UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCHE FREEDMAN LLP, Plaintiff, v. JASON CYRULNIK, Defendant.	Case No. 1:21-cv-01746 (JGK)
JASON CYRULNIK, Counterclaim-Plaintiff, v. ROCHE FREEDMAN LLP, KYLE ROCHE, DEVIN FREEDMAN, AMOS FRIEDLAND, NATHAN HOLCOMB, and EDWARD NORMAND, Counterclaim-Defendants.	

PLAINTIFF AND COUNTERCLAIM-DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION TO EXCLUDE VIKRAM KAPOOR

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Roche Freedman LLP ("RF") and the Counterclaim-Defendants (collectively, "RF Parties") move to strike the testimony of Vikram Kapoor.

BACKGROUND

In September 2019, RF executed an engagement letter with Ava Labs. In the letter, RF agreed not to charge Ava Labs for "the first $1,700,000 in fees . . . each year during the Engagement for a maximum period of four years (the "Billable Hour Advance")." ECF No. 509-2, at RF__0426716. In return, Ava Labs agreed to pay RF 2,160,000 cryptocurrency tokens. *Id*.

To protect Ava Labs if the price of the tokens spiked and to protect RF if the price of the tokens tanked, the parties provided that (i) either one "may terminate this Engagement, at **any** time for **any** reason" (*id*. at RF__0426719) (emphasis added); and (ii) provided a clear 3-year vesting schedule for the tokens so that if the agreement was terminated, no further tokens vested:

> In the event [Ava Labs] or the Firm terminate this Engagement prior to the exhaustion of the Billable Hour Advance, you agree that the Firm shall retain a pro rata portion of . . . the Token Consideration (the "Termination Portion"). **Immediately upon execution** of the Engagement, **the Termination Portion shall be at least 25%** of . . . the Token Consideration. Thereafter, the Termination Portion **shall increase by 12.5%** of the total . . . Token Consideration **every six months until the conclusion of thirty-six months**, at which time the Termination Portion shall constitute 100% of the . . . Token Consideration.

Id. (emphasis added).

As part of his contract and fiduciary duty claims, Cyrulnik asserts he is entitled to damages resulting from the RF Parties' failure to deliver him 25% of the tokens that Ava Labs agreed to pay to the firm in installments over a multi-year period (the "Tokens"). To quantify those alleged damages, Cyrulnik intends to rely on the expert opinion of Vikram Kapoor, who purports to measure damages relating to two sets of Tokens: (1) Tokens that Ava Labs had transferred to the firm or its attorneys on or before Cyrulnik's termination on February 12, 2021 (the "2019 Vested

Tokens[1]"), and (2) Tokens Ava Labs had not transferred to the firm or its attorneys before Cyrulnik's termination (the "Remaining Tokens"). Declaration of Randy M. Mastro ("Mastro Decl.") Ex. 1 (Kapoor Report) ¶ 8.

The first category of Tokens, the 2019 Vested Tokens, vested on September 30, 2019, *i.e.,* the date the engagement letter was executed. ECF No. 509-2 at RF__0426719. They were delivered to Roche and Freedman a year later, on October 27, 2020. Kapoor Report ¶ 16. Cyrulnik alleges he was entitled to 25% of these tokens, which amounts to 135,000 of the 2019 Vested Tokens. Kapoor calculates the value of these 2019 Vested Tokens in two ways, by multiplying their quantity by their price on (1) the date of their *highest* value between October 27, 2020 and trial, or alternatively, (2) the date Cyrulnik was removed for cause. Kapoor Report ¶¶ 16-17, n.31.

The second category of Tokens, the Remaining Tokens, began to vest every six months after the engagement letter's execution (*i.e.*, March 2020) until October 2022. ECF No. 509-2 at RF__0426719. Cyrulnik alleges he is entitled to 25% of these tokens on the date of his removal (February 10, 2021), which amounts to 133,650 *vested* Remaining Tokens and 271,350 *unvested* Remaining Tokens.

Finally, after these Remaining Tokens *vested*, they were still subject to a "lock up" that prohibited their sale for a period of time. ECF 519-26, at RF__0424068; Kapoor Report ¶ 34. At the date of Cyrulnik's removal, 33,750 of the *vested* Remaining Tokens were free of the lock up, or *unrestricted*; the remaining 99,000 were *vested*, but *restricted*.

