EXHIBIT S

LEXSEE

UNITED NATIONAL MAINTENANCE INC., Plaintiff, vs. SAN DIEGO CONVENTION CENTER CORPORATION, INC., Defendant.

CASE NO. 07-cv-2172 BEN (JMA)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

2010 U.S. Dist. LEXIS 79541

August 2, 2010, Decided
August 3, 2010, Filed

SUBSEQUENT HISTORY: Summary judgment granted, in part, summary judgment denied, in part by, Objection overruled by *United Nat'l Maint., Inc. v. San Diego Convention Ctr. Corp., 2010 U.S. Dist. LEXIS 78322 (S.D. Cal., Aug. 2, 2010)*

COUNSEL: [*1] For United National Maintenance, Inc., a Nevada Corporation, Plaintiff: Jacob M Slania, LEAD ATTORNEY, Kirby Noonan Lance & Hoge, San Diego, CA; Jeffrey A Leon, LEAD ATTORNEY, Ungaretti and Harris, Chicago, IL; Kristopher J. Stark, LEAD ATTORNEY, Ungaretti and Harris, Chigago, CA; Theodore Tetzlaff, LEAD ATTORNEY, Ungaretti and Harris LLP, Chicago, IL; Dylan O Malagrino, UC Davis School of Law, Davis, CA; James R Lance, Kirby Noonan Lance and Hoge LLP, San Diego, CA.

For San Diego Convention Center Corporation, Inc, a California corporation, Defendant: John H L'Estrange, Jr, Joseph Thomas Ergastolo, LEAD ATTORNEYS, Wright and L'Estrange, San Diego, CA.

JUDGES: Hon. Roger T. Benitez, United States District Court Judge.

OPINION BY: Hon. Roger T. Benitez

OPINION

ORDER DENYING DEFENDANT'S MOTION IN LIMINE TO EXCLUDE EXPERT TESTIMONY BY PATRICK KENNEDY

[Docket No. 93]

Currently before the Court is Defendant's Motion to Exclude Opinion Testimony of Plaintiff's Designated Expert Patrick Kennedy. (Docket No. 93.) The Motion is made pursuant to *Federal Rules of Evidence 103*, *104* and *702* and on the grounds that Dr. Kennedy's opinion testimony concerning Plaintiff's lost profits damages and restitutionary disgorgement relief [*2] is unreliable and will not assist the trier of fact. For the reasons set forth below, the Motion is **DENIED.**

BACKGROUND

This action arises from a new policy implemented by Defendant in July 2007, concerning trade show cleaning services at the convention center that Defendant owns and operates.

On November 13, 2007, Plaintiff initiated this action based on alleged antitrust violations and related state law claims. (Docket No. 1.) Specifically, Plaintiff's First and Second Causes of Action allege antitrust violations under *Section 2* of the Sherman Act; the Third and Fourth Causes of Action allege antitrust violations under *Section 1* of the Sherman Act; the Fifth Cause of Action alleges interference with contract under state law; the Sixth Cause of Action alleges interference with prospective business advantage under state law; and the Seventh Cause of Action alleges unfair violations under *Section 17200 et seq. of California's Business and Professions Code. Id.*

Concurrently herewith, the Court entered an order granting summary judgment in favor of Defendant on Plaintiff's Third, Fourth and Seventh Causes of Action,

and denying summary judgment on Plaintiff's First, Second, Fifth and Sixth [*3] Causes of Action.

On February 3, 2010, Defendant filed the Motion currently before the Court. (Docket No. 93.) The Motion seeks to exclude Dr. Kennedy from testifying at trial regarding: (1) Plaintiff's damages for lost profits; and (2) the monetary relief (restitutionary disgorgement) that Plaintiff seeks to recover under its Seventh Cause of Action. *Id.* Plaintiff filed an opposition, and Defendant filed a reply. (Docket Nos. 98, 100.)

The Court first notes that, contrary to Plaintiff's assertions, the Motion is timely. Pursuant to the Scheduling Order dated January 27, 2009, Defendant was not required to file the Motion on or before December 11, 2009. The Motion is a motion in limine and, therefore, expressly excluded from the December 2009 deadline. (Docket No. 64, ¶ 6.) For the reasons set forth below, however, the Motion is **DENIED.**

DISCUSSION

I. OPINION ON DAMAGES FOR LOST PROFITS

Dr. Kennedy states that Plaintiff's economic damages "consist of (1) the lost profits caused by increased labor costs that [Plaintiff] incurred when it was forced to use [Defendant's] labor, and (2) lost exhibit booth cleaning profits due to [Defendant's] appropriation of [Plaintiff's] booth cleaning revenues." [*4] (L'Estrange Decl., Ex. 450, pg. 76.) Defendant contends Dr. Kennedy's opinion is unreliable and, therefore, should be excluded at trial. (P. & A., pg. 4.)

