

HONORABLE RICHARD A. JONES

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7 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 395 LAMPE, LLC, et al.

10 Plaintiffs, Counterclaim
Defendants,

11 v.

12 KAWISH, LLC, et al.,

13 Defendants, Counterclaim
14 Plaintiffs, Third-Party
Plaintiffs,

15 v.

16 WAYNE L. PRIM, et al.,

17 Third-Party Defendants.

CASE NO. C12-1503RAJ

ORDER

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19 **I. INTRODUCTION**

20 This matter comes before the court on several motions the parties filed in advance
21 of the three-day evidentiary hearing set to begin on January 7, 2014. For the reasons
22 stated below, the court GRANTS Plaintiffs' motion (Dkt. # 82) to exclude any expert
23 witness for Defendants except Doug McDaniel, DENIES Defendants' motion (Dkt. # 88)
24 to extend the discovery cutoff, and directs the clerk to TERMINATE Defendants' motion
25 for partial summary judgment (Dkt. # 86) without prejudice.
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28 ORDER – 1

II. DISCUSSION

1 No later than May 20, 2013, the parties agreed to begin resolving their disputes by
2 preparing for a three-day hearing to determine the value of membership units in Western
3 Pacific Timber, LLC (“WPT”). The parties’ disputes arise from a series of loans that
4 Plaintiffs made to Defendants. Plaintiff 395 Lampe, LLC (“Lampe”) and at least one
5 other entity under the control of Wayne Prim made those loans to Defendant Kawish,
6 LLC (“Kawish”), an entity that Timothy Blixseth controls.¹ Mr. Blixseth personally
7 guaranteed the loans. The loans are in default. Among the collateral Mr. Blixseth used
8 to secure the loans was his one-third interest in WPT. WPT’s principal assets are three
9 large parcels of timberland in Washington and Idaho. Mr. Prim or entities under his
10 control controlled, at the time of the loans, another one-third interest in WPT. An
11 unrelated party apparently controls the remaining one-third interest in WPT.

12 The parties are focused on the value of WPT because if, as Mr. Blixseth and other
13 Defendants contend, the value of Mr. Blixseth’s WPT interest exceeds Defendants’
14 outstanding debt, it may be unnecessary (or unlawful) for Plaintiffs to continue their
15 efforts to seize other collateral and otherwise collect on the loans.

16 The parties have filed three motions. First, Plaintiffs ask the court to prevent
17 Defendants from untimely identifying expert witnesses and from relying on improper
18 expert testimony from Mr. Blixseth. Second, Defendants ask the court to extend the
19 discovery deadline until December 31. Finally, Defendants seek partial summary
20 judgment on certain issues arising from Plaintiffs acquiring title to Mr. Blixseth’s WPT
21 interest in April 2012 in an effort to collect on the loans.

22 To put these motions in context, the court notes that the process of bringing these
23 disputes to this forum has been frustratingly slow and convoluted. The court was
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25 ¹ Plaintiffs and Defendants are an interrelated web of corporations and other corporate entities,
26 along with Mr. Prim and Mr. Blixseth, who own or control those entities. This order contains no
27 findings of fact (except those related to the conduct of the parties’ counsel), and the court has not
28 identified other Plaintiffs or Defendants except as necessary.

1 encouraged that as of the spring of this year, the parties had ended most of their litigation
2 in other courts and had begun to agree on a process for resolving these disputes. In their
3 May 20 “Joint Statement Regarding Litigation Status,” (Dkt. # 69), the parties informed
4 the court that the “heart of this dispute” was Defendants’ assertion that their debts had
5 been extinguished by Plaintiffs taking title to Mr. Blixseth’s WPT interest. *Id.* at 6.
6 Although they identified several subsidiary issues (including whether taking title to Mr.
7 Blixseth’s WPT interest constituted a “disposition” of that interest), they proposed an
8 evidentiary hearing on just two issues: the “value of the WPT Membership Units and the
9 method, if any, of the commercially reasonable disposition” of those units. *Id.* at 7.

