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SOUTHERN DISTRICT OF CALIFORNIA

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6 **UNITED STATES DISTRICT COURT**  
7 **SOUTHERN DISTRICT OF CALIFORNIA**  
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9 MEDICAL SALES & CONSULTING  
10 GROUP; et al.,

11 Plaintiffs,

12 vs.

13 PLUS ORTHOPEDICS USA, INC.; SMITH  
14 & NEPHEW, INC.,

15 Defendants.

CASE NO. 08cv1595 BEN (BGS)

**ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANTS' MOTION TO  
STRIKE**

[Dkt. No. 64]

16 **INTRODUCTION**

17 Defendants Plus Orthopedics, LLC's and Smith and Nephew, Inc.'s motion to strike the  
18 expert report and testimony of R. Bruce Phillips is before the Court. (Dkt. No. 64.) Defendants  
19 argue that because Phillips' only experience in the orthopedic medical device industry is as an  
20 attorney, he is not an expert in the medical device business and he should not be allowed to render  
21 opinions on contract interpretation or industry practices. Defendants move to exclude any  
22 testimony by Phillips at trial.<sup>1</sup> Plaintiffs oppose the motion, arguing that Phillips' experience in the  
23 industry qualifies him to testify about industry standards and practices regarding treatment of  
24 independent sales representatives and the integration of a sales force after an acquisition. For the  
25 reasons that follow, Defendants' motion is **GRANTED in part and DENIED in part**.

26  
27 <sup>1</sup>Defendants also move to strike Phillips' expert report without citation to authority for doing  
28 so or explaining the need to strike the actual report, rather than just limiting his testimony.  
Accordingly, the Court will not strike any portions of the actual report, but limits his testimony as  
explained below.

1 **BACKGROUND**

2 In his expert report, Phillips offers opinions on three subjects: (1) whether Defendants'  
3 conduct impaired Plaintiffs' ability to sell products such that sales quotas were unreasonably high;  
4 (2) how an orthopedic manufacturer should handle sales agents of an acquired company; and (3) a  
5 change-in-control provision within a contract. Phillips served on the in-house legal staff of an  
6 orthopedic device manufacturer, Zimmer, Inc., from 1991 to 2004 and has since worked  
7 independently as a consultant and as counsel for orthopedic device manufacturers. Phillips' work  
8 at Zimmer included handling sale representation agreements and advising the company about sales  
9 force integration following the acquisition of another orthopedic device manufacturer.

10 **DISCUSSION**

11 **I. Impairments of Plaintiffs' Ability to Sell, Sales Quotas, and Post-Acquisition**  
12 **Integration**

13 Defendants challenge Phillips' opinion that Smith & Nephew's actions impaired Plaintiffs'  
14 ability to sell, resulting in unattainable quotas, and his opinions regarding how a sales force should  
15 be integrated following an acquisition. Defendants argue his opinions are unreliable because he  
16 does not refer to data to support his conclusions. Plaintiffs respond that Phillips opinions are based  
17 on his industry knowledge and experience and the reliability issues raised go to the weight to be  
18 given to the testimony rather than its admission.

19 In his report, Phillips concludes that Plaintiffs' businesses were damaged by a number of  
20 decisions by Smith & Nephew following its acquisition of Plus. Phillips interviewed each Plaintiff  
21 to identify acquisition-related events beyond Plaintiffs' control that adversely effected Plaintiffs.  
22 Phillips then explains the effect each event would have on Plaintiffs based on his experience in the  
23 industry. For example, Phillips explains the consequences of removing a product from the  
24 portfolio when that product is usually sold with another component, *i.e.*, difficulty selling the  
25 paired component. But, as to the analysis of the sales quotas, there is little, if any, industry  
26 knowledge or experience applied. Phillips simply restates what Plaintiffs reported to him about  
27 how their quotas were set and applied. Similarly, Phillips' report on post-acquisition sales force  
28 integration relies almost exclusively on the powerpoint slides prepared for Zimmer's acquisition of

1 Centerpulse, the only acquisition Phillips is familiar with. Phillips does offer opinions regarding  
2 issues that arose following the Plus acquisition, but those opinions are based on the Zimmer  
3 acquisition powerpoint.

