

1 **UNITED STATES DISTRICT COURT**  
2 **DISTRICT OF NEVADA**

3 \* \* \*

4 ROBERT SLOVAK,

5 Plaintiff,

6 v.

7 GOLF COURSE VILLAS  
8 HOMEOWNERS' ASSOCIATION, *et al.*,

9 Defendants.

Case No. 3:13-CV-0569-MMD-CLB

**ORDER GRANTING WELLS FARGO  
BANK, N.A.'S MOTION TO EXCLUDE  
PLAINTIFF'S DISCLOSED WITNESSES  
AND DENYING SLOVAK'S MOTION TO  
EXCLUDE WELLS FARGO'S  
DISCLOSED WITNESS**

[ECF Nos. 338, 353]

10 Before the Court is Defendant Wells Fargo Bank, N.A.'s ("Wells Fargo") motion to  
11 exclude Plaintiff Robert Slovak's ("Slovak") disclosed witnesses. (ECF No. 338.) Slovak  
12 responded, (ECF No. 352), and Wells Fargo replied. (ECF No. 355.) Also before the Court  
13 is Slovak's motion to exclude Wells Fargo's disclosed witness. (ECF No. 353). Wells  
14 Fargo responded, (ECF No. 363), and Slovak replied. (ECF No. 367.) For the reasons  
15 discussed below, the Court grants the motion to exclude Slovak's disclosed witnesses,  
16 (ECF No. 338), and denies the motion to exclude Wells Fargo's disclosed witness, (ECF  
17 No. 353).

18 **I. BACKGROUND AND PROCEDURAL HISTORY**

19 Slovak filed this lawsuit in 2013 seeking quiet title and declaratory relief related to  
20 a condominium property located in Incline Village, Nevada. (ECF No. 1.) A settlement  
21 was reached between Wells Fargo and Slovak in June 2014. (ECF No. 83.) Pursuant to  
22 the terms of the agreement, Slovak agreed to pay Wells Fargo \$280,000. (ECF No. 124.)  
23 In return, Wells Fargo agreed to provide Slovak with the deed of trust, the note, and to  
24 reconvey the property to him. (*Id.*) To date, more than seven years later, the terms of that  
25 settlement agreement have yet to be consummated.

26 The primary contention between the parties remains the issue of whether the  
27 documents tendered by Wells Fargo, are, in fact, the original note and deed of trust  
28 required to be delivered pursuant to the terms of the parties' agreement.

1           At a hearing on June 20, 2018, Slovak's attorney, Pankopf, claimed the forensic  
2 examination conducted on the loan documents "irrefutably" established the documents  
3 were "forgeries" and Wells Fargo had perpetrated a fraud on the Court. (ECF No. 202,  
4 Hr'g Minutes; ECF No. 214 at 3, Hr'g Transcript.) His claims were based upon two expert  
5 reports he received prior to the hearing but did not provide to the Court or opposing  
6 counsel. (ECF No. 214 at 5-6.) Based on the seriousness of Slovak's accusation, but  
7 without any evidence to review, the Court concluded it could not rule on the outstanding  
8 motion to enforce settlement until it had an opportunity to consider the allegations made  
9 by Slovak. (*Id.* at 15-16.) Slovak then withdrew his motion to enforce, without prejudice,  
10 indicating he wanted to proceed by filing a motion for sanctions. (*Id.* at 17.)

11           Slovak filed a motion for sanctions on August 17, 2018. (ECF No. 218.) The  
12 overarching contention of Slovak's motion for sanctions was his argument that Wells  
13 Fargo and its counsel failed to provide "original copies" of the note and deed of trust as  
14 required by the parties' previous settlement agreement. (*Id.*) According to Slovak, the  
15 documents Wells Fargo and its counsel tendered as "originals" were, "at best copies or  
16 at worst fabricated forgeries." (*Id.* at 10.) Slovak's argument was premised upon the  
17 alleged expert reports and opinions provided by Dr. James E. Kelley ("Dr. Kelley") and  
18 Gary Michaels ("Michaels"), who Slovak proffered as experts in the field of forensic  
19 document examination. Slovak offered the C.V.s of Dr. Kelley and Michaels, as well as  
20 their respective expert reports, as evidence to support his contentions. (*Id.* at Exs. 8-11.)

