed. R. Evid. 803(6) as business records.

2. The district court properly admitted Ms. Davis's Declaration and its supporting materials as expert testimony under Fed. R. Evid. 702 and 703. Ms. Davis's expertise, knowledge and education qualified her to testify as an expert; Goldman does not challenge her credentials. Her methodology has been accepted repeatedly by courts; Goldman does not contend otherwise. Ms. Davis assisted the district court to understand how Goldman's bank records showed that he used tainted money from the APM scheme to pay for his house; Goldman offers no response.

3. Goldman is wrong that the FTC improperly failed to provide him with Ms. Davis's source materials, a requirement under Rule 1006. There is no production obligation under Rule 702, which permits an expert report to be admitted if experts in the field rely on the same evidence to form an opinion. The FTC complied with its expert testimony discovery obligations by identifying Ms. Davis and providing her Declaration and its exhibits. Even if the rules did require disclosures of all background materials, there is no harm here because Ms. Davis principally relied on Goldman's own bank records. He

presumably had access to them. If he no longer did, he could have asked the FTC, or his banks, for the records, but never did.

4. Goldman is wrong that the lien could not lawfully include money spent by Goldman to "maintain"—as opposed to "improve"—his homestead. The law is plainly otherwise.

5. The district court properly declined to hold an evidentiary hearing on the amount of the equitable lien. Because Goldman did not contradict Ms. Davis's tracing analysis, there was nothing to hold a hearing about.

STANDARD OF REVIEW

The Court reviews evidentiary rulings regarding the admission of expert testimony for abuse of discretion, requiring reversal only where the ruling is "manifestly erroneous." *Adams v. Lab. Corp. of America*, 760 F.3d 1322, 1327 (11th Cir. 2014) (per curiam) (citations omitted). The Court reviews a district court's decision whether to hold an evidentiary hearing for abuse of discretion. *United States v. Kapordelis*, 569 F.3d 1291, 1308 (11th Cir. 2009) (citing *United States v. Arbolaez*, 450 F.3d 1283, 1293 (11th Cir. 2006)). The Court reviews the district court's factual findings for clear error and its application of law to facts *de novo*. *FTC v. Washington Data Res., Inc.*, 704 F.3d 1323, 1326 (11th Cir. 2013) (citing *CFTC v. Wilshire Inv. Mgmt.*, 531 F.3d 1339, 1343 (11th Cir. 2008)).

ARGUMENT

Florida law permits an equitable lien on a homestead where the plaintiff shows: (1) the existence of fraudulent or egregious conduct and (2) the tracing of funds from that conduct to the purchase, investment in, or improvement of the homestead.[2] Once a lien is imposed, the property can be sold and its proceeds collected.[3] Goldman disputes none of this. In particular, he does not dispute that he spent fraudulently obtained funds on his homestead or that the district court properly placed a lien on the property. He raises only a narrow challenge to the amount of the lien.

The district court's decision to impose an equitable lien in the amount of $428,604.95 on Goldman's homestead fell squarely within its broad discretion and should be affirmed. The court relied on the expert testimony of the FTC's forensic accountant, who used Goldman's own bank records and applied well-recognized accounting and tracing principles to trace moneys from the fraudulent APM scheme to payments on his homestead. In response, Goldman

[2] *See, e.g.*, *Havoco of America, Ltd. v. Hill*, 790 So. 2d 1018, 1028 (Fla. 2001); *Fishbein*, 619 So. 2d at 270-71; *Jones v. Carpenter*, 106 So. 127, 130 (Fla. 1925); *In re Hecker*, 264 F. App'x. 786, 791 (11th Cir. 2008); *Fin. Federated Title & Trust*, 347 F.3d at 887-88.

[3] *SEC v. Kirkland*, No. 6:06-cv-183, 2008 WL 1787234, at *5 (M.D. Fla. Apr. 11, 2008) (citing *Jones*, 106 So. at 129).

offered no evidence to rebut her findings. Goldman provides no good reason to question the district court's order.

I. THE DAVIS DECLARATION WAS OFFERED AND ADMITTED AS EXPERT TESTIMONY UNDER RULES OF EVIDENCE 702 AND 703, NOT AS A SUMMARY UNDER RULE 1006

Goldman devotes much of his brief to the argument that the Davis Declaration was "inadmissible hearsay" that did not satisfy the admission requirements for "summaries" offered under Fed. R. Evid. 1006.[4] Br. 7-9. The argument rests on the false premise that the Declaration was offered and admitted as a summary under that rule. In fact, it was offered and admitted as expert testimony under Fed. R. Evid. 702 and 703.[5] Unlike a summary, expert

---

[4] Rule 1006, titled "Summaries to Prove Content," provides that a:

> proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time or place. And the court may order the proponent to produce them in court.

