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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BENNION & DEVILLE FINE HOMES, INC., a California corporation, BENNION & DEVILLE FINE HOMES SOCAL, INC., a California corporation, WINDERMERE SERVICES SOUTHERN CALIFORNIA, INC., a California corporation,

Plaintiffs,

v.

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

Defendant.

AND RELATED COUNTERCLAIMS

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

Hon. Manuel L. Real

DEFENDANT'S AND COUNTERCLAIMANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION IN LIMINE TO EXCLUDE PORTIONS OF THE STORM REBUTTAL REPORT

Motion *in Limine* No. 2 of 4

Date: May 15, 2017
Time: 10:00 a.m.
Courtroom: 880

Complaint Filed: September 17, 2015

I. INTRODUCTION

Plaintiffs and Counter-Defendants Robert L. Bennion, Joseph R. Deville, B&D Fine Homes, Inc., B&D Fine Homes SoCal, Inc., and Windermere Services Southern California, Inc. ("WSSC") (collectively "Counter-Defendants") served initial expert opinions under the guise of a "rebuttal" report weeks after the deadline to serve initial expert disclosures. These untimely disclosures relate to allegations in Counter-Defendants' First Amended Complaint ("FAC"), and are well beyond the scope of the report Counter-Defendants were purportedly rebutting. Consequently, Defendant and Counterclaimant Windermere Real Estate Services Company ("WSC") was not given an opportunity to properly respond to these improper disclosures. Accordingly, they must be excluded.

Further, some of the untimely opinions relate to claims asserted by Counter-Defendants that the Court already dismissed in its Order Granting WSC's Motion for Partial Summary Judgment. Specifically, Counter-Defendants seek to introduce, through their expert, evidence that WSC failed to provide adequate technology or a viable "Windermere system;" claims on which the Court already dismissed in WSC's favor. Thus, these opinions are irrelevant and because they have no probative value, are substantially outweighed by a danger they would be unfairly prejudicial, cause undue delay, confuse the issues, and mislead the jury. In sum, any expert opinions pertaining to Counter-Defendants' dismissed claims should be excluded.

II. FACTUAL BACKGROUND

In its FAC, Counter-Defendants allege that WSC breached the Area Representation Agreement ("ARA") by, among other things, failing to provide a viable "Windermere System," failing to provide an adequate technology system, and failing to pay WSSC the "termination fee." (Document No. 31, FAC ¶ 163.) In its Order granting WSC's Motion for Partial Summary Judgment, the Court entered summary judgment on (1) Counter-Defendants' claims that WSC failed to provide a

viable Windermere System or adequate technology, (2) Counter-Defendants' Fourth Claim for Relief regarding WSC's alleged failure to file the necessary franchise disclosure documents, and (3) Counter-Defendants' Seventh Claim for Relief regarding violations of the California Franchise Relations Act. (Document No. 66, pp. 4-7.)

Regarding Counter-Defendants' remaining claims, WSC did not breach the ARA and WSSC is therefore not entitled to a termination fee. WSSC is only entitled to a termination fee (the fair market value of its interest in the ARA based on the methodology identified in the ARA) if WSC terminated the ARA without cause or failed to give WSSC reasonable notice and an opportunity to cure its material breaches. (Declaration of Paul Drayna ("Drayna Decl."), Ex. A.) Therefore, whether WSSC materially breached the ARA is a central issue in this case.

The parties exchanged initial expert disclosures on September 16, 2016. (Declaration of Christopher W. Rowlett ("Rowlett Decl."), ¶ 3, Exs. A, B.) Counter-Defendants identified one expert, Peter Wrobel, to testify about their alleged damages. (Rowlett Decl., Ex. B.) WSC identified two experts: Neil Beaton to testify about damages, and David Holmes to explain the applicable franchising model and testify about WSSC's failures under the ARA. (Rowlett Decl., Ex. A.) On September 30, 2016, Counter-Defendants served a "rebuttal report" by Marvin Storm purporting to rebut the Findings in the Holmes report. (Rowlett Decl., Ex. C.) Storm's report contained several opinions that were entirely outside the scope of the Holmes report.

