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7 COUNTY OF FRESNO and FRESNO COUNTY IN-
8 HOME SUPPORTIVE SERVICES PUBLIC
9 AUTHORITY

8 UNITED STATES DISTRICT COURT
9
10 NORTHERN DISTRICT OF CALIFORNIA
11
12 SAN FRANCISCO/OAKLAND DIVISION

12 MIKESHA MARTINEZ, et al.,
13
14 Plaintiffs,

Case No. C 09-02306 CW

**OBJECTIONS TO DECLARATION OF
CANDACE HOWES**

15 v.

HEARING:

16 ARNOLD SCHWARZENEGGER,
17 Governor of the State of California; JOHN
18 A. WAGNER, Director of the California
19 Department of Social Services; DAVID
20 MAXWELL-JOLLY, Director of the
21 California Department of Health Care
22 Services; JOHN CHIANG, California State
23 Controller; COUNTY of FRESNO; and
24 FRESNO COUNTY IN-HOME
25 SUPPORTIVE SERVICES PUBLIC
26 AUTHORITY,

DATE: June 25, 2009
TIME: 2:00 p.m.
CRTRM: 2

27 Defendants.

28
29 Defendants COUNTY OF FRESNO and FRESNO COUNTY IN-HOME SUPPORTIVE
30 SERVICES PUBLIC AUTHORITY (collectively, "the County"), by and through their attorneys
31 of record, hereby asserts the following objections to the Declaration of Candace Howes.

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I.
**THE DECLARATION OF CANDACE HOWES SHOULD BE STRICKEN IN ITS
ENTIRETY**

Objection is made to the Declaration in its entirety. Courts have carefully scrutinized expert witness declarations to determine whether they contain the appropriate background, experience, analysis and data to garner admissibility. In that regard, Federal Rule of Evidence Rule 702, states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The Court has long held that, in determining the admissibility of expert testimony, the Court must assess (1) whether the witness is qualified; and (2) whether the testimony can assist the trier of fact. (McKendall v. Crown Control Corp., 122 F.3d 803, 805-806 (9th Cir. 1997); See also, Burkhart v. Washington Metro. Area Transit Auth., 112 F.3d 1207, 1211 (U.S. App. D.C. 1997).) The proponent of expert testimony bears the burden of establishing its admissibility by a preponderance of the evidence. (FRE Rule 702 advisory committee's note.)

An expert's opinion must be based on fact and opinions which are mere speculation are improper. (Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986).) "Without more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible." (Viterbo v. Dow Chem. Co., 826 F.2d 420, 424 (5th Cir. 1988).) Expert declarations have been rejected by the Court when they are "full of assertion but empty of facts and reason", as the Court must "look behind [the expert's] ultimate conclusion ... and analyze the adequacy of its foundation." (Matrix Motor Co. v. Toyota Jidosha Kabushiki Kaisha, 290 F. Supp. 2d 1083, 1097 (S.D. Cal. 2003), quoting Richardson v. Richardson-Merrell, Inc., 857 F.2d 823, 829-32 (D.C. Cir. 1988).)

It is fundamental that expert testimony must be predicated on facts legally sufficient to provide a basis for the expert's opinion; thus, an expert should not be permitted to give an opinion

1 that is based on conjecture or speculation from an insufficient evidentiary foundation. (Damon v.
 2 Sun Co., 87 F.3d 1467, 1474 (1st Cir. 1996).) In speaking to the admissibility of expert
 3 testimony, the United States Supreme Court has declared that the “focus, of course, must be
 4 solely on principles and methodology, not on the conclusions they generate.” (Daubert v. Merrell
 5 Dow Pharmaceuticals, Inc., 509 U.S. 579, 595 (1993).) In Kumho Tire Co. Ltd. v. Carmichael,
 6 526 U.S. 137 (1999), the United States Supreme Court held that Daubert's general holding –
 7 setting forth a trial judge's general “gate keeping” obligation – applies not only to testimony
 8 based on “scientific” knowledge, but also testimony based on other specialized knowledge. (Id.
 9 at 141-142.)

10 While certain data and writings can be relied upon by an expert in rendering an opinion,
 11 there must be a foundation to establish the reliability of any information contained within those
 12 writings. (FRE Rule 702, 703.) In particular, the proponent of the testimony must show that the
 13 facts and evidence are of a type reasonably relied on by experts in the particular fields, and that
 14 the probative value of the underlying data substantially outweighs its prejudicial effect. (Turner
 15 v. Burlington Northern Santa Fe R.R. Co., 338 F.3d 1058, 1061 (9th Cir. 2003).)

16 Here, although Ms. Howes states that she has done some limited analysis of the effect of
 17 proposed cuts to the State of California's maximum IHSS compensation, Plaintiffs have failed to
 18 establish that she is qualified to render the opinions contained in her declaration, particularly with
 19 respect to the County of Fresno. As the Court has held, an economics professor’s opinion similar
 20 to Ms. Howes was properly excluded under Federal Rule of Evidence 702 because the opinions
 21 were not based upon facts and/or accepted scientific evidence. (Casper v. SMG, 389 F. Supp. 2d
 22 618, 621-623 (D.N.J. 2005).) Here, it is clear that Ms. Howes is not qualified to offer any
 23 opinions as to the County because the data she relies upon do not relate to Fresno County. For
 24 example, the surveys she relies upon were conducted in the following counties: San Francisco,
 25 Los Angeles, Yolo, Yuba, Sutter, Sierra, Nevada, Plumas and Placer. [See Declaration, ¶¶ 12, 17;
 26 Appendix “B”.] By her own admission, none of the data was obtained from or about Fresno
 27 County. Therefore, her conclusions have no factual basis as to the County and should be stricken.

