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United States District Court  
Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

LEARNING TECHNOLOGY  
PARTNERS,  
  
Plaintiff,  
  
v.  
  
UNIVERSITY OF THE INCARNATE  
WORD,  
  
Defendant.

Case No. 14-cv-4322-PJH  
  
**FINAL PRETRIAL ORDER**

Pursuant to Rule 16(e) of the Federal Rules of Civil Procedure, this final pretrial order is hereby entered and shall control the course of the trial unless modified by a subsequent order.

I. MOTIONS IN LIMINE

A. Plaintiffs' Motion in Limine No. 1

Plaintiff's first motion in limine to exclude evidence regarding the number of students using services in breach of the exclusivity provision is DENIED.

B. Plaintiff's Motion in Limine No. 2

Plaintiff's second motion in limine to exclude evidence of the 3-5% discount sought in connection with defendant's counterclaim is DENIED.

C. Plaintiff's Motion in Limine No. 3

Plaintiff's third motion in limine to exclude evidence of plaintiff's revenue and profit unrelated to defendant is GRANTED.

1 D. Plaintiff's Motion in Limine No. 4

2 Plaintiff's fourth motion in limine to exclude the testimony of defendant's expert  
3 Jason Frankovitz is GRANTED in part and DENIED in part. The parties agree that two  
4 out of the three topics covered by the Frankovitz report (specifically, the issue of whether  
5 plaintiff's own actions contributed to any usage/capacity issues, and the issue of  
6 derivative work) are no longer relevant to any claims at issue. Thus, to the extent that  
7 plaintiff seeks to exclude those portions of the report, the motion is GRANTED. However,  
8 the parties also agree that the third topic covered by the Frankovitz report (whether  
9 plaintiff could have discovered or prevented defendant's alleged breach) could be  
10 relevant to at least some of defendant's affirmative defenses, and thus, the motion to  
11 exclude that portion of the report is DENIED.

12 E. Plaintiff's Motion in Limine No. 5

13 Plaintiff's fifth motion in limine seeks to preclude cross-examination of Reda  
14 Athanasios regarding claimed damages arising from labor costs, which are no longer  
15 sought in the case. Because Athanasios' credibility is relevant to other categories of  
16 claimed damages, plaintiff's fifth motion in limine is DENIED.

17 F. Defendant's Motion in Limine No. 1

18 Defendant's first motion in limine to preclude plaintiff's damages expert from  
19 presenting calculations not disclosed in his expert report is GRANTED in part and  
20 DENIED in part. Plaintiff's expert shall be permitted to offer modified versions of the  
21 calculations already contained in the report (for instance, damages for a limited temporal  
22 scope), but may not offer calculations based on new damages theories.

23 G. Defendant's Motion in Limine No. 2

24 Defendant's second motion in limine to preclude plaintiff from offering testimony  
25 regarding defendant's document retention policy or regarding allegations of  
26 lost/destroyed documents is GRANTED.

27 H. Defendant's Motion in Limine No. 3

28 Defendant's third motion in limine to admonish Reda Athanasios regarding the

1 personal knowledge evidentiary requirement is DENIED.

2 I. Defendant's Motion in Limine No. 4

3 Defendant's fourth motion in limine to preclude plaintiff from presenting evidence  
4 or argument that other clients were charged "standard rates" is GRANTED, based on  
5 plaintiff's inability to identify any such evidence that was produced during discovery.

6 J. Defendant's Motion in Limine No. 5

7 Defendant's fifth motion in limine to preclude plaintiff from offering "improper  
8 character testimony regarding Dr. and Mr. Porter" is GRANTED in part and DENIED in  
9 part. The motion is granted only to the extent that defendant seeks to preclude evidence  
10 related to Dr. Porter's alleged mishandling of expenses during previous employment.  
11 Any other character evidence-related issues will be resolved by the court as they arise.

12 K. Defendant's Motion in Limine No. 6

13 Defendant's sixth motion in limine to preclude evidence related to its own profits is  
14 GRANTED, for the same reasons as plaintiff's third motion in limine was granted.

15 L. Defendant's Motion in Limine No. 7

16 Defendant's seventh motion in limine to preclude plaintiff from presenting evidence  
17 or argument relating to usage/capacity issues is GRANTED in part and DENIED in part.  
18 As mentioned above (in the context of plaintiff's fourth motion in limine), plaintiff's  
19 knowledge of the usage/capacity issues could be relevant to defendant's affirmative  
20 defenses, so to the extent that plaintiff seeks to introduce evidence for that purpose, the  
21 motion is DENIED. However, to the extent that plaintiff seeks to introduce the evidence  
22 for any other purpose (including any alleged damages stemming from the usage/capacity  
23 issues), the motion is GRANTED.

