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8
9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**

11
12 **BENNION & DEVILLE FINE**
HOMES, INC., a California
13 corporation, **BENNION & DEVILLE**
FINE HOMES SOCAL, INC., a
14 California corporation, **WINDERMERE**
SERVICES SOUTHERN
15 **CALIFORNIA, INC.**, a California
corporation,

16 Plaintiffs,

17 v.

18
19 **WINDERMERE REAL ESTATE**
SERVICES COMPANY, a Washington
20 corporation; and **DOES 1-10**

21 Defendant.

22
23 **AND RELATED COUNTERCLAIMS**
24
25
26
27
28

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

Hon. Manual L. Real

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION IN
LIMINE NO. 2 TO EXCLUDE
PORTIONS OF PLAINTIFFS'
REBUTTAL REPORT**

Date: May 15, 2017

Time: 10:00 a.m.

Courtroom: 880

Action Filed: September 17, 2015

Trial: May 30, 2017

1 Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc. (“B&D Fine
2 Homes”), Bennion & Deville Fine Homes SoCal, Inc. (“B&D SoCal”), Windermere
3 Services Southern California, Inc. (“Services SoCal”), and Counter-Defendants Robert L.
4 Bennion and Joseph R. Deville (collectively, the “B&D Parties”) respectfully submit this
5 Opposition to Defendant/Counter-Plaintiff Windermere Real Estate Services Company’s
6 (“WSC”) motion *in limine* to exclude portions of the B&D Parties’ rebuttal report.

7 **I. INTRODUCTION**

8 As a preliminary matter, the instant motion *in limine* is likely moot in light of the
9 B&D Parties’ motion to exclude WSC’s franchise expert David Holmes (“Holmes”)
10 currently pending before the Court. [Dkt. No. 82.] As explained in detail in the B&D
11 Parties’ motion to exclude, Holmes should not be permitted to testify at trial because: (1)
12 this Court has already found that the Area Representation Agreement is not a franchise,
13 rendering Holmes’ franchise expertise irrelevant to this case; (2) the Court has limited
14 WSC’s claims against the B&D Parties to breaches for failing to pay fees and use of the
15 Windermere mark – two straightforward topics where expert testimony will not aid the
16 trier of fact; (3) the contractual terms at issue are straightforward and unambiguous,
17 rendering an expert’s opinions as to custom and practice unnecessary; (4) Holmes’
18 opinions lack foundation and do not meet the *Daubert* standard; and (5) Holmes’ opinions
19 are impermissible legal conclusions under FRE 702 that simply tell the jury how to decide
20 the case. [See Dkt. Nos. 82, 88.] In light of the Court’s anticipated order granting the B&D
21 Parties’ motion and excluding Holmes from testifying at trial, the B&D Parties’ rebuttal
22 franchise expert, Marvin Storm, will no longer be necessary.

23 However, in the unlikely event that the B&D Parties’ motion to exclude Holmes is
24 denied, Mr. Storm is a necessary rebuttal expert that has provided opinions on franchising
25 industry and practice that directly contradict those opinions provided by Holmes. [Dkt.
26 No. 104, pp. 124-169.] On that basis, the B&D Parties’ oppose WSC’s motion *in limine*
27 on the following grounds:

28 First, WSC’s argument that Mr. Storm’s opinions fall outside the scope of his

1 allowable rebuttal testimony reflects a mischaracterization of both the expert testimony in
2 this case and the law. Ninth Circuit case law dictates that rebuttal testimony is proper as
3 long as it addresses the *same subject matter* as the initial expert and does not introduce
4 novel arguments. Mr. Storm’s testimony falls squarely within these parameters. In
5 rendering his opinions, WSC’s expert Holmes concluded that the area representative
6 (Services SoCal) in the franchisor-area representative relationship was responsible for
7 numerous tasks that Mr. Storm found to be the role of the franchisor (WSC). This is
8 appropriate (and expected) rebuttal testimony.

