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11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**

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

21 Plaintiffs,

22 v.

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

26 Defendant.

27 **AND RELATED COUNTERCLAIMS**
28

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

Hon. Manual L. Real

**PLAINTIFFS AND COUNTER-
DEFENDANTS' NOTICE OF
MOTION AND 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

[Concurrently filed with the Declaration
of Kevin Adams and [Proposed] Order]

Action Filed: September 17, 2015

Pretrial Conf.: November 14, 2016

Trial: May 30, 2017

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on Monday, April 17, 2017 at 10:00 a.m., or as
3 soon thereafter as the Motion may be heard at the United States District Court located at
4 the Roybal Federal Building and U.S. Courthouse, 255 East Temple Street, Los Angeles,
5 CA 90012, Courtroom 880, 8th Floor, Plaintiffs and Counter-Defendants Bennion &
6 Deville Fine Homes SoCal, Inc. (“B&D SoCal”) and Windermere Services Southern
7 California, Inc. (“Services SoCal”), and Counter-Defendants Robert Bennion
8 (“Bennion”) and Joseph R. Deville (“Deville”) (collectively, “Plaintiffs”) will and hereby
9 do move this Court for an Order excluding Defendant/Counterclaimant Windermere Real
10 Estate Services Company’s (“WSC”) expert witness David E. Holmes (“Holmes”) from
11 testifying at trial pursuant to Federal Rules of Evidence 403, 702 and the standards set
12 forth by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579
13 (1993).

14 WSC is attempting to put an attorney on the stand masquerading as an expert to
15 provide speculative and unsubstantiated opinion on the customs and practices in the
16 franchise industry ignoring the express obligations set forth in the parties’ Area
17 Representation Agreement. WSC’s attempt to use Holmes to rewrite the parties’
18 contractual agreement should not be permitted. Exclusion of Holmes is appropriate for
19 the following reasons:

20 **First**, Holmes will testify to what he believes the customs and practices are for
21 area representatives in franchise systems. However, the Court has already found that the
22 Area Representation Agreement in question is not a franchise agreement.¹ Thus, the
23 customs and practices in franchise systems are not in any way relevant to whether there
24 was a breach of the Area Representation Agreement. Thus, Holmes’ testimony should be
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¹ See Order Granting Defendant’s Motion for Partial Summary Judgment, pp. 5-6.
(Dkt. No. 66)

1 excluded as it would not be helpful to the trier of fact and would only confuse the issues
2 in the case.

3 **Second**, even if the Area Representation Agreement involved franchising, Holmes'
4 testimony would still be irrelevant. WSC cannot point to any terms in the Area
5 Representation Agreement that are ambiguous such as to require evidence of customs and
6 practices in the industry. Where the contractual terms are unambiguous, evidence of
7 custom and practice is not admissible. Thus, Holmes' testimony should be excluded as it
8 would not be helpful to the jury and would only confuse the issues.

9 **Third**, even if franchise customs and practices were relevant as to the discreet
10 issues remaining in the case – *e.g.*, trademark infringement and the payment of royalties –
11 Holmes' testimony goes far beyond those issues. Instead, Holmes discusses a myriad of
12 Services SoCal's actions that have no relation to the claims in this case. In fact, Holmes
13 generally opines as to how he believes a reasonable area representative should act
14 without regard to the parties' rights and duties set forth in the Area Representation
15 Agreement. Such testimony is not relevant, unfairly prejudicial and misleading to the
16 jury.

17 **Fourth**, Holmes' testimony lacks any foundation and does not meet the *Daubert*
18 standard. Holmes simply sets forth Services SoCal's actions and proceeds to conclude
19 that the actions were not in line with the customs and practices of area representatives in
20 franchising. There is no survey, research or documentation underlying these claims.
21 There is no evidence that Holmes has any familiarity with area representatives in
22 franchising systems. Thus, the anticipated testimony is entirely conclusory, speculative
23 and lacks foundation. It should be excluded.

24 **Fifth**, even if Holmes' testimony is reliable it should be excluded. Under the guise
25 of discussing custom and practice, Holmes is attempting to tell the jury to find a breach
26 of the Area Representation Agreement without regard to its terms. This type of legal
27 conclusion from an expert is not permissible; it is not helpful under FRE 702 to simply
28

1 tell the jury how to decide the case. It is for the jury alone to interpret the Area
2 Representation Agreement and decide whether there was a breach and by whom.

3 For each of these reasons, Holmes should be excluded from trial.

4 This Motion is based upon (1) this Notice of Motion and Motion, (2) the
5 Memorandum of Points and Authorities, (3) the Proposed Order, (4) the Declaration of
6 Kevin A. Adams and exhibits thereto, (5) all other pleadings and papers on file in this
7 action, and (6) upon such other matters as may be presented to the Court at the time of
8 the hearing.

9
10 Dated: March 20, 2017

MULCAHY LLP

11
12 By: /s/ Kevin A. Adams

13 Kevin A. Adams

14 *Attorneys for Plaintiffs and Counter-*
15 *Defendants Bennion & Deville Fine Homes*
16 *SoCal, Inc., Windermere Services Southern*
17 *California, Inc., and Counter-Defendants*
18 *Robert Bennion and Joseph R. Deville*

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1 **Second**, even if the Area Representation Agreement involved franchising, Holmes'
2 testimony would still be irrelevant. WSC cannot point to any terms in the Area
3 Representation Agreement that are ambiguous such as to require evidence of customs and
4 practices in the industry. Where the contractual terms are unambiguous, evidence of
5 custom and practice is not admissible. Thus, Holmes' testimony should be excluded as it
6 would not be helpful to the jury and would only confuse the issues.

