

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.,	)	MAGISTRATE JUDGE
	)	FRENSLEY
Defendants.	)	

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PLAINTIFFS’ REPLY TO DEFENDANTS’ RESPONSE IN OPPOSITION TO PLAINTIFFS’  
MOTION TO EXCLUDE EXPERT WITNESS JUSTIN OCHS

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Plaintiffs respectfully reply to the state’s response in opposition to the motion to exclude its expert witness, Justin Ochs. The state fails to show that Ochs used any objective methodology and is largely non-responsive to the arguments made in Plaintiffs’ motion.

On unaddressed points alone, Ochs must be excluded. His principal conclusion relates to the similarity in risks between online and live auctions. But the state *does not address* Plaintiffs’ first point (Doc. 89-1 at 6-7), that auctioneers—his field—do not evaluate relative consumer harms or efficacy of licensure. How can anyone determine whether Ochs’ methods have “been generally accepted in the particular scientific field,” *Smelser v. Norfolk S. Ry.*, 105 F.3d 299, 303 (6th Cir. 1997) (quotation omitted) when auctioneers don’t reach these sorts of conclusions at all? The state *does not address* that Ochs’ opinions were developed solely for litigation, what the Sixth Circuit has called a “very significant fact.” *Smelser*, 105 F.3d at 303. Ochs has long been a political advocate for the regulation of online auctions on behalf of the Tennessee Auctioneers Association. (Doc. 89-1 at 16-17.) Each point is an un rebutted, independent basis for the exclusion of Ochs.

The state *does not* address the substance of Plaintiffs’ relevancy argument. (Doc. 89-1 at 13-15.) Ochs’ testimony that online and live auctions pose similar risks to consumers could only ever be relevant if Ochs otherwise established that live auctions are risky. This he did not do, nor did he establish a baseline for what it means to be risky.<sup>1</sup> In the end, Ochs holds the decidedly non-technical opinion that consumers face some risks when they engage in commerce, but that the harms from online auctions are present in any online sale (eBay/Craigslist) or in consignment sales. (Doc. 89-2 at PageID #: 2946:4-7; *id.* at PageID #: 2946:9-2947:22; *id.* at PageID #: 2948:16-21.) This opinion is not helpful.

On reliability, the state offers no “objective, independent validation of [Ochs’] methodology.” *Smelser*, 105 F.3d at 303. The state relates that Ochs has extensive experience. (Doc. 102 at 2-3.) Experience alone is not sufficient:

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply “taking the expert's word for it.”

Fed. R. Evid. 702 Advisory Committee’s Note (citing *Daubert v. Merrell Dow*, 43 F.3d 1311, 1319 (9th Cir. 1995)). The state makes no attempt to show how Ochs’ experience in auctioneering “leads to the conclusions reached.” *Id.* Ochs was up front that he never studied or tested any of his opinions, and that they were rooted in nothing more than his experience. (Doc. 89-2 at PageID #: 2898:8-19); *id.* at PageID #: 2900:4-6; *id.* at PageID #: 2929:12-14, 20-24; *id.* at PageID #: 2930:10-25; *id.* at PageID #: 2950:19-2951:7; *id.* at PageID #: 2959:11-17). Ochs did not arrive at

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<sup>1</sup> As related in Plaintiffs’ memo, Ochs defined risk to mean that 15% of transactions must harm consumers. (Doc. 89-1 at 14.) He was obviously making this number up; regardless, his assessment of risk in auctions does not appear to be borne out by the available complaint data. (*See id.* at 14 n.5.)

his opinions through a methodology that “can be explained in objective terms.” *Downs v. Perstorp Components, Inc.*, 126 F. Supp. 2d 1090, 1127 (E.D. Tenn. 1999). His opinions are wholly immune from “falsifiability, or refutability, or testability.” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593 (1993). Ochs even admitted that this case was “the first time” he had given the subject on which he opines “serious thought.” (Doc. 89-2 at PageID #: 2899:10-11). “Who is better” than Ochs? (Doc. 102 at 3.) Someone with a process for evaluating risk in consumer transactions that can be objectively related and subjected to verification.

The state argues that reviewing complaint data would be “practically worthless” since it has not “had jurisdiction to regulate online auctions” since August 2016. (Doc. 102 at 4.) It is true that the state *lacked jurisdiction* to regulate online auctions. It did so anyway.<sup>2</sup> (Doc. 94-2 at PageID #: 3327-34 (PCI file and consent order); Doc. 95-3 at PageID #: 3593-3605 (Transcript).) TAC members related at the 2017 PCI hearing that the state does regulate online auctions if it extends the bidding time. *See* Doc. 95-3 #: 3595-96 (Morris: “you can [do something about it] if they extend the bidding”). There is no excuse for Ochs to not review the complaint data.

Even if the state never took any action on online complaints,<sup>3</sup> Ochs could have determined whether live and online auctions triggered relatively equal number of complaints. Ochs should have asked why, of the 33 consumer complaints registered by consumers in 2018, only 4 related to online auctions and *none* with an extended-time ending. SUMF ¶ 207 (Compl. & Ans. ¶ 154.)

