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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TECHSHOP, INC.,
Plaintiff,
v.
DAN RASURE, et al.,
Defendants.

Case No. [18-cv-01044-HSG](#)

**ORDER DENYING DAUBERT
MOTIONS; DENYING
ADMINISTRATIVE MOTIONS TO
SEAL**

Re: Dkt. No. 111, 123, 124, 126

Currently before the Court are two Daubert motions to exclude expert witnesses, see Dkt. Nos. 124, 126, and two related administrative motions to file under seal, see Dkt. Nos. 111, 123.¹ For the following reasons, the Court **DENIES** all four motions.

I. LEGAL STANDARDS

A. Exclusion of Witnesses

Federal Rule of Evidence 702 allows a qualified expert to testify “in the form of an opinion or otherwise” where:

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

Fed. R. Evid. 702. Expert testimony is admissible under Rule 702 if it is both relevant and reliable. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993). “[R]elevance means that the evidence will assist the trier of fact to understand or determine a fact in issue.” *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007); see also *Primiano v. Cook*, 598 F.3d 558,

¹ The Court finds this matter appropriate for disposition without oral argument and the matter is deemed submitted. See Civil L.R. 7-1(b).

1 564 (9th Cir. 2010) (“The requirement that the opinion testimony assist the trier of fact goes
2 primarily to relevance.”) (quotation omitted).

3 Under the reliability requirement, the expert testimony must “ha[ve] a reliable basis in the
4 knowledge and experience of the relevant discipline.” Primiano, 598 F.3d at 565. To ensure
5 reliability, the court must “assess the [expert’s] reasoning or methodology, using as appropriate
6 such criteria as testability, publication in peer reviewed literature, and general acceptance.” Id. at
7 564. These factors are “helpful, not definitive,” and a court has discretion to decide how to test
8 reliability “based on the particular circumstances of the particular case.” Id. (internal quotation
9 marks and footnotes omitted). “When evaluating specialized or technical expert opinion
10 testimony, the relevant reliability concerns may focus upon personal knowledge or experience.”
11 *United States v. Sandoval-Mendoza*, 472 F.3d 645, 655 (9th Cir. 2006).

12 The inquiry into the admissibility of expert testimony is “a flexible one” where “[s]haky
13 but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to
14 the burden of proof, not exclusion.” Primiano, 598 F.3d at 564. “When the methodology is
15 sound, and the evidence relied upon sufficiently related to the case at hand, disputes about the
16 degree of relevance or accuracy (above this minimum threshold) may go to the testimony’s
17 weight, but not its admissibility.” *i4i Ltd. P ’ship v. Microsoft Corp.*, 598 F.3d 831, 852 (Fed. Cir.
18 2010). The burden is on the proponent of the expert testimony to show, by a preponderance of the
19 evidence, that the admissibility requirements are satisfied. *Lust v. Merrell Dow Pharm., Inc.*, 89
20 F.3d 594, 598 (9th Cir. 1996).

21 **B. Motion to Seal**

22 Courts generally apply a “compelling reasons” standard when considering motions to seal
23 documents. *Pintos v. Pac. Creditors Ass’n*, 605 F.3d 665, 678 (9th Cir. 2010) (quoting *Kamakana*
24 *v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006)). “This standard derives from
25 the common law right ‘to inspect and copy public records and documents, including judicial
26 records and documents.’” Id. (quoting *Kamakana*, 447 F.3d at 1178). “[A] strong presumption in
27 favor of access is the starting point.” *Kamakana*, 447 F.3d at 1178 (quotation omitted). To
28 overcome this strong presumption, the party seeking to seal a judicial record attached to a

1 dispositive motion must “articulate compelling reasons supported by specific factual findings that
2 outweigh the general history of access and the public policies favoring disclosure, such as the
3 public interest in understanding the judicial process” and “significant public events.” *Id.* at 1178–
4 79 (quotation omitted). “In general, ‘compelling reasons’ sufficient to outweigh the public’s
5 interest in disclosure and justify sealing court records exist when such ‘court files might have
6 become a vehicle for improper purposes,’ such as the use of records to gratify private spite,
7 promote public scandal, circulate libelous statements, or release trade secrets.” *Id.* at 1179
8 (quoting *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978)). “The mere fact that the
9 production of records may lead to a litigant’s embarrassment, incrimination, or exposure to further
10 litigation will not, without more, compel the court to seal its records.” *Id.*

