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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BENNION & DEVILLE FINE HOMES, INC., a California corporation, BENNION & DEVILLE FINE HOMES SOCAL, INC., a California corporation, WINDERMERE SERVICES SOUTHERN CALIFORNIA, INC., a California corporation,

Plaintiffs,

v.

WINDERMERE REAL ESTATE SERVICES COMPANY, a Washington corporation; and DOES 1-10

Defendant.

AND RELATED COUNTERCLAIMS

Case No. 5:15-CV-01921 R (KKx)

Hon. Manuel L. Real

DEFENDANT AND COUNTERCLAIMANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF *DAUBERT* MOTION *IN LIMINE* TO EXCLUDE PLAINTIFFS' EXPERT PETER WROBEL

[FRE 104, 402, 403, 702, 703]

Motion *in Limine* No. 1 of 4

Date: May 15, 2017
Time: 10:00 a.m.
Courtroom: 880

Complaint Filed: September 17, 2015

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I. INTRODUCTION

Defendant and Counterclaimant Windermere Real Estate Services Company ("WSC") brings this motion pursuant to Rules 104, 402, 403, 702, and 703 of the Federal Rules of Evidence and the standards set forth by the Supreme Court in *Daubert v. Merrell Dow Pharm., Inc*, and seeks an Order from the Court excluding the testimony and report of Peter D. Wrobel, designated by Plaintiffs and Counter-Defendants Bennion & Deville Fine Homes, Inc. ("B&D Fine Homes"), Bennion & Deville Fine Homes, Inc. ("B&D SoCal"), and Windermere Services Southern California, Inc. ("WSSC") as expert on "the amount of out-of-pocket damages."[1] Wrobel has identified four categories of "damages" that he contends were suffered by B&D SoCal and WSSC in this matter. None of his opinions should be presented to the jury.

First, Wrobel's opinion regarding the "Net Value of WSSC as of January 2015" as the termination fee owed under the parties' agreement is inadmissible. Initially, this form of damages is contrary to the express terms of the parties' agreement, which set forth a *specific contractual procedure* for determining the amount to which WSSC is entitled in the event WSC terminated the agreement without cause. That procedure expressly prohibits consideration of future revenues and only permits the consideration of revenues received during the prior 12 months. In calculating the purported net value of WSSC, Wrobel improperly considered over $1 million dollars in phantom revenue – revenue that Wrobel admits was never paid to WSSC and was not reported on WSSC's audited financial statements that were provided to the State of California with WSC's franchise registration documents. This fictitious revenue was reflected on a Restated Profit & Loss Statement that was created solely for purposes of this litigation and produced on the last day of

[1] B&D Fine Homes, B&D SoCal, and WSSC are referred to collectively herein as "Plaintiffs." Plaintiffs were all owned and operated by Counter-Defendants Robert B. Bennion and Joseph R. Deville. (*See* Document No. 31, FAC, ¶¶ 18, 25, 39.)

discovery. Wrobel used Restated Profit & Loss Statement to purportedly calculate WSSC's future revenue. Because Wrobel does not follow the parties agreed-upon method for calculating the termination obligation, his opinion regarding the purported net value of WSSC is irrelevant.

In addition, the data and assumptions on which Wrobel relied in forming his opinion are wildly speculative and contrary to the evidence, and inherently unreliable. Therefore, Wrobel's opinion regarding the purported net value of WSSC should be excluded.

Second, the alleged damages suffered by B&D SoCal related to the opening of its Encinitas and Little Italy offices are not compensable under any of the claims asserted in Plaintiffs' First Amended Complaint ("FAC"). (Document No. 31.) Wrobel's opinions on this issue are based on his "understanding that WSC induced WSSC[2] to open" these offices. However, the FAC does not assert any claims for fraud. Instead, B&D SoCal has only asserted claims for breach of contract and breach of the covenant of good faith and fair dealing. Importantly, none of Plaintiffs' prior filings, depositions or discovery responses contained *any* allegations *whatsoever* regarding any damages relating to supposed losses sustained at either of these locations. Even if this claim were proper (it is not) and supported by an appropriate cause of action (it is not), damages for both of B&D SoCal's causes of action are limited to those that were reasonably foreseeable by the parties when they entered into their agreement. Damages related to B&D SoCal's claim that it was induced to open additional offices was beyond the expectations of the parties and

[2] Wrobel's reference to WSSC is clearly an error as it was B&D Fine Homes that entered into the lease for the Encinitas location and B&D SoCal that entered into the Little Italy lease. The Schedules to this portion of Wrobel's report identify B&D SoCal as the party allegedly suffering the damages. This is indicative of the global carelessness governing Wrobel's report, analysis and opinions, which, as set forth more fully below, are fraught with errors throughout. One example (of many) is Exhibit C to the report, which purports to set forth Wrobel's prior testimony but instead includes duplicate entries for 16 cases.

are therefore not compensable under California law. As a result, Wrobel's opinions on this issue are irrelevant and should be excluded.

Finally, there is no need for expert testimony regarding damages allegedly suffered in the form of settlement payments that have been withheld and unreimbursed expenses. Wrobel himself testified that his opinions on these issues were simple arithmetic. As such, his opinions will not assist the jury and should therefore be excluded.