After providing background on the franchise industry generally, Holmes makes 36 Findings that fall into three categories: (a) what duties and obligations WSSC had under the ARA [Findings 1, 2]; (b) how failing to meet those obligations could impact the franchisor and franchisees [Findings 3, 4]; and (c) whether WSSC met its obligations under the ARA [Findings 8-36]. (Rowlett Decl., Ex. A, pp. 42-

86.) The Strom "rebuttal" report identifies 15 opinions that fall into four categories: (a) WSC's duties under the ARA [Opinion 1]; (b) whether the ARA was consistent with typical franchisor-area representative arrangements [Opinions 2, 3]; (c) whether WSC fulfilled its obligations under the ARA [Opinions 4, 5, 7]; and (d) whether WSSC fulfilled its obligations under the ARA [Opinions 6, 8-15]. (Rowlett Decl., Ex. C.) Opinions 6 and 8-15 address the issues raised in the Holmes report regarding WSSC's performance under the ARA and are therefore appropriate rebuttal opinions. *Id.* Opinions 1-5 and 7, however, are new opinions well outside the scope of the Holmes report. Thus, these opinions should have been disclosed by the initial expert disclosure deadline. Because they were not, they must now be excluded.

III. LEGAL ANALYSIS

A. Storm's New Opinions Beyond the Subject Matter of the Holmes Report Should be Stricken

Fed. R. Civ. P. 26(a)(2)(D)(ii) limits the proper scope of a rebuttal expert report to that information "intended *solely* to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B)." (Emphasis added.) A rebuttal expert may only testify after the opposing party's initial expert witness testifies. *Lindner v. Meadow Gold Dairies, Inc.*, 249 F.R.D. 625, 636 (D. Hi 2008) (excluding opinions outside the proper scope of a rebuttal report). Specifically, rebuttal expert testimony must address the "same subject matter" identified by the initial expert. Fed. R. Civ. P. 26(a)(2)(C)(ii); *Lindner*, 249 F.R.D. at 636. "A rebuttal expert report is not the proper place for presenting new arguments." *Trowbridge v. U.S.*, No. 07-32, 2009 WL 1813767, at *12 (D. Idaho June 25, 2009) (excluding portions of "rebuttal" report because they expressed new opinions beyond the scope of the original report). Reports captioned as rebuttal expert reports that treat matters other than those identified by the initial expert and that introduce "novel arguments" do not qualify as rebuttal expert reports under

FED. R. CIV. P. 26(a)(2)(D)(ii). *Laflamme v. Safeway, Inc.*, No. CV 09-00514 ECR, 2010 WL 3522378, at *2 (D. Nev. Sept. 2, 2010).

The opinion in *Lindner* is particularly instructive. The plaintiff in *Lindner* did not initially designate any experts, but later submitted multiple expert "rebuttal" reports in response to the defendant's experts. *Lindner*, 249 F.R.D. at 636-37. The court compared the "rebuttal" reports against the reports they purported to rebut and identified the portions of the reports that contradicted or rebutted the initial reports and the portions that did not contradict or rebut anything in the initial reports. *Id.* at 637. The court allowed the expert to testify as to the opinions that *directly* rebutted the initial reports, and *excluded* testimony regarding the remaining opinions beyond the scope of the initial reports. *Id.*

The same result should follow here. Holmes' report focused on WSSC's performance under the ARA. (Rowlett Decl., Ex. A, pp. 42-86.) While Storm's report contradicts some of those findings, it improperly expands the analysis to include opinions regarding WSC's performance under the ARA. (Rowlett Decl., Ex. C.) While Storm is permitted to testify regarding his opinions pertaining to WSSC's performance under the ARA (Opinions 6, 8-15), he should be precluded from testifying regarding any other opinions contained in his "rebuttal" report.