Rule 1006 permits summaries to be admitted to prove the content of its voluminous source documents, but only if those source documents themselves are admissible. *See Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1159-60 (11th Cir. 2004).

[5] Rule 702, titled "Testimony by Expert Witnesses," provides that:

> 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:

testimony may rely on hearsay. As a result, Goldman's arguments are beside the point.

The Davis Declaration was plainly an expert report, as Goldman clearly understood. The FTC described Ms. Davis as "a forensic accountant who specializes in forensic investigation" who "conducted the tracing analysis" of Goldman's accounts "[u]sing well-accepted accounting principles and legal presumptions." D.339 at 6, 8 [App. 119, 121]. That is a classic description of expert testimony.

In addition, the FTC provided all the information needed both to admit the Davis Declaration as expert testimony under Fed. R. Evid. 702 and 703, and to satisfy its discovery disclosure obligations governing expert testimony

---

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

Rule 703 is described in n. 8, below. The proponent of expert testimony must establish its admissibility by a preponderance of the evidence. *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1256 (11th Cir. 2002) (citations omitted).

under Fed. R. Civ. P. 26(a)(2).[6] Ms. Davis's Declaration is a "written report" detailing (1) her "qualifications" to conduct "forensic accounting investigation services," including her "expertise" in this area and cases in which she had testified as an "expert witness"; (2) "documents and information" upon which she relied; and (3) the "methodologies and assumptions" she employed in her analysis. *See* D.339-4 at 1-4 ¶¶ 1-15; *id*. at 13-15 (Ex. A); *id*. at 16-18 (Ex. B); *id*. at 19-21 (Ex. C); *id*. at 22-23 (Ex. D) [App. 195-98, 207-09, 210-12, 213-15, 216-17]. At no point did the FTC describe the Declaration as a summary.

Goldman clearly understood the Davis Declaration as an expert report. He asked the district court for an extension of time to "hire his own forensic accountant to rebut the FTC's forensic accountant's report." D.346/347 at 2-3

---

[6] Rule 26(a)(2) provides that a party that intends to provide expert testimony under Fed. R. Evid. 702 or 703, must provide (unless otherwise stipulated or ordered by the court) a "written report" that contains:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

¶ 8 [FTC App. 05-06]. When Goldman asked for a second extension, the FTC opposed it on the ground that by that point "no *expert* has been hired, nor is such a hire imminent." D.352 at 2 (emphasis added) [FTC App. 22]. And when Goldman challenged the admissibility of the Declaration as a "self-serving summary," D.355 at 10-11 [App. 346-47], the FTC made clear in response that it sought admission of the Declaration as expert testimony. D.356 at 2-3 [FTC App. 25-26].

The district court likewise characterized the Davis Declaration in terms classically descriptive of an expert report. It determined that the Declaration "explains her findings and [tracing] methodology and provides supporting documentation." D.357 at 3 [App. 359]. It described how Ms. Davis applied Florida tracing law to show how money flowed from the APM scam to Goldman's bank records to his homestead payments. *Id*. The court never referred to the Declaration as a "summary."

II. THE DAVIS DECLARATION SATISFIED RULE 702

Because Goldman's challenge mischaracterizes the Davis Declaration as a summary, his brief does not challenge, or even address, the admissibility of the Declaration as an expert report. Nor did he oppose the admission of the Declaration on that ground below. Goldman thus has waived any challenge to the Davis Declaration as an expert report. *SunAmerica Corp. v. Sun Life Assur.*

Co. of Canada, 77 F.3d 1325, 1333 (11th Cir. 1996) ("[A]n argument not made is waived.") (citations omitted). Nonetheless, the district court properly admitted the Declaration.

This Court reviews the admissibility of expert testimony pursuant to Fed. R. Evid. 702 under a three-part test that assesses whether:

> (1) the expert is qualified to testify competently regarding the matters she intends to address;
>
> (2) the methodology by which the expert reaches her conclusions is sufficiently reliable; and
>
> (3) the testimony assists the trier of fact to understand the evidence or to determine a fact in issue.

