IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

WILL MCLEMORE, et al.,	)	
	)	
Plaintiffs,	)	
	)	No. 3:19-cv-00530
v.	)	JUDGE RICHARDSON
	)	
ROXANA GUMUCIO, et al,	)	
	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE DEFENDANTS' EXPERT WITNESS JUSTIN OCHS

Plaintiffs submit this memorandum in support of its motion to exclude the testimony of the state's proffered expert, Justin Ochs, under Fed. R. Evid. 104(a), 703, and 704. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *and Kumho Tire Co. v. Carmichael*, 526 U.S. 136 (1999). Plaintiffs respectfully submit that this Court can grant their motion to exclude based on the pleadings, deposition, and related exhibits. Otherwise, Plaintiffs respectfully request a *Daubert* hearing, at which time the state must establish the prerequisites for admissibility by a preponderance of the evidence. Fed. R. Evid. 104(a); *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987).

Background

On February 19, 2021, the state provided a notice that it may rely on the expert opinion testimony of Justin Ochs. (Ochs Dep., Ex. 1.) Ochs is an auctioneer, licensed by the state of Tennessee. (Ochs Dep., Ex. 3.) The state noticed that Ochs will "provide opinions regarding the auctioneering profession; the similarities between online auctions and in-person auctions; the risks of auctions to sellers and consumers; and the benefits of requiring education, training, and

regulation for auctioneers." *Id*. at Ex. 1. His opinions were to be based on his knowledge and experience "from several years as an auctioneer and auctioneer instructor, as well as pleadings and discovery in this matter." *Id*.

The state's disclosure was provided on February 19, 2021, the same day the parties agreed to "identify and disclose all expert witnesses *and expert reports*." Doc. 82 (emphasis added). The state did not provide its report until March 4, 2021. (Ochs Dep., Ex. 2; *see* Fed. R. Civ. P. 26(a)(2)(B) (requiring a "complete statement" of all retained experts, opinions, and bases for the opinions, as well as data and information relied on.)) Ochs was deposed on March 26, 2021. (Ochs Dep.)

Ochs concluded that online auctions are like in-person auctions in terms of risks to the public and should require the same education, training, and experience. (Ochs Dep. Ex. 2 at 1; Ochs Dep. 113:1-22.) His conclusion rests on three principal opinions. *Id.* Ex. 2; Ochs Dep. at 93:12-13, 15; 95:5-96:12; *see also id.* at 93:12-15 (reiterating that the three opinions encapsulate Ochs' full range of opinions); *id.* at 96:8-12 (confirming Ochs has no additional opinions). They are:

- **Opinion 1**-that there is no difference in risks to the public between an online-only auction, a live auction, and a simulcast auction (*id.* Ex. 2 at 1; Ochs Dep. 92:17-92:1; 96:14-17, 24);
- **Opinion 2**-that education, training and affiliateship, and regulations reduce the risks or problems that can occur during the auction process (*id.* Ex. 2 at 1-2; Ochs Dep. 92:3-10; 96:17-20, 24);
- **Opinion 3**-that there are no alternatives to licensure that adequately protect the public (*id.* at Ex. 2 at 2-3; Ochs Dep. 92:10-93:8; 96:20-21, 24).

Legal Standard

Federal Rules of Evidence 702 and 703 govern testimony of expert witnesses. The state carries the burden of establishing that Ochs' testimony meets admissibility requirements. *See Bourjaily*, 483 U.S. at 176.

The Court exercises a vital gatekeeping responsibility with respect to proffered experts, ensuring that "any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589. The courts must "strike a balance between a liberal admissibility standard for relevant evidence on the one hand and the need to exclude misleading 'junk science' on the other." *Best v. Lowe's Home Ctrs., Inc.*, 563 F.3d 171, 176-77 (6th Cir. 2009). Rejection is the exception rather than the rule. *In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 531 (6th Cir. 2008).

