

1 John D. Vaughn, State Bar No. 171801  
Jeffrey A. Feasby, State Bar No. 208759  
2 Christopher W. Rowlett, State Bar No. 257357  
PEREZ VAUGHN & FEASBY Inc.  
3 600 B Street, Suite 2100  
San Diego, California 92101  
4 Telephone: 619-702-8044  
Facsimile: 619-460-0437  
5 E-Mail: vaughn@pvflaw.com

6 Jeffrey L. Fillerup, State Bar No. 120543  
7 Rincon Law LLP  
90 New Montgomery St  
8 Suite 1400  
San Francisco, California 94105  
9 Telephone: (415) 996-8199  
Facsimile: (415) 996-8280  
10 E-Mail: jfillerup@rinconlawllp.com

11 Attorneys for Defendant and Counterclaimant  
12 Windermere Real Estate Services Company

13 **UNITED STATES DISTRICT COURT**  
14 **CENTRAL DISTRICT OF CALIFORNIA**

15 BENNION & DEVILLE FINE  
16 HOMES, INC., a California  
corporation, BENNION & DEVILLE  
17 FINE HOMES SOCAL, INC., a  
California corporation, WINDERMERE  
18 SERVICES SOUTHERN  
CALIFORNIA, INC., a California  
19 corporation,

20 Plaintiffs,

21 v.

22 WINDERMERE REAL ESTATE  
SERVICES COMPANY, a Washington  
23 corporation; and DOES 1-10

24 Defendant.

25 **AND RELATED COUNTERCLAIMS**  
26

Case No. 5:15-CV-01921 R (KKx)

Hon. Manuel L. Real

**OPPOSITION TO PLAINTIFFS  
AND COUNTER-DEFENDANTS'  
MOTION TO EXCLUDE THE  
TESTIMONY OF DAVID E.  
HOLMES BASED ON FRE 403, 702  
AND DAUBERT**

Date: April 17, 2017

Time: 10:00 a.m.

Courtroom: 880

Complaint Filed: September 17, 2015

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1     **I. INTRODUCTION**

2           Plaintiffs and counter-defendants Bennion & Deville Fine Homes, Inc.,  
3     Bennion & Deville Fine Homes SoCal, Inc., Windermere Services Southern  
4     California, Inc. (“WSSC”) and counter-defendants Robert L. Bennion and Joseph R.  
5     Deville (collectively, “Counter-Defendants”) bring this motion to exclude the  
6     testimony of one of defendant and counterclaimant Winder Real Estate Services  
7     Company’s (“WSC”) designated expert witnesses, David W. Holmes. Counter-  
8     Defendants bring this motion prior to deposing Mr. Holmes.

9           At the outset, it is important to note that Counter-Defendants have not even  
10    deposed Mr. Holmes. Had they done so, many of the issues raised in their motion  
11    would disappear. Nevertheless, Counter-Defendants argue that Holmes should be  
12    precluded from testifying because, they contend: (1) the Court’s order granting  
13    WSC’s motion for summary judgment resolved all issues of franchise law; (2)  
14    Holmes’ opinions are not necessary for purposes of interpreting the Area  
15    Representation Agreement between WSC and WSSC; (3) his opinions are irrelevant  
16    and unfairly prejudicial; (4) Holmes’ qualification and opinions do not meet the  
17    *Daubert* standards; and (5) Holmes’ opinions would wrongfully impinge on the  
18    duties of the jury. None of these arguments warrant excluding Holmes’ opinions and  
19    testimony from trial.

20           First, Holmes is imminently qualified as an expert on franchising law in  
21    general, and has substantial experience with the area representative model of  
22    franchising. His opinions are based on over 40 years of experience in franchising  
23    and his familiarity with the industry as a whole, and its operation in California in  
24    particular. Exclusion of his opinions would be a violation of the Court’s  
25    gatekeeping function under *Daubert* and Rule 702 of the Federal Rules of Evidence.

