Denker v. Ricchio, Case No. 21-1668 JVS (DFMx)

Tentative Minute Order re Motions *in Limine*

Robin Denker and Jerry Klein (collectively "Denker") and Defendant Michael Ricchio ("Ricchio") move the Court for relief by way of Motions *in Limine.* The Court now enters its rulings.

I. Denker's Motions *in Limine.*

A. Motion *in Limine* No. 1: Expert Lee.

Denker seeks an order to exclude the testimony of expert Harry G. Lee Jr. ("Lee") on procedural grounds. (Docket No. 58.) Ricchio has filed an opposition (Docket No. 74), and Denker has replied (Docket No. 82).

1. Untimely Disclosure.

Lee's report was disclosed two weeks after the date for initial expert disclosures. Denker invokes the automatic exclusion under Rule 37(c) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 37(c)(1); Yetti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1105-06 (9th Cir. 2001). Ricchio contends that his report is a rebuttal report and thus timely.

The Court need not determine whether the report is in fact a rebuttal report. Lee was deposed, and Denker had a full opportunity examine. Assuming that the report should have been disclosed as an initial report, the two-week delay was harmless. Fed. R. Civ. P. 37(c)(1). While the Court feels strongly that disclosure deadlines should be met, the drastic remedy of exclusion is not warranted here.

2. Failure to Disclose Basis for Opinions.

A retained expert must present a report which, among other things, provides "a complete statement of all opinions the witness will express and the basis and reasons for them." (Fed. R. Civ. Pro. 26(a)(2)(B)(i).) Denker contends that Lee failed to meet this requirement.

Denker contends that a schedule of assets upon which Lee relied was never produced. However, such a shortcoming is neutralized by the fact that Denker's expert Dorothy Haraninic ("Haraninic") used the same schedule in her work. (Smith Decl., Ex. 4, pp. 18-19.)

Lee used a proprietary tool to conduct his block chain analysis to which Denker never had access. According to Ricchio, the tool merely made the block chain analysis more efficient. Denker had an opportunity to examine Lee about his core analysis at deposition. This is sufficient.

The Court finds that Denker also had adequate access to the data for Ricchio's Gemini and Coinbase accounts for use at deposition, including access through third-party discovery. Moreover, the updated information was not used for Lee's valuation opinion.

None of the asserted shortcomings in Lee's report or document disclosure rises to the level warranting exclusion.

The Motion is denied

B. Motion *in Limine* No. 2: *Daubert Challenge*.

Denker seeks an order to exclude Lee's testimony based on his failure to meet the standards under Rule 702 of the Federal Rules of Evidence and Daubert. (Docket No. 59.) (Docket No. 58.) Ricchio has filed an opposition (Docket No. 74), and Denker has replied (Docket No. 82).

1. Legal Standard.

Federal Rule of Evidence 702 permits expert testimony from "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education," if:

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

> and (d) the expert has reliably applied the principles and methods to the facts of the case.

(Fed. R. Evid. 702.)

On this challenge, the Court is called to exercise its "gatekeeper" function to "ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 597 (1993). A trial court's "gatekeeping" obligation to admit only expert testimony that is both reliable and relevant is especially important "considering the aura of authority experts often exude." Mukhtar v. Cal. State Univ., 299 F.3d 1053, 1063-64 (9th Cir. 2002). Nevertheless, "[s]haky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." Primiano v. Cook, 598 F.3d 558, 564 (9th Cir. 2010). Importantly, the Court's gatekeeper role under Daubert is "not intended to supplant the adversary system or the role of the [trier of fact]." Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F.3d 1333, 1341 (11th Cir. 2003) (internal quotation marks and citation omitted). In other words, at this stage, the Court is not supposed "to make ultimate conclusions as to the persuasiveness of the proffered evidence." (Id.) As the Ninth Circuit summed up in Alaska Rent-A-Car, Inc. v. Avis, 738 F.3d 960, 969-70 (9th Cir. 2013):

> Basically, the judge is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable. The district court is not tasked with deciding whether the expert is right or wrong, just whether his testimony has substance such that it would be helpful to a jury.

The requirement that expert testimony "help the trier of fact to understand the evidence or to determine a fact in issue" goes primarily to relevance. Primiano, 598 F.3d at 564.

The Rule 702(c) and (d) reliability indicators are subject to a more flexible analysis. According to the Ninth Circuit,

> [i]n Daubert, the Supreme Court gave a non-exhaustive

> list of factors for determining whether scientific testimony is sufficiently reliable to be admitted into evidence, including: (1) whether the scientific theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether there is a known or potential error rate; and (4) whether the theory or technique is generally accepted in the relevant scientific community.

Domingo ex rel. Domingo v. T.K., 289 F.3d 600, 605 (9th Cir. 2002).

