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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. Manual L. Real

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

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Trial: May 30, 2017

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Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc. ("B&D Fine Homes"), Bennion & Deville Fine Homes SoCal, Inc. ("B&D SoCal"), Windermere Services Southern California, Inc. ("Services SoCal"), and Counter-Defendants Robert L. Bennion ("Bennion") and Joseph R. Deville ("Deville") (all collectively, the "B&D Parties") respectfully submit this Opposition to Defendant/Counter-Plaintiff Windermere Real Estate Services Company's ("WSC") *Daubert* Motion in *Limine* to Exclude Plaintiffs' Expert Peter Wrobel.

I. INTRODUCTION

WSC seeks to exclude all of the opinions of the B&D Parties' damages expert Peter Wrobel ("Wrobel") with arguments that, at most, should be raised in cross-examination at trial, not a *Daubert* motion. As explained in detail below, WSC's arguments should be denied on the following grounds:

First, WSC's attempt to mischaracterize Wrobel's valuation as a "Net Value" instead of a "fair market value" is merely a play on words and ignores Wrobel's ultimate opinions as to the fair market value of the Area Representation Agreement. Because Wrobel's ultimate opinion identifies the fair market value of the Area Representation Agreement as required by the agreement, WSC's motion should be denied.

Second, WSC misinterprets the language of the Area Representation Agreement in arguing that future revenues should not be included in the calculation of the fair market value.[1] In truth, the ARA only precludes the consideration of "*speculative*" future revenues, not the non-speculative revenues that must be taken into account when performing a fair market valuation of the business. Moreover, this argument by WSC improperly attacks the factual basis for Wrobel's calculation, not the admissibility of the opinion. This is not the focus of the *Daubert* test. For that reason alone, WSC's motion

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[1] Even if there was some ambiguity regarding the future revenue that could be considered under the Area Representation Agreement, these ambiguities must be construed against WSC as the drafter of the agreement. *United States v. Westlands Water Dist*., 134 F. Supp. 2d 1111, 1137 (E.D. Cal. 2001)

should be denied.

Third, WSC's attempt to exclude that B&D Parties' breach of contract damages in connection with the Encinitas and Little Italy locations is equally inappropriate in the *Daubert* analysis. The losses were reasonably foreseeable and Wrobel's calculation is ground in facts presented to him for review. Thus, WSC's motion lacks a proper basis for the exclusion of Wrobel's opinions.

Fourth, WSC's attempt to exclude some of Wrobel's opinions because they can be achieved with "simple arithmetic" is misguided and naive. As explained in Wrobel's concurrently filed declaration, his opinions are far more than simple calculations that the jury could decipher on its own. However, it is inevitable that some component of every damage expert's calculation could be deciphered with a calculator and "simple arithmetic." This is not a valid basis to exclude who is tasked with presenting all of the damages to the jury in efficient and economic manner. In the interest of judicial economy, and to simplify the presentation of evidence to the jury, Wrobel should present these damages at trial. WSC's argument, if granted, would undermine the testimony of nearly every tasked with presenting damages to a jury at trial. Thus, WSC's motion should be rejected.

In sum, WSC inappropriately uses the *Daubert* motion to attack the factual basis for Wrobel's expert opinion. Because Wrobel's calculations find support in the record and the parties' Area Representation Agreement WSC's motion to exclude Wrobel should be denied.

II. STATEMENT OF RELEVANT FACTS

The factual background surrounding this case arises from a series of franchise agreements and an area representation contract entered into by the parties. (*See generally,* First Amended Compl. ("FAC"), D.E. 31.) WSC is a real estate brokerage franchisor headquartered in Seattle, Washington. (FAC, D.E. 31, ¶ 15.) B&D Fine Homes and B&D SoCal are franchisees of WSC. (FAC, D.E. 31, ¶ 18; Decl. of Joseph

