

1 **MULCAHY LLP**

2 James M. Mulcahy (SBN 213547)

3 *jmulcahy@mulcahyllp.com*

4 Kevin A. Adams (SBN 239171)

5 *kadams@mulcahyllp.com*

6 Four Park Plaza, Suite 1230

7 Irvine, California 92614

8 Telephone: (949) 252-9377

9 Facsimile: (949) 252-0090

10 *Attorneys for Plaintiffs and Counter-Defendants*

11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**

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

21 Plaintiffs,

22 v.

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

26 Defendant.

27 **AND RELATED COUNTERCLAIMS**
28

Case No. 5:15-CV-01921 JCG
Hon. Jay C. Gandhi

**PLAINTIFF WINDERMERE
SERVICES SOUTHERN
CALIFORNIA, INC.'S
OPPOSITION TO DEFENDANT'S
MOTION *IN LIMINE* TO
EXCLUDE OPINION OF EXPERT
PETER WROBEL RE: NET VALUE
[DKT. 167]**

Date: June 18, 2018

Time: 10:00 a.m.

Courtroom: 6B

[Concurrently filed with Declaration of
Kevin A. Adams]

Action Filed: September 17, 2015

Pretrial Conf.: June 18, 2018

Trial: July 10, 2018

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1 Plaintiff Windermere Services Southern California, Inc. (“WSSC”) hereby
2 submits this Opposition to Defendant Windermere Real Estate Services
3 Company’s (“WSC”) Motion *in Limine* to Exclude Opinion of Expert Peter
4 Wrobel Re: Net Value (Dkt. 167) for the reasons set forth below:
5

6 **I. INTRODUCTION**
7

8 Plaintiffs’ damages expert Peter Wrobel (“Wrobel”) was tasked, in part, with
9 identifying the damage to WSSC for the total loss of its area representation
10 business resulting from WSC’s numerous breaches of the parties’ Area
11 Representation Agreement (“ARA”). As this Court has already recognized, WSSC
12 has asserted several claims for breach of contract (both express and implied)
13 against WSC. [See Dkt. 164, p. 5.] These breaches by WSC gave rise to alternative
14 theories of damages.
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17 Under the first theory, WSSC alleges that WSC constructively terminated
18 the ARA by depriving WSSC of its primary benefits under the ARA – namely, the
19 ability to offer and sell Windermere franchises – by failing (and refusing) to
20 register a Franchise Disclosure Document with the California Department of
21 Business Oversight. [Dkt. 31, ¶¶ 135, 163(a), (f), (g), (h).] Under the second
22 theory, WSSC alleges that WSC breached the ARA by failing to pay the
23 “Termination Obligation” following WSC’s termination of the ARA in accordance
24 with Section 4 of the ARA. [*Id.*, ¶ 163(e).] If the jury finds for WSSC on its first
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1 theory of damages (constructive termination), it does not need to reach the issue of
2 damages under WSSC's second theory (failure to pay the Termination Obligation).

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4 Until recently, WSSC has taken the position that, under both of its
5 alternative theories of damages, the final damages figure must reflect a total loss of
6 the business— *i.e.*, the fair market value of WSSC.¹ In Wrobel's Rule 26 report, he
7 identified the fair market value of WSSC to be \$2,592,526. [Dkt. 168-2, Ex. 2, pp.
8 2, Schedule 2A; Declaration of Kevin A. Adams ("Adams Decl."), Ex. A.)]

9
10 In April 2017, WSC's counsel took Wrobel's deposition. The deposition
11 lasted more than four hours and resulted in 182 pages of deposition transcript.

12 [Adams Decl., Ex. A.] During the deposition, Wrobel made clear that the
13 \$2,592,526 amount represented the fair market valuation of WSSC less necessary
14 adjustments. [Adams Decl., Ex. A, pp. 63:8-19, 81:13-82:6.] This final figure
15 reflected damages under both of WSSC's theories of damages. [*See* Dkt. 168-2,
16 Ex. 2, p. 2.]

