

**UNITED STATES TAX COURT
WASHINGTON, DC 20217**

AD INVESTMENT 2000 FUND LLC,)		
COMMUNITY MEDIA, INC., A PARTNER)		
OTHER THAN THE TAX MATTERS)		
PARTNER, ET AL.,)		
)		
Petitioner(s),)		
)		
v.)	Docket No. 9177-08,	9178-08.
)		
COMMISSIONER OF INTERNAL REVENUE,)		
)		
Respondent)		

ORDER

Petitioners have moved to vacate decision (motion) in these consolidated cases on the grounds that Thomas Murphy, one of respondent's witnesses, lied in both his expert testimony and in his trial testimony as to his expert credentials. Petitioners support their motions with portions of the transcript in another Tax Court case, Tucker v. Commissioner, dkt No. 12307-04, in which Mr. Murphy conceded errors in stating his credentials and in omitting from his expert report citations to certain cases in which he had testified. We concluded that his report did not accord with the requirements of Rule 143(g), Tax Court Rules of Practice and Procedure, addressing expert witnesses and we excluded it. Rule 143(g)(2) provides that an expert's testimony will be excluded for failure to comply with Rule 143(g) unless the failure is shown to be due to good cause and unless the failure does not unduly prejudice the opposing party. Since Mr. Murphy has already testified, we cannot at this point not allow him to testify. Petitioners argue that, in the present cases, Mr. Murphy's testimony was material and that the Court's decisions in these cases should be vacated. Petitioners pray that the Court vacate its decisions and grant petitioners "such other and further relief as may be just and proper."

In response to our orders requiring respondent to respond to the motions, respondent states: "To the extent the Court has concerns about Mr. Murphy's testimony, respondent would not object to vacating the decision in this case for the purpose of addressing Mr. Murphy's qualifications as an expert witness."

The Court wishes further information from the parties and guidance from them concerning how the Court should proceed.

Petitioners shall inform the Court of when they first learned that Mr. Murphy might be a witness for respondent. Also, they shall examine the cases omitted from his expert report and propound the questions that, based on those cases, they would have put to Mr. Murphy during cross examination and did not do so. In our memorandum opinion in this case, T.C. Memo. 2015-233, at *14, we found "that the option spreads at issue here would never have expired on the 'sweet spot' (the exchange rate at which the long option is in the money, but the short option is not). All experts agreed that the probability of such an event's even theoretically occurring was extremely small." Our finding was based in part on Mr. Murphy's testimony. Do petitioners contend that, ignoring Mr. Murphy's testimony, there is evidence in the record to contradict our finding that the option spreads at issue would never have expired on the "sweet spot", and, if so, what evidence? Do petitioner's contend that the probability of the option spreads expiring on the sweet spot was not small, and, if so, on the basis of what evidence? Do petitioners contend contrary to Mr. Murphy's testimony, see id. at 15-16, that the option pairs acquired by the corporations were particularly good investments, and, if so, on what evidence?

The following questions are directed at both parties. In light of the Tucker transcript, must or should the Court hold an evidentiary hearing to determine the extent, if any, that Mr. Murphy was inaccurate or was incomplete in presenting his credentials and his experience to the Court, and, if he was incomplete or inaccurate, was there good cause for those errors? Must or should the Court further inquire into the reliability of Mr. Murphy's expert testimony (beyond his credentials)? Assuming the Court finds inaccuracies not materially different to those shown in the Tucker transcript, what options does the Court have? Must the Court reconsider its findings and opinion? See Rule 161, Tax Court Rules of Practice and Procedure. If so, upon reconsideration, may it conclude that, taking into account any established inaccuracies in Mr. Murphy's testimony, his expert opinions remain sufficiently persuasive that the Court may rely on those opinions as it did in its memorandum opinion in these cases, reported at T.C. Memo. 2015-223? If it may not so conclude, or decides that Mr. Murphy's opinions are not

reliable, what should or must the Court do? For instance, should the Court order Mr. Murphy's testimony stricken from the hearing transcripts and order the parties to submit new briefs relying only on the revised transcripts? If so, or in any event in which the Court decides not to rely fully on Mr. Murphy's testimony, should the Court assign these cases to another division of the Court for any further proceedings? Should the Court open the record to further expert testimony or other evidence going to the merits of the case? The parties should address these and any other issues that they think relevant. The Court is interested in how not only the Tax Court but, also, other courts have dealt with similar issues.

On the premises stated, it is

ORDERED that the parties shall on or before July 22, 2016, provide the Court legal memorandums addressing the questions and issues set forth above.

**(Signed) James S. Halpern
Judge**

Dated: Washington, D.C.
June 23, 2016