

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

_____)	
In the Matter of)	
REALCOMP II LTD.,)	
Respondent.)	Docket No. 9320
_____)	

ORDER ON COMPLAINT COUNSEL'S MOTIONS *IN LIMINE*

I.

On May 18, 2007, Complaint Counsel filed three motions *in limine*: (a) Complaint Counsel's Motion *In Limine* Requesting an Order to Preclude Lay Opinion Testimony Regarding Certain Hypothetical Legal Issues ("Motion on Legal Issues"); (b) Complaint Counsel's Motion *In Limine* to Bar Lay Opinion Testimony Regarding Comparisons of Southeastern Michigan with Other Locales ("Motion on Comparisons"); and (c) Complaint Counsel's Motion *In Limine* to Bar Lay Opinion Testimony Regarding Justifications for Realcomp's Rules and Policies ("Motion on Justifications").

By Order dated May 22, 2007, the parties' Joint Motion for an Extension to Answer Complaint Counsel's Motions *In Limine* was granted. Respondent filed its oppositions on May 31, 2007.

On June 1, 2007, Complaint Counsel filed an unopposed motion for leave to file a reply to Respondent's Answer to Complaint Counsel's Motion on Legal Issues. Complaint Counsel's motion for leave to file this reply is **GRANTED**.

For the reasons set forth below, Complaint Counsel's Motion on Legal Issues is **GRANTED in part** and **DENIED in part**. Complaint Counsel's Motion on Comparisons is **DENIED**; and Complaint Counsel's Motion on Justifications is **DENIED**.

II.

A.

A "motion *in limine*" refers "to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984); *see also In re Motor Up Corp., Inc.*, Docket 9291, 1999 FTC LEXIS 207, at *1 (August 5, 1999). Although the Federal Rules of Evidence do not explicitly

authorize *in limine* rulings, the practice has developed pursuant to the court's inherent authority to manage the course of trials. *Luce*, 469 U.S. at 41 n.4. Motions *in limine* are generally used to ensure evenhanded and expeditious management of trials by eliminating evidence that is clearly inadmissible. *Bouchard v. American Home Products Corp.*, 213 F. Supp. 2d 802, 810 (N.D. Ohio 2002); *Intermatic Inc. v. Toeppen*, 1998 WL 102702, at *2 (N.D. Ill. 1998). Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *see also SEC v. U.S. Environmental, Inc.*, 2002 WL 31323832, at *2 (S.D.N.Y. 2002).

Courts considering a motion *in limine* may reserve judgment until trial, so that the motion is placed in the appropriate factual context. *U.S. Environmental*, 2002 WL 31323832, at *2. *In limine* rulings are not binding on the trial judge, and the judge may change his mind during the course of a trial. *Ohler v. U.S.*, 529 U.S. 753, 758 (2000); *Luce*, 469 U.S. at 41 (A motion *in limine* ruling "is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer."). "Denial of a motion *in limine* does not necessarily mean that all evidence contemplated by the motion will be admitted at trial. Denial merely means that without the context of trial, the court is unable to determine whether the evidence in question should be excluded." *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000); *Knotts v. Black & Decker, Inc.*, 204 F. Supp. 2d 1029, 1034 n.4 (N.D. Ohio 2002).

B.

The Scheduling Order in this case specifically provides, "[w]itnesses may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Scheduling Order at 6; *see also* Fed. R. Evid. 602. Further, "[f]act witnesses shall not be allowed to provide expert opinions." Scheduling Order at 6; *see also* Fed. R. Evid. 701. A witness not testifying as an expert may give an opinion only if it is "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701.