Kapoor calculated the value of the *vested* and *unrestricted* Remaining Tokens by merely multiplying their quantity by their price as of the date of Cyrulnik's removal. Kapoor Report ¶ 22.

[1] Kapoor's report calls these the "Converted Tokens." The RF Parties decline to adopt that improper nomenclature.

Kapoor used a Monte Carlo simulation to calculate the value of *all other* Remaining Tokens, *whether or not* they had already vested. *See Id.* ¶¶ 23-35. In other words, for valuation purposes Kapoor ignored the fact that the vast majority of those Tokens had not yet vested. *See*, *e.g., id.* ¶ 23 (lumping vested and unvested together), ¶¶ 20-21, ¶ 49.

Kapoor's testimony about the (i) the 135,000 2019 Vested Tokens, (ii) the 33,750 *vested* and *unrestricted* Remaining Tokens, and (iii) the 271,350 *unvested* Remaining Tokens should be excluded in full for the following reasons.[2]

First, with respect to the 2019 Vested Tokens, Kapoor's damages analysis is legally irrelevant. It is black-letter law that damages for breach of contract and breach of fiduciary duty are calculated as of the date of the breach. Because the alleged breach occurred when Roche and Freedman received the tokens and failed to deliver them to Cyrulnik on October 27, 2020, Cyrulnik's damages are measured—as a matter of law—by the value of the tokens *on that date*. Kapoor, however, purports to calculate damages for the 2019 Vested Tokens based on two other dates—their date of highest value, or the date Cyrulnik was removed for cause. *See* Kapoor Report ¶¶ 16-17, n.31. Neither date nor valuation is proper or relevant. Accordingly, Kapoor's testimony regarding the 2019 Vested Tokens cannot assist the jury in calculating damages and should be excluded.

Second, even if Kapoor's dates were correct (they are not), his damages analysis for the 135,000 2019 Vested Tokens and the 33,750 *vested* and *unrestricted* Remaining Tokens, is still inadmissible because he simply multiplies a price by a quantity. The jury does not need, and Rule 702 does not permit, Kapoor to testify to basic arithmetic.

[2] The RF Parties do not challenge Kapoor's testimony as to tokens that were *vested*, but *restricted*.

Third, with respect to the *unvested* Remaining Tokens, Kapoor's opinions should be excluded because courts have repeatedly held that damages flowing from unvested options are "impermissibly speculative." Here, both the firm and Ava Labs retained the right to terminate the engagement at "**any time"** for "**any reason**" which would stop the unvested Remaining Tokens from vesting. As explained below, there are many reasons why the parties may have terminated the agreement early.

Fourth, Kapoor's calculation of prejudgment interest should be stricken because the computation of prejudgment is a question of law for the Court.

LEGAL STANDARD

The relevant legal standard is set forth in pages 4–5 of Counterclaim-Defendants' Memorandum of Law in Support of Their Motion to Exclude Eric Jenkins.

ARGUMENT

A. Kapoor's valuation of the 2019 Vested Tokens must be excluded.

Kapoor's two damages calculations with respect to the 2019 Vested Tokens should be excluded in full, because they are legally irrelevant and not based on any expert analysis.

1. Kapoor's damages calculations are based on legally irrelevant valuation dates.

The appropriate date to measure any damages flowing from a purported breach of a duty to deliver the Tokens to Cyrulnik is a question of law. *See Wolff & Munier, Inc. v. Whiting-Turner Contracting Co.*, 946 F.2d 1003, 1009 (2d Cir.1991) ("Although the amount of recoverable damages is a question of fact, 'the measure of damages upon which the factual computation is based is a question of law.'") (quoting *United States ex rel. N. Maltese & Sons, Inc. v. Juno Constr. Corp.*, 759 F.2d 253, 255 (2d Cir.1985)).

The only permissible measure of damages here is the tokens' value as of the date of alleged breach. New York law applies to Cyrulnik's breach of contract claim (ECF No. 539 at 11-12), and "New York courts are clear that breach of contract damages are measured from the date of the breach." *Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186, 196 (2d Cir. 2003) (citations omitted); *Boyce v. Soundview Tech. Grp., Inc.,* 464 F.3d 376, 384 (2d Cir. 2006) ("It is settled Second Circuit law that in a breach of contract case, damages are calculated at the time of the breach."). Similarly, Florida law applies to Cyrulnik's breach-of-fiduciary-duty claim (ECF No. 539 at 12), and under Florida law "[l]ike damages for breach of contract, damages for breach of fiduciary duty are measured as of the date of breach." *Haddad v. Rav Bahamas, Ltd*., 589 F. Supp. 2d 1302, 1307 (S.D. Fla. 2008).

