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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 YOUNGEVITY INTERNATIONAL,
12 INC. AND JOEL D. WALLACH,
13 Plaintiffs,
14 v.
15 TODD SMITH et al.,
16 Defendants.
17

18 _____
19 AND RELATED COUNTER ACTION.
20

Case No.: 16-cv-704 BTM (JLB)

**ORDER GRANTING PLAINTIFFS'
MOTION TO EXCLUDE
TESTIMONY OF TIMOTHY L.
FORT AND DENYING
DEFENDANTS' MOTIONS TO
EXCLUDE EXPERT TESTIMONY**

**ECF NOS. 294, 306, 310, 311, 312,
313, 314, 315, 318**

21 On December 6, 2017, Plaintiffs filed a motion to exclude the expert
22 testimony of Timothy L. Fort. (ECF No. 294). Defendants also filed eight motions
23 to exclude the expert testimony of Dr. Philip Michael Bolger (ECF No. 306), Robert
24 Geary (ECF No. 310), Dr. Michael John Glade (ECF No. 311), Dr. Samuel N. Grief
25 (ECF No. 312), Dr. Edward M. Mazze (ECF No. 313), Dr. Arthur J. Miller (ECF No.
26 314), Dr. David Stewart (ECF No. 315), and Brian Bergmark (ECF No. 318). For
27 the reasons below, the Court grants Plaintiffs' motion to exclude Timothy L. Fort
28 and denies Defendants' motions.

1 **I. STANDARD**

2 Federal Rule of Evidence 702 permits expert testimony if:

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

9 Under Rule 702, expert testimony must be both relevant and reliable. *Daubert v.*
10 *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993); *Kumho Tire Co. v.*
11 *Carmichael*, 526 U.S. 137, 149 (1999). The trial court must act as a “gatekeeper”
12 to exclude expert testimony that does not meet Rule 702's reliability standards.
13 *Kumho Tire*, 526 U.S. at 147-48.

14 With respect to relevance, there must be a “valid scientific connection to the
15 pertinent inquiry” in order for Rule 702’s “helpfulness” standard to be met. *Daubert*,
16 509 U.S. at 592. As for reliability, the Court must make a preliminary assessment
17 of whether the reasoning or methodology underlying the testimony is scientifically
18 valid and whether that reasoning or methodology can be applied to the facts in
19 issue. *Id.* at 592-93. In *Daubert*, the Supreme Court listed several factors that
20 may be pertinent in assessing reliability: (1) whether the scientific theory or
21 technique can be (and has been) tested; (2) whether the theory or technique has
22 been subjected to peer review and publication; (3) whether there is a known or
23 potential error rate; and (4) whether the theory or technique is generally accepted
24 in the relevant scientific community. *Id.* at 593-94.

25 The inquiry under Rule 702 is a “flexible” one, and the district court has “the
26 discretionary authority . . . to determine reliability in light of the particular facts and
27 circumstances of the particular case.” *Kumho Tire*, 526 U.S. at 158. Accordingly,
28 the factors identified in *Daubert* may or may not be pertinent in assessing reliability,
depending on the nature of the issue, the expert’s particular expertise, and the

1 subject of his testimony. *Id.* at 150.

2 Importantly, the focus of the court’s gatekeeping inquiry “must be solely on
3 principles and methodology, not the conclusions that they generate.” *Daubert*, 509
4 U.S. at 595. “When an expert meets the threshold established by Rule 702 . . . the
5 expert may testify and the jury decides how much weight to give that testimony.”
6 *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010).

7 **II. DISCUSSION**

8 **A. Robert Geary and Timothy L. Fort**

9 Plaintiffs have withdrawn Robert Geary as an expert witness. (ECF No. 385
10 at 1). Therefore, Defendants’ motion to exclude his testimony is denied as moot.

11 Defendants have offered Timothy L. Fort as an expert witness “to respond to
12 the expert witness report provided by Mr. Robert F. Geary . . . and to testify
13 regarding the nature of fiduciary duty related to defendant William Andreoli.” (ECF
14 No. 294, Exh. B at 2). On the topic of fiduciary duty, Fort’s testimony addresses
15 whether Andreoli complied with Delaware and California law with respect to the
16 duty of care and duty of loyalty, and whether Andreoli breached any contractual
17 duties under California law. *Id.* at 2-3. To the extent that Fort’s testimony rebuts
18 the testimony of Geary, it is precluded. See *Bakst v. Cmty. Mem’l Health Sys., Inc.*,
19 2011 WL 13214315, at *27 (C.D. Cal. Mar. 7, 2011) (“Because the testimony [the
20 expert] was hired to rebut will not be offered, [the expert] may not testify.”). To the
21 extent that Fort’s testimony concludes that Andreoli complied with California and
22 Delaware law, it is also precluded. See *Hangarter v. Provident Life & Acc. Ins. Co.*,
23 373 F.3d 998, 1016 (9th Cir. 2004) (“an expert witness cannot give an opinion as
24 to her legal conclusion, i.e., an opinion on an ultimate issue of law. Similarly,
25 instructing the jury as to the applicable law is the distinct and exclusive province of
26 the court.”) (internal citations and quotations omitted). Therefore, Plaintiffs’ motion
27 to exclude the testimony of Timothy L. Fort is granted.