R. Deville ("Deville Decl."), ¶ 60.)[2] Services SoCal is the Southern California area representative for WSC. (*Id*.)

The relationship of Services SoCal and WSC is governed by an Area Representation Agreement ("ARA"). (FAC, D.E. 31 ¶ 25-28; Decl. of Paul S. Drayna ISO WSC's Mot. in *Limine* ("Drayna Decl."), Ex. A.) Importantly, WSC's general counsel, Paul S. Drayna ("Drayna"), drafted the ARA. (Decl. of Kevin A. Adams ("Adams Decl."), Ex. A, 42:24 – 43:14.) As the area representative, Services SoCal was tasked with two distinct roles; (i) offer Windermere licenses to real estate brokerage businesses to use the Trademark and the Windermere System in the Region and (ii) provide certain support and auxiliary services to both incoming and existing Windermere franchisees in the Region. (Drayna Decl., Ex. A §§ 2, 3.) In exchange, Services SoCal was to share "***equally***" with WSC in "***all initiation and licensing fees***" for (i) the seven existing Windermere franchises in Southern California, and (ii) "all future Windermere offices" opened in Southern California. (*See id*., Ex. A, §§ 3, 10, Exhibit A, § 3 (emphasis added).)

The ARA expressly describes the parties' rights and obligations in the event of a termination of the agreement. (*Id*., § 4.) For instance, if the ARA was terminated without cause, the terminated party was entitled to payment of the fair market value of the business from the terminating party (the "Termination Obligation"). (*Id*., Ex. A § 4.2.) Specifically, the ARA provides, in relevant part:

> In the event either party elects to terminate the Agreement [without cause], it is agreed that the [Terminated Party] will be paid an amount equal to the fair market value of the Terminated Party's interest in the Agreement [], in accordance with the provisions of this Agreement. The fair market value of the Terminated Party's interest in the Agreement will be determined by mutual agreement of the parties or, if unable to reach agreement, by each party selecting an appraiser and the two appraisers selecting a third

[2] The Deville Decl. was originally submitted to the Court on November 28, 2016 at Docket Entry 73-2. For the convenience of the Court, the B&D Parties have resubmitted the same as part of this filing.

> appraisers. The fair market value of the Terminated Party's interest will be determined by the appraisers without consideration of speculative factors including, specifically, future revenue. The 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. The median appraisal of the three appraisers shall determine price, and each party agrees to be bound by the determination.

(*Id*.) In late 2014, WSC terminated the ARA without proper notice or opportunity to cure. Services SoCal now seeks the fair market value of its interest in the ARA pursuant to Section 4.2.

Throughout the term of the parties' relationships, the B&D Parties were constantly expanding their Windermere franchises throughout Southern California. (FAC, D.E. 31, ¶ 35-36.) In recent years, an anti-Windermere marketing campaign of a disgruntled former Seattle, under the name "Windermere Watch," had a serious impact on the B&D Parties' businesses. (Deville Decl., ¶ 12-25.) On December 21, 2012, each of the B&D Parties entered into an agreement with WSC modifying their franchise agreements and ARA (hereafter, the "Modification Agreement"). (Drayna Decl., ¶ 7, Ex. B.) As part of the Modification Agreement, WSC agreed to "make commercially reasonable efforts to actively pursue counter-marketing, and other methods seeking to curtail the anti-marketing activities undertaken by […] Windermere Watch." (*Id*., Ex. A § 3(A).)

Based on WSC's representation that it would make efforts to curtail the adverse effects of Windermere Watch, the B&D Parties established new brokerage locations in Encinitas and Little Italy. (Deville Decl., ¶ 46.) WSC's failure to make any real effort to curtail the effects of Windermere Watch caused the B&D Parties to incur substantial losses in connection with the Encinitas and Little Italy locations. (*Id*.) The B&D Parties seeks these losses as part of their damages in this case.

To combat the severe impact of the Windermere Watch campaign on the Windermere brand in Southern California, Services SoCal engaged in mitigating activities at a heavy monetary cost. (*Id*., ¶ 45.) While WSC reimbursed some of Services

SoCal's expenses, WSC did not fully reimburse the expenses Services SoCal incurred attempting to defuse Windermere Watch. These unreimbursed Windermere Watch expenses are damages that the B&D Parties now seek in this case.