II. FACTUAL BACKGROUND

Plaintiffs are former Windermere representatives and franchisees of WSC in Southern California. (Document No. 31, FAC ¶ 1.) The parties' relationship was governed by a number of different contracts. On August 1, 2001, WSC and B&D Fine Homes entered into a *Windermere Real Estate License Agreement for Coachella Valley* (the "Coachella Valley Agreement"). (Document No. 31, FAC, ¶ 18, Ex. A.) In brief, this agreement provided B&D Fine Homes with a license to use the Windermere trademark and gave it access to various WSC products and services in exchange for various fees.

On May 1, 2004, WSC and WSSC entered into a *Windermere Real Estate Services Company Area Representation Agreement for the State of California* (the "ARA"). (Document No. 31, FAC ¶ 25; Declaration of Paul S. Drayna, ¶ 4, Ex. A.) Pursuant to the ARA, WSC agreed to provide WSSC with a non-exclusive right to offer WSC licensees use of the "Windermere System." (Drayna Decl., Ex. A, p. 2, § 2.) As the Area Representative, WSSC was responsible for, among other things, collecting, accounting for, and remitting all license fees, technology fees, administrative fees, and other amounts due under franchise agreements between WSC and licensees in Southern California. (*Id*. at p. 3, § 3, ¶ 2.) WSSC kept 50% of all license fees collected, and remitted all remaining fees to WSC. (*Id*. at p. 8, § 10.)

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As it relates to this motion, WSSC is seeking damages resulting from WSC's alleged breach of the ARA "for failing to pay [WSSC] the termination fee – i.e. the fair market value of its interest in the Area Representation Agreement – following termination without cause." (Document No. 31, FAC, ¶163(e).) This termination fee is set forth in Section 4.2 and applies when the ARA is terminated without cause.[3] Pursuant to that section, the terminated party "will be paid an amount equal to the fair market value of ***the Terminated Party's interest in the Agreement*** (the "Termination Obligation"), in accordance with the provisions of this Agreement." (Drayna Decl., Ex. A, p. 5, § 4.2 [emphasis added].) That Section goes on to set forth the specific manner in which the Termination Obligation is to be determined: "The fair market value of the Terminated Party's interest will be determined [ ] ***without consideration of speculative factors including, specifically, future revenue***." (*Id*. [emphasis added].) Instead, "[t]he appraisers shall look at the gross revenues received under the Transaction during the twelve months preceding the termination date from then existing licensees that remain with or affiliate with the Terminating Party." (*Id*.)

On March 29, 2011, WSC and B&D SoCal entered into a *Windermere Real Estate Franchise License Agreement* (the "SoCal Agreement"). (Document No. 31, FAC, ¶ 39, Ex. D.) Like the Coachella Valley Agreement, the SoCal Agreement provided B&D SoCal with a license to use the Windermere trademark and gave it access to various WSC products and services in exchange for various fees. On December 18, 2012, the parties entered into an *Agreement Modifying Windermere Real Estate Franchise License Agreements*, which modified the terms of the Coachella Valley Agreement and the SoCal Agreement (the "Modification

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[3] Although not relevant for purposes of this motion, WSC maintains that it properly terminated the ARA for cause, in which case WSSC would not be entitled to recover anything as a result of the termination of the ARA. (*See* Document No. 31, FAC ¶ 25, Ex. B, p. 4, § 4.1 (c), p. 5, § 4.2.)

Agreement"). (Document No. 31, FAC, ¶ 56; Drayna Decl., ¶ 5, Ex. B.) Pursuant to the Modification Agreement, WSC was to "make commercially reasonable efforts to actively pursue counter-marketing, and other methods seeking to curtail the anti-marketing activities undertaken by [Windermere Watch]." (Drayna Decl., Ex. B, p. 2, § 3(A).)

As regards this motion, B&D SoCal is seeking damages resulting from WSC's alleged breach of Section 6 of the SoCal Agreement for allegedly "failing to take necessary action (legal or otherwise) to prevent the infringement of the Windermere trademark or the related unfair competition faced by Plaintiffs in the Southern California region as a result of the Windermere Watch websites," and breach of Section 3(A) of the Modification Agreement for allegedly "failing to make commercially reasonable efforts to curtail Windermere Watch and related attacks on the Windermere brand in Southern California." (Document No. 31, FAC ¶¶ 175(c), (d).)

Wrobel's report contains four categories of damages, which he opines resulted from WSC's alleged breach of the parties' various agreements: (1) Net Value of WSSC as of January 2015 in the amount of $2,592,526; (2) Settlement Amounts Improperly Withheld from WSSC in the amount of $66,037; (3) Past Losses and Future Lease Obligations – BD SoCal in the amount of $1,431,482; and (4) Net Unreimbursed Windermere Watch Expenses in the amount of $146,954. (Declaration of Jeffrey A. Feasby ("Feasby Decl."), ¶ 3; Ex. 1, p. 1.) For the reasons set forth below, none of Wrobel's opinions should be presented to the jury.

III. LEGAL ARGUMENT

A. Standards on Motion to Exclude Expert Testimony Under FRE 702

Applying Rule 702, for expert testimony to be admissible, "(1) the expert must be qualified; (2) the expert's testimony must be relevant, i.e., must assist the trier of fact to understand the evidence or determine a fact in issue; and (3) the expert's testimony must be reliable." *Novalogic, Inc. v. Activision Blizzard*,

41 F.Supp.3d 885, 894 (C.D. Cal. 2013); *see also Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579, 592-593 (1993) ("*Daubert I*"). The Court's role is to ensure that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999). This gatekeeping function applies to all expert testimony, not just scientific testimony. *Id*. at 148. The party proposing the expert witness bears the burden of establishing the expert's admissibility by the preponderance of the evidence standard. *See* Fed. R. Evid. 702, Advisory Committee's Note (2000).