The Sixth Circuit requires a two-step inquiry from the trial judge when evaluating a proposed expert. "First, the court is to determine whether the experts' testimony reflects scientific knowledge, whether their findings are derived by the scientific method, whether their work product amounts to good science." *Smelser v. Norfolk S. Ry.*, 105 F.3d 299, 303 (6th Cir. 1997) (quotations and citations omitted). Second, the courts "must ensure that the proposed expert testimony is relevant to the task at hand." *Id.* (quotation omitted). "The Supreme Court referred to this as the 'fit' requirement." *Id.*

At step one, courts evaluate the admissibility of expert testimony using well-known factors. The party offering the evidence has the burden to show that: (1) the expert is qualified due to having knowledge, skill, experience, training, or education in the field of said testimony; (2) such testimony will assist the trier of fact to understand evidence or determine a fact in issue; (3) the testimony is based on sufficient facts or data; (4) the testimony is the product of reliable principles

and methods; and, (5) the witness reliably applies the principles and methods to the facts of the case. Fed. R. Evid. 702; *see Daubert*, 509 U.S. at 588.

The important gatekeeping role of the courts applies even to so-called "non-scientific" experts. *First Tenn. Bank Nat'l Ass'n v. Barreto*, 268 F.3d 319, 335 (6th Cir. 2001) (citing *Kumho Tire Co.*, 526 U.S. at 141, 147-49) (the gatekeeper function of trial judges "applies to all expert testimony, regardless of whether such testimony is based upon scientific, technical, or other specialized knowledge."). A non-scientific expert evaluates fields "that are 'technical' or 'specialized' in nature." *United States v. Mallory*, 902 F.3d 584, 593 (6th Cir. 2018) (quotation omitted). The *Daubert* factors may be considered when assessing the reliability of any type of expert testimony. *Kumho*, 526 U.S. at 149-52. For non-scientific experts, the courts recognize additional factors such as: (1) whether the expert considered alternative theories of causation; (2) whether the testimony is generally helpful and relevant; (3) whether the expert relied on anecdotal evidence; (4) consideration of non-judicial uses of the expert's methods; (5) temporal proximity; and (6) evaluation of expert extrapolation. *Rondigo, LLC v. Casco Twp.*, 537 F. Supp. 2d 891, 894 (E.D. Mich. 2008) (citing Xavier Pena, Note, *The Effective Evaluation of Expert Reliability*, 20 Rev. Litig. 743, 770 (2001)). For scientific and non-scientific experts alike, factors are "flexible" and some may not apply. *Mallory*, 902 F.3d at 593; *Rondigo*, 537 F. Supp. 2d at 893 (quoting *Kumho Tire Co.*, 526 U.S. at 141-42).

The party seeking to have the testimony admitted must provide some "objective, independent validation of the expert's methodology; the expert's bald assurance of validity is not enough." *Smelser*, 105 F.3d at 303 (cleaned up). "As a prerequisite to making the Rule 702 determination that an expert's methods are reliable, the court must assure that the methods are adequately explained." *United States v. Hermanek*, 289 F.3d 1076, 1094 (9th Cir. 2002) (collecting

supporting cases); *see also Rondigo*, 537 F. Supp. 2d at 895, 899 (excluding expert testimony lacking reliable methods: "[a]cceptance of this expert testimony would distort *Daubert* beyond recognition.") (citations omitted).

Argument

Ochs does not offer admissible expert testimony or even testimony that falls within his claimed field of expertise: the auction industry.[1] (Ochs Dep. 90:25-91:7.) **First**, Ochs' expertise does not "fit" his opinions. *Smelser*, 105 F.3d at 303. He is an experienced auctioneer, but auctioneers do not evaluate relative consumer harms, the necessity of licensure, or the adequacy of alternatives. **Second**, Ochs used no reliable methodology such that he can offer any opinions on the risks to consumers, the necessity of licensure, or the adequacy of other consumer protection measures. **Third**, Ochs' testimony is not relevant. It amounts to the subjective opinion of one licensed auctioneer that, because live auctions are regulated, online auctions should be too. **Fourth**, Ochs' opinions were prepared solely for purposes of litigation. He is nothing more than a lay witness with a demonstrated interest in the outcome of this case, who the state has employed to smuggle in policy preferences under the guise of expert testimony. His testimony is not admissible under Fed. R. Evid. 702 and 703.

[1] In fact, Ochs' purported field of expertise was itself a mystery until he disclosed it at his deposition. No one is an across-the-board expert. They are experts "in [a] particular field." *See* Fed. R. Evid. 703; *Kumho Tire Co.*, 526 U.S. at 152 (trial court must 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"). The state failed to identify Ochs's field of expertise in its expert disclosure. (Ochs Dep., Ex.1.) Nor did Ochs himself identify a field anywhere in his report. (Ochs Dep., Ex. 2.) Only when directly asked by Plaintiffs did Ochs reveal that the field of his expertise was "the auction industry." (Ochs Dep. 90:25-91:7.)

