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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. Manual L. Real

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

Date: April 17, 2007
Time: 10:00 a.m.
Courtroom: 880

Action Filed: September 17, 2015
Pretrial Conf.: November 14, 2016
Trial: May 30, 2017

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Plaintiffs and Counter-Defendants Bennion & Deville Fine Homes SoCal, Inc. ("B&D SoCal"), Windermere Services Southern California, Inc. ("Services SoCal"), and Counter-Defendants Robert Bennion ("Bennion") and Joseph Deville ("Deville") (collectively, the "Plaintiffs") hereby submit this Reply in support of their motion to exclude the testimony and opinions at trial of Defendant/Counterclaimant Windermere Real Estate Services Company's ("WSC") proposed franchise law expert David E. Holmes ("Holmes").

I. INTRODUCTION

WSC's Opposition leaves no doubt that the proposed expert opinions of franchise attorney Holmes should be excluded from trial. This is not a franchise case. There are no franchise claims, no franchise statues at issue, and the Court has already found that the Area Representation Agreement is not a franchise. [*See* D.E. 66] Incredibly, WSC defends its expert designation of Holmes on the basis that he "is imminently qualified as an expert on franchising law." Opposition, p. 1:20. WSC's position misses the mark. Because this matter involves a contract dispute – and not the interpretation of franchise laws or statutes – WSC's designation of franchise attorney Holmes to serve as an expert is misplaced. Thus, the Court should grant the B&D Parties' Motion and exclude Holmes from testifying at trial.

According to WSC, Holmes will opine as to whether: (1) WSC properly terminated the Area Representation Agreement for cause in light of Services SoCal's alleged failure to collect franchise fees; and (2) Services SoCal breached the Area Representation Agreement by not collecting franchise fees from Windermere franchisees. However, neither opinion is admissible as the Area Representation Agreement is not a franchise agreement rendering Holmes' opinions on franchise "customs and practices" irrelevant.

Further, Holmes cannot be used to interpret the terms of the parties' contracts. The contract terms in question are unambiguous. WSC itself concedes that "none of Holmes' opinions purport to interpret any provisions of the Area Representation Agreement."

Opposition, p. 2:10-11. Thus, there is no basis for any expert testimony with regard to these contractual obligations.

It is also well settled that evidence of industry customs and practices is not relevant to whether there is a breach. Holmes' opinions as to custom and practices are not helpful to determine breach because the parties' conduct is guided by the unambiguous provisions of the Area Representation Agreement. Even if it was helpful (*it is not*), it would invade the province of the jury as it is an ultimate legal conclusion.

Lastly, Holmes has no expertise or personal experience with regard to an area representative's collection of fees and thus does not meet the *Daubert* standard to provide expert testimony in this capacity. For these reasons, Holmes should be excluded from testifying at trial.

In the unlikely event that the Court does allow Holmes to testify, it should sharply limit his testimony to whether Services SoCal's actions with regard to the collection of franchise fees conform with its' obligations under the Area Representation Agreement. There is no basis for Holmes to express his myriad of other opinions regarding Services SoCal being a subpar area representative without any connection to the actual claims in this case. Allowing such opinions would only confuse the jury from the actual issues to be decided. Holmes' other opinions are not relevant, are unfairly prejudicial and thus properly excluded.

II. THE AREA REPRESENTATION AGREEMENT CLAUSES AT ISSUE ARE UNAMBIGUOUS

Holmes intends to testify with regard to two clauses in the Area Representation Agreement. WSC is currently pursuing a breach of contract claim against Services SoCal for "failing and refusing to collect and remit fees from Windermere franchisees". Section 3 of the Area Representation Agreement simply requires, among other things, that the

> Area Representative's responsibilities will include the responsibility to receive, collect, account for all license fees, administrative fees, Advertising Fund contributions, and other amounts due under license agreements in the

Region, and to remit to WSC its share of such fees.

Adams Decl., Ex. B, § 3. There is no dispute that this clause is unambiguous.

