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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GARY WAGNER, a married man; GIGGLING MARLIN, INC., a Wyoming corporation,

Plaintiffs-counter-defendants-Appellees,

v.

DEREK ADICKMAN, husband

Defendant-counter-claimant-Appellant,

KEITH FOULKE, husband

Defendant-Appellant,

and

UNKNOWN ADICKMAN, named as Jane Doe Adickman, wife; STACY FOULKE, wife; LVR FAMILY TRUST,

Defendants.

No. 21-16243

D.C. No. 2:19-cv-03216-SMB

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

GARY WAGNER, a married man; GIGGLING MARLIN, INC., a Wyoming corporation, Plaintiffs-counter-defendants-Appellees, v. KEITH FOULKE, husband; UNKNOWN ADICKMAN, named as Jane Doe Adickman, wife; STACY FOULKE, wife; LVR FAMILY TRUST, Defendants, and DEREK ADICKMAN, husband Defendant-counter-claimant-Appellant.	No. 21-16868 D.C. No. 2:19-cv-03216-SMB

Appeal from the United States District Court
for the District of Arizona
Susan M. Brnovich, District Judge, Presiding

Submitted November 14, 2022[**]
Phoenix, Arizona

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: BYBEE and OWENS, Circuit Judges, and RAKOFF,[***] District Judge.

Defendant-Appellant Derek Adickman ("Appellant") appeals from a judgment, imposition of sanctions, and award of attorney's fees in a civil action against Plaintiffs-Appellees Gary Wagner and Giggling Marlin, Inc. ("Plaintiffs"). The lawsuit concerned a business, named "Giggling Marlin Tequila," that the parties had started together. A jury found Appellant liable for fraud (among various other claims), for which a judgment of $87,250.31 in compensatory damages and $250,000 in punitive damages was entered against Appellant. In addition, the district court imposed sanctions against Appellant for failing to arbitrate the dispute and awarded Plaintiffs attorney's fees against Appellant pursuant to Ariz. Rev. Stat. § 12-231.01. We affirm.

I. Exclusion of Expert Testimony

Appellant alleges that the district court erred by excluding profferred expert testimony that Giggling Marlin Tequila was worth roughly $8 million. We review the district court's admission or exclusion of testimony by non-"scientific" experts for abuse of discretion. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999); *United States v. Spangler*, 810 F.3d 702, 706 (9th Cir. 2016). "The district court is

[***] The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

accorded broad latitude in determining the reliability of expert testimony." *United States v. Vallejo*, 237 F.3d 1008, 1019 (9th Cir. 2001) (citing *Kumho Tire*, 526 U.S. at 142).

The expert obtained his $8 million estimate by assuming an annual revenue that starts at $3 million, grows at 25% per year for the first five years (i.e., the "operating net cash flow"), and then stays constant as a perpetuity thereafter (i.e., the "terminal value"). However, these projections had no reasonable basis in reality—the revenues from 2015 to 2019 ranged from $12,000 to $162,000 with a median of $40,000, more than an order of magnitude lower than $3 million.[1] The expert's testimony is therefore excludable under Fed. R. Evid. 702, 703 as being unreliable. Since "we may affirm the district court on any basis supported by the record," *United States v. Mixon*, 930 F.3d 1107, 1110 (9th Cir. 2019), we hold that the district court was within its discretion to exclude the expert's testimony.

II. Sanctions for Failed Arbitration

Appellant contends that the district court erred when it sanctioned him for causing the arbitration to fail, arguing that the district court's characterization of

[1] There is some debate over whether the estimate was actually based on a purported $15 million, five-year distribution contract (i.e., $3 million per year), although the expert explicitly denied that it was. Such a deal would substantiate the assumed revenue projections, but nothing in the record indicates that such a deal existed.

events is factually incorrect. "We review the district court's imposition of a . . . sanction for an abuse of discretion, and any factual findings related to that sanction are reviewed for clear error." *Merchant v. Corizon Health*, 993 F.3d 733, 739 (9th Cir. 2021) (citing *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 957–58 (9th Cir. 2006)). The district court's recounting of events is clearly erroneous if it is "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Doe v. Snyder*, 28 F.4th 103, 106 (9th Cir. 2022) (quoting *Edmo v. Corizon, Inc.*, 935 F.3d 757, 785 (9th Cir. 2019)).

The district court found that Appellant refused to pay the arbitration deposit and did not send Plaintiffs' counsel a copy of the revised arbitration agreement. These findings are substantiated by the arbitrator's order terminating the arbitration as well as testimony by Appellant's counsel during a contempt hearing. Appellant fails to point to any part of the record that contradicts these findings. We therefore see no clear error in the district court's determination that Appellant was at fault in causing the arbitration to be terminated, and thus no abuse of discretion in its decision to sanction Appellant.

