UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LACEY MARKETPLACE ASSOCIATES II, LLC, Plaintiff, v. UNITED FARMERS OF ALBERTA COOPERATIVE LTD, et al., Defendants.	CASE NO. C13-0383JLR ORDER
BURLINGTON RETAIL, LLC, Plaintiff, v. UNITED FARMERS OF ALBERTA COOPERATIVE LTD, et al., Defendants.	CASE NO. C13-0384JLR

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I. INTRODUCTION

Before the court are Defendant United Farmers of Alberta Cooperative Limited ("UFA") renewed motion for judgment as a matter of law and motion for a new trial. (Mot. (Dkt. # 220).) The court has considered the motions, all submissions filed in support of and opposition to the motions, the balance of the record, and the applicable law. Being fully advised,[1] the court DENIES UFA's renewed motion for judgment as a matter of law and motion for a new trial.

II. BACKGROUND

The court conducted a jury trial in this matter from March 2 to March 6, 2015, on Plaintiffs Lacey Marketplace Associates II, LLC's ("Lacey") and Burlington Retail, LLC's ("Burlington") breach of contract claims against Defendant Wholesale Sports USA, Inc. ("Wholesale Sports"), tortious interference with contract claims against Defendants United Farmers of Alberta Co-Op Limited ("UFA"), Alamo Group, LLC ("Alamo"), and Donald Gaube ("Mr. Gaube"), and fraudulent transfer claims against UFA, Alamo, and Mr. Gaube, and defendant Sportsman's Warehouse, Inc. ("Sportsman"). (See Dkt. ## 223-227 (trial transcripts); Jury Inst. (Dkt. # 183) No. 15.) The jury returned a verdict in Plaintiffs' favor on all claims. (Verdict (Dkt. # 187).) The jury awarded damages as follows: $5,218,493.35 to Lacey on each claim and $6,668.255.94 to Burlington on each claim. (Id.)

At trial, Plaintiffs argued that Wholesale, a wholly-owned UFA subsidiary that

[1] Neither party requested oral argument, and the court deems it unnecessary for the disposition of the motions. See Partridge v. Reich, 141 F.3d 920, 926 (9th Cir. 1998).

operated large retail sporting good stores, breached its leases on Plaintiffs' properties by failing to make monthly rental payments. Plaintiffs further argued that the other Defendants tortiously interfered with Plaintiffs' leases by executing a series of transactions that left Wholesale without assets and unable to pay the rent. Plaintiffs' further argued that these transactions resulted in fraudulent transfers by Wholesale.

Specifically, Plaintiffs argued that the transactions occurred as follows: Defendants entered into a "Master Transaction Agreement." Under this agreement, Wholesale sold all of its assets and inventory, and almost all of its retail store locations, to Sportsman. However, Wholesale retained the two stores and leases on Plaintiffs' property. Sportsman paid $47 million for Wholesale's assets and inventory. The purchase price was ultimately transferred to UFA.[2] UFA then sold Wholesale's stock to Alamo, Mr. Gaube's company, for $1.00.[3] At that point, Wholesale held lease obligations, but essentially no assets. Shortly thereafter, Wholesale defaulted on its leases to Plaintiffs.[4]

Plaintiffs contended that they were owed two types of damages: (1) the missed rental payments incurred before they obtained replacement tenants, and (2) the

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[2] Under the written terms of the agreement, Sportsman was to pay Wholesale, who would immediately transfer the money to UFA. At trial, Plaintiffs contended that the money was actually paid directly to UFA. UFA contended that UFA ultimately applied the purchase price in part to pay off its debts.

[3] There is no documentation that the $1.00 was ever paid.

[4] Various last minute amendments and side agreements between the parties resulted in additional monetary transfers from UFA and Sportsman to Alamo that amounted to approximately $1.8 million.

construction, remodeling, and other costs that they necessarily expended to obtain the replacement tenants.

At the close of evidence, UFA made a motion pursuant to Federal Rule of Civil Procedure 50(a). In its motion, UFA argued that it was entitled to judgment as a matter of law on the fraudulent transfer claim because (1) Plaintiffs were not "present creditors" and "there's no evidence in the record to establish that they were as of the date of closing the Master Transaction Agreement." (3/5/15 Tr. Trans. (Dkt. # 226) at 216.) UFA also argued that it was entitled to judgment as a matter of law on the tortious interference claim because there was a "lack of evidence of an improper purpose or improper means."[5] (Id.)