Knight through Kerr v. Miami-Dade Cty., 856 F.3d 795, 808 (11th Cir. 2017) (citing *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (en banc)); *Adams*, 760 F.3d at 1328. The Davis Declaration met all those requirements for admission.[7]

Qualifications. Ms. Davis was plainly qualified to provide expert testimony. Her Declaration showed that she had the "knowledge, skill, experience, training, or education" to address asset tracing. Fed. R. Evid. 702; *Knight through Kerr*, 856 F.3d at 808 (citing *Frazier*, 387 F.3d at 1261). She is a Certified Public Accountant and a Certified Fraud Examiner, with extensive

[7] Ms. Davis attested to the truth of her Declaration, which under 28 U.S.C. § 1746 has the same effect as a sworn declaration. D.339-4 at 1 [App. 195].

experience conducting forensic accounting investigations, including asset tracing. She has provided expert testimony on this subject numerous times and has written and spoken publicly about it as well. D.339-4 at 1-2 ¶¶ 1-4; *id*. at 14-15 (Ex. A); *id.* at 17-18 (Ex. B) [App. 195-96, 208-09, 211-12].

Methodology. Ms. Davis's tracing of Goldman's assets was "based on a widely accepted methodology" and grounded in the evidence. *United Fire & Cas. Co. v. Whirlpool Corp.*, 704 F.3d 1338, 1342 (11th Cir. 2013). Goldman deposited more than $2.6 million from the APM scheme, through APM's management company and clearing firm and a related individual, into different bank accounts he controlled. *See* D.357 at 3 [App. 359]; D.339-1 (Ex. 1) at 5 (14:21-16:8); *id*. at 6 (20:7-13); *id*. at 7 (22:1-24, 23:5-10); *id*. at 15 (76:8-25); *id*. at 19 (122:25-123:10); *id*. at 22-23 (144:16-145:3); *id*. at 24-25 (151:23-153:10); *id*. at 25-26 (156:1-157:8) [App. 138, 139, 140, 148, 152, 155-56, 157-58, 158-59]; D.339-2 (Ex. 2) at 4 (49:4-51:2); *id*. at 5 (71:9-13); *id*. at 6-7 (132:3-135:13); *id*. at 8-9 (162:16-165:23) [App. 171, 172, 173-74, 175-76]; D.339-3 (Ex. 3) at 6 (27:2-17) [App. 185]; D.339-4 at 5 ¶¶ 18-19 [App. 199]; *id*. at 38-46 (Ex. G) [App. 232-40]; *see generally* D.339 at 6-7 and nn.15-20 [App. 119-20]. He also deposited untainted money in those accounts, thus commingling the funds. D.339-4 at 5 ¶¶ 21-22 [App. 199]. Ms. Davis applied a well-established accounting principle where accounts are commonly owned, as

well as two reliable legal tracing rules, to trace dirty APM money to Goldman's bank accounts and then to his homestead payments. D.339-4 at 6-12 ¶¶ 23-50 [App. 200-06].

1. Ms. Davis properly reviewed and analyzed the Goldman accounts on a consolidated basis, meaning she consolidated all of the bank accounts into one database and eliminated all of the transfers between the Goldman accounts. She explained that this is "a more efficient method to trace money from outside sources, while preserving its accuracy." D.339-4 at 6-7 ¶¶ 23-29; *id*. at 20-21 (Ex. C); *id*. at 48-52 (Ex. H) [App. 200-01, 214-15, 242-46].

Reviewing and analyzing multiple accounts on a consolidated basis is a recognized and reliable accounting method applied by Florida courts when tainted money flows through multiple commonly owned accounts. *See, e.g.*, *In re Mazon*, 387 B.R. 641, 645-46 (M.D. Fla. 2008).

2. To trace the flow of money through the consolidated account, Ms. Davis applied two well-established legal tracing presumptions, both of which preserve fraudulently converted assets for the benefit of the fraud victims. *In re Hecker*, 316 B.R. 375, 387-88 (Bankr. S.D. Fla. 2004), *aff'd*, No. 9:05-cv-80181 (S.D. Fla. Nov. 16, 2006), *aff'd*, 264 F. App'x 786 (11th Cir. 2008).

