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13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

15 BENNION & DEVILLE FINE
16 HOMES, INC., a California
17 corporation, BENNION & DEVILLE
18 FINE HOMES SOCAL, INC., a
19 California corporation, WINDERMERE
20 SERVICES SOUTHERN
21 CALIFORNIA, INC., a California
22 corporation,

23 Plaintiffs,

24 v.

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

28 Defendant.

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

Hon. Manual L. Real

**PETER WROBEL DECLARATION
IN SUPPORT OF THE B&D
PARTIES' OPPOSITION TO WSC'S
DAUBERT MOTION IN LIMINE TO
EXCLUDE PLAINTIFFS' EXPERT
PETER WROBEL**

Date: May 15, 2017

Time: 10:00 a.m.

Courtroom: 880

Action Filed: September 17, 2015

Trial: May 30, 2017

AND RELATED COUNTERCLAIMS

1 I, Peter Wrobel, do hereby state and declare as follows:

2 1. I have personal knowledge of the matters set forth below, and if called as a
3 witness, I could and would testify competently thereto. I make this Declaration in
4 support of the B&D Parties' opposition to Windermere Real Estate Services Company's
5 ("WSC") *Daubert* Motion in *Limine* to Exclude Expert Peter Wrobel.

6 2. I am a Managing Director of Berkeley Research Group, LLC. Prior to
7 joining Berkeley Research Group, I held similar positions with LECG, LLC, Navigant
8 Consulting, Inc. and FTI Consulting Inc. I have also served as a Senior Partner of
9 Simpson LLP and a Senior Manager at Coopers & Lybrand (now known as
10 PricewaterhouseCoopers LLP). I hold an MBA with a concentration in Accounting from
11 the University of Southern California and a BA and MA from UCLA. I am a Certified
12 Public Accountant and a Certified Fraud Examiner. I hold the American Institute of
13 Certified Public Accountants' Accreditation in Business Valuation which is a specialized
14 business valuation credential. I am a member of the American Institute of Certified
15 Public Accountants and the Association of Certified Fraud Examiners. I have been
16 accepted by state and federal courts as an expert witness on business valuation,
17 accounting, fraud, economic and financial matters.

18 3. I was engaged on behalf of Plaintiffs and Counter-Defendants Bennion &
19 Deville Fine Homes, Inc. ("BD Fine"), Bennion & Deville Fine Homes SoCal, Inc. ("BD
20 SoCal") and Windermere Services Southern California, Inc. ("WSSC") in the *BD Fine,*
21 *et al. v. Windermere Real Estate Services Company* matter. I have been asked to
22 calculate the amount of damages, if any, suffered by these entities as a result of the
23 certain alleged activities at issue in this lawsuit. I issued a FRCP Rule 26 report on
24 September 16, 2016 which set forth the damages I calculated and the basis for those
25 damages.
26

27 4. I calculated that WSSC and BD SoCal have or will suffer at least \$4,237,999
28 in damages. Damages consisted of the following:

1		
2	Net Value of WSSC as of January 2015	\$2,592,526
3		
4	Settlement Amounts Improperly Withheld from WSSC	66,037
5	Past Losses and Future Lease Obligations – BD SoCal	1,431,482
6		
7	Net Unreimbursed Windermere Watch Expenses	146,954
8	Total	<u>\$4,237,999</u>
9		

10 5. I have reviewed “Defendant and Counterclaimant’s Memorandum of Points
11 and Authorities in Support of *Daubert* Motion *In Limine* to Exclude Plaintiffs’ Expert
12 Peter Wrobel” (“Wrobel MIL”) filed on April 17, 2017. I have been asked to comment
13 on some of the issues raised in this Motion.

14 6. The Wrobel MIL raises four major issues: 1) I improperly calculated the Fair
15 Market Value of WSSC by using an incorrect valuation formula and included “phantom
16 revenue” in my calculation, 2) my calculation of damages relating to the opening of two
17 WSC franchises in Encinitas and Little Italy was not properly pled by the Plaintiffs, 3)
18 two damage calculations were simple arithmetic exercises and should not be presented
19 by an expert, and 4) my report included examples of “global carelessness.”

