

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

**IN RE APPLE INC. SECURITIES
LITIGATION**

Case No. 4:19-cv-02033-YGR

ORDER ON MOTIONS TO EXCLUDE

Dkt. Nos.: 292, 301

Before the Court are the parties' motions to exclude expert opinions. (Dkt. Nos. 292, 301.) For the reasons given herein defendants' motion is denied and plaintiff's motion is granted in part and denied in part.

I. LEGAL FRAMEWORK

Federal Rule of Evidence 702 permits expert opinion testimony by a witness who is qualified and offers a relevant and reliable opinion. An expert witness may be qualified by "knowledge, skill, experience, training, or education." Fed. R. Evid. 702. The proponent of expert testimony has the burden of proving admissibility. Fed. R. Evid. 702, Advisory Committee Notes (2000 amendments). "An expert should be permitted to testify if the proponent demonstrates that: (i) the expert is qualified; (ii) the evidence is relevant to the suit; and (iii) the evidence is reliable." *Perez v. Rash Curtis & Assocs.*, No. 16-cv-03396-YGR, 2019 WL 1491694, at *3 (N.D. Cal. Apr. 4, 2019) (referencing *Thompson v. Whirlpool Corp.*, No. C06-1804-JCC, 2008 WL 2063549, at *3 (W.D. Wash. 2008) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589-90 (1993) ("*Daubert I*")).

Trial judges have discretion to determine reasonable measures of reliability. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153 (1999). *Daubert I* and Rule 702 also require that expert

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591, 597. “Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.” *Id.* at 591. 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” rather the “list of factors was meant to be helpful, not definitive, and the trial court has discretion to decide how to test an expert’s reliability as well as whether the testimony is reliable, based on “the particular circumstances of the particular case.” *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010), as amended (Apr. 27, 2010) (internal quotation omitted).

Additionally, Paragraph 11 of this Court’s standing order for civil cases reads:

Daubert Motions. Each side is limited to three Daubert motions throughout the entire case absent leave of court. Daubert motions *must clearly specify the paragraphs or portions of the report that the party seeks to exclude*. Parties are reminded that issues going to the weight and credibility to be given to a report are not proper bases to bring a Daubert motion.

(Emphasis supplied.)

Here, the Court allowed the parties to submit omnibus orders challenging more than three experts. (Dkt. No. 288.) It did not relieve the parties from the requirement that they clearly identify the opinions being challenged.

II. DEFENDANTS’ MOTION TO EXCLUDE

Defendants move to exclude opinions of two of plaintiff’s experts: Frank Partnoy and Dr. Oded Shenkar. (Dkt. No. 292; Dkt. No. 292-2, Partnoy Rebuttal; Dkt. No. 292-6, Shenkar Report.) The Court addresses each in turn.

A. Frank Partnoy

Defendants first argue the opinions referenced in paragraphs 9-21 of the Partnoy Rebuttal should be excluded as improper legal opinions because Partnoy opines that the experts he is rebutting, Alex Gauna and Brett Trueman, do not rely on any reliable methodology or principles. (Dkt. No. 292 at 2.) Though a few sentences in the challenged opinions use language from Federal Rule of Evidence 702, they are not legal opinions. (*See, e.g.*, Partnoy Rebuttal at ¶ 9 (stating Gauna and Trueman “do not describe any reliable methodology, or reliable principles and methods, that they applied in forming their opinions and conclusions, or any principles and

methods that another expert could follow to test or replicate their opinions”).) The challenged opinions include detailed analysis of what he sees as the shortcomings of the other experts’ opinions. Partnoy is making a substantive critique of the methods employed by the other experts, which is often the central role of a rebuttal expert. He is not simply stating as a matter of law that they are inadmissible under *Daubert*.

Defendants additionally seek exclusion of the opinions in paragraphs 25-26 and 28-31 because they go beyond rebuttal of defendants’ experts. Defendants argue that Partnoy improperly refers to media articles and reports about the November 1, 2018 call that were not referenced by defendants’ experts. This is not improper. Partnoy refers to these sources as a critique of defendants’ experts’ methodology. Defendants’ experts only looked at a certain kind of analyst report during a specific period of time after the call as a basis for their opinions on how the public perceived the Challenged Statement. Partnoy argues that these limitations were arbitrary and that a broader view undermines their findings regarding how the Challenged Statement was understood. Thus, his references to other sources is directly responsive to their opinions.

Accordingly, the motion is **DENIED** as to Partnoy.