In determining whether the expert's testimony is reliable, courts must ensure that the expert's testimony reflects scientific knowledge, the findings are derived by the scientific method, and the work product amounts to "good science." *Daubert v. Merrell Dow Pharms.*, 43 F.3d 1311, 1315 (9th Cir. 1995) (citation and quotations omitted). In determining reliability, the focus is on "principles and methodology, not on the conclusions that [the experts] generate." *Daubert I*, 509 U.S. at 594–95. If the basis for an expert's opinion is clearly unreliable, it may be disregarded. *See Cholakyan v. Mercedes-Benz USA, LLC*, 281 F.R.D. 534, 546-47 (C.D. Cal. 2012) (holding expert's report inadmissible for purposes of plaintiffs' motion for class certification).

B. Wrobel's Opinion Regarding Damages for Termination of the ARA is Inadmissible

1. WSSC's "Net Value" is Not a Proper Measure of Damages Under the ARA

The bulk of the total amount of damages set forth in Wrobel's report are what he labels "Net Value of WSSC as of January 2015." Wrobel contends that this amount is equivalent to "the fair market value of [WSSC's] interest in the [ARA]." (Feasby Decl., ¶¶ 3, 5, Ex. 1, p. 2, Ex. 3, Wrobel Depo., p. 54, l. 8-p. 55, l. 4.) However, Wrobel's analysis regarding the fair market value of WSSC's interest in

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the ARA is wholly inconsistent with the method *expressly* set forth by the parties in the ARA.

As noted in the FAC, the ARA provides that it may be terminated in several ways, including termination without cause "upon one hundred eighty (180) days written notice to the other party;" or for cause based on a material breach of the ARA following 90 days written notice and an opportunity to cure. (Document No. 31, FAC, ¶ 31.) In drafting the ARA, the parties purposefully included a specific means to calculate an agreed-upon payment to the non-terminating party in the event the ARA was terminated by the other party without cause, which is clearly set forth in Section 4.2. Pursuant to that section, upon termination without cause, the terminated party "will be paid an amount equal to the fair market value of the Terminated Party's ***interest in the Agreement*** (the "Termination Obligation"), ***in accordance with the provisions of this Agreement***." (Drayna Decl., Ex. A, p. 5, § 4.2 [emphasis added].) That Section goes on to set forth the specific manner in which the Termination Obligation is to be determined: "The fair market value of the Terminated Party's interest will be determined [ ] ***without consideration of speculative factors including, specifically, future revenue***." (*Id*. [emphasis added].) Thus, the clear, unambiguous, agreed-upon language of the ARA prohibits consideration of future revenues in calculating the Termination Obligation.[4] Instead, "[t]he appraisers shall look at the gross revenues received under the Transaction during the twelve months preceding the termination date from then existing licensees that remain with or affiliate with the Terminating Party." (*Id*.) Thus, pursuant to Section 4.2, the parties agreed that the Termination Obligation would be based on the revenue stream that would be lost by the terminated party, not on value of the terminated party itself.

[4] Plaintiffs have maintained throughout this litigation that the ARA is not ambiguous. (*See, e.g*., Document No. 82, p. 3, ll. 4-7.)

In direct violation of the ARA's clear instruction that future revenues were not to be used in calculating the Termination Obligation, Wrobel wrongfully included future revenues going out to 2020 in calculating purported damages consisting of the "Net Value of WSSC as of January 2015." (Feasby Decl., ¶¶ 3, 5, Ex. 1, p. 2, Schedule 2A; Ex. 3, Wrobel Depo., p. 151, l. 2-p. 152, l. 15.) As stated in his report, the net value Wrobel ascribed to WSSC "was determined by discounting the future cash flows expected to be generated from WSSC for the years 2015 through 2019 and then capitalizing a termination value for WSSC as of December 31, 2020." (Feasby Decl., ¶ 3, Ex. 1, p. 2.) This improper under the parties' agreement.

Moreover, Wrobel's calculations are based on over $1 million in phantom revenues for 2013-2015 that were never received by WSSC. This is contrary to the ARA's procedure, which required only consideration of revenues actually ***received*** during the prior 12 months. Specifically, Wrobel relied on a Recast Profit & Loss statement for WSSC that was produced by Plaintiffs on the last day of discovery in this case. (Feasby Decl., ¶ 6.) That document was created at Wrobel's request. (Feasby Decl., ¶ 5, Ex. 3, Wrobel Depo., p. 125, ll. 8-14.) The Recast Profit & Loss purports to reflect over $1.7 million in revenue received by WSSC from 2011 through 2015, including a line item for franchise fees owed by B&D Fine Homes and B&D SoCal. (Feasby Decl., ¶ 6, Ex. 4.) However, these amounts attributed to B&D Fine Homes and B&D SoCal were not included on WSSC's audited financial statements for the years ending 2013, 2012 and 2011. (Drayna Decl., ¶ 6, Ex. C.) This audited financial statement was prepared by WSSC for submission to the State of California with WSC's franchise renewal documents. (*Id.*)

Wrobel took the numbers from the Recast Profit & Loss for 2013-2015 and used them to calculate the purported net value of WSSC. (Feasby Decl., ¶ 3, Ex. 1, Schedule 2B.) However, Wrobel testified that these amounts were not paid to WSSC. (Feasby Decl., ¶ 5, Ex. 3 Wrobel Depo., p. 71, l. 7-p. 72, l. 2.) Since these

amounts were not actually received by WSSC in the 12 months prior to termination of the ARA, it was improper of Wrobel to rely upon them in reaching his opinion.

