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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GINA L. BRITTON, a single woman, and
JEREMY N. LARSON, a single man, and
on behalf of others similarly situated,

Plaintiffs,

v.

SERVICELINK FIELD SERVICES,
LLC, formerly known as LPS FIELD
SERVICES, INC.,

Defendant.

NO: 2:18-CV-0041-TOR

ORDER DENYING CLASS
CERTIFICATION

BEFORE THE COURT are Plaintiffs Gina L. Britton (and Jeremy N. Larson's)¹ Motion for Class Certification (ECF No. 51) and Defendant

¹ The original motion for Class Certification was brought by Gina L. Britton and Tami J. Frase-Phillips, but Ms. Frase-Phillips' claims have since been dismissed and Jeremy N. Larson was added as a named Plaintiff. ECF No. 67.

1 ServiceLink Field Services, LLC’s Motion to Exclude (ECF No. 84) and Motion
2 for Evidentiary Hearing (ECF No. 85). The Court reserved ruling on the necessity
3 of an evidentiary hearing until after considering the parties’ oral arguments on the
4 other motions. On June 25, 2019, the Court heard oral argument on the Motion to
5 Certify and Motion to Exclude. The Court has reviewed the file and the records
6 therein, heard from counsel and is fully informed. For the reasons discussed
7 below, Plaintiffs’ Motion to Certify (ECF No. 51) is **denied**. Defendant’s Motion
8 to Exclude (ECF No. 84) is **granted**. Defendant’s Motion for Evidentiary Hearing
9 (ECF No. 85) is **denied as moot**.

10 **BACKGROUND**²

11 The instant suit involves a claim by Plaintiffs Gina L. Britton and Jeremy N.
12 Larson, personally and on behalf of others similarly situated, against Defendant
13 ServiceLink Field Services, LLC,³ for its part in securing properties subject to
14 foreclosure.

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18 ² The underlying facts are not in dispute, unless otherwise noted.

19 ³ Given Defendant is a successor in interest to LPS Field Services, Inc., the
20 Court need not distinguish between ServiceLink and LPS Field Services.

1 **A. ServiceLink; Complained-of Services**

2 ServiceLink provides asset preservation services to lenders by contracting
3 with vendors, who provide the actual services. ECF No. 73 at 17. Among other
4 things, ServiceLink would – through its vendors – “confirm owner occupancy, []
5 preserve property where owners died or property was otherwise vacant or
6 abandoned, address insurance losses/repairs, remedy code or HOA violations, []
7 address emergencies like burst pipes[,]” and “abate[] hazards/nuisances to prevent
8 deaths/injuries.” ECF No. 73 at 17. Specifically at issue here, ServiceLink would
9 drill out and replace the locks on homes – barring access *through that entry* – and
10 leave a sticker on the home informing the owner of how they can get a key. ECF
11 No. 73 at 17. In all, ServiceLink worked with 28 lenders and 27 unrelated vendors
12 during the proposed class period. ECF No. 73 at 17. Notably, “Lenders represent
13 their authority to [order the services to] ServiceLink and warrant compliance with
14 all laws[.]” ECF No. 73 at 17.

15 In 2016, the Supreme Court of Washington held that contract provisions
16 found in deeds of trust which purport to allow lenders to take possession of homes
17 after default, but before foreclosure, were invalid. *Jordan v. Nationstar Mortg.,*
18 *LLC*, 185 Wash.2d 876 (2016). As a result, all entries and actions on the property
19 – specifically, drilling out and replacing the locks – based *solely* on this pre-default
20 consent were deemed to be a trespass that effectively interfered with the owner’s

1 property rights. Here, Plaintiffs are seeking to hold Defendant liable for working
2 as the middleman between the lenders and the vendors.