9 Second, the factual grounds for Mr. Storm’s opinions were informative, reliable,
10 and based on a substantial review of the evidence that significantly exceeded the review
11 undertaken by Holmes. In particular, Mr. Storm’s opinions rely, in part, upon sections of
12 the ARA cited by Holmes in his report but excluded from his analysis. This type of in-
13 depth analysis of materials that the other expert conveniently overlooked is appropriate for
14 rebuttal testimony and not a basis for exclusion.

15 Finally, because Holmes’ opinions are almost entirely ground in the parties’ rights
16 under the ARA, any exclusion of Mr. Storm’s opinions as to the ARA would require
17 exclusion of Holmes’ opinions as to the ARA as well.

18 For these reasons, set forth in detail below, the B&D Parties respectfully request
19 that the Court – to the extent it allows Holmes to testify at trial – deny WSC’s motion to
20 exclude rebuttal opinions of Mr. Storm.¹

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22 ///

24
25 ¹ The rebuttal report of Mr. Storm was completed and served on WSC prior to the
26 Court’s rulings on the parties’ motions for summary adjudication. [Dkt. Nos. 66, 104-2,
27 p. 169.] In light of the Court’s rulings, the B&D Parties concede that Mr. Storm’s
28 Opinion Nos. 4 and 5, addressing WSC’s deficient technology, are no longer relevant to
the case. Thus, Mr. Storm will not be asked by the B&D Parties to offer testimony on
these topics unless the topic is first raised by WSC.

1 **II. RELEVANT FACTUAL BACKGROUND**

2 **A. The Parties' Expert Witness Designations**

3 On September 16, 2016, WSC served the B&D Parties with its expert witness
4 disclosures. [Dkt. No. 104-2, ¶ 3, Ex. A.] WSC designated franchise expert David E.
5 Holmes (“Holmes”). [*Id.*, Ex. A.] A report prepared by Holmes was attached to WSC’s
6 disclosure. [*Id.*, p. 44-88.] In the report, Holmes explained that he was asked to provide
7 opinions with respect to “various franchising-related matters as they may have arisen in
8 this matter.” [*Id.*, p. 44.] These matters are broadly articulated by Holmes as follows:

- 9
- 10 (a) business and strategic rationales, and related standards and practices,
11 supporting a franchisor’s decision to utilize an area representative
12 model for territorial expansion, including the appropriateness of a
13 decision to appoint an area representative in the business situation
14 presented and whether, in that business situation, other franchisors
15 might have followed the same strategy;
 - 16 (b) respective roles, and industry standards and practices, for area
17 representatives and franchisors, possibly including (but not limited to)
18 those related to real estate-related franchises; and
 - 19 (c) standards of care and practices regarding an area representative with
20 respect to the sale of franchises and support of local franchisees,
21 including considerations where an area representative is itself a
22 franchisee of the franchisor.

21 [*Id.*, p. 44-45.]

22 On September 30, 2016, the B&D Parties timely designated franchise expert
23 Marvin Storm as their rebuttal witness to Holmes. [Dkt. No. 104-2, ¶ 5, Ex. C.] Mr.
24 Storm’s rebuttal report was included with the B&D Parties’ designation. [*Id.*, p. 124-186.]
25 In his report, Mr. Storm clearly states that his assignment was to “express opinions related
26 to the Expert Witness Report submitted by David E. Holmes, Esq.,” and that Mr. Storm’s
27 report responded to 6 topics raised in Holmes’ report. [*Id.*, p. 125.] The topics are as
28 follows:

- 1
2 1. Provide an analysis of the customary franchise industry standards that
3 apply to the structure of an area representative and franchisor
4 relationship, the roles and responsibilities that are customarily
5 delegated to an area representative, and the roles and responsibilities
6 that are customarily maintained by the franchisor in an area
7 representative structure;
- 8 2. Review the roles and responsibilities of a franchisor in the area
9 representative relationship described in the Windermere Southern
10 California Area Representative Agreement;
- 11 3. Review the roles and responsibilities of an Area Representative in the
12 area representative relationship described in the Windermere Southern
13 California Area Representative Agreement;
- 14 4. Determine whether Windermere Real Estate Services Company
15 fulfilled its roles and responsibilities as a franchisor in the
16 Windermere Southern California Area Representative Agreement for
17 the time period September 17, 2011 to September 30, 2015;
- 18 5. Determine whether Windermere Services Southern California, Inc.
19 fulfilled its roles and responsibilities as an area representative in the
20 Windermere Southern California Area Representative Agreement for
21 the time period September 17, 2011 to September 30, 2015; and
- 22 6. Directly respond to any other findings and opinions identified by Mr.
23 Holmes.

24 [*Id.*, p. 125.]

25 **B. The Holmes Report**

26 In his 45-page report, Holmes offered extensive opinions as to “a franchisor’s
27 decision to utilize an area representative model for territory expansion” [dkt. No. 104-2, p.
28 46.] the “respective roles, and industry standards and practices, for area representatives
and franchisors” [*id.*, p. 53], and the “standards of care and practices regarding an area
representative with respect to the sale of franchises and support of local franchises,
including considerations where an area representative is itself a franchisee of the

1 franchisor.” [*Id.*, p. 58.] Throughout his opinions, Holmes offers extensive commentary on
2 and references to the parties’ rights and obligations set forth in the ARA. [*See e.g., id.*, pp.
3 47, 48, 55, 56, 60, 68.]

4 **C. The Storm Rebuttal Report**

5 Before identifying his opinions, Mr. Storm provided the following introduction to
6 his “Basis and Reasons for Opinions”:

7 I have reviewed the report of David E. Holmes. I disagree with some of the
8 opinions he rendered, in part because some of the evidence upon which he
9 relies in support of those opinions is taken out of context and because he
10 disregards facts that are inconsistent with his opinions. Mr. Holmes bases his
11 opinions on a selective view of the evidence that colors his conclusions,
12 while looking at the evidence in context fails to support key opinions that he
13 renders.

14 I formed my opinions by engaging in an analysis of the facts that are
15 described above and reflected in the materials identified in Attachment 3 and
16 applied those facts to the opinions express by Mr. Holmes. In forming my
17 opinions, I applied my experience in franchising including being a
18 franchisee, multi-unit franchise and area representative in multi-franchise
19 concepts, and being a franchisor in two different franchise companies,
20 serving on a board of directors and providing consulting services to
21 franchisors.

22 [Dkt. 104-2, p. 140.]

23 Thereafter, Mr. Storm provided 15 opinions directly responding to the broad
24 franchising opinions raised in Holmes’ report. [Dkt. No. 104-2, pp. 141-168.] WSC’s
25 motion *in limine* only seeks to exclude Mr. Storm’s opinions 1 through 5 and 7.² [*See* Dkt.
26 No. 104-3.] As reflected above, the B&D Parties do not dispute WSC’s motion as to

27 ² WSC asks the Court to exclude other portions of Mr. Storm’s report, “including
28 without limitation Opinions 1-5 and 7.” [Dkt. No. 104-3.] However, WSC’s failure to
articulate any other portions of Mr. Storm’s report that it seeks to exclude should be fatal
to the request as it requires both the Court and the B&D Parties’ to guess in order to
respond.

1 opinions 4 and 5. The remaining opinions are summarized in Mr. Storm’s report as
2 follows:

3 **Opinion 1** – Franchisor's Role in a franchisor - area representative
4 relationship.

5 **Opinion 2** – The franchisor delegated most of the customary roles and
6 responsibilities to the Area Representative and retained certain
7 customary roles and responsibilities.

8 **Opinion 3** – Franchisor delegating royalty collection to the Area
9 Representative.

10 **Opinion 7** – The franchisor failed to manage the franchise's trademark,
11 brand and reputation.