WSC is also claiming that it properly terminated the Area Representation Agreement for cause and thus owes no termination fee. However, Section 4.1(c) does not simply allow for a "for cause" termination as WSC alleges. Instead, that Section states that the agreement may be terminated:

> By either party upon ninety (90) days written notice to the other party; provided that such termination shall be limited to **termination for cause based upon a material breach of the Agreement** described in the notice and not cured within the ninety (90) day period […]

Adams Decl., Ex. B, § 4.1(c). If a party is terminated pursuant to Section 4.1(c) there is no obligation to make a termination payment under Section 4.2. There is no dispute that this clause is unambiguous.

The only material breach under Section 4.1(c) claimed by WSC is the purported failure to pay fees as required under Section 3 of the Area Representation Agreement. *See* generally Opposition; *see also* Motion in Limine to Preclude WSC from Introducing Evidence of Breach Services SoCal Not Identified in the Notice of Termination.

III. HOLMES' TESTIMONY CANNOT BE RELEVANT AS THE AREA REPRESENTATION AGREEMENT IS NOT A FRANCHISE AGREEMENT

Holmes' opinion is solely as to the customs and practices for area representatives in franchise systems. The testimony is intended to communicate to the jury that the Area Representation Agreement has been breached because Services SoCal did not follow Holmes' alleged franchise customs and practices. However, franchise customs and

practices are not relevant to deciding whether the Area Representation Agreement has been breached because it's not a franchise agreement.[1]

WSC's response to this is to say that Services SoCal works with a franchisor and franchisees. However, this connection does not suffice to make Holmes' opinion testimony relevant. Just because Services SoCal works with a franchisor and franchisees does not create an obligation for Services SoCal to conform to what Holmes calls franchise customs and practices.

Indeed, at some point, WSC reveals that Holmes intends to opine whether Services SoCal "performed its obligations under the agreement in accordance with industry standards". Opposition, p. 8:8-10. However, Services SoCal has no obligation under its agreement to conform its conduct to some nebulous standard for franchise customs and practices. It only has an obligation to perform according to the terms of the agreement. An agreement that the Court has concluded is not a franchise agreement. Therefore, Holmes' testimony is not relevant to any obligation under the Area Representation Agreement and consequently not relevant to whether there is a breach. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993) ("Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.")

As the entirety of Holmes' opinion is as to franchise customs and practices for area representatives, Holmes should be excluded from testifying at trial.

IV. HOLMES' TESTIMONY IS NOT RELEVANT TO WHETHER THE AREA REPRESENTATION AGREEMENT WAS BREACHED

WSC argues that "Holmes' opinions are directly relevant to the issue of whether WSC properly terminated the Area Representation Agreement for cause and whether [Services SoCal] breached the agreement by failing to meet industry standards for the collection of franchise fees from its related Windermere franchisees." Opposition, p. 2:17-20. WSC doesn't dispute that the two sections of the Area Representation

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[1] *See* Order Granting Defendant's Motion for Partial Summary Judgment, pp. 5-6. (Dkt. No. 66)

Agreement in question are unambiguous. *See* Opposition, p. 2:10-11 ("none of Holmes' opinions purport to interpret any provisions of the Area Representation Agreement"). Nor can they. Thus, Holmes intends to testify that the terms were breached based upon his notion of industry customs and practices.

The "custom and practice" of a theoretically reasonable franchise area representative is irrelevant to a jury's determination of whether an unambiguous contractual provision was breached. *See e.g. Palazzetti Imp./Exp., Inc. v. Morson*, No. 98 CIV. 722 (FM), 2001 WL 793322, at *3 (S.D.N.Y. July 13, 2001); *Mariner Energy, Inc. v. Devon Energy Prod. Co.*, 690 F. Supp. 2d 558, 572 (S.D. Tex. 2010), *aff'd sub nom. Mariner Energy, Inc. v. Devon Energy Prod. Co., L.P.*, 517 F. App'x 226 (5th Cir. 2013) ("Because both parties agree that the Letter Agreement is unambiguous, evidence of industry custom or usage—outside of interpreting technical terms in the Agreement—is not permitted"). This is because "evidence of custom and practice may not prevail over the unambiguous language of a contract." *Roy F. Weston Servs., Inc. v. Halliburton NUS Envtl. Corp.*, 839 F. Supp. 1144, 1148 (E.D. Pa. 1993); *Cheaves v. United States*, 108 Fed. Cl. 406, 412 (2013) (evidence of trade practice inadmissible "because the Court has found that the contract unambiguously contemplated payment on a permit basis"). Thus, Holmes' opinions are inadmissible.