24 II. DEFENDANT'S DAUBERT MOTION

25 Defendant seeks to exclude the testimony of plaintiff's damages expert, Mark  
26 Cohen.

27 A. Legal Standard

28 Federal Rule of Evidence 702 permits experts qualified by "knowledge,

1 experience, skill, expertise, training, or education” to testify “in the form of an opinion or  
2 otherwise” based on “scientific, technical, or other specialized knowledge” if that  
3 knowledge will “assist the trier of fact to understand the evidence or to determine a fact in  
4 issue.” Fed. R. Evid. 702.

5 The proponent of expert testimony bears the burden of establishing by a  
6 preponderance of the evidence that the admissibility requirements are met. See Fed. R.  
7 Evid. 702, Advisory Committee Notes. Although there is a presumption of admissibility,  
8 Daubert v. Merrell Dow Pharms., Inc., (“Daubert I”) 509 U.S. 579, 588 (1993), the trial  
9 court is obliged to act as a “gatekeeper” with regard to the admission of expert scientific  
10 testimony under Rule 702. Id. at 597.

11 Daubert requires a two-part analysis. First, the court must determine whether an  
12 expert's testimony reflects “scientific knowledge,” whether the findings are “derived by the  
13 scientific method,” and whether the work product is “good science” - in other words,  
14 whether the testimony is reliable and trustworthy. Id. at 590 & n.9, 593. Second, the  
15 court must determine whether the testimony is “relevant to the task at hand.” Id. at 597.

16 B. Legal Analysis

17 In general, as discussed at the pretrial conference, the court finds that many of the  
18 arguments raised by defendant in this motion relate more to the legal theories and the  
19 evidence underlying Mr. Cohen's report, than to the methodology used in the report. As  
20 a result, the court construes the Daubert motion more as a motion in limine rather than as  
21 a true Daubert motion. And because both parties had a full opportunity to brief the issues  
22 raised in the motion, and had an opportunity to present further argument at the pretrial  
23 conference, the court is prepared to make the following evidentiary rulings based on the  
24 arguments presented by the parties.

25 First, defendant seeks to preclude Mr. Cohen from opining that the 60% discount  
26 applied to fees that were waived pursuant to the parties' contract. The language of the  
27 contract supports defendant's argument, as it provides as follows:  
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**LTP Exclusivity.** Client acknowledges and agrees that LTP will incur significant costs in initializing the relationship with Client, including initial setup fees and custom work charges. In addition, LTP is providing a discount exceeding sixty percent (60%) of its standard fees. As a consideration for LTP agreeing to waive its setup fees and custom work charges, and providing such discount, Client agrees that for the term of this Agreement LTP shall be Client’s sole and exclusive provider for all distance education Content Management Systems or Learning Management Systems.

Dkt. 1, Ex. 1 at 5.

The provision first states that plaintiff will incur significant initialization costs, then sets forth the discount to its standard fees, and then provides that, in exchange for exclusivity, plaintiff will “waive its setup fees and custom work charges, and provid[e] such discount” (emphasis added). Thus, the fee waiver is separate from the discount, and while plaintiff may seek reimbursement of the waived fees, it may not seek a refund of any alleged discount applied to those amounts.

The second, related issue also arises out of the same provision. Mr. Cohen’s report opines that certain fees for work performed over the life of the contract were waived, and thus should be included in any calculation of exclusivity-related damages. However, the exclusivity provision is clear in stating that the waiver applies to costs incurred “in initializing the relationship” with defendant (emphasis added). Thus, while plaintiff may seek reimbursement of fees incurred in “initializing” the services provided to defendant, it may not seek reimbursement of all waived fees.

The third issue first arose in plaintiff’s opposition to defendant’s Daubert motion, and relates to the timeframe for which damages are sought. Plaintiff states that it now “plans to only seek repayment of discounts for fees invoiced after the first breach of the exclusivity provision,” but now claims that the first breach may have occurred well before the date identified in its interrogatory responses. Dkt. 105 at 4. Specifically, in response to an interrogatory asking plaintiff to identify all facts related to the alleged exclusivity breach, plaintiff responded that “the breach began no later than 2013.” Dkt. 83-2, Ex. F at 7. Plaintiff now claims that, while deposing one of defendant’s witnesses, it learned

1 that the first breach may have occurred as early as 2010, or even earlier. However,  
2 plaintiff never supplemented its discovery responses to reflect its new theory regarding  
3 the initial breach, nor did it mention any pre-2013 breach in opposition to defendant's  
4 motion for summary judgment. See Dkt. 52 at 7-8 (alleging exclusivity breaches in 2013  
5 and 2014, but no earlier). Plaintiff is not permitted to change its theory of the case on the  
6 eve of trial, and thus, plaintiff is precluded from alleging any exclusivity breach prior to  
7 2013.

8 Fourth, defendant seeks to preclude Mr. Cohen from offering testimony that  
9 plaintiff is entitled to prejudgment interest. The court first finds that the contract is silent  
10 as to the amount of interest in the case of disputed payments. Defendant argues that  
11 such silence indicates that interest is precluded, but the court disagrees. Instead, the  
12 applicable rule comes from California Civil Code section 3287, which provides for a 10%  
13 interest rate, but has been interpreted by the courts to apply only where the damages are  
14 "capable of being made certain by calculation." And the test for determining "certainty" is  
15 "whether the defendant actually knows the amount owed or could have computed the  
16 amount from reasonably available information."