The B&D Parties initiated this action seeking to recover these and other damages that stemmed from a number of WSC's material breaches of the parties' agreements. (FAC, D.E. 31.)

In September 2016, the B&D Parties served WSC with the expert report of damages expert Peter Wrobel ("Wrobel"). (Decl. of Jeffrey A. Feasby in Support of WSC's Mot. in *Limine* No. 1 ("Feasby Decl."), Ex. 1.) In his report, Wrobel details his opinion and calculation of damages that the B&D Parties suffered as a result of WSC's numerous breaches. (*Id*.) In short, Wrobel concluded that: (i) the net value of Services SoCal as of the termination date was $2,592,526; (ii) the settlement amounts improperly withheld from Services SoCal were $66,037; (iii) the past losses and future lease obligations B&D SoCal suffered in the Encinitas and Little Italy locations are $1,431,482; and (iv) Services SoCal was not reimbursed for expenses incurred in combatting Windermere Watch in the amount of $146,954. (*Id*., at 1.)

WSC now seeks to exclude all of Wrobel's opinions and damage calculations from trial. As explained below, WSC's motion is wholly improper and should be denied in its entirety.

III. LEGAL ARGUMENT

A. The *Daubert* Admissibility Factors Test Relevancy And Reliability, Not Factual Disputes

Expert testimony that would be helpful to the jury should be admitted if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. Fed. R. Evid. 702. *Daubert* guards against parties misleading juries based on "junk science." *See Elsayed Mukhtar* v. *Cal State Univ., Hayward,* 299 F.3d 1053, 1063-64 (9th Cir. 2002) (*Daubert* guards against "junk

science" and "is particularly important considering the aura of authority experts often exude, which can lead juries to give more weight to their testimony"); *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 595-97 (1993) (new standard will prevent "befuddled juries"). WSC's reiteration of the *Daubert* standard, while correct, omits relevant qualifications while WSC's argument ignores the context at issue here.

Here, Wrobel's opinions rest on the calculation of damages caused by tangible and documented business losses. WSC intends to create a false equivalency between disputes of fact and admissibility of Wrobel's expert opinion. *Daubert* and its progeny did not alter the rule that the factual basis of an expert opinion "goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination." *Hose v. Chicago Northwestern Transp. Co.,* 70 F.3d 968, 974 (8th Cir. 1995); *see also Southland Sod Farms* v. *Stover Seed Co.,* 108 F.3d 1134, 1143 (9th Cir. 1997) ("Technical unreliability goes to the weight accorded a survey, not its admissibility.") (citations omitted); *Kannankeril v. Terminix Int'l, Inc.,* 128 F.3d 802, 807, 809 (3d Cir. 1997) (reversing exclusion of expert based on "insufficient factual foundation" and cautioning that the "trial judge must be careful not to mistake credibility questions for admissibility questions"). The proper means of attacking expert testimony is more often cross-examination in "the crucible of adversarial proceedings." *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1079 (5th Cir. 1996). WSC's motion attacks the factual basis for Wrobel's opinions. Such an attack is improper, and on that basis, WSC's motion does not pass muster. Accordingly, WSC's motion in *limine* to exclude Wrobel should be denied.

B. Wrobel's Calculation Of Services SoCal's Fair Market Value Is Proper Under The ARA

WSC's attack on Wrobel's calculation of the Termination Obligation amounts to nothing more than an attack upon the factual basis of his expert opinion. WSC objects with the interpretation of the ARA. Specifically, WSC objects that, under § 4.2, future revenue and amounts not actually received should not be included in the calculation of

the fair market value. Such an attack on the proper interpretation of the contract, however, as outlined above, is not proper under the *Daubert* standard. *See Hose*, 70 F.3d at 974; *Southland Sod Farms*, 108 F.3d at 1143; *Kannankeril*, 128 F.3d at 807, 809. Moreover, as set forth below, Wrobel's analysis of Services SoCal's fair market value is consistent with § 4.2 of the ARA.