3 **B. Plaintiff Britton**

4 Britton purchased property located at 35 E. Walton, in Spokane,
5 Washington, with Sean Britton (her future husband) and her grandmother Esther
6 Haugen (“Haugen”) as co-owners, using an FHA-loan. ECF No. 73 at 19. Britton
7 testified that Haugen was on the loan “so [Britton] could get into a house” and that
8 Haugen thereafter tried to transfer her property interest to Britton, but the
9 document purporting to do so was not valid. ECF No. 80-2 at 152-153. Haugen
10 passed away in 2004 and her heirs have not been joined as named parties.

11 Britton fell behind on payments and her lender enlisted ServiceLink to
12 determine the occupancy status. *See* ECF No. 80-3 at 127 (letter re: default on
13 loan), 130 (Letter verifying occupancy). “In 2011, Britton entered into a
14 forbearance agreement with Wells Fargo, promising to owner-occupy” the Walton
15 house (“Walton”), but “[w]ithin days she [] moved to Northport” and “admit[ted]
16 Northport was her primary residence.” ECF No. 73 at 19. Britton later told the
17 foreclosure trustee and Wells Fargo that Walton was “owner occupied”, despite her
18 only allegedly visiting the property once or twice a month to make repairs. ECF
19 No. 73 at 20. “Britton admits Walton looked abandoned with no utilities, missing
20

1 siding and furnishings, discontinued construction, accumulated mail, no garbage
2 service, and no one living there.” ECF No. 73 at 20.

3 “On December 30, 2013, Wells Fargo noted emergent conditions—that
4 Walton was likely to freeze—and ordered preservation, providing its guidelines
5 and instructions.” ECF No. 73 at 20. “On January 2, 2014, a vendor reported
6 Walton was vacant and that it had changed the front door lock and padlocked the
7 shed.” ECF No. 73 at 20. Britton asserts that the vendor also replaced the lock on
8 the garage. ECF No. 73 at 20. The vendor reported that the toilet had frozen and
9 the line broke. ECF No. 73 at 20-21.

10 Britton went to the property on or about January 11, 2014 and was able to
11 enter the house through the back door with her own key. ECF Nos. 73 at 21; 56-1
12 at 30-31. ECF No. 73 at 21. According to Britton, “[t]he inside was absolutely
13 trashed.” ECF No. 80-2 at 32. “There was garbage thrown all over the floor”,
14 “urine all over the bathroom”, and “[t]he toilet was broken.” ECF No. 80-2 at 32.
15 Britton received a key to the changed lock and, on January 16, 2014, Britton broke
16 the key off in the lock to keep ServiceLink from entering the property thereafter.
17 ECF Nos. 73 at 21; 56-1 at 31. At no time was Britton locked out of the house.

18 Britton blamed ServiceLink for “destroy[ing]” her house and for stealing
19 property inside the home. ECF No. 80-3 at 213-14. She complained to the lender
20 that ServiceLink was “stalking” her at her property. ECF No. 80-3 at 215.

1 Britton’s lender tried to arrange a meet-and-greet between Britton and ServiceLink
2 to discuss the issues, but Britton did not want to deal with them. ECF No. 80-3 at
3 216. The lender “got a different contractor” with ServiceLink to discuss the issue
4 with Britton, but Britton’s partner (Time Lowe) told the lender to “go ahead and
5 send them out” and relayed his intention to physically assault and detain the
6 contractor, concluding with “[h]ow does that sound?”. ECF No. 80-3 at 216; *see*
7 *also* ECF No. 80-3 at 247. The lender ultimately purchased the home in a
8 foreclosure sale on June 13, 2014.

9 **C. Plaintiff Larson**

10 Larson purchased property at 5501 NE 49th Street, Vancouver, Washington.
11 ECF No. 73 at 23. “On March 17, 2017, ServiceLink informed Larson’s lender
12 [that the property] was reported unsecure and asked if [Larson’s lender] had the
13 borrower(s) consent to enter, secure, and maintain the property.” ECF No. 73 at
14 23. ServiceLink then changed a lock on the property. However, Larson, like
15 Britton, was never locked out and he was able to gain access to the property
16 immediately (only the backdoor lock was replaced). ECF No. 73 at 23. Larson
17 continued to live at the property and “never demand[ed] a lock change or lockbox
18 removal.” *See* ECF Nos. 73 at 23; 82-3 at 1-2, ¶ 2.