Thus, Wrobel's opinion regarding the net value of WSSC is not the same as fair market value of ***WSSC's interest in the ARA***, as the parties agreed. Wrobel's use of future revenues and revenue not actually received by WSSC are not a proper means of calculating the Termination Obligation. As a result, his opinion is not supported by the record and should be excluded. *See Onyiah v. St. Cloud State Univ.*, 684 F.3d 711, 720 (8th Cir. 2012) (in wage discrimination action, expert's testimony about what the amount of professor's initial salary should have been was excessively speculative, unreliable and inadmissible, where expert explained calculation by relying on irrelevant factors rather than on university's salary grids that were essential to computation).

Wrobel's error in considering future revenues and revenue not received is compounded by Section 4.4 of the ARA, which states "[e]xcept as specifically provided herein neither party will owe any obligation to the other following termination of the Agreement, except for final accounting and settlement of any previously accrued license fees, and excluding any accrued claim for damages and associated attorneys' fees and costs, or otherwise arising by law." Therefore, Wrobel's opinion regarding WSSC's net value is irrelevant and should be excluded as such. Under Federal Rule of Evidence 401, "[e]vidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." "Irrelevant evidence is not admissible." Fed. R. Evid. 402. Consequently, because Wrobel's opinion regarding the purported Net Value of WSSC as of January 2015 is irrelevant, it does not meet the second requirement of *Daubert I*. *See Novalogic, Inc.*, 41 F.Supp.3d at 894 ("the expert's testimony must be relevant, i.e., must assist the trier of fact to understand the evidence or determine a fact in issue."). As a result, his opinion should be excluded.

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2. The Assumptions Upon Which Wrobel's Opinion Relies are Speculative and Not Supported By the Record

"An expert's opinion should be excluded when it is based on assumptions which are speculative and are not supported by the record." *Tyger Const. Co. Inc. v. Pensacola Const. Co*., 29 F.3d 137 (1994 4th Cir.), certiorari denied 513 U.S. 1080 (internal citation omitted). *See also McGlinchy v. Shell Chem. Co*., 845 F.2d 802, 806-807 (9th Cir. 1988) (opinion regarding lost profits properly excluded where experts "study rests on unsupported assumptions and ignores distinctions crucial to arriving at a valid conclusion."); *Nebraska Plastics, Inc. v. Holland Colors Americas, Inc*., 408 F.3d 410, 415-416 (8th Cir. 2005) (expert's testimony properly excluded after pretrial hearing where assumptions were invalid in view of facts of case); *Krouch v. Wal-Mart Stores, Inc*., 2014 WL 5463333, at *6-7 (N.D. Cal. 2014) (excluding expert opinion that was founded on assumptions contradicted by plaintiff's deposition testimony); *Estate of Gonzales v. Hickman*, 2007 WL 3237727, n. 34 (C.D. Cal. 2007) and cases cited therein (excluding expert opinion where "no specific facts in the record [ ] support the opinion, and the only available evidence contradicts it."). Here, Wrobel's opinion regarding WSSC's purported net value is inadmissible on the additional ground that it relies on assumptions that are contrary to the evidence.

First, Wrobel's valuation wrongfully assumes that B&D Fines Homes and B&D SoCal would have paid the franchise fees they owed to WSSC but for the parties' dispute. (Feasby Decl., ¶ 5, Ex. 3, Wrobel Depo., p. 72, ll. 3-11.) However, Bennion testified that at the time the outstanding fees began to accrue, in July 2014, B&D SoCal was struggling financially and had to rely on money from B&D Fines Homes to keep its operations going. (Feasby Decl., ¶ 7, Ex. 5, Bennion Depo., p. 123, l. 5-p. 124, l. 3.) Bennion further testified that this required B&D Fine Homes to send all its available revenue to B&D SoCal such that it could not meet its

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own obligations. (*Id.*) Therefore, Wrobel's assumption that these entities could have and would have paid the fees owed to WSSC is contrary to the evidence.

Second, Wrobel's valuation wrongfully assumes that WSSC would continue to service WSC franchisees in Southern California after the termination of the ARA. (Feasby Decl., ¶ 5, Ex. 3, Wrobel Depo., p. 74, l. 8-24.) This bewildering assumption is a non-sequitur. Once WSSC was terminated as WSC's area representative it could no longer conduct ongoing business operations as WSC's area representative. Thus, after WSC terminated the ARA, WSSC was not entitled to receive any fees from WSC's franchisees in Southern California.[5] Wrobel's assumption to the contrary is not supported by the record or, for that matter, fundamental logic. As a result, his opinion regarding the net value of WSSC should be excluded.

3. Wrobel's Opinion Regarding the "Net Value" of WSSC is Inherently Unreliable

Not only is Wrobel's opinion regarding WSSC's purported net value an improper measure of damages under the ARA and based on demonstrably false assumptions, his opinion is also inherently unreliable.

Wrobel's opinion is based upon a Restated Profit & Loss Statement for 2011 through 2015 that was created by Plaintiffs' CPA (1) for purposes of this litigation, (2) at Wrobel's request, and (3) which was produced on the date of the discovery cutoff in this case. This Statement includes phantom fee income attributed to franchise fee payments purportedly made by B&D Fines Homes and B&D SoCal but which, in fact, were never made.