Wrobel's analysis comports with the terms set forth in the ARA. As outlined above, § 4.2 of the ARA governs the calculation of the Termination Obligation, due to a terminated party where the ARA is terminated without cause.[3] (Drayna Decl., Ex. A, § 4.2.) Under the ARA, the valuation of Services SoCal must not include speculative factors. (*Id*.) However, Wrobel testified that he did not include speculative considerations, including speculative future revenues. (Adams Decl., Ex. B, 55:24 – 56:21, 63:8 – 64:10; Decl. of Peter Wrobel ISO the B&D Parties' Oppo. to WSC's Mot. in *Limine* No. 1 ("Wrobel Decl."), ¶ 10.) Moreover, by using the term "fair market value" without defining it, their ordinary meaning must be employed. *Flores v. Am. Seafoods Co*., 335 F.3d 904, 910 (9th Cir. 2003) ("Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself.") To establish the fair market value of a business as would be established in an arms-length transaction, the ability of the business to generate ongoing revenues and profits must be considered. (Wrobel Decl., ¶¶ 10-12.) In other words, a potential buyer does not only ask whether the business made

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[3] The ARA provides that where the parties cannot agree on the fair market value, the Termination Obligation will be determined "by each party selecting an appraiser and the two appraisers selecting a third appraiser."(*Id*.) Because it refuses to hire an appraiser to calculate the fair market value, and refuses to pay the Termination Obligation, WSC has breached the ARA. Bewilderingly, in its Motion in *Limine* No. 4, WSC seeks to exclude two offers it made to purchase B&D Fine Homes, B&D SoCal, and Services SoCal for approximately $12.5 million. (WSC's Mot. in *Limine* No. 4, D.E. 106-1, at 4.) These offers encompass the fair market value that WSC ascribed to Services SoCal; the closest WSC has come to an appraisal under § 4.2.

profits in the past, she would also ask whether the business will make profits in the future.

Furthermore, the Termination Obligation provision contemplates future revenues to be included in the valuation of the fair market value. Section 4.2 states: "The 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***. (Drayna Decl., Ex. A, § 4.2 (emphasis added).) By qualifying the revenues considered to those that "remain with or affiliate with the Terminating Party," the appraiser is instructed to consider franchisees that foreseeably will continue to generate revenue.

Section 4.3 of the ARA makes clear that non-speculative future revenues are part of the fair market value. In relevant part, § 4.3 states: "The Termination Obligation shall be paid in monthly installments . . . . Monthly installments in an amount equal to [25%] of the Continuing License Fees, if any, received by the terminating Party from licensees in the Region ***existing at the termination date and remaining with or affiliating with the Terminating Party***." (*Id*., Ex. A, § 4.3 (emphasis added).) It is readily evident that Services SoCal's fair market value includes non-speculative future revenue. There would otherwise be no need to make the payments based upon the future license fees collected after the termination.

Even if the ARA is ambiguous as to whether non-speculative future revenues should be considered, the ambiguity must be construed against WSC. It is undisputed that WSC drafted the ARA. Drayna, WSC's general counsel, testified that he drafted the ARA. (Adams Decl., Ex. A, 42:24 – 43:14.) It is axiomatic that "[i]f an ambiguity persists in the contract after resort to extrinsic evidence, the doctrine of *contra proferentem* must be applied, which construes any ambiguity in the contract against the drafter." *United States v. Westlands Water Dist*., 134 F. Supp. 2d 1111, 1137 (E.D. Cal. 2001) (citing *Vizcaino v. Microsoft Corp*., 97 F.3d 1187, 1194 (9th Cir. 1996)). It is the B&D Parties' position that non-speculative future revenues are properly considered

under § 4.2. WSC contends otherwise. Consequently, any ambiguity as to whether non-speculative future revenues should be considered must be construed against WSC. As set forth above, attacking the factual basis for an expert's opinion is not proper under the *Daubert* standards, and should be left for trial.