The trial court has "broad latitude" in deciding how to determine the reliability of an expert's testimony and whether the testimony is in fact reliable. Mukhtar, 299 F.3d at 1064; see also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999). The "test of reliability is 'flexible,' and Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case." Kumho Tire, 526 U.S. at 141.

2. Discussion.

Denker challenges Lee's valuation opinion and his opinion that Ricchio was a "hobbyist."

Valuation Opinion.

The Court finds none of Denker's attacks warrant exclusion.

First, the use on an incorrect conversion for Economic coins, which Lee subsequently corrected, can be addressed on cross examination and only goes to the weight of his opinion.

Second, that he used a "consulting" standard rather than an audit standard again goes to weight. The Court's role is not to be the ultimate fact finder. Alaska Rent-A-Car, Inc., 738 F.3d at 969-70.

Third, there is nothing improper about experts assuming one version

of disputed facts. Indirect USA Corp. v. Parks Assost LLC, (S.D. Cal Sept 22, 2021). Again, the Court is not the ultimate fact finder.

Fourth, the challenge to various inputs to Lee's analysis goes to weight. Hemmings, 285 F.3d at 1188.

Grist for a forceful cross examination is not cause for excluions. Primiano, 598 F.3d at 564.

Hobbyist Opinion.

Both parties offer expert opinions whether Ricchio was a mere hobbyist when it comes to cryptocurrency trading. Lee says "Yes." Haraninic says "No." The parties very motions make clear that the issue is relevant.

First, the Court finds that opinions in this area would be helpful to a lay jury. (Fed. R. Evid. 702(a).) Cryptocurrency, its trading, and mode of creation are not part of the common understanding of lay witnesses. Expert opinion is a response to that knowledge deficit. If the issue turned on model airplanes or stamp collecting, the need for expertise might be different

Second, frequency analysis is a legitimate, repeatable methodology. Domingo ex rel. Doming, 289 F.3d at 605.

Third, criticisms about the data set used and other criticisms go to the weight, not the admissibility of Lee's opinons in this area. Bazemore v. Friday, 478 U.S. 385, 400 (1986); Primiano v. Cook, 598 F.3d at 564; Hemmings v. Tidyman's Inc., 285 F.3d 1174, 1188 (9th Cir. 2002).

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The Motion is denied.

II. Ricchio's Motions *in Limine.*

A. Motion *in Limine* No. 1: Dorothy Haraminac.

Ricchio seeks an order to exclude certain opinions of expert Dorothy Haraminac ("Haraminac"). (Docket No. 64.) Denker has filed an opposition (Docket No. 68), and Ricchio has replied (Docket No. 87).

The Court has set out the legal standard in the preceding sections.

At the outset, the Court notes that Ricchio makes no challenge to Haranmina's credentials.

Ricchio focuses on threes opinions.

1. Calculation of Damages.

In calculating damages, Haraninic uses a "Demand Date," the date on which Denker requested the return of funds, and "Date of Refusal," the date on which Ricchio refused to return the funds. (Smith Decl., Ex. B, pp. 49-50 [hereinafter "Haraminac Depo."].) She made no secret that these dates were provided by counsel, and that she was not expressing a factual opinion. Rather, she used these bench marks in making her calculations. An expert is not required to vouch for each assumption that goes into a calculation. Others can be cross-examined as to the accuracy of these bench marks.

As explained in Section II.E, the Court rejected the argument that Rule 408 bars the use of the correspondence which reflects the parties' positions on those dates.

2. Additional Considerations.

In her opinion concerning Denker's losses, she includes a section entitled "Additional Considerations." These include surmises about Ricchio's possible use of Denker's funds for his own transactions and details Ricchio's other unrelated trading activities in the period. (Haraninic Report, p. 10.) The Court excludes this paragraph as irrelevant. (Fed. R. Evid. 402.)

3. "Hobbyist" Opinion.

Haraninic relied on an IRS standards to form her opinion that Ricchio

was not a "hobbyist" trade.

> As to Question 5, I have evaluated Mr. Ricchio's descriptions of activities, his disclosed transaction records, and his identification of those activities as a hobby. I have found that Mr. Ricchio's activities are not consistent with a "hobby" description based on my application of the internal Revenue Service's factors for distinguishing hobbies from business activities. Mr. Ricchio's statements regarding his cryptocurrency activities reflect his attempts to earn a profit and do not reflect attempts to engage in sport or recreation.

(Haranminac Report, p. 2, pagination per report.)

Ricchio makes three points: (1) she does not know whether the IRS uses the factors for cryptocurrency; (2) she never previously applied these factors to cryptocurrency; and (3) she offers no opinion with regard to the applicability of these factors to crytocurrency. As to the third point, Ricchio is simply incorrect. (Haraninic Decl., pp. 77, 161-62.) The other issues go to weight, and are to be tested on cross-examination. Primiano, 598 F.3d at 564 .