26           Second, although the Court found that the parties’ Area Representation  
27    Agreement was not a franchise agreement, that did not dispose of all issues of  
28    franchise law in this case. Specifically, Holmes’ opinions go directly to WSSC’s

1 claims that WSC breached the Area Representation Agreement by failing to pay  
2 WSSC a fee for its termination of the agreement. However, that fee was only owed  
3 if WSC terminated the agreement without cause. If the jury determines that WSC  
4 properly terminated the agreement for cause, WSSC is not entitled to the  
5 termination fee. Holmes' opinions that WSSC fell below industry standards for an  
6 area representative in a number of areas supports WSC's contentions that it properly  
7 terminated the Area Representation Agreement for cause. Holmes' opinions also  
8 support WSC's claims that WSSC failed to meet industry standards with regard to  
9 the collection of fees from its related Windermere franchisees.<sup>1</sup>

10 Third, none of Holmes' opinions purport to interpret any provisions of the  
11 Area Representation Agreement. Instead, Holmes relies on over 40 years of  
12 experience in the franchise industry to set forth various opinions regarding WSSC's  
13 failure to meet industry standards with regard to various issues. Opinions regarding  
14 industry standards is a classic example of proper expert opinion. Moreover, these  
15 opinions support WSC's contention that it properly terminated the parties'  
16 agreement for cause and that WSSC breached the parties' agreement.

17 Fourth, Holmes' opinions are directly relevant to the issue of whether WSC  
18 properly terminated the Area Representation Agreement for cause and whether  
19 WSSC breached the agreement by failing to meet industry standards for the  
20 collection of franchise fees from its related Windermere franchisees. The probative  
21 value of his opinions greatly outweigh any prejudicial affect they might have and  
22 they will not mislead the jury.

23 Finally, as noted above, Holmes' proposed opinions present classic expert  
24 material. It should be presented in order to assist the jury in determining whether  
25 WSC properly terminated the Area Representation Agreement for cause and

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26  
27 <sup>1</sup> WSSC, Bennion & Deville Fine Homes, Inc., and Bennion & Deville Fine Homes  
28 SoCal, Inc. are all owned by counter-defendants Bennion and Deville. (*See*  
Document 31, ¶ 16.)

1 whether WSSC breached the agreement by failing to meet industry standards to  
2 collect fees from its related Windermere franchisees. Holmes' opinions address  
3 these ultimate issues, and he certainly is not seeking to tell the jury how it must find  
4 on this issue.

5 Therefore, for these reasons and as set forth more fully below, Counter-  
6 Defendants' motion should be denied in its entirety.

## 7 **II. LEGAL ANALYSIS**

### 8 **A. Holmes' Opinions Are Proper Under *Daubert***

9 Federal Rule of Evidence 702 provides that expert testimony is admissible if  
10 "scientific, technical, or other specialized knowledge will assist the trier of fact to  
11 understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Expert  
12 testimony under Rule 702 must be both relevant and reliable. *Daubert v. Merrell*  
13 *Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993); *Primiano v. Cook*, 598 F.3d 558, 564  
14 (9th Cir. 2010) (trial courts "must assure that the expert testimony 'both rests on a  
15 reliable foundation and is relevant to the task at hand.'") When considering  
16 evidence proffered under Rule 702, the trial court must act as a "gatekeeper" by  
17 making a preliminary determination that the expert's proposed testimony is reliable.  
18 *Elsayed Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1063 (9th Cir. 2002),  
19 amended by 319 F.3d 1073 (9th Cir. 2003).

20 The *Daubert* factors "may or may not be pertinent in assessing reliability,  
21 depending on the nature of the issue, the expert's particular expertise, and the subject  
22 of his testimony." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Under the  
23 Federal Rules of Evidence, expert testimony is liberally admitted. *See Daubert*, 509  
24 U.S. at 588.