17 As applied to this case, the sheer number of legitimate factual disputes prevents  
18 the court from finding that either party actually knew the amount owed or could have  
19 computed the amount from reasonably available information. Thus, plaintiff is precluded  
20 from presenting testimony regarding prejudgment interest.

21 For the foregoing reasons, defendant's motion is GRANTED in part and DENIED  
22 in part. To the extent that defendant's motion seeks any relief other than that stated  
23 above, it is denied. In particular, the court notes that defendant's motion re-asserts an  
24 argument made in its motion for partial summary judgment – that plaintiff is not entitled to  
25 a refund of the 60% discount provided in the parties' contract. The court rejected that  
26 argument during summary judgment, and finds no basis to revisit it here (though it does  
27 clarify, as it did at the pretrial conference, that the court has not accepted plaintiff's  
28 damages theory – it merely found that the issue may be presented to the jury).

1           Finally, at the pretrial conference, the court noted that both parties concede that  
2 some of the calculations in the Cohen report may be inaccurate – either because  
3 incorrect rates were used by Mr. Cohen, or because the underlying invoices reflected  
4 incorrect rates. As discussed at the conference, the parties are to meet and confer  
5 regarding these miscalculations and submit a stipulation regarding the correction of any  
6 incorrect figures.

7           III.    VOIR DIRE

8           As discussed at the pretrial conference, the court will include joint questions 2, 3, 8  
9 and 9 (to be combined into one question), 13 and 14 (to be combined), 15, 16, and 17  
10 and 18 (to be combined) in its jury questionnaire. The court will also include plaintiff's  
11 proposed questions 3 and 4. The parties shall submit a joint filing, containing all revised  
12 voir dire questions, by **January 15, 2016**.

13           IV.   JURY INSTRUCTIONS

14           At the pretrial conference, the court addressed a subset of the jury instructions, but  
15 deferred a determination of the remaining instructions until after the parties' supplemental  
16 briefing regarding affirmative defenses (which will be more fully discussed below).  
17 Specifically, the court indicated that it would not allow plaintiff's proposed instruction 1.15  
18 (questions to witnesses by jurors), 4.1 (corporations and partnerships), 316  
19 (interpretation – meaning of technical words), but would allow plaintiff's proposed  
20 instruction 312 (substantial performance). Regarding defendant's proposed instructions,  
21 the court indicated that it was unlikely to allow instructions that were based only on case  
22 law. The court will re-address this issue after the parties submit supplemental briefing.

23           V.    VERDICT FORM

24           As with the jury instructions, the court defers a determination on the verdict form  
25 until it receives further briefing regarding the asserted affirmative defenses.

26           VI.   TRIAL SCHEDULE AND TIME LIMITS

27           The duration of the trial shall be 5 days (Monday, Tuesday, Thursday, and Friday,  
28 from 8:30 a.m. to 1:30 p.m., with two 15-minute breaks). Jury selection will occur on the

1 first day, as will opening statements (time permitting). During the remaining four days,  
2 each side shall have 9 hours to present their case. Closing arguments, final jury  
3 instructions, and deliberations are not included within the 5-day trial allotment.

4 VII. FINAL COMMENTS

5 As mentioned above, the parties are to submit the revised voir dire questions by  
6 **January 15, 2016.**

7 The parties shall also submit briefing on issues of (1) the applicability of a  
8 comparative fault defense, and (2) the applicability of the asserted affirmative defenses in  
9 general, including whether they are to be decided by the court or by a jury. The parties  
10 are further directed to avoid affirmative defenses that are duplicative or that largely  
11 overlap with each other. Each party may submit a supplemental brief, not to exceed ten  
12 (10) pages, no later than **January 15, 2016.** Each party may also submit a response, not  
13 to exceed ten (10) pages, by **January 22, 2016.** No replies are permitted.

14 Finally, the court notes one potential point of confusion that arose during the  
15 pretrial conference. Plaintiff appeared to indicate that part of its damages calculation  
16 stemmed from lost revenue caused by the alleged capacity/usage issues. Although the  
17 court is unclear as to whether plaintiff actually intends to pursue this theory, to avoid any  
18 confusion, the court will hold plaintiff to the representation made in the joint pretrial  
19 statement that it “will not present any evidence regarding alleged general business losses  
20 (e.g., the alleged 120 inquiries LTP received and was unable or unwilling to respond to  
21 while addressing server and capacity issues and Mr. Athanasios’ estimate of the number  
22 of clients LTP would have acquired had LTP followed up on those inquiries).” Dkt. 87 at  
23 7.

24 **IT IS SO ORDERED.**

25 Dated: December 18, 2015

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28 PHYLLIS J. HAMILTON  
United States District Judge