21           According to Dr. Kelley's report, the documents tendered were not originals but  
22 were copies made by an ink jet printer. (*Id.* at Ex. 10.) Michaels did not personally examine  
23 the documents. (*Id.* at Ex. 11.) Rather, according to this report, he simply reviewed Dr.  
24 Kelley's report and conclusions. Based on that review, he agreed that the documents  
25 were not the originals but were copies made by an ink jet printer. However, Michaels also  
26 went one step further concluding the documents were "forgeries." (*Id.*)

27           Wells Fargo opposed the motion for sanctions on August 31, 2018. (ECF No. 222.)  
28 Wells Fargo argued that the Court should deny the sanctions for a variety of reasons.

1 Specifically, Wells Fargo challenged Slovak's expert witnesses arguing that their expert  
2 opinions and reports should be rejected by the Court because neither witnesses'  
3 testimony or opinions satisfy the requirements of Federal Rule of Evidence 702 or the  
4 *Daubert* analysis. (*Id.* at 7-10.) According to Wells Fargo, without these expert opinions  
5 and reports, there was no evidence in the record to support any finding that the  
6 documents tendered were not the originals. Slovak filed his reply on September 11, 2018.  
7 (ECF No. 225.)

8 Due to the seriousness of Slovak's allegations, the Court ordered an evidentiary  
9 hearing to determine whether the expert opinions and reports offered by Slovak satisfied  
10 Rule 702 and *Daubert*. (ECF No. 238.) This hearing was held on November 28, 2018.  
11 (ECF No. 244, Hr'g Minutes; ECF No. 249, Hr'g Transcript.) At that hearing, the Court  
12 heard testimony of Dr. Kelley regarding his qualifications and his expert opinions  
13 regarding the documents. (*Id.*)

14 At Slovak's request, however, the Court agreed to bi-furcate the hearing into two  
15 parts. The first stage of the hearing was to address Slovak's motion for sanctions –  
16 specifically, to determine whether the expert testimony of Slovak's experts satisfied the  
17 requirements under Federal Rules of Evidence 702 and *Daubert*. The second stage of  
18 the hearing was to take evidence related to the limited question of the authenticity of the  
19 documents Wells Fargo provided and claimed were the "original." Thus, the only issue to  
20 be presented at the second stage of the bifurcated hearing is whether the documents  
21 provided by Wells Fargo are the authentic originals.

22 Initially, it was the Court's intent to issue a ruling on Slovak's motion for sanctions  
23 after concluding both aspects of the evidentiary hearing. However, after hearing the  
24 testimony from Dr. Kelley, it was plain that the motion for sanctions could be decided  
25 without any additional evidence or testimony. Thus, following the evidentiary hearing, the  
26 Court entered its order denying Slovak's motion for sanctions after finding Slovak's expert  
27 witness, Dr. Kelley was not qualified to provide expert testimony regarding forensic  
28 document analysis as he lacked the requisite "knowledge, skill, experience, training, or

1 education” in this field. (ECF No. 250.) In addition, the Court found that Dr. Kelley’s  
2 methods were not reliable as required under *Daubert* and Rule 702. (*Id.*) In the order, the  
3 Court also ruled that a “forensic examination report” prepared by Michaels is equally  
4 inadmissible and would not be considered by the Court. (*Id.*) Thus, the Court denied  
5 Slovak’s motion for sanctions ruling that Slovak provided no admissible evidence to  
6 support his claims that the documents tendered were not originals and denied the motion  
7 for sanctions. (*Id.*)

8           However, in the order, the Court did not make any factual findings related to  
9 whether there was sufficient evidence presented by Wells Fargo to establish that the  
10 documents it presented in the Spring of 2018 were authentic and original. This issue was  
11 still to be addressed at the second stage of the evidentiary hearing. However, given that  
12 over five years had elapsed between the date of the parties’ settlement conference and  
13 the continued evidentiary hearing (which was set to take place in February 2019), it was  
14 unclear if Slovak was ready, willing, and able to pay the \$280,000 required to finalize the  
15 settlement, if the Court found in favor of Wells Fargo.

16           Therefore, the Court ordered Slovak to deposit \$280,000 with the Clerk of the  
17 Court to evidence his ability to abide by the settlement terms before any further litigation  
18 ensued related to the enforcement of the parties’ settlement agreement. (ECF Nos. 251.)  
19 The Court vacated the second part of the evidentiary hearing at that time and indicated  
20 the hearing would be rescheduled after Slovak complied with the order to deposit the  
21 funds. (*Id.*)

22           Slovak failed to comply. Rather, Slovak filed an interlocutory appeal to the Ninth  
23 Circuit Court of Appeals, which the Ninth Circuit dismissed for lack of jurisdiction. (ECF  
24 Nos. 254, 260.) At no time did Slovak seek a stay of the Court’s deposit order while the  
25 case was pending on appeal.