4 “Rule 702 allows admission of ‘scientific, technical, or other specialized knowledge’ by a  
5 qualified expert if it will ‘assist the trier of fact to understand the evidence or to determine a fact in  
6 issue.’” *Hangarter v. Provident Life and Accident Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004).

7 The testimony must be based on sufficient facts or data, the product of reliable principles and  
8 methods, and based on a reliable application of the principles and methods to the facts of the case.  
9 FED. R. EVID. 702. This “gatekeeping role” applies “to all forms of expert testimony, not just  
10 scientific testimony.” *Hangarter*, 373 F.3d at 1017. But, when non-scientific testimony “depends  
11 heavily on the knowledge and experience of the expert, rather than the methodology or theory  
12 behind it,” “the *Daubert* factors (peer review, publication, potential error rate, etc.) simply are not  
13 applicable to this kind of testimony.” *Id.* Rather, the Court may satisfy this obligation by  
14 considering the “personal knowledge or experience” of the expert. *Id.* (quoting *Kumho Tire Co.,*  
15 *Ltd. v. Carmichael*, 526 U.S. 137, 150 (1999)).

16 Phillips appears qualified to offer a reliable opinion on industry standards and practices and  
17 the effect of specific events on Plaintiffs’ businesses given those standards and practices. In this  
18 respect, his testimony is admissible. However, his opinions regarding Plaintiffs’ quotas do not  
19 apply his knowledge of the industry to the facts of the case, rather, he simply summarizes the facts  
20 as described by the Plaintiffs. This does not assist the trier of fact or reliably apply his industry  
21 knowledge and experience to the facts of the case. FED. R. EVID. 702 (requiring expert testimony  
22 assist the trier of fact and reliably apply his knowledge to the facts). Finally, Phillips’ opinions on  
23 post-acquisition sales force integration are not based on sufficient knowledge and experience,  
24 rather, he has simply explained powerpoint slides developed for the one acquisition he has worked  
25 on.

26 Accordingly, the Court excludes any opinion testimony from Phillips about Plaintiffs’  
27 quotas and post-acquisition sales force integration, but allows his testimony about the effect of  
28 specific events related to the acquisition on Plaintiffs’ businesses.

1 **II. Change-In-Control Provision**

2 Defendants challenge Phillips' opinions regarding a change-in-control provision. Phillips  
3 separates the language into two "triggers," offers his opinion about what the terms of each trigger  
4 mean, outlines three possible constructions of the term "comparable designation," identifies the  
5 construction that he believes best represents the original intent of the parties, and then concludes  
6 that a comparable designation was not provided under any of the identified constructions of the  
7 term. In short, Phillips primarily offers his opinion on how the contract should be interpreted. But,  
8 Phillips also provides background on the industry, including the likelihood of acquisition, its  
9 effect, and motives for change-in-control provisions in industry contracts.

10 Contract interpretation is a matter of law for the Court. Expert "testimony cannot be used  
11 to provide legal meaning or interpret [a contract] as written. *McHugh v. United Serv. Auto Assoc.*,  
12 164 F.3d 451, 454 (9th Cir. 1999) (citing *Crow Tribe of Indians v. Raciot*, 87 F.3d 1039, 1045 (9th  
13 Cir. 1996)). But, an expert can testify about the practices and norms of an industry if the expert is  
14 "qualified as an expert by knowledge, skill, experience, training, or education." *Hangerter*, 373  
15 F.3d at 1016 (quoting Federal Rule of Evidence 702).


16 Accordingly, the Court excludes any opinion testimony on how the contract should be  
17 interpreted, but allows his testimony about industry practices and norms with regard to change-in-  
18 control provisions.

19 **III. CONCLUSION**

20 The Court **GRANTS in part and DENIES in part** Defendants' motion to exclude  
21 Phillips' testimony.

22  
23 **IT IS SO ORDERED.**

24  
25 DATED: January 26, 2011

  
26 Hon. Roger T. Benitez  
27 United States District Court Judge  
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