I. Ochs' Opinions Are Not Within the Scope of His Expertise.

Before even reaching Ochs' flawed methodology, his opinions can be discounted because they do not fit his expertise. In other words, Ochs is an experienced auctioneer, but that doesn't qualify him to offer these opinions.

"The issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications *provide a foundation for a witness to answer a specific question*." *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994) (emphasis added). An expert's "training and experience must relate to the subject matter of his proposed testimony." *Smelser*, 105 F.3d at 303. The expertise must "fit" the opinions.

Ochs' training and experience do not relate to any of the opinions presented by the state. For Opinion One, that there is no difference in risk of potential harm among different types of auctions (Ochs Dep., Ex. 2 at 1; Ochs Dep. 91:17-92:1), Ochs admitted he was unaware of experts in his field "evaluat[ing] the relative risk to the public between online-only auctions, live auctions, and simulcast auctions." *Id.* at 103:2-6. Consequently, Ochs could not say how others within the auction industry would evaluate the risks to the public from various forms of auctions. *Id.* at 103:22-24. He was also unaware of someone within the auction industry testing or producing reports on the subject. *Id.* at 103:22-24. The training and experience of auctioneers does not relate to evaluating relative consumer harms, at least not in any other sense than a subjective opinion that cannot qualify under Rule 702. *See Smelser*, 105 F.3d at 303 ("objective, independent validation of the expert's methodology.")

The same is true for Opinion Two. Ochs agreed that "evaluating the value of education, training, affiliateship and regulation in terms of reducing the risk to the public" is not something

evaluated or tested within the auction industry. *Id.* at 125:11-15. He conceded that he had never "seen experts in the auction industry test that sort of thing." *Id.* at 125:16-18.

Likewise, with Opinion Three, Ochs agreed that he had never seen experts in the field of auctioneering evaluate alternatives to licensing auctions. *Id.* at 133:18-20. Ochs also did not have any knowledge about how experts in his field would reach an opinion about alternatives to licensing (*id.* at 133:21-24), what sort of evidence experts in the field would rely on to reach an opinion about possible alternatives (*id.* at 133:25-134:3), or what methodological approach would be employed by experts in the field to form opinions on alternatives to licensure. *Id.* at 134:4-9.

Because experts within the field of the auction industry do not so much as conduct assessments that could lead to any of the opinions expressed by Ochs (*see* Ochs Dep. 96:14-24), his proffered expert opinions are not within his claimed field of expertise. This, in turn, makes it impossible to even begin to assess whether Ochs' methodologies accord with the accepted practices within his field. Ochs' opinions did not "grow[] naturally and directly out of research [he] conducted independent of litigation." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) ("*Daubert* (on remand)"). His testimony should be excluded.

II. Ochs' Opinions Are Not Based On Any Reliable Methodology.

Ochs' opinions are not based on any methodology whatsoever and should be excluded. Other than assertions about Ochs' knowledge and experience, neither Ochs' report nor his testimony provide any basis for determining the reliability of these proffered "expert" opinions. (Ochs Dep. Ex. 1; *id.* Ex. 2 at 4; *see also* Ochs Dep. at 41:1-3 (did not rely on anything other than personal experience in preparing report), 50:13-119 (assignment [to produce an expert report] "was based off my experience and time in the auction industry").)

Ochs acknowledged that his opinions were not based on anything that could be tested, even though "[t]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability." *Daubert*, 509 U.S. at 593. Rather, his personal experience was the exclusive basis for his conclusions. (Ochs Dep. 41:1-3.) This in itself is a "'red flag[]' that should cause concern for the trial court." *Downs v. Perstorp Components, Inc.*, 126 F. Supp. 2d 1090, 1125-26 (E.D. Tenn. 1999) (reliance on anecdotal evidence or "basing an expert opinion upon the expert's own experience or on a few case studies" is a "red flag" under *Daubert*).

