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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BENNION & DEVILLE FINE HOMES, INC., a California corporation, et al.,)	CASE NO. EDCV 15-1921-R
)	
Plaintiffs,)	ORDER DENYING PLAINTIFFS AND COUNTER-DEFENDANTS' MOTION TO EXCLUDE THE TESTIMONY OF DAVID E. HOLMES
v.)	
)	
WINDERMERE REAL ESTATE SERVICES COMPANY, a Washington corporation, and DOES 1-10,)	
)	
Defendant.)	
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Before the Court is Plaintiffs Bennion and Deville Fine Homes SoCal, Inc. (“B&D SoCal”), and Windermere Services Southern California, Inc. (“Services SoCal”), and Counter-Defendants Robert Bennion (“Bennion”) and Joseph R. Deville’s (“Deville”) (collectively, “Plaintiffs”) Motion to Exclude the Testimony of David E. Holmes (Dkt. No. 82), which was filed on March 20, 2017. Having been fully briefed by both parties, the Court took the matter under submission on May 8, 2017.

Plaintiffs move to exclude the testimony of Defendant and Counter-Claimant, Windermere Real Estate Services Company’s (“WSC”) expert witness, David E. Holmes. Holmes’s testimony generally relates to the industry practices and norms of a franchisee-franchisor relationship, specifically focusing on the considerations of an area representative relationship. Plaintiff raises

1 five bases upon which Holmes’s testimony should be excluded: (1) given this Court’s ruling that
2 the Area Representation Agreement is not a franchise agreement, the testimony not relevant; (2)
3 the testimony is not relevant because the contract language is unambiguous and therefore does not
4 merit interpretation through industry norms; (3) the testimony goes beyond the remaining issues in
5 the case; (4) the testimony lacks foundation and does not meet the *Daubert* standard; and (5) the
6 testimony invades the province of the fact finder. For the reasons discussed below, the Motion to
7 Exclude expert testimony is denied.

8 The facts of this matter are familiar to the parties and more thoroughly discussed in the
9 Court’s previous orders. (*See* Dkt. Nos. 66, 75, and 80). Accordingly, the facts listed herein are
10 only those relevant to this order. Mr. Deville and Bennion, through various business entities,
11 formed a real estate business relationship with Defendant. Plaintiffs’ various entities include
12 Windermere franchises as well as an agent charged with managing other franchises in the region
13 on Defendant’s behalf. During the course of the business relationship, the parties had numerous
14 disputes which ultimately led to this case. Previously, this Court held that because Services SoCal
15 did not pay a franchise fee to WSC and its lack of authority to negotiate on WSC’s behalf, the
16 Area Representation Agreement was not a franchise agreement under California law.

17 First, Plaintiffs argue that expert testimony regarding the customs and norms of the
18 franchise industry are irrelevant to this matter because the Court previously held that the Area
19 Representation Agreement was not a franchise agreement. (Dkt. No. 82 at 5.) Federal Rule of
20 Evidence 702 requires that expert testimony “help the trier of fact to understand the evidence or to
21 determine a fact in issue.” Fed. R. Evid. 702(a). “This condition goes primarily to relevance.
22 Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-
23 helpful.” *Daubert v. Merrel Dow Pharms. Inc.*, 509 U.S. 579, 591 (1993). As Defendant argues
24 in its opposition, the fact that the Area Representation Agreement was not a franchise agreement
25 does not render Holmes’s testimony irrelevant. WSC is a franchisor of the Windermere system of
26 franchisees. Its business revolves around franchises. Services SoCal was WSC’s agent charged
27 with managing and assisting WSC’s franchisees. Thus, the norms of the franchise industry,
28 business considerations of a franchise relationship, and an assessment of the parties’ performance

1 in relation to these standards would help the trier of fact to understand the evidence presented.

2 Plaintiff's second argument to exclude Holmes's testimony is that the testimony is
3 irrelevant because the language of the Area Representation Agreement is unambiguous and,
4 therefore, industry standards and norms are not needed to interpret the contract language. (Dkt.
5 No. 82 at 6.) However, Holmes's testimony regarding industry norms and standards does not
6 attempt to interpret any provision of the contract. Rather, Holmes's testimony presents his expert
7 opinion as to whether the alleged conduct of Plaintiffs fell within reasonable industry norms.
8 Specifically, Holmes's testimony relates to Plaintiffs' collection and remittance of fees from
9 franchisees and whether Plaintiffs' favoritism towards certain franchisees is outside the normal
10 expectations of a franchisor. Holmes's testimony would also help a fact finder determine whether
11 WSC terminated the agreement for cause and therefore justified a termination payment. Though
12 Holmes may not opine whether there was cause to terminate the agreement, his expertise and
13 testimony will assist the fact finder in its determination of that issue. Comparing Plaintiffs'
14 actions to those reasonably expected in the franchise context would be relevant to a determination
15 of cause.