19 Defendant contends that it is still determining whether the lender had actual
20 authority from Larson or whether the lock change was a result of a mistake, given

1 Defendant changed its policies post-*Jordan* to require post-default consent before
2 performing a lock change. ECF No. 73 at 23.

3 D. Claims

4 Based on its role in facilitating the asset preservation services, Plaintiffs
5 assert that ServiceLink is liable for (1) Common Law Trespass; (2) Intentional
6 Trespass in violation of RCW 4.24.630; (3) Negligent Trespass; (4) violation of the
7 Washington Consumer Protection Act, RCW 19.86; and (5) Negligent Supervision.
8 ECF No. 69 at 36-49, ¶¶ 7.1-11.11. Plaintiffs seek damages, attorneys' fees, costs,
9 and injunctive relief. ECF No. 69 at 49-50.

10 Plaintiffs now move the Court to certify their proposed class. ECF No. 51;
11 *see* ECF No. 69 at 23, ¶ 6.1 (proposed class definition). Defendant opposes the
12 motion and requests the Court exclude the Plaintiff's expert opinion. ECF Nos. 73;
13 84. These motions are now before the Court.

14 GOVERNING LAW; STANDARD OF REVIEW

15 Federal Rule of Civil Procedure 23 governs class actions. "Rule 23 specifies
16 that the party seeking class certification bears the burden of demonstrating that (i)
17 all four requirements of Rules 23(a) and (ii) at least one of the three requirements
18 under Rule 23(b) are met." 1 McLaughlin on Class Actions § 4:1 (15th ed.). Rule
19 23(a) lists the following four "prerequisites" for a class action:

- 20 (1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;

- 1 (3) the claims or defenses of the representative parties are typical of the
claims or defenses of the class; and
2 (4) the representative parties will fairly and adequately protect the interests
of the class.
3

4 Rule 23(b)(3) – upon which Plaintiffs rely – provides that a class action may be
5 maintained if the four prerequisites under 23(a) are present and “the court finds
6 that the questions of law or fact common to class members predominate over any
7 questions affecting only individual members, and that a class action is superior to
8 other available methods for fairly and efficiently adjudicating the controversy.”

9 “The class-action device was designed as ‘an exception to the usual rule that
10 litigation is conducted by and on behalf of the individual named parties only.’”
11 *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982) (quoting *Califano v.*
12 *Yamasaki*, 442 U.S. 682, 700-701 (1979)). “Broadly speaking, the joint purpose of
13 these class certification conditions is to ensure that it is fair to purported absent
14 class members and not meaningfully prejudicial [to] defendants to depart from the
15 paradigm of non-representative litigation because the claims of (and defenses
16 against) a representative plaintiff are sufficiently similar to those of class
17 members.” 1 McLaughlin on Class Actions § 4:1.

18 “In determining the propriety of a class action, the question is not whether
19 the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits,
20 but rather whether the requirements of Rule 23 are met.” *Eisen v. Carlisle &*

1 *Jacquelin*, 417 U.S. 156, 178 (1974) (citation omitted). As such, in the class action
2 setting, courts do not have “any authority to conduct a preliminary inquiry into the
3 merits of a suit in order to determine whether it may be maintained as a class
4 action.” *Id.* at 177. However, “the class determination generally involves
5 considerations that are enmeshed in the factual and legal issues comprising the
6 plaintiff’s cause of action.” *Gen. Tel. Co. of Sw.*, 457 U.S. at 160 (internal
7 quotation marks and citations omitted).