Reports, studies, data, etc. specifically prepared for purposes of litigation are generally not the type of information an expert would rely upon in forming an

[5] This demonstrates why the parties included the Termination Obligation in the ARA to calculate the value of WSSC's *interest* in the ARA, as opposed to a determination of WSSC's *value*, which is what Wrobel improperly sought to do.

opinion. *Holbrook v. Lykes Bros. S.S. Co., Inc*., 80 F.3d 777, 781-782 (3rd Cir. 1996); *United States v. Tran Trong Cuong*, 18 F.3d 1132, 1143 (4th Cir. 1994); *Muñoz v. Orr*, 200 F.3d 291, 301-302 (5th Cir. 2000) (expert's reliance on data compiled by plaintiffs gave rise to "common-sense skepticism."). The rational for this rule is simple: the financial incentives of litigation may pose a risk to the objectivity and neutrality of the person gathering the data "such that the data would not normally be considered reliable in the relevant field." *United States v. Marine Shale Processors*, 81 F.3d 1361, 1370 (5th Cir. 1996). That risk is glaringly apparent in this case, where: (1) the Restated Profit & Loss Statement flatly contradicts the revenue received by WSSC as set forth in its audited financial statements (compare Feasby Decl., ¶ 6, Ex. 4 with Drayna Decl., ¶ 6, Ex. C, p. WSC 1696); (2) hundreds of thousands of dollars in fees that were included in the Restatement relied upon by Wrobel were amounts that were *forgiven by WSSC* under the Modification Agreement (Drayna Decl., ¶ 5, Ex. B, Exhibit A); and (3) WSSC testified that B&D Fines Homes and B&D SoCal paid absolutely *no fees* after June 2014 (Feasby Decl., ¶ 8, Ex. 6, Robinson Depo., p. 32, l. 23-p. 35, l. 16).

Rule 403 of the Federal Rules of Evidence provides, in relevant part, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury." Even if the Court finds Wrobel qualified under Rule 702, Federal Rule of Evidence 403 permits the Court to exclude his opinions if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence. *Rogers v. Raymark Indus., Inc*., 922 F.2d 1426, 1430 (9th Cir. 1991). Because Wrobel's opinion regarding the purported net value of WSSC is based upon unreliable Restated Profit & Loss, his opinion should be excluded from trial.

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C. **B&D SoCal Is Not Entitled to Damages for Losses It Allegedly Sustained at Its Encinitas And Little Italy Offices**

1. Plaintiffs Have Waived a Claim for Damages Based on Alleged Losses and Lease Costs for B&D SoCal's Encinitas and Little Italy Offices

Plaintiffs' complaint was filed on September 17, 2015. (Document No. 1.) The FAC was filed on November 16, 2015. (Document No. 31.) B&D SoCal's responses to WSC's interrogatories, which included interrogatories requesting all facts relating to the "actual damages" B&D SoCal suffered, were served on April 13, 2016. (Feasby Decl., ¶ 4, Ex. 2 [*see* Interrogatory Nos. 9, 10].) Pursuant to the Court's Order Setting Pre-Trial & Trial Dates, the discovery cutoff was August 29, 2016. (Document No. 35.) Plaintiffs' Memorandum of Contentions of Fact and Law was filed on August 29, 2016. (Document No. 49.) The parties' [Proposed] Final Pretrial Conference Order was filed on September 12, 2016. (Document No 57.) *None* of these documents contained any allegations, evidence, or argument whatsoever that B&D SoCal was seeking damages relating to losses it supposedly sustained at its Encinitas and Little Italy locations, or any losses that it allegedly would continue to sustain as a result of the leases entered into for those locations. Similarly, none of Plaintiffs' witnesses testified regarding the operation of these offices, let alone any damages relating to these offices. (Feasby Decl., ¶ 3.)

Instead, hoping to sandbag WSC, Plaintiffs waited until September 16, 2016, a full year after they filed their complaint, after the close of discovery, and after all of the parties' contentions should have been disclosed, in order to assert these damages for the first time with their designation of Wrobel as an expert and the production of his report. (Feasby Decl., ¶ 3.) However, even as of September 16, 2016, the basis for such a claim for damages remained a mystery because Wrobel's report merely recited that his opinions on this issue were based on his "understanding that WSC induced WSSC to open" the Encinitas and Little Italy offices. It wasn't until Wrobel's deposition on April 5, 2017 – not even two weeks ago - that this contention was articulated with any specificity. At his deposition,

Wrobel testified that his opinion regarding the losses sustained by B&D SoCal were based on his understanding that B&D SoCal was induced to open the office based on WSC's promise under the Modification Agreement to use commercially reasonable efforts to address Windermere Watch. (Feasby Decl., ¶ 5, Ex. 3, Wrobel Depo., p. 154, l. 20-p. 155, l. 12.) The Court should summarily reject Plaintiffs' trial-by-ambush tactics, and Wrobel's opinions and testimony on this issue should be excluded from trial in their entirety.

The FAC's Fifth and Sixth Claims for Relief are asserted on behalf of B&D SoCal alone. Those claims are for breach of contract and breach of the covenant of good faith and fair dealing, respectively. There are no allegations in the FAC whatsoever regarding damages supposedly suffered by B&D SoCal relating to alleged losses and future lease costs at the Encinitas and Little Italy locations, let alone that WSC allegedly induced B&D SoCal to open those locations. Indeed, while the FAC mentions other locations opened by B&D SoCal (*see* Document No. 31, FAC ¶ 39), nowhere in the FAC are the Encinitas or Little Italy locations even referenced.