11 The Court must “balance[] the competing interests of the public and the party who seeks to
12 keep certain judicial records secret. After considering these interests, if the court decides to seal
13 certain judicial records, it must base its decision on a compelling reason and articulate the factual
14 basis for its ruling, without relying on hypothesis or conjecture.” *Id.* Civil Local Rule 79-5
15 supplements the compelling reasons standard set forth in *Kamakana*: the party seeking to file a
16 document or portions of it under seal must “establish[] that the document, or portions thereof, are
17 privileged, protectable as a trade secret or otherwise entitled to protection under the law . . . The
18 request must be narrowly tailored to seek sealing only of sealable material.” Civil L.R. 79-5(b).

19 Records attached to nondispositive motions, however, are not subject to the strong
20 presumption of access. See *Kamakana*, 447 F.3d at 1179. Because such records “are often
21 unrelated, or only tangentially related, to the underlying cause of action,” parties moving to seal
22 must meet the lower “good cause” standard of Rule 26(c) of the Federal Rules of Civil Procedure.
23 *Id.* at 1179–80 (quotation omitted). This requires only a “particularized showing” that “specific
24 prejudice or harm will result” if the information is disclosed. *Phillips v. Gen. Motors Corp.*, 307
25 F.3d 1206, 1210–11 (9th Cir. 2002); see also Fed. R. Civ. P. 26(c). “Broad allegations of harm,
26 unsubstantiated by specific examples of articulated reasoning” will not suffice. *Beckman Indus.,*
27 *Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (quotation omitted).

28

1 **II. DEFENDANTS’ MOTION TO PRECLUDE DR. ERIC MATOLO**

2 Defendants moved under Federal Rules of Evidence 402 and 403 to preclude Plaintiff’s
3 damages expert, Dr. Eric Matolo, from testifying about “(1) the law; (2) Defendants’ alleged
4 profits; and (3) his reliance on Plaintiff’s foreign licenses to opine on hypothetical lost licensing
5 revenue for its U.S. ‘TECHSHOP’ marks.” See Dkt. No. 124 (“DM”) at 1. Plaintiff opposed, see
6 Dkt. No. 141 (“PO”), and Defendants replied, see Dkt. No. 157 (“DR”).

7 First, Defendants contend that Matolo’s report contains “legal principles” and that he
8 “should be precluded from instructing the jury on trademark damages law as part of his
9 testimony.” DM at 2. Of course, “an expert witness cannot give an opinion as to her legal
10 conclusion, i.e., an opinion on an ultimate issue of law” and “instructing the jury as to the
11 applicable law is the distinct and exclusive province of the court.” *Nationwide Transp. Fin. v.*
12 *Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (internal quotation omitted). But
13 Matolo’s report neither gives an opinion on his legal conclusion nor instructs on the law; rather, it
14 briefly quotes a statute to review the types of damages available. Accordingly, the Court will not
15 preclude Matolo’s report or testimony on this basis at this time. The Court does not anticipate that
16 Matolo will need to reference this legal background in his testimony.

17 Second, Defendants argue that Matolo should not be allowed to offer his opinion as to
18 damages or testify as to Defendants’ revenues. See DM at 3. But these arguments do not support
19 exclusion of Matolo. Instead, Defendants should cross-examine Matolo on his calculations,
20 assumptions, and underlying evidence or present contrary evidence to the jury.

21 Third, Defendants assert that Matolo should be barred from relying on Plaintiff’s foreign
22 licensing agreements to calculate lost U.S. licensing revenue. See DM at 4. Again, these are
23 arguments going to the weight rather than the admissibility of Matolo’s testimony and thus do not
24 warrant exclusion.

25 Lastly, Defendants contend that Matolo’s opinions must be precluded under Federal Rule
26 of Evidence 403 because the probative value of the proffered evidence “is greatly outweighed by
27 the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, and wasting
28 time.” DM at 5 (quoting Fed. R. Evid. 403). The Court disagrees. The potential weaknesses in

1 Matolo’s conclusions that Defendants have identified may be explained to the jury but they do not
2 require exclusion under Rule 403.

