IN THE CHANCERY COURT, STATE OF WYOMING

2024 WYCH 6

CHIPCORE, LLC,

Plaintiff and Counterclaim-Defendant,

v.

LEADERSHIP CIRCLE ENERGY LLC,

Defendant, Counterclaim-Plaintiff,
Third-Party Plaintiff,

v.

THREE CROWN PETROLEUM, LLC,

Third-Party Defendant.

Case No. CH-2023-0000016

Order Denying Motion to Exclude Opinions of Mary Ellen Denomy filed jointly by Chipcore, LLC and Three Crown Petroleum, LLC

[¶ 1] Before the court is Plaintiff Chipcore, LLC (Chipcore) and Third-Party Defendant Three Crown Petroleum, LLC (Three Crown)'s motion to exclude the opinions of Mary Ellen Denomy (FSX No. 72487108), an expert designated by Defendant and Counterclaim-and-Third-Party Plaintiff, Leadership Circle Energy LLC (LCE). The motion to exclude Ms. Denomy's opinions is **DENIED**.

BACKGROUND

[¶ 2] The court enters contemporaneously with this order an order denying Chipcore and Three Crown's motion for summary judgment.[1] That order sets forth the background of this case. Those details need not be repeated here. Instead, they are incorporated into this order by this reference.

[1] *Chipcore, LLC v. Leadership Circle Energy LLC*, 2024 WYCH 5, Ord. Denying Motion for Summary Judgment (Wyo. Ch. C. 2024).

[¶ 3] This order deals with the expert-witness designation of Mary Ellen Denomy, who provided two reports in this case: one dated January 6, 2024 (the "expert report"), and a rebuttal report dated February 16, 2024 (the "rebuttal report"). Ms. Denomy was deposed by Chipcore's counsel on February 29, 2024, and movants have submitted portions of that deposition in support of their motion.

[¶ 4] The expert report includes five opinions, four of which involve Chipcore's accounting practices and one of which—based on invoices—concluded that the Kessler wells were never completed. The rebuttal report disagreed with expert-witness Finley's conclusion that, in light of the Wyoming Oil and Gas Conservation Commission definition of a completed well, the Kessler wells were completed[2] and also opined that Chipcore overcharged certain completion costs for one of the wells.

[¶ 5] In their motion, movants appear to take most issue with Ms. Denomy's opinion that the wells were never completed. In her report, Ms. Denomy opined that:

> ***Chipcore has never completed either Kessler #1 or Kessler #2 well.***
>
> All of the documents that have been provided by Chipcore do not show that any permanent equipment has been set for either well, which indicates that the wells have never been completed. Costs for flowback water, which is a cost of completion, continued through 2022. This indicates that the wells were never completed.

Similarly, in her rebuttal report, Ms. Denomy opined that:

> There is no evidence to substantiate that the wells were completed or equipped for permanent production. It is not unusual for wells to be tested in the field with rental equipment to determine if they are viable, but permanent equipment must be installed to complete and equip a well for production. Mr. Finley has conceded that permanent equipment was not installed on the well sites.
>
> Neither well was capable of producing oil in paying quantities as evidenced by the first months of sales of oil brought up by rental equipment. At best, the Kessler 20-62-33-4-lCH was only able to produce about 40% of the amount needed to pay the ongoing costs of the well. The Kessler 20-62-28-21-2CH was only able to produce 7% of the amount needed to produce in paying quantities. Chipcore ceased operating both wells after the initial three month test period and never installed permanent equipment.

[2] Movants have not provided a copy of the Finley report for the court's review.

> Chipcore has attempted to charge expenses as lease operating expenses when the wells were never completed.