17
18 Last month, this Court found that Wrobel's calculation of damages was not
19 consistent with the language of the Termination Obligation. [Dkt. 164.] Because of
20 this, WSSC does not intend to introduce Wrobel's damages calculation on its
21 second theory of damages for failure to pay the Termination Obligation. However,

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¹ In theory, the constructive termination of the ARA would result in the payment to WSSC of the fair market value of the total loss of the business, and damages under the Termination Obligation expressly require WSC to pay to WSSC its "fair market value" of its interest in the ARA.

1 and as noted by the Court in its ruling, WSSC's other contract claims – including
2 its theory of damages for constructive termination – are not limited by the language
3 of the Termination Obligation. [Dkt. 164, pp. 5-6.] Thus, WSSC intends to
4 introduce Wrobel's damages calculation in support of those other contract claims.
5

6 WSC now seeks to exclude all of Wrobel's opinions concerning the
7 valuation of the ARA because the opinions would be “unfairly prejudicial, will
8 confuse the issues, and would mislead the jury.”² [Dkt. 167-1.] It is obvious that
9 WSC's arguments fail to appreciate the relevance of WSSC's fair market value to
10 both of WSSC's theories of damages. Moreover, and explained in detail below,
11 Wrobel's identification and calculation of WSSC's fair market value was properly
12 disclosed to WSC, and Wrobel's findings are highly relevant to WSSC's other
13 contract claims. Accordingly, WSC's motion should be denied.
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18 **II. STATEMENT OF RELEVANT FACTS**

19 The facts relevant to the instant *in limine* motion are straightforward. The
20 relationship between WSC (franchisor) and WSSC (area representative) was
21 governed by an Area Representation Agreement (hereafter, the “ARA”). [*See*
22 *Feasby Decl.*, Ex. 1.] WSSC contends that WSC breached numerous express and
23

24 ² WSC also seeks to exclude Wrobel's opinions under Federal Rules of
25 Evidence 702 and 703. However, these identical arguments were previously raised
26 by WSC in a *Daubert* motion and rejected by Judge Manuel L. Real. [Dkt. 141.]
27 For the reasons identified by Judge Real, WSC's arguments are inappropriate
28 under FRE 702 and 703. For the convenience of the Court, a copy of Judge Real's
order denying WSC's *Daubert* motion is attached to the Adams Declaration as
Exhibit B.

1 implied terms in the ARA resulting in both the termination of the ARA and
2 damage to WSSC. [Dkt. 130-1 (Proposed Final Pretrial Conference Order
3 (“FPCO”)).]

4 **A. WSSC’s Contract Claims**

5 WSSC’s claims for breach of contract (Count 3) and breach of the implied
6 covenant of good faith and fair dealing (Count 4) arise out of WSC’s numerous
7 breaches of the express and implied terms of the ARA. [Dkt. 31 (First Amended
8 Complaint) ¶¶ 11, 62-78.] These breaches by WSC can be summarized as follows:³

- 9 • Breach of **Section 2** of the ARA by failing to provide WSSC with
10 the uninterrupted right to offer Windermere franchised businesses
11 in Southern California;
- 12 • Breach of **Section 4** – and in particular, Section 4.2 – of the ARA
13 by failing to pay WSSC the required “termination obligation”
14 following WSC’s termination of the ARA without cause;
- 15 • Breach of **Section 7** of the ARA by failing to promptly and
16 diligently commence and pursue the preparation and filing of all
17 franchise registration filings required under California law and/or
18 the United States of America and in particular failing to maintain
19 the registration of the Windermere Franchise Disclosure
20 Document, thereby precluding WSSC from offering and selling
21 any new Windermere franchises;
- 22 • Breach of **Section 10** of the ARA by depriving WSSC of its right
23 to offer new Windermere franchises rendering it unable to collect
24 initial franchise fees and continuing license fees from new
25 franchisees;
- 26 • Breach of **Ex. A, Sec. 3** of the ARA by terminating the ARA under

27
28 ³ Each of WSSC’s contract claims against WSC is set forth in more detail in the
parties’ FPCO, submitted to the Court on May 23, 2017. [Dkt 130-1 pp. 12-15.]

