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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BENNION & DEVILLE FINE HOMES, INC., a California corporation, et al.,)	CASE NO. EDCV 15-1921-R
)	
Plaintiffs,)	ORDER DENYING DEFENDANT AND COUNTERCLAIMANT’S <i>DAUBERT</i>
)	MOTION IN LIMINE TO EXCLUDE
v.)	PLAINTIFFS’ EXPERT
)	
WINDERMERE REAL ESTATE SERVICES COMPANY, a Washington corporation, and DOES 1-10,)	
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Defendant.)	
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Before the Court is Defendant Windermere Real Estate Services Company’s (“WSC”) *Daubert* Motion in Limine to Exclude Plaintiffs’ Expert Peter Wrobel (Dkt. No. 103), which was filed on April 17, 2017. Having been fully briefed by both parties, the Court took the matter under submission on May 25, 2017.

Defendant moves to exclude the testimony of Bennion and Deville Fine Homes, Inc. (“B&D Fine Homes”), Bennion and Deville Fine Homes Southern California (“B&D SoCal”), and Windermere Services Southern California, Inc.’s (“Services SoCal”) (collectively, “Plaintiffs”) expert witness, Peter D. Wrobel. Wrobel purports to testify to the four categories of damages he contends were suffered by the Plaintiffs. Defendant argues that the testimony should be excluded for three reasons: (1) Wrobel’s inclusion of future revenues in his calculation of the termination

1 fee renders his opinion unreliable under *Daubert*; (2) Wrobel included damages related to the
2 opening of two offices which were properly disclosed; and (3) testimony regarding damages in the
3 form of settlement payments will not assist the jury because all that is required is simple
4 arithmetic. For the reasons discussed below, the Motion is denied.

5 The facts of this matter are familiar to the parties and more thoroughly discussed in the
6 Court's previous orders. (*See* Dkt. Nos. 66, 75, and 80). Accordingly, the facts listed herein are
7 only those relevant to this Order. WSC and Services SoCal entered into the Area Representation
8 Agreement ("the ARA") in May 2004. The ARA required Services SoCal to undertake various
9 roles relating to the management and supervision of WSC's franchisees in the Southern California
10 region. In exchange, Services SoCal would share equally in fees paid by the franchisees. The
11 ARA also defined a "Termination Obligation" in the event of a breach. Section 4.2 of the ARA
12 states that if the agreement is terminated without cause the terminated party "will be paid an
13 amount equal to the fair market value of the Terminated Party's interest in the Agreement (the
14 "Termination Obligation"), in accordance with the provisions of this Agreement. The fair market
15 value of the Terminated Party's interest will be determined by mutual agreement of the parties or,
16 if unable to reach agreement, by each party selecting an appraiser and the two appraisers selecting
17 a third appraiser. The fair market value of the Terminated Party's interest will be determined by
18 the appraisers without consideration of speculative factors including, specifically, future revenue.
19 The appraisers shall look at the gross revenues received under the Transaction during the twelve
20 months preceding the termination date from then existing licensees that remain with or affiliate
21 with the Terminating Party." (Dkt. No. 103-3, Ex. A, p. 5)

22 During the parties' relationship, a negative marketing campaign known as Windermere
23 Watch became a problem for Plaintiffs. In response, the parties entered into a modifying
24 agreement (the "Modification Agreement") whereby Defendants would make "commercially
25 reasonable efforts" to combat Windermere Watch. Plaintiffs allege that as a result of WSC's
26 renewed commitment to combat Windermere Watch, they decided to open two new brokerage
27 locations in Encinitas and Little Italy. Ultimately, those locations suffered losses which Plaintiffs
28 now seek to recover. Additionally, Plaintiffs attempt to recover for expenses they incurred in

1 combatting Windermere Watch.

2 Wrobel's expert report concluded that Plaintiffs incurred four categories of damages: (1)
3 Net value of Services SoCal at the termination date in the amount of \$2,592,526; (2) Settlement
4 amounts improperly withheld from Services SoCal in the amount of \$66,037; (3) Past and future
5 lease obligations owed by B&D SoCal in the amount of \$1,431,482; and (4) net unreimbursed
6 Windermere Watch expenses in the amount of \$146,954. (Dkt. 103-2, Ex. 1, p.1).

7 Federal Rule of Evidence 702 provides that expert testimony is admissible if: "(a) the
8 expert's scientific, technical, or other specialized knowledge will help the trier of fact to
9 understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient
10 facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert
11 has reliably applied the principles and methods to the facts of the case." District courts perform a
12 gatekeeping function to determine the reliability of expert testimony. *Ellis v. Costco Wholesale*
13 *Corp.*, 657 F.3d 970, 982 (9th Cir. 2011). "The trial court must assure that the expert testimony
14 'both rests on a reliable foundation and is relevant to the task at hand.'" *Primiano v. Cook*, 598
15 F.3d 558, 565 (9th Cir. 2010) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597
16 (1993)). "Shaky but admissible evidence is to be attacked by cross examination, contrary
17 evidence, and attention to the burden of proof, not exclusion." *Id.* at 564. Courts should "screen
18 the jury from unreliable nonsense opinions, but not exclude opinions merely because they are
19 impeachable." *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969 (9th Cir.
20 2013). Opinions are reliable if the knowledge underlying them "has a reliable basis in the
21 knowledge and experience of the relevant discipline." *Primiano*, 598 F.3d at 565.