B&D SoCal's responses to WSC's interrogatories also did not disclose alleged damages resulting from some purported inducement to open offices in general, or with regard to the Encinitas or Little Italy offices in particular. For instance, in response to Interrogatory No. 9, B&D SoCal responded:

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INTERROGATORY NO. 9:

State all facts Relating to Your "actual damages" suffered as a result of WSC's "breaches of the SoCal Franchise Agreement" as alleged in paragraph 176 of the FAC.

RESPONSE TO INTERROGATORY NO. 9:

At this stage in discovery, and without the benefit of WSC's discovery responses or expert analysis following receipt of those records, Plaintiffs' "actual damages" are not known. However, the nature of B&D SoCal's actual damages relate to (1) its loss of real estate listings, customers, and agents, (2) expenditure of funds to create and maintain the technology tools that were to be provided by WSC needed to support the agents and listings, (3) the expenses associated with the technology identified in response to Interrogatory No. 1, above, (4) the expenditures associated with the development and maintenance of a user friendly real estate website that provided the technology, tools, and features that WSC's website(s) failed to provide, (5) expenses associated with preparing its own operating system and tools due to deficiencies in the Windermere System; (6) a reduced ability to obtain agents, clients, and listings because of Windermere Watch; and (7) expenditures in connection with the search engine optimization efforts undertaken by B&D SoCal to curtail the presence of Windermere Watch. Discovery continues and this responding party will supplement its response following the receipt and review of WSC's discovery responses and document production.

(Feasby Decl., ¶ 4, Ex. 2. p. 10, ll. 6-24.) B&D SoCal provided the same response to Interrogatory No. 10, requesting facts relating to the "actual damages" allegedly suffered as a result of WSC's breach of the covenant of good faith and fair dealing. (*Id*. at p. 10, l. 25-p. 11, l. 16.)

In responding to interrogatories, "[a] party seeking damages must timely disclose its theory of damages as well as its computation of those damages. . . . Further, the service of expert witness' reports does not excuse a litigant from his/her other discovery obligations, such as a computation of damages." *Fay Ave. Properties, LLC v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 2965316, at *3 (S.D. Cal. July 1, 2014) (internal citations omitted). Here, it is a gross understatement to say that Plaintiffs failed to timely disclose that B&D SoCal was seeking damages relating to losses and future lease expenses for its Encinitas and Little Italy locations.

Additionally, the Court's Final Pretrial Conference Order (the "Order") is void of any contention that WSC induced B&D SoCal to open any offices, nor does it mention losses allegedly sustained relating to the Encinitas and Little Italy offices. The Ninth Circuit has made it clear that "[u]nder Rule 16(e) of the Federal Rules of Civil Procedure, a pretrial order controls the subsequent course of the action unless modified at the trial to prevent manifest injustice." *S. California Retail Clerks Union & Food Employers Joint Pension Trust Fund v. Bjorklund*, 728 F.2d 1262, 1264 (9th Cir. 1984). The Ninth Circuit has also "consistently held that issues not preserved in the pretrial order have been eliminated from the action." *Id*. As noted in the Advisory Committee Notes regarding the 1983 Amendments to Rule 16:

> Once formulated, pretrial orders should not be changed lightly; but total inflexibility is undesirable. [Citation.] The exact words used to describe the standard for amending the pretrial order probably are less important than the meaning given them in practice. By not imposing any limitation on the ability to modify a pretrial order, the rule reflects the reality that in any process of continuous management, what is done at one conference may have to be altered at the next. In the case of the final pretrial order, however, a more stringent standard is called for and the words "to prevent manifest injustice," which appeared in the original rule, have been retained. They have the virtue of familiarity and adequately describe the restraint the trial judge should exercise.

"Counsel bear a substantial responsibility for assisting the court in identifying the factual issues worthy of trial. If counsel fail to identify an issue for the court, the right to have the issue tried is waived. Although an order specifying the issues is intended to be binding, it may be amended at trial to avoid manifest injustice. *See* Rule 16(e). However, the rule's effectiveness depends on the court employing its discretion sparingly." Fed. R. Civ. Proc. 16, Advisory Committee Notes (1987).

Here, Plaintiffs failed to identify any facts or damages in the Order relating to the alleged inducement of B&D SoCal to open offices in Encinitas and Little Italy or damages resulting therefrom. As set forth in the Order under "the key evidence the B&D Parties rely on for each claim," Plaintiffs assert the following contentions in support of B&D SoCal's claim for breach of contract:

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WSC breached Section 6 by failing to take necessary action (legal or otherwise) to prevent infringement of the Windermere trademark or the related unfair competition faced by Plaintiffs in the Southern California region as a result of the Windermere Watch websites. WSC similarly breached Section 3(A) of the Modification Agreement by failing to make commercially reasonable efforts to curtail Windermere Watch and related attacks on the Windermere brand in Southern California.[6]

(Document No. 79, p. 19, ll. 2-8.) The allegations supporting B&D SoCal's claim for breach of the covenant of good faith and fair dealing as set forth in the Order have nothing to do with Windermere Watch. (*See* Document No. 79, p. 19, ll. 13-26.) Thus, as with the FAC, the Order does not contain any allegations or indication that B&D SoCal was pursuing damages on a claim that it was induced to open offices in Encinitas and Little Italy. As a result, any claims of damages for losses sustained at these offices have been eliminated from this action (if they ever existed at all). *Bjorklund*, 728 F.2d at 1264.