Ochs further acknowledged that he didn't rely on any external sources other than one regulation (*id.* at 40:20-25), that he had never written an article or published work about the subject matter of his opinions (*id.* at 74:12-15), had not ever read any articles in scientific or professional publications regarding the subject matter of his opinions (*id.* at 74:16-20), was not familiar with any article that supported his asserted theories (*id.* at 75:1-3), had not done any experiments or testing on his asserted theories (*id.* at 75:4-6; *see Downs*, 126 F. Supp. 2d at 1127 ("[I]f the expert has not even tested the hypothesis he is testifying to, this is considered an extremely negative factor.")), and was not aware of any peer reviewed study supporting his assertions. (Ochs Dep. 75:7-10.) He also never devoted study or analysis to the precise opinions listed in his report until February 27, 2021 (*id.* at 73:8-20), and stated that "this would be the first time that I've given [the question of differences between online-only extended-time auctions and live or simulcast auctions] serious thought." *Id.* at 74:10-11.

Moreover, despite the state's notice relating that Ochs' opinion would be based in part on "pleadings and discovery," (Ochs. Dep. Ex. 1), and despite his claim that the facts of this case are complicated (Ochs Dep. 54:3-6), Ochs confirmed that he only "briefly reviewed" the amended complaint (*id.* at 41:8-9; *id*. at 51:18-52:2; *id.* at 117:25-118:1 ("I haven't reviewed completely

through this 46-page [complaint].")). Ochs' opinions are purely subjective and incapable of falsification. *Downs*, 126 F. Supp. 2d at 1127 ("It follows that if an expert's methodology cannot be explained in objective terms, and is not subject to be proven incorrect by *objective* standards, then the methodology is presumptively unreliable.") (emphasis added). The lack of any discernible methodology should result in Ochs' exclusion. *Buck v. Ford Motor Co.*, 810 F. Supp. 2d 815, 832 (N.D. Ohio 2011) ("Without providing any guidelines by which Sero's simulation might be replicated, its results verified and critiqued, his testing cannot meet this element of the *Daubert* standard."). A closer look at his opinions further undermines their reliability.

A. Opinion 1

Addressing his first opinion that there is no difference in risk of potential harm among different types of auctions, (Ochs Dep. 91:17-92:1), Ochs asserted that the opinion was based exclusively on his experience (*id.* at 104:12-14, 105:19-25), and that there were not "any other facts that [he had] considered when arriving at the opinion that there is no difference in the risk to the public between the three types of auctions." *Id.* at 104:15-19. Ochs did not review or rely on any literature (*id.* at 105:16-18), and used no method or technique to reach his conclusion. *Id.* at 105:10-25. He did not "start with a theory and then subject it to testing." *Id.* at 104:20-24.

Ochs failed to do what was easy and obvious—test his hypothesis by evaluating consumer complaints from live and online auctions. *See Downs*, 126 F. Supp. 2d at 1127. The state had this data readily available.[2] If the risks really are the same, then one would expect to see a proportionately equal number of complaints in live and online auctions. But Ochs admitted he did not test his hypothesis, (Ochs. Dep. 117:5-7) or run it through any other "scientific process" (*id.* at

[2] The task force's table of complaint data is available at: <https://www.tn.gov/commerce/regboards/auction-law-tf/additional-resources-.html>.

106:9-12), despite confirming that would be one way to evaluate risks to the public. *Id*. at 106:22-107:2. He did not analyze the history of consumer complaints or enforcement actions in Tennessee. *Id.* at 108:23-109:1. He did not so much as review the complaint data in the state's possession. *Id.* at 116:23-25. He did not know how many auctions Tennessee has annually, or how many Tennessee auctions are online. *Id.* at 109:2-7. Ochs, therefore, had no idea "how many auctions harm either the buying or selling public in some way" (*id.* at 109:8-10), how many auctions that harm the public are overseen by licensed auctioneers (*id.* at 109:11-14), how many auctions that are harmful to the public are online versus live (*id.* at 15-17), or how many online auctions that are harmful to the public involve online auctions with an extended-time ending. *Id.* at 109:18-23.

Ochs could not even provide a meaningful baseline, like a standard for what number of complaints about auctions would signal risk to the public. *Id.* at 108:11-21. When pressed, Ochs reckoned that if 15% of auctions generated a valid complaint, that would be cause for concern (*id.* at 111:22-112:6), and that a large disparity in valid complaints between online and live auctions would show him that there was less risk to the public involved with the type of auction generating fewer complaints. *Id.* at 115:18-116:4. Had Ochs actually examined the task force complaint data table included in the complaint (Doc. 50 ¶ 154), that he claims to have reviewed, Ochs would have seen that–under his "15%" criteria–there was no basis for his conclusion about risks, period.[3] *See Downs*, 126 F. Supp. 2d at 1126 (proffered expert relied on insufficient information and failed to connect a proper methodology to the facts of the case).