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1 **B. Dr. Samuel N. Grief, Dr. Michael John Glade, Dr. Arthur J.**
2 **Miller, and Dr. Philip Michael Bolger**

3 Defendants seek to exclude, in their entirety, the testimony of Dr. Samuel N.
4 Grief, who evaluated the scientific validity of weight loss claims for Wakaya's
5 ketogenic diet program (see ECF No. 312-3, Exh. A), Dr. Michael John Glade, who
6 examined Wakaya's claims about Octodrine in its dietary supplement product as
7 well as Wakaya's claims about the health benefits of ginger and turmeric (see ECF
8 No. 311-3, Exh. A), Dr. Arthur J. Miller, who evaluated the food safety risk of
9 Wakaya's products containing ginger (see ECF No. 314-3, Exh. A), and Dr. Philip
10 Michael Bolger, who evaluated the risks of lead and arsenic exposure from
11 products containing bentonite clay (see ECF No. 306-3, Exh. A). Defendants
12 challenge all four experts on essentially the same two grounds: (1) the expert's
13 testimony did not provide affirmative evidence that Wakaya's statements were
14 false or misleading, and (2) the expert relied on incomplete information in forming
15 his opinion. (See ECF No. 312-2 at 1; ECF No. 311-2 at 1; ECF No. 314-2 at 1;
16 ECF No. 306-2 at 1). Both grounds are insufficient to warrant exclusion. The first
17 ground improperly challenges the conclusions of the experts rather than their
18 principles and methodology. See *Daubert*, 509 U.S. at 595 (the focus of the court's
19 gatekeeping inquiry "must be solely on principles and methodology, not the
20 conclusions that they generate"). The second ground goes to the weight and
21 credibility of the expert's testimony rather than its admissibility. See *Bergen v. F/V*
22 *St. Patrick*, 816 F.2d 1345, 1352 n.5 (9th Cir. 1987) ("The relative weakness or
23 strength of the factual underpinnings of the expert's opinion goes to weight and
24 credibility, rather than admissibility.") (internal quotation omitted). Therefore,
25 Defendants' motions to exclude the testimony of Dr. Samuel N. Grief, Dr. Michael
26 John Glade, Dr. Arthur J. Miller, and Dr. Philip Michael Bolger are denied.

27 **C. Dr. David Stewart**

28 Defendants seek to exclude the testimony of Dr. David Stewart, who

1 designed a research study to evaluate consumers' perceptions of claims on
2 Wakaya's website. (See ECF No. 315-3, Exh. A at 5). Defendants' first ground for
3 exclusion rests on Stewart's characterization that Wakaya's income claims "lack
4 substantiation," which does not prove that the claims are false or misleading. See
5 *id.* at 2. As explained above, this is an improper challenge to an expert's
6 conclusions rather than to his principles and methodology. See *Daubert*, 509 U.S.
7 at 595. Defendants' second ground for exclusion challenges the resulting data from
8 Stewart's consumer survey. (See ECF No. 315-2 at 4). This objection does not go
9 to admissibility. See *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1188 (9th Cir.
10 2002) ("objections to the inadequacies of a study are more appropriately
11 considered an objection going to the weight of the evidence rather than its
12 admissibility. Vigorous cross-examination of a study's inadequacies allows the jury
13 to appropriately weigh the alleged defects and reduces the possibility of prejudice")
14 (internal citations omitted). Therefore, Defendants' motion to exclude the testimony
15 of Dr. David Stewart is denied.

16 **D. Dr. Edward M. Mazze**

17 Defendants seek to exclude the testimony of Dr. Edward M. Mazze, who
18 "evaluate[d] Wakaya Perfection's multi-level marketing program and provid[ed] an
19 opinion as to whether or not the program [was] a pyramid and endless chain
20 scheme." (ECF No. 313-3, Exh. A at 2). Defendants argue that Mazze's testimony
21 is an impermissible legal conclusion and that he relied on an incorrect legal
22 standard. (See ECF No. 313-2 at 2). Mazze's expert report describes what
23 characteristics of Wakaya's multi-level marketing program match characteristics of
24 a pyramid scheme. (See ECF No. 313-3, Exh. A). This is permissible testimony.
25 See *F.T.C. v. BurnLounge, Inc.*, 753 F.3d 878, 888 (9th Cir. 2014) (affirming district
26 court's admission of expert testimony where expert "testified about whether
27 [defendant] was a pyramid"). Further, Mazze's report includes the correct criteria
28 of the Federal Trade Commission's test for what constitutes a pyramid scheme.