26           Upon remand, the Court again ordered Slovak to deposit \$280,000 with the Clerk  
27 of the Court to evidence his ability to finalize the settlement agreement. (ECF No. 282.)  
28 Again, Slovak failed to comply. This time Slovak used a new tactic. He filed an untimely

1 “objection” the second deposit order, which he simultaneously titled a “motion for  
2 reconsideration.” (ECF No. 283.) The District Court overruled the objection. (ECF No.  
3 291). After the objection was overruled, and even though the deposit orders were never  
4 stayed, Slovak continued to refuse to comply with the Court’s deposit orders. Ultimately,  
5 the Court entered an “order to show cause” why Slovak should not be sanctioned for his  
6 violations of the Court’s deposit orders. (ECF No. 292.) After the hearing on the order to  
7 show cause, Slovak finally deposited the funds into a separate bank account.<sup>1</sup> After  
8 several continuances were granted, the continued evidentiary hearing is now set for  
9 October 27 and 28, 2021. (ECF Nos. 312, 317, 362.)

10 **A. Wells Fargo’s Motion to Exclude Witnesses**

11 In preparation for the continued evidentiary hearing, the parties submitted their  
12 witness and exhibit lists, (ECF Nos. 336, 337). Thereafter, Wells Fargo filed a motion to  
13 exclude all witnesses designated by Slovak, except for Slovak and the witnesses Wells  
14 Fargo intends to call. (ECF No. 338.)

15 The witnesses listed by Slovak that Wells Fargo seeks to exclude are as follows:

- 16 1. Douglas Cobb – expected to testify regarding his observation of the paper provided  
17 to Plaintiff at the signing of the note and deed of trust compared to the documents  
18 presented at the November 2018 hearing and December 2018 examination.
- 19 2. Tom Vastrick – expected to testify regarding the Jan Kelly report.
- 20 3. Alan D. Wallace – expected to testify regarding escrow and title Procedures,  
21 custodial file, custodial agreement, and bailor/bailee agreement/receipt.
- 22 4. Dr. James Kelley – expected to testify regarding loan documents he has observed.
- 23 5. Robert Ferguson – expected to testify regarding loan documents and chain of  
24 custody.
- 25 6. Catherine O’Mara – expected to testify regarding loan documents and chain of

26  
27 <sup>1</sup> The Court, however, held its decision in abeyance on the question of whether  
28 sanctions would be imposed on Slovak for his repeated failures to comply with the Deposit  
Orders. A decision on this issue will be issued in due course.

1 custody.

2 7. Shae Smith – expected to testify regarding loan documents and chain of custody.

3 8. Kevin Michael Weber – expected to testify regarding loan documents and chain of  
4 custody.

5 (*Compare* ECF No. 336, *with* ECF No. 337.)

6 Wells Fargo argues that Slovak is “improperly trying to use this hearing as a re-do  
7 of his failed 2018 effort to affirmatively prove his signature was inauthentic . . .” (ECF No.  
8 338.) Wells Fargo argues that one expert, Dr. Kelley, has already been excluded, three  
9 witnesses are experts with no reports, and the others are supposed custodial witnesses  
10 Wells Fargo did not designate and were not subpoenaed. (*Id.*)

11 Slovak responded that he never finished presenting his case because Wells Fargo  
12 produced a witness who was not a qualified records custodian, and that Dr. Kelley is now  
13 a fact witness. In addition, Slovak argues that Doug Cobb, Alan Wallace, and Thomas  
14 Vastrick are qualified expert witnesses and the Court never precluded or limited Slovak’s  
15 identification of fact or expert witnesses. (ECF No. 352.)

16 Wells Fargo replied that Slovak mistakes the hearing’s purpose, Slovak failed to  
17 disclose expert reports for his three newly designated experts, the three experts never  
18 observed the loan documents and the time to do so has passed, the Court has already  
19 excluded Dr. Kelley, and Slovak’s pre-hearing disclosure was untimely. (ECF No. 355.)

20 **B. Slovak’s Motion**

21 Slovak also filed a motion to exclude Wells Fargo’s disclosed witness, Jodie  
22 Hawkins (“Hawkins”). (ECF No. 353.)<sup>2</sup> Slovak argues (1) he was “denied his right to finish  
23 his day in court midstream,” including the completion of his examination of Hawkins; (2)  
24 Hawkins is unqualified to be a “chain of custody” witness; and (3) Slovak requests the  
25 opportunity to finish his witness examination of Hawkins. (*Id.*)

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27 <sup>2</sup> Slovak also specifically “requested that he be afforded the same accommodation  
28 provided Wells Fargo by the Court with respect to Wells Fargo’s motion to exclude Mr.  
Slovak’s witnesses. That is, an opportunity to file a reply to any response Wells Fargo  
may file to Mr. Slovak’s instant Motion to Exclude.” (*Id.* at 11.)