WSC, in kitchen sink fashion, sets forth a number of additional collateral attacks on Wrobel's expert opinion. Each of its arguments is equally unavailing.

First, WSC argues that the Termination Obligation is based on the revenue stream rather than the value of Services SoCal. This is nonsensical. Section 4.2 expressly states that the Termination Obligation will be the "fair market value of the Terminated Party's interest in the Agreement." (Drayna Decl., Ex. A.) The Terminated Party's interest is not limited to the revenue stream. Under the ARA, Services SoCal was granted the right to offer Windermere licenses to real estate brokerage businesses. (*Id*., Ex. A, § 2.) Services SoCal would be entitled to 50% of all initiation and licensing fees owed to WSC under each sold license. (*Id*., Ex. A, § 10.) Services SoCal's interest, then, includes the potential for future revenue.[4] Any potential purchaser would appropriately consider this.

Second, WSC cleverly characterizes revenues not received as "phantom" revenues. This is contrary to the rights granted by the ARA and the Termination Obligation provision. Services SoCal was granted 50% of the initial and continuing fees franchisees due to WSC. (*Id*.) The fair market value of any business for sale is based upon the revenues to which it is entitled, (Wrobel Decl., ¶ 13.), which reflects the principles and methods generally accepted by business valuation professionals. *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579, 594 (1993) (listing general acceptance of methodology or technique in the relevant scientific community as a factor for admissibility of expert testimony). WSC points to the fact that the Recast Profit & Loss statement was produced at Wrobel's request as a basis to challenge the admissibility of Wrobel's expert opinion. This, however, constitutes impeachment evidence to attack

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[4] Importantly, Wrobel's calculation of future revenue was discounted using a discount rate that contemplates risks with earning revenues in the future. (Wrobel Decl., ¶ 10.)

Wrobel's credibility. The Recast Profit and Loss Statement was created at the instruction of Wrobel because he needed the full extent of the revenue to which Services SoCal was entitled. WSC's repeated attack on this statement belongs in cross-examination at trial. Such attack does not belong in the consideration of the *Daubert* factors.

Lastly, WSC erroneously relies upon § 4.4 of the ARA as added support. Section 4.4, titled "No ***Other*** Obligation," sets forth and adds limitations to the parties' obligations in addition to and beyond those set forth in §§ 4.1-4.3. Therefore, § 4.4 has no bearing on the calculation of the Termination Obligation.[5]

The language of §§ 4.2 and 4.3 of the ARA make it clear that non-speculative future revenues are a proper consideration in calculating the fair market value of Services SoCal's interest in the agreement. Because Wrobel's calculation of the Termination Obligation follows the prescribed method in the ARA, his expert opinion should not be excluded.

C. <u>Wrobel Did Not Rely Upon Speculative Assumptions</u>

WSC's argument that Wrobel relied upon speculative assumptions is without merit. First, notwithstanding WSC's clever characterization, license fees from B&D Fine Homes and B&D SoCal were not "phantom" revenues. Second, WSC's argument that Wrobel unfairly assumes that Services SoCal would continue to service the franchisees had it not been terminated is negated by the terms of the ARA escapes fundamental logic. Again, these attacks are on the factual basis for Wrobel's expert opinions, and this is another improper consideration under the *Daubert* analysis. Moreover, the so-called assumptions are based upon the financial records of B&D Fine Homes and B&D SoCal, and on the terms of the ARA. *See Coleman v. Dydula*, 139 F.Supp.2d 388, 390 (W.D.N.Y. 2001) (finding expert testimony reliable where it has "a traceable, analytical basis in objective fact").

Services SoCal was entitled to 50% of all license fees franchisees owed to WSC.

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[5] Additionally, § 4.4 is ambiguous and unintelligible.