1 See *Webster v. Omnitrition Int'l, Inc.*, 79 F.3d 776, 781 (9th Cir. 1996) (“payment
2 by participants of money to the company in return for which they receive (1) the
3 right to sell a product and (2) the right to receive in return for recruiting other
4 participants into the program rewards which are unrelated to sale of the product to
5 ultimate users”); ECF No. 313-3, Exh. A at 7. Therefore, Defendants’ motion to
6 exclude the testimony of Dr. Edward M. Mazze is denied.

7 **E. Brian Bergmark**

8 Defendants seek to exclude the testimony of Brian Bergmark, who calculated
9 damages using a lost-profit analysis and a marketing-cost analysis.¹ Defendants
10 object to the underlying facts that Bergmark’s analysis relied upon. (See ECF No.
11 318-2). Bergmark’s report lists the specific financial documents he examined and
12 explains his calculation method. (See ECF No. 318-3, Exh. 2). For example,
13 Bergmark calculated lost profits using Youngevity’s historical quarterly and annual
14 sales in its direct selling segment, Youngevity’s forecasted and actual revenues,
15 combined annual sales experienced by some of the key distributor groups, and
16 financial data from Wakaya, such as sales and sources of revenue. (See ECF No.
17 318-3, Exh. 2 at 7-8). Bergmark’s lost profit damages are supported by “substantial
18 evidence.” See *Humetrix, Inc., v. Gemplus S.C.A.*, 268 F.3d 910, 919 (9th Cir.
19 2001) (“We uphold awards of lost profit damages so long as they are supported by
20 substantial evidence.”); *In re James E. O’Connell Co., Inc.*, 799 F.2d 1258, 1262
21 (9th Cir. 1986) (declining to overturn lost profit award based on expert testimony
22 supported by financial statements, data pertaining to similar businesses, and
23 market forecasts). Defendants’ objections go to the weight and credibility of the
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25 ¹ Defendants also seek to exclude Bergmark’s Supplemental Report as untimely. (See ECF No. 318-2 at 4).
26 Defendants’ rebuttal expert, Richard S. Hoffman, reviewed Bergmark’s supplemental report, sat in on Bergmark’s
27 deposition, and subsequently submitted his own supplemental report. (See ECF No. 369, Exh. D at 70-72). There
28 is no prejudice here. See *Celador Int’l, Ltd. v. Walt Disney Co.*, 2008 WL 11342595, at *8 (C.D. Cal. Dec. 17,
2008) (“a supplemental report, and the testimony thereon, should be excluded only if there is prejudice to the
opposing party”) (citing *Wendt v. Host International, Inc.*, 125 F. 3d 806 (9th Cir. 1997)).

1 testimony rather than its admissibility. See *Humetrix*, 268 F.3d at 919 (“To the
2 extent [defendant] sought to challenge the correctness of [plaintiff’s] experts’
3 testimony [on lost profits], its recourse is not exclusion of the testimony, but, rather,
4 refutation of it by cross-examination and by the testimony of its own expert
5 witnesses.”); *Wylar Summit P’ship v. Turner Broad. Sys., Inc.*, 235 F.3d 1184, 1192
6 (9th Cir. 2000) (“Weighing the credibility of conflicting expert witness testimony is
7 the province of the jury.”). Therefore, Defendants’ motion to exclude the testimony
8 of Brian Bergmark is denied.

9 **III. CONCLUSION**

10 For the foregoing reasons, the Court GRANTS Plaintiffs’ motion to exclude
11 the expert testimony of Timothy L. Fort (ECF No. 294) and DENIES Defendants’
12 motions to exclude the expert testimony of Dr. Philip Michael Bolger (ECF No.
13 306), Robert Geary (ECF No. 310), Dr. Michael John Glade (ECF No. 311), Dr.
14 Samuel N. Grief (ECF No. 312), Dr. Edward M. Mazze (ECF No. 313), Dr. Arthur
15 J. Miller (ECF No. 314), Dr. David Stewart (ECF No. 315), and Brian Bergmark
16 (ECF No. 318).

17 The Court limits its ruling to the consideration of the expert evidence on the
18 35 pending motions for summary judgment. If the expert is to actually be called as
19 a witness at trial, a party may use one of its allotted motions *in limine* to seek an
20 evidentiary hearing seeking to exclude the expert’s testimony.

21 IT IS SO ORDERED.

22 Dated: February 13, 2018

23 
24 Barry Ted Moskowitz, Chief Judge
25 United States District Court
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