[3]There were, for instance, *no* consumer complaints regarding online auctions with extended time endings in 2018, the last year studied. (Doc. 50 ¶ 154.)

B. Opinion 2

Ochs' second opinion that education, training and affiliateship, and regulations reduce the risks or problems that can occur during the auction process (Ochs Dep. 92:3-10), suffers from the same shortcomings. Once again, Ochs stated that this opinion was based on nothing more than his experience (*id.* at 124:23-125:10, 125:19-23), and admitted this opinion was not reached through any method or technique. *Id.* at 126:2-10.

Ochs again failed to use even the most obvious means to test his hypothesis. He acknowledged that different jurisdictions regulate auctions differently, and that there are "some states that don't even requiring licensing." *Id.* at 127:3-6. But he failed to compare the effectiveness of various requirements in protecting buying and selling consumers relative to auctions. *Id.* at 127:7-10. He did not study how effectively states with no education or training requirements protect the public (*id.* at 129:9-13), and did not study how effectively Tennessee protects the public compared to states that license live, but not online-only auctions. *Id.* at 131:7-12.

Ochs also failed to avail himself of the rare opportunity afforded by COVID to test this opinion. He admitted that a fair way to evaluate risk to the public would be to study a period during which unlicensed auctions increased to study whether consumer harms also increased. *Id.* at 131:14-20. And this is precisely what happened during COVID when the state shut down[4] most live auctions but not online auctions (which the state may not regulate per this Court's injunction). Despite acknowledging the usefulness of this approach, Ochs did not study auctions and consumer complaints during this period. *Id.* at 132:5-16, 132:21-133:2. Ochs was also unfamiliar with academic and professional experts in the field of professional education and training requirements

[4] <https://www.tn.gov/content/dam/tn/commerce/documents/regboards/auction/posts/COVID-19-Letter_4-6-2020.pdf>

(*id.* at 127:16-128:4), and had not reviewed or relied on well-known literature in the field. *Id.* at 128:5-14.

C. Opinion 3

Ochs' third opinion on the efficacy of alternatives to licensure in preventing harm to buying and selling consumers has the same fundamental (and fatal) flaws. Once again, Ochs based this opinion on nothing more than his personal experience. *Id.* at 134:15-17, 135:17-24. He did not test the theory that there are no alternatives to licensing auctioneers that can adequately protect the public. *Id.* at 134:18-22. He did not consider or rely on additional facts or data (*id.* at 134:11-17), or apply any technique or methodology to arrive at his conclusion that licensing auctioneers is necessary to protect the buying and selling public. *Id.* at 135:3-15. Instead, Ochs started with the assumption that licensure was the most effective way to protect the public (*id.* at 137:2-7), and failed to consider or test the effectiveness of any alternative to licensing. *Id.* at 136:10-12, 137:21-22 ("Licensure is the only option I considered."); c.*f., Downs*, 126 F. Supp. 2d at 1127 (experts who reach "a conclusion before the expert makes a reasonable attempt to eliminate some of the most obvious causes" are another "red flag" under *Daubert*). Ochs did not consider the efficacy of (1) certification (Ochs Dep. 137:24-138:4), (2) registration (*id.* at 138:6-12), (3) bonding or insurance requirements (*id.* at 138:14-20), (4) unlicensed inspections (*id.* at 139:14-19), (5) use of the Deceptive Trade Practices Act (*id.* at 139:21-25), (6) private causes of action that allow for compounding attorney's fees (*id.* at 140:1-7), (7) criminal remedies for identity theft, stealing property, or converting funds held in escrow (*id.* at 142:13-23), or (8) the Tennessee Attorney General's Office's enforcement of the Tennessee Consumer Protection Act. *Id.* at 142:24-143:9.