1 the pretense that WSSC was the “guarantor” of the franchise fees
2 owed by the franchisees in the Southern California region;

- 3 • Breach of the implied covenant of good faith and fair dealing in the
4 ARA by taking action to interfere with and damage many of the
5 relationships between WSSC and franchisees in the Southern
6 California region; and
- 7 • Breach of the implied covenant of good faith and fair dealing in the
8 ARA by failing to act in good faith and conduct its business such
9 that WSSC could receive the benefits of operating as the area
10 representative.

11 [Dkt. 130-1 pp. 12-15.]

12 WSSC further contends that WSC’s breaches of sections 2, 7, and 10 of the
13 ARA, along with WSC’s breach of the related implied terms of the ARA resulted
14 in a constructive termination of the ARA. [See e.g., Dkt. 31 ¶ 110 (“[T]he notice of
15 termination is rendered moot in light of WSC’s conduct leading up to the January
16 28, 2015 date which resulted in a constructive termination of the Area
17 Representation Agreement, without proper notice or just cause.”); ¶ 116 (“WSC’s
18 unilateral termination of [WSSC’s] right and ability to solicit and sell new
19 Windermere franchises resulted in the premature, constructive termination of the
20 Area Representation Agreement.”); ¶ 135 (“WSC had constructively terminated
21 the Area Representation Agreement eight months earlier [before the notice of
22 termination was sent], when WSC failed to register the FDD and long before
23 sending the notice of termination letter.”).

1 In connection with the above contract claims, WSSC generally seeks
2 “compensatory damages in an amount to be proven at trial.” [Dkt. 31 ¶¶ 163-164,
3 170-171, Prayer for Relief, pp. 46-47.]
4

5 **B. The Termination Obligation Identified In The ARA**

6 As reflected above, one of the seven breaches advanced by WSSC is that
7
8 WSC breached Section 4 of the ARA by not paying WSSC the “Termination
9 Obligation” – identified in Section 4.2 – when it terminated the ARA.
10

11 The Termination Obligation expressly requires the terminating party to pay
12 the terminated party “*an amount equal to the terminated party’s fair market*
13 *value in the [ARA].*” [Dkt. 168-2, Ex. 1, § 4.2 (emphasis added).] Further, Section
14 4.2 provides that:
15

16 The **fair market value** of the Terminated Party’s interest in the
17 Agreement will be determined by mutual agreement of the parties or, if
18 unable to reach agreement, by each party selecting an appraiser and the
19 two appraisers selecting a third appraiser. The **fair market value** of
20 the Terminated Party’s interest will be determined by the appraisers
21 without consideration of speculative factors including, specifically,
22 future revenue. The appraisers shall look at the gross revenues received
23 under the Transaction during the twelve months preceding the
24 termination date from then existing licensees that remain with or
25 affiliate with the Terminating Party. The median appraisal of the three
26 appraisers shall determine price, and each party agrees to be bound by
27 the determination.

28 [*Ibid.* (emphasis added).]

Importantly, the Court has already found that only damages arising out of
WSSC’s claim for breach of Section 4 would be subject to the Termination

1 Obligation identified above. [See Dkt. 164, p. 5 (“**The Termination Obligation**
2 **is but one measure of Plaintiffs’ potential damages**. Plaintiffs have several
3 breach of contract claims based on the ARA (see Dkt. 31 ¶ 163); several of these
4 claims involve provisions other than § 4.2; and the Termination Obligation only
5 applies to termination under § 4.1(b).”) (emphasis added); see also, p. 5 (“Plaintiffs
6 also alleged other breaches of the ARA and that those breaches caused unspecified
7 damages.” (Citing Dkt. 31 ¶¶ 163(a), (e), (f), (g), (h), and (j), 164) (emphasis
8 added).)]

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12 In other words, damages to WSSC for WSC’s breach of the six other express
13 and implied terms of the ARA would not be limited by the Termination Obligation
14 in Section 4 of the ARA. In essence, these claims are pled in the alternative. [Dkt.
15 31, 163(e).]