1 In response, Wells Fargo argues the motion should be denied because (1)  
2 excluding Hawkins from testifying as a representative and custodian of records is  
3 squarely at odds with the express purpose of the hearing, which is for Wells Fargo to  
4 present evidence of the Loan Documents' authenticity through its expert testimony and  
5 custodial witnesses; (2) Slovak is too late in scrutinizing how Hawkins was designated at  
6 the November 2018 hearing so the time for any such objection has long passed and is  
7 therefore waived; (3) Slovak's argument that Hawkins is unqualified goes only to weight  
8 and not admissibility; and (4) Slovak was not denied the right to fully examine Hawkins at  
9 the November 2018 hearing. (ECF No. 363.)

10 Slovak's reply was due September 14, 2021. On September 14, 2021, Slovak filed  
11 an appeal for district judge review of this Court's September 1, 2021, minute order. (ECF  
12 No. 365.) In his objection, Slovak, discussed, in part, the "no filings" directive of the minute  
13 order arguing it "not only chills legal advocacy, but it also suppresses it." (*Id.* at 2-3.)  
14 Because Slovak did not file a timely reply, but instead filed his objection, the Court granted  
15 Slovak a three-day extension to file his reply to Wells Fargo's response. (ECF No. 366.)  
16 On September 17, 2021, Slovak filed a reply and stated the extension was not necessary  
17 and Slovak "did not reply on September 14, 2021 simply because he does not believe  
18 one is warranted." (ECF No. 367.)

## 19 **II. DISCUSSION**

### 20 **A. Scope and Purpose of the Hearing**

21 The scope and purpose of the continued evidentiary hearing is to allow Wells  
22 Fargo to proffer evidence that the loan documents are original documents. (Tr. Of  
23 Proceedings of November 28, 2018, ECF No. 249 at 179:3-18.) On several occasions,  
24 the Court has made the scope and purpose of this hearing clear on the record.  
25 Specifically, during the first part of the evidentiary hearing, the following exchange took  
26 place:

27 THE COURT: The plaintiff has filed a Motion for Sanctions that alleges  
28 Wells Fargo lied to the Court when it said it had original documents. And

1 the only evidence to support that that information is false is the expert  
2 testimony and witness that has been offered, at this point, by the plaintiff.

3 MR. JOHANNESSEN: Uh-huh.

4 THE COURT: If that testimony and information is not admissible, then we  
5 are left back with the idea that the only evidence in this case is that this is  
6 the original -- these are the originals, as it's been represented by Wells  
7 Fargo. That might mean that we have to have a bifurcated hearing --

8 MR. JOHANNESSEN: Yes.

9 THE COURT: -- to then come back and decide that question.

10 (*Id.* at 179:3-18.)

11 In the event the Court excluded Dr. Kelley's testimony, which it ultimately did,<sup>3</sup> the  
12 Court noted on the record it was unclear whether it was even necessary to take any  
13 additional evidence regarding the originality of the loan documents:

14 THE COURT: -- if there's no evidence that the documents are not originals,  
15 if [Dr. Kelley's] testimony is not provided -- is not admissible, and it's not  
16 accepted by the Court, then there's no evidence to claim that they're not  
17 originals.

18 . . .

19 And I will tell you I am disinclined to have more evidence and more  
20 testimony and more hearings on this question because without expert  
21 testimony, I see no reason why I should question the statements made by  
22 officers of this court. And, I see no reason not to accept the fact that they  
23 have affidavits provided by custodians of record that state we received  
24 these documents and then we provided them to our attorneys.

25 (*Id.* at 211:14-18, 213:2-10.) However, to ensure that there was "a very thorough record  
26 in the event that [an appeal was filed] at the conclusion of this hearing" and to "create a  
27 record and to protect everybody involved," (*id.* at 218:5-13), the Court granted Slovak's  
28 request to bifurcate the hearing:

THE COURT: And Wells Fargo's position has been, from the beginning of  
this, on remand --

MR. JOHANNESSEN: Yes.

THE COURT: -- that these are the originals.

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<sup>3</sup> ECF No. 250.



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MR. JOHANNESSEN: I agree with that. I agree that that has been their position.

THE COURT: And so without any evidence to the contrary, where would that leave us?

MR. JOHANNESSEN: Oh, I don't think just because there's a negative you can prove the positive ...

(*Id.* at 186:15-24.)