First, she applied the "lowest intermediate balance rule." The rule presumes that untainted money is spent before tainted money. D.339-4 at 7-8

¶¶ 32-34 [App. 201-02]. Under that approach, the expert regards funds belonging to fraud victims as the last funds withdrawn from a commingled account. *Hecker*, 316 B.R. at 387 (citing cases); *Bethlehem Steel Corp. v. Tidwell*, 66 B.R. 932, 942 (M.D. Ga. 1986). Courts consistently recognize the rule "as an acceptable method" to trace money from fraudulent conduct in commingled accounts. *In re Lee*, No. 8:15-bk-01038, 2017 WL 2729808, at *6 and nn. 51-55 (Bankr. M.D. Fla. June 23, 2017) (collecting cases); *Hecker*, *supra*; *Tidwell*, *supra*; *Matter of Felton's Foodway, Inc.*, 49 B.R. 106, 108-09 (Bankr. M.D. Fla. 1985).

3. Ms. Davis also applied the "replenishment rule," which presumes that new money deposited into commingled accounts will be used first to replenish any tainted money wrongfully spent. D.339-4 at 9 ¶ 37 [App. 203]; *Hecker*, 316 B.R. at 387-88. Only after the "dirty money" balance is fully restored will any remaining funds from the deposit be deemed clean money. *Id*. This rule also has been recognized as a valid means of tracing funds in commingled accounts. *See, e.g.*, *Hecker*, 316 B.R. at 388; *Tidwell*, 66 B.R. at 942 ("When a trustee replenishes a commingled account which has fallen below the amount held in trust due to the trustee's invasion, the trustee is presumed to return the beneficiary's money first for the same reasons that we presume that the trustee would use his own money first when withdrawing from the account."). Using

the two rules together, Ms. Davis analyzed the flow of payments and explained how she traced tainted money through the accounts and into payments on Goldman's house. D.339-4 at 7-12 ¶¶ 30-50 [App. 201-06].

Not only were Ms. Davis's methods well-accepted ones, but "application of her extensive, relevant experience contributed to the reliability of her methodology." *Adams*, 760 F.3d at 1330.

Assisting the district court. Third, the Davis Declaration "assist[ed] the trier of fact through the application of expertise to understand the evidence or determine a fact in issue." *Adams*, 760 F.3d at 1328 (citing *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1335 (11th Cir. 2010)). Expert testimony assists the fact finder "if it concerns matters that are beyond the understanding of the average lay person." *Knight through Kerr*, 856 F.3d at 808 (citing *Frazier*, 387 F.3d at 1262). Tracing funds through multiple commingled accounts is beyond the understanding of ordinary people. Ms. Davis explained how she accomplished that feat and allowed the district court to understand the complex process—which was the key issue in the proceeding.

III. UNDER RULE 703, AN EXPERT MAY RELY ON OTHERWISE INADMISSIBLE EVIDENCE, AND THE DAVIS DECLARATION RELIED ON ADMISSIBLE EVIDENCE IN ANY EVENT

Goldman claims that the Davis Declaration was inadmissible on two grounds: because its supporting materials were inadmissible and because the

FTC did not make those materials available to him. Br. 7-11. Both arguments turn entirely on Goldman's erroneous theory that the Declaration was admitted as a summary under Rule 1006. Properly assessed as expert testimony, the Declaration suffers from neither purported flaw.

Rule 703 permits the admission of expert testimony that relies on underlying facts whether or not they would be admissible, so long as experts in the field would reasonably rely on the same type of data to render an opinion.[8] Even "hearsay testimony by experts is permitted if it is based upon the type of evidence reasonably relied upon by experts in the particular field." *United States v. Floyd*, 281 F.3d 1346, 1349 (11th Cir. 2002) (citing *United States v. Cox*, 696 F.2d 1294, 1297 (11th Cir.1983)). The Davis Declaration primarily relies on Goldman's own bank records, as well as his deposition testimony, to trace tainted funds to his homestead. D.339-4 at 3 ¶ 13; *id*. at 20-21 (Ex. C); *id*. at 23 (Ex. D) [App. 197, 214-15, 217]. In other cases, forensic accounting

[8] Rule 703 ("Bases of an Expert's Opinion Testimony") provides that:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

experts have relied on the same kinds of evidence to conduct the very types of analyses conducted here. *See Mazon*, 387 B.R. at 645-46.