(Drayna Decl., Ex. A, § 10.) The license fees that B&D Fine Homes and B&D SoCal would have paid had WSC not breached the franchise agreements exist; they are derived from B&D Fine Homes' and B&D SoCal's revenues. These fees are not a non-existent phantom. In order to perform a fair market valuation, a valuation professional has to consider all actual revenues. (Wrobel Decl., ¶ 13.) WSC argues that B&D Fine Homes and B&D SoCal were struggling financially, and that they would not have paid the fees. (WSC's Mot. in *Limine* No. 1, D.E. 103-1, at 10.) This constitutes the type of attack on the factual basis for Wrobel's expert opinion that is improper under the *Daubert* analysis. *See Hose*, 70 F.3d at 974; *Southland Sod Farms*, 108 F.3d at 1143; *Kannankeril*, 128 F.3d at 807, 809.

Next, WSC bewilderingly argues that Wrobel wrongly assumes that Services SoCal would continue to service Windermere franchisees. (WSC's Mot. in *Limine* No. 1, D.E. 103-1, at 11.) However, this is in the context of determining the Termination Obligation under § 4.2 of the ARA. The Termination Obligation consists of the fair market value of Services SoCal's interest in the ARA. (*Id*.) As set forth above, the fair market value includes non-speculative future revenues. (*Id*.) As a matter of common sense, a premise of any future revenue calculation is the continued entitlement.

Section 4.3 of the ARA outlines this premise. § 4.3 states: "The Termination Obligation shall be paid in monthly installments . . . . Monthly installments in an amount equal to ***[25%] of the Continuing License Fees, if any, received by the terminating Party from licensees in the Region existing at the termination date and remaining with or affiliating with the Terminating Party***." (*Id*., Ex. A, § 4.3 (emphasis added).) The Termination Obligation, then, is paid based upon the fees received in the future. This implicitly assumes that Services SoCal would continue to service those franchisees. That is, Services SoCal's Termination Obligation is based upon the revenues of the franchisees it would have serviced but for WSC's termination. Because Wrobel did not rely upon speculative assumptions, and because WSC's argument goes to the factual basis rather than the admissibility of Wrobel's opinion, WSC's motion to exclude

Wrobel's valuation of Services SoCal should be denied.

IV. B&D SOCAL IS ENTITLED TO ITS REASONABLY FORESEEABLE DAMAGES FOR LOSSES SUSTAINED AT THE ENCINITAS AND LITTLE ITALY OFFICES

A. B&D SoCal Did Not Waive A Claim For Damages For Losses And Lease Costs For Its Encinitas And Little Italy Offices

The claimed damages for losses suffered at the Encinitas and Little Italy locations were all reasonably foreseeable from WSC's failure to make commercially reasonable efforts to curtail the negative impact of Windermere Watch. Based on WSC's renewed promise to combat Windermere Watch, B&D SoCal expanded and opened the Encinitas and Little Italy locations. Because the WSC and the B&D Parties structured their business dealings with expansion in mind, it was reasonably foreseeable that if WSC did not deliver on its promise, B&D SoCal would also be damaged at new locations.

B&D SoCal pleaded a claim for breach of the B&D SoCal FA. (FAC, D.E. 31.) In the Final Pretrial Conference Order, the claim was briefly summarized, in part, as follows:

> 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.

(Final Pretrial Conference Order, D.E. 79, 19:2-8.) If a theory is "at least implicitly included in the [pretrial] order" it will be preserved for trial. *Apple, Inc. v. Samsung Electronics Co., Ltd.*, 2014 WL 6687122, at *3-4, 117 U.S.P.Q.2d 1593 (N.D. Cal. Nov. 25, 2014) (holding that where Apple did not use exact words "ongoing royalties" in pretrial order, because it requested royalties for the infringement throughout litigation and Apple included boilerplate request for damages that compensate for infringement, claim for ongoing royalties was preserved). Here, B&D SoCal seeks to be compensated

for the damages WSC caused by failing to combat Windermere Watch.