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8 issues remaining in the case – *e.g.*, trademark infringement and the payment of royalties –
9 Holmes' testimony goes far beyond those issues. Instead, Holmes discusses a myriad of
10 Services SoCal's actions that have no relation to the claims in this case. In fact, Holmes
11 generally opines as to how he believes a reasonable area representative should act
12 without regard to the parties' rights and duties set forth in the Area Representation
13 Agreement. Such testimony is not relevant, unfairly prejudicial and misleading to the
14 jury.

15 **Fourth**, Holmes' testimony lacks any foundation and does not meet the *Daubert*
16 standard. Holmes simply sets forth Services SoCal's actions and proceeds to conclude
17 that the actions were not in line with the customs and practices of area representatives in
18 franchising. There is no survey, research or documentation underlying these claims.
19 There is no evidence that Holmes has any familiarity with area representatives in
20 franchising systems. Thus, the anticipated testimony is entirely conclusory, speculative
21 and lacks foundation. It should be excluded.

22 **Fifth**, even if Holmes' testimony is reliable it should be excluded. Under the guise
23 of discussing custom and practice, Holmes is attempting to tell the jury to find a breach
24 of the Area Representation Agreement without regard to its terms. This type of legal
25 conclusion from an expert is not permissible; it is not helpful under FRE 702 to simply
26 tell the jury how to decide the case. It is for the jury alone to interpret the Area
27 Representation Agreement and decide whether there was a breach and by whom.
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1 For these reasons, set forth in detail below, Plaintiffs' Motion should be granted
2 and Holmes should be excluded from testifying at trial.

3 **II. THE HOLMES EXPERT REPORT**

4 Holmes identifies himself as a franchise attorney who has been practicing in the
5 area of franchise law since 1975. Adams Decl., ¶ 3, Ex. A, pp. 27-31. Nowhere in his
6 Curriculum Vitae does he claim to have any experience as a franchisor, franchisee, area
7 representative, or experience with the use of area representative relationships in franchise
8 systems. *Id.*

9 Despite not having any practical experience with area representative relationships,
10 Holmes' anticipated expert testimony is his take on industry custom and practice
11 regarding area representatives in franchise systems. In fact, Mr. Holmes summarizes his
12 testimony as the following:

13 Specifically, I've been asked to provide my opinions with respect to the:

- 14 (a) business and strategic rationales, and related standards and practices,
15 supporting a franchisor's decision to utilize an **area representative**
16 **model** for territorial expansion, including the appropriateness of a
17 decision to appoint an **area representative** in the business situation
18 presented and whether, in that business situation, other franchisors may
19 have followed the same strategy.
- 19 (b) respective roles, and industry standards and practices for **area**
20 **representatives** and franchisors, possibly including (but not limited to)
21 those related to real estate-related franchises; and
- 22 (c) standards of care and practices regarding an **area representative** with
23 respect to the sale of franchises and support of local franchisees,
24 including considerations where an area representative is itself a
25 franchisee of the franchisor.

24 Adams Decl., ¶ 3, Ex. A, pp. 1-2 (emphasis added). As Holmes' summary suggests, the
25 entire layout of the report is an academic discussion of the pro's and con's of area
26 representatives in franchising. These pro's and con's are then followed by Holmes'
27 conclusions that Services SoCal's conduct is inconsistent with industry custom and
28

1 practice. As discussed below, Holmes’s testimony is not relevant to this case, he is not
2 qualified to serve as an expert, and his legal conclusions do not assist the trier of fact.

3 **III. RULES GOVERNING EXPERT WITNESS TESTIMONY**

4 Federal Rule of Evidence 702 governs the admission of expert testimony. It states:

5 If scientific, technical or other specialized knowledge will assist the trier of
6 fact to determine a fact at issue, a witness qualified as an expert by
7 knowledge, skill, experience, training, or education, may testify thereto in
8 the form of an opinion or otherwise, if (1) the testimony is based upon
9 sufficient facts or data, (2) the testimony is the product of reliable principles
10 and methods; and (3) the witness has applied the principles and methods
reliably to the facts of the case.

11 Applying Rule 702, for expert testimony to be admissible, “(1) the expert must be
12 qualified; (2) the expert’s testimony must be relevant, *i.e.*, must assist the trier of fact to
13 understand the evidence or determine a fact in issue; and (3) the expert’s testimony must
14 be reliable.” *Novalogic, Inc. v. Activision Blizzard*, 41 F.Supp.3d 885, 894 (C.D. Cal.
15 2013); *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-593 (1993).
16 “The Court has a basic gatekeeping function to ensure that testimony meets these
17 requirements”. *Novalogic*, 41 F.Supp.3d at 894; *Kumho Tire Co. v. Carmichael*, 526 U.S.
18 137, 147 (1999) (gatekeeper responsibility applies to all expert testimony, not just
19 scientific testimony).

20 “A district court's gatekeeping function requires that it ‘ensure that the proposed
21 expert testimony is ‘relevant to the task at hand,’ *i.e.*, that it logically advances a material
22 aspect of the proposing party's case’”. *CFM Commc'ns, LLC v. Mitts Telecasting Co.*, 424
23 F. Supp. 2d 1229, 1237 (E.D. Cal. 2005). The party advancing the expert testimony bears
24 the burden of showing that it is relevant to advancing a claim or defense. *Id.*

25 Expert testimony that merely states a legal conclusion should be excluded. *See e.g.*
26 *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (“an
27 expert witness cannot give an opinion as to her legal conclusion, *i.e.*, an opinion on an
28 ultimate issue of law.”) Mere “legal conclusions without underlying factual support ...