III. Improper Statements by Plaintiffs' Counsel

During closing argument, Plaintiff's counsel told the jury that the dispute with Appellant "should have never come to court" and implied that it would have

been arbitrated had it not been for Appellant's uncooperative behavior during the arbitration proceedings. He also made comments about how the damages do not include the "couple hundred thousand dollars" of attorney's fees incurred by his client over the course of the litigation, but he thinks that they "should be in there."

Appellant did not object to these statements when they were made or before the verdict was read, and so we are limited to plain error review. *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1192–93 (9th Cir. 2002) (applying plain error review when the appellant "failed to object to [statements] made by [opposing] counsel during closing argument"). Accordingly, we can reverse only if the statements by Plaintiffs' counsel "affected [Appellant]'s substantial rights" and "seriously affected the fairness, integrity, or public reputation" of the trial. *Bearchild v. Cobban*, 947 F.3d 1130, 1139 (9th Cir. 2020).

Nothing in the record suggests that the verdict was, as Appellant argues, a result of the jury "retaliat[ing] against Appellant . . . for not arbitrating." Appellant also posits that the jury's question during deliberations, "What are pla[i]ntiffs att[]orney fees?," indicates that they attempted to factor in attorney's fees into their damages calculation. He argues, "It's not a coincidence that the jury's award of punitive damages[] ($250,000.00) is roughly the same amount of attorney's fees conveyed to the jury by Plaintiffs' counsel." But the district court's response to the

jury's question nullified any intent they had of incorporating attorney's fees into their damages determination: "Attorney fees are not a part of damages and not relevant to your decision." Nothing in the record indicates that the jurors did not understand the district court's unambiguous answer.

We therefore hold that Appellant's arguments do not pass muster with respect to the stringent plain-error standard articulated above. *See, e.g.*, *Draper v. Rosario*, 836 F.3d 1072, 1076 (9th Cir. 2016) ("We conclude that defense counsel improperly vouched for the credibility of [its] witnesses during closing argument, but on plain error review, the district court's failure to correct the error sua sponte does not warrant reversal."); *see also id.* at 1085 (noting that reversal due to plain error "is available only in *extraordinary* cases" (emphasis added) (cleaned up) (quoting *Hemmings*, 285 F.3d at 1193)).

IV. Attorney's Fees Under Arizona State Law

Appellant argues that the district court erred in awarding Plaintiffs attorney's fees pursuant to Arizona state law, which provides that, "[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." Ariz. Rev. Stat. § 12-341.01(A). Relying on this statute, the district court awarded Plaintiffs $315,934 in attorney's fees. "We

review an award of attorney's fees for abuse of discretion." *Stetson v. Grissom*, 821 F.3d 1157, 1163 (9th Cir. 2016).

First, Appellant argues that this case is not one "arising out of a contract," and so § 12-341.01 is inapplicable. Specifically, he contends that he and Plaintiffs never agreed on the terms to their business agreement, and so no valid contract exists between them. But the statute does not encompass only those actions whose underlying contracts are valid. "The proper inquiry for determining whether a claim 'arise[s] out of a contract' is whether the claim could not exist but for the breach or avoidance of contract. It is well established, moreover, that a defendant is entitled to attorney's fees if the plaintiff's claims arise out of an *alleged* contract that is proven not to exist." *Harris v. Maricopa Cnty. Superior Ct.*, 631 F.3d 963, 974 (9th Cir. 2011) (emphasis added) (citations and internal quotation marks omitted). Here, the record contains a "Giggling Marlin Tequila Private Operating Agreement" signed by both parties, and both parties filed breach-of-contract claims against each other. We therefore hold that the action before us is one "arising out of a contract" for the purposes of Ariz. Rev. Stat. § 12-341.01.

Next, Appellant argues that, even conceding § 12-341.01's applicability, the district court abused its discretion in its analysis of the factors outlined in *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570 (1985), which "a court

deciding whether to award fees under [§ 12-341.01] must consider." *Harris*, 631 F.3d at 974. Here, the district court provided a reasoned explanation of its analysis, and Appellant does not raise any counterarguments that leave us with "a definite and firm conviction that the district court committed a clear error of judgment." *United States v. Mixon*, 930 F.3d 1107, 1110 (9th Cir. 2019) (cleaned up) (quoting *United States v. Braunstein*, 281 F.3d 982, 992 (9th Cir. 2002)). And "while different courts might reasonably reach different determinations as to whether a fee award was appropriate under the [*Warner*] factors," *Harris*, 631 F.3d at 975, we hold that the district court did not abuse its discretion here.

AFFIRMED.