16
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18 **C. Wrobel Provided Extensive Testimony On WSSC’s Contract**
19 **Damages**

20 Plaintiffs retained Peter Wrobel (“Wrobel”) to serve as their damages expert
21 in the case. [Dkt. 168-2, Ex. 2.] Wrobel is a highly credentialed business valuation
22 specialist and a distinguished expert in his field. [Adams Decl., Ex. A.]⁴ He holds
23 three degrees from UCLA: a bachelor’s degree, master’s degree, and a degree as a
24 candidate in philosophy. [*Id.*, Ex. A, p. 12:18-22.] He also holds a master’s degree
25
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27

28 ⁴ Attached as Exhibit A to the Adams Decl. is a complete copy of Wrobel’s deposition transcript for reference by the Court.

1 from USC in business administration with an emphasis in accounting. [*Id.*, Ex. A,
2 pp. 21-22.] Wrobel became a Certified Public Accountant in 1991, and has since
3 been accredited in business valuation (ABV) by the American Institute of Certified
4 Public Accountants, and also obtained the distinction as a Certified Fraud
5 Examiner (CFE). [*Id.*, Ex. A, pp. 9:22-10:15.] He is currently a managing director
6 at Berkeley Research Group, a global strategic advisory and expert consulting firm.
7
8 [*Id.*, Ex. A, pp. 8:23-9:21.]

9
10 On September 16, 2016, Plaintiffs disclosed Wrobel’s Rule 26 report. [Dkt.
11 168-2, Ex. 2.] In the report, Wrobel explains that he was “asked to calculate the
12 amount of out-of-pocket damages, if any, suffered by [the Plaintiff entities] as a
13 result of these certain alleged activities at issue in this matter.” [*Id.*, Ex. 2, p. 1.]
14
15 The report then goes on to identify four categories of damages. The first category –
16 and the *only* category at issue here – shows the “Net Value of WSSC as of January
17 2015” to be “\$2,592,526.” [*Id.*, Ex. 2, pp. 2, 6.] According to Wrobel, this figure
18 reflects the damages to WSSC for WSC’s termination of the ARA. [*Id.*, Ex. 2, pp.
19 2, Schedule A.]

20
21
22 Wrobel opined that WSC’s termination of the ARA – constructive or
23 otherwise – would allow for damages in an amount consistent with the fair market
24 value of WSSC interest in the ARA. [Dkt. 168-2, Ex. 2, p. 2.] Specifically,
25
26 Wrobel’s report states:
27
28

1 It is my understanding that WSC effectuated a *constructive*
2 *termination* of the [ARA] with [WSSC] by late summer 2014, *and*
3 *later* provided [WSSC] a formal notice of termination in January
4 2015. *In either event, it is my further understanding that the*
5 *termination of the [ARA] was without cause.* This termination
6 triggered a clause in the [ARA] which provided for the terminating
7 party to pay the terminated party “*an amount equal to the fair market*
8 *value of the Terminated Party’s interest in the Agreement.*”

9 [Dkt. 168-2, Ex. 2, p. 2 (emphasis added).]

10 In April 2017, WSC’s counsel took Wrobel’s deposition. The deposition
11 lasted more than four hours and resulted in 182 pages of deposition transcript.

12 [Adams Decl., Ex. A.] During the deposition, Wrobel testified, in great detail,
13 about his damages calculations, the use of a discounted cash flow model to
14 determine the appropriate fair market value of WSSC, the appropriate growth rate,
15 applicable AICPA standards, alternative standards of value in valuing the business,
16 among numerous other topics relevant to his calculation of damages for WSSC.