1 constitute ‘unsupported speculation’ and are therefore inadmissible.” *Plush Lounge Las*
2 *Vegas LLC v. Hotspur Resorts Nevada Inc.*, 371 Fed.Appx. 719, 720 (9th Cir.2010).

3 A “trial court properly excludes testimony which instructs the jury on legal issues
4 or effectively attempts to instruct the jury how to decide.” *Shops at Grand Canyon 14,*
5 *LLC v. Rack Room Shoes, Inc.*, No. 2:09-CV-01234-RLH, 2010 WL 4181361, at *3 (D.
6 Nev. Oct. 20, 2010); *Nationwide*, 523 F.3d at 1059-60; (testimony “that simply tells the
7 jury how to decide is not considered helpful” and thus should be excluded).

8 Even if an expert passes the gatekeeper test, expert testimony may still be excluded
9 under Federal Rule of Evidence 403 if the probative value is substantially outweighed by
10 the danger of unfair prejudice, confusion of the issues or misleading the jury. *Rogers v.*
11 *Raymark Indus.*, 922 F.2d 1426, 1430 (9th Cir. 1991).

12 **IV. LEGAL ARGUMENT**

13 **A. Holmes’ Testimony Is Not Relevant Following The Court’s Finding That** 14 **The Area Representation Agreement Is Not A Franchise**

15 Holmes’ opinions are each predicated on how an area representative – in this case,
16 Services SoCal – should act in a franchise relationship. However, the Court has already
17 found on summary judgment that Services SoCal’s Area Representation Agreement with
18 WSC is not a franchise agreement. (Dkt. No. 66, pp. 5-6). Because the parties’
19 relationship is not a franchise relationship, Holmes’ testimony regarding franchising
20 “custom and practice” is irrelevant and he should be excluded as a result.

21 In the First Amended Complaint, Services SoCal brought a claim for violation of
22 the California Franchise Relations Act (“CFRA”) (Cal. Bus. & Prof. Code § 20020)
23 against WSC on the basis that the Area Representation Agreement constituted a franchise
24 under the law. *See* First Amended Complaint, at ¶¶ 183-186 (Dkt. No. 31). ***WSC filed a***
25 ***Motion for Partial Summary Judgment arguing that the Area Representative***
26 ***Agreement was not a franchise agreement under the law.*** (Dkt. No. 59-1.) The Court
27 ***agreed***, finding that the Area Representation Agreement was not a franchise agreement as
28 there was no franchise fee paid. *See* Order Granting Defendant’s Motion for Partial

1 Summary Judgment, pp. 5-6 (Dkt. No. 66). Likewise, the Court concluded that Services
2 SoCal was not an area franchise under the CFRA. *Id.* In light of these findings of the
3 Court, expert testimony on Services SoCal’s adherence to franchising “custom and
4 practice” is misplaced.

5 Nonetheless, WSC maintains its expert designation of Holmes to opine on how the
6 “best practices” in franchising are used to interpret the parties’ performance under the
7 Area Representation Agreement. This should not be allowed. Because the Area
8 Representation Agreement is not a franchise agreement, Holmes’ opinions and
9 conclusions are not relevant in this case.

10 Federal Rule of Evidence 702 requires “that the evidence or testimony ‘assist the
11 trier of fact to understand the evidence or to determine a fact in issue.’” *Daubert*, 509
12 U.S. at 591. “This condition goes primarily to relevance.” *Id.* “Expert testimony which
13 does not relate to any issue in the case is not relevant and, ergo, non-helpful.” *Id.* Because
14 Holmes’ so-called expertise and anticipated testimony do not relate to the facts at issue in
15 this case, they are not relevant and, therefore, not helpful. Thus, Holmes should be
16 excluded from testifying under Federal Rule of Evidence 702.

17
18 **B. Holmes’ Testimony Should Be Excluded Because Evidence Of Franchising**
19 **Customs And Practices Is Not Relevant Since The Area Representation**
20 **Agreement Is Unambiguous**

21 Even if the Area Representation Agreement involved franchising, Holmes’
22 testimony would still be irrelevant. All of Holmes’ testimony relates to the performance
23 of the franchise relationship. In other words, Holmes seeks to opine regarding how a
24 reasonable area representative should act in certain factual circumstances. The “custom
25 and practice” of a theoretically reasonable franchise area representative is irrelevant to
26 the contract dispute at issue. The parties’ rights and obligations are defined entirely and
27 explicitly by their express agreements.

1 Expert testimony regarding industry standards or trade practice “is admissible *only*
2 *if* the contract language at issue is ambiguous or involves a specialized term of art,
3 science or trade.” *Suzlon Wind Energy Corp. v. Shippers Stevedoring Co.*, 662 F. Supp.
4 2d 623, 668 (S.D. Tex. 2009) (emphasis added); *Sheet Metal Workers, Int'l Assn., Local*
5 *Union No. 24 v. Architectural Metal Works, Inc.*, 259 F.3d 418, 424 n. 4 (6th Cir.2001)
6 (“[T]he construction of unambiguous contract terms is strictly a judicial function; the
7 opinions of percipient or expert witnesses regarding the meaning(s) of contractual
8 provisions are irrelevant and hence inadmissible.”); *N. Am. Specialty Ins. Co. v. Myers*,
9 111 F.3d 1273, 1281 (6th Cir. 1997) (“Absent any need to clarify or define terms of art,
10 science, or trade, expert opinion testimony to interpret contract language is
11 inadmissible.”) Here, Holmes’ “expertise” is not needed as the terms of the Area
12 Representation Agreement are clear and unambiguous.