25 Here, Counter-Defendants argue that Holmes is not qualified to testify as an  
26 expert on franchise law. (Document 82, p. 3.) According to Counter-Defendants,  
27 in spite of Holmes' 42 years of franchise law experience, he is not qualified to  
28 testify as an expert in this case because "nowhere in his Curriculum Vitae does he

1 claim to have any experience as a franchisor, franchisee, area representative, or  
2 experience with the use of area representative relationships in franchise systems.”  
3 (Document 82, p. 3.) Had Counter-Defendants reviewed Holmes’ CV more closely,  
4 or deposed him prior to filing this motion, they would have understood that he is  
5 eminently qualified to testify as an expert regarding franchise industry customs and  
6 practices regarding use and duties of area representatives acting as agents of the  
7 franchisor.

8 A witness may qualify as an expert based on his or her knowledge, skill,  
9 training, experience or education in the field in question. Fed. R. Evid. 702;  
10 *see Primiano*, 598 F.3d at 563 (a board certified orthopedic surgeon and medical  
11 school professor was qualified to give opinion on elbow replacements). When  
12 evaluating specialized or technical expert opinion testimony, “the relevant reliability  
13 concerns may focus upon personal knowledge or experience.” *U.S. v. Sandoval-*  
14 *Mendoza*, 472 F.3d 645, 655 (9th Cir. 2006); *Pyramid Technologies Inc. v. Hartford*  
15 *Cas. Ins. Co.*, 752 F.3d 807, 814 (9th Cir. 2014) (reversing summary judgment  
16 entered because trial court excluded the testimony of industry expert with 30 years  
17 of experience and multiple certifications). An “expert’s testimony must be  
18 grounded in an accepted body of learning or experience in the expert’s field, and the  
19 expert must explain how the conclusion is so grounded.” Fed. R. Evid. 702,  
20 Advisory Committee Note, 2000 Amendments. When determining a witness’s  
21 qualifications to testify as an industry expert, courts are not required to assess the  
22 testimony against the *Daubert* factors (i.e., peer review, publication, error rates, etc.)  
23 because it is the “kind of testimony, whose reliability depends heavily on the  
24 knowledge and experience of the expert, rather than the methodology or theory  
25 behind it.” *Greenberg v. Paul Revere Life Ins. Co.*, 91 F. App’x. 539, 540-41  
26 (9th Cir. 2004) (affirming admission of expert testimony regarding insurance  
27 industry standards for the proper handling of disability claims).

28 ///

1 Counter-Defendants rely on *LuMetta v. United States Robotics, Inc.*, 824 F.2d  
2 768 (9th Cir. 1987) to support its contention that Holmes should be excluded  
3 because there is no foundation establishing he is qualified to offer opinions  
4 regarding the area representative model of franchising. (Document 82, p. 13, ll. 10-  
5 23.) However, *LuMetta* is distinguishable because in that case, the judge conducted  
6 an extensive *voir dire* of the experts prior to determining that they lacked sufficient  
7 experience to testify regarding the matters presented.<sup>2</sup> *Id.* at 771. Here, on the other  
8 hand, Counter-Defendants have not even deposed Holmes in order to inquire into  
9 his background regarding area representatives.

10 Holmes is qualified to testify as an expert on the performance of an area  
11 representative in a franchise system. Holmes has over 40 years of experience in  
12 domestic and international franchising.<sup>3</sup> (Declaration of David E. Holmes filed  
13 concurrently herewith (“Holmes Decl.”), ¶¶ 2-30.) He was certified as a Franchise  
14 and Distribution Law Specialist by the State Bar of California’s Board of Legal  
15 Specialization, and has served as the Co-Chair of the California State Bar Franchise  
16 Law Committee. (Holmes Decl., ¶¶ 2, 15.) Holmes has actively participated in the  
17 International Franchise Association, the largest franchising organization in the  
18 world, including assisting the Best Practices Product Review Task Force update  
19 their recommendations and written materials. (Holmes Decl. ¶ 9.) Holmes has been  
20 designated and testified as an expert on franchising and franchising-related matters  
21 numerous times. (Declaration of Jeffrey Feasby (“Feasby Decl.”) Ex. A.) As the  
22 Executive Editor of the CEB practice book “California Franchise Law and Practice,”

23 \_\_\_\_\_  
24 <sup>2</sup> In addition, *LuMetta* was decided prior to *Daubert*.