10 The court issued an order requiring the parties to “explain precisely how the[y]
11 propose to resolve the issues they have raised, whether by way of dispositive motion, a
12 ‘trial on the papers’ procedure, by evidentiary hearing, or otherwise.” Dkt. # 71 (Jun. 24
13 ord. at 2). In response, the parties filed a joint status report in which they proposed that
14 the court first conduct “an evidentiary hearing to determine the value of the WPT
15 Membership Units.” Dkt. # 73 (Jul. 12 joint status report at 3). The parties asked for
16 three days for the hearing. *Id.* They identified no other issue for the court to resolve at
17 the hearing. They told the court that they would schedule a mediation to take place
18 shortly after the court determined the value of the WPT units. *Id.* at 4. The parties
19 represented that they had already had a discovery conference and that they would
20 exchange initial disclosures as of the day they filed the joint status report. *Id.* at 7. They
21 agreed that a “reasonable deadline for making expert disclosures” would be 60 days from
22 the court’s entry of a scheduling order, and that they would make rebuttal disclosures 30
23 days thereafter. *Id.* They agreed that they could complete “valuation discovery” within
24 120 days of that order. *Id.*

25 In short, the parties proposed a relatively brief discovery period, making a series
26 of agreements as to events to occur during that discovery period, and they proposed that

1 the court resolve the sole issue they identified for early resolution – the value of
2 membership units in WPT – solely via a three-day evidentiary hearing. Despite the
3 court’s explicit instruction to do so, they disclosed no intent to file dispositive motions.

4 The court issued a minute order on July 29 setting the close of discovery “on
5 issues related to the value of the WPT Membership units” on December 13. The court
6 imposed no subsidiary discovery deadlines, satisfied that the parties’ agreements ensured
7 that no more detailed court order was necessary. The court set a three-day evidentiary
8 hearing to begin January 7, 2014.

9 Despite having not complied with the court’s instructions to disclose any plan to
10 file a dispositive motion, Defendants filed their motion for partial summary judgment on
11 November 21, noting it for consideration on December 13. As noted, the court set no
12 deadline for dispositive motions because the parties did not request one. If the court had
13 set a deadline, it would either have set it much sooner than November 21, or it would
14 have set the evidentiary hearing much later. The court typically requires at least 30 days
15 from the conclusion of briefing to resolve a dispositive motion, and almost invariably sets
16 the deadline for dispositive motions so that the end of that 30-day period comes about a
17 month before trial. That practice allows the parties to incorporate a ruling on their
18 dispositive motions into their pretrial preparation or settlement discussions. Plaintiffs, for
19 their part, offer no objection to Defendants’ decision to file a summary judgment motion,
20 although they oppose the relief requested in the motion.

21 The court will not resolve the summary judgment motion before the evidentiary
22 hearing. Rather than resolve the motion hastily (and over the winter holidays), the court
23 will simply take it off its calendar. The court observes that the motion raises two related
24 disputes. Defendants contend that valuation methods that consider the “fair market
25 value” of the WPT units do not reflect the reality that, in this case, Plaintiffs’ assumption
26 of title of Mr. Blixseth’s WPT units in April 2012 was an event wherein Plaintiffs

1 acquired the units at a value that exceeded their fair market value. They argue that Mr.
2 Blixseth's interest was worth more to Plaintiffs than an open market buyer because their
3 acquisition of that interest gave them a two-thirds controlling interest in WPT. For that
4 reason, Defendants contend that it would be inappropriate to assess the value of their
5 interests by applying discounts that would treat Mr. Blixseth's interest as a minority
6 interest in a closely held corporation and value it as if it were to be acquired on the open
7 market. Plaintiffs dispute these contentions. Indeed, they dispute even that their taking
8 title to Mr. Blixseth's WPT interest in April 2012 was a disposition of that interest, as
9 opposed to a preliminary step toward conducting a disposition of those units on the open
10 market.