13 At this late juncture in the proceeding, there are only a few contract terms at issue
14 in the case. WSC is currently pursuing a breach of contract claim against Services SoCal
15 for: (1) “failing and refusing to collect and remit fees from Windermere franchisees”, and
16 (2) by misusing “the Windermere name and trademarks following expiration/termination
17 of the Area Representation Agreement.”³ See First Amended Counter-Claim, ¶¶ 127-141
18 (Dkt. No. 16). The sections in the Area Representation Agreement pertaining to fees and
19 trademark usage are unambiguous. In particular, Section 2 states that the “Area
20 Representative agrees not to make or authorize any use, direct or indirect, of the
21 Trademark for any other purpose or in any other manner” other than set forth in the
22 Windermere License Agreement. Adams Decl., ¶ 4, Ex. B. Section 3 of the Area
23 Representation Agreement simply requires, among other things, that the “Area
24 Representative’s responsibilities will include the responsibility to receive, collect,
25 account for all license fees, administrative fees, Advertising Fund contributions, and
26

27 ³ WSC’s other contract claims against Services SoCal were disposed of on partial
28 summary judgment. See Order Granting in Part and Denying in Part Plaintiffs and
Counter-Defendants Motion for Partial Summary Judgment, pp. 2-3 (Dkt. No. 75).

1 other amounts due under license agreements in the Region, and to remit to WSC its share
2 of such fees.” *Id.* Neither of these contract terms is ambiguous such as to require an
3 expert to testify as to industry standards or trade practice.

4 Likewise, Holmes’ testimony is irrelevant to Services SoCal’s contract claim
5 against WSC. Services SoCal’s contract claim against WSC concerns WSC’s failure to
6 comply with the following terms of the Area Representation Agreement:⁴

- 7 a. Section 2, for failing to provide Services SoCal with the uninterrupted right to
8 offer Windermere franchised businesses in Southern California;
- 9 e. Section 4.2, for failing to pay Services SoCal the termination fee – *i.e.* the fair
10 market value of its interest in the Area Representation Agreement – following
11 termination without cause;
- 12 f. Section 7, for failing to promptly and diligently commence and pursue the
13 preparation and filing of all franchise registration filings required under California
14 law and/or the United States of America;
- 15 g. Section 7, for failing to maintain the registration of the Southern California
16 FDD;
- 17 h. Section 10, for depriving Services SoCal of its right to offer new Windermere
18 franchises rendering it unable to collect initial franchise fees and continuing license
19 fees from new franchisees; and
- 20 j. Exhibit A, § 3, by attempting to terminate the Area Representation Agreement
21 under the pretense that Services SoCal was the “guarantor” of the franchise fees
22 owed by the franchisees in the Southern California region.

21 *See* First Amended Complaint, ¶ 165 (Dkt. No. 31). Again, none of the parties have taken
22 the position that any of these contract terms are ambiguous. Thus, none of these terms
23 provide a basis for bringing in Holmes to testify regarding industry customs and practice.

24 It is well settled that where a contractual term is clear and unambiguous, a party
25 may not use evidence of custom or usage (or any other extrinsic evidence) to vary or
26

27 ⁴ Other portions of the Third Claim for Relief in the First Amended Complaint were
28 dismissed by the Court’s Order Granting Defendant’s Motion for Partial Summary
Judgment (Dkt. No. 66).

1 contradict the contractual language. *See e.g. Varni Bros. Corp. v. Wine World, Inc.*, 35
2 Cal.App.4th 880, 890 (1995); *Peiser v. Mettler*, 50 Cal.2d 594, 610 (1985). The “custom
3 and practice” of a theoretically reasonable franchise area representative is irrelevant to a
4 jury’s determination of breach. *See e.g. Palazzetti Imp./Exp., Inc. v. Morson*, No. 98 CIV.
5 722 (FM), 2001 WL 793322, at *3 (S.D.N.Y. July 13, 2001) (franchise expert’s
6 testimony is inadmissible as the franchise agreement was unambiguous and thus industry
7 custom and practice was not relevant). Because each contract term at issue is clear and
8 unambiguous, testimony regarding industry customs and practice is not necessary.

9 It is WSC’s burden to show that Holmes’ testimony is relevant to advancing a
10 claim or defense. *CFM Commc'ns*, 424 F. Supp. 2d at 1237. As set forth above, it cannot
11 meet this burden as Holmes’ testimony is not relevant to any of the parties’ claims. As it
12 has no relevance, the Court should exercise its gatekeeping function and exclude Holmes
13 from testifying at trial.

14
15 **C. The Vast Majority Of Holmes’ Testimony Has No Relevance To Any**
16 **Claim In This Case And Should Be Excluded**

17 In the unlikely event that the Court finds Holmes’ testimony to be relevant to the
18 claims at issue, his testimony should be limited to those topics. Review of Holmes’ report
19 shows that he hardly mentions the trademark and fee issues, and instead, pontificates as
20 to the best practices in a franchising system and how various actions of Services SoCal
21 do not conform to his ideal beliefs.