8 At the certification stage, the party seeking to maintain a class action under
9 Rule 23(b)(3) cannot rely on pleadings, but “must affirmatively demonstrate his
10 compliance” with Rule 23, including the requirement that “questions of law or fact
11 common to class members predominate over any questions affecting only
12 individual members[.]” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011);
13 *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013).

14 **DISCUSSION**

15 The Court finds that Plaintiffs have failed to demonstrate that a class action
16 should be certified. As discussed below, because Britton and Larson were never
17 locked out of their homes – by far the gravamen of the proposed class damages –
18 their claims are not typical of the proposed class and they are not adequate
19 representatives. Further, Plaintiffs have failed to demonstrate that common
20 questions predominate because (1) absent a viable methodology, the issue of

1 damages will predominate over the common questions, and (2) Plaintiffs have not
2 provided a viable class-wide methodology for determining loss of use damages.

3 A. Typicality

4 “To demonstrate typicality, Plaintiffs must show that the named parties’
5 claims are typical of the class.” *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970,
6 984 (9th Cir. 2011); Fed. R. Civ. P. 23(a)(3). “The test of typicality is whether
7 *other members have the same or similar injury*, whether the action is based on
8 conduct which is not unique to the named plaintiffs, and whether other class
9 members have been injured by the same course of conduct.” *Id.* (internal citations
10 omitted; emphasis own) (quoting *Hanon v. Dataproducts, Corp.*, 976 F.2d 497,
11 508 (9th Cir. 1992). “The purpose of the typicality requirement is to ensure that
12 the interests of the class representative align with those of the class, so that by
13 prosecuting his own case he simultaneously advances the interests of the absent
14 class members.” 1 McLaughlin on Class Actions § 4:16.

15 While “Rule 23(a)(3) does not require the representative plaintiffs to have
16 the same claim size or financial interest as the class they seek to represent[.]” *Id.* §
17 4:17, the Court finds that Britton and Larson are not typical of the proposed class
18 because they did not “suffer the same injury” as the class they seek to represent.
19 *Ellis*, 657 F.3d at 984 (“The test of typicality is whether *other members have the*
20 *same or similar injury*” (emphasis own)); *Schlesinger v. Reservists Comm. to Stop*

1 *the War*, 418 U.S. 208, 216 (1974) (“To have standing to sue as a class
2 representative it is essential that a plaintiff must be a part of that class, that is, he
3 must possess the same interest and suffer the same injury shared by all members of
4 the class he represents.”). Importantly, Plaintiffs seek damages for (1) the cost of
5 replacing the damaged lock, (2) the value of rent for the time the members were
6 *actually* ousted from the property (a proxy for loss of use of the property), (3) the
7 amount of fees charged to the members for the services, and (4) disgorgement of
8 earnings. *See* ECF No. 69 at 35, ¶¶ 6.34.6, 6.36. However, neither Britton nor
9 Larson have a claim for recovering rental value because they were never locked
10 out of their houses, which is by far the most substantial claim for damages. Given
11 the fact that (1) whether Plaintiffs can recover the fair market rental value is not a
12 settled issue, *see* ECF No. 51 at 24, and (2) Britton and Larson have no personal
13 stake in securing such a remedy, the Court cannot say Britton and Larson’s claims
14 are typical of the class members. *See Hesse v. Sprint Corp.*, 598 F.3d 581, 592
15 (9th Cir. 2010) (“As a resident of Missouri, Benney’s injury was not typical of the
16 Washington Plaintiffs’ injury, and, as a result, he failed to vigorously prosecute
17 their claims or avoid the conflict between their legal interests.”).