22 The Supreme Court suggested numerous factors by which a court may consider the
23 reliability of an expert's testimony such as "1) whether a theory or technique can be tested; 2)
24 whether it has been subjected to peer review and publication; [or] 3) the known or potential error
25 rate of the theory," among others. *Pyramid Technologies, Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d
26 807, 814 (9th Cir. 2014) (quotations omitted). However, the Defendant does not mention any of
27 the *Daubert* factors in its Motion as they are hardly relevant to its challenges of Wrobel's report.

28 Defendant first argues that Wrobel included various figures in his calculation of the

1 Termination Obligation which are not permitted under the ARA. This critique of Wrobel’s report
2 does not speak to Wrobel’s qualifications, the reliability of his calculation, or “the soundness of
3 his methodology.” *Primiano*, 598 F.3d at 564-65. Nor does it have any relation to the knowledge
4 underlying Wrobel’s opinion having a basis in the knowledge and experience of the relevant
5 discipline. Rather, Defendant’s critiques are repeated factual challenges appropriately raised on
6 cross examination.

7 Next, Defendant argues that Wrobel should be precluded from testifying to damages
8 incurred from the losses and lease costs of the Encinitas and Little Italy offices because those
9 damages were not disclosed to WSC before the discovery cutoff or in the pretrial conference
10 order. Plaintiffs admit that the first time they disclosed these damages was in Wrobel’s expert
11 report which was exchanged in September 2016, after the discovery cutoff and the submission of
12 the proposed final pretrial conference order. Federal Rule of Civil Procedure 16(e) provides that
13 “a pretrial order controls the subsequent course of the action unless modified at trial to prevent
14 manifest injustice.” *S. California Retail Clerks Union & Food Emp’rs Joint Pension Trust Fund*
15 *v. Bjorklund*, 728 F.2d 1262, 1264 (9th Cir. 1984). However, the pretrial conference order need
16 only implicitly include a theory of damages in order to preserve an issue for trial. *Apple, Inc. v.*
17 *Samsung Electronics Co. Ltd.*, 2014 WL 6687122, at *3-4 (N.D. Cal. Nov. 25, 2014). Plaintiffs
18 argue that the pretrial conference order alleges a claim for breach of the Modification Agreement
19 which implicitly included its theory for recovery of the Encinitas and Little Italy damages. The
20 pretrial conference order states B&D SoCal’s claim that WSC breached the Modification
21 Agreement by failing to make commercially reasonable efforts to curtail Windermere Watch. This
22 general claim implicitly includes a theory for consequential damages or inducement. Furthermore,
23 Plaintiffs disclosed the theory in September 2016, nearly nine months prior to the trial date in this
24 case. Defendants have had sufficient time to analyze and rebut such a theory.

25 Finally, WSC argues that the portion of Wrobel’s report relating to damages for settlement
26 payments will not assist the jury and is speculative. Wrobel’s report includes the calculation of
27 portions of settlements owed to WSC to which Services SoCal is entitled a portion. The
28 calculations entail a present value calculation as well as the addition of several years’ worth of

1 payments. The calculation of net present values is beyond the typical layman's mathematical
2 skills and therefore having an expert provide those calculations would assist the jury. WSC argues
3 that because it is unclear whether the future payments owed to WSC will actually be made,
4 Wrobel's calculations are speculative. Again, WSC challenges the factual basis for Wrobel's
5 opinion rather than its reliability. The appropriate time to raise such challenges is on cross
6 examination. *Primiano*, 598 F.3d at 565. Therefore, the Motion is denied as to the settlement
7 payments.

8 In sum, because Plaintiffs did not disclose their theory of damages related to the Encinitas
9 and Little Italy branches prior to the discovery cutoff and pretrial conference order, Wrobel's
10 proposed testimony relating to those damages is excluded. WSC's remaining challenges to
11 Wrobel's report and proposed testimony are not the proper subject of a *Daubert* motion. Wrobel's
12 report is reliable, and should Defendant desire to challenge the factual basis for his testimony, it
13 may do so on cross examination.

14 **IT IS HEREBY ORDERED** that WSC's *Daubert* Motion in Limine to Exclude
15 Plaintiffs' Expert Peter Wrobel (Dkt. No. 103) is DENIED.

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17 Dated: May 31, 2017.



20 MANUEL L. REAL
21 UNITED STATES DISTRICT JUDGE
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