Accordingly, *as a matter of law*, Cyrulnik's damages *must* be based on the market price of tokens *as of the date* the RF Parties allegedly breached. *Sharma v. Skaarup Ship Mgmt. Corp.*, 916 F.2d 820, 826 (2d Cir. 1990) ("It is also fundamental that, where the breach involves the deprivation of an item with a determinable market value, the market value at the time of the breach is the measure of damages.").

It is undisputed that (i) Roche and Freedman received the 2019 Vested Tokens on October 27, 2020, and (ii) transferred none to Cyrulnik. Kapoor Report ¶ 16 (citing RF__0429303). In sworn interrogatory responses, Cyrulnik stated that "[t]hose Tokens should have been remitted to Cyrulnik as soon as reasonably practicable and in no event later than 21 days after such distribution." Mastro Decl. Ex. 2 (Cyrulnik's Am. Resp. and Obj. to Plf. and Countercl.-Defs.' Third Set of Interrog.), at 5. Cyrulnik then claims the RF Parties breached the MOU and their fiduciary duties by not transferring 25% of those tokens to him, *i.e.,* 135,000 tokens. The date of

breach then, is October 27, 2020, the date the tokens were not delivered to Cyrulnik.[3] *See Oscar Gruss & Son*, 337 F.3d at 197 ("Based on clear New York law, the proper valuation for the [asset] was the date of the breach—the date Hollander failed to deliver the [asset]."); *see also Simon v. Electrospace Corp.*, 28 N.Y.2d 136, 145 (1971) ("The proper measure of damages for breach of contract is determined by the . . . gain prevented at the time and place of breach . . . [t]he rule is precisely the same when the breach of contract is nondelivery of shares of stock.").

Kapoor's damages calculations regarding the 2019 Vested Tokens, however, are *not* based on the price of the tokens as of October 27, 202. Because those calculations are not tied to the date of breach, they are irrelevant and inadmissible. *See Jakobovits v. PHL Variable Ins. Co.*, 645 F. Supp. 3d 95, 112-13 (E.D.N.Y. 2022) (excluding testimony from damages expert, where calculation was not based on the date of breach). That is true with respect to *both* of Kapoor's proposed methodologies for estimating Cyrulnik's damages regarding the 2019 Vested Tokens. Kapoor Report ¶¶ 15-19.

First, Kapoor's primary approach to estimating damages for the 2019 Vested Tokens is based on the "highest intermediate value" of the price of the tokens. Kapoor Report ¶¶ 16-17. Kapoor concludes that the "highest intermediate value" occurred on November 21, 2021, when the tokens reached an all-time high market price of $146.22, and he calculates Cyrulnik's damages based on that valuation. *Id.* ¶ 17. Kapoor's opinion must be excluded because (i) it's untethered to the date of breach and (ii) the Second Circuit has unequivocally held that the "highest intermediate value" is a conversion measure of damages not available in breach of contract cases.

[3] As proposed in Cyrulnik's interrogatory responses, 21 days later would have been November 17, 2020. But the price on October 27 is the highest price the token reached between those two dates. Thus, if Cyrulnik picks a different date, it would only reduce his claim.

Specifically, Kapoor's calculation relies on a valuation date *more than a year* after the alleged breach occurred on October 27, 2020. As explained above, that valuation date is legally irrelevant and must be excluded. But worse, Kapoor's opinion to use the "highest intermediate value rule" asks the Court to commit clear error; the Second Circuit has held that the "highest intermediate value rule" is available only for a claim of "conversion, rather than breach of contract," and has already reversed a district court for using that rule, saying that doing so "ignored binding precedent in this Circuit." *Lucente v. Int'l Bus. Machines Corp.,* 310 F.3d 243, 262 (2d Cir. 2002).[4] To put it bluntly, the Second Circuit has "flatly rejected" Kapoor's opinion for "breach of contract" cases. *Oscar Gruss & Son*, 337 F.3d at 196-97. Thus, Kapoor's "highest intermediate value" opinion must be stricken.