WSC does not respond to this argument and thus implicitly concedes that Holmes' testimony has no relevance. As Holmes' opinions are not relevant to determining whether there is a breach of the Area Representation Agreement, his opinions do not advance any claim or defense. Therefore, the Court should exercise its gatekeeping function and exclude Holmes from testifying at trial.

V. HOLMES' TESTIMONY INVADES THE PROVINCE OF THE FACTFINDER

Holmes' opinion that Services SoCal breached the Area Representation Agreement by not collecting fees is not helpful to the trier of fact, embraces an ultimate issue and

thus should be excluded. It is for the jury alone to interpret the Area Representation Agreement and decide whether there was a breach and by whom.

"Fed.R.Evid. 702 permits a qualified expert to testify in the form of an opinion or otherwise only if such testimony would assist the trier of fact to understand the evidence or determine a factual issue." *Little Oil Co. v. Atl. Richfield Co.*, 852 F.2d 441, 446 (9th Cir. 1988). Experts are properly excluded where their opinions state an ultimate legal conclusion as to whether an agreement was breached. *Id.* at 445-446; *see also Snyder v. Wells Fargo Bank, N.A.*, 594 F. App'x 710, 714 (2d Cir. 2014) ("The district court also correctly excluded the expert's opinion insofar as it went to ultimate issues for jury resolution—specifically, an opinion that Wachovia's contractual and fiduciary duties required it to implement the hedging strategy, and an opinion that Wachovia breached these duties by failing to implement the hedging strategy upon receipt of Snyder's September 27, 2008 email directing transfer of his assets to Bank of New York."); *CIT Grp./Bus. Credit, Inc. v. Graco Fishing & Rental Tools, Inc.*, 815 F. Supp. 2d 673, 678 (S.D.N.Y. 2011) ("Although Parker's proposed testimony to establish prevailing customs and practices in the commercial lending industry is relevant and reliable and would be admissible for that purpose, he may not go so far as to opine as to whether certain events constituted a material breach of the Credit Agreement.")

Within Holmes' 23 page expert report, only 4 paragraphs appear to concern the collection of fees:

> 11. In the deposition of Mr. Gregor (page 85; line 20), Mr. Gregor states, after being asked "And if there was an issue in your mind about whether or not these owners could pay the fees they were required to pay under the Franchise Agreement, would you speak up and make that known to Mr. Deville?", Mr. Gregor responded "That was beyond my grade at that time."
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> 12. Standard franchising practices for area representatives would not include franchise sales staff who might have issues with respect to a prospective franchisee's possible inability to pay required fees failing to alert the area representative's management to such concerns. On the contrary, the payment

of required fees is a prime concern for all responsible franchisors or area representatives.

13. In the deposition of Mr. Robinson, at a number of points the deponent addresses questions relating to the area representative's (or its affiliate's) alleged failure to pay (or being delinquent in paying) franchise fees. [See page 33; lines 20 – 24; page 35; lines 6 – 9; page 40; lines 4 – 9.]

14. A franchisor would reasonably expect that an area representative would not show favoritism regarding payment of fees by offices owned and operated by it or an affiliated company, as compared to offices owned 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.

See e.g. Adams Decl., Ex. A., Findings ¶¶ 11-14.