Witnesses not designated as experts are limited to testifying to opinions which are rationally based on their actual perception. *Indemnity Ins. Co. v. Am. Eurocopter*, 227 F.R.D. 421, 424 (D.N.C. 2005); *Express One Int'l, Inc. v. Sochata*, 2001 U.S. Dist. LEXIS 25281, *11-12 (N.D. Tex. 2001). The Advisory Committee Notes to Rule 701(c) state: "most courts have permitted the owner or officer of a business to testify as to the value or projected profits of the business without the necessity of qualifying the witness as an accountant, appraiser, or similar expert." Fed. R. Evid. 701(c) advisory committee note. "Such opinion testimony," the committee stated, "is admitted not because of experience, training or knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business." *Id.*

Lay witnesses are not precluded from giving first-hand participant testimony simply because they have specialized training. *Indemnity Ins.*, 227 F.R.D. at 424. For example, in *Gomez v. Rivera Rodriguez*, 344 F.3d 103, 113 (1st Cir. 2003), the mere fact that an individual testified that he gave legal advice did not transform that testimony into a legal opinion which would subject the individual to being nominated an expert witness. There, the individual was not commenting on the correctness of the opinion, only that it had been made. As stated by the court in *Gomez*, “a party need not identify a witness as an expert so long as the witness played a personal role in the unfolding of events at issue and the anticipated questioning seeks only to elicit the witness’ knowledge of those events.” 344 F.3d at 113-14. *See also West Tenn. Chapter of Associated Builders & Contractors, Inc. v. Zellner Constr. Co., Inc.*, 219 F.R.D. 587, 590-91 (W.D. Tenn. 2004) (allowing lay witnesses who conducted study on racial disparities in the procurement of contracts to testify on how the conclusions were formulated).

III.

A.

Complaint Counsel’s Motion *In Limine* Requesting an Order to Preclude Lay Opinion Testimony Regarding Certain Hypothetical Legal Issues seeks to preclude Karen Kage, Robert Taylor, Douglas Hardy, Douglas Whitehouse, and any other Respondent witnesses from testifying as to lay opinions, either live or by deposition, for the justification of Realcomp’s Website and Search Function Policies (“the Policies”) regarding the possible outcome of a procuring cause dispute under an Exclusive Agency contract, or any other opinions as to which they do not have personal knowledge or are not qualified as experts in legal issues. Motion on Legal Issues at 1. Complaint Counsel asserts that Respondent’s Deposition Designations and Final Proposed Witness List indicate that Respondent intends to defend the Policies by introducing the testimony of certain fact witnesses regarding the application of contract law to certain hypothetical disputes between brokers. Motion on Legal Issues at 1. Complaint Counsel argues that Respondent seeks to offer testimony regarding the application of legal principles to a hypothetical dispute involving a listing broker that uses an Exclusive Agency contract and a cooperating broker that procures a buyer for the property and that the hypothetical result is being offered by Respondent as a justification for its Policies disfavoring Exclusive Agency Listings. Motion on Legal Issues at 1-2.

Respondent asserts that its witnesses’ testimony will be based upon their personal experiences with the rules at issue, the practical application of these rules, and their personal perceptions as real estate professionals. Opposition on Legal Issues at 2. Respondent further asserts that each of its witnesses has substantial knowledge of, and experience in, the real estate industry and that this knowledge and experience provides a sufficient foundation for lay opinion testimony. Opposition on Legal Issues at 5-6.

Complaint Counsel makes the assertions that whether or not a cooperating broker is the procuring cause of sale and entitled to the offer of compensation laid out in the Realcomp

Multiple Listing Service (“MLS”) is a question of basic contract law; that the issue of performance under the contract involves the application of established legal principles to particular facts; and that whether a broker is excused from obligations under the contract is an issue of law. Motion on Legal Issues at 6-8. Respondent will, of course, be precluded from eliciting testimony on clearly defined issues of law from its fact witnesses. It appears, however, that Respondent is not seeking to provide testimony on these abstract legal issues. Rather, Respondent seeks to introduce testimony explaining their understanding of the market and the applications of the rules and the present intent of the rules and how they are designed to protect members of Realcomp. Opposition on Legal Issues at 7. As such, Respondent will not be precluded from presenting testimony, where based on personal knowledge, on what its reasons were for implementing the Policies.

With respect to Kage, Whitehouse, and Hardy, Respondent has made a preliminary showing that these witnesses will testify based on their personal experience and will not offer legal opinions. As such, Complaint Counsel’s Motion on Legal Issues is **DENIED in part**. To the extent their testimony strays from the parameters of permissible lay witness opinion testimony, Complaint Counsel may raise appropriate objections at trial.