1. Counter-Defendants' Untimely Disclosure of the New Opinions in the Storm Report is Neither Substantially Justified nor Harmless

Because Storm's report contains new opinions, Counter-Defendants must be sanctioned for their failure to timely disclose those opinions unless it was substantially justified or harmless. If a party fails to properly disclose an expert's opinions, a party is precluded from introducing those opinions at trial unless it can show the failure was substantially justified or harmless. Fed. R. Civ. Proc. 37(c); *Lindner*, 249 F.R.D. at 641. The party seeking to introduce the improperly identified expert bears this burden. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001).

Counter-Defendants' untimely disclosure was neither substantially justified nor harmless. Counter-Defendants' FAC alleged WSC breached the ARA in several ways. (Document No. 31, FAC ¶ 163.) Consequently, they sought to make WSC's performance under the ARA an issue from the outset and could have identified an expert to testify on this issue at the outset. Instead, they chose to wait until WSC's expert issued his opinions about WSSC's performance and sandbag WSC with a "rebuttal" report containing a host of new opinions unrelated to WSSC's performance. Each of these opinions is based on evidence and testimony that was available to Counter-Defendants prior to the initial expert disclosure deadline. Accordingly, WSSC can offer no justification, substantial or otherwise, for its failure to disclose these new opinions prior to the initial expert disclosure deadline.

Similarly, Counter-Defendants' failure to properly disclose these new Storm opinions is not harmless. Because Counter-Defendants disclosed the new opinions shortly before the rebuttal report deadline, WSC was not given an opportunity to respond. Even if the Court were to now provide WSC the opportunity to respond to Storm's new opinions, allowing WSSC's untimely new disclosure to stand would likely delay the case and lead to additional rounds of expert discovery. Accordingly, sanctions are warranted under Rule 37(c)(1). *See Lindner*, 249 F.R.D. at 641-42.

Courts are given "particularly wide latitude" to issue sanctions under Rule 37(c)(1), including excluding untimely expert opinions. *Yeti*, 259 F.3d at 1106. To determine if exclusion is appropriate, courts in the Ninth Circuit consider the following five factor test: "1) the public's interest in expeditious resolution of litigation; 2) the court's need to manage its docket; 3) the risk of prejudice to the defendants; 4) the public policy favoring disposition of cases on their merits; 5) the availability of less drastic sanctions." *Wendt v. Host Intern., Inc.*, 125 F.3d 806, 814 (9th Cir. 1997). The *Wendt* factors weigh heavily in favor of excluding the inappropriate and prejudicial Storm opinions.

Allowing the untimely report to stand would delay the case and prejudice WSC. If Counter-Defendants are allowed to proceed with Storm's untimely opinions, WSC must be given an opportunity to rebut those opinions.[1] This would delay the proceedings while Holmes prepares a rebuttal to these new opinions regarding WSC's performance under the ARA. Once the rebuttal report was complete, Counter-Defendants presumably would want the opportunity to depose Holmes regarding his rebuttal opinions and the information on which he relied. Trial is scheduled to start approximately two weeks after this motion is set to be heard. The additional discovery necessitated by allowing Counter-Defendants to proceed with these untimely opinions would further delay this litigation and prejudice WSC. Consequently, the first three factors in the *Wendt* analysis favor exclusion.

The fourth factor, public policy favoring the resolution of disputes on their merits, is neutral because excluding Storm's new opinions is not tantamount to dismissal. *Lindner*, 249 F.R.D. at 642. WSC is not asking the Court to exclude all of Storm's opinions. Rather, WSC is only asking the Court to exclude only the new opinions – those well beyond the scope of Holmes' report that Counter-Defendants failed to disclose before the initial expert disclosure deadline (Opinions 1-5 and 7). The balance of Storm's opinions (nine of the 15 opinions in his report) remain. Accordingly, excluding the improper opinions will not prevent this dispute from being resolved on its merits.