[¶ 6] The deposition excerpts raised by movants show that Ms. Denomy concluded that the wells have not been completed based on her experience in the oil and gas industry; she did not consult any outside sources or industry-standard materials in determining that the wells were not completed. Ms. Denomy testified that she had not reviewed firsthand the written agreements between the parties to this case. Ms. Denomy testified that the only language from those agreements she had seen was one paragraph emailed to her by LCE's counsel. Ms. Denomy also did not review any correspondence between the parties and appears to have not reviewed any pertinent rules of the Wyoming Oil and Gas Conservation Commission since about 2012.

REQUESTED RELIEF

[¶ 7] Movants request exclusion of Ms. Denomy's opinions under Wyoming Rule of Evidence 702 and the *Daubert* standard adopted by the Wyoming Supreme Court in *Bunting v. Jamieson*, 984 P.2d 467 (Wyo. 1999). Because some of the Ms. Denomy's opinions are based on her experience in the oil and gas industry, movants argue that those opinions should be excluded under the standards of *Hoy v. DRM, Inc.*, 2005 WY 76, 114 P.3d 1268 (Wyo. 2005), which incorporated the standards set forth in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

[¶ 8] Movants argue that (1) Ms. Denomy's opinions are unreliable because they (a) are not based on sufficient facts or data, (b) do not employ reliable methodology, and (c) parrot LCE's counsel's legal opinions, and that (2) Ms. Denomy's opinions do not fit the facts of this case because they are speculative, failing to connect general theories to the facts of the case.

LEGAL STANDARDS

[¶ 9] Wyoming Rule of Evidence 702 ("Testimony by Experts") provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise 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.

[¶ 10] The Wyoming Supreme Court in *Bunting v. Jamieson* expressly adopted the *Daubert* framework for assessing whether "to admit or exclude expert testimony." 984 P.2d at 469 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)). *Daubert* employs a two-part test: the court assesses whether "the methodology or technique" employed is "reliable" and whether the testimony "'fits' the facts of the particular case." *Bunting*, 984 P.2d at 471.

[¶ 11] To determine whether expert-witness testimony is reliable:

> the district court must determine whether the reasoning or methodology underlying the testimony is scientifically valid. *Daubert* provided a non-exclusive list of four criteria to guide the trial court's determination: 1) whether the theory or technique in question can be and has been tested; 2) whether it has been subjected to peer review and publication; 3) its known or potential rate of error along with the existence and maintenance of standards controlling the technique's operation; and 4) the degree of acceptance within the relevant scientific community.

Id. at 472 (citations omitted). Other courts have proposed additional criteria: "the extensive experience and specialized expertise of the expert, whether the expert is proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, and the non-judicial uses to which the method has been put[.]" *Bunting*, 984 P.2d at 472 (internal citations omitted).

[¶ 12] In reviewing whether an expert's testimony "fits" the facts of a case, the court asks whether the testimony is relevant, speaks to disputed facts, and is validly connected to the "pertinent inquiry." *Id.*

[¶ 13] The court must keep in mind "three inter-related considerations" when performing its *Daubert* gatekeeping:

> First, the trial court may consider one or more of the criteria mentioned in *Daubert*, but those factors may not all be helpful in every case, so the test must remain flexible enough to give the trial court broad latitude in determining reliability. Second, expert testimony must be based upon reliable methodology, but it need not be so persuasive as to meet the proponent's burden of proof on an issue. 'Shaky' but admissible evidence can be tested through traditional means, such as cross-examination, contrary evidence, and careful jury instruction. And third, a trial court's exclusion of evidence as unreliable is potentially inconsistent with the jury's duty to evaluate witness credibility and to assign evidentiary weight. To avoid usurping the jury's role, the trial court should limit its assessment to the soundness of the scientific principles and the propriety of the methodology

> and should not concern itself with the scientific validity of the conclusions offered by the expert.

Reichert v. Phipps, 2004 WY 7, ¶ 9, 84 P.3d 353, 356–57 (Wyo. 2004).