UFA's renewed motion for judgment as a matter of law raises the same two arguments, as well as the argument that, with respect to the tortious interference claim, there is insufficient evidence to show that UFA intentionally interfered with Plaintiffs' contracts. (See Mot. at 3-6.) UFA's motion for a new trial raises the three arguments mentioned above, in addition to three legal arguments pertaining to damages: (1) the court improperly excluded certain evidence pertaining to damages, (2) the court erroneously prevented Defendants from offsetting future expected rents from the replacement tenants against Plaintiffs' damages, and (3) the court erroneously interpreted

[5] Specifically, counsel for UFA moved in total as follows: "We move for a directed verdict to dismiss the claim under RCW 19.40.051(a) because the landlords were not a present creditor, and there's no evidence in the record to establish that they were as of the date of closing of the Master Transaction Agreement. And, also, the tortious interference claim for lack of evidence of an improper purpose or improper means." (3/5/15 Tr. Trans. at 216.)

Burlington's contract as permitting recovery of consequential damages. (See id. at 7-12.) UFA's motions are now before the court.

III. ANALYSIS

A. Standard for Judgment as a Matter of Law

The court may grant UFA's renewed motion for judgment as a matter of law if it "finds that a reasonable jury would not have a legally sufficient evidentiary basis" to find for Plaintiffs. See Fed. R. Civ. P. 50(a). The court must view the evidence and draw all reasonable inferences in favor of Plaintiffs—the parties in whose favor the jury returned its verdict. Ostad v. Or. Health Sci. Univ., 327 F.3d 876, 881 (9th Cir. 2003). Granting a motion for judgment as a matter of law is proper if "the evidence permits only one reasonable conclusion, and the conclusion is contrary to that reached by the jury." Id. Judgment as a matter of law "is appropriate when the jury could have relied only on speculation to reach its verdict." Lakeside-Scott v. Multnomah Cnty., 556 F.3d 797, 802-03 (9th Cir. 2009).

A renewed motion for judgment as a matter of law under Rule 50(b) is limited to the grounds asserted in the pre-deliberation Rule 50(a) motion. EEOC v. GoDaddy Software, Inc., 581 F.3d 951, 961-62 (9th Cir. 2009). Thus, a party cannot properly raise arguments in its post-trial motion under Rule 50(b) that it did not raise in its pre-verdict Rule 50(a) motion. Id. (citing Freund v. Nycomed Amersham, 347 F.3d 752, 761 (9th Cir. 2003) and other cases). If a party raises additional grounds for judgment as a matter of law, the court will review those grounds only "for plain error, and [will] reverse only if such plain error would result in a manifest miscarriage of justice." Id. at 961. "This

exception permits only extraordinarily deferential review that is limited to whether there was any evidence to support the jury's verdict." Id. at 961-62 (alterations in text omitted; italics in original) (citing Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1109 (9th Cir. 2001)).

B. Standard for a Motion for a New Trial

The standard under which the court considers UFA's motion for a new trial is distinct from the standards under which it considers UFA's renewed motion for judgment as a matter of law. Under Rule 59(a)(1)(A), the "court may, on motion, grant a new trial on all or some of the issues—and to any party . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). "Rule 59 does not specify the grounds on which a motion for new trial may be granted." Molski v. M.J. Cable, Inc., 481 F.3d 724, 729 (9th Cir. 2007). Rather, the court is "bound by those grounds that have been historically recognized." Id. "Historically recognized grounds include, but are not limited to, claims 'that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving.'" Id. (citation omitted).

Courts apply a lower standard of proof to motions for new trial than they do to motions for judgment as a matter of law. Thus, even if the court declines to grant judgment as a matter of law, it may order a new trial under Rule 59. A verdict may be support by substantial evidence, yet still be against the clear weight of evidence. Landes Const. Co. v. Royal Bank of Canada, 833 F.2d 1365, 1371 (9th Cir. 1987). Unlike a motion for judgment as a matter of law, in addressing a motion for a new trial, "[t]he

judge can weigh the evidence and assess the credibility of witnesses, and need not view the evidence from the perspective most favorable to the prevailing party." Id. Instead, if, "having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed," then the motion should be granted. Id. at 1371-72.