25 <sup>3</sup> Cross-Defendants failed to include Holmes’ Curriculum Vitae (which sets forth all  
26 of his relevant experience), his List of Publications, or the other information  
27 regarding his qualifications in their motion. All of that information was produced  
28 along with Holmes’ report, and Cross-Defendants could have inquired about his  
qualification had they deposed him before filing the present motion. A complete  
copy of the Holmes report is attached to the Declaration of Jeffrey Feasby, filed  
concurrently herewith.



1 Holmes literally wrote the book on franchise law in California. (Feasby Decl.  
2 Ex. A, p. 32.)

3 Holmes' professional experience includes 4 years as Vice President and  
4 Counsel for Century 21 Real Estate Corporation, the largest real estate brokerage  
5 franchise in the country, where his duties included franchise and other legal  
6 compliance matters. (Holmes Decl., ¶ 4.) During his tenure with Century 21, they  
7 used a nation-wide subfranchising model, which is similar to the area representative  
8 model at issue in the present case. (Holmes Decl. ¶ 27.)

9 With more than 40 years of franchise experience, including 4 years as legal  
10 counsel for the largest real estate brokerage in the country, there is perhaps no  
11 person more qualified to testify about the standards and practices at issue in this case  
12 than Holmes.

13 **B. Holmes' Opinions Will Assist the Trier of Fact**

14 1. Despite the Court's Prior Order, Franchise Issue Remain in This  
15 Case

16 Counter-Defendant's initial argument is that because the Court determined  
17 that Area Representation Agreement is not a franchise agreement, Holmes' opinions  
18 regarding franchising "custom and practice" is irrelevant and should be excluded.  
19 This argument is absurd and an obvious red herring.

20 As alleged in Counter-Defendants' First Amended Complaint, WSC "is a  
21 franchisor of the Windermere system of franchisees providing real estate brokerage  
22 services to customers seeking to buy, sell or lease real property." (Document 31,  
23 ¶ 15.) The First Amended Complaint is similarly clear that WSSC was WSC's  
24 agent with regard to WSC's franchisees in Southern California – WSSC "was to  
25 provide certain 'support and auxiliary services' to both incoming and existing  
26 Windermere franchisees in the [Southern California]." (Document 31, ¶ 27.) Thus,  
27 although the Area Representation Agreement was not a franchise agreement, that  
28 agreement was made for the specific purpose of making WSSC WSC's agent with

1 regard to its franchisees in Southern California. This connection to franchising  
2 cannot be ignored in this case. Holmes' opinions address WSSC's performance as  
3 an area representative in WSC's franchise system.

4 In particular, WSSC's claim for breach of the Area Representation Agreement  
5 is based in part on WSSC's contention that WSC breached Section 4.2 of that  
6 agreement by failing to pay WSSC a termination fee. (Document 31, ¶ 163(e).)  
7 While Section 4.2 does provide for a termination fee if the agreement is terminated  
8 without cause pursuant to Section 4.1(b), WSC contends that it terminated the  
9 agreement for cause pursuant to Section 4.1(c). (See Document 82-3, pp. 8-9 of 20,  
10 §§ 4.1-4.2.) Termination of the agreement under that section does not trigger the  
11 termination fee. (*Id.*) Thus, the issue of whether or not WSC owes the termination  
12 fee depends upon a determination of whether or not WSC properly terminated the  
13 agreement for cause.<sup>4</sup> This issue is addressed by Holmes' opinions that, assuming  
14 various factual issues are established, WSSC fell below industry standards in  
15 performing as an area representative. (See *e.g.* Document 82-2, pp. 17-23 of 24,  
16 ¶¶ 3, 6, 14, 16, 18, 20, 22, 24, 26, 30, 32, 34, 36.)

17 In addition, WSC claims that although WSSC was not a guarantor of the  
18 payment of franchise fees by WSC's Southern California franchisees, WSSC  
19 nevertheless breached the parties' agreement by failing to undertake reasonable  
20 efforts to collect outstanding fees owed by WSSC's related Windermere franchisees,  
21 Bennion & Deville Fine Homes, Inc. and Bennion & Deville Fine Homes SoCal,  
22 Inc. (See Document 16, ¶ 131.) Holmes' opinions directly address this issue.  
23 (Document 82-2, p. 20 of 24, ¶ 14.)