[¶ 14] The proponent of expert-witness testimony carries the burden of proving that the testimony is admissible evidence. *Bunting*, 984 P.2d at 472 (citations omitted). But this burden focuses only on admissibility, not whether the evidence establishes the proponent's case. *Id.*

[¶ 15] Wyoming courts "consider federal authority interpreting procedural rules highly persuasive when [Wyoming's] rules are sufficiently similar or identical." *Rodriguez v. State*, 2019 WY 25, ¶ 31, 435 P.3d 399, 408 n.4 (Wyo. 2019) (quoting *CSC Group Holdings, LLC v. Automation & Elecs., Inc.*, 2016 WY 26, ¶ 24, 368 P.3d 302, 308 (Wyo. 2016)). This approach applies to the rules of evidence. *Gezzi v. State*, 780 P.2d 972, 974 n.2 (Wyo. 1989).

[¶ 16] The Wyoming Supreme Court grants "considerable leeway" in deciding how to perform *Daubert* gatekeeping. *Hoy*, ¶ 23, 114 P.3d at 1281 (citing *Daubert*). The Tenth Circuit allows "greater leeway" when the court sits as factfinder.[3] The court finds the Tenth Circuit's assessment particularly instructive because Wyoming's rule governing expert testimony is very similar to its federal counterpart and because Wyoming has adopted the federal *Daubert* and *Kumho Tire* standards. Chancery court disputes are, of course, never tried by juries. W.R.C.P.Ch.C. 2(a).

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[3] *See Att'y Gen. of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir. 2009) ([W]hile *Daubert*'s standards must still be met, the usual concerns regarding unreliable expert testimony reaching a jury obviously do not arise when a district court is conducting a bench trial. . . . [A] judge conducting a bench trial maintains greater leeway in admitting questionable evidence, weighing its persuasive value upon presentation.") (citations omitted); *Mountain v. United States*, No. 19-CV-005-J, 2020 WL 8571674, at *2 (D. Wyo. Sept. 11, 2020) ("This Court's analysis of Defendant's *Daubert* objections differs when the matter is to be tried to the court and not a jury. The typical concern that unreliable expert testimony will be presented to a jury are absent for a bench trial. *Daubert's* primary purpose is to protect juries from unreliable or confusing scientific testimony, and these concerns are significantly lessened in a bench trial. Thus, trial courts conducting bench trials have the flexibility to admit proffered expert testimony and to then decide during trial whether the evidence meets the requirements of *Daubert* and Rule 702. The trial judge is fully capable of sorting the wheat from the chaff at trial.") (internal citations omitted); *Morris v. United States*, No. CIV. 08-912 JCH/ACT, 2010 WL 8848636, at *1 (D.N.M. June 3, 2010) (quoting *SmithKline Beecham Corp. v. Apotex Corp.,* 247 F.Supp.2d 1011, 1042 (N.D.Ill.2003) (Posner, J., sitting by designation)) ("[B]ecause the primary purpose of *Daubert* is to protect juries from being 'bamboozled by technical evidence of dubious merit .... in a bench trial it is an acceptable alternative to admit evidence of borderline admissibility and give it the (slight) weight to which it is entitled.... *Daubert* requires a binary choice—admit or exclude—and a judge in a bench trial should have discretion to admit questionable technical evidence, though of course he must not give it more weight than it deserves.'").

ANALYSIS

[¶ 17] Movants assert that "*Hoy* controls the present case." *Rply*, p. 3 (FSX No. 72590651). The court does not read *Hoy* to bind the court's discretion and require exclusion of the subject testimony in this case.

[¶ 18] Under *Hoy's* standard of review, the Wyoming Supreme Court upheld exclusion of the expert-witness testimony because doing so was not an abuse of discretion—in other words, did not exceed "the bounds of reason under the circumstances." *Hoy*, ¶ 13, 114 P.3d at 1276 (citing *Clark v. Gale,* 966 P.2d 431, 435 (Wyo. 1998)). The court finds that the circumstances of LCE's expert-witness testimony differ from *Hoy* in significant ways.