3 Accordingly, the Court **DENIES** Defendants’ motion to exclude Matolo’s testimony.

4 **III. PLAINTIFF’S MOTION TO PRECLUDE JEREMIAH JOHNSON AND MARK**
5 **BÜNGER**

6 Plaintiff moved to preclude the testimony of Defendants’ expert witnesses Jeremiah
7 Johnson and Mark Bünger. See Dkt. No. 126 (“PM”). Defendants opposed, see Dkt. No. 144
8 (“DO”), and Plaintiff replied, see Dkt. No. 156 (“PR”).

9 **A. Jeremiah Johnson**

10 Plaintiff moved to exclude Johnson’s expert testimony based on Defendants’ failures to
11 make the required disclosures, establish Johnson’s expertise, and provide an expert report. See
12 PM at 5. Defendants respond that Johnson “will not offer expert opinion testimony” because he
13 was not retained as an expert but instead will be testifying as a fact witness in his role as “the CFO
14 of TheShop.Build and TheShop.Build San Fran.” DO at 2–3. Because Defendants aver that
15 Johnson will testify as a lay witness, not an expert witness, the Court finds that there is no reason
16 to exclude his testimony under Rule 702 and **DENIES** Plaintiff’s motion.

17 **B. Mark Bünger**

18 Plaintiff contends that two reports authored by Defendants’ expert Mark Bünger must be
19 excluded. See PM at 6–8. According to Plaintiff, Bünger’s opinions are irrelevant, he lacks the
20 specialized training and experience to testify competently, and his conclusions are mere
21 speculation. See *id.* Plaintiff’s arguments do not merit excluding Bünger’s testimony; rather,
22 Plaintiff should challenge the weight of his conclusions through cross-examination and
23 presentation of competing experts and evidence. And, as with all witnesses, Bünger’s testimony is
24 subject to objections at trial, such as lack of personal knowledge or speculation. Accordingly, the
25 Court **DENIES** Plaintiff’s motion.

26 **IV. ADMINISTRATIVE MOTIONS TO FILE UNDER SEAL**

27 Along with their Daubert motion, Defendants filed an administrative motion to file under
28 seal certain attached exhibits. See Dkt. No. 123. Defendants also filed an administrative motion

1 to file under seal in connection with their motion for leave to file a Daubert motion. See Dkt. No.
2 111. Defendants sought to seal these documents “only because Plaintiff has designated the
3 information confidential and/or highly confidential” and indicated that Plaintiff was the party
4 claiming confidentiality. See Dkt. No. 123 at 1. Under Civil Local Rule 79-5(e), Plaintiff was
5 required to file a declaration within four days establishing that the material was sealable. Plaintiff
6 has not done so. However, Plaintiff filed a declaration in response to Defendants’ administrative
7 motion to file under seal in connection with Defendants’ motion for leave to file a Daubert
8 motion, which contained the same underlying documents. See Dkt. No. 118. But this declaration
9 does not support sealing any of the documents attached to either motion. With respect to each
10 document, Plaintiff either explicitly waived the prior claims of confidentiality or failed to
11 articulate a particularized showing of harm to meet even the good cause standard. See *id.*

12 Accordingly, because Plaintiff has failed to meet the good cause standard for sealing
13 documents, the Court **DENIES** the administrative motions to file under seal.


14 **V. CONCLUSION**

15 For the foregoing reasons, the Court:

- 16 1. **DENIES** Defendants’ motion to preclude Dr. Matolo’s testimony. See Dkt. No.
17 124.
- 18 2. **DENIES** Plaintiff’s motion to preclude Mr. Johnson’s and Mr. Büniger’s testimony.
19 See Dkt. No. 126.
- 20 3. **DENIES** the administrative motions to file under seal. See Dkt. Nos. 111, 123.
21 Defendants are **DIRECTED** to file unredacted versions of these documents within
22 7 days of the date of this order.

23 **IT IS SO ORDERED.**

24 Dated: 4/24/2019

25 
26 HAYWOOD S. GILLIAM, JR.
27 United States District Judge
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