Bennion's and Deville's entitlement to 50% of the fees and royalties of future franchises created a symbiotic relationship with their WSC franchised businesses they owned. (FAC, D.E. 31, ¶ 35-36.) Given the parties' shared goal of expanding WSC's presence in Southern California, and the symbiotic relationship created by the ARA, with WSC's permission, Services SoCal engaged in a mass expansion of the Windermere brand in Southern California. (*Id.*) WSC renewed its promise to combat Windermere Watch in the Modification Agreement. (Deville Decl., ¶ 20-21; Drayna Decl., Ex. B.) Consequently, relying on WSC's promise in the Modification Agreement, B&D SoCal continued its expansion of the Windermere brand by opening the Encinitas and Little Italy locations. WSC and B&D SoCal anticipated this continued expansion, and in fact, it was a mutual goal. Therefore, the losses suffered at the new locations were reasonably foreseeable and stemmed from WSC's breach, as briefly stated in the Pretrial Order. (Final Pretrial Conference Order, D.E. 79, 19:2-8.)

Apple, Inc., 2014 WL 6687122, at *3-4, is instructive here. In that case, Apple was seeking damages for Samsung's infringement. While Apple did not explicitly request "ongoing royalties" as a form of damages, it sought royalties for the infringement throughout the litigation. *Id*. Based on that context, the court held that it had not waived "ongoing royalties" as a form of damages. *Id*. Similarly here, B&D SoCal has maintained its prayer for damages that stemmed from WSC's failure to combat Windermere Watch. (FAC, D.E. 31; Final Pretrial Order, D.E. 79, 19:2-8.) As such, it has not waived the claim for damages suffered at the Encinitas and Little Italy locations as a result of WSC's breach.

Importantly, B&D SoCal disclosed these damages in September 2016, almost nine months before trial. The B&D Parties sent their expert disclosures on September 16, 2016. (Feasby Decl., ¶ 3, Ex. 1.) The disclosure contained Wrobel's report. (*Id*.) Wrobel's report contained the very damages WSC claims B&D SoCal' waived. (*Id*.) Moreover, in its responses to WSC's interrogatories, B&D SoCal stated that its

responses were subject to change after expert analysis. (Mot. in *Limine* No. 1, at 15.) B&D did, however, detail that it suffered damages from "its loss of real estate listings, customers, and agents . . . [and] a reduced ability to obtain agents, clients, and listings because of Windermere Watch. (*Id*.) This response, along with the later expert disclosure containing the damages WSC now seeks to exclude, informed WSC that WSC's failure to combat Windermere Watch cause damages in the form of business losses. B&D SoCal did not waive its claim for losses at the Encinitas and Little Italy locations, and it properly preserved the same in the Pretrial Conference Order. Accordingly, WSC's motion to exclude Wrobel's calculation of B&D SoCal's damages related to the Encinitas and Little Italy Offices should be denied.

B. Breach Of Contract Damages For The Losses At The Encinitas And Little Italy Locations Were Reasonably Foreseeable By the Parties

WSC's argument that the Encinitas and Little Italy losses were not foreseeable from the parties' B&D SoCal FA and Modification Agreement is nonsensical. The purpose of entering into the Modification Agreement was for WSC to renew its promise to combat Windermere Watch. (Deville Decl., ¶ 20-21; Drayna Decl., Ex. B.) The effects of Windermere Watch were suffered by Windermere franchisees throughout Southern California. (Deville Decl., ¶¶ 12-20.) The losses at the Encinitas and Little Italy were the very losses that the B&D Parties sought to eliminate—they were necessarily foreseeable.

As outlined above, B&D SoCal has maintained that WSC's failure to combat Windermere Watch, constituting a breach of both the franchise and modification agreements, caused the loss of listings, clients, and agents. (Final Pretrial Conference Order, D.E. 79, 19:2-8, 14:20-24; WSC's Mot. in *Limine* No. 1, at 15, 17, 19.) "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). The parties

here entered into the Modification Agreement whereby WSC explicitly agreed to make commercially reasonable efforts to curtail the effects of Windermere Watch on Windermere franchisees. The claimed damages were not only reasonably foreseeable, they were the very purpose of the Modification Agreement.