B. ODED SHENKAR

Defendants argue that Shenkar’s opinions include improper assertions about defendants’ subjective knowledge.¹ “Courts routinely exclude as impermissible expert testimony as to intent, motive, or state of mind.” *Lanard Toys Ltd. v. Anker Play Prod., LLC*, No. CV 19-4350-RSWL-AFMX, 2020 WL 6873647, at *7 (C.D. Cal. Nov. 12, 2020) (citation and internal quotation marks omitted) (collecting cases). However, “[g]enerally, ‘state of mind’ and ‘intent’ objections are better ruled on at trial: the context of the testimony and the purposes for which it is offered are critical.” *In re Juul Labs, Inc. Mktg., Sales Pracs. & Prod. Liab. Litig.*, No. 19-MD-02913-WHO, 2022 WL 1814440, at *14 (N.D. Cal. June 2, 2022). Opinions premised on what a defendant

¹ Defendants only identify paragraphs 75, 91, 103, 116, 123, 129, and 172, but purport to challenge any paragraphs in which Dr. Shenkar makes improper assertions regarding knowledge or state of mind. The motion is denied as to any opinions not specifically identified. It is not the role of the Court to scour the report *sua sponte* for potential problems.

1 knew at a certain time may be appropriate where reasonably based on admissible evidence. *Id.*
2 (leaving until trial determination of whether expert could opine regarding what defendant knew
3 regarding health effects).

4 The opinions defendants identified do not go to intent or motive, they are statements
5 regarding what Apple must have known at certain times based on the evidentiary record.
6 Accordingly, the Court does not find exclusion at this time appropriate and denies the motion on
7 this basis.

8 Defendants also move to exclude opinions in paragraphs 4, 14, and 52-63.² They argue
9 Shenkar may not opine on certain economic issues in China as he is a sociologist and not an
10 economist. Specifically, they challenge his expertise on “economic trends, and in particular, their
11 impact on the Chinese smartphone market.” (Dkt. No. 292 at 7.)

12 Shenkar is qualified to give the challenged opinions. He is an expert in Chinese sociology
13 with a focus on business. His background and experience sufficiently prepare him to make the
14 challenged opinions, which are his opinion regarding what studies and other sources say about the
15 general economic climate in China. Shenkar grounds these opinions in citations to various
16 sources, none of which defendants challenge. Accordingly, the Court finds the opinions
17 adequately supported and within Shenkar’s expertise.

18 Accordingly, the motions is **DENIED** as to Shenkar.

19 Defendants’ motion to exclude is therefore **DENIED** in its entirety.

20 **III. PLAINTIFF’S MOTION**

21 The Court first addresses three issues relevant to multiple experts. First, to the extent
22 plaintiff seeks to exclude experts based on relevance because they opine on the accuracy of the
23 November 1, 2018, 1Q19 Guidance (“Guidance”), the motion is denied. The accuracy of the
24 Guidance and the extent to which it accounted for factors that plaintiff alleges were not adequately
25 disclosed through the Challenged Statement are relevant to various of defendants’ defenses,

26
27 ² Again, though defendants request the Court strike all opinions in which Dr. Shenkar
28 opines improperly on the Chinese economy, the Court only addresses those paragraphs which
defendants specifically identify and denies any other as procedurally not properly raised

1 including that defendants did not act with knowledge or intent, which is relevant to scienter.
2 Similarly, the Court rejects plaintiff's argument that opinions regarding whether factors and events
3 subsequent to the Challenged Statement are irrelevant and prejudicial. Though plaintiff is correct
4 that such opinions are not relevant to determination of what defendants knew when the Challenged
5 Statement was made, they are relevant to issues such as loss causation. Plaintiff must show that
6 the Challenged Statement caused its loss. Whether other events subsequent to November 1 and
7 before the end of the class period impacted changes in the value of Apple's securities is relevant.

8 Second, plaintiff appears to seek to exclude any opinions on the accuracy of the
9 Challenged Statement as interpreted by defendants (that is, that the Challenged Statement was
10 retrospective and/or about countries experiencing currency value fluctuation). While plaintiff is
11 correct that experts may not opine on Cook's *intent* in making the statement, or what he thought
12 the statement meant, they may opine on whether a given interpretation of the statement is factually
13 supported.

14 Third, to the extent plaintiff seeks to exclude opinions without adequately identifying the
15 specific paragraphs at issue, the motion is denied. In line with this Court's standing order, the
16 Court limits its review of plaintiff's motion to opinions that are clearly identified.

17 **A. DENNIS YANG**

18 Dennis Yang, Ph.D. was hired by defendants to opine on macroeconomic conditions in
19 China during the second half of 2018. (Dkt. No. 301-2, "Yang Report.")

20 Plaintiff does not clearly identify the portions of the Yang Report it seeks to exclude. (*See*,
21 *e.g.*, Dkt. No. 301 at 3 (stating at one point that "much of" the testimony is unreliable and
22 irrelevant and later that the entire report is unreliable and irrelevant).) The Court has considered
23 whether each argument raised is a basis for excluding the entire report or, if identified, the specific
24 paragraphs. As with the defendants, the Court will not scour the record to identify objectionable
25 opinions not specified by plaintiff. While plaintiff raises numerous objections to Yang's proffered
26 testimony, his qualifications as an expert on the Chinese economy is not one of them.

27 // //

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