18 **B. Adequacy**

19 “An adequate representative must have the capacity to vigorously and
20 conscientiously prosecute a derivative suit and be free from economic interests that

1 are antagonistic to the interests of the class.” *Larson v. Dumke*, 900 F.2d 1363,
2 1367 (9th Cir. 1990) (citations omitted). Among other considerations, courts look
3 to the “lack of any personal commitment to the action on the part of the
4 representative plaintiff” and the “remedy sought by plaintiff”. *Id.* (citations
5 omitted). Moreover, “if the putative representative’s conduct raises questions
6 about his or her credibility or integrity, certification will be denied.” 1
7 McLaughlin on Class Actions § 4:27.

8 The Court finds Britton and Larson are not adequate representatives of the
9 class. As discussed above, they do not have any personal commitment to the
10 recovery of the value of rent for damages because they were never locked out of
11 their houses. As such, they cannot adequately represent a class where the
12 predominate source of damages stems from damages they do not share. *See*
13 *Hesse*, 598 F.3d at 588-89 (9th Cir. 2010) (representative was not typical because
14 he did not suffer the injury suffered by Washington residents). Indeed, they do not
15 even have standing to pursue such a remedy because litigating that matter will not
16 redress Plaintiffs’ injuries.

17 The Court also finds that Plaintiffs have failed to demonstrate that Britton
18 can fairly fulfill her role as a fiduciary to the putative class members. First, Britton
19 has an uncontroverted record of lying with respect to the property at issue
20 (specifically telling the lender that the property was owner-occupied, despite only

1 visiting the property one or two times a month for much-needed repairs). Second,
2 Britton admitted to breaking out the windows, gutting the kitchen cabinets and the
3 bathroom sink and tub, leaving the house unsecured, and also breaking off the key
4 inside the changed lock. *See* ECF No. 80-2 at 76 (Britton denying she did anything
5 to damage the property then admitting she broke the windows out because she was
6 “pissed off because Wells Fargo stole my house.”); ECF No. 80-2 at 82, 99
7 (admitting she took the bathtub and sink from the bathroom, along with the
8 cabinets from the kitchen); ECF No. 80-2 at 89 (admitting she broke the key off in
9 the door). Third, Britton does not have a viable trespass claim (because of the
10 statute of limitations), and there is a question about whether the fractured
11 ownership of the Walton house will become an issue unique to Britton. Esther
12 Haugen’s heirs have not appeared, nor has co-owner Sean Britton. Additionally,
13 Britton is an admitted daily user of marijuana that previously used the property to
14 grow marijuana. At the very least, these problems would be a serious distraction to
15 the merits of the underlying case.

16 The Court also finds that Plaintiffs have failed to demonstrate that Larsen
17 can fairly fulfill his role as a fiduciary to the putative class members. Larson is an
18 admitted marijuana grower who grew 205 plants in his house, was arrested,
19 pleaded guilty and was placed on probation. He was never evicted or left. He lost
20 one stick out of the bundle of sticks—exclusive possession, but that did not bother

1 him at all. He continued to live there for over two years without paying the
2 mortgage yet collected somewhere between \$1,250 to \$1,500 a month from three
3 different tenants. Larsen maintained two properties, the subject property on 49th
4 Street and another on 91st street where he lives with his two children and their
5 mother, —but he claims to live in both houses. These issues would be a serious
6 distraction to the merits of the underlying case and compound the complexity of
7 determining damages for someone that does not live with his family in the 49th
8 street property and was never locked out.

9 C. **Predominance**

10 While the Court finds there are common questions of law—namely, whether
11 Defendant is liable for trespass and for its conduct under the Washington
12 Consumer Protection Act—the Court also finds the individualized question of
13 damages, without a common methodology in assessing those damages, will
14 overwhelm the common questions. The Court further finds that Plaintiffs have
15 failed to present a viable class-wide method for calculating damages.