In any event, however, the Davis Declaration *is* based on evidence that is fully admissible: Goldman's bank records and deposition testimony. The bank records meet all the requirements of the business records exception to the hearsay rule, Fed. R. Evid. 803(6).[9] *See United States v. Langford*, 647 F.3d 1309, 1326-27 (11th Cir. 2011) (affirming admission of bank records under Rule 803(6)). His deposition testimony likewise is admissible as a non-hearsay

[9] Rule 803(6) ("Records of a Regularly Conducted Activity") provides that:

> A record of an act, event, condition, opinion, or diagnosis [is not excluded by the hearsay rule] if:
>
> (A) the record was made at or near the time by – or from information transmitted by – someone with knowledge;
>
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
>
> (C) making the record was a regular practice of that activity;
>
> (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
>
> (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

opposing party statement under Fed. R. Evid. 801(d)(2)(A).[10] *See United States v. Veltman*, 6 F.3d 1483, 1499-1500 (11th Cir. 1993) (defendant's deposition properly admitted in a later related proceeding under Rule 801(d)(2)(A)).

For similar reasons, Goldman is also wrong that the Davis Declaration was inadmissible because the FTC did not provide him with the underlying documents. Br. 9-11. At the outset, the argument is waived because Goldman failed to raise it below. *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004) (citation omitted).[11] It fails on the merits in any event.

Expert testimony does *not* implicate the affirmative obligation to produce source materials as Goldman suggests is required under Rule 1006. Rather, expert testimony is subject to the disclosure obligations of Fed. R. Civ. P. 26(a)(2), which requires only the identification of the proposed witness and her "written report," which consists of (1) her qualifications, opinions and the bases for them; (2) the facts or data she considered; and (3) supporting exhibits. The FTC fully complied with Rule 26(a)(2) by identifying Ms. Davis

[10] Rule 801(d)(2)(A) provides that a statement made by a party that is offered against that party is not hearsay.

[11] Although Goldman argued he had the "right" to inspect or make copies of those materials, D.355 at 11 [App. 347], he never argued that the FTC's supposed failure to produce the documents barred the admission of Ms. Davis's Declaration.

and providing her Declaration and exhibits. D.339-4 at 1-12; *id.* at 13-141 (Exs. A-I) [App. 195-206, 207-335]. Those disclosures adequately allowed Goldman to depose Ms. Davis or to prepare his own expert report. *See Brown v. NCL (Bahamas) Ltd.*, 190 F. Supp. 3d 1136, 1141-42 (S.D. Fla. 2016) (citing *Reese v. Herbert*, 527 F.3d 1253, 1265 (11th Cir. 2008)); Fed. R. Civ. P. 26(b)(4)(A)(expert deposition to be taken after report is provided).

Goldman never sought to depose Ms. Davis, nor did he hire his own expert accountant. He also did not ask for any of the materials supporting Ms. Davis's testimony. This was so even though he was well aware of the materials upon which Ms. Davis relied, *see* D.339-4 at 3 ¶ 13; *id*. at 19-21 (Ex. C); *id*. at 22-23 (Ex. D) [App. 197, 213-15, 216-17],[12] which consisted of *his own bank records and deposition testimony*, which he presumably had. If he no longer had them, he had only to ask the FTC for them, but he did not.

Contrary to his suggestion, Br. 10, the FTC had no obligation to produce the materials Ms. Davis considered in forming her opinion without a document request. *See* Fed. R. Civ. P. 34(a) (obligation to produce documents triggered by document request). Having failed to take the simple step of asking the FTC for the bank records and deposition testimony upon which Ms. Davis relied—

[12] In fact, Goldman knew about the supporting materials *before* the case was even filed. Pursuant to S.D. Fl. Local Rule 7.1(a)(3), FTC staff and Goldman's current counsel conferred *three times* before the case was filed to discuss the FTC's motion and its factual and legal support. *See* D.345 at 1 [FTC App. 01].

even after having received more than a month of additional time to prepare his own factual submissions and expert report—he has shown no ground for error.

IV. FLORIDA LAW ALLOWS AN EQUITABLE LIEN TO INCLUDE "MAINTENANCE" EXPENSES

Goldman contends that the district court's lien improperly includes payments Goldman made to "maintain" his homestead. The argument is that in *Havoco*, 790 So. 2d at 1028, the Florida Supreme Court held that only money used to "improve" a homestead may be counted in an equitable lien, but money used to "maintain" the homestead may not be counted. Br. 13-15. That case does not support Goldman's argument.