22 For example, at least one third of Holmes’ report is dedicated to discussing the
23 “[b]usiness and strategic rationales, and related standards and practices, supporting a
24 franchisor’s decision to utilize an area representative model for territorial expansion.”
25 Adams Decl., ¶ 3, Ex. A, pp. 3-10. After providing an overview of what he believes to be
26 the pro’s and con’s of the use of an area representative, Holmes concludes that WSC’s
27 “decision to appoint an area representative would have been appropriate and would not
28 be inconsistent with franchise industry standards as applied to forming area

1 representative relationships.” *Id.* at p. 10. It is unclear how this conclusion or the
2 underlying information would have any relevance to the claims at issue. Testimony to
3 this effect should be excluded as it would only confuse the jury as to the real issues in the
4 case.

5 Similarly, Holmes muses generally as to what the “[r]espective roles, and industry
6 standards” are for area representatives and franchisors. *Id.* at pp. 10-15. In discussing
7 these roles he notes all the negative repercussions that would occur if a hypothetical area
8 representative was not “committed to the success of the franchisees”. *Id.* at p. 14. In so
9 doing, he is trying to imply that Services SoCal may be one of these hypothetical area
10 representatives that diminish the efficacy of a franchise system. This type of hypothetical
11 is not based on fact and, therefore, has no relevance here. The attempt to implicitly
12 tarnish Services SoCal would be highly prejudicial under Federal Rule of Evidence 403,
13 misleading and not relevant.

14 Holmes also discusses the “standards of care and practices regarding an area
15 representative”. *Id.* at pp. 15-17. Putting aside the notion that this is not a case that would
16 involve a standard of care (*e.g.* negligence claim) this again is merely Holmes’ personal,
17 subjective recitation of what he believes are best practices for franchisors and area
18 representatives. Again, none of this would assist the jury with the issues in this case.

19 Most of Holmes’ report attempts to compare an idealized area representative to a
20 hypothetical area representative who worked against the franchisor’s interests. While
21 such conjecture and pontification may have some academic value, it has no relation to the
22 actual facts of this case. “Testimony ‘fits’ a case if it ‘logically advances a material aspect
23 of the proposing part’s case.” *In re Silicone Gel Breast Implants Prod. Liab. Litig.*, 318
24 F.Supp.2d 879, 893 (C.D. Cal. 2004). None of Holmes’ anticipated testimony advances
25 any aspect of WSC’s case and therefore it has no relevance. The purpose of such
26 testimony is clearly to cast a pall over Services SoCal and simply demean its integrity or
27 actions without any reference to the claims at issue.

28

1 The rest of Holmes' report identifies his findings as to various alleged actions by
2 Services SoCal. Incredibly, Holmes simply repeats a litany of purported actions by
3 Services SoCal and summarily concludes that these actions are not consistent with
4 franchise industry standards and practices. Holmes' conclusory findings include, for
5 example, the following:

- 6 • Services SoCal did not deal "fairly and honestly" with franchisees.
7 Adams Decl., ¶ 3, Ex. A, p. 18, ¶ 5;
- 8 • Franchise owners were "disgruntled" with an affiliated company of
9 Services SoCal opening an office in Encinitas. *Id.* at p. 19, ¶ 9;
- 10 • Services SoCal did not collaborate with WSC sufficiently with regard
11 to the closure of a Windermere office. *Id.* at p. 20, ¶ 15;
- 12 • Services SoCal's representatives made disparaging remarks to
13 franchisees. *Id.* at p. 20, ¶¶ 17-18;
- 14 • Services SoCal did not make a franchisee aware of certain software
15 tools. *Id.* at p. 21, ¶¶ 23-26.
- 16 • Services SoCal told representatives of WSC not to contact
17 franchisees. *Id.* at p. 22, ¶¶ 31-32.
- 18 • Services SoCal's representatives were "unpleasant". *Id.* at pp. 22-23,
19 ¶¶ 33-35.

20 None of these conclusions and anticipated testimony has any relation to any claim in this
21 case. Holmes appears to have simply combed the discovery and depositions under his
22 counsel's command to find anything that Services SoCal did that he could say was
23 inconsistent with industry practice without regard to whether it concerned any claim.
24 Because the vast majority of Holmes' anticipated testimony has no probative value to any
25 claim, it should be excluded.

26 Moreover, Holmes' anticipated testimony should be excluded because its probative
27 value is substantially outweighed by the dangers of unfair prejudice, confusing the issues,
28 misleading the jury and undue delay. *See* Federal Rule of Evidence 403. With respect to

1 expert witnesses, “[i]t is particularly appropriate for the trial judge to carefully weigh the
2 potential for confusion in the balance [...]” *Rogers*, 922 F.2d at 1431. This is because
3 “[j]urors may well assume that an expert, unlike an ordinary mortal, will offer an
4 authoritative view on the issues addressed,” and “the jury may follow the ‘expert’ down
5 the garden path and thus focus unduly on the expert’s issues to the detriment of issues
6 that are in fact controlling.” *Id.*

7 Here, there is a considerable risk that if Holmes is permitted to testify the jury may
8 be confused and wrongly believe a number of Services SoCal’s actions are at issue when,
9 in fact, they have no relation to the claims. The admission of Holmes’ testimony may
10 lead to a decision on an improper basis and wrongfully prejudice Services SoCal. For
11 these reasons, the Court need not even consider the reliability of Holmes’ testimony; it
12 should be excluded on relevance and prejudice grounds alone.