16 1. Individual questions of damages predominate

17 “The test [for predominance] is whether adjudication of the class
18 representatives’ claims, taking into consideration (among other things) how
19 damages must be proved in the case and any affirmative defenses available to
20 defendant, will effectively establish a right of recovery for all other class members

1 without the need to inquire into each individual’s circumstances.” 1 McLaughlin
2 on Class Actions § 5:23. “Predominance is thus not a strict counting exercise;
3 rather, it requires a weighing of the overall significance of common issues against
4 those requiring individual proof and evaluation of whether common issues are
5 integral to every class member’s claim and significantly advance each class
6 member’s claim toward resolution.” *Id.* “Predominance is established if the legal
7 or factual issues that can be resolved through generalized, common evidence are
8 more significant to the litigation than the issues subject only to individualized
9 proof.” *Id.* “If what remains behind for subsequent individual adjudication is
10 more significant, certification should be denied.” *Id.*

11 Critically, Plaintiffs seek to recover the fair market rental value for the time
12 class members were locked out of their houses. This requires two individualized
13 inquiries into (1) the rental value for each member; and (2) the duration the
14 member was locked out of their house. In comparison to the relatively
15 straightforward common issues – whether Defendants are legally liable for the
16 undisputed conduct – that are mostly legal in nature, the individualized inquiries
17 are highly fact sensitive and unique to each member. In light of the little leg-work
18 needed to address the issues common to all members, the individual inquiries
19 would overwhelm the common issues, absent some workable methodology. In
20 such circumstances, the Court cannot say that the common issues predominate or

1 that a class action is the superior method of resolution. As discussed below,
2 Plaintiffs attempt to buttress these concerns by proposing a class-wide model that
3 streamlines the process of calculating fair rental value, but this attempt falls far
4 short.

5 2. Plaintiffs do not have a viable class-wide methodology

6 Where damage calculations would otherwise predominate over the common
7 questions, a class may be maintained if the plaintiff demonstrates “that the
8 damages resulting from that injury [are] measurable ‘on a class-wide basis’
9 through use of a ‘common methodology.’” *See Comcast Corp.*, 569 U.S. at 30.

10 That is, individualized claims for damages can be manageable “where the fact of
11 injury and damage breaks down in what may be characterized as ‘virtually a
12 mechanical task,’ ‘capable of mathematical or formula calculation[.]’” *Windham*
13 *v. Am. Brands, Inc.*, 565 F.2d 59, 68 (4th Cir. 1977) (footnotes omitted); 2

14 McLaughlin on Class Actions § 8:12.

15 On the other hand, where the issue of damages and impact does not lend
16 itself to such a mechanical calculation, but requires “separate ‘mini-
17 trial,(s)’” of an overwhelming large number of individual claims, courts have
18 found that the “staggering problems of logistics” thus created “make the
19 damage aspect of (the) case predominate,” and render the case
20 unmanageable as a class action.

19 *Windham*, 565 F.2d at 68 (footnotes omitted); 1 McLaughlin on Class Actions
20 § 4:19 (“Courts have routinely denied certification where determining individual

1 damages is not susceptible to a readily-applied, mechanical computation, but rather
2 is dependent on the unique or complex circumstances of each class member”).

3 Plaintiffs proffer the opinion of Dr. Kilpatrick for the position that the
4 damages can be calculated on a class-wide methodology. *See* ECF No. 55.
5 Defendant argues the opinion is inadequate because the damage calculations are
6 not reliable or relevant. ECF No. 84 at 5. Plaintiffs, however, urge the Court to
7 view the potential problems as an issue of weight and not admissibility, and note
8 that Dr. Kilpatrick’s opinions have not yet been finalized. The Court agrees with
9 Defendants and finds Plaintiffs have failed to present a viable methodology for
10 calculating damages; the matter is not one of weight, but of admissibility as a
11 matter of relevance. Moreover, the time to present a valid methodology is now, at
12 the certification stage, not later.⁴

13 Dr. Kilpatrick proposes finding the fair market rental value based on the
14 value of the property and the relevant rent-to-price ratio *for the county*. Dr.
15 Kilpatrick determines the value of the property by using the Greenfield automated
16 valuation model (AVM) when there are a sufficient number of “comparable
17 properties”. Under this approach, the AVM calculates the proposed value of a
18 property by comparing like sales based on the property type, the location, and the

20 ⁴ Notably, this issue was not addressed in the case of *Jordan v. Nationstar*.