Second, Kapoor's alternative damages estimate for the 2019 Vested Tokens calculates their value based on the tokens' market price on February 12, 2021, which was the date the RF Parties notified Cyrulnik he was removed for cause. Kapoor Report ¶ 17 n.31. That is, of course, four months after the actual date of breach, *i.e.,* October 27, 2020, the date Roche and Freedman received and did not turn over any of the 2019 Vested Tokens in an alleged breach of Cyrulnik's sworn response that they should have been given to him "as soon as reasonably practicable and in no event later than 21 days after such distribution." Ex. 2, at 5. Accordingly, Kapoor's alternative damages estimate is also legally irrelevant and must be excluded.

Furthermore, Kapoor's attempt to tie the value of the 2019 Vested Tokens to dates many months after Roche and Freedman "failed to deliver the [asset]," *Oscar Gruss & Son*, 337 F.3d at 197, is a transparent and impermissible attempt to benefit from spikes in the value of the token

[4] Notably, Kapoor authored his report before this Court dismissed Cyrulnik's conversion claim.

which soared in value from $4.14 on the date of breach to $49.08 and $146.22 on the two dates Kapoor uses in his report. Black letter law says Cyrulnik cannot do that. Indeed, if Cyrulnik was "anxious to own the shares rather than obtain their value, he was free to purchase them in the market. His cause of action should not and may not be converted into carrying a market 'call' or 'warrant' to acquire the stock on demand if the price rose above its value as reflected in his cause of action." *Simon*, 28 N.Y.2d at 146; *Kaminsky v. Herrick, Feinstein LLP*, 59 A.D.3d 1, 12, 870 N.Y.S.2d 1, 8–9 (2008) (citing *Simon*, holding damages are at time of breach, and stating that "had plaintiff wished to own the shares and profit from their appreciation in subsequent trading, he could have purchased them in the open market.").

In sum, Kapoor's damage estimates bear no relation to Cyrulnik's legal entitlements and are an impermissible attempt to provide Cyrulnik with a "call" to acquire the tokens at higher values. For all these reasons, Kapoor's damages estimates must be excluded.

2. Calculating damages for the 2019 Vested Tokens does not involve any expertise.

Setting aside that Kapoor's analysis must be excluded because it is based on legally irrelevant valuation dates, his valuation opinions on the 2019 Vested Tokens must also be excluded because they are not based on any expert analysis and therefore would not assist the jury.

Indeed, "[i]t is well-settled that 'expert testimony is excluded under Rule 702 if it is directed solely to lay matters which a jury is capable of understanding and deciding without the expert's help.'" *Luck v. McMahon*, 2022 WL 5500934, at *7 (D. Conn. Feb. 11, 2022) (quoting *Master-Halco, Inc. v. Scillia, Dowling & Natarelli, LLC*, 2010 WL 2978289, at *2-6 (D. Conn. Apr. 9, 2010)). For that reason, "[c]ourts regularly exclude expert testimony where the expert 'engages in arithmetic, not expert analysis.'" *Golden Unicorn Enters., Inc. v. Aubible, Inc.*, 2023 WL 4561718, at *6 (S.D.N.Y. July 17, 2023) (quoting *FPP, LLC v. Xaxis US, LLC*, 2017 WL

11456572, at *1-2 (S.D.N.Y. Feb. 13, 2017) (Swain, J.)); *see id.* (excluding expert testimony where expert "merely multiplie[d] the price of each returned audiobook by the royalty rate," which was "relatively simple arithmetic, not expert analysis"); *FPP, LLC*, 2017 WL 11456572, at *1-2 (excluding expert opinion that conducted "simple arithmetic" on three figures); *Edmondson v. RCI Hosp. Holdings, Inc.*, 2020 WL 1503452, at *6 (S.D.N.Y. Mar. 30, 2020) (Caproni, J.) (excluding expert damages calculation that averaged two numbers because that was "a basic mathematical calculation taught in grade school").

