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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Western Alliance Bank,
Plaintiff,
vs.
Richard Jefferson,
Defendant.

**2:14-cv-0761 JWS
ORDER AND OPINION
[Re: Motion at Docket 113]**

Richard Jefferson,
Counter-claimant,
vs.
Western Alliance Bank,
Counter-defendant.

Richard Jefferson,
Third-party plaintiff,
vs.
**Theodore Kritza & Michelle Lee
Kritza,**
Third-party defendants.

1 **I. MOTION PRESENTED**

2 At docket 113, plaintiff Western Alliance Bank (“Bank”) moves to preclude expert
3 opinion testimony by James Tucciarone (“JT”). Third-party defendant Kritza filed a
4 joinder at docket 114. Defendant Richard Jefferson (“Jefferson”) opposes the motion at
5 docket 138. Bank replies at docket 147. Oral argument was requested but would not
6 assist the court.

7 **II. BACKGROUND**

8 The background giving rise to this litigation has been described in detail in the
9 order at docket 183. It need not be repeated here. However, some procedural
10 background needs to be set out.

11 Rule 26(a) and the court’s Scheduling Order at docket 26 set out numerous pre-
12 trial tasks to be accomplished by the parties.¹ Jefferson does not dispute the accuracy
13 of the following:

14 1) Jefferson supplied the disclosures required by Rule 26(a)(1)(A) on July
15 14, 2014 and did not identify JT as a person likely to possess
discoverable information.

16 2) Jefferson provided a supplemental disclosure of information required by
17 Rule 26(a)(1)(A) on October 14, 2014 and did not identify JT as a person
likely to possess discoverable information.

18 3) On November 10, 2014, the date set by the court for Jefferson’s expert
19 disclosures, Jefferson identified only William J. Flynn as an expert. JT
was not mentioned.

20 4) Jefferson filed the witness list required by the court’s order on February
21 27, 2015, at docket 74. In it he listed numerous lay witnesses, including
JT. The witness list identified only William J. Flynn as an expert witness.

22 5) Also on February 27, 2015, Jefferson supplied a second supplement to
23 the disclosures under Rule 26(a)(1)(A) which indicated for the first time
that JT might possess discoverable information.

24 6) JT’s deposition was noticed for May 7, 2015. About 12 hours before
25 JT’s deposition was to commence, Jefferson disclosed a report and other
papers containing JT’s opinions, summaries and analyses regarding
26 certain accounts.

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¹Some dates in the original Scheduling Order were extended by subsequent orders.

1 7) At the deposition on May 7, 2015, it was learned that Jefferson had
2 hired JT prior to commencement of this lawsuit which was filed in state
3 court on February 20, 2014. Jefferson had possession of JT's report and
the related documents containing his opinions since January of 2014, if
not earlier.

4 8) Jefferson has not moved to amend the Scheduling Order to permit him
5 to name JT as an expert witness.

6 9) Discovery has closed.

7 The recitation of uncontested facts above establishes the conduct of Jefferson's
8 counsel to be among the worst "sand-bagging" the assigned judge has seen since
9 taking the bench in 1992. In a separate order addressing motions aimed at excluding
10 the testimony of William J. Flynn, the court noted that the late disclosures by
11 Jefferson's counsel were not substantially justified, but nevertheless allowed Jefferson
12 to use Flynn as an expert witness because a lesser sanction than exclusion of his
13 opinion testimony was deemed appropriate. Here that is not the case. Nothing short of
14 foreclosing use of JT as an expert witness pursuant to Rule 37(c)(1) is an appropriate
15 sanction for the egregious behavior by Jefferson's lawyers and the prejudice to Bank,
16 Kritza, and the court's efforts to provide for the orderly development of this litigation.

17 **V. CONCLUSION**

18 For the reasons above, the motion at docket 113 is GRANTED. Plaintiff may not
19 call James Tucciarone to offer opinion testimony. If he is called as a lay witness, any
20 testimony which purports to summarize documents or events must be strictly limited to
21 lay testimony and may not be used as a back door through which opinion testimony is
22 elicited.

23 DATED this 6th day of August, 2015.

24 _____
25 /s/

26 JOHN W. SEDWICK
27 SENIOR UNITED STATES DISTRICT JUDGE
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