24 Therefore, Holmes' opinions are directly relevant to the issues remaining in  
25 this case.

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26  
27 <sup>4</sup> This is no small issue as the termination fee represents over \$2.5 million of a total  
28 of just over \$4.2 million in damages as set forth in the report of Counter-  
Defendants' expert. (Feasby Decl., ¶ 4.)

1                   2.     Holmes’ Opinions Do Not Interpret The Area Representation  
2                                    Agreement

3                   Counter-Defendants next argue that Holmes’ opinions are impermissible as  
4 they seek to interpret the terms of the parties’ unambiguous contract. This misstates  
5 Holmes’ opinions. Although Holmes makes it clear that WSSC’s obligations under  
6 the Area Representation Agreement are consistent with the obligations of area  
7 representatives in the franchise industry, at no point does he purport to interpret any  
8 portion of the parties’ agreement. Instead, Holmes’ opinions set forth his  
9 conclusions regarding whether WSSC performed its obligations under the  
10 agreement in accordance with industry standards.

11                   As noted above, Holmes’ opinions are relevant to WSSC’s claims that WSC  
12 failed to pay the termination fee (i.e. did WSC properly terminate the agreement for  
13 cause) and WSC’s claims that WSSC failed to undertake proper efforts to collect  
14 franchise fees from its related WSC franchisees, Bennion & Deville Fine Homes,  
15 Inc. and Bennion & Deville Fine Homes SoCal, Inc. Importantly, Counter-  
16 Defendants’ motion identified both of these as remaining issues in the case. At page  
17 7, line 15, Counter-Defendants’ recognize WSC’s remaining claim against WSSC  
18 for “failing and refusing to collect and remit fees from Windermere franchisees.”  
19 Holmes’ report directly addresses this breach in, concluding that:

20                   A franchisor would reasonably expect that an area representative would  
21 not show favoritism regarding payment of fees by offices owned and  
22 operated by it or an affiliated company, as compared to offices owned  
23 and operated by other franchisees. Standard franchise industry practice  
is for area representatives to pay fees on units owned and operated by  
them according to their legal obligations.

24 (Document 82-2, pp. 20 of 24, ¶ 14.)

25                   The remainder of Holmes’ opinions address WSSC’s claim that WSC  
26 breached the Area Representation Agreement by failing to pay the termination fee  
27 under Section 4.2. (See Document 82, p. 8, ll. 9-11.) As also noted above, this fee  
28 was not owed if WSC terminated the agreement for cause. Importantly, in

1 California, “a right to terminate ‘for cause’ or ‘for good cause’ means upon  
2 reasonable grounds assigned in good faith.” *R.J. Cardinal Co. v. Ritchie*,  
3 218 Cal.App.2d 124, 146 (1963); *see also* CACI 2404 (in the employment context,  
4 “good cause” to terminate an employee “exists when an employer’s decision to  
5 [discharge/demote] an employee is made in good faith and based on a fair and  
6 honest reason.”). Thus, Holmes’ opinions that WSSC fell below industry standards  
7 in a number of areas as WSC’s area representative are directly relevant to WSC’s  
8 claims it had good faith bases to terminate the Area Representation Agreement for  
9 cause.<sup>5</sup> As such, the opinions are relevant without regard to the interpretation of  
10 WSSC’s obligations under the Area Representation Agreement.

11 3. Holmes’ Opinions Are All Relevant to the Remaining Issues in  
12 this Case and Should Not Otherwise Be Excluded Under  
FRE 403

13 As established above, Holmes’ opinions are relevant to the determination of  
14 WSSC’s claim that it is entitled to a termination fee under the Area Representative  
15 Agreement and WSC’s claim that WSSC breached that agreement. Counter-  
16 Defendants other primary contention is that Holmes’ opinions would be unduly  
17 prejudicial or mislead the jury and so they should be excluded under Federal Rules  
18 of Evidence 403. However, the probative value of Holmes’ opinions outweighs any  
19 prejudice they might cause.