12 [Dkt. No. 104.2, pp. 141-146.] Each of the above opinions expressed by Mr. Storm is
13 clearly within the same subject matter advanced in Holmes’ report.

14 **III. MR. STORM’ OPINIONS REBUT WSC’S FRANCHISE EXPERT’S**
15 **OPINIONS ON THE SAME SUBJECT MATTER**

16 “The function of rebuttal testimony is to explain, repel, counteract or disprove
17 evidence of the adverse party.” *Grove City Veterinary Serv., LLC v. Charter Practices,*
18 *Int’l, LLC*, 2016 U.S. Dist. LEXIS 52646, at *46–47 (D. Or. Apr. 19, 2016). “As long as
19 defendant's rebuttal expert witnesses speak to the same subject matter the initial experts
20 addressed and do not introduce novel arguments, their testimony is proper under Federal
21 Rule of Civil Procedure 26(a)(2)(C) and related case law from District Courts in this
22 circuit.” *Cohen v. Trump* (S.D. Cal., Aug. 29, 2016, No. 3:13-CV-2519-GPC-WVG) 2016
23 WL 4543481, at *12 (citing *Laflamme v. Safeway, Inc.*, No. 3:09-CV-00514, 2010 WL
24 3522378, at *3 (D. Nev. Sept. 2, 2010); *Lindner v. Meadow Gold Dairies, Inc.*, 249
25 F.R.D. 625, 636 (D. Hawaii 2008); *Trowbridge v. United States*, 2009 WL 1813767, at
26 *11 (D. Idaho June 25, 2009)).

27 WSC’s motion *in limine* seeks to limit Mr. Storm’s opinions to only those “opinions
28 pertaining to [Service SoCal’s] performance under the ARA.” (Mtn. p. 4.) Incredibly,

1 WSC takes the position that “Holmes’ report focused on [Service SoCal’s] performance
2 under the ARA,” and certain opinions of Mr. Storm should be excluded because his
3 analysis “include[s] opinions regarding WSC’s performance under the ARA.” WSC’s
4 argument should be summarily rejected as it completely ignores the broad opinions of its
5 own expert as to the parties’ obligations under the ARA and the extensive opinions given
6 by Holmes as to the franchisor-area representative relationship generally.

7 As reflected above, Holmes addresses, at length, WSC’s role and responsibilities in
8 the franchisor-area representative relationship. These opinions expressly include the
9 “respective roles, and industry standards and practices, for area representatives *and*
10 *franchisors*” [dkt. No. 104-2, p. 45, 53 (emphasis added)], “a franchisor’s decision to
11 utilize an area representative model for territorial expansion” [*id.*, pp. 44, 46], “the
12 franchisor and franchisee have a direct contractual and business relationship” [*id.*, p. 46],
13 “the franchisor will also provide after-sales service and support directly to the franchisee”
14 [*id.*], “in this model, the franchisor will have also entered into an agreement (typically
15 called an area representation – or area representative – agreement) with the area
16 representative” [*id.*, p. 46], “the franchisor will provide services to the area representative
17 related to its functions” [*id.*, p. 48], and “the franchisor will generally provide ongoing
18 service and support to the unit-level (retail) franchisee” [*id.*, p. 53], among numerous other
19 references to the role of WSC as the franchisor. Mr. Storm’s rebuttal report addresses –
20 and in many instances, corrects – the franchisor-area representative relationship set forth
21 in Holmes’ report.