Moreover, even if the Court were to determine that Plaintiffs did not waive B&D SoCal's brand new claims of inducement, those claims should be excluded under Rule 403 of the Federal Rules of Evidence. As noted above, that rule provides that the Court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice. Here, allowing Wrobel to testify regarding this new theory of damages would unfairly prejudice WSC. WSC has not had the opportunity to take any discovery from Plaintiffs on this issue since it was not asserted until after the discovery cutoff. Additionally, when it specifically asked B&D SoCal about all of the facts supporting its claims, B&D SoCal failed to mention anything about being induced to open offices in Encinitas or Little Italy or any damages resulting from the opening of those offices. In light of the foregoing, it would be patently unfair to require WSC to first address the factual basis for these claims at trial.

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[6] As with the FAC, these are the claims that remain after the Court granted summary judgment in favor of WSC on B&D SoCal's claims regarding the Windermere System. (*See* Document No. 66, p. 4, ll. 13-15.)

In sum, Wrobel's opinion and testimony regarding damages allegedly suffered by B&D SoCal relating to the Encinitas and Little Italy offices should be excluded.

2. Damages Based on Alleged Losses and Lease Costs for B&D SoCal Relating to the Encinitas and Little Italy Offices are Not Recoverable Under Plaintiffs' Claims

Plaintiffs' claims for alleged losses sustained by B&D SoCal relating to its Encinitas and Little Italy offices are not recoverable under California law. California Civil Code section 3300 governs contract damages and provides:

> For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.

"Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectations of the parties are not recoverable." *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 515 (1994) (citing Cal. Civ. Code § 3300). *See also Gibson v. Office of Attorney Gen., State of Cal.*, 561 F.3d 920, 929 (9th Cir.2009) (applying California law and stating, "Plaintiffs' contractual claims must fail because Plaintiffs have failed to allege any foreseeable contract damages"). "Because the covenant of good faith and fair dealing essentially is a contract term that aims to effectuate the contractual intentions of the parties, compensation for its breach has almost always been limited to contract rather than tort remedies." *Cates Constr., Inc. v. Talbot Partners*, 21 Cal.4th 28, 43 (1999) (internal quotations omitted).

In support of B&D Fine Homes' claims for damages, Plaintiffs have alleged as follows:

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> 20 The Windermere Watch anti-marketing campaign has had a significant and
> 21 monetarily damaging effect on Plaintiffs' businesses. Windermere's competitors
> 22 incorporate information from the site in pitches to both agents and clients. WSC's
> 23 failure to protect the brand in the face of the anti-marketing campaign regularly
> 24 caused the loss of listings, clients, and agents.

(Document No. 79, Order, p. 14, ll. 20-24.) Similarly, in response to WSC's interrogatories, B&D SoCal claimed damages in the form of "a reduced ability to obtain agents, clients, and listings because of Windermere Watch." (Feasby Decl., ¶ 4, Ex. 2 p. 11, ll. 11-12.) However, B&D SoCal's new claim that WSC's agreement to use commercially reasonable efforts to address Windermere Watch induced it to open offices in Encinitas and Little Italy is well beyond the contemplation of the parties. This much is certain because B&D SoCal failed to obtain the required permission from WSC prior to opening these locations. (Drayna Decl., ¶ 7.) Moreover, WSSC never reported these as branches, and B&D SoCal never paid any franchise or other fees to WSC related to these two locations. (*Id.*) In fact, WSSC never even listed these locations as branches operated by B&D SoCal on the accountings it provided to WSC. (*Id.*.)

Further, Plaintiffs' effort to attribute losses sustained by the Encinitas and Little Italy offices to Windermere Watch is wholly speculative. *Vu v. California Commerce Club, Inc.*, 58 Cal.App.4th 229 (1997) is illustrative of this point. In *Vu*, plaintiffs brought an action against a gambling establishment, the California Commerce Club, Inc. ("Club"), after they lost a substantial amount of money in two card games - Asian stud poker and Pan-Nine. *Id.* at 231. The plaintiffs asserted various contract claims including breach of an implied contract and breach of the implied covenant of good faith and fair dealing, premised on the theory that an implied contract existed between them and the Club whereby the Club impliedly agreed to provide adequate security, including the investigation of cheating, to

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ensure that games were honestly played. *Id*. at 232. The Club allegedly breached this duty, and this caused the plaintiffs to lose their hands to cheating players. *Id*.

On appeal, the court concluded that the causal connection between the alleged breach (the Club's failure to provide adequate security) and the damages (the plaintiffs' gambling losses) was "based on speculation" that the games would have turned out more favorable than they did without the alleged cheating. *Id*. at 235. The causal connection between breach and damages was simply too speculative to support a viable claim:

> Causation of damages in contract cases, as in tort cases, requires that the damages be proximately caused by the defendant's breach, and that their causal occurrence be at least reasonably certain. (Civ. Code, §§ 3300, 3301.) No such certainty or probability appertains with respect to plaintiffs' gambling losses, assertedly the result of cheating. Assuming arguendo that an adequate causal connection could be established between the club's alleged breach of security obligations and the cheating that plaintiffs allegedly encountered, no such relationship appears between the cheating and plaintiffs' losses. That is because winning or losing at card games is inherently the product of other factors, namely individual skill and fortune or luck. It simply cannot be said with reasonable certainty that the intervention of cheating such as here alleged was the cause of a losing hand, and certainly not of two weeks' or two years' net losses (as alleged by Matloubi and Vu respectively).