Exclusion is warranted here too. Kapoor's analysis regarding the 2019 Vested Tokens consists of basic arithmetic: multiplying a quantity (135,000 Tokens) by a price ($49.08 or $146.22) listed on a website. *See* Kapoor ¶ 14 (explaining the "Average Price" was taken from "the Average Price history of AVAX from Coinmarketcap.com"); ¶ 17 & Mastro Decl. Ex. 3 (Exhibit 1 to Kapoor Report) (conducting basic calculations). No jury needs an expert to tell it how to conduct such "basic mathematical calculation[s] taught in grade school." *Edmondson*, 2020 WL 1503452, at *6. Thus, Kapoor's opinions and testimony relating to the 2019 Vested Tokens should be excluded in full.

B. Kapoor's valuation of the *vested* and *unrestricted* Remaining Tokens must also be excluded as basic arithmetic.

Kapoor's opinion on the 33,750 *vested* and *unrestricted* Remaining Tokens must be excluded for the same reason: it is basic arithmetic and not the proper subject of expert testimony. Specifically, Kapoor opines that "[f]or the remaining 33,750 tokens, I calculate the value by multiplying 33,750 by the Average Price as of" a specific date. Kapoor Report ¶ 22. Accordingly, his testimony relating to the value of the *vested* and *unrestricted* Remaining Tokens should be excluded too.

C. Kapoor's valuation of the unvested Remaining Tokens must be excluded.

Kapoor used a Monte Carlo simulation to calculate the value of the *unvested* Remaining Tokens as of the dates Cyrulnik was notified of his removal and the future dates the Tokens were scheduled to vest and be distributed. *See* Kapoor Report ¶¶ 23-35. In so doing, however, Kapoor failed to account for the risk that RF's engagement with Ava Labs might terminate *before* those tokens could actually vest. As explained below, his opinion must be excluded both because (i) it is at odds with the law that finds *unvested* assets too speculative to recover; and (ii) his calculation is inherently unreliable.

1. Kapoor's opinion on unvested Remaining Tokens attempts to assign value to assets that the law says are too speculative.

Kapoor's damages opinions with respect to the *unvested* Remaining Tokens must be excluded as they attempt to value unduly speculative assets.

Courts have repeatedly found that damages calculations based on the value of unvested stock options are impermissibly "speculative" because there can be no reasonable certainty the options would have vested. *Kinsey v. Cendant Corp.*, 521 F. Supp. 2d 292, 308 (S.D.N.Y. 2007) (rejecting damages for unvested stock options as "too speculative" because "there simply can be no certainty as to whether [plaintiff] would have remained employed . . . long enough for the . . . Options to vest"). For example, in *Guidehouse LLP v. Shah*, plaintiff's unvested shares were set to "vest[] in equal portions annually over five years, subject to [his] 'continued employment.'" 2022 WL 769209, at *3 (S.D.N.Y. Feb. 28, 2022). After his employment terminated, Plaintiff sued for the value of the unvested shares. *Id.* at *2. The court excluded any evidence of damages from those unvested shares because "evidence of the loss . . . would be impermissibly speculative" as it "would call upon the jury to speculate as to how long [plaintiff] might have stayed employed." *Id.* at *3; *see Ott v. Alger Mgmt. Inc.*, 2012 WL 4767200, at *8 (S.D.N.Y. Sept. 27, 2012) (dismissing

at will employee's breach of contract claim for unvested stock options as too speculative because there could be "no certainty" that she'd still be employed on the date the options vested); *Smith v. Zipcar, Inc.*, 125 F. Supp. 3d 340, 349 (D. Mass. 2015) (collecting authority for the proposition that "assigning a value to unvested stock options is an exercise in uncertainty"); *Cioni v. Globe Specialty Metals, Inc.*, 618 F. App'x 42, 45 (3d Cir. 2015) (holding that damages for ***unvested*** options had no value "where an options holder possesses only a conditional promise of a future right, but no present right, to purchase shares"); *Rhee v. SHVMS, LLC*, 2023 WL 8889697, at *8 (S.D.N.Y. Dec. 26, 2023) (remitting jury award for a bonus "because her right to that bonus never vested" and "[w]ithout a guaranteed term of employment, there simply can be no certainty as to whether" it would have); *Butvin v. DoubleClick, Inc*., 2001 WL 228121, at *9 (S.D.N.Y. Mar. 7, 2001) ("[Plaintiff] had no ownership interest in stock options before they vested; when [defendant] fired [plaintiff] before all his stock options vested he might feel ill-used but he cannot argue that he had been deprived of anything to which he was entitled."), *aff'd*, 22 F. App'x 57 (2d Cir. 2001).