[¶ 19] First, the expert-witness testimony in *Hoy* attempted to explain proximate causation in a negligence action. To do that, the experts "developed several theories" to explain why Hoy's leach field had failed. *Id.,* ¶ 22, 114 P.3d at 1279**.** When scientific testing of those theories proved inconclusive, the experts "simply fell back on what they used to develop their theories in the first place—their personal knowledge and experience." *Id.* The testimony was unreliable under *Daubert* because the experts could not rule out other causes of the leach field's failure[4] and because they did not explain how their opinions were "reliably derived from the application of [their] experience and knowledge to the facts." *Id.,* ¶ 25, 114 P.3d at 1283. The opinion noted, however, that "[r]eliability could be established . . . by reference to the expert's experience with similar situations" and that the "particular means by which the expert may establish the reliability of his opinion will necessarily vary with the particular circumstance." *Id.*

[¶ 20] Second, the testimony in *Hoy* provided "nothing that would allow a jury to objectively evaluate their opinion on causation. Accordingly, the analytical gap in the experts' testimony [was] simply too great for the opinions to establish causation." *Id.,* ¶ 26, 114 P.3d at 1284. The testimony therefore asked the jury to assess proximate cause based "upon possibilities, not probabilities" and gave the jury no "objective basis upon which the proffered opinion could be evaluated[.]" *Id*.

[¶ 21] Unlike the opinions in *Hoy*, Ms. Denomy's testimony is not offered to prove any particularly novel or difficult legal elements.[5] *See Hoy*, ¶ 24, 114 P.3d at 1283 ("The more

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[4] A notable deficiency considering the opinions were intended to establish proximate cause. *See, e.g., Kopriva v. Union Pac. R. Co.*, 592 P.2d 711, 713 (Wyo. 1979) ("'Proximate cause' is most often defined as any cause which in natural and continuous sequence, *unbroken by any efficient intervening cause*, produces the result complained of and without which the result would not have occurred . . . .") (emphasis added).

[5] *See, e.g., In re Boeing 737 MAX Pilots Litig.*, 638 F. Supp. 3d 838, 852 (N.D. Ill. 2022) ("'A firm definition for the term 'proximate cause' has escaped judges, lawyers, and legal scholars for centuries.' The idea of proximate cause, as distinct from actual cause or cause in fact, defies easy summary. There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion. Professors and scholars, lawyers and judges have been tilting at that windmill for generations.") (cleaned up).

subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable."). As the court understands it, Ms. Denomy reviewed various invoices related to the Kessler wells' exploration and operation. She then opined on whether the charges in those invoices were appropriate based on her experience performing accounting services in the oil and gas industry. These invoices are reviewable by the court and provide an objective basis to evaluate Ms. Denomy's conclusions.

[¶ 22] Ms. Denomy's opinions whether the charges in the invoices she reviewed were appropriate based on her experience in the industry are based on sufficient data. Although Ms. Denomy did not review all of the invoices, the parties' contract documents, applicable regulatory rules, or outside academic or industry-specific materials in drafting her report, the court finds that she did not need to do so to opine on whether Chipcore's invoices align with what she has seen as an accountant in the oil and gas industry. Beyond her opinions on Chipcore's accounting practices, however, the court acknowledges the tenuous connection between Ms. Denomy's previous experiences as an oil-and-gas industry accountant and how the Kessler wells were actually constructed and operated, and whether they were completed, but believes such shortcomings go to weight, not admissibility. *See Bunting*, 984 P.2d at 471 (quoting *Daubert*) ("[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."). *See also Morris v. United States*, supra.