22 In the rebuttal report, Mr. Storm makes clear that he had “reviewed the report of
23 David E. Holmes” and disagreed with many of Holmes’ conclusions. [Dkt. No. 104-2, p.
24 140.] Opinions 1 through 3 of Mr. Storm’s report directly correlate with Holmes’
25 extensive description of the franchisor-area representative relationship. [Compare *id.* pp.
26 46-60 with *id.*, pp. 141-142.] Opinion 7 – regarding the franchisor’s obligation to manage
27 the franchise’s trademark, brand and reputation – expresses Mr. Storm’s discontent with
28 Holmes’ comments regarding “the franchisor licensing the franchisee to use the

1 franchisor's brand, trademarks and system(s) of operation, marketing, administration, etc.”
2 [Compare *id.* pp. 46, 48-50, 55-56, 61 with *id.*, pp. 146-148.] Importantly, the only real
3 difference of opinion on these topics by the experts is which party in the franchisor-area
4 representative relationship should shoulder the responsibility for these tasks – naturally,
5 Holmes blames the area representative and Mr. Storm placed the burden on the franchisor.
6 These are the exact type of disputes that should be expected from a rebuttal expert. *See*
7 *Laflamme*, 2010 WL 3522378, at *3 (“Defendant's rebuttal experts reviewed the initial
8 expert witness reports, among other materials, and developed their own reports in
9 response. [...] Contradicting expert opinions, questioning methodology, and opining on
10 methods and facts plaintiffs' experts did not consider are precisely the type of rebuttal
11 testimony the court would expect.”).

12 Mr. Storm’s opinions on the responsibilities of the parties in the franchisor-area
13 representative relationship involve the identical subject matter raised in Holmes’ expert
14 report. Accordingly, WSC’s attempt to exclude Storm’s opinions should be denied.

15 **IV. MR. STORM PROPERLY RELIED UPON SECTIONS OF THE ARA**
16 **OMITTED FROM HOLMES’ ANALYSIS**

17 Holmes’ opinions are almost entirely predicated upon the parties’ performance and
18 obligations under the ARA. Among other sections, Holmes’ cites to Sections 2 and 3 of
19 the ARA. [Dkt. No. 104-2, pp. 55-56, 60.] Conveniently, however, Holmes omits any
20 reference to the obligations of WSC set forth in those sections. For instance, Section 2
21 required WSC to provide Services SoCal “the non-exclusive right to offer Windermere
22 licenses to real estate brokerage businesses to use the Trademark and the Windermere
23 System in the Region in accordance with the terms of the Windermere License
24 Agreement.” This obligation of WSC was omitted from Holmes’ report but relied upon by
25 Storm. [See Dkt. No. 104-2, p. 130.] Similarly, Section 3 of the ARA included a laundry
26 list of obligations of WSC that were left out of Holmes’ analysis but included by Storm.
27 [See *id.*, p. 131.] Mr. Storm’s rebuttal report addresses these obligations of WSC under the
28 ARA that were omitted from Holmes’ report.

1 Incredibly, WSC now seeks to exclude any opinions of Mr. Storm that concern
2 “WSC’s performance under the ARA” because Holmes only “focused on [Service
3 SoCal’s] performance under the ARA.” (Mtn. p. 4.) WSC’s argument undermines the use
4 of rebuttal witnesses under FRCP 26. This type of in-depth analysis of contractual
5 provisions that the other expert conveniently overlooked is appropriate for rebuttal
6 testimony and not a basis for exclusion. Accordingly, WSC’s motion *in limine* should be
7 denied in its entirety.

8 Additionally, because Holmes’ opinions are almost entirely ground in the parties’
9 rights under the ARA, it would be severely prejudicial to the B&D Parties to allow
10 Holmes to express these opinions while precluding Mr. Storm from offering the same.
11 Thus, any exclusion of Mr. Storm’s opinions as to the ARA would require exclusion of
12 Holmes’ opinions as to the ARA as well.

13 **V. CONCLUSION**

14 For the reasons stated above, the B&D Parties respectfully request that the Court
15 deny WSC’s motion *in limine* number 2 to exclude portions of Mr. Storm’s anticipated
16 expert testimony at trial.

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18 Dated: April 24, 2017

MULCAHY LLP

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20 By: /s/ Kevin A. Adams
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22 Attorneys for Plaintiffs/Counter-Defendants
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