However, a motion for new trial should not be granted "simply because the court would have arrived at a different verdict." Pavao v. Pagay, 307 F.3d 915, 918 (9th Cir. 2002). Indeed, when a motion for a new trial is based on insufficiency of the evidence, "a stringent standard applies" and a "new trial may be granted . . . only if the verdict is against the great weight of the evidence" or "it is quite clear that the jury has reached a seriously erroneous result." Digidyne Corp. v. Data Gen. Corp., 734 F.2d 1336, 1347 (9th Cir. 1984) (internal quotations and citations omitted). "[D]enial of a motion for a new trial is reversible only if the record contains no evidence in support of the verdict or if the district court 'made a mistake of law." GoDaddy Software, Inc., 581 F.3d at 962.

C. Tortious Interference with Contract

"A claim for tortious interference with a contractual relationship or business expectancy requires five elements: (1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage." Leingang v. Pierce Cnty. Med. Bureau, Inc., 930 P.2d 288, 300 (Wash. 1997). Interference for an "improper purpose" means interference with

the intent to harm the plaintiff or for some other improper objective, such as hostility or retaliation. See Pleas v. City of Seattle, 774 P.2d 1158, 1163 (Wash. 1989); Elcon Const., Inc. v. E. Wash. Univ., 273 P.3d 965, 971 (Wash. Ct. App. 2012).

UFA challenges the sufficiency of the evidence supporting the third and fourth elements. (Mot. at 4.) UFA challenged the fourth element, but not the third, in its Rule 50(a) motion at trial. (See 3/5/15 Tr. Trans. at 216.) Therefore, on the renewed motion for judgment as a matter of law under Rule 50(b), the court reviews the jury's finding of the fourth element for substantial evidence and the jury's finding of the third element for "plain error [that] would result in a manifest miscarriage of justice." See GoDaddy Software, Inc., 581 F.3d at 961-62.

At trial, Plaintiffs put forth evidence showing the following. UFA controlled Wholesale.[6] UFA sold off all of Wholesale's assets and pocketed the money for itself.[7] UFA knew that after the sale, Wholesale had no assets, and consequently was unable to meet its lease obligations.[8] UFA transferred Wholesale's stock to Alamo[9] essentially for

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[6] (3/4/15 Tr. Trans. (Dkt. # 225) at 60:23-61:7, 64:12-17, 106:15-107:24; Tr. Ex. 1 ¶ A; Tr. Ex. 8 (collectively showing that Wholesale was UFA's wholly-owned subsidiary, the two companies shared board members, and no independent director of Wholesale approved the Master Transaction Agreement).

[7] (MTA ¶ 2.1 (sale of Wholesale assets to Sportsman), ¶ 2.2(a) (transfer of asset purchase price to UFA); Tr. Ex. 5 (UFA schematic showing asset price transferred to UFA); 3/4/15 Tr. Trans. at 68:19-69:6 (UFA used the money from Sportsman pay off its debts), 94:14-18 (same).)

[8] (3/5/15 Tr. Trans. at 79:18-25 (testimony by UFA's chief executive officer ("CEO") admitting that, the day after the transaction, Wholesale "had nothing in it" except for the leases).

[9] (MTA ¶¶ C.2, 2.2(b), (c) (sale of Wholesale stock to Alamo for $1 scheduled to occur after the transfer of the asset purchase price); 3/6/15 Tr. Trans. (Dkt. # 227) at 38:5-7, 39:8-9 (UFA has no documentation that the contractual $1 was paid); Tr. Ex. 76 (stating that Alamo did not intend to pay anything for Wholesale's stock because the stock was "effectively worthless").

free.[10] UFA knew that, if Wholesale did not perform on its lease obligations, the transaction could be considered a "sham."[11]

The court finds that, viewed in the light most favorable to Plaintiffs, this evidence is sufficient for a jury to find that UFA's interference with Plaintiffs' leases was intentional and for an improper objective. UFA's insistence on a smoking gun is misguided. (See Mot. at 7 (arguing that there was no direct evidence that UFA affirmatively desired to harm Plaintiffs).) Plaintiffs' evidence showed that UFA intentionally orchestrated its transactions to siphon all value out of Wholesale, divest itself from liability for Wholesale's actions, and leave Plaintiffs with a judgment-proof debtor unable to meet its lease obligations. A jury viewing this situation in the light most favorable to UFA could reasonably infer that UFA intended to interfere with Plaintiffs' leases and did so with an improper objective. See Pleas, 774 P.2d at 1163.