Therefore, the purpose of the second stage of the evidentiary hearing is, *narrowly tailored* for Wells Fargo to put on its case on originality through its single expert and its chain of custody witnesses. Specifically, the Court stated:

I think we should have a second hearing. And at that hearing, I would ask if Wells Fargo intends to have an expert witness that's going to opine as to whether or not these documents are original; that that person be prepared to testify to that but also, if necessary, provide a report to the plaintiff so that they can be prepared to cross-examine. . . . I think in this particular instance, because I think it makes sense to get to that second issue, that we should have that person prepared to testify to just not Dr. Kelley and his report, but also if that person is going to go on to do the next step, which I would suggest that they do so that we can get to that question of originality as well. If there's any witnesses as to chain of custody, I think those witnesses should be prepared to testify.

(*Id.* at 219:19-220:11.)

Moreover, the Court agreed to take further evidence as to whether the loan documents Wells Fargo proffered in connection with the settlement were originals. (*Id.*) However, the Court made a record that it will not allow the parties to "litigate and litigate and litigate." (*Id.* at 190:17.) The Court determined Slovak has already put on his case:

THE COURT: So if this Court finds that Dr. Kelley's opinion is not admissible, and that it rejects his opinions, then we're left back with the same place where we were before.

MR. JOHANNESSEN: Uh-huh.

THE COURT: I'm not sure I understand, at that point, why there would need to be any further examination because that's exactly what you already got. Right? Did plaintiffs not hire an expert to do an examination of these documents?

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MR. JOHANNESSEN: Correct.

THE COURT: Okay. So let's go on – forward this way --

MR. JOHANNESSEN: Okay.

THE COURT: -- this hearing is specific to that. But at end of the day, if that evidence is gone, there is no other evidence that these are not originals and that these documents are not authentic.

(*Id.* at 183:1-18.)

The Court has since reiterated the purpose of the bifurcated evidentiary hearing:

At the November hearing, Slovak requested the court bifurcate the ultimate issue of whether there was evidence that the documents were, in fact, originals. (ECF Nos. 244 at 4, 249 at 204.) Slovak argued that even if the court denied the Sanctions Motion or rejected his experts, there was still no evidence in the record that the documents were in fact originals and the court should hold an additional hearing to make a factual finding on this issue. (ECF No. 249 at 204.)

He asserted there may still be a basis to contest that the documents were originals even without his expert testimony. (*Id.* at 227.) The court agreed to the requested bifurcation and set a second hearing for February 7-8, 2019. (ECF Nos. 244 at 5, 249 at 243.)

(Feb. 26, 2020 Order, ECF No. 280, at 6-7.)

The Court restated in its July 16, 2021 order that “. . . the purpose and scope of the evidentiary hearing set for August 2021 remains the same as when this hearing was originally set in February 2019. . . . Specifically, the purpose of the hearing was, and continues to be, for the presentation of evidence related to the authenticity and originality of the documents offered by Wells Fargo in 2018 to finalize the parties’ settlement agreement.” (ECF No. 335, at 1-2.) This evidence will be presented through those witnesses that have personal knowledge of the chain of custody of the documents from the time they were signed until the hearing, and Wells Fargo’s expert witness, which the Court expressly stated would be permitted to testify as to the originality and authenticity of the documents.

1           **B.     Witnesses at Issue**

2                   **1.     Dr. James Kelley**

3           The Court has already concluded that Dr. Kelley “is not a qualified expert in the  
4 area of forensic document examination and his opinions are not supported by scientifically  
5 reliable or accepted methods or principals.” (ECF No. 250 at 13.) The Court has further  
6 held “Dr. Kelley is excluded as an expert and his expert opinions are excluded from  
7 consideration by this court.” (*Id.*)

8           Slovak claims that Dr. Kelley is a “fact witness” because he claims to have  
9 reviewed the documents provided at the first stage of the evidentiary hearing and now  
10 claims they are not the “same” as the documents he initially reviewed. (ECF No. 352 at  
11 5-6.) However, the Court disagrees that Dr. Kelley can testify on these issues as merely  
12 a “fact witness.” Dr. Kelley was provided the documents at the first stage of the hearing  
13 and was allowed ample time to review them. At that time, he was given the opportunity to  
14 testify as to whether the documents appeared to be the same as those that he previously  
15 examined and he claimed he could not testify to that without conducting additional  
16 “examination” of the documents. Therefore, the testimony that Slovak seeks to provide  
17 from Dr. Kelley is not merely lay observations (as he now claims); rather, he seeks to  
18 admit additional “expert” opinions from Dr. Kelley. However, this Court has already  
19 determined that Dr. Kelley is not an “expert,” he is not credible, and, even if he had the  
20 credentials to be deemed a forensic document expert, the techniques he used to examine  
21 documents are unreliable. Therefore, the Court excludes Dr. Kelley from testifying at the  
22 continued hearing.

