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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

EDU-SCIENCE (USA) INC.,

Plaintiff,

 Plaintiff,

v.

INTUBRITE LLC,

 Defendant.

Defendant.

Case No. 12-cv-1078 BAS (JLB)

**ORDER DENYING PLAINTIFF’S
MOTION TO EXCLUDE THE
EXPERT TESTIMONY OF DANA
A. BASNEY**

[ECF 129]

**AND RELATED
COUNTERCLAIMS AND CROSS-
CLAIMS**

Before the Court is Plaintiff Edu-Science (USA) Inc. (“Edu-USA”) and Cross-Defendant Edu-Science (HK) Ltd. (“Edu-HK”) (collectively, “Edu-Science”) motion to exclude the expert testimony of Dana A. Basney. ECF 129. Defendant and Counter-Claimant IntuBrite LLC’s (“IntuBrite”) opposed the motion. ECF 135. Edu-Science replied. ECF 139.

On June 22, 2015, the Court heard oral argument on the motion. For the

1 following reasons, the Court **DENIES** Edu-Science’s motion to exclude Basney’s
2 testimony. ECF 129.

3 **I. LEGAL STANDARD**

4 Rule 702 of the Federal Rules of Evidence governs the admissibility of expert
5 testimony. *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 859 (9th Cir.
6 2014). Rule 702 provides that a witness “qualified as an expert by knowledge, skill,
7 experience, training, or education may testify in the form of an opinion or otherwise
8 if”:

- 9 (a) the expert’s scientific, technical, or other specialized knowledge
10 will help the trier of fact to understand the evidence or to
determine a fact in issue;
11 (b) the testimony is based on sufficient facts or data;
12 (c) the testimony is the product of reliable principles and methods;
13 and
14 (d) the expert has reliably applied the principles and methods to the
15 facts of the case.

16 Fed. R. Evid. 702. Under Rule 702, expert testimony must be both relevant and
17 reliable. *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 462 (9th Cir. 2014).
18 Relevancy simply requires that “[t]he evidence . . . logically advance a material
19 aspect of the party’s case.” *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007).
20 Reliability requires that an expert’s testimony “have a reliable basis in the knowledge
21 and experience of his discipline.” *Estate of Barabin*, 740 F.3d at 462 (quoting
22 *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 148 (1999)).

23 The courts are not concerned with the “correctness of the expert’s conclusions
24 but the soundness of his [or her] methodology.” *Primiano v. Cook*, 598 F.3d 558,
25 564 (9th Cir. 2010) (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.
26 3d 1311, 1318 (9th Cir. 1995)); *see also Ellis v. Costco Wholesale Corp.*, 657 F.3d
27 970, 982 (9th Cir. 2011) (A court is not required “to admit or to exclude evidence
28 based on its persuasiveness;” but rather “to admit or exclude evidence based on its

1 scientific reliability and relevance.”). “For scientific opinion, the court must assess
2 the reasoning or methodology, using as appropriate such criteria as testability,
3 publication in peer reviewed literature, and general acceptance, but the inquiry is a
4 flexible one.” *Primiano*, 598 F.3d at 564. “Shaky but admissible evidence is to be
5 attacked by cross examination, contrary evidence, and attention to the burden of
6 proof, not exclusion.” *Id.*; see also *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,
7 509 U.S. 579, 595-96 (1993).

8 The duty falls upon the district court to act “in a gatekeeping role, to assess
9 whether the reasoning or methodology underlying the testimony is valid and whether
10 that reasoning or methodology properly can be applied to the facts in issue.” *Ollier*,
11 768 F.3d at 860 (quoting *Daubert*, 509 U.S. at 592-93) (internal quotation marks
12 omitted); see also *Ellis*, 657 F.3d at 982 (“[T]he trial court must act as a “gatekeeper”
13 to exclude junk science that does not meet Federal Rule of Evidence 702’s reliability
14 standards by making a preliminary determination that the expert’s testimony is
15 reliable.”). The party seeking to offer the testimony bears the burden of establishing
16 its admissibility. *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 549 (C.D. Cal. 2014)
17 (citations omitted).

18 II. DISCUSSION

19 Edu-Science have challenged Dana A. Basney’s expert testimony regarding
20 the damages IntuBrite reportedly sustained based upon inaccuracies in his Expert
21 Report. Basney Report, ECF 129-3. First, they challenge his methodology of
22 employing a Microsoft Excel trendline to extrapolate lost sales and damages because
23 they claim it is contraindicated as inaccurate by Microsoft’s own Excel
24 documentation. Second, they argue that IntuBrite continued to sell Edu-Science
25 goods after May 2011. Basney’s analysis assumes that in May 2011 IntuBrite had
26 exhausted its Edu-Science inventory. Third, they argue that Basney did not consider
27 alternative causes of IntuBrite’s sales reductions, such as IntuBrite’s start-up
28 company status or increasing market competition. All of these challenges target the

1 reliability of the methodology applied by Basney, under Federal Rule of Evidence
2 702(c) and (d).