UFA's remaining arguments are similarly unavailing. The fact that the structure of the transactions did not violate Plaintiffs' leases does not save UFA from tort liability. (See Mot. at 6.) A defendant does not have to induce two contract violations to be liable for tortious interference. Additionally, the evidence of Alamo's attempts to locate replacement tenants is not so overwhelming as to demand a finding of lack of intent on the part of UFA. (See id. (alleging but failing to identify any such evidence in the trial

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[10] In fact, UFA ultimately paid Alamo approximately $1.2 million to accept Wholesale's stock and its concomitant liabilities. (See 3/4/15 Tr. Trans. at 76:7-:78:20, 80:1-5 (testimony by UFA's CEO).)

[11] (See Tr. Ex. 65 (email from UFA's general counsel predicting that the transaction "could be considered as a sham" if Mr. Gaube did not find replacement tenants); 3/4/15 Tr. Trans. at 90:2-91:12.)

record).) The court concludes that the jury's finding of intent was not plain error, and the jury's finding of improper purpose was supported by substantial evidence. See GoDaddy Software, Inc., 581 F.3d at 961-62. Therefore, the court denies UFA's motion for judgment as a matter of law on this claim.

For similar reasons, the court denies UFA's motion for a new trial. Even weighing the evidence and judging the credibility of the witnesses, it is not clear that the jury's findings go "against the great weight of the evidence" or give rise to a "seriously erroneous result." Digidyne Corp, 734 F.2d at 1347. The court is not "left with the definite and firm conviction that a mistake has been committed." Landes Const. Co., 833 F.2d at 1371. Therefore, a new trial on this claim is not warranted. See Molski, 481 F.3d at 729.

D. Fraudulent Transfer

The jury was instructed on four circumstances in which a transfer by Wholesale could be fraudulent. (Jury Inst. Nos. 29-33); see RCW 19.40.041(a)(1), (2); RCW 19.40.051(a). The jury was also instructed that one circumstance applied only if UFA was a "present creditor" as defined by Washington's fraudulent transfer statute. (Jury Inst. No. 33); see RCW 19.40.051(a). The verdict form, however, did not differentiate between the definitions of fraudulent transfer applicable to present as opposed to future creditors. (See Verdict.) Instead, the verdict form asked generally: "Do you find that [Plaintiff] has proved its fraudulent transfer claim against UFA?" (Id.)

UFA contends that there was no evidence to support a finding that Plaintiffs were present creditors at the time the transfer to UFA occurred. (Mot. at 6.) UFA reasons that,

because the verdict form did not differentiate between the types of fraudulent transfer, "it is impossible to determine whether the jury relied on the present creditor claim to hold UFA liable." (Mot. at 6.) UFA then concludes that judgment as a matter of law in favor of UFA or a new trial is required.

First, judgment as a matter of law is unwarranted. Even accepting UFA's premise that a jury could not reasonably find that Plaintiffs were present creditors, UFA has not shown—or even attempted to show—that there was insufficient evidence for a jury to find liability under the other three definitions of fraudulent transfer. As a result, UFA has not demonstrated that it is entitled to judgment in its favor on this claim. Accordingly, the court denies UFA's renewed motion for judgment as a matter of law.

Second, a new trial is also unwarranted. Under the statute, a present creditor is a "creditor whose claim arose before the transfer was made." RCW 19.40.051(a). Conversely, a future creditor is a creditor whose claim "arose . . . after the transfer was made." RCW 19.40.041(a). A claim "means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." RCW 19.40.011.

UFA's position is that Plaintiffs had no contingent or un-matured right to payment from UFA at the time of the transfer because Wholesale was current on its rental payments and did not default until a few months later. (Mot. at 6.) This position is contrary to the plain language of the statute. See RCW 19.40.011. It also disregards Wholesale's preexisting contractual obligations: at the time the transfer was made, Wholesale was already contractually obligated to make a payment to each Plaintiff every

month for the remainder of the leases (approximately the next 8 years). (See Tr. Exs. 2 (Lacey lease) ¶ 2, 3 (Burlington lease) ¶ 2.) Moreover, UFA offers no authority in support of its position that "a ten-year lease with five years left to run is not a present obligation." (See 3/6/15 Tr. Trans. (Dkt. # 227) at 7:18-20).)