20 First, Counter-Defendants complain about Holmes’ presentation of some  
21 background and general principles regarding the use of the area representative  
22 model of franchising. However, Federal Rules of Evidence 702 permits experts to  
23 testify about background or general principles without substantive connection to the  
24 facts of a case. *Emblaze Ltd. v. Apple Inc.*, 52 F. Supp. 3d 949, 961 (N.D. Cal.

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25  
26 <sup>5</sup> Counter-Defendants will likely argue that WSC did not provide WSSC an  
27 opportunity to cure many of these alleged breaches. However, that is not an issue  
28 on which Holmes has opined. Moreover, that is an ultimate issue of fact for the jury  
to decide.

1 2014). It is “important in some cases for an expert to educate the factfinder about  
2 general principles, without ever attempting to apply these principles to the specific  
3 facts of the case.” Fed. R. Evid. 702, Advisory Committee Note,  
4 2000 Amendments. The ruling in *Emblaze* is instructive here. The purported expert  
5 in *Emblaze* applied “general principles to the case at the ‘level of principle’” and did  
6 not engage in “granular case-specific analysis.” *Emblaze*, 52 F. Supp. 3d at 959-60.  
7 Unlike in this case, the purported expert in *Emblaze* was deposed before the  
8 opponent filed a motion to exclude his opinion. *Id.* That deposition “revealed  
9 sizable separation between the facts of this case and [the expert’s] analysis,” which  
10 the court determined would be of “limited use to the fact-finder in resolving any  
11 question of fact at issue in this case.” *Id.* Nevertheless, the trial court allowed the  
12 expert to testify because the background and general principles testimony was  
13 permissible. *Id.* The same result is warranted here, where a review of the  
14 background and principles related to franchising and the area representative model  
15 will greatly assist the jury in determining the relevant issues. This is especially so  
16 given the complexity of the parties’ relationship in this case, and in particular given  
17 the Counter-Defendants’ rolls as both area representative and franchisees.

18 Counter-Defendants also argue that Holmes’ report identified a number of  
19 unsupported conclusions that WSSC’s conduct was not consistent with franchise  
20 industry standards and practices. (Document 82, p. 11, ll. 1-25.) This misrepresents  
21 the report. All of Holmes’ opinions regarding whether WSSC carried out its duties  
22 in accordance with industry standards and practices is supported by deposition  
23 testimony in this case.<sup>6</sup> (See Document 82-2, pp. 19-24 of 24.) That is the same for  
24 all of the opinions identified in Counter-Defendants’ motion, each of which supports

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25  
26 <sup>6</sup> As set forth in a portion of the Holmes report that was not filed by Counter-  
27 Defendants in support of their motion, Holmes lists all of the materials he reviewed  
28 in preparing his opinions in this case. (Feasby Decl., Ex. A, pp. 25-26.) This  
consisted of the parties’ written discovery responses and 11 different deposition  
transcripts. (*Id.*)

1 WSC's contention that it was justified in terminating the Area Representation  
2 Agreement for cause. The probative value of each of these opinions greatly  
3 outweighs any potential prejudice to WSSC.

4 Finally, to the extent there is any concern that the general background and  
5 principles presented by Holmes or any of these opinions might confuse the jury, the  
6 Court can address those concerns when it instructs the jury.

7 4. Holmes' Opinions Will Assist the Trier of Fact

8 As established above, Holmes' opinions are relevant to the determination of  
9 WSSC's claim that it is entitled to a termination fee under the Area Representative  
10 Agreement and WSC's claim that WSSC breached that agreement. As also  
11 established above, Holmes' opinions are based on his over 40 years of experience in  
12 franchise law, as well as his review of voluminous discovery records in this case and  
13 11 different deposition transcripts. These opinions will greatly assist the jury in  
14 determining these issues.