17 [See *id.*]

18 Additionally, Wrobel testified as to the difference between his final damages
19 calculation and the fair market valuation that he believed to apply under the
20 Termination Obligation. For instance, WSC’s counsel and Wrobel had the
21 following exchange:
22

23 Q: You are referring to damages, and I just want to be clear. The
24 damages that you are talking about in this instance are the damages
25 that as set forth in the termination obligation in the Area
26 Representation Agreement?
27
28

1 A: Well, again, the termination or the area agreement deals with the
2 fact that you need to calculate the fair market value. In this
3 case, I did it as of January 2015. In terms of damages, there is
4 one further adjustment that needed to be done, which is the
5 fact that after 2015, January 2015, WSSC would have received
6 some additional funds, and so those are being subtracted out to
7 calculate what the damage number would be.

8 Q: So is the number reflected in your report the damages number or
9 the termination obligation number under the Area Representation
10 Agreement?

11 A: **I guess both are reflected. In my report it shows what is the
12 fair market value, and then a final adjustment was made to
13 calculate what the damages related to that would be.**

14 [Adams Decl., Ex. A, p. 81:13-82:6 (emphasis added).]

15 During the deposition, Wrobel explained that the language of the
16 Termination Obligation was potentially confusing as it required the appraiser to
17 identify the “fair market value” of WSSC’s interest in the ARA but then contained
18 limiting language that – if performed consistent with WSC’s interpretation of the
19 ARA – would not result in a value that reflected the fair market value of WSSC’s
20 interest in the ARA.⁵ [Adams Decl., Ex. A, pp. 55:17-56:4, 62:23-68:20.] Wrobel’s
21 testimony on this topic included the following exchange with counsel:
22

23 Q: Okay. It says, as we talked about before. “The fair market value of
24 the Terminating Party’s interest will be determined by the
25

26 ⁵ This Court has already recognized that WSC was the drafter of the ARA, and
27 held that any ambiguities in the language of the ARA “would be construed against
28 [WSC], as the ARA’s drafter.” [Dkt. 164, p. 5 (citing *Masonite Corp. v. Pac. Gas
& Elec. Co.*, 65 Cal. App. 3d 1, 8 (1976)).]

1 appraisers without consideration of speculative factors including,
2 specifically, future revenue.”

3 So you read that to mean that as long as the future revenues aren’t
4 speculative, they can be considered?

5 A: Well, yes. I mean, I think that is in order to do the valuation of a –
6 of WSSC, a fair market value consideration of non-speculative
7 factors, which include the future revenues, need to be incorporated
8 into that analysis.”

9 [Id., Ex. A, p. 63:8-19.]

10 Ultimately, Wrobel opined that in order to properly determine the fair
11 market value of WSSC’s interest in the ARA, “you need to evaluate a lot of
12 different factors.” [Id., Ex. A, p. 64:1-5.] If you do not account for these factors,
13 “you will not get a fair market value” as required by the ARA.⁶ [Id., Ex. A, p. 68:4-
14 20.] And, the only way to reconcile the language of the Termination Obligation is
15 to exclude “speculative future revenue” – not non-speculative future revenue. [Id.,
16 Ex. A, pp. 63:8-64:24.]

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19 **D. The Court Finds The Language Of The Termination Obligation**
20 **To Be Unambiguous**
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22 Despite Wrobel’s stated inability to reconcile the “fair market value”
23 requirement of the Termination Obligation with WSC’s interpretation of the
24

25 _____
26 ⁶ It is reasonable to include future income into a fair market valuation of a
27 business. See e.g. *California Shoppers, Inc. v. Royal Globe Ins. Co.*, 175 Cal. App.
28 3d 1, 61 (1985) (“It is axiomatic that the current market value of a business as a
going concern includes the discounted present value of its estimated flow of future
earnings.”).