At trial, Plaintiffs offered the Lacey and Burlington leases as exhibits and presented testimony regarding Wholesale's obligations under the leases. (See Tr. Exs. 2, 3, 27, A-206; 3/3/15 Tr. Trans. (Dkt. # 224) at 15:7-15, 17:5-22, 20:12-20, 24:10-22, 59:21-60:11, 70:8-25 (collectively establishing that Wholesale's leases ran for 15 years with monthly payments of $71,582.50 to Lacey and $73.814.00 to Burlington); see also 3/6/15 Tr. Trans. 56:5-14 (estimating that the total rent obligations through the end of the lease period were "roughly $30 million").) In accordance with the Washington statute, the court instructed the jury that, "A creditor is a party who has a right to payment from a debtor, whether or not the right to payment is reduced to judgment, contingent, matured, un-matured, disputed, or undisputed." (Jury Inst. No. 29.) The court further instructed the jury that the fourth definition of fraudulent transfer applied only if "[t]he creditor's right to payment arose before the transfer was made." (Id. No. 34.) During closing arguments, UFA presented its position that Plaintiffs were not present creditors. (3/6/15 Tr. Trans. at 168:18-24.)

The court concludes that the jury was free to reject UFA's argument and find in favor of Plaintiffs. In light of the evidence as to Wholesale's preexisting contractual obligations to Plaintiffs, a finding that Wholesale was a present creditor to Plaintiffs does not go "against the great weight of the evidence" or give rise to a "seriously erroneous

result." Digidyne Corp, 734 F.2d at 1347. Furthermore, UFA's argument that such a result renders the distinction between present and future creditors null is incorrect; to give just one example, a proper future creditor would be a person who entered into a contract with the debtor after the fraudulent transfer had been made. In sum, the court is not "left with the definite and firm conviction that a mistake has been committed." Landes Const. Co., 833 F.2d at 1371. Therefore, the court denies UFA's motion for a new trial on the fraudulent transfer claim. See Molski, 481 F.3d at 729.

E. Legal Damages Issues

In its motion for a new trial, UFA challenges three rulings made by the court before and during trial. (Mot. at 7-12.) UFA already had a full opportunity to brief and argue these issues. (See UFA MSJ (Dkt. # 110); Def. Br. (Dkt. # 163); Plf. Br. (Dkt. # 164); 2d Plf. Br. (Dkt. # 175); 2d Def. Br. (Dkt. # 174).) UFA presents no new authority supporting its positions, but rather rehashes arguments previously raised. Nonetheless, the court reconsiders its rulings. Upon reconsideration, the court reaches the same conclusions as it previously reached.

1. UFA's expert evidence regarding market value

Lacey and Burlington contended that certain remodeling expenses they incurred after Wholesale's breach constituted consequential damages because they were necessary to procure replacement tenants ("re-tenanting costs"). The court instructed the jury that measure of contract damages was "losses that were reasonably foreseeable, at the time the contract was made, as a probable result of a breach." (Jury Inst. No. 19.) The court further instructed the jury:

> Where rental premises were specifically designed or improved for the exclusive benefit of the breaching tenant and had to be remodeled in order to be marketable to a new tenant, plaintiffs may recover the remodeling costs to the extent the costs were reasonably necessary in order to re-let the properties and not capital improvements for the benefit of the new tenant.
>
> Factors that may indicate a capital improvement include, among other factors, whether the remodeling substantially increased the value of the premises and whether the remodeling included major, permanent structural changes.

(Jury Instr. No. 21); see Family Med. Bldg., Inc. v. State, *Dep't* of Soc. & Health Servs., 702 P.2d 459, 464 (Wash. 1985).[12] UFA does not dispute this statement of the law. Rather, UFA takes issue with the court's exclusion of certain expert testimony regarding Plaintiff's re-tenanting costs.

UFA originally took the position that Defendants were entitled to offset against Plaintiffs' damages any increase in market value in Plaintiffs' property that had occurred since Wholesale's breach. (See 1/28/15 Order at 34-39.) In support of this position, UFA offered two expert reports. (See Offer of Proof (Dkt. # 180) (attaching the disputed expert reports).) Both experts opined that the market value of Plaintiffs' properties had increased for two reasons: (1) the replacement tenants were more financially stable than Wholesale had been (which increased the capitalization rate applicable to the market value calculation), and (2) the new leases included higher rental payments. (See id.) The experts concluded that, as a result of this increase in market value attributable to the

[12] See also Pioneer Trust & Sav. Bank v. Zonta, 421 N.E.2d 239, 245 (Ill. Ct. App. 1981) (cited by Family Medical); In *re Stewart's* Props., Inc., 41 B.R. 353, 356 (Bankr. D. Haw. 1984) (collecting cases); New Mkt. Acquisitions, Ltd. v. Powerhouse Gym, 212 F. Supp. 2d 763, 776-77 (S.D. Ohio 2002).

replacement tenants, Plaintiffs had not suffered any damages due to the breach of contract. (See id.)

