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7 UNITED STATES DISTRICT COURT  
8 SOUTHERN DISTRICT OF CALIFORNIA  
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10 EMOVE, INC., a Nevada corporation, and  
11 U-HAUL INTERNATIONAL INC., a  
12 Nevada corporation,

13 Plaintiffs,

14 v.

15 HIRE A HELPER LLC, a California  
16 limited liability company, and MICHAEL  
17 GLANZ, an individual,

Defendants.

Case No.: 17cv0535-CAB-JLB

**ORDER REGARDING MOTION TO  
EXCLUDE TESTIMONY OF MARK  
KEEGAN [Doc. No. 168] AND  
MOTION TO EXCLUDE TESTIMONY  
OF JONATHAN HIBBARD [Doc. No.  
164]**

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19 On June 8, 2018, Plaintiffs filed a motion to exclude the testimony of Mark Keegan.  
20 [Doc. No. 168.] On June 8, 2018, Defendants filed a motion to exclude the testimony of  
21 Jonathan Hibbard. [Doc. No. 164.] The motions are fully briefed.

22 Defendants designated Mr. Keegan as an expert in trademark consumer surveys to  
23 “determine whether the phrases MOVING HELP and MOVING HELPER are understood  
24 by consumers to be brand names or common names (i.e. generic phrases) with regard to  
25 moving services.” [Doc. No. 168-3 at 5, ¶1.] Plaintiffs designated Mr. Hibbard as a  
26 rebuttal expert.

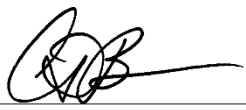
27 As this Court has previously stated, it will not adjudicate the issue of whether the  
28 trademarks are generic, as that was the subject of the previous litigation. Nevertheless,

1 Defendants argue Mr. Keegan’s testimony is relevant to the issue of whether the Non-  
2 Opposition Clause is unenforceable as a matter of public policy. On March 20, 2018, this  
3 Court denied Defendants’ motion for summary adjudication of that issue because there was  
4 no showing of significant public injury. [Doc. No. 117 at 6.] Defendants argue that Mr.  
5 Keegan’s testimony is evidence of such public injury.

6 After conducting a consumer survey, Mr. Keegan concludes that “MOVING HELP  
7 and MOVING HELPER are generic, common names with respect to the moving services  
8 market.” [Doc. No. 168-3 at 20, ¶55.] Assuming for purposes of argument that this  
9 conclusion is accurate, it speaks only to whether there is public confusion. It does not  
10 speak to whether there is public injury. Consumer injury is a separate inquiry from  
11 consumer confusion and “involve[s] a far greater level of harm.” *Times Mirror Magazines,*  
12 *Inc. v. Field & Stream Licenses Co.*, 103 F.Supp.2d 711, 740 (S.D.N.Y. 2000), aff’d 294  
13 F.3d 383, 395 (2d. Cir. 2002)(“in order to obtain rescission of a freely bargained trademark  
14 contract, a party must show that the public interest will be significantly injured if the  
15 contract is allowed to stand”). *See also Puck v. Zwiener*, No. CV 08-3394 GAF (PLAx),  
16 2008 WL 11339974, at \*2 (C.D. Cal. June 20, 2008)(preliminary injunction denied where  
17 plaintiff only showed consumer confusion, but not consumer injury).

18 After reviewing Mr. Keegan’s report, the Court is unable to find any opinion related  
19 to whether there was consumer injury. Therefore, Mr. Keegan’s (and Mr. Hibbard’s)  
20 testimony is irrelevant and is **EXCLUDED**. The *Daubert* motions to exclude the  
21 testimony of Mr. Keegan and Mr. Hibbard are **DENIED AS MOOT**.

22 Dated: September 27, 2018

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25 Hon. Cathy Ann Bencivengo  
26 United States District Judge  
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