15 Counter-Defendants rely on *Little Oil Co. v. Atl. Richfield Co.*, 852 F.2d 441,  
16 446 (9th Cir. 1998) to support its argument that Holmes' opinions will not assist the  
17 jury. However, that case was also decided prior to *Daubert*, and applied pre-  
18 *Daubert* standards for determining the admissibility of expert testimony. That case  
19 is further distinguishable. In that case, the District Court was only asked to preclude  
20 the expert from answering three specific questions. *Id.* at 445-446. The District  
21 Court in that case had over 400 pages of testimony from the expert on which it  
22 based its conclusion that the expert would be precluded from answering three  
23 specific questions. *Id.* at 446. Based on that record, the Ninth Circuit held that the  
24 District Court did not abuse its discretion in excluding the expert's opinions on the  
25 three identified questions. *Id.* Importantly, however, the Ninth Circuit's opinion  
26 was based in part on the fact that the expert's other opinions had "already given the  
27 jury the facts it needed to draw its own conclusions" regarding the matters at issue.  
28 *Id.*

1 As noted above, Holmes' opinions in this case are supported by his  
2 experience and the facts in this case. Those opinions are directly relevant to discreet  
3 issues remaining in the case, and the opinions will assist the trier of fact in  
4 determining those issues. Therefore, Holmes' opinions and testimony should be  
5 presented to the jury.

6 Counter-Defendants also take issue with the fact that Holmes is an attorney  
7 and contend that he is indirectly telling the jury how to decide the case. However,  
8 the fact that Holmes is an attorney should not render his testimony inadmissible.  
9 The jury can weigh his credibility the same as any other witness. Further, to the  
10 extent there is any genuine concern regarding what impact his being an attorney  
11 might have on the jury, not that there is, the Court can instruct the jury on that issue.

12 5. Holmes' Use of Qualifiers is Acceptable

13 Finally, Cross-Defendants argue that Mr. Holmes' testimony is  
14 "inconclusive" and fails "to provide information beyond what a layperson already  
15 knows" because the opinions are "couched in qualifiers." This argument, even if  
16 true, is not sufficient grounds to exclude Mr. Holmes' testimony. An expert's  
17 testimony can assist the trier of fact even if it does not resolve an issue with  
18 complete certainty. Lack of certainty is not, for a qualified expert, the same thing as  
19 guesswork. "Expert opinion testimony is relevant if the knowledge underlying it  
20 has a valid connection to the pertinent inquiry. And it is reliable if the knowledge  
21 underlying it has a reliable basis in the knowledge and experience of the relevant  
22 discipline." *Sandoval-Mendoza*, 472 F.3d at 654 (reversing jury verdict because  
23 trial court improperly excluded a qualified expert). "Reliable expert testimony need  
24 only be relevant, and need not establish every element that the plaintiff must prove,  
25 in order to be admissible." *Primiano*, 598 F.3d at 565; *see also Adams v.*  
26 *Laboratory Corp. of America*, 760 F3d 1322, 1334 (11th Cir. 2014) (even "shaky"  
27 opinions may be admissible because shakiness goes to weight, not admissibility).  
28 Mr. Holmes' report contains his opinions based on the evidence he reviewed as of

1 that date. It was based on certain assumptions, all of which are identified in the  
2 report. Cross-Defendants are free to depose Holmes and seek a more specific  
3 statement of Mr. Holmes’ opinions.

4 Moreover, because he is qualified to testify as an expert and his opinions are  
5 relevant to this case, even if Cross-Defendants disagree with Holmes’ opinions or  
6 believe the opinions are “inconclusive,” those opinions are “to be attacked by cross  
7 examination, contrary evidence, and attention to the burden of proof, not exclusion.”  
8 *Primiano*, 598 F.3d at 564. Excluding the opinions prior to trial is not proper.

9 **III. CONCLUSION**

10 For all of these reasons, Counter-Defendants’ Motion to Exclude the  
11 Testimony of David E. Holmes should be denied in its entirety.

12  
13 DATED: March 27, 2017 PEREZ VAUGHN & FEASBY INC.

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15 By: /s/ Jeffrey A. Feasby  
16 John D. Vaughn  
17 Jeffrey A. Feasby  
18 Attorneys for  
19 Windermere Real Estate Services Company  
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