The admissibility of expert testimony is governed by *Federal Rule of Evidence 702* which requires courts to ensure that expert testimony "rests on a reliable foundation" and will assist the trier of fact. *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*; *Fed. R. Evid. 702*. Under *Daubert*, district courts act as gatekeepers to ensure that expert testimony is sufficiently reliable before it is admitted. In this role, the court must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert, 509 U.S. at 592-93*.

Rule 702, however, does not permit the Court to weigh conflicting expert testimony or exclude expert testimony because it seems doubtful, nor should the Court determine whether the conclusions are correct. *Clicks Billiards, Inc. v. Sixshooters, Inc., 251 F.3d 1252, 1262-63 (9th Cir. 2001)* (noting that faults in methodology and calculations, and critiques [*5] of conclusions go the weight and not the admissibility of expert opinions); *Kennedy v. Collagen Corp., 161 F.3d 1226,1230-31 (9th Cir. 1998)* (same). As summarized in the Advisory Committee Notes to *Rule 702*, proponents of expert testimony "do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable ... The evidentiary requirement of reliability is lower than the merits standard of correctness." *See* Advisory Committee Notes to *Rule 702*, 2000 Amendments (quoting *In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 744 (3rd Cir. 1994))*. To ensure reliability of the expert testimony, "[t]he trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded." *See* Advisory Committee Notes to *Rule 702*, 2000 Amendments.

Here, Defendant contends Dr. Kennedy's opinion is unreliable because [*6] Dr. Kennedy assumes the Living Wage Ordinance ("LWO") does not apply to Plaintiff, erroneously applies the Living Wage Ordinance to Defendant, and fails to account for inflation. (P. & A., pgs. 4-5.)

A. LIVING WAGE ORDINANCE

1. LWO Applicability

Defendant contends the LWO applies to Plaintiff and, because Dr. Kennedy's opinion excludes the LWO, Dr. Kennedy's opinion is unreliable and should be excluded.

The LWO requires employers who contract with the City of San Diego ("City") to pay their employees "a wage that will enable a full-time worker to meet basic needs and avoid economic hardship." S. D. Muni Code § 22.4201. The LWO applies to "any City facility agreement, including any applicable sublease, subcontract, or concession agreement in effect on July 1, 2007." *Id.* at § 22.4210(a)(4). "City facility means any of the following facilities that are owned, operated, managed, or leased by the City... (d) San Diego Convention Center." *Id.* at § 22.4205. "City facility agreement" is defined to include "subcontracts and concession agreements for services at the City facility with a combined annual value of payments in excess of $25,000 for any single subcontractor or concessionaire, and with [*7] a term of more than 90 days." *Id.* Defendant contends Plaintiff's contracts for trade show cleaning services at the San Diego Convention Center fall under this definition of "City facility agreement" and, therefore, the LWO applies.

Plaintiff first argues the Motion is premature and not the proper avenue for determining whether LWO applies to this case. The Court notes, however, that the applicability of the LWO in this case is a legal question and relates to the admissibility of an expert opinion. As such, the issue is proper for an in limine motion and for resolution at this stage of the case. *Fed. R. Evid. 104*; *Haberren v. Kaupp Vascular Surgeons Ltd. Defined Benefit Plan and Trust Agreement, 812 F. Supp. 1376, 1378 (E.D. Pa. 1992)* (legal issues are to be determined by the court and not the trier of fact, and are appropriate for resolution at the in limine stage). Additionally, both parties briefed the issue. Accordingly, the Court finds the issue ripe for determination.

Plaintiff next argues its contracts are exempt from the LWO because Defendant is not an arm of the City and Plaintiff's contracts for trade shows at the San Diego Convention Center do not have terms of more than 90 [*8] days. As detailed in the accompanying Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment, however, the Court finds that Defendant is a state actor. In particular, the undisputed facts show that Defendant was created by the City to operate and manage the San Diego Convention Center, and the City is Defendant's sole member and appoints each voting member of the Board of Directors. Therefore, Defendant is an arm of the City for purposes of the LWO. The issue now becomes whether Plaintiff's trade show contracts for the San Diego Convention Center have terms of more than 90 days.