1 time. ECF No. 55 at 22, ¶ 52. Dr. Kilpatrick only identifies four property types:
2 single-family residences, condominiums, townhouses, and commercial properties.
3 ECF No. 55 at 22, ¶ 52. The “location” is a region of the state up to individual
4 neighborhood. ECF No. 55 at 22, ¶ 52. At its base, the AVM simply assigns a
5 value to a home based on the average value of properties with certain
6 characteristics and within a certain geographical area.

7 Dr. Kilpatrick determines the rent-to-price ratio for the relevant county by
8 (1) comparing actual rental transactions to the value of the rental home (calculated
9 by using the AVM) to determine a rent-to-price ratio, or (2) using summarized
10 rental values from the U.S. Census Bureau and HUD data to determine a non-
11 market based rent-to-price ratio, depending on the available data. ECF No. 55 at
12 28-31, ¶¶ 67-75. The proposed fair market rental value is then determined by
13 applying the rent-to-price ratio to the proposed value of the house.

14 Once the daily rental value for the property is determined, the purported
15 rental value is multiplied by the number of days the member is locked out to
16 determine the total damages for loss of use. Dr. Kilpatrick calculates the number
17 of days locked out by beginning with the date the lock-change services were
18 provided and ending with the date the property was sold (where no records of a
19 sale occurred, the end date is ongoing and set at the day of the report). ECF No. 55
20 at 11, ¶ 17.

1 The proposed method has several problems. First, there appears to be no
2 real method for determining which variables to use for the AVM—at the very
3 least, Dr. Kilpatrick failed to explain such. Dr. Kilpatrick states that the
4 “[i]nformation most relied upon is living area, location, and sale date” and that he
5 “determined that incorporating other variables, such as number of bedrooms,
6 basement size, attic size, and fireplace characteristic, would depend on the property
7 type and ownership.” ECF No. 55 at 21, ¶¶ 51-52. He then states that “[i]n the
8 AVM used to model the plaintiff properties many of the possible property
9 characteristics were not necessary because of the high statistical correlations with
10 the variable [he] had already chosen” ECF No. 55 at 21, ¶ 51. However, Dr.
11 Kilpatrick does not explain (1) the method of determining what characteristics to
12 use, (2) why he chose the variables he did for Britton and Larson, or even (3) what
13 variable he used for Britton and Larson.⁵ Without answers to these questions, the
14

15 ⁵ Notably, Dr. Kilpatrick determined that “comparable properties” for Britton
16 and Larson are “residential single family homes [in the subject property county]
17 where the primary owner is an individual.” ECF No. 55 at 24, ¶ 58. This seems to
18 suggest that Dr. Kilpatrick did not use other variables for his calculations. If true,
19 every single-family home would be valued the same as others in their
20 neighborhood—a separate problem in and of itself. However, it appears Dr.

1 Court cannot adequately determine the actual methodology or whether the model is
2 reliable.

3 Second, Dr. Kilpatrick’s proposed method fails to take into account
4 information that is critical to a fair calculation of rental value. Importantly, Dr.
5 Kilpatrick assumes “that the actual condition of [the] home falls within . . . the
6 definition of average for that marketplace.” ECF No. 83-1 at 105. In other words,
7 the actual condition of the home is not taken into account when determining rental
8 value. This information is important because Britton’s property was not even
9 inhabitable, as may be the case for many other distressed properties. As such,
10 awarding rental value based on the average house condition would result in a
11 windfall to Britton (and others similarly situated) and violate Defendant’s Seventh
12 Amendment right to a jury trial and due process.