13 **D. Holmes Testimony Lacks Foundation and Is Conclusory**

14 Even if franchise customs and practices were in some way relevant, and the litany
15 of subjective conclusions reached by Holmes actually concerned claims in the case,
16 Holmes should still be precluded from testifying as his testimony lacks foundation and
17 does not meet the *Daubert* standard. Expert testimony must be both relevant and reliable
18 to be presented to the trier of fact. *Elsayed Mukhtar v. Cal State Univ., Hayward*, 299
19 F.3d 1053, 1063-64 (9th Cir. 2002) (It is the “trial court’s ‘special obligation’ to
20 determine the relevance and reliability of an expert’s testimony”). Opinions are
21 inadmissible if they are nothing more than “subjective belief or unsupported speculation.”
22 *Daubert*, 509 U.S. at 590 (“The word ‘knowledge’ connotes more than subjective belief
23 or unsupported speculation.”); *California ex. rel. Brown v. Safeway, Inc.*, 615 F.3d 1171,
24 1181, fn. 4 (9th Cir. 2010) *on reh'g en banc sub nom. California ex rel. Harris v.*
25 *Safeway, Inc.*, 651 F.3d 1118 (9th Cir. 2011) (“An expert's opinions that are without
26 factual basis and are based on speculation or conjecture are inadmissible at trial”)

27 Here, Holmes holds himself as an “expert” and provides a 45-page report on the
28 ideal customs and practices of an area representative in a franchise system. Incredibly, in

1 support of these opinions – and outside of the case file – the only authority that Holmes
2 cites to is the book “Franchising for Dummies.” *See* Adams Decl., ¶ A., pp. 25-26
3 (identified as “[e]xpert advice on choosing and running the right franchise”). He did not
4 undertake any objective research or study to verify whether Services SoCal’s actions
5 were consistent with industry standard. Holmes does not cite to any facts or data
6 underlying his opinions. And, he does not identify any other franchise agreements,
7 disclosure documents, or manuals that helped him form a substantive basis for his
8 opinions. Without identifiable substantiation, Holmes’ subjective opinions do not meet
9 the *Daubert* standard.

10 Additionally, Holmes does not provide *any* background for his purported
11 knowledge and familiarity with area representative relationships. Holmes’ Curriculum
12 Vitae shows that he has practiced as a franchise attorney since 1975 but fails to show any
13 prior encounter with an area representative in a franchising system.

14 Critically, Holmes implicitly acknowledges that he is speculating based on limited
15 snippets of deposition testimony he read. *See e.g.* Adams Decl., ¶ 3, Ex. A, p. 21, ¶ 24
16 (note the repetition of the phrase “Such a situation [...]”). His status as a franchise
17 attorney does not qualify one to address and surmise as to the nuances of area
18 representatives across the country. In short, without substantiation for his opinions,
19 Holmes’ testimony is not reliable. There is no foundation for it nor does he have the
20 requisite expertise to render his conclusions. “Where foundational facts demonstrating
21 [...] qualifications are not sufficiently established, exclusion of proffered expert
22 testimony is justified.” *LuMetta v. United States Robotics, Inc.*, 824 F.2d 768, 771 (9th
23 Cir. 1987).

24 In total then, Holmes’ testimony cannot meet the *Daubert* standard. The Holmes
25 report makes clear that his testimony is unreliable and amounts to pure speculation as to
26 what he believes may be appropriate for an area representative. As Holmes’ opinions and
27 anticipated testimony are not reliable, they should be excluded.

1 **E. Holmes Testimony Invades the Province of the Fact Finder**

2 Even if Holmes’ testimony is relevant and reliable, it should still be excluded.
3 WSC is using Holmes to tell the jury to find that the actions committed by Services
4 SoCal are breaches of the Area Representation Agreement without regard to its terms.
5 Holmes attempts to disguise this by stating that the actions committed by Services SoCal
6 are inconsistent with what he believes are the franchise area representative’s best
7 practices. However, in reality, Holmes, an attorney, is indirectly telling the jury how to
8 decide the case.

9 For example, Holmes testifies as to the various contractual obligations under the
10 Area Representation Agreement. *See Adams Decl.*, ¶ 3, Ex. A, pp. 12-13. He then
11 concludes that such contractual provisions “are consistent with standards and practices in
12 area representative franchising.” *Id.* at p. 13. From there he opines that the “failure to
13 comply or perform the Area Representative’s obligations undertaken under such
14 provisions (including but not limited to those involving collection and remission of fees)
15 would not be consistent with standards and practices in area representative franchising.”
16 *Id.*

17 In repeatedly reaching these types of conclusions, Holmes establishes a two-step
18 paradigm that is seen throughout his report. *See e.g. Adams Decl.*, ¶ 3, Ex. A, p. 17, ¶ 3,
19 p. 18, ¶ 6, p. 19, ¶ 14, p. 20, ¶¶ 16, 18, p. 21, ¶¶ 20, 22, 24, 26. First, Holmes states in
20 conclusory fashion that the particular contractual provisions in the Area Representation
21 Agreement is in line with the standards and practices in franchising. He then quickly
22 concludes that Services SoCal’s actions are not in accordance with the standards and
23 practices in franchising. In so doing, he is telegraphing to the jury one thing; his opinion,
24 as an attorney, that Services SoCal breached the Area Representation Agreement.