Id. at 233.

Similarly, in this case, Wrobel's opinion regarding losses sustained by the Encinitas and Little Italy locations as being caused by Windermere Watch and WSC's alleged inducement of B&D SoCal to open those offices are pure speculation. Such speculative opinions are unreliable and, therefore, properly excluded under *Daubert I*.

D. Wrobel's Opinions Regarding Alleged Damages for Settlement Payments and Windermere Watch Expenses Will Not Assist the Jury and are Speculative

Expert opinion testimony is appropriate when the factual issue is one that the trier of fact would not ordinarily be able to resolve without technical or specialized assistance. *Daubert I*, 509 U.S. at 591; *Kumho Tire Co*., 526 U.S. at 156. "(E)vidence based on scientific, technical, or other specialized knowledge must be

useful to the finder of fact in deciding the ultimate issue of fact …. This is the basic rule of relevancy." *Lauzon v. Senco Products, Inc.*, 270 F.3d 681, 686 (8th Cir 2001). If a jury is capable of drawing its own inferences from the available evidence, expert opinion testimony may not "help the trier of fact." Fed. R. Evid. 702.

In general, matters within "common knowledge" are not helpful to the jury and therefore not normally a proper subject for expert testimony. *Persinger v. Norfolk & Western Ry. Co.*, 920 F.2d 1185, 1188 (4th Cir. 1990); *see also Evans v. Mathis Funeral Home, Inc.*, 996 F.2d 266, 268 (11th Cir. 1993) (expert opinion testimony on probable cause of plaintiff's fall (e.g., uneven risers, height of handrail, dim lighting) properly excluded as within jurors' common knowledge); *Florek v. Village of Mundelein, Ill.*, 649 F.3d 594, 603 (7th Cir. 2011) ("everyday experience teaches people how long it takes to walk from room to room"). Not only is expert testimony unhelpful in such circumstances, but it may also risk unfair prejudice to the opposing party, confuse the issues, and/or mislead the jury:

> Expert testimony on a subject that is well within the bounds of a jury's ordinary experience generally has little probative value. On the other hand, the risk of unfair prejudice is real. By appearing to put the expert's stamp of approval on the government's theory, such testimony might unduly influence the jury's own assessment of the inference that is being urged.

United States v. Montas, 41 F.3d 775, 784 (1st Cir. 1994). *See also Hayes v. Wal-Mart Stores, Inc.*, 294 F.Supp.2d 1249, 1251 (E.D. Ok. 2003) (proposed expert testimony re financial effect of punitive damages not helpful and risked confusion or misleading jury). Wrobel's remaining two opinions are well within the common knowledge of a jury and should be excluded as such.

First, Wrobel purports to opine regarding the amount of WSSC's portion of settlement payments that WSC has received from some of its former franchisees,

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King and Kirksey, and the value of future payments.[7] (*See* Feasby Decl., ¶ 3, Ex. 1, p. 3, Schedules 3, 4.) However, a determination of this amount requires the jury to simply add WSSC's portion of the payments that WSC has received. Even Wrobel testified that it was "fairly straightforward arithmetic." (Feasby Decl., ¶ 5, Ex. 3, Wrobel Depo., p. 131, l. 6-p. 132, l. 5.) Therefore, Wrobel's opinion on this issue will not assist the jury.

Second, Wrobel purports to opine regarding amounts allegedly expended by WSSC in addressing Windermere Watch. (*See* Feasby Decl., ¶ 3, Ex. 1, p. 3, Schedule 8.) This amount was determined by taking a spreadsheet provided by Plaintiffs, adding the annual totals on that spreadsheet, and then subtracting out a payment made by WSC to reimburse for some of the amount allegedly expended. (Feasby Decl., ¶ 5, Ex. 3, Wrobel Depo., p. 134, l. 11-p. 139, l. 21.) Again, Wrobel concedes "[i]t is simple arithmetic." (*Id*. at p. p. 139, ll. 14-21.) Thus, his opinion on this issue will not assist the jury.

Because Wrobel's opinions regarding amounts allegedly owed on the King and Kirksey settlements and for allegedly unreimbursed Windermere Watch expenses will not assist the jury and are speculative, those opinions should be excluded under *Daubert I* and Rules 702 and 403.

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[7] For purposes of the future payments, Wrobel took the amount of the future monthly payments due under the settlement agreements and discounted those payments to present value. (*See* Feasby Decl., ¶ 3, Ex. 1, Schedules 3, 4.) However, it is pure speculation to assume that next month's payments will be made, let alone that a payment will be made on April 1, 2019 (Schedule 3) or December 20, 2020 (Schedule 4). In fact, Kirksey has not made a payment since May 9, 2016, after Plaintiffs had refused Kirksey's offer to make a lump-sum payment to resolve the total amount owed. (Drayna Decl., ¶ 8.) WSSC is not entitled to its portion of those payments until they are made. *See Instrumentation Laboratory Co. v. Binder*, 2013 WL 12049070 * 18 (S.D. Cal. 2013). Therefore, these amounts should be also excluded as speculative and unreliable under *Daubert I*, or as unduly prejudicial or confusing to the jury under Rule 403.

IV. CONCLUSION

For all these reasons, WSC respectfully requests that the Court enter an Order excluding all evidence and testimony related to the opinions of Plaintiffs' expert witness, Peter Wrobel.

DATED: April 17, 2017 PEREZ VAUGHN & FEASBY INC.

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