23                   **2.     Doug Cobb, Tom Vastrick, Alan Wallace**

24           Next, Wells Fargo argues that Slovak intends to call Douglas Cobb, Tom Vastrick,  
25 and Alan Wallace as experts; however, Slovak did not timely disclose these experts and  
26 no expert reports have been provided. (ECF No. 338 at 12.) Wells Fargo also argues that  
27 the Federal Rules of Civil Procedure do not contemplate an infinite number of experts on  
28 a subject, but instead one, and Slovak already introduced expert testimony and failed.

1 (Id. at 11.)

2 Slovak contends Cobb, Vastrick, and Wallace are all “experts” and should be  
3 allowed to testify. (ECF No. 352 at 4-7.) In support, Slovak does not produce any expert  
4 reports; rather, he merely attaches each person’s C.V. and brief statements as to what  
5 their proposed testimony would be.

6 In reply, Wells Fargo again contends that Slovak’s three newly designated expert  
7 witnesses should be excluded because Slovak did not disclose expert reports for any of  
8 them, as required by Fed. R. Civ. P. 26. Further, Wells Fargo argues the newly disclosed  
9 experts should not be permitted to testify regarding the Loan Documents because they  
10 have never observed the documents and the time to do so has long-since passed. (ECF  
11 No. 355.)

12 The Court agrees with Wells Fargo that the alleged expert testimony that Slovak  
13 seeks to offer with these experts is improper and should not be permitted.

14 **i. Expert Disclosure Pursuant to Fed. R. Civ. P. 26**

15 Fed. R. Civ. P. 26(a)(2) governs the disclosure of expert testimony and provides  
16 that in addition to the disclosures required by Rule 26(a)(1), “a party must disclose the  
17 identity of any witness it may use at trial ... this disclosure must be accompanied by a  
18 written report ... if the witness is one retained or specifically employed to provide expert  
19 testimony in the case.” The report must contain:

- 20 (i) a complete statement of all opinions the witnesses will express and that  
21 basis and reasons for them; (ii) the facts or data considered by the  
22 witnesses in forming them; (iii) any exhibits that will be used to summarize  
23 or support them; (iv) the witness’s qualifications, including a list of all  
24 publications authored in the previous 10 years; (v) a list of all other cases in  
25 which, during the previous 4 years, the witnesses testified as an expert at  
26 trial or deposition; and (vi) a statement of the compensation to be paid for  
27 the study and testimony in the case.

28 Fed. R. Civ. P. 26(a)(2)(B); *See Goodman v. Staples the Office Superstore, LLC*, 644  
F.3d 817, 827 (9th Cir. 2011). Additionally, Fed. R. Civ. P. 26(a)(2)(D) provides that a  
party must make its expert witnesses disclosures at the times and in the sequences that  
the court orders.

1 In addition to the procedural requirements for disclosure of experts stated above,  
2 Federal Rule of Civil Procedure 702 defines the overarching requirements for the  
3 admission of expert testimony. The rule states that expert testimony can be admitted:

4 If scientific, technical, or other specialized knowledge will assist the trier of  
5 fact to understand the evidence or to determine a fact in issue, a witness  
6 qualified as an expert by knowledge, skill, experience, training, or  
7 education, may testify thereto in the form of an opinion or otherwise if (1)  
8 the testimony is based upon sufficient facts or data, (2) the testimony is the  
9 product of reliable principles and methods, and (3) the witness has applied  
10 the principles and methods reliably to the facts of the case.

11 Fed. R. Evid. 702.

12 “Faced with a proffer of expert scientific testimony, the court must determine at the  
13 outset ... whether the expert is proposing to testify to (1) scientific knowledge that (2) will  
14 assist the trier of fact to understand or determine a fact in issue. This usually entails a  
15 preliminary assessment of whether the reasoning or methodology underlying the  
16 testimony is scientifically valid and of whether that reasoning or methodology properly  
17 can be applied to the facts in issue.” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509  
18 U.S. 579, 589 (1993). The court has discretion under Rule 702 as a “gatekeeper to decide  
19 what evidence is relevant, reliable, and helpful the trier of fact.” *Desrosiers v. Flight Int'l  
20 of Fla. Inc.*, 156 F.3d 952, 961 (9th Cir. 1998).