WSC admits that based upon the above purported facts, Holmes will give an opinion as to whether "WSC properly terminated the Area Representation Agreement for cause and whether [Services SoCal] breached the agreement by failing to meet industry standards for the collection of franchise fees from its related Windermere franchisees." Opposition, p. 2:17-20. WSC concedes that these opinions "address … ultimate issues". Opposition, p. 3:2-3. As the opinions go to ultimate legal conclusions as to whether or not the agreement was breached they are inadmissible.

Furthermore, the determination of whether Services SoCal breached the Area Representation Agreement by not collecting fees does not require specialized knowledge or a sophisticated understanding of franchise custom and industry practices. The jury can simply look to the Area Representation Agreement and Services SoCal's actions to decide whether Services SoCal breached Section 3. This case "presents a question that the average layperson could answer by utilizing his or her general knowledge to determine the presence of a breach." *Wartsila NSD North Am., Inc. v. Hill Intern., Inc.*, 342 F.Supp.2d 267, 282-83 n. 9 (D.N.J.2004) (holding expert not necessary, in breach-of-contract case, to establish breach of duty); *see also Lake Home Prod., LLC v. Sandee Mfg. Co.*, No. CIV.03-6331(MJD/JGL), 2005 WL 1490312, at *7 (D. Minn. June 23,

2005) ("a jury need not have expert testimony to understand whether Defendant's proffered parts met the contractual requirements here.")

The jury can draw its own conclusions about whether Services SoCal's and WSC's actions constituted a breach of the Area Representation Agreement. Holmes testimony that Services SoCal breached the Area Representation Agreement by not collecting fees is not admissible. Therefore, none of Holmes' testimony is admissible and he should be excluded from testifying at trial.

VI. HOLMES HAS NO FOUNDATION FOR HIS OPINIONS AS TO INDUSTRY CUSTOM AND PRACTICE

Holmes has no basis for his opinions as to customs and practices for area representatives in franchising systems. He simply is an experienced franchise lawyer with his own subjective opinions about how franchises should be run. *See generally* Holmes Decl. There is no survey, research or documentation underlying these claims. Holmes does not rely on any industry trade group standard and has not objectively researched how area representatives are used in franchising.

Holmes has only a passing familiarity with the concept of area representatives. All Holmes can demonstrate through his declaration is that as a franchise law attorney he has occasionally come across a franchisor who used area representatives in their franchising model. Holmes Decl., ¶ 26. This does not suffice to establish expertise on customs and practices for area representatives in franchising systems. WSC argues that Holmes is an expert in "franchise law" based on his 42 years of experience. *See* Opposition, p. 3:25-27. There is no dispute that Holmes has plenty of experience as a franchise attorney. However, that does not make one an expert on franchising as a business and how area representatives are treated and act in different franchise systems.

Even drilling deeper, Holmes, when given a chance to prepare a declaration, does not demonstrate *any* knowledge regarding the practices of area representatives in collecting franchise fees on behalf of franchisors. Thus, any opinion he would provide on

the one and only discreet issue that may be admissible, has no substantive basis. As such, Holmes' testimony cannot meet the *Daubert* standard.

WSC cites *Greenberg v. Paul Revere Life Ins. Co.*, 91 Fed.Appx. 539, 540-541 (9th Cir. 2004) for the proposition that industry experts do not have to pass the *Daubert* standard. In *Greenberg*, the expert testified as to the "industry standards for the proper handling of disability claims". *Id.* at 541. The court affirmed the admission of testimony based in part on the fact that there was no showing of prejudice. *Id.* As to *Daubert*, *Greenberg* simply stands for the proposition that the testimony need not be based on "peer review" or "publication" if the reliability of the testimony "depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it." *Id.* Ultimately, the purpose of the reliability requirement "is to make certain an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

"[C]ourts often have excluded expert testimony where the proffered expert lacked training in the specific area relevant to the case." *Toomey v. Nextel Commc'ns, Inc.*, No. C-03-2887 MMC, 2004 WL 5512967, at *7 (N.D. Cal. Sept. 23, 2004). Here, as demonstrated above, there is no evidence that Holmes knows what the industry standards are for area representatives. Indeed, he can't point to one example of how an area representative has acted in their roles. Holmes certainly has no experience with regard to the area representative's obligation to collect franchise fees. For that reason, his testimony is inadmissible. *See e.g. United States v. Chang*, 207 F.3d 1169, 1172-73 (9th Cir.2000) ("extremely qualified" expert in international finance was properly precluded from testifying about validity of certificate in question, because identification of counterfeit securities was beyond witness's expertise).