In addition, Haranminac's analysis was not limited to the IRS factors. (Haranminac Depo., p. 161 ("I used not just these nine factors, but Mr. Ricchio's testimony, the records he's provided in this case, and my professional expertise and analysis.").)

The Court declines to exclude this opinion.

B. Motion *in Limine* No. 2: Drug and Alcohol Abuse.

Ricchio seeks an order to exclude evidence of his drug and alcohol abuse. (Docket No. 60.) Denker has filed an opposition (Docket No. 69), and Ricchio has replied (Docket No. 88).[1]

[1]The Court overrules Ricchio's objection to a portion of the Elsa Denker Declaration. (See Docket No. 88-2.)

In professing that he cannot recall many of the relevant events and transactions, Ricchio has put in issue activities in impairment of memory. His drug and alcohol use are thus relevant. (Fed. R. Evid. 401.) Evidence of impairment may be prejudicial, but not such that it outweighs the probative value of providing an explanation for Ricchio's conduct. (Fed. R. Evid. 403.) The Court will limit such evidence to the period during which he was managing Denker's funds. The Court also excludes the means by which Ricchio acquired drugs; e..g., Silk Road, the internet. The focus on any examination in this area should be impairment.

The Court will also allow evidence that he was using Denker funds to purchase drugs. This is relevant to motive. However, a separate showing shall first be made to the Court out of the presence of the jury.

The Motion is granted in part and denied in part.[2]

C. Motion *in Limine* No 3: Evidence of Settlement Discussion.

Ricchio seeks an order to exclude evidence of parties' settlement communications on June 2, 2021 and June 29, 2021. (Docket No. 61.) Denker has filed an opposition (Docket No. 70), and Ricchio has replied (Docket No. 89).

On summary judgment, the Court held that although the letters could fairly be characterized as settlement communications, they were nevertheless admissible to show notice, an exception clearly recognized under Federal Rule of Evidence 408. (Docket No. 57, pp. 7-8.) Nothing has changed.

The letters are not excludable under Rule 403. The exchange is not prejudicial and their value on the notice issue outweighs any potential harm.

The Motion is denied.

D. Motion *in Limine* No. 4: Punitive Damages.

[2]Given the Court's determination that the evidence, with the limits noted above, is directly relevant, the Court need not consider the parties' contentions under Rule 404(b)

Ricchio seeks an order to exclude references to punitive damages. (Docket No.62.) Denker has filed an opposition (Docket No. 71), and Ricchio has replied (Docket No. 91).

The premise of the motion is that "there is no evidence that Mr. Ricchio acted fraudulently and with malice and oppression in handling Plaintiffs' funds for investment." (Motion, p. 2.)[3] The Court rejects Ricchio's motion as a stealth summary judgment motion. The Court cautioned the parties against such motions is it Order for Jury Trial (Docket No. 23, p. 4). The case law clearly recognizes that motions *in limine* may not be used for summary judgment motions. Kaneka Corp. v. SKC Kolon PI, Inc., 2015 WL 12696109 at *11 (C.D. Cal. Nov. 5, 2015); Engmand v. City of Ontario, 2011 WL 2463178 at *9 (C.D. Cal. June 20, 2011).

The Motion is denied.

E. Motion *in Limine* No. 5: Ricchio's 2018 Tax Filings.

Ricchio seeks an order to exclude evidence he received an assessment on his 2018 federal tax return from the Internal Revenue Service and subsequently filed an amended return. (Docket No. 63.) Denker has filed an opposition (Docket No. 72), and Ricchio has replied (Docket No. 91).

The Court finds that evidence of the extent of Ricchio's cryptocurrency tradingis relevant, and rebuts the contention that he was a novice or "hobbyist." His amended return will show this.

The Court excludes evidence of the Internal Revenue assessment as more prejudicial than probative. Moreover, litigation of the correctness of his original return could easily devolve into a time wasting trial within a trial. (Fed. R. Evid. 403.) The Court similarly rejects such evidence under Federal Rule of Evidence 404(b) on like grounds. Moreover, none of the grounds for admission of such evidence reflect on the present claimed wrong doing. (Fed. R. Evid. 404(b)(2) (admissible to show "motive, opportunity, intent, preparation, plan,

[3]His request to exclude evidence of him financial condition is tied to the punitive damages claim.

knowledge, identity, absence of mistake, or lack of accident").

Such evidence is not saved under Federal Rule of Evidence 608. The basic Rule 403 problems are unchanged regardless of which rule the evidence is offered under.

The Motion is granted in part and denied in part.

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Counsel are ordered to advise the parties and all witnesses of the Court's rulings so that there are no inadvertent violations of this Order.