11 The court suggests no opinion on the outcome of the disputes in the summary
12 judgment motion. The court's initial review of the motion strongly suggests, however,
13 that if it raises any disputes of law, they are disputes whose resolution depends on the
14 resolution of the parties' factual disputes. The parties will presumably resolve those
15 disputes at the evidentiary hearing, where the court will simply find facts, as opposed to
16 being constrained by the rigid fact-finding rules that apply to a motion for summary
17 judgment. If there are legal disputes to be resolved in light of those factual findings, the
18 parties are free to point that out to the court at the evidentiary hearing. If necessary, the
19 court may order briefing to follow the hearing.

20 In addition, the summary judgment motion suggests that the parties have
21 disagreements over the scope of the evidentiary hearing. It appears, for example, that
22 Plaintiffs contend that whether their actions in April 2012 constituted a disposition of Mr.
23 Blixseth's WPT interest is beyond the scope of the hearing. This order concludes with
24 instructions to the parties to clarify the scope of the evidentiary hearing in conjunction
25 with their pre-hearing statement due on December 19.

1 The court now turns from the summary judgment motion to the parties' discovery
2 disputes. The record reveals that Defendants have almost wholly abdicated their
3 responsibility to timely make expert disclosures. Defendants agreed that they would do
4 so by 60 days after the entry of a scheduling order (which was about September 27), but
5 they did not. Worse, they took their position that their agreement to provide reports by
6 that date was meaningless because the court did not memorialize their agreement in its
7 July 29 scheduling order. Defendants were free, of course, to request a reasonable
8 extension of the deadline to which they agreed. But to treat their own agreements about
9 discovery deadlines as meaningless is bad faith. That bad faith was compounded by
10 Defendants' insistence that they had no obligation to produce expert reports until the
11 close of discovery on December 13. The record further reflects that Plaintiffs made
12 reasonable compromises with an eye toward simply completing expert discovery.
13 Despite those compromises, Defendants produced an expert report from just one witness:
14 Doug McDaniel. Defendants identified other experts by name, but have produced no
15 expert reports from them, despite their insistence that they could do so any time before
16 the close of discovery.

17 The court orders that Defendants may rely on no non-percipient expert witness
18 except Mr. McDaniel. Mr. McDaniel, moreover, must limit his testimony to the scope of
19 the five-page report that he submitted in November. The court makes no ruling on
20 whether Mr. Blixseth himself may offer opinion testimony on the value of the WPT units.
21 Because the court will serve as the fact finder at the evidentiary hearing, there is no
22 danger that a jury will draw improper conclusions if Mr. Blixseth testifies to something
23 beyond the scope of whatever expertise he allegedly possesses. Plaintiffs may rely on
24 objections and cross-examination to point out opinion testimony that is beyond the scope
25 of Mr. Blixseth's expertise.

1 The court declines to extend the discovery cutoff. Defendants have not shown
2 good cause for an extension. The court notes that the parties have stipulated to conduct a
3 deposition of a WPT representative late this month, and the court has no objection to that
4 stipulation, or to any other voluntary discovery efforts that occur before the evidentiary
5 hearing. The court also suggests no opinion on any third party's obligation to respond to
6 any valid subpoena.

7 III. CONCLUSION

8 For the reasons stated above, the court GRANTS Plaintiffs' motion (Dkt. # 82) to
9 exclude any expert witness for Defendants except Doug McDaniel, DENIES Defendants'
10 motion (Dkt. # 88) to extend the discovery cutoff,² and directs the clerk to TERMINATE
11 Defendants' motion for partial summary judgment (Dkt. # 86) without prejudice.

12 The court's scheduling order requires the parties to submit a joint statement akin
13 to a pretrial order no later than December 19. In preparing that statement, the parties
14 should work together to agree on the scope of issues to be resolved at the evidentiary
15 hearing. If the parties consent that the court may resolve an issue, the court will resolve
16 it. If the parties do not reach agreement, the court will resolve just one issue: the value of
17 the WPT membership units.

18 DATED this 18th day of December, 2013.

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22 The Honorable Richard A. Jones
23 United States District Court Judge

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27 ² Late yesterday afternoon, the parties filed a stipulation withdrawing the motion to extend the
28 discovery cutoff. The court need not address that stipulation in light of its disposition today.