13 Third, the method for determining the number of days locked out is wholly
14 insufficient. First, the method assumes every member was actually locked out
15

16 Kilpatrick may have used additional variables because square feet, acres, year
17 built, and total baths are included as variables for Britton and Larson on Table 1 of
18 Dr. Kilpatrick’s declaration, although Dr. Kilpatrick does not mention their
19 application. ECF No. 55 at 25-26, ¶ 61. In any event, this ad-hoc, unexplained
20 approach as to what factors should be considered is anything but methodical.

1 beginning at the time of the service; yet both class representatives were never
2 locked out. Second, the method assumes every member was locked out until the
3 time of foreclosure or sale of the house and assumes the lock-out is ongoing where
4 no record of the sale is found. *See* ECF No. 55 at 10-11, ¶¶ 16-17. As with the
5 first problem, this ignores the fact (1) that many members were *never* completely
6 locked out and (2) that many others that were locked out were able to gain access
7 to the home before foreclosure or some other sale occurred (the sticker left by
8 Defendant informed the owner that they can recover the keys). Again, awarding
9 damages based on such calculations would result in a windfall to Plaintiffs and
10 violate Defendant's right to due process.

11 These problems are highlighted in Dr. Kilpatrick's application of the
12 methodology to the representative Plaintiffs' cases. Using his method, Dr.
13 Kilpatrick's proposed value for the Britton property was 40 percent over the actual
14 sale price. ECF No. 84 at 7. Further, Dr. Kilpatrick determined Britton was
15 locked out for 181 days and that Larson was locked out for 651 days, even though
16 neither was actually locked out of their home for even one day. ECF No. 84 at 7.
17 This demonstrates the impact of failing to take into account critical, individualized
18 information as to the (1) the condition of the house (*e.g.* whether the house was
19 even habitable) and (2) whether the member was actually ousted or whether he or
20 she simply lost one stick (exclusive access) out of the proverbial bundle of sticks.

1 *See Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1305 (9th
2 Cir. 1990) (“Rule 23 [does not] permit[]dispensing with individual proof of
3 damages”).

4 At the hearing for class certification, Counsel for Plaintiffs suggested the
5 model could be used as a base and then damages can be calculated by looking to
6 each members’ facts—in recognition that Britton and Larson were not even
7 ousted—but this turns the whole methodology back into an individualized
8 approach for each member. *See e.g., Corley v. Entergy Corp.*, 220 F.R.D. 478, 486
9 (E.D. Tex. 2004) (“Damages for trespass to land cannot be calculated without
10 examining the individual circumstances underlying land ownership. Overall,
11 trespass damages in this case cannot be calculated on a class-wide basis. Instead,
12 each landowner is entitled to damages based on the specific characteristics of his or
13 her land and the extent of the Defendants’ trespass on his or her land.”).

14 As such, Plaintiffs have not met their burden in demonstrating class
15 certification is proper and their Motion (ECF No. 51) is **denied**. Given the opinion
16 of Dr. Kilpatrick is not relevant or reliable, the Motion to Exclude (ECF No. 84) is
17 **granted**. *See Wal-Mart Stores*, 564 U.S. at 354 (evinced doubt that *Daubert* did
18 not apply to expert testimony at the certification stage of class-action proceedings).
19 The Motion for Evidentiary Hearing (ECF No. 85) is **denied as moot**.

20 //

1 **ACCORDINGLY, IT IS HEREBY ORDERED:**

2 1. Plaintiffs Gina L. Britton (and Jeremy N. Larson's) Motion to Certify

3 (ECF No. 51) is **denied**.

4 2. Defendant ServiceLink Field Services, LLC's Motion to Exclude (ECF

5 No. 84) is **granted**.

6 3. Defendant ServiceLink Field Services, LLC's Motion for Evidentiary

7 Hearing (ECF No. 85) is **denied as moot**.

8 The District Court Executive is hereby directed to enter this Order and
9 provide copies to counsel.

10 **DATED** July 26, 2019.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
Chief United States District Judge