IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

ROBROY INDUSTRIES – TEXAS, LLC, a Texas corporation, and ROBROY INDUSTRIES, INC., a Pennsylvania corporation, *Plaintiffs*, v. THOMAS & BETTS CORPORATION, a Tennessee corporation, *Defendant*.	§	Case No. 2:15-CV-512-WCB
THOMAS & BETTS CORPORATION, a Tennessee corporation, *Plaintiff*, v. ROBROY INDUSTRIES – TEXAS, LLC, a Texas corporation, and ROBROY INDUSTRIES, INC., a Pennsylvania corporation, *Defendants.*	§	Case No. 2:16-CV-198-WCB

MEMORANDUM OPINION AND ORDER

Before the Court are Plaintiffs' Motion to Exclude the Testimony and Report of Ambreen Salters, Dkt. No. 133 ("Robroy's Motion to Exclude"), and Thomas and Betts' Motion to Exclude Opinions of Chase A. Perry Regarding Damages, Dkt. No. 136 ("T&B's Motion to Exclude"). The plaintiffs' motion is GRANTED IN PART and DENIED IN PART. Thomas & Betts' motion is DENIED.

BACKGROUND

Both the plaintiffs ("Robroy") and the defendant ("T&B") propose to call an expert witness to testify about damages. In addition, T&B's expert witness intends to testify about the absence of a causal link between the allegedly improper conduct of T&B representatives and any losses suffered by Robroy. Both proposed expert witnesses are "professional witnesses," as opposed to "industry witnesses," in that neither has expertise in the industry at issue in this case, and both are associated with consulting groups that offer analysis and expert testimony on economic and financial issues to parties in legal proceedings.

1. Robroy's expert witness, Chase A. Perry, proposes to testify in support of Robroy's claim for damages. He has a law degree and an M.B.A., and he is employed by a consulting group where he has provided economic analysis and testimony in numerous commercial disputes, including unfair competition cases. In his expert report, Mr. Perry explains (1) that he assumes T&B will be held liable for one or more of Robroy's claims; (2) that he does not offer an opinion on the liability issue; and (3) that he addresses only the issue of the damages resulting from T&B's allegedly unlawful acts. Expert Report of Chase A. Perry Regarding Damages, Dkt. No. 136-4, at 3 ("Perry Report"). Based on his analysis of the evidence from T&B, Mr. Perry concludes in his supplemental report that Robroy is due damages in the form of disgorgement of T&B's profits in the amount of no less than $8.1 million, and as much as $22.9 million. Supplemental Expert Report of Chase A. Perry Regarding Damages, Dkt. No. 136-1, at 9 ("Perry Supplemental Report"). In the alternative, he testifies, Robroy is due lost profits damages of no less than $6.6 million and as much as $18.7 million. Perry Supplemental Report, Dkt. No. 136-1, at 10.

Mr. Perry proposes to testify about those projects for which data is available and in which, according to Robroy, T&B won the conduit contract as a result of false statements to customers. He proposes to testify that he derived his estimate of the profits T&B earned on those projects by subtracting the expenses T&B incurred from the dollar value of the sales, and that he derived the profits that Robroy would have earned on those projects by estimating the expenses that Robroy would have incurred and subtracting them from the gross revenue Robroy would have obtained from the projects in question.

T&B has moved to exclude Mr. Perry's testimony for three reasons: (1) because Mr. Perry "presents no reliable link between the alleged false statements" and the projects that he uses to calculate damages, T&B's Motion to Exclude, at 1, 8; (2) because Mr. Perry "relied on speculative and unreliable data to assign an 'estimated minimum and maximum sales value' of potentially lost sales for each . . . project," id. at 11; and (3) because Mr. Perry describes only "speculative and attenuated harm that the statements-at-issue merely enabled T&B to potentially make conduit sales to a customer," id. at 14.

2. T&B intends to call Ambreen Salters as an expert witness at trial. She has a background as an economist, with a B.A. in business administration and an M.S. in economics. She is employed by a firm that, among other things, provides expert witnesses in legal proceedings. Like Mr. Perry, she does not purport to be an expert in the electrical conduit industry or any related industry.