20 7. Defendant Windermere Real Estate Services Corporation (“WSC”)
21 mischaracterizes my calculation of the “Net Value of WSSC as of January 2015”.¹ My
22 calculation correctly uses both the proper valuation formula and the proper revenue
23 amounts. My calculation was based on Section 4.2 of the Area Representation
24 Agreement (“ARA”) which provided that the terminated party “will be paid an amount
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28 ¹ The term “Net Value” as used in my report is the same as Fair Market Value less an adjustment for WSSC earnings after the valuation date. I calculated the Fair Market Value of WSSC as of January 2015 and then subtracted out any earnings after that date. I explained this adjustment and the meaning of “Net Value” in my April 4, 2017 deposition (80:17-83:13).

1 equal to the fair market value of the Terminated Party's interest in the Agreement."
2 Section 4.2 provides a mechanism for both parties to select appraisers and also provided
3 that "the fair market value will be determined by the appraisers without consideration of
4 speculative factors including, specifically, future revenue. The appraisers shall look at
5 the gross revenues received under the Transaction during the twelve months preceding
6 the termination date from the then existing licensees that remain with or affiliate with the
7 terminating Party."²

8 8. "Fair Market Value" is a term that is universally understood in business
9 valuation to mean "[t]he price at which the property would change hands between a
10 willing buyer and an willing seller when the former is not under any compulsion to buy
11 and the latter is not under any compulsion to sell, both parties having reasonable
12 knowledge of relevant facts."³ In order to properly calculate the Fair Market Value of a
13 business, it is necessary to consider many different factors, including the ability of the
14 business to generate ongoing revenues and profits.

15
16 9. WSC takes issue with two general adjustments I made to determine the Fair
17 Market Value. First, they argue that I should only have looked at the twelve months'
18 prior revenue of WSSC and exclude any future revenues. Second, WSC argued that I
19 included "phantom" revenue in my calculations. However, in order to properly
20 determine the Fair Market Value, it was necessary to make these adjustments.⁴

21 10. As I testified in my deposition, I did exclude "speculative future revenues."⁵
22

23 ² WSC ARA for the State of California § 4.2.

24 ³ See, for example, Shannon P. Pratt, *Business Valuation Body of Knowledge: Exam Review and Professional*
25 *Reference*, (New York: John Wiley, 1998), p. 28. See also United States Treasury Regulation § 20.2031-1(b) and IRS
26 Revenue Rulings 59-60 and 66-49. See also AICPA, *Statement on Standards for Valuation Services (SSVS) No. 1,*
27 *Valuation of a Business, Business Ownership Interest, Security, or Intangible Asset* Appendix C Glossary of Additional
28 Terms which defines "Fair Market Value" as "the price, expressed in terms of cash equivalents, at which property would
change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms length
in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable
knowledge of the relevant facts."

⁴ As I point out later in this Declaration, the "phantom revenue" alluded to by WSC is, in fact, actual revenue.

⁵ I made several references as to the distinction between "speculative" future revenues and non-speculative expected
future revenues. See Wrobel April 4, 2017 Deposition at 55:24-56:21 and 63:8-19.

1 However, I also considered the ability of WSSC to generate future cash flows, which is
2 primarily what a willing buyer would consider when purchasing a company in an arms-
3 length transaction. In order to consider future cash flows, it is necessary to project
4 future revenues based on an analysis of historical patterns of revenue. Looking at
5 historical patterns of revenue is an accepted methodology within the valuation
6 profession and will result in projections of future revenue which are reasonable and are
7 not speculative. These future revenues are also discounted using a discount rate which
8 also takes into account the risks associated with WSSC earning the revenues in the
9 future. The methodology I used is called the discounted cash flow method and it is a
10 common and accepted methodology in the business valuation community. I considered
11 the prior twelve months' revenue as part of my calculations.
12