Defendant argues that because Plaintiff's general contracts with certain trade show organizers are for a term of over 90 days, Plaintiff does not fall within the 90-day exception to the LWO. (L'Estrange Decl., Exs. 83, 84.) Those contracts, however, do not concern the San Diego Convention Center. Rather, the contracts are general contracts setting forth general terms and conditions for Plaintiff's cleaning services. The contracts are not specific to San Diego Convention Center or to any facility located within the City. The language of the LWO, as applied here, clearly states that [*9] only "subcontracts and concession agreements for services at the City facility with... a term of more than 90 days" are subject to the LWO. S. D. Muni Code § 22.4205. The LWO also clearly states the LWO is intended to "meet the employment and economic needs of the City and its workforce. Private businesses that do not fall into any of the above described categories are not required to comply with this division." *Id.* at § 22.4201. The express language and policy of the LWO confirms the LWO only applies to contracts with or expressly relating to the San Diego Convention Center (or other City facilities) and that contain a term of over 90 days; it does not apply to general contracts, such as those presented here, that are not specific to City facilities and that concern private businesses. Defendant produces no evidence, disputed or otherwise, showing that any of Plaintiff's trade show cleaning contracts for the San Diego Convention Center contain a term of over 90 days. Instead, Plaintiff produces evidence showing that it provides trade show cleaning services on a per show contract basis and that the shows last far less than 90 days, and usually less than one week. (Slania Decl., Ex. [*10] D at pgs. 39-43, and Ex. N at 164:1-9.) Defendant does not dispute this evidence. Accordingly, the Court finds the LWO does not apply to Plaintiff.

Defendant also contends Dr. Kennedy erred in applying the LWO to Defendant in his rebuttal opinion. The applicability of the LWO to Defendant, however, has no bearing on its applicability to Plaintiff. (L'Estrange Decl., Ex. 450; see also P. & A., 8:25-27 (acknowledging that whether the LWO applies to Plaintiff is a separate inquiry than whether the LWO applies.) Additionally, the applicability of the LWO to Defendant appears to be irrelevant, as Defendant concedes it pays its cleaning employees a rate "comparable to or higher than the LWO rates." (P. & A., pg. 9, n. 6.) Defendant fails to show how Dr. Kennedy's error, if any, in applying the LWO to Defendant in his rebuttal opinion renders Dr. Kennedy's opinion on lost profit damages unreliable.

2. LWO Assumption

Plaintiff contends that, regardless of the applicability of the LWO, Dr. Kennedy is permitted to base his opinion on assumptions and any assumptions later determined to be erroneous would merely go to the weight of the opinion, not to its admissibility. Because the Court finds it [*11] was not erroneous for Dr. Kennedy to assume the LWO does not apply to Plaintiff, the Court need not address this issue here.

B. INFLATION

Defendant also contends Dr. Kennedy's opinion is inadmissible because he did not account for inflation when calculating Plaintiff's labor rate and Dr. Kennedy fails to explain why he assumed Plaintiff's labor costs would have stayed constant.

In opposing the Motion, however, Plaintiff produced evidence showing that Dr. Kennedy did, in fact, take inflation into account. (Opp., pg. 15.) Specifically, Dr. Kennedy submitted a declaration stating he reviewed Plaintiff's payroll records from 2007 through 2009 and observed Plaintiff's wage rates did not change. (Kennedy Decl. [Docket No. 98-1], ¶ 6.) From that, Dr. Kennedy calculated an inflation rate of zero and applied that rate to his lost profit calculations. *Id.*

Defendant does not dispute the calculation but rather, on reply, argues a zero inflation rate does not properly calculate the amount of damages under a "but for" damages model. (Reply, pg. 5.) Defendant cites no authority for its position or to otherwise show that such error, even if true, affects the reliability of Dr. Kennedy's opinion. Whatever [*12] error exists goes to the weight of Dr. Kennedy's opinion and not to its admissibility. *See, e.g., Primrose Operating Co. v. National American Ins. Co., 382 F.3d 546, 562 (5th Cir. 2004)* (holding "[a]s a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility"); *Clicks Billiards, 251 F.3d at 1262-63* (faults in methodology and calculations, and critiques of conclusions go the weight and not the admissibility of expert opinions).

Accordingly, Defendant's motion to exclude Dr. Kennedy's opinion on lost profit damages is denied.

II. OPINION ON DAMAGES FOR RESTITUTIONARY DISGORGEMENT

Defendant also seeks to exclude Dr. Kennedy's opinion on restitutionary disgorgement. This opinion relates to Plaintiff's damages under California's Unfair Competition Law ("UCL"), as sought by Plaintiff in the Seventh Cause of Action. *Cal. Bus. & Prof. Code § 17203*. (Compl., ¶ 111.) Concurrently herewith, however, the Court entered an order granting summary adjudication in favor of Defendant on the Seventh Cause of Action. Accordingly, Defendant's motion to exclude Dr. Kennedy's opinion on damages under UCL is [*13] denied as moot.

CONCLUSION

For the reasons set forth above, the Court **DENIES** Defendant's Motion to Exclude Opinion Testimony of Plaintiff's Designated Expert Patrick Kennedy.

IT IS SO ORDERED.

Date; August 2, 2010

/s/ Hon. Roger T. Benitez

Hon. Roger T. Benitez

United States District Court Judge