The state cannot hope to show that Ochs possesses any sort of objective reliability. His "methodology cannot be explained in objective terms, and is not subject to be proven incorrect by

objective standards…." *Downs*, 126 F. Supp. 2d at 1127. Of course, an expert may offer "experience" as the basis for their testimony. But "'if the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached … and how that experience is reliably applied to the facts.'" *Thomas v. City of Chattanooga*, 398 F.3d 426 (6th Cir. 2005) (quoting Fed. R. Evid. 702 Advisory Committee's Note). Ochs cannot show how his experience leads to the conclusions reached.

III. Ochs' Opinions Are Not Relevant.

Ochs' testimony should be excluded on basic relevancy grounds, also a factor under *Daubert*. 509 U.S. at 595 ("Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 … exercises more control over experts than over lay witnesses.") (quotation omitted). *Daubert's* reliability and relevancy test requires a court to "ensure that the proposed expert testimony is relevant to the task at hand." *Daubert* (on remand), 43 F.3d at 1315. "Evidence is relevant if: a) it has any tendency to make a fact more or less probable than it would be without the evidence; and b) the fact is of consequence in determining the action." Fed. R. Evid. 401. When making preliminary findings on admissibility, the court looks "not [to] the qualifications of a witness in the abstract but whether those qualifications provide a foundation for a witness to answer a specific question." *Berry*, 25 F.3d at 1351.

To be relevant to the First Amendment question, Ochs must offer something relevant to a fact at issue under (at best) intermediate scrutiny. (Doc. 83 at 39.) To pass muster, the state must show both a significant interest and that PC 471 is narrowly tailored to advance that interest. *Richland Bookmart v. Knox Cty,* 555 F.3d 512, 521-22 (6th Cir. 2009). Ochs offers nothing relevant. Even if it is true that consumers face equal harms from online auctions as they do with

auctions using other types of communications, that would only be relevant under intermediate scrutiny if it was otherwise established that traditional auctions pose harms to consumers that are "significant." The state has never produced any evidence to this end. Again, Ochs never examined the table of complaints prepared by the Auctioneer Modernization Task Force. (Ochs Dep. 117:21-118:4.) He failed to examine such readily available data, even as he otherwise testified that *15% of transactions* must harm consumers in some verified manner in order to, in his opinion, constitute a meaningful threat to the public.[5]

In the end Ochs' opinions that consumers face equal harms from online and live auctions boils down to an opinion that consumers face harms in the marketplace. Ochs acknowledged that the harms he identified are equally present in any consumer transaction, such as online sales (eBay, Craigslist) or in consignment sales. (Ochs Dep. 121:4-7, 1212:9-122:22, 123:16-21.) This is obvious and obviously not based on any "specialized knowledge."

Ochs' opinions are not relevant for a host of other reasons. The particular question before the Court is not whether online auctions pose similar risks to live auctions, but *whether extended-time online auctions pose similar risks to live auctions*. Only extended-time online auctions are regulated by PC 471. Fixed-time online auctions like eBay remain fully unregulated. *See* PC 471 § 6(9) (exempting "timed listings"); *id*. at § 4(12) (redefining timed listings to exclude websites that "extend based on bidding activity."). Ochs himself admitted that the ending time has nothing to do with potential harm to consumers. (Ochs Dep. 118:22-119:14.) He did not conduct any analysis of complaints to see if fixed time online auctions had a statistically significant fewer

[5] According to the Task Force, consumers only registered 117 total auctioneer complaints in three years. Even assuming that 100% of those complaints were verified by adverse findings, it would only meet Ochs' threshold of 15% if there were less than 780 auctions over that same three-year period. Unless the state can show that there were that few auctions in that time, then Ochs' opinion undercuts the very idea that consumers face meaningful risk from auctions, live or online.

number of consumer complaints. *Id.* at 117:5-7. Nor does he address how the public is adequately protected by a regulation of online auctions that exempts a whole list of different speakers conducting those auctions. *Id.* at 123:22-124:13.

Likewise, the question is not whether training and education of auctioneers is useful to preventing consumer harms. Requiring auctioneers to get advanced degrees is undoubtedly useful. But the state must show that its approach is narrowly tailored. *Richland Bookmart,* 555 F.3d at 521-22. Ochs did not study other state's approaches, even those of other licensing states with lighter burdens. He gave no thought to the adequacy of other possible forms of government intervention.