13 11. WSC's arguments are misleading about whether or not a valuation
14 professional should consider future revenues. There are common and accepted valuation
15 methodologies that do not explicitly calculate future revenues but are nevertheless
16 incorporated into a valuation. For example, a valuation professional might consider the
17 prior twelve months' revenue and determine the cash flows generated from that revenue
18 stream. The valuation professional would then determine a capitalization rate to apply to
19 that cash flow. The capitalization rate implicitly considers future revenues because it is
20 used essentially as a multiplier of the twelve months' prior cash flows. Mathematically
21 you are projecting future cash flows. The result of this calculation would be identical to
22 the Fair Market Value I determined using a discounted cash flow method. In my
23 experience as a testifying expert, I have found that juries understand discounted cash
24 flow models more easily than capitalization models and that is the reason I chose it in
25 this case.

26 12. WSC also failed to mention in the Wrobel MIL that my Fair Market
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28

1 Valuation is consistent with at least four other contemporaneous Fair Market Valuations
2 that were made in 2014 and 2015.⁶ First, CPA Gregory Barton calculated a value for
3 WSSC of approximately \$3,200,000 as of August 2015. Second, WSC attempted to
4 purchase WSSC, BD SoCal and BD Fine in July 2015 for approximately \$12,500,000.
5 Third, the Mentor Group valued BD SoCal and BD Fine (excluding WSSC) for
6 \$9,800,000 in September 2014. Fourth, Vincent and Nicholas Gattuso made an \$11
7 million cash offer for BD SoCal and BD Fine (excluding WSSC) in August 2015.
8 Subtracting the Mentor Group and Gattuso offers from WSC's offer of \$12,500,000
9 implied a value of WSSC of \$1,500,000 or \$2,700,000.

10
11 13. I have also reviewed WSC's "Motion *In Limine* to Exclude Evidence
12 Related to Its Offer to Purchase Plaintiffs and Counter-Defendants [Motion *In Limine*
13 No. 4 of 4]" ("MIL No. 4"). MIL No. 4 relates to the attempted purchase of WSSC, BD
14 SoCal and BD Fine by WSC in July and August 2015. Specifically,

15 "WSC anticipates that Plaintiffs and Counter-Defendants may seek to admit
16 evidence at trial regarding an offer made by WSC's principals to purchase
17 the B&D Entities for approximately \$12.5 million. These offers were set
18 forth in two letters of intent dated July 28, 2015 and August 2, 2015, and
19 included as Plaintiffs and Counter-Defendants' proposed exhibit numbers
20 249 and 250, respectively. WSC anticipates that Plaintiffs and Counter-
21 Defendants may seek to enter these exhibits into evidence in order to
22 mislead the jury regarding the value of one or more of the B&D Entities.
23 They may also use this evidence to help validate the opinion of their expert
24 Peter Wrobel regarding the "net value" of WSSC."⁷

25 I have considered the WSC offer in my evaluation of the Fair Market Value of WSSC
26 (again, the "net value" referenced is the Fair Market Value of WSSC less an adjustment
27 for WSSC earnings after the valuation date). It is appropriate, and in fact essential, for
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⁶ This issue is addressed in WSC's "Motion *In Limine* to Exclude Evidence Related to Its Offer to Purchase
...[WSSC] [Motion *In Limine* No. 4 of 4]" ("MIL No. 4"), filed on April 17, 2017. See Paragraph 13 of this Declaration for
a discussion of MIL No. 4.

⁷ MIL No. 4, 1:10-18.