These cases all demonstrate that unvested options have no value in litigation for damages. Cyrulnik's claims for *unvested* Remaining Tokens directly contradicts that rule because it ascribes damages to an asset that the caselaw says cannot be recovered.

On the date Cyrulnik was terminated, 1,080,000 of the Remaining Tokens were **unvested**. ECF No. 509-2, at RF__0426719. Critically, these million tokens would only vest if neither Ava Labs nor the firm terminated the agreement over the next 20 months – a right either could exercise "at **any** time for **any** reason." *Id.*

The economics of the engagement letter underscore just how real the risk of termination was. On the date of Cyrulnik's removal, the firm was obligated to provide Ava Labs with approximately $5,100,000 of legal services over the next three years. ECF No. 509-2, at

RF__0426716. If the value of the *unvested* Remaining Tokens surpassed $5,100,000, Ava Labs would have been economically irrational **not to** terminate the letter, sell the tokens it had earmarked for the firm, hire the firm (or other counsel) for regular hourly rates, and pocket the difference. For example, if (as Kapoor opines[5]) the *unvested* Remaining Tokens rose to $39,279,000 in value, Ava Labs would certainly have terminated the agreement, sold the tokens for $39,274,648, re-hired the firm to provide it with $5,100,000 of services, and pocketed the $34,179,000 profit. Indeed, consistent with this logic, shortly after Cyrulnik was terminated in February 2021, Ava Labs asked the firm "that the relationship be reevaluated in light of the value of the token," Mastro Decl. Ex. 4 (Ava Labs Dep. Tr.), at 71:17-22—a request that resulted in a renegotiation of the terms of the engagement where the firm granted Ava Labs various additional rights and extended the contract an additional four years to accommodate the increased value. *Compare* ECF No. 509-2 at 27 (contemplating up to $1.7 million in services for four years), *with* Mastro Decl. Ex. 5 (Ava Labs Dep. Ex. 17), at RF__0427126-27 (extending to eight years).

On the other hand, if the value of the *unvested* Remaining Tokens decreased below $5,100,000, the firm would have a strong financial incentive to terminate the agreement and direct its lawyers to work on matters that paid its hourly rates.

There are, of course, many other reasons why the firm's engagement with Ava Labs could have ended before the *unvested* Remaining Tokens vested. To name just a few: (i) Ava Labs could have become dissatisfied with the firm's services; (ii) Ava Labs could have decided it no longer wanted to pre-buy $5,100,000 in legal services; (iii) key personnel from the firm (like Roche or

[5] Kapoor calculates Cyrulnik's damages for the Remaining Tokens as of the Separation Date to be worth $14,727,993, or ~$36.37 per AVAX Token. Kapoor Report ¶ 9(b). Using that price per token on the entire 1,080,000 unvested tokens yields a total value of $39,279,000 for the unvested tokens.

Freedman) could have become disabled or died; or (iv) either the firm or Ava Labs (both new ventures with uncertain futures) could have went out of business.

These facts demonstrate that just like damages for **unvested stock options** are "too speculative" because "there simply can be no certainty as to whether [plaintiff] would have remained employed . . . long enough for the . . . Options to vest," damages for the 1,080,000 ***unvested*** **Remaining Tokens** are likewise "too speculative" because "there simply can be no certainty as to whether" the engagement letter would have stayed in place "long enough for the [tokens] to vest." *See Kinsey*, 521 F. Supp. 2d at 308. Indeed, Cyrulnik testified that "[i]f Ava Labs, you know, wasn't obligated to transfer certain tokens or decided not to transfer those tokens, that beef would be with Ava Labs, *assuming there is a beef* . . ." Mastro Decl. Ex. 6 (Cyrulnik Dep. Tr. 194:12-16) (emphasis added).

Kapoor's opinion on the *unvested* Remaining Tokens is plainly at odds with the law. Unvested tokens are simply too speculative to value, and Cyrulnik should not be permitted to seek damages for them.

2. Kapoor's opinion on unvested Remaining Tokens is inherently unreliable

Even if some calculation of damages as to the unvested Remaining Tokens were permissible here, the Court still should exclude Kapoor's calculations for two separate reasons.