On summary judgment, the court held that Defendants were not entitled to offset the increased market value against Plaintiffs' damages. (See 1/28/15 Order at 34-39.) The court added that Defendants would not be permitted to offer evidence or argument for the purpose of requesting such an offset. (Id.) The court made clear, however, that "this ruling does not prevent [Defendants] from introducing evidence showing increases in market value of the property attributable to specific construction projects (as opposed to the new leases or tenants) for the limited purpose of showing whether the resulting claimed construction cost was a capital improvement or a mitigation expense." (Id. at 39.)

One month before trial, UFA revised the topics of its experts' testimony. (See Pretrial Order (Dkt. # 154) at 6; Pretrial Conf. Trans. (Dkt. # 157) at 19:23-22:16.) For the first time, UFA contended that its experts would address "increases in market value of the property attributable to specific construction projects." (See Plf. Br.) Plaintiffs objected to this testimony as beyond the scope of the experts' reports. (Pretrial Conf. Trans. at 19:23-22:16.) The court requested additional briefing and heard argument on the matter. (See Def. Br.; Plf. Br.; 2/23/15 Hearing Tr. (Dkt. # 166).) The court excluded certain testimony by UFA's experts for two reasons.

First, the experts' reports simply did not address the issue of whether Plaintiffs' construction projects increased the market value of the property. (See Offer of Proof.) UFA's arguments to the contrary mischaracterize the reports. Rather, the reports opined

only that the market value of the properties increased due to the new tenants and higher rents. (See id.) UFA contends that its experts should have been permitted to connect the dots at trial, and opine that Plaintiffs were able to charge higher rents or attract better tenants because of the construction projects. (Reply at 5-6.) Such testimony, however, would run afoul of Federal Rule of Civil Procedure 37(c)(1), which provides:

> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

Fed. R. Civ. P. 37(c)(1); see also Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2001) ("Rule 37(c)(1) gives teeth to these requirements by forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not properly disclosed.").

Rule 26 requires parties to disclose in a written report "a complete statement of all opinions the witness will express and the basis and reasons for them." Fed. R. Evid. 26(a)(2). Because the experts' reports did not address construction projects as capital improvements or link the calculated market value increase to capital improvements in any way, UFA failed to provide information required by Rule 26(a). UFA put forth no evidence or argument showing that the failure to disclose a complete statement of its expert witnesses' opinions was substantially justified or harmless. See id. Accordingly, the court excluded the proffered testimony. (See 2/23/15 Hearing Tr.); see also Hoffman v. Constr. Protective Servs., Inc., 541 F.3d 1175, 1179 (9th Cir. 2008), as amended (Sept. 16, 2008) (upholding district court's exclusion of undisclosed evidence).

UFA now complains that the exclusion was inappropriate because its experts were qualified to opine that Plaintiffs' construction projects were capital improvements that increased the market value of the property. (Reply at 5 n.1.) That may be. The experts' qualifications, however, are beside the point. The problem with the proffered testimony was that the experts' reports did not fairly disclose such testimony beforehand.

UFA also contends that the court's ruling rests on a mere technicality. (Reply at 6.) Rule 32 is not a technicality. Rather, it is a "self-executing, automatic sanction to provide a strong inducement for disclosure of material." See Hoffman, 541 F.3d at 1179. Permitting the expert testimony to be admitted would have seriously prejudiced Plaintiffs. UFA disclosed the subject matter of the testimony only one month before trial. As such, Plaintiffs had no opportunity to confront the experts about the testimony. Worse, they had no indication as to what the specific content of the testimony would be. At trial, they would have been flying blind. Therefore, the court declines to reverse its ruling excluding UFA's revised expert testimony

Second, UFA failed to identify any other witness qualified to explain the connection between the experts' market value calculations and Plaintiffs' remodeling projects. (See 2/23/15 Hearing Tr.) The opined market value increase due to replacement leasehold interests, however, was far afield from the issue in question: whether Plaintiffs' remodeling costs constituted capital improvements. Without a connection between the two topics, the opinion testimony was not helpful to the jury. See Fed. R. Evid. 702 (requiring expert testimony to "help the trier of fact to understand the

evidence or to determine a fact in issue"). Rather, it was an invitation to impermissible speculation.