1 any valuation professional to consider contemporaneous appraisals of the target
2 valuation company. Not only is this common sense, it is particularly appropriate to
3 consider WSC's offer because WSC would presumably have more information about the
4 nature of the business of WSSC than an independent party such as the Mentor Group or
5 Vincent and Nicholas Gattuso. The professional valuation literature supports this
6 assessment: "[e]ven if not accepted, a bona fide offer, particularly if submitted in
7 writing, can at least corroborate the value [of the company being valued]." ⁸

8 14. WSC's second substantive argument against my Fair Market Value
9 calculation is that I included "over \$1 million in phantom revenues for 2013 – 2015." ⁹
10 This is incorrect and misleading since these revenues actually existed and were not
11 "phantom". In January 2015 WSSC was the area representative for WSC and was to
12 receive license fees and royalties paid by BS SoCal, BD Fine and other Windermere
13 franchisees. Starting in 2011 WSSC chose not to record those revenues on WSSC
14 financial statements. However, a business valuation professional must consider the
15 economic substance of a transaction over its form. For whatever reason WSSC chose
16 not to record those revenues, they nevertheless reflected revenues WSSC were entitled
17 to. In order to perform a Fair Market Valuation, a valuation professional has to consider
18 adding those actual revenues back to WSSC. At my request, Greg Barton, who is
19 WSSC's outside CPA, recast the WSSC financial statements to reflect this. Making
20 adjustments to audited financial statements is sometimes necessary in order to determine
21 the Fair Market Value of a company.

22 15. WSC also takes issue with my calculation of damages resulting from the
23 failed operations of the Encinitas and Little Italy offices. WSC's arguments mainly
24 involve legal procedural issues. From a damages standpoint, it was my understanding
25 that these losses flowed from a breach of contract by WSC. WSC does not argue that the
26 damage amounts I calculated were incorrect, merely that they are not recoverable
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28 ⁸ Pratt, Shannon P, and Niculita, Alina V., *Valuing a Business: The Analysis and Appraisal of Closed Held Companies, Fifth Edition*, (New York: McGraw-Hill, 2008), p. 87.

1 damages.

2 16. WSC has also argued that two other damages I calculated – involving
3 settlement damages and unreimbursed Windemere Watch costs – are obvious and
4 speculative. It is true that the calculations I performed were essentially arithmetic
5 exercises. However, it has been my experience that experts such as myself are routinely
6 asked to calculate different types of damages and present the total to the trier of fact. In
7 this case, calculating settlement damages and adding up the Windemere Watch expenses
8 are additional elements of damages and are added to both the Fair Market Value of
9 WSSC and Lease Obligation damages in order to show total damages. Having a
10 damages expert testify to these amounts assists the trier of fact in two ways. First, this is
11 an economical way to present total damages and can preclude WSSC from having
12 another witness testify to the amount of these damages. Second, having an expert
13 calculate and present total damages will also allow the trier of fact to more easily
14 understand total compensatory damages if and when punitive damages need to be
15 considered or prejudgment interest needs to be calculated.

17 17. Finally, WSC added a gratuitous comment on footnote 5 of the Wrobel MIL
18 about a minor error in my report. On one of my schedules I noted that BD SoCal
19 entered into a lease for the Encinitas property. In fact, it was BD Fine that entered into
20 the lease. This error has no impact on my opinions concerning damages. Rule 26 also
21 requires experts to disclose all prior testimony for the previous four years. I have
22 testified in 61 cases which were listed on Schedule C of my report. Unfortunately, 16 of
23 those cases were mistakenly repeated. WSC noted that the error concerning BD Fine
24 was “indicative of the global carelessness governing Wrobel’s report, analysis and
25 opinions, which, *as set forth more fully below*, are fraught with errors throughout.”
26 [emphasis added] I do acknowledge the error concerning the Encinitas location and the
27

28 ⁹ Wrobel MIL 8:11-12.

1 fact that 16 cases were repeated. I also note that WSC did not note any other examples
2 of “global carelessness” anywhere else in the report.
3

4 I declare under penalty of perjury under the laws of the United States of America
5 that the foregoing is true and correct.

6 Executed this 24th day of April, 2017 in Los Angeles, California.
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13 _____
14 Peter D. Wrobel, CPA
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