1 remaining language of Termination Obligation, the Court has since found the
2 language of the Termination Obligation to be unambiguous. [Dkt. 164.] WSSC
3 recognizes this and understands that it is now precluded from offering Wrobel's
4 stated damages calculation in connection with WSSC's claim for breach of Section
5 4 of the ARA. However, the Court made clear that its order was limited to WSSC's
6 claimed breach of Section 4 of the ARA – not WSSC's six other contract claims.
7
8 [Id. at 5-6.]
9

10 Through its instant motion, WSC now seeks to preclude Wrobel from
11 introducing any opinions as to WSSC's breach of contract damages for all of
12 WSSC's contract claims. [Dkt. 167-1.] For the reasons set forth below, WSC's
13 motion should be denied.
14
15

16 **III. WROBEL'S FAIR MARKET VALUE CALCULATION IS HIGHLY**
17 **RELEVANT TO WSSC'S OTHER CONTRACT CLAIMS**
18

19 WSC argues that Wrobel's calculation of the fair market value of WSSC is
20 irrelevant in light of the Court's ruling on WSC's partial summary judgment
21 motion. This position overstates the Court's decision – which expressly limited its
22 holding to the calculation of damages for breach of the Termination Obligation –
23 and ignores WSSC's claim that WSC constructively terminated the ARA. [See
24 Dkt. 164, at 6.] As explained below, Wrobel's calculations are relevant to WSSC's
25 contract claims that do not invoke the Termination Obligation – *i.e.*, breach of
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1 Sections 2, 7, 10, and Ex. A of the ARA, along with breach of the implied terms
2 identified in the First Amended Complaint. [Dkt. 31.] Accordingly, WSC’s motion
3 to exclude Wrobel’s opinions under Federal Rule of Evidence (“FRE”) Rules 401,
4 402, and 403 should be denied.

6 As stated above, WSSC’s contract claims are based on two *alternative*
7 theories of termination of the ARA. First, WSSC alleges that WSC breached the
8 ARA by depriving WSSC of its primary benefit under the ARA – namely, the
9 ability to offer and sell Windermere franchises – by failing (and refusing) to
10 register a Franchise Disclosure Document with the Department of Business
11 Oversight. [Dkt. 31, ¶¶ 135, 163(a), (f), (g), (h).] This resulted in a constructive
12 termination of the ARA. *Id.* Second, and only if the jury does not find a
13 constructive termination to have already occurred, WSSC alleges that WSC
14 breached Section 4 of the ARA by failing to pay the Termination Obligation
15 following WSC’s termination of the ARA in accordance with Section 4 of the
16 ARA. [*Id.*, ¶ 163(e).]

22 Under both of these alternative termination theories, Wrobel’s damages
23 calculations reflect the total loss of WSSC’s business – *i.e.*, the fair market value of
24 WSSC. The Court’s finding that Wrobel’s damages analysis did not follow Section
25 4 of the ARA does not render Wrobel’s analysis any less relevant to the total loss
26 of WSSC’s business under its constructive termination theory of liability.
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1 WSC's relevancy argument is misguided. The test of relevancy of an
2 expert's testimony under FRE 401 is whether "it has any tendency to make a fact
3 [of consequence] more or less probable than it would be without the evidence."
4 Similarly, under FRE 702 and 403, expert testimony is admissible if it "speaks
5 clearly and directly to an issue in dispute in the case, and that it will not mislead
6 the jury." *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1321 fn. 17 (9th
7 Cir. 1995) (citing FRE 403 and 702). Here, there is a clear dispute about whether
8 the ARA was constructively terminated by WSC outside of the termination
9 provision set forth in Section 4 of the ARA. [See Dkt. 164 at 5.] Wrobel's damages
10 calculation establishes the measure of damages under this theory of termination.
11 As a result, it speaks clearly and directly to an issue in dispute in the case. WSC's
12 relevancy argument is without merit.
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18 WSC's request for exclusion of Wrobel's calculations under FRE 403 is a
19 red herring and also should be rejected. WSC argues that Wrobel's calculation
20 should be excluded under FRE 403 because the parties are limited to the
21 Termination Obligation as a measure of damages, and any other calculation outside
22 of the Termination Obligation would confuse the jury. [Dkt. 167-1 at 6:8-16.]
23 Again, the Court has already found that WSSC is not limited to the Termination
24 Obligation in a claim for breach of the ARA. [See Dkt. 164 at 5-6.] Moreover, in
25 light of the Court's prior ruling on partial summary judgment, WSSC does not
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1 intend to introduce any of Wrobel's opinions as to the proper calculation of
2 damages under the Termination Obligation. There is simply no danger of
3 misleading or confusing the jury on these issues. Accordingly, the potential for
4 prejudice does not outweigh the relevance of Wrobel's calculations to WSSC's
5 construction termination theory of liability. WSC's motion should be denied.
6