25 “Fed.R.Evid. 702 permits a qualified expert to testify in the form of an opinion or
26 otherwise only if such testimony would assist the trier of fact to understand the evidence
27 or determine a factual issue.” *Little Oil Co. v. Atl. Richfield Co.*, 852 F.2d 441, 446 (9th
28 Cir. 1988). “The test for admissibility is whether the jury will receive ‘appreciable help.’”

1 *Id.* Testimony “that simply tells the jury how to decide is not considered helpful”.
2 *Nationwide*, 523 F.3d at 1059-60. Similarly here, Holmes’ testimony that Services
3 SoCal’s actions are not in accordance with the practices and standards of franchising
4 (read Area Representation Agreement) is not helpful.

5 *Little Oil* is illustrative here. In that case, franchise gasoline distributors filed a
6 lawsuit against a franchisor alleging that the franchisor’s institution of new marketing
7 changes was prohibited by the terms of the franchise agreement and constituted
8 constructive termination of the franchise agreement. *Little Oil Co.*, 852 F.2d at 443. The
9 distributors attempted to have an expert testify that the franchisor’s marketing changes
10 amounted to a termination of the franchise agreement. *Id.* at 445-446. The Ninth Circuit
11 affirmed the exclusion of the expert’s testimony on the basis that the opinions would not
12 have been helpful to the jury. *Id.* at 446. The jury could “draw its own conclusions”
13 regarding the marketing practices. *Id.*

14 Similarly here, the jury can draw its own conclusions about whether Services
15 SoCal’s and WSC’s actions constituted a breach of the Area Representation Agreement.
16 Ultimately, the “question of interpretation of the contract is for the jury and the question
17 of legal effect is for the judge. In neither case do [courts] permit expert testimony.” *Loeb*
18 *v. Hammond*, 407 F.2d 779, 781 (7th Cir. 1969). Holmes’ testimony is merely designed
19 to instruct the jury to find breaches of the Area Representation Agreement or find
20 Services SoCal to be a bad actor. It invades the province of the jury. As such, it should be
21 excluded.

22 **F. Holmes’ Opinions Do Not Assist the Trier of Fact**

23 In addition to relevance and foundation arguments set forth above, Holmes’
24 testimony also should be excluded from trial for being inconclusive and failing to provide
25 information beyond what a layperson already knows. *See generally* Fed. R. Evid. 702.
26 Holmes’ opinions are couched in qualifiers that suggest that either (i) there is no correct
27
28

1 answer, or (ii) he does not know the answer. Under either scenario, Holmes must be
2 disqualified as an expert in the case.

3 Holmes use of qualifiers is rampant throughout his report. Adams Decl., Ex. A.
4 Prime examples of failure to provide definitive opinions or take positions that would
5 helpful to the trier of fact include the following references in his expert report: p. 3 (“will
6 **generally** remain constant”), p. 3 (“**usually** embodied in a franchise agreement”), p. 3
7 (“**usually**, a periodic royalty, **generally** based on sales”), p. 3 (“**Often**, the franchisor will
8 also provide”), p. 3 (“that third party is **typically** referred to as the ‘area representative’”),
9 p. 3 (“**typically** called an area representation”), p. 4 (“**typically** limited to unit franchisees
10 within a specified geographic area”), p. 4 (“Those obligations **can** include (among other
11 things)...”), p. 4 (“the area representative **can** also serve as a conduit for
12 communication”), p. 4 (“The area representative **may** also work with the franchisor and
13 the franchisee in situations where the franchisee **may** be in default of its financial or other
14 obligations.”), p. 4 (“**In some cases**, the area representative will have an obligation to
15 assist in soliciting the sale [...], such an obligation **often** being called a development
16 schedule.”), p. 4 (“**In some cases**, the area representative will also be allowed to own and
17 operate [their own franchises]. Such unit(s) **may** be used for training of new franchisees
18 and their employees.”), p. 5 (“**In many cases**, the franchisor will provide services to the
19 area representative [...]. These **can** include training [...] and (**sometimes**) with respect to
20 the operation of the franchised businesses.”), p. 5 (“The area representative **may** pay the
21 franchisor an initial fee [...] and will **generally** receive a portion of the royalty [...].
22 Those fees paid by the retail-level franchisee **may** be either directly to the franchisor [...],
23 or **may** be paid by the franchisee to the area representative.”), p. 5 (the “franchisor – area
24 representative relationship **can** include the following”), p. 5 (“which **might otherwise** be
25 provided by the franchisor”), p. 5 (“the franchisor **generally** does not need to maintain
26 such personnel”), p. 6 (“the franchisor **may** benefit accordingly”), p. 6 (“multiple area
27 representatives throughout the country **can potentially** result in faster sales”), p. 6 (“**can**
28 have related benefits”), p. 6 (“use of area representatives who are already (**hopefully**