Havoco held that a court may impose an equitable lien where "funds obtained through fraud or egregious conduct were used to invest in, purchase, or improve the homestead." 790 So. 2d at 1028. The court recognized that the lien generally covers situations that "fell within one of the three stated exceptions to the homestead provision," namely "the payment of taxes and assessments" on the property, "obligations contracted for the purchase, improvement or repair" on the property, and "obligations contracted for house, field or other labor performed on the realty." *Id*. at 1020, 1027 (citing Fla. Const. art. X, § 4(a)(1); *Butterworth v. Caggiano*, 605 So. 2d 56, 60 n.5 (Fla. 1992)). *Havoco*—and the homestead provision itself—thus rebut Goldman's argument that "maintenance" expenses cannot be included in an equitable lien.

Indeed, Goldman defines "maintenance" to include "general repair[s]," Br.13, but payments for "repair[s]" are expressly exempt from homestead protection under *Havoco* and the Florida Constitution. Beyond that, he provides no meaningful way to distinguish between "maintenance" expenses and others "for the purchase, improvement or repair," or "for house, field, or other labor performed on the realty." Fla. Const. art. X, § 4(a)(1).

Under *Havoco* (and the cases it relied on) and its progeny, the district court properly included in the scope of the lien Goldman's mortgage payments; property taxes; homeowner's insurance premiums; homeowner association fees; and expenses for utilities, lawn care, landscaping, pool, and air conditioning services. *See* D.339-4 at 4-5 ¶¶ 16-17; *id*. at 24-30 (Ex. E); *id*. at 31-37 (Ex. F) [App. 198-99, 218-24, 225-31]. Every one of these payments falls comfortably within the permissible scope of an equitable lien as approved by Florida courts. For example, in *Sonneman v. Tuszynski*, 191 So. 18, 19-21 (Fla. 1939), the Florida Supreme Court approved an equitable lien on the defendant's homestead consisting of money the plaintiff advanced to the defendant, and for labor and services she performed for him, including cooking, housecleaning, and landscaping. *Fishbein*, 619 So. 2d at 268-71, affirmed an equitable lien where fraudulently obtained funds were used to pay preexisting mortgages and property taxes on the homestead. *Jones*,106 So. at

128-30, allowed an equitable lien where fraudulently obtained money was used to paint and repair the roof of the homestead. *See also Kirkland*, 2008 WL 1787234, at *1, *3-5 (equitable lien imposed where tainted money used to "purchase and *maintain*" the homestead, including mortgage payments, homeowners' insurance and association fees, and other home service payments) (emphasis added).[13]

We are aware of no case that has excluded "maintenance" fees as such from an equitable lien. Contrary to Goldman's assertion, Br. 14, *Mazon* did no such thing. There, the court approved an equitable lien that covered fraudulently obtained funds that "were used in connection with the [homestead]." 387 B.R. at 645.

[13] Florida courts similarly have imposed equitable liens on properties, without discussing the homestead exemption, based on payments identical or similar to those made by Goldman. *See*, *e.g.*, *Fernandez-Fox v. Reyes*, 79 So. 3d 895, 896 (Fla. Dist. Ct. App. 5th Dist. 2012) (affirming equitable lien imposed on property based on payments for "maintenance, taxes, and mortgage"); *Della Ratta v. Della Ratta*, 927 So. 2d 1055, 1057-61 (Fla. Dist. Ct. App. 4th Dist. 2006) (complaint stated a cause of action for an equitable lien to reimburse plaintiff for paying real estate taxes, maintenance fees, association fees, insurance, utilities, repairs, and capital improvements to property); *First NLC Financial Services, LLC v. Altamirano*, 847 So. 2d 516, 517 (Fla. Dist. Ct. App. 3d Dist. 2003) (equitable lien awarded in the amount of funds used to pay mortgage and property taxes).

V. THE DISTRICT COURT CORRECTLY DECLINED TO HOLD AN EVIDENTIARY HEARING

Finally, Goldman argues that the district court erred by failing to hold an evidentiary hearing to determine "the amount of an equitable lien." He also claims a hearing was required to rule on the relevancy and admissibility of the FTC's evidence. Br. 11-13. The court acted well within its broad discretion.

To begin with, expert testimony meeting the requirements of Rule 702 (as the Davis Declaration did for all the reasons stated above) may be admitted through written submissions and need not be presented live in court. *See, e.g.*, *McCorvey*, 298 F.3d at 1257-59 and nn. 2-3 (relying on expert affidavits, which supported an "extremely significant" finding, to reverse a summary judgment order).