16 Next, Plaintiffs argue that Holmes's testimony should be excluded because it goes beyond
17 the remaining claims at issue. Plaintiffs request that should the Court allow Holmes's testimony
18 to come in, that it be limited to those topics. Specifically, Plaintiffs argue that Holmes's testimony
19 regarding business and strategic rationales generally underlying franchise systems is irrelevant.
20 This Court disagrees. This is a complicated matter with varying layers of business relationships.
21 Background information will likely assist the fact finder in understanding the businesses involved
22 in this matter. Fed. R. Evid. 702, Advisory Committee Notes (2000)("[I]t might also be important
23 in some cases for an expert to educate the factfinder about general principles, without ever
24 attempting to apply these principles to the specific facts of the case.")

25 Plaintiffs' fourth argument to exclude Holmes's testimony is that it does not meet the
26 *Daubert* standard. Specifically, Plaintiffs claim that Holmes's report is "unreliable and amounts to
27 pure speculation as to what he believes may be appropriate for an area representative." (Mot. at
28 13). Expert testimony must be both relevant and reliable. *Daubert*, 509 U.S. at 589. *Daubert*

1 requires courts to perform a gatekeeping function to assess the reliability of expert testimony.
2 *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir 2011). The objective of the *Daubert*
3 gatekeeping requirement is to “make certain that an expert, whether basing testimony upon
4 professional studies or personal experience, employs in the courtroom the same level of
5 intellectual rigor that characterizes the practice of an expert in the relevant field.” *Kumho Tire*
6 *Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999).

7 Here, Holmes’s background indicates that he is an expert in the field of franchise business
8 and law. Holmes is a lawyer with forty years of experience in the field of franchising. He is
9 certified by the California Board of Legal Specialization as a Franchise and Distribution Law
10 Specialist, and he has served as the co-chair of the California Bar State Franchise Law Committee.
11 Finally, he authored a practice book on the field of franchise law. As to the specific field of real
12 estate franchises, Holmes worked for Century 21 Real Estate Corporation regularly advising on
13 franchise matters. This Court finds that Mr. Holmes is more than qualified to testify regarding
14 industry standards and norms in franchise relationships and arrangements.

15 Similarly, the Court finds that Holmes’s proposed testimony is reliable. Holmes’s
16 testimony and the facts of this case do not support an analysis under the *Daubert* factors because
17 the testimony is based upon Holmes’s experience and knowledge rather than scientific
18 methodology. *U.S. v. Hankey*, 203 F.3d 1160, 1169 (9th Cir. 2000). Here, Holmes reviewed the
19 Area Representation Agreement, discovery materials, depositions, and other relevant documents
20 and materials. Furthermore, Holmes’s background information is phrased in general terms and
21 based largely on his experience in the industry. As discussed above, Holmes’s experience is
22 extensive in the franchise industry. Accordingly, the Court finds that the proposed testimony is
23 reliable.

24 Finally, Plaintiff argues that Holmes’s testimony should be excluded because it invades the
25 province of the fact finder. Holmes presents his expert opinion as to whether the conduct of
26 Plaintiffs conforms with the industry standards and norms. Holmes will not be permitted to testify
27 as to whether Plaintiffs’ actions breached the Area Representation Agreement, and this Court does
28 not read his proposed testimony as an attempt to offer such an opinion. As such, Holmes’s

1 testimony will not invade the province of the fact finder who will ultimately be charged with
2 determining whether the agreement was breached, and whether it was terminated for cause.

3 This Court finds that Holmes's expert testimony is reliable, relevant, and helpful to the fact
4 finder. The business arrangements in this case involve multiple entities, multiple purposes, and
5 multiple levels. Holmes's proposed testimony will assist the fact finder by providing a
6 background to these types of arrangements as well as giving the fact finder a baseline
7 understanding of conduct commonly accepted in the industry. Holmes will not be permitted to
8 testify as to his opinion of whether a party breached or whether the Area Representation
9 Agreement was terminated for cause. Those are findings reserved for the fact finder. Consistent
10 with this order, Holmes will be limited to testimony that is relevant to the remaining issues in this
11 matter.

12 **IT IS HEREBY ORDERED** that Plaintiffs' Motion to Exclude the Testimony of David
13 E. Holmes (Dkt. No. 82) is DENIED.

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15 Dated: May 8, 2017.



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17 MANUEL L. REAL
18 UNITED STATES DISTRICT JUDGE
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