In light of the fact that Defendants were not entitled to offset the market value increase, testimony had limited relevance to the question of damages. That limited relevance was substantially outweighed by a danger that the testimony would confuse the issues before the jury and mislead the jury as to the appropriate way to calculate damages. See Fed. R. Evid. 403. Therefore, the court declines to reverse its exclusion of UFA's experts' original testimony regarding market value.

As the court stated in its summary judgment order, UFA was free to identify remodeling projects that it believed were capital improvements and explain that those projects increased the properties' market value. (See 1/28/15 Order at 39.) Instead, UFA prepared expert reports based on erroneous understanding of Washington law. By the time the misunderstanding was apprehended, it was too late to salvage the reports. There is no legal error here.

2. Offset of future rents

On summary judgment, the court rejected UFA's argument that Defendants were entitled to offset the market value of the properties against Plaintiffs' past damages. (See 1/28/15 Order at 34-39.) In a variation on that theme, UFA sought to argue at trial that Defendants were entitled to offset the future rent payments from the replacement tenants against Plaintiffs' past damages. Plaintiffs objected, and the court ordered supplemental briefing on the matter. (See 2d Plf. Br.; 2d Def. Br.) In its briefing, UFA contended that the Defendants were entitled to the offset because the leases required Plaintiffs to re-let

the properties on the tenant's account. (See 2d Plf. Br. at 1.) The court ultimately found that Washington law did not permit an offset. (3/5/15 Trans. at 65:2-6:14.)

Under Washington law, a landlord has two options when a tenant stops paying rent: (1) treat the lease as surrendered and re-let the premises on her own account, or (2) treat the lease as continuing and re-let the premises on the tenant's account. See Hargis v. Mel-Mad Corp., 730 P.2d 76, 79-80 (Wash. Ct. App. 1986). Under the first option, a landlord can recover damages for lost rent up until the date he or she re-let the premises; under the second option, a landlord can recover damages for the lost rent for the entire term of the lease, but is required to offset the total of whatever future rents he or she will recover from re-letting the property. Id.

Plaintiffs requested damages consistent with the first option: lost rent up until the date they re-let the premises.[13] (3/6/15 Tr. Trans. at 141:19-142:20 (Plaintiffs' closing argument disavowing damages for future rent and calculating damages for past rent).) The court reviewed Plaintiffs' dealings with Wholesale after the default and concluded that Plaintiffs' evinced an intent to re-let the premises on the landlords' own accounts. (See 3/5/15 Trans. at 65:2-6:14; 2d Plf. Br. Exs. 1, 2 ("Burlington Retail, LLC, is electing to proceed with its option, pursuant to Paragraph 22 of the Lease, to 're-enter and take possession of the Premises' and 're-let all or any part of the Premises.'") (quoting the

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[13] Plaintiffs consistently advanced that position throughout the course of the litigation. (See, e.g., 9/26/14 Barrick Rep. (Dkt. # 118-21) at 18:8-9 (Plaintiffs' damages expert stating that lost rent was calculated "up to the date the properties will be fully re-leased," which was "anticipated to occur at approximately the time of trial").)

Burlington lease).) Therefore, the court concluded that, under the common law, Defendants were not entitled to an offset. See Hargis, 730 P.2d at 79-80.

UFA now reiterates its argument that the leases prevented Plaintiffs from re-letting the properties on their own accounts. (Mot. at 11.) The plain language of the leases does not support that argument. In general, the leases provide that, in the event of a default, Plaintiffs could elect to terminate the lease or not; Plaintiffs could choose to re-enter the premises; re-entering the premises did not necessarily terminate the leases; and if Plaintiffs chose to re-enter the premises, they were required to make "commercially reasonable efforts" to re-let the premises. (See Tr. Exs. 2 (Lacey lease) ¶ 22, 3 (Burlington lease) ¶ 22.2.) The leases do not, however, foreclose Plaintiffs from re-leasing on their own accounts, or otherwise limit the type of damages Plaintiffs could seek upon re-letting the premises. (See Tr. Exs. 2 (Lacey lease) ¶ 22, 3 (Burlington lease) ¶ 22.2.) The court further found that, although Paragraph 22 arguably required a landlord that sought damages for future rents to offset the damages with payments from replacement tenants going forward, that provision was inapplicable to the situation in which a landlord did not seek future rents. (See 3/5/15 Trans. at 65:2-6:14.) Because Plaintiffs did not seek future rents, no offset against past damages was required.