Losses of listings, clients, and agents are what led to the losses to the Encinitas and Little Italy locations. The parties are engaged in the real estate brokerage business. The ability to obtain listings, clients, and agents is the core of the real estate industry. It is a matter of common sense that where a brokerage firm is unable to obtain these indispensable components, the businesses will suffer. It is those losses that B&D SoCal claimed as a result of WSC's breach. It is those losses that B&D SoCal suffered at the Encinitas and Little Italy locations. WSC's argument that they are not recoverable under the breach of contract and breach of the covenant of good faith and fair dealing escapes all logic.

WSC's reliance on *Vu v. California Commerce Club, Inc.*, 58 Cal.App.4th 229 (1997) is equally unavailing. In that case, the plaintiff claimed that the casino breached an implied contract by not preventing cheating in a card game. *Id.*, 58 Cal.App.4th at 231-32. The court held that the alleged breach (the casino's failure to provide security) and the claimed gambling losses were too speculative because the plaintiff could not show that absent the cheating, the card games would have turned out in the favor of plaintiff. *Id*. In this case, there is no gambling, and the Modification Agreement was specifically purposed to prevent the very losses at issue here. WSC had a tangible target to combat, Windermere Watch's online presence and other marketing efforts. This is not a case based on chance. There are tangible effects, and WSC's attempt to equate poker gambling to an attack on the Windermere brand is confusing, at best.

WSC's argument for exclusion, again, constitutes an attack on the factual basis for Wrobel's opinions. Such an attack does not go to the admissibility of an expert's opinion, and is thus improper under the *Daubert* standards. *See Hose*, 70 F.3d at 974; *Southland Sod Farms*, 108 F.3d at 1143; *Kannankeril*, 128 F.3d at 807, 809. B&D

SoCal's losses suffered at the Encinitas and Little Italy locations were reasonably foreseeable by the parties at the time they entered into the Modification Agreement. Accordingly, WSC's motion to exclude Wrobel's expert opinion should be denied.

V. WROBEL'S OPINION AND CALCULATION OF SERVICES SOCAL'S DAMAGES FOR SETTLEMENT PAYMENTS AND WINDERMERE WATCH EXPENSES ARE PROPER

WSC's attempt to exclude Wrobel's calculation of settlement payments and Services SoCal's Windermere Watch expenses misses the mark. The B&D Parties seek to have Wrobel testify as to all of their damages. In so doing, the B&D Parties hope to streamline the presentation of evidence to the jury.

WSC's motion seeks to add unnecessary witnesses to this trial which could lead to the confusion of the jury. WSC's motion to exclude Wrobel's calculation of the settlement payments and Windermere Watch expenses should be denied.

WSC's motion divorces the settlement payments and Windermere Watch expenses from the other damages of the B&D Parties. However, Wrobel's opinion, and helpfulness to the jury, must be analyzed in light of the other categories of damages, which do require expert testimony. Wrobel will present, in one package, all damages claimed by the B&D Parties. The trial will run more smoothly; presentation of evidence will not be unnecessarily lengthened; and the jury will not have to consider the testimony of different witnesses when it calculates damages that it awards. If Wrobel's opinion concerning the settlement payments and Windermere Watch expenses is excluded, the B&D Parties will be forced to add a witness to testify about the expenses sought as damages in this case. It is in the interest of judicial economy, and to the benefit of the jury, to allow Wrobel to testify on these issues. Accordingly, WSC's motion to exclude Wrobel's opinions about the settlement payments and Services SoCal's expenses incurred battling Windermere Watch should be denied.

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VI. CONCLUSION

For the reasons stated above, WSC's *Daubert* Motion in *Limine* to Exclude Plaintiffs' Expert Peter Wrobel should be denied in its entirety.

Dated: April 24, 2017

MULCAHY LLP

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