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[1] It is useful to contrast this with Counter-Defendants' motion to exclude Neil Beaton's rebuttal report. (Document No. 84-1.) In that motion, Counter-Defendants do not, and cannot, argue that Beaton's rebuttal report contains new opinions beyond the scope of their expert's damages analysis. Therefore, no additional expert opinions are necessary if the Court denies that motion, as it should. Here, on the other hand, WSC must be given an opportunity to rebut Storm's new opinions (Fed. R. Civ. Proc. 26) which would necessarily delay the proceedings and prejudice WSC.

Finally, there is no lesser sanction that is appropriate under the circumstances. If the Court allows Storm to present his new opinions regarding WSC's performance under the ARA, WSC must have an opportunity to rebut those opinions. Fed. R. Civ. Proc. 26(a)(2)(D)(ii). This case is over 18 months old, has already been continued twice, and is set for trial two weeks after these motions are scheduled for a hearing. The parties are making their final preparations for trial, and any additional delay simply isn't warranted under the circumstances.[2]

Because the five *Wendt* factors weigh in favor of excluding the improper and untimely Storm opinions (Opinions 1-5 and 7), exclusion is appropriate here.

B. Storm's Opinions are Irrelevant and Should be Excluded

In addition to being untimely, Storm offers opinions that are irrelevant because they relate to claims the Court already ruled upon. Evidence is relevant if it: (1) tends to make a fact more or less probable than it would be without the evidence; and (2) the fact is of consequence to the action. Fed. R. Evid. 401. Relevant evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issue, misleading the jury, or undue delay. Fed. R. Evid. 403.

WSSC's FAC alleges that WSC breached the ARA by failing to provide adequate technology or a viable "Windermere System." (Document No. 31, FAC ¶ 163(b), 170(a).) In October 2016, the Court entered summary judgment on behalf of WSC as "to the technology and 'Windermere systems' portions" of Counter-Defendants' claims. (Document No. 66, p. 4.) Consequently, any evidence regarding Counter-Defendants' allegations that WSC failed to provide adequate technology or a viable "Windermere system" is irrelevant and should be excluded.[3]

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[2] If the Court is inclined to allow Counter-Defendants to present Storm's untimely new opinions, WSC respectfully requests that Counter-Defendants be ordered to reimburse WSC's attorneys fees and costs associated with filing the present motion and conducting the required additional expert discovery.

[3] WSC has filed a contemporaneous motion *in limine* seeking to exclude all

Storm's Opinion No. 4 is that WSC "was deficient in discharging its obligations and responsibilities because it failed to provide a properly working technology platform." (Rowlett Decl., Ex. C, p. 20.) Similarly, Storm's Opinion No. 5 states that WSC "failed in its troubleshooting role to resolve technical difficulties concerning its technology in a timely manner." (Rowlett Decl., Ex. C, p. 21.) Neither of these opinions is relevant to this case. When the Court entered summary judgment for WSC and against Counter-Defendants on claims related to technology and the "Windermere system," all evidence pertaining to those claims became irrelevant and inadmissible.

Further, because it has no probative value, Storm's opinions regarding these dismissed claims are substantially outweighed by their danger of causing unfair prejudice, confusing the issues, misleading the jury, and/or causing undue delay. With the untimely Storm opinions regarding technology, Counter-Defendants are clearly trying to relitigate an issue already adjudicated by the Court. Any evidence or argument relating to the technology or "Windermere system" issues will unfairly prejudice WSC because it already prevailed on these issues. Similarly, evidence regarding these dismissed claims will mislead the jury into thinking they are relevant to the dispute and cause undue delay because WSC will need to defend itself against claims that were already dismissed. *See U.S. v. 87.98 Acres of Land More or Less in the County of Merced*, 530 F.3d 899, 906 (9th Cir. 2008) (exclusion of evidence pursuant to Rule 403 is appropriate when there is a potential prejudicial effect and no probative value).

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evidence related to dismissed claims that include evidence beyond the irrelevant opinions in the untimely Storm report.

IV. CONCLUSION

For all of these reasons, WSC respectfully requests that the Court grant its Motion *In Limine* to Exclude Portions of the Storm Rebuttal Report in its entirety.

DATED: April 17, 2017 PEREZ VAUGHN & FEASBY INC.

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