21 The first portion of the evidentiary hearing was held on November 18, 2018. (ECF  
22 No. 244.) Over two years later and less than two weeks before the second portion of the  
23 evidentiary hearing was to be held, Slovak disclosed—for the first time— three additional  
24 expert witnesses he wished to have testify at the hearing on August 6, 2021. (ECF No.  
25 337.) Slovak’s disclosure was untimely. In addition, Slovak failed to disclose the written  
26 reports for each purported expert as required by Fed. R. Civ. P. 26. Therefore, based  
27 upon the late disclosure and lack of written reports, Slovak’s proposed experts will not be  
28 permitted to testify.

Also, the Court finds that Slovak’s proposed experts must be excluded for  
additional reasons. Specifically, these witnesses must be excluded because the proposed

1 testimony identified by Slovak of these witnesses is improper and inadmissible under Rule  
2 702. The Court will address each expert in turn.

3 **ii. Cobb**

4 First, Slovak seeks to admit the expert testimony of Cobb, who claims he is a  
5 “paper expert.” However, Cobb has not reviewed the documents Wells Fargo submits are  
6 the authentic originals. Rather, Slovak admits that Cobb has only reviewed “unsigned  
7 duplicate original escrow documents.” (ECF No. 352 at 6). Slovak apparently wants Cobb  
8 to review the documents presented at the hearing to opine whether the paper of those  
9 documents matches the paper that the alleged “unsigned duplicates” were printed on and  
10 is thus the same paper. Slovak claims if they are printed on the same paper, “then the  
11 settlement can be consummated.” (*Id.*)

12 This is not a proper basis for an expert to testify and it will not be allowed. There  
13 has been no explanation as to how this “expert” would conduct an analysis of the  
14 competing documents or reach an opinion while sitting on the witness stand. There would  
15 be no way to evaluate whether this person is truly an expert, the methods used in reaching  
16 any “opinion” provided, or the reliability of those opinions – based analysis that would  
17 apparently occur—*in real time*—at the hearing. This type of testimony is improper in that  
18 there is no way to evaluate the methodology used by the expert. However, there would  
19 be no way for opposing counsel cross-examine such a witness. As such, this evidence  
20 would not be useful to the trier of fact. Therefore, the Court finds that Cobb’s proposed  
21 testimony is not based upon sufficient facts or data, there is no way for the Court to  
22 determine if Cobb’s testimony would be based on reliable scientific principles and/or  
23 methods, and, as such, his testimony proposed testimony would not be helpful to the trier  
24 of fact. Therefore, aside from the late disclosure and lack of expert report, Cobb will also  
25 not be permitted to testify as the proffered testimony does not meet the necessary  
26 requirements under Rule 702.<sup>4</sup>

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28 <sup>4</sup> It is worth noting that if Slovak was willing to consummate the settlement based on

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**iii. Vastrick**

Next, Slovak seeks to admit the expert testimony of Vastrick, who claims to be an expert in the areas of “handwriting, hand printing, typewriting, indented writing, counterfeiting, and mechanical impressions” and is expected to provide rebuttal testimony as to Jan Seaman Kelly’s report. (ECF No. 352 at 5-7.)

Like Cobb, there has been no explanation how this “expert” would conduct an analysis of the competing documents while sitting on the witness stand to reach any type of admissible expert opinion. Here again, there would be no way to test whether this person is an expert in this field, any means to challenge the reliability of his methodology or his analysis that would also apparently occur in real time at the hearing. Therefore, as with Cobb, the Court finds that Vastrick’s proposed testimony is not based upon sufficient facts or data, there is no way for the Court to determine if his testimony would be based on reliable scientific principles and/or methods, and, as such, the proffered testimony would not be helpful to the trier of fact. Therefore, Vastrick will also not be permitted to testify as his proposed testimony does not meet the necessary requirements under Rule 702 in addition to his late disclosure and lack of expert report.

**iv. Wallace**

Finally, Slovak seeks to admit the expert testimony of Wallace, who claims to be an expert “regarding escrow and title procedures, custodial files and agreements, and bailor/bailee agreements.” (ECF No. 352 at 5-6.) Slovak claims the unsigned original duplicate of the home equity line of credit note (“Note”) he has in his possession is four single-sided pages whereas the note presented in Las Vegas for examination and the note presented at the hearing are two double-sided pages, thus Slovak claims Wallace will offer his opinions regarding why the duplicate originals are not printed on the same number of pages. (*Id.* at 6.)

It is entirely unclear to the Court how testimony about page numbers could

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Cobb’s review of the documents, this could have been addressed by the parties without having an evidentiary hearing.