From Ms. Salters' report, Rule 26 Expert Report of Ambreen Salters on Behalf of Defendant Thomas & Betts Corporation, Dkt. No. 133-1 ("Salters Report"), it appears that T&B intends to offer Ms. Salters' testimony for several purposes: (1) to show that Robroy has not established a causal nexus between the defendants' allegedly wrongful conduct and the resulting

harm to Robroy, id. at ¶¶ 41-44; (2) to testify as to the considerations that influence purchasing decisions by customers of PVC-coated conduit, id. at ¶¶ 45-57; (3) to establish that customers can readily verify whether a particular product complies with applicable standards for PVC-coated conduit, id. at ¶¶ 58-60; and (4) to respond to Robroy's evidence regarding damages, id. at ¶¶ 61-82. The first three categories all go to the question whether the alleged false statements made by T&B caused actionable injury to Robroy.[1] The Court will therefore deal with those portions of Ms. Salters' testimony collectively under the rubric of "causation."

Robroy has moved to exclude Ms. Salters' testimony on the ground that her opinion testimony and report "are based on unreliable principles and methodology [and] would not be helpful to the jury." In its motion to exclude, Robroy argues: (1) Ms. Salters' conclusions as to the issue of causation are inadmissible, both because Mr. Perry will not be testifying as to causation and because Ms. Salters' opinions as to causation constitute impermissible attempts to offer testimony as to a legal conclusion; (2) her opinions on the issue of damages are based only

[1] In her report, Ms. Salters states that she has "assumed solely for purposes of responding to the Robroy damages report that T&B is liable for the wrongful acts alleged by Robroy. Even assuming liability, however, Robroy is not entitled to damages unless it can establish that such acts caused damages, computed to a reasonable certainty. Based on my review of the documents produced and deposition testimony given in this matter, there is not an apparent nexus between T&B's allegedly wrongful statements and Robroy's purported damages." Salters Report, Dkt. No. 133-1, at ¶ 39. That characterization incorrectly conflates causation and damages. Under the Lanham Act, causation is an element of liability. IQ Prods. Co. v. Pennzoil Prods. Co., 305 F.3d 368, 375 (5th Cir. 2002) ("The plaintiff must establish five elements to make out a *prima facie* case of false advertising under the Lanham Act: . . . (5) the plaintiff has been or is likely to be injured as a result of the statement at issue."). If the plaintiff fails to prove that the defendant's false advertising caused or is likely to cause injury to the plaintiff, the defendant is not liable for a Lanham Act violation. Causation is thus an element of the tort. Proof of damages is then necessary to determine whether the plaintiff is entitled to a legal remedy for the tort, and in what amount. See Schlotzsky's, Ltd. v. Sterling Purchasing & Nat'l Distrib. Co., Inc., 520 F.3d 393, 401 (5th Cir. 2008) (after establishing liability under the Lanham Act, the "plaintiff is entitled, 'under the principles of equity,' to recover the profits a defendant gained from its violation of the Act, 'any damages' the plaintiff suffered, and costs.") (quoting remedial provision, 15 U.S.C. § 1117(a)).

on her review of particular information provided to her by counsel and are therefore unreliable; (3) her "regurgitation of facts" from depositions and other sources does not qualify as expert testimony; (4) her opinions as to the reasons that consumers make purchasing decisions in the PVC-coated conduit market are not based on an adequate foundation; and (5) because she is not an expert in the PVC-coated conduit market, her opinions on that subject would not be helpful to the jury.

DISCUSSION

At the outset, four points need to be made. First, even though Robroy's motion purports to be directed to the exclusion of both Ms. Salters' report and her testimony, it is clear that her report (like Mr. Perry's report) is inadmissible. See Hunt v. City of Portland, 599 F. App'x 620, 621 (9th Cir. 2013) (expert's written report "is hearsay to which no hearsay exception applies"); Worldwide Sorbent Prods., Inc. v. Invensys Sys., Inc., Civil Action No. 1:13-cv-252, 2014 WL 12596585, at *4 (E.D. Tex. Oct. 29, 2014); Bianco v. Globus Med., Inc., 30 F. Supp. 3d 565, 570 (E.D. Tex. 2014) (citing cases); Sommerfield v. City of Chicago, 254 F.R.D. 317, 329 (N.D. Ill. 2008) (citing cases). Other than in the caption of Robroy's Motion to Exclude, neither party has indicated that it intends to offer its expert's report into evidence, but just for clarity, the reports themselves are plainly hearsay and will not be admitted into evidence absent stipulation by the parties; all that is at issue here is the question of the admissibility of the opinion testimony that the parties intend to offer through their expert witnesses.

Second, both experts' reports are divided into a background section and a section summarizing their opinions. The background sections contain some material that seems uncontroversial, such as Ms. Salters' summary of the allegations of the complaint and of the contents of Mr. Perry's expert report, which are found in paragraphs 34-38 of Ms. Salters' report.

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