1 successfully) operating a franchised outlet in the general market area of potential
2 franchisees *can* be a more effective franchise marketing strategy”), p. 6 (“A prospective
3 franchisee [...] *may* feel more secure”), p. 6 (“adaptation and adjustment of the business
4 model *may* be more effective *where* a local area representative is aware of the need for
5 such variations”), p. 7 (“opportunities or challenges in the relevant market(s) *can* be
6 implemented more quickly and effectively, *possibly* even leading to development of
7 superior best practices”), p. 7 (“*may* be more readily accepted by the local franchisees”),
8 p. 7 (“One of the benefits of a franchised business model *can* be that the franchisee [...]”
9 is highly incentivized to have it succeed, *perhaps* even more so than an employee with no
10 ownership”), p. 7 (“The same dynamic *can* apply to the area representative”), p. 7
11 (“*possibly* increasing the chances of its success”), p. 7 (“This *can* be particularly true”),
12 p. 7 (“use of a broker to market franchises *may* entail the disadvantage that the broker
13 will be (*generally*) marketing a wider range of franchised opportunities, *perhaps* even
14 competing ones [...]. Those issues are *normally* not present where an area representative
15 is used.”), p. 7 (“communications and accommodation between those franchisees and a
16 geographically distant franchisor *may* be more effective.”), pp. 7-8 (“an area
17 representative with multiple unit-level franchisees in his or her territory *may* be more
18 readily accepted”), p. 8 (“Aside from the generally positive elements discussed above,
19 area representative franchising *can* also present potential negatives[.]”), p. 8 (“the
20 franchisor *may* experience significant negative cash flow”), p. 8 (“the franchisor’s
21 revenues *may* be reduced accordingly”), p. 8 (“If the area representative fails to collect
22 and remit portions of the initial franchise fees [...] the franchisor’s revenues *may* be
23 reduced accordingly”), p. 8 (“their power within the franchise system *can* expand”), p. 8
24 (“the franchisor *may* face complaints”), p. 8 (“the *possibility exists* that they will not be
25 as well presented or performed”), p. 9 (“the *sometimes* difficult issue of how to address
26 any such shortcomings will necessarily arise. The possibility of such issues arising *may*
27 be increased where the area representative has little or no prior experience”), p. 9
28 (“knowledge of the details of the underlying business model being franchised *may* not, *by*

1 *itself*, be adequate”), p. 9 (“the area representative’s human and financial resources *may*
2 become more focused”), p. 9 (“those area representative-owned business *may* be
3 perceived [...] as having secured access to favorable locations/markets”), p. 10 (“in such
4 a case, *perceptions may* be critical to the relationship”), p. 10 (“In my experience [...],
5 *similar (although not identical)* relationships *seemed* to have been *generally*
6 successful.”), p. 10 (“the franchisor will *generally* provide ongoing service and support
7 [...]. This ongoing service and support function will *often* be expected by the
8 franchisee”), p. 10 (“Financially and operationally successful franchisees are *more likely*
9 to be [...]”), p. 11 (“That financial and operation success *can* be enhanced by ongoing
10 advice and assistance”), p. 11 (“All of these *may* involve ongoing training and support”),
11 p. 11 (“*For most franchised business models*, both franchisees and franchisors consider
12 such support to be a vital ingredient in the possible success of both the franchisor and its
13 franchisees.”), p. 11 (“the factors discussed above *generally* apply to the area
14 representative in performing his or her functions”), p. 12 (“it’s *doubtful* that an area
15 representative model would have been used”), p. 13 (“an arrangement whereby fees are
16 paid by Franchisees to the Area Representative, rather than to the Franchisor directly,
17 *may* not be typical in area representative franchising”), p. 14 (“*can* face significant
18 negative internal stress, *potentially* damaging the brand”), p. 14 (“franchisees *may* even
19 decide to leave the system and will *almost surely* fail to provide positive validation”), p.
20 14 (“which *may* significantly differ from management methodologies used”), p. 14 (“in
21 which franchisees *generally* take pride”), p. 14 (“and *almost always* cannot be ‘fired’
22 without cause”), p. 15 (“Certain elements present in the real estate profession *can* raise
23 issues of *possible* competition between an area representative [and] franchisee”), p. 15
24 (“there is *at least* the *potential* for competition”), p. 15 (“it *may* negatively impact the
25 relationship”), p. 15 (“serious consideration would *normally* be given by the area
26 representative”), p. 15 (“*could* diminish brand equity and, among other things, damage
27 new sales of franchises”), p. 16 (“The principles laid out above will, *in most instances*,
28 inform and support the standards of care”), p. 16 (“Such actions or omissions by an area

1 representative, *if they took place, could potentially* damage the value of the franchised
2 brand”), p. 16 (“such actions or omissions by an area representative, *if they took place,*
3 *could potentially* negatively impact franchise sales”), p. 16 (“since prospective
4 franchisees *may* contact existing franchisees prior to making their purchase decision,
5 *could* receive negative validation regarding the possible purchase”), p. 16 (“as is
6 *generally* true in real estate”), p. 17 (“Those duties and obligations of the area
7 representative with respect to franchisees are, *in broad measure, substantially similar* to
8 such duties and obligations of area representatives in franchising”), p. 18 (“Such a failure
9 by an area representative *could* [...]”), p. 20 (“*In general,* conduct by an area
10 representative as testified to by Mr. Johnson [...], would not be consistent with applicable
11 standards in area representative franchising.”), p. 21 (“Such a limitation or direction by
12 an area representative would not, *in general,* be typical in franchising”) (twice), p. 21
13 (“would normally be expected”). *See generally* Adams Decl., Ex. A.

14 Holmes’ extensive use of qualifiers and failure to identify definitive opinions
15 renders his testimony confusing and unhelpful to the trier of fact. Under the standard set
16 forth in *Daubert*, 509 U.S. 579, and in Rule 702, such anticipated “expert” testimony
17 cannot be permitted.

18 **V. CONCLUSION**

19 For all the foregoing reasons, Plaintiffs respectfully request that the Court grant
20 their Motion and enter an order excluding David Holmes from testifying at trial.

21 Dated: March 20, 2017

MULCAHY LLP

22
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