First, his calculations are inherently unreliable. During his deposition, Kapoor admitted that a valuation of a services agreement should consider "the ability of one side to terminate or change the terms of the contract." Mastro Decl. Ex. 7 (Kapoor Dep. Tr. 49:18-50:9). Yet he did not even follow his own rule. Instead, he admitted that his opinion did *not* take into account Ava Labs' ability to terminate the engagement letter. *See id.* at 232-33 ("I don't have an opinion on that. That's, you know, random."). Kapoor's "fail[ure] to apply his own methodology reliably" warrants exclusion. *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 268-69 (2d Cir. 2002); *see*

also, *e.g.*, *Disabled in Action v. City of New York*, 360 F. Supp. 3d 240, 247 (S.D.N.Y. 2019) (Caproni, J.) ("Pinto's compliance opinions, which are the results of a methodology that he acknowledges he did not follow, are therefore unreliable and inadmissible under Rule 702.").

Exclusion is especially warranted here because, as discussed above, there were salient reasons to think the engagement letter with Ava Labs would change or terminate well before any additional Remaining Tokens could vest. In fact, that is precisely what happened. Kapoor refused to account for *any* of these risks, contrary to his own stated methodology. Given his failure to account for these risks, Kapoor's calculations are inherently unreliable and should not be heard by the jury.

Second, Kapoor's calculations are based entirely on his own unreliable say-so. According to Kapoor, there is *no difference* "between an options contract, which *cannot* be terminated between the time when the option-holder gets the option and when they can exercise their option, and a contract, which *can* [be] terminated in that intervening period." Mastro Decl. Ex. 7 (Kapoor Dep. Tr.), at 248:25-249:17 (emphasis added). Kapoor opined – without any substantiation – that "the value of both of those two options are exactly the same." *Id.*; *see also id.* at 260:2-15 ("Q: Does the discount differ if the tokens are vested but not yet unlocked as opposed to vesting in the future . . . A: No.").

Not only does Kapoor's opinion on "valuation theory" squarely contradict (i) the uniform conclusion of courts as explained above, (ii) his own testimony that it should be considered, *see id.* at 49:18-50:9, and (iii) common sense, but it also is "supported only by his own *ipse dixit*, which is insufficient," *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d 430, 500 (S.D.N.Y. 2018) (Buchwald, J.); *see also*, *e.g.*, *Paine ex rel. Eilman v. Johnson*, 2010 WL 749851, at *4 (N.D. Ill. Feb. 25, 2010) ("opinions reached merely by virtue of the expert's . . .

intuition are not admissible"). That is "the essence of unverified subjectivity" that should properly be excluded. *Nimely v. City of New York*, 414 F.3d 381, 399 (2d Cir. 2005).

In sum, Kapoor's opinion on the value of the *unvested* Restricted Tokens must be excluded because: (i) it attempts to value an asset the law says has no non-speculative value; (ii) it fails to follow Kapoor's own methodology and does not take into account the ability of either side to terminate the agreement; and (iii) it is a self-contradicted opinion that is unsupported by anything more than Kapoor's own *ipse dixit*. Kapoor's opinion on "valuation theory" cannot supersede the law. It must be excluded.

D. Kapoor's calculation of prejudgment interest should be stricken.

Kapoor's opinions regarding prejudgment interest (*e.g.*, Kapoor Report ¶ 9), should also be excluded. "[P]rejudgment interest is an issue for the court, and not the jury, to determine." *Crown Cork & Seal Co., Inc. Master Ret. Tr. v. Credit Suisse First Bos. Corp.*, 2013 WL 978980, at *13 (S.DN.Y. Mar. 12, 2013). As a result, Kapoor's opinions regarding prejudgment interest should not be presented to the jury. *See Fitzpatrick v. Am. Int'l Grp., Inc.*, 2013 WL 5912236, at *6 (S.D.N.Y. Nov. 2, 2013) (excluding testimony regarding prejudgment interest).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that according to the word count feature of the word processing program used to prepare this brief, the brief contains 4,812 words (exclusive of the cover page, certificate of compliance, table of contents, and table of authorities), and complies with Local Civil Rule 11.1 of the Southern District of New York, as well as with this Court's Individual Practice Rule 2.D.

/s/ Randy M. Mastro
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