1 possibly be relevant, reliable, or helpful in the Court's determination as to chain of  
2 custody. Thus, the proffered testimony does not satisfy the requirements of Rule 702 and  
3 will not be permitted.

4 In sum, Slovak's proffered experts were not timely disclosed and did not provide  
5 expert reports and, on this basis alone, should be excluded. However, in addition, these  
6 witnesses also do not have any personal knowledge of the actual chain of custody of the  
7 documents at issue and none of them have reviewed the actual documents Wells Fargo  
8 has proffered as the authentic originals. Therefore, none of these witnesses can provide  
9 expert opinions based on sufficient facts and data required by Rule 702.

10 As these witnesses were untimely disclosed, have not provided any information on  
11 their reliability any possible expert opinions they may provide, have no personal  
12 knowledge of the actual chain of custody of the documents, have no personal knowledge  
13 as to how Wells Fargo handled the documents at issue, and have not personally reviewed  
14 the documents at issue, the court finds, in its discretion, that these witnesses do not have  
15 any evidence to present that would be: (1) relevant; (2) reliable; or (3) helpful to the trier  
16 of fact. *Desrosiers*, 156 F.3d at 961. Therefore, the Court exercises its discretion and  
17 excludes Slovak's proffered experts from testifying at the evidentiary hearing for all the  
18 reasons stated above.

19 **3. Robert Ferguson, Catherine O'Mara, Shae Smith, and**  
20 **Kevin Michael Weber**

21 Wells Fargo and Slovak listed five duplicate witnesses who are expected to testify  
22 as to the loan documents and chain of custody. (ECF Nos. 336, 337.) Slovak listed four  
23 other chain of custody witnesses, listed above. (ECF Nos. 337.) Wells Fargo seeks to  
24 exclude Slovak's four additional chain of custody witnesses as too numerous. (ECF No.  
25 338.) In his response, Slovak does not address these additional chain of custody  
26 witnesses. (See ECF No. 352.) Therefore, the Court determines that the five custodial  
27 witnesses identified by both Slovak and Wells Fargo are sufficient to determine the chain  
28 of custody. Therefore, Slovak's four additional chain of custody witnesses—Robert



1 Ferguson, Catherine O'Mara, Shae Smith, and Kevin Michael Weber—will not be  
2 permitted to testify.

#### 3 **4. Jodie Hawkins**

4 Finally, Slovak seeks to exclude Wells Fargo's disclosed witness, Jodie Hawkins.  
5 (ECF No. 353.) Slovak argues (1) he was "denied his right to finish his day in court  
6 midstream," including the completion of his examination of Hawkins; (2) Hawkins is  
7 unqualified to be a "chain of custody" witness; and (3) Slovak requests the opportunity to  
8 finish his witness examination of Hawkins. (*Id.*)

9 In response, Wells Fargo argues the motion should be denied because (1)  
10 excluding Hawkins from testifying as a representative and custodian of records is  
11 squarely at odds with the express purpose of the hearing, which is for Wells Fargo to  
12 present evidence of the Loan Documents' authenticity through its expert testimony and  
13 custodial witnesses; (2) Slovak is too late in scrutinizing how Hawkins was designated at  
14 the November 2018 hearing so the time for any such objection has long passed and is  
15 therefore waived; (3) Slovak's argument that Hawkins is unqualified goes only to weight  
16 and not admissibility; and (4) Slovak was not denied the right to fully examine Hawkins at  
17 the November 2018 hearing. (ECF No. 363.)

18 Slovak replied on September 17, 2021; however, his reply contains no substantive  
19 argument. (ECF No. 367.)

20 As outlined above, the express purpose of this hearing is for Wells Fargo to present  
21 evidence of the Loan Documents' authenticity through its custodial witnesses. Not only is  
22 Slovak's objection untimely, but Slovak has no valid basis to object to Hawkins testifying  
23 for this purpose. Accordingly, Slovak's motion is denied.

#### 24 **III. CONCLUSION**

25 For the reasons discussed above, **IT IS HEREBY ORDERED** that Wells Fargo's  
26 motion to exclude Plaintiff's disclosed witnesses, (ECF No. 338), is **GRANTED**. The  
27 following witnesses will not be permitted to testify at the evidentiary hearing: Dr. James  
28 Kelley, Doug Cobb, Tom Vastrick, Alan Wallace, Robert Ferguson, Catherine O'Mara,

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Shae Smith, and Kevin Michael Weber.

**IT IS FURTHER ORDERED** that Slovak's motion to exclude Wells Fargo's disclosed witness, (ECF No. 353), is **DENIED**.

**DATED:** September 21, 2021



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UNITED STATES MAGISTRATE JUDGE