With respect to Taylor, Complaint Counsel has demonstrated Taylor’s lack of personal knowledge regarding relevant arbitrations involving Exclusive Agency listings. As such, Complaint Counsel’s Motion on Legal Issues is **GRANTED in part**. Respondent may not elicit testimony from Taylor regarding the possible outcome of a procuring clause dispute under an Exclusive Agency contract unless Respondent can demonstrate at trial that Taylor has personal knowledge of relevant arbitrations involving Exclusive Agency listings.

B.

Complaint Counsel’s Motion *In Limine* to Bar Lay Opinion Testimony Regarding Comparisons of Southeastern Michigan with Other Locales seeks to preclude Douglas Hardy, Dale Smith, Kelly Sweeney, Douglas Whitehouse, and any other Respondent witnesses from testifying as to a comparison of the market for residential real estate in southeastern Michigan with any other market or locale. Motion on Comparisons at 1. Complaint Counsel asserts that Respondent’s Final Proposed Witness List indicates that Respondent expects several of its witnesses to testify to the residential real estate market in Michigan and how that compares to other markets. Motion on Comparisons at 1. Complaint Counsel argues that none of these witnesses has personal knowledge of the market for residential real estate beyond southeastern Michigan and that, absent such personal knowledge, any testimony comparing southeastern Michigan with other locales would be based on conjecture and hearsay. Motion on Comparisons at 1.

Respondent asserts that its witnesses have substantial knowledge of, and experience in, the real estate industry. Opposition on Comparisons at 2. Respondent further asserts that industry knowledge and experience provide a sufficient foundation for lay opinion testimony.

Opposition on Comparisons at 2.

Complaint Counsel's Motion on Comparisons is **DENIED**. Respondent has made a preliminary showing that these witnesses will testify based on their personal experience and that the intended testimony is within these witnesses' particularized knowledge, perception and experience in the real estate industry. To the extent their testimony strays from the parameters of permissible lay witness opinion testimony, Complaint Counsel may raise appropriate objections at trial.

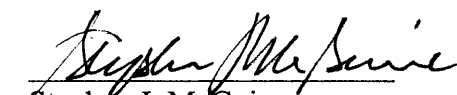
C.

Complaint Counsel's Motion *In Limine* to Bar Lay Opinion Testimony Regarding Justifications for Realcomp's Rules and Policies seeks to preclude Robert Gleason, Douglas Hardy, Douglas Whitehouse, and any other Respondent witnesses without personal knowledge from testifying regarding supposed justifications for Respondent's Website and Search Function Policies. Motion on Justifications at 1. Complaint Counsel asserts that Respondent's Final Proposed Witness List indicates that Respondent expects several of its witnesses to testify to the problems that the Policies were intended to address. Motion on Justifications at 1. Complaint Counsel argues that none of these witnesses have personal knowledge in these supposed problems and that their opinions are purely speculative. Motion on Justifications at 1-2.

Respondent states that each of its witnesses has substantial knowledge of and experience in the real estate industry. Opposition on Justifications at 3-4. Respondent asserts that the testimony each witness will offer is based on the witness's own perception and understanding of why the Policies are justified and their first hand knowledge of the MLS and its rules. Opposition on Justifications at 2. Respondent further asserts that its witnesses will respond to the Complaint's allegations with testimony regarding why Realcomp is doing what it is doing now, as well as the actual and probable consequences of Complaint Counsel's proposal to change Realcomp's policies. Opposition on Justifications at 5.

Complaint Counsel's Motion on Justifications is, therefore, **DENIED**. Testimony offered by lay witnesses on what they heard from other agents will be excluded as hearsay if offered to prove the truth of the matter asserted by the out of court declarant. However, where such testimony is offered to show the information upon which a particular witness based his actions or understanding or belief that the Policies are justified, it may be admitted.

ORDERED:


Stephen J. McGuire
Chief Administrative Law Judge

Date: June 6, 2007