28 Furthermore, Ms. Howes’ statistical analysis and methodology are flawed. Specifically,

1 in her declaration, she compares the maximum amount of compensation provided to IHSS
 2 providers, although the declarations of various interested parties submitted in support of
 3 Plaintiffs' Request demonstrates that the maximum compensation is not paid. [See Declarations
 4 of interested parties and potential class members.] Nonetheless, Ms. Howes' conclusions fail to
 5 take into account this critical fact.

6 Ms. Howes also relies upon data that is irrelevant. In particular, all of her conclusions are
 7 based upon surveys that were conducted in 2005 when job prospects were more plentiful. Her
 8 reliance on this outdated and irrelevant data renders her entire Declaration objectionable.
 9 (Buchanan v Consol. Stores Corp., 217 FRD 178, 196 (DC Md, 2003), relying on Kumho Tire
 10 Co., supra, 526 U.S. 137; Pottenger v. Potlatch Corp., 329 F.3d 740, 747-748 (9th Cir. 2003)
 11 [finding that all variables must be taken into account when rendering an opinion]; Westberry v.
 12 Gislaved Gummi AB, 178 F.3d 257, 261 (4th Cir. 1999).) This is particularly true when her 2005
 13 survey was not conducted in Fresno County. Although Ms. Howes makes reference to a 2009
 14 "working paper" from Powers and Powers, the record is devoid of any evidence that this
 15 "working paper" considered Fresno County.

16 Further demonstrating the unreliability of the data Ms. Howes' relies is the fact that there
 17 are currently, 450 active, qualified providers in Fresno County on the Physician Assistant registry
 18 maintained for Fresno County actively seeking work in IHSS. (See Declaration of Steve
 19 Sanchez, ¶5.) Of the 450 active, qualified providers, only 187 are working at least 30 hours per
 20 week. (Ibid.) In other words, there are 263 qualified providers who have no recipient or are
 21 looking for more hours. (Ibid.) Thus, it is clear, at least with respect to the County, that Ms.
 22 Howes' data and analysis is flawed. As a result, based upon the incomplete and flawed data Ms.
 23 Howes' conclusions are based, her Declaration should be stricken.

24 **II.**
 25 **THE DECLARATION SHOULD ALSO BE STRICKEN BECAUSE IT WAS NOT**
 26 **EXECUTED UNDER PENALTY OF PERJURY**

27 Federal Rule of Evidence Rule 43 provides that declarations are admissible so long as the
 28 testimony is given under penalty of perjury or a similar oath. Absent such an oath, the
 declaration, similar to testimony given at trial, is not admissible. (FRE Rule 43; See also, United

1 States v. Lightly (4th Cir. 1982) 677 F.2d 1027, 1028.) Based on the fact that Ms. Howes'
2 Declaration was not submitted under penalty of perjury, it should be stricken.

3 Notwithstanding the above, the County makes the following objections to specific
4 paragraphs of Ms. Howes' Declaration:

5 Paragraphs 5 and 6

6 Although Ms. Howes does not need to disclose her source of data, Federal Rule of
7 Evidence Rule 705 entitles the County to cross-examine Ms. Howes regarding the source of such
8 data and to challenge the same. (FRE Rule 705, Adv. Comm. Notes; Smith v. Ford Motor Co.,
9 626 F.2d 784, 793 (10th Cir. 1980).) Considering Ms. Howes' Declaration and these paragraphs
10 before the County has the opportunity to cross-examine Ms. Howes would be improper. (Ibid.)
11 Therefore, absent the opportunity for cross-examination, these paragraphs should be stricken.

12 Paragraph 7

13 Ms. Howes' conclusions are based upon surveys that were conducted in 2005 when job
14 prospects were more plentiful, and thus her reliance on this outdated and irrelevant data renders
15 these conclusions baseless. (Kumho Tire Co., supra, 526 U.S. 137; Pottenger, supra, 329 F.3d at
16 747-748.) Thus, this paragraph should be stricken.

17 Paragraphs 11-23

18 The data relied upon by Ms. Howes admittedly was not based upon information derived
19 from the County of Fresno. As a result, these paragraphs should be stricken according to Federal
20 Rule of Evidence 702 because the opinions were not based on facts and/or accepted scientific
21 evidence. (Casper, supra, 389 F. Supp. 2d at 621-623.)

22 Paragraphs 26-27

23 Objection is made that this statement lacks foundation and is speculative. Ms. Howes
24 does not identify what the information was that was provided to her by Altshuler Berzon LLP.
25 Because the County is entitled to cross-examine Ms. Howes on those sources, these Paragraphs
26 should be stricken, absent the opportunity to cross-examine Ms. Howes. (FRE Rule 705, Adv.
27 Comm. Notes; Smith, supra 626 F.2d at 793.)

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Paragraphs 29-79

These paragraphs contain Ms. Howes' conclusions. As set forth above, the data in which she relies is irrelevant and unreliable. (FRE Rule 702; Casper, supra, 389 F. Supp. 2d at 621-623.) Based upon this, all of her conclusions are unsubstantiated and should be stricken. (Kumho Tire Co., supra, 526 U.S. 137; Pottenger, supra, 329 F.3d at 747-748.)

Dated: June 11, 2009

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

By: /s/ Michael G. Woods
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Timothy J. Buchanan
Attorneys for Defendant
COUNTY OF FRESNO and FRESNO
COUNTY IN-HOME SUPPORTIVE
SERVICES PUBLIC AUTHORITY

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