Beyond that, an evidentiary hearing is necessary only if the court must resolve disputed material factual issues raised in the parties' briefs and supporting materials. *See, e.g.*, *United States v. Brown*, 441 F.3d 1330, 1349-50 (11th Cir. 2006) (no evidentiary hearing required to rule on the admissibility of out-of-court identifications where defendant provided no evidence to support suppression); *McDonalds Corp. v. Robertson*, 147 F.3d 1301, 1312-13 (11th Cir. 1998) (no evidentiary hearing required to resolve a motion for preliminary injunction where no material facts were in dispute). Contrary to Goldman's suggestion, Br. 6, this principle also applies outside of

the summary judgment context to a "post-settlement, post-final judgment proceeding" like this one where there are no disputed facts to resolve. *See, e.g.*, *Fla. Wildlife Fed'n Inc. v. EPA*, 620 F. App'x 705, 708 (11th Cir. 2015) (no evidentiary hearing required to resolve motion to modify a consent decree where no material facts were in dispute); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Olympia Holding Corp.*, 140 F. App'x 860, 864 (11th Cir. 2005) (recognizing "there were no material issues of fact requiring an evidentiary hearing" in affirming an order of contempt) (citing *Mercer v. Mitchell*, 908 F.2d 763, 769 n.11 (11th Cir. 1990)).

Once the moving party meets its initial burden through supporting affidavits, "the burden then shifts to the nonmoving party to come forward with sufficient evidence to rebut this showing with affidavits or other relevant and admissible evidence." *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991) (citations omitted). The nonmoving party cannot meet its burden by relying on inadmissible evidence, "conclusory allegations or legal conclusions." *Id.* (citations omitted).

Goldman presented no evidence in response to the Davis Declaration. He did not challenge Ms. Davis's qualifications, her tracing analysis, or the bank records or deposition testimony she relied upon. Nor did he submit any other evidence to rebut Ms. Davis's analysis, or that created a genuine dispute

over any material fact, even though he had an ample opportunity to do so. The district court therefore was not required to hold an evidentiary hearing to resolve any factual disputes.

Nor was an evidentiary hearing required to rule on the relevancy and admissibility of the Davis Declaration or other evidence, Br. 12-13, which can be resolved solely on the parties' submissions. *See, e.g.*, *In re Hanford Nuclear Reserv. Litig.*, 292 F.3d 1124, 1138-39 (9th Cir. 2002) (no evidentiary hearing required to rule on admissibility of expert evidence where the district court had an adequate record to make ruling) (citing *Oddi v. Ford Motor Co.*, 234 F.3d 136, 154 (3d Cir. 2000)); *see also McCorvey*, 298 F.3d at 1256-60 (discussing admissibility and significance of expert affidavits submitted on summary judgment). Goldman could have moved to bar the admission of Ms. Davis's Declaration or to elicit contrary evidence, but he did not do so. *In re Grand Jury Subpoena*, 274 F.3d 563, 576 (1st Cir. 2001) (whether evidentiary hearing is required is based on whether a party "had a fair opportunity to present relevant facts and arguments to the court and to counter the opponent's submissions.") (citations omitted). His failure to rebut Ms. Davis's tracing analysis when he had the chance does not call into question the district court's exercise of its broad discretion to resolve the matter on the pleadings alone.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

DAVID C. SHONKA
Acting General Counsel

JOEL MARCUS
Deputy General Counsel

/s/ *Michael D. Bergman*
MICHAEL D. BERGMAN
Attorney
FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, NW
Washington, D.C. 20580
(202) 326-3184
mbergman@ftc.gov

Of Counsel:

MIRIAM R. LEDERER
Attorney
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

November 1, 2017

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Answering Brief of the Federal Trade Commission complies with the volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 7,195 words, using the word count of Microsoft Word 2010, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4, and that it complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) and (6) because it was prepared in 14-point Times New Roman typeface.

November 1, 2017

s/ Michael D. Bergman
MICHAEL D. BERGMAN
Attorney
FEDERAL TRADE COMMISSION

CERTIFICATE OF SERVICE

I certify that on November 1, 2017, I caused a copy of the foregoing Answering Brief of the Federal Trade Commission to be served on appellant's counsel, who is a registered CM/ECF filer, using the Court's CM/ECF system.

November 1, 2017

/s/ *Michael D. Bergman*
MICHAEL D. BERGMAN
Attorney
FEDERAL TRADE COMMISSION