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<sup>2</sup> Video of the [June 19, 2017](https://www.youtube.com/watch?v=PNNzK_kVjsA) TAC meeting where the PCI complaint first surfaced is at <[https://www.youtube.com/watch?v=PNNzK\\_kVjsA](https://www.youtube.com/watch?v=PNNzK_kVjsA) (appx. 44 min)>. *See* Doc. 95-3 at PageID #: 3596 (“if they extend the bidding. We can issue fines if – under that case.”). On [September 18, 2017](https://www.youtube.com/watch?v=F7R_kNwycwM), <[https://www.youtube.com/watch?v=F7R\\_kNwycwM](https://www.youtube.com/watch?v=F7R_kNwycwM) (appx. 19:40-23:40)>, the TAC voted to sanction PCI after its lawyers determined that it extended time. (Ex. 1 at 2:4-3:25.)

<sup>3</sup> Prior to PC 471’s enactment, the Department of Commerce and Insurance did intake complaints for extended-time online auctions, as this Court already found when the state previously tried to erroneously attribute the lack of complaints to a lack of jurisdiction. (Doc. 29 at 23.)

Ochs could have also studied whether the complaints, (*id.*), relate to consumer harms (tending to support his hypotheses) or unlicensed conduct (which would not). Ochs could have also analyzed complaints for live auctions. Ochs just assumed that live auctions were inherently risky. The state cannot dispute that live auction complaints were investigated, but did they meet his 15% standard? (Doc. 89-2 at PageID #: 2936:19-2937:12.) Ochs could have tested his assumption pertaining to live auctions. He did not. (Doc. 89-2 at PageID #: 2942:5-7.)

The state thinks it can avoid a risk comparison with fixed-time auctions by just declaring that those are not auctions. (Doc. 102 at 5.) Semantics are irrelevant to an analysis of relative risk. Besides, if fixed time listings were not an auction, then they wouldn't need an *exemption* from the *definition* of an auction. *See* Tenn. Code Ann. §§ 62-19-101(2) & -103(9).<sup>4</sup> And if a lack of jurisdiction explains the low number of complaints over online auctions, and fixed-time listings aren't even an auction, then fixed-time should have even fewer complaints than extended-time. *The proof shows the very opposite.* Pls.' SUMF ¶ 207 (Compl. & Ans. ¶ 154.) Ochs, to be deemed credible, needs to have considered this contrary evidence against his hypotheses.

The state is also incorrect that this Court's injunction during COVID, when the state directed auctions to proceed online, meant the TAC had no complaints to evaluate. (Doc. 102 at 4.) Despite the injunction (Doc. 29 at 29), the TAC still sent out letters of instruction to online auctions. (Doc. 94 at PageID #: 3279:5-8.) On [February 24, 2020](#),<sup>5</sup> the TAC considered online auction complaints, maintaining that extending bidding made an online auction regulated and investigating the company further. (Ex. 2 at 2:19-3:13.) The attorney reminded the TAC of this

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<sup>4</sup> Note also that the Task Force table appeared to recognize fixed-time auctions, separating out those extended-time auctions in its table from other types of online auctions. SUMF ¶ 207 (Compl. & Ans. ¶ 154).

<sup>5</sup> <<https://www.youtube.com/watch?v=tNl2BresM-4>> Relevant portion runs from appx. 29 to 35.

Court's injunction and litigation. (Ex. 2 at 2:19-23, 3:18-4:5, appx. 30 min, 32:30.) Undeterred, Defendant Morris responded: "if there's any extension of time *then we do regulate those internet auctions.*" (Ex. 2 at 2:19-23, 3:10-11 (emphasis added), appx. 30:08-52; Doc. 94 at PageID #: 3279:15-23.) Again on [May 18, 2020](#),<sup>6</sup> (Ex. 3 at 2.) Morris explained that auction that extend time remain regulated (appx. 35:28-35:40): "They started out . . . extended time for bidding and then someone told them that they shouldn't do that if they wanted to stay outside the law."<sup>7</sup> (Ex. 3 at 2:13-17.) There certainly was "probative" evidence during COVID for Ochs to consider. (Doc. 102 at 5.)

Even if this were a rational basis case (Doc. 102 at 3-4), it would not diminish the Court's important role in ensuring that Ochs' opinions amount to "good science." *Smelser*, 105 F.3d at 303. Regardless, the state's position is clarifying; it believes that the rational basis standard is so "toothless," *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 698 (E.D. Ky 2014) (citing *Mathew v. Lucas*, 427 U.S. 495, 510 (1967)) as to warrant the court abandoning its gatekeeping function. This is not a rational basis case, and rational basis review does not ease the rules of evidence.

In the end, the burden of proof is on the state. *See Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987). Even if the state had good reasons to not engage in the methodologies suggested by Plaintiffs, it still needs to show that Ochs' opinions are "derived by the scientific method." *Smelser*, 105 F.3d 303 (quotation omitted). Its response shows that it cannot meet its burden.

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<sup>6</sup>< <https://www.youtube.com/watch?v=ROdv53qFmPc>>. The relevant portion runs from appx. 34:40 to 39.

<sup>7</sup> The TAC sent letters of instructions to the parties. (Doc. 94 at PageID #: 3279:5-14.) They were later rescinded when Plaintiffs notified the state that the Defendants were violating the injunction. (Id. at PageID#: 3280:11-25.)

Dated: May 21, 2021.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served on the following persons by the following mean(s) on the following date:

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R. Mitchell Porcello Office of the Attorney General Tax Division P.O. Box 20207 Nashville, TN 37202 Mitch.porcello@ag.tn.gov	Defendants	<input type="checkbox"/> United States mail, postage prepaid <input type="checkbox"/> Hand delivery <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> FedEx <input checked="" type="checkbox"/> Efile
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On this date: May 21, 2021.

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