3 On the first point, Edu-Science argue that the trendline analysis performed
4 automatically in Microsoft Excel is inaccurate for any chart other than an “xy
5 scatterplot” because y-values are not taken into account in other graphs. To support
6 this contention, Edu-Science cite to Microsoft’s Support Article ID: 211967,
7 available online and attached to their Motion. ECF 129-5. This article refers to
8 trendline formulas that are inaccurate because they are rounded, but it does not
9 suggest that the trendline graphic generated by the program is inaccurate. After
10 reviewing other Microsoft Support articles, it is clear that Microsoft built in
11 properly-functioning trendlines for bar graphs.¹ Additionally, Article 211967 states
12 that the trendline *formula* “will be inaccurate if displayed on a [bar chart]” “because
13 [t]he X axis is plotted only as a linear series in these chart types, regardless of what
14 the labels actually are.” The graphs in question here are monthly sales figures, each
15 bar corresponding to a single month’s sales. As such, the x axis is regular and
16 represents consistent units of time, as in an xy scatterplot. Even if many bar graphs
17 would be affected by this error, it is unclear that Basney’s are affected. In such a
18 circumstance, Edu-Science may cross-examine Basney on his trendlines, but his
19 methodology is not “junk science” that requires this Court to exercise its gatekeeper
20 duties.

21 Second, Edu-Science argue that IntuBrite continued to sell Edu-Science goods
22 after May 2011; Basney’s Report assumes they had exhausted all Edu-Science goods
23 at that time. This underlying fact is still in dispute, with IntuBrite arguing that while
24 new shipments ceased in May 2011, simply subtracting sold goods from delivered
25 goods does not take into account quality control procedures required before the
26

27 ¹ See *Add, Change, or Remove a Trendline in a Chart*, MICROSOFT, <https://support.office.com/en-us/article/Add-change-or-remove-a-trendline-in-a-chart-072d130b-c60c-4458-9391-3c6e4b5c5812>.
28

1 goods could be circulated or defective goods that could not be sold, among other
2 discrepancies. Basney’s determination that Edu-Science goods were effectively out
3 of circulation after May 2011 may be based on what Edu-Science contend is an
4 inferior assumption. Nevertheless, that assumption is sufficiently reliable as the basis
5 for expert opinion for purposes of admissibility. IntuBrite may still point to
6 alternative theories or impeaching evidence at trial to undermine this assumption.²

7 Similarly, Edu-Science’s third argument argues that Basney faultily assumed
8 that factors outside of Edu-Science’s cessation of delivery did not influence
9 IntuBrite’s sales figures. Edu-Science cite to *McGlinchy v. Shell Chemical Co.*, 845
10 F.2d 802 (9th Cir. 1988), which involved an expert witness who impermissibly
11 extrapolated a compound growth factor based on a misleadingly simplistic analysis
12 of prior sales. In *McGlinchy*, the Ninth Circuit held that the district court properly
13 excluded the testimony. In response, IntuBrite argues that “before and after” is a
14 routine method of damage calculation, citing *D&R Distributing Co. v. Chambers*
15 *Corp.* (C.D. Cal. 1984).

16 The expert in *McGlinchy* relied on demonstrably false assumptions to arrive
17 at speculative lost profits calculations resulting from Shell Oil’s breach of contract.
18 For example, he claimed to account for “experience plus inflation” to arrive at the
19 expenses to subtract from his expected gross profits calculation, but mystifyingly
20 assumed no increase in expenses over a nine year period. *McGlinchy*, 845 F.2d at
21 807. Further, “he documented little of the basis for his conclusions.” *Id.*

22 Here, even though Basney’s Report relies on a scant few pillars to support its
23 conclusions, those pillars are well-documented and reliable. This reliability and
24 documentation significantly reduces the possibility of misleading or confusing the
25 jury, especially when compared to the convoluted obfuscation of the expert in
26

27 ² IntuBrite raised new theories at oral argument to support beginning the cut-off at the time of
28 breach. IntuBrite is cautioned that only those assumptions an expert *actually relied on* are relevant
to support the reliability of the expert’s opinion.

1 *McGlinchy*. While Basney's spartan approach may reduce the weight of his
2 testimony and prove fertile grounds for cross-examination, it is not misleading.

3 Accordingly, the Court need not exercise its gatekeeping duty to exclude
4 Basney's Report. The Court **DENIES** the motion.

5 **IT IS SO ORDERED.**

6 Dated: July 1, 2015



Hon. Cynthia Bashant
United States District Judge

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