UFA now argues that the court should have allowed the jury to determine, based on Plaintiffs' interactions towards Wholesale after the default, whether Plaintiffs truly intended to re-let the properties on their own behalf. (Mot. at 9-10.) This is the first time UFA has taken that position. That position, moreover, conflicts with UFA's previous briefing to the court, in which it specifically requested the court to decide the issue of

whether Plaintiffs re-leased the properties on their own account. (See Plf. Br. at 1 (requesting the court to find that that an offset "is directed by Washington common law.") (emphasis in original).) Furthermore, when the court decided the issue of an offset at trial, UFA did not object on the basis that the issue was a jury question.[14] (See 3/5/15 Trans. at 65:2-6:14.)

Nonetheless, UFA now "questions" whether "the Court's refusal to let this issue reach the jury comported with the Seventh Amendment's mandate that 'the right of a trial by jury shall be preserved.'" (Mot. at 11 (quoting U.S. Const. amend. VII).) UFA advances no authority in support of its constitutional "question." (See id.) UFA does not even cite caselaw showing that the availability of an offset is an issue of fact for the jury. (See id.); see generally Farmer v. Farmer, 259 P.3d 256, 262 (Wash. 2011) ("[The] measure of damages is a question of law.") In fact, UFA's motion devotes a single sentence to its constitutional musing. (See id.) The court finds that UFA has not properly raised this argument as a ground for requesting a new trial. Therefore, the court declines to address it. The court denies UFA's motion for new trial on this basis.

3. Burlington's lease

The court's summary judgment order fully addressed UFA's contention that Burlington's lease limited the damages it could seek in the event of default. (See 1/28/15 Order at 32-33.) The court incorporates that analysis in full into this order. (See id. at 32-33 ("UFA and Sportsman's attempt to transform Section 22.2.1 into a liquidated

[14] Neither did UFA submit any proposed jury instructions concerning the issue of whether Plaintiffs re-let on their own behalf or on the tenants' behalf. (See Disp. Jury. Inst. (Dkt. # 160).)

damages or waiver of damages clause is not supported by the plain language of the clause or by the remainder of the lease.").) UFA raises no new arguments in support of its position. Therefore, for the same reasons as articulated in its summary judgment order, the court denies UFA's motion for judgment as a matter of law or a new trial on this basis.

4. Excessive damages

UFA claims in passing that the jury's damage award was "excessive" (Mot. at 6), but fails to advance any argument or authority supporting that position throughout the remainder of its briefing. With respect to damages, the court notes that the jury awarded Plaintiffs their maximum requested damages for both the tortious interference and fraudulent transfer claims against UFA. (See Verdict.) There can be no dispute that Plaintiffs are not entitled to a double recovery. Accordingly, the court intends to enter judgment in favor of Plaintiffs only once in the amount of their maximum requested damages.

F. Miscellaneous arguments

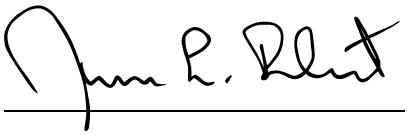
Finally, UFA purports to "renew" all of the arguments it made throughout the course of summary judgment, pretrial, and trial proceedings concerning "contested issues of law . . . regarding joint and several liability, the elements of the [Uniform Fraudulent Transfer Act] and tortious interference claims, and the proper principles for calculating damages for breach of a lease." (Mot. at 13.) The court will not revisit each and every ruling it made on those topics, especially when UFA has not bothered to specify the unidentified rulings with which it takes issue, let alone advance arguments supporting its

positions on those rulings. The court finds that these arguments are not properly raised. Therefore, the court denies UFA's motion for judgment as a matter of law or a new trial on this basis.

IV. CONCLUSION

For the foregoing reasons, the court DENIES UFA's renewed motion for judgment as a matter of law and motion for a new trial (Dkt. # 220).

Dated this 14th day of May, 2015.



JAMES L. ROBART
United States District Judge