In total then, the Holmes report is the speculative and unreliable subjective opinion of an attorney. He has no expertise in the subject matter at issue, the collection of franchise fees by area representatives. As such, he should be precluded from testifying.

VII. IF HOLMES IS ALLOWED TO TESTIFY HE SHOULD BE STRICTLY LIMITED TO DISCREET ISSUES

If franchise customs and practices are relevant as to the discreet issue of Services SoCal's payment of royalties, Holmes testimony should be strictly limited to that topic. That is, if anything, the only portion of Holmes opinion that should be admissible is limited testimony with regard to the collection of franchise fees. *See e.g.* Adams Decl., Ex. A., Findings ¶¶ 11-14. However, for the reasons stated above, this testimony should not be admissible either.

WSC attempts to exploit one section of the Area Representation Agreement in order to allow its expert Holmes to testify as to everything about Services SoCal's conduct and actions. WSC argues it should be able to get the testimony of Holmes in as to "whether or not WSC properly terminated the agreement for cause." Opposition, p. 7:11-13. However, section 4.1(c) does not allow for simply a "for cause" termination. Adams Decl., Ex. B, ¶ 4.1(c). That section specifically delineates that WSC had a right to terminate Services SoCal "for cause based upon a material breach of the agreement." *Id.* WSC does not identify any material breach beyond not collecting fees under Section 3 of the Area Representation Agreement. As there is no other identified breach, this section cannot be the basis for bringing in opinion testimony as to a myriad of issues completely unrelated to fee collection.

WSC would like to have Holmes testify that generally Services SoCal "fell below industry standards in performing as an area representative" based upon a number of actions unrelated to the claims in this case. Opposition, p. 7:14-15; *see also* p. 12-13 ("[Services SoCal's] failure to meet industry standards with regard to various issues.") However, such testimony has no relevance, would be confusing to the jury and unfairly prejudicial. *See* Federal Rule of Evidence 403. Holmes' conclusory findings, among others, include, that:

- Services SoCal did not deal "fairly and honestly" with franchisees. Adams Decl., ¶ 3, Ex. A, p. 18, ¶ 5;

- Franchise owners were "disgruntled" with an affiliated company of Services SoCal opening an office in Encinitas. *Id*. at p. 19, ¶ 9;
- Services SoCal did not collaborate with WSC sufficiently with regard to the closure of a Windermere office. *Id.* at p. 20, ¶ 15;
- Services SoCal's representatives made disparaging remarks to franchisees. *Id.* at p. 20, ¶¶ 17-18;
- Services SoCal did not make a franchisee aware of certain software tools. *Id.* at p. 21, ¶¶ 23-26.
- Services SoCal told representatives of WSC not to contact franchisees. *Id.* at p. 22, ¶¶ 31-32.
- Services SoCal's representatives were "unpleasant". *Id.* at pp. 22-23, ¶¶ 33-35.

None of these conclusions and anticipated testimony has any relation to any claim in this case.

For these reasons, to the extent the Court allows Holmes to testify, his testimony should be strictly limited to the customs and practices of area representatives in collecting fees from franchisees and nothing more. Holmes should be precluded from testifying as to the rest of his opinions as they are not relevant and the nonexistent probative value is substantially outweighed by prejudice.

VIII. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion and either (1) enter an order excluding David Holmes from testifying at trial; or alternatively (2) limit Holmes' testimony to whether Services SoCal breached its obligation under the Area Representation Agreement by not collecting fees from franchisees.

Dated: April 3, 2017

MULCAHY LLP

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