[¶ 23] Nor is Ms. Denomy's methodology so unreliable as to make it inadmissible. Under *Hoy*, reliability is properly established "by reference to the expert's experience with similar situations." *Hoy*, ¶ 25, 114 P.3d at 1283. The excerpts of Ms. Denomy's deposition testimony that the court has seen so far reference her experience with similar situations (e.g., 126:13-21, "Q. In the last sentence of that paragraph you state: 'The ability for the well to sustain production in paying quantities is certainly a standard that must be achieved in the industry to determine if a well is completed.' Can you tell me where that sentence came from? A. It came from my years of experience as an oil and gas auditor. And like I said, I have been -- I've testified as an expert and I've been accepted on a paying quantities issue."; 142:8-12, "Q. Do you think that the well site would have the same equipment that entire time -- that 50 years? A. I've seen a lot of them that have the same equipment that ha[s] been on there, in Kansas and Oklahoma and Colorado, for 50 years."). Again, the weaknesses in this testimony can be properly subjected to cross-examination and presentation of contrary evidence. *See Hoy*, ¶ 11, 114 P.3d at 1276 ("The ultimate question for the trial judge is whether both sides will have a fair opportunity to test the validity" of the expert's conclusions.). But the court finds sufficient indicia of reliability to make the testimony admissible.

[¶ 24] Regarding Ms. Denomy's parroting of LCE's counsel's legal interpretations: the court will not allow any expert witness to opine on the proper legal construction of the parties' contract documents. *See Wadi Petroleum, Inc. v. Ultra Res., Inc*., 2003 WY 41, ¶

11, 65 P.3d 703, 708 (Wyo. 2003) ("[T]he interpretation and construction of contracts is a matter of law for the courts."). *See also Roberts v. Roberts*, 2023 WY 8, ¶ 9, 523 P.3d 894, 897 (Wyo. 2023) ("An expert witness cannot state legal conclusions by applying the law to the facts[.]"). The court interprets Ms. Denomy's report and testimony, however, to root her opinion in common accounting practice in the oil and gas industry, not in the subjective intent of the parties in entering into their contract documents.

[¶ 25] As described in the court's summary-judgment order, the court views what the parties intended "production"—a term undefined in their contract documents—to mean to be a central issue in this case. And even when reviewing unambiguous contracts dealing with mineral interests, the Wyoming Supreme Court has "consistently" assessed the contract's "surrounding circumstances, facts showing the relations of the parties, the subject matter of the contract, and the apparent purpose of making the contract." *Boley v. Greenough*, 2001 WY 47, ¶ 11, 22 P.3d 854, 858 (Wyo. 2001). Our Supreme Court has also noted that an operating agreement allocating profits and expenses of exploration and production of mineral interests was "negotiated and drafted by professionals in a technical industry, using distinctive terminology for which customary meanings are often assumed." *Union Pac. Res. Co. v. Texaco, Inc.*, 882 P.2d 212, 214 (Wyo. 1994). And here, the parties used the A.A.P.L. Form 610 template for their operating agreement: a form that "has been used widely in the oil and gas industry since the first version was prepared in 1956[.]" *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.*, 116 Cal. App. 4th 1375, 1380–81, 11 Cal. Rptr. 3d 412, 416–17 (2004). It appears likely that the terms used therein were likewise negotiated and drafted by professionals in a technical industry, using distinctive terminology for which customary meanings were assumed.

[¶ 26] As such, the customary meaning of the term "production" in the oil and gas industry is relevant to this dispute. The court finds that Ms. Denomy's conclusion regarding whether "production" typically means "production in paying quantities" in the industry is not derived by applying theoretical knowledge or legal analysis to the facts of the case. Rather, that conclusion is based on what Ms. Denomy has seen in the past in the oil and gas industry. The testimony is relevant, speaks to disputed facts, and is validly connected to the pertinent inquiry.

[¶ 27] The court concludes that the proposed testimony can be properly subjected to the adversarial process. The court can, and will, give Ms. Denomy's testimony its appropriate weight. The Motion to Exclude Opinions of Mary Ellen Denomy is **DENIED**.

IT IS SO ORDERED.
DATED: May 15, 2024

/s/ Richard L. Lavery
CHANCERY COURT JUDGE