7
8 **IV. WROBEL'S CALCULATION OF THE FAIR MARKET VALUE OF**
9 **WSSC WAS PROPERLY DISCLOSED**

10
11 WSC next argues that Wrobel's fair market value calculation should be
12 excluded because his opinion was not disclosed in the Rule 26 report, and that the
13 report cannot now be supplemented to add this purportedly new calculation of
14 damages. WSC's supposed interpretation of Wrobel's report is incorrect.
15

16 As reflected above, the Rule 26 report shows that Wrobel has identified the
17 fair market value of WSSC in order to identify the total loss of WSSC as a result of
18 WSC's breaches of the ARA. The fair market value of WSSC reflected Wrobel's
19 opinions on the damages for a total loss of WSSC under both the Termination
20 Obligation and WSSC's constructive termination theory of liability. Wrobel's
21 deposition testimony further supports this conclusion. [*See e.g.*, Adams Decl., Ex.
22 A, p. 81:13-82:6.]
23
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25

26 There is no need for Wrobel to supplement his report to again express these
27 same calculations as WSSC's damages for the constructive termination. Similarly,
28

1 WSC cannot claim “surprise” by the inclusion of Wrobel’s fair market valuation of
2 WSSC’s damages at trial. As reflected above, WSC spent the majority of Wrobel’s
3 deposition inquiring about his valuation of WSSC. [*See generally* Adams Decl.,
4 Ex. A, pp. 10:2-13, 62:9 – 63:6, 72:17 - 82:6.]

6 Moreover, nearly a year ago – on April 17, 2017 – WSC filed a *Daubert*
7 motion seeking to exclude Wrobel’s testimony *making the same arguments it*
8 *makes here*. [Dkt. 103-1.] In denying its motion, Judge Real found that
9 “Defendant’s critiques are repeated factual challenges appropriately raised on cross
10 examination.” [Dkt. 141 at 4.] Similarly here, WSC should attack Wrobel’s
11 calculations and bases on cross-examination, not by seeking a wholesale exclusion
12 of these calculations through an *in limine* motion.
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16 In sum, there is no need for WSSC to submit a new expert report now.
17 Because Wrobel’s damages calculation correctly accounts for the total loss to
18 WSSC’s business resulting from the constructive termination of the ARA by WSC,
19 those calculations are highly relevant to this case and should not be excluded.
20
21 Thus, WSC’s motion should be denied.
22

23 **V. CONCLUSION**

24 As explained above, WSC was fully apprised of Wrobel’s fair market
25 valuation of WSSC and WSSC’s use of that figure as its total loss damages in the
26 case. This was identified in Wrobel’s Rule 26 Report and, in more detail, during
27
28

1 his deposition. WSC's counsel had opportunity to (and did, at length) question
2 Wrobel as to these fair market value calculations under WSSC's constructive
3 termination theory of liability. Wrobel's fair market value calculations are highly
4 relevant to WSSC's constructive termination theory of liability and it would be
5 severely prejudicial to WSSC for these opinions of Wrobel to be excluded from
6 trial. Accordingly, WSSC respectfully requests that the Court deny WSC's motion
7
8
9 *in limine* to exclude Wrobel's testimony re: net value.
10
11

12 Dated: May 9, 2018

MULCAHY LLP

13
14 By: /s/ Kevin A. Adams
15 Kevin A. Adams
16 *Attorneys for Plaintiffs/Counter-*
17 *Defendants Bennion & Deville Fine*
18 *Homes, Inc., Bennion & Deville Fine*
19 *Homes SoCal, Inc., Windermere*
20 *Services Southern California, Inc.,*
21 *and Counter-Defendants Robert L.*
22 *Bennion and Joseph R. Deville*
23
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25
26
27
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