Ochs also provides no testimony relevant to any fact of consequence on Plaintiffs' Commerce Clause claims. He is not qualified to address, nor does he speak to the reach of PC 471, or to the "location" of an auction, except to remark that, "the value of the asset, the venue in which it is sold, and the location of the bidder do not matter." (Ochs Dep., Ex. 2 at 1.) Ochs testified that if an auctioneer could still sell to, or on behalf of, Tennesseans and evade the regulation of online auctions by simply hosting a website out of state, that would not prevent the harms associated with auctioneering. (Ochs Dep. 102:5-19.) This would, of course, only harm the state's claim to protect consumers while simultaneously arguing that it will only regulate online auctions when the computer is physically within Tennessee's borders. *See* Doc. 83 at 22.

At most, Ochs' general testimony about auctioneering wastes time and needlessly presents cumulative evidence. *See* Fed. R. Evid. 403. His testimony should be excluded.

IV. Ochs Prepared His Opinions Solely for Purposes of Litigation in Which He Has a Stake in the Outcome.

Ochs' opinions were developed for this litigation. The state's designation of Ochs as expert appears to be an attempt to introduce the preferences and opinions of a biased layperson.

Another strike against Ochs' reliability is that his opinions were developed "expressly for purposes of testifying." *Smelser*, 105 F.3d at 303 (citing *Daubert* (on remand), 43 F.3d at 1317 ("One very significant fact to be considered" is whether testimony was developed for litigation)). Ochs squarely admitted that he had not worked on the topics in his opinions "until after [he was] retained in litigation." (Ochs Dep. 73:17-20.) Ochs' March 4, 2021 report consisted of barely four pages about potential harms involved in auctioneering and why auctioneering school is helpful for preparing to be an auctioneer. *See* Ochs Dep., Ex. 2. During his deposition, Ochs said that he was retained by the state on February 10, 2021 (Ochs Dep. 73:13-16), and that the first time he devoted study to his opinions was when he began working on the expert report on February 27, 2021. *Id.* at 73:8-12. This means that Ochs began his work *after the deadline for disclosure of his report*. (Doc. 82.) Because Ochs did not develop his opinions "before being hired as a witness," *Daubert* (on remand), 43 F.3d at 1317, the state lacks "objective proof that the research comports with the dictates of good science." *Smelser*, 105 F.3d at 303.

There is good reason to suspect that Ochs "developed [his] opinions expressly for purposes of testifying," *Daubert* (on remand), 43 F.3d 1317, in order to suit the state's litigation needs. Of all the experienced auctioneers, the state offers one with a history of political advocacy. In 2016, in his capacity as the President of the Tennessee Auctioneers Association, Ochs wrote to the Joint Government Operations Committee expressing "the Tennessee Auctioneers Association's full

support" for regulating online auctions. *See* Ochs Dep. Ex. 6.[6] Ochs was then part of discussions about how to present proposed Rule 28 in testimony to the Government Operations committee to avoid the appearance of anti-competitiveness and inaccurately emphasize the rule as a mere clarification. *Id.* at 85:20-86:9; *id.* at Ex. 8 (email, page 3 of 4: "We need to paint this as a clarification. It does not need to be seen as anti-competitive. The committee also worries about auctioneers turning in other auctioneers."). Ochs is an auctioneer and auctioneering instructor who has openly stated his interest in "protect[ing]" auctioneering. *Id.* at Ex. 6 (requiring all auctions of any type to adhere to the rules of the Tennessee Auctioneer Commission is paramount "to protect the integrity of the auction profession"). He acknowledged that he would prefer to see the case come out a particular way. (Ochs Dep. 75:18-19.) Ochs is plainly interested in seeing his competitors regulated, he has publicly disagreed *with a plaintiff in this case on the topic of the litigation*, and he signed up to offer nothing more than his personal opinion under the guise of expert testimony.

Ochs is a self-interested party hired for purposes of litigation and without qualification or experience to provide testimony on issues of consequence in this case.

[6] After learning of this letter, Plaintiff Will McLemore wrote Ochs a response, wherein he stated that he "opposed this rule, along with several other dues paying members of the TAA." *See* Ochs Dep., Ex. 7. Will also expressed that he believed "the membership should have the opportunity to discuss important policies like these before you express a position on its behalf." *Id.* The state's proffered expert and Plaintiffs have been on opposite sides of this very policy debate for years. Ochs cannot be expected to render objective, reliable testimony on this subject.

Conclusion

This Court should exclude Ochs.

Dated: April 30, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served via email to:

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On this date, April 30, 2021.

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