

MULCAHY LLP

James M. Mulcahy (SBN 213547)

jmulcahy@mulcahyllp.com

Kevin A. Adams (SBN 239171)

kadams@mulcahyllp.com

Filemon Carrillo (SBN 314220)

fcarrillo@mulcahyllp.com

Four Park Plaza, Suite 1230

Irvine, California 92614

Telephone: (949) 252-9377

Facsimile: (949) 252-0090

Attorneys for Plaintiffs and Counter-Defendants

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

BENNION & DEVILLE FINE
HOMES, INC., a California
corporation, BENNION & DEVILLE
FINE HOMES SOCAL, INC., a
California corporation, WINDERMERE
SERVICES SOUTHERN
CALIFORNIA, INC., a California
corporation,

Plaintiffs,

v.

WINDERMERE REAL ESTATE
SERVICES COMPANY, a Washington
corporation; and DOES 1-10

Defendant.

Case No. 5:15-CV-01921-DFM

Hon. Douglas F. McCormick

**PLAINTIFFS' MOTION *IN LIMINE*
TO PRECLUDE DEFENDANT
FROM ARGUING THAT
WINDERMERE SERVICES
SOUTHERN CALIFORNIA, INC.'S
FAILURE TO SERVICE
WINDERMERE HOMES AND
ESTATES WAS A MATERIAL
BREACH OF THE AREA
REPRESENTATION AGREEMENT**

Complaint Filed: September 17, 2015

Counterclaim Filed: October 13, 2015

AND RELATED COUNTERCLAIMS

1 **I. INTRODUCTION**

2 During trial, Windermere Real Estate Services Company (“WSC”)
3 introduced evidence and testimony in an effort to show that Windermere Services
4 Southern California, Inc. (“Services SoCal”) breached Section 3 the ARA¹ by
5 failing to provide services to Windermere Homes and Estates (“WHE”). Under the
6 express terms of the ARA, however, WSC must show that this alleged breach was
7 “material” to escape liability for its failure to pay the Termination Obligation. [Tr.
8 Ex. 10, §§ 4.1(c), 4.2.] Following an earlier decision by Judge Real, WSC cannot
9 show that Services SoCal’s failure to provide prompt service to WHE was a
10 material breach of the ARA.
11
12
13
14

15 Earlier in this litigation, Judge Real found that WSC could not show that it
16 suffered damages from this alleged breach and, based on this finding, granted
17 partial summary judgment in favor of Services SoCal. [Dkt. No. 75, at 3.]
18 California law is clear that a breach of contract that does not cause any damages is
19 not a material breach as a matter of law. *Viacom Int’l Inc. v. MGA Entm’t, Inc.*, No.
20 CV 15-9621-R, 2016 WL 7448142, at *1 (C.D. Cal. Aug. 11, 2016) (citing *Boston*
21 *LLC v. Juarez*, 245 Cal. App. 4th 75, 87 (2016)). Following this judicial precedent,
22 WSC cannot show that Services SoCal’s alleged failure to provide services to
23 WHE was a material breach of Section 3 the ARA. Furthermore, because Section 3
24
25
26
27

28 ¹ “ARA” means the Area Representation Agreement. [Tr. Ex. 10.]

1 is the only provision of the ARA that imposes a services obligation on Services
2 SoCal, the Court’s prior ruling is conclusive on this issue.

3
4 The B&D Parties² anticipate that WSC will argue in closing that (1) it
5 terminated the ARA for cause based in part on this alleged breach and/or (2) that
6 Services SoCal is not entitled to the Termination Obligation based on this breach.
7
8 WSC should be estopped from taking this position as it would be contrary to Judge
9 Real’s holding and the express language of the ARA, and because it would confuse
10 the issues, mislead the jury, and would prejudice the B&D Parties. Fed. R. Evid.
11 403. For these reasons, the B&D Parties file the instant motion *in limine* to
12 preclude this anticipated position during closing arguments.
13
14

15 **II. RELEVANT FACTUAL BACKGROUND**

16 **A. The Court Held That WSC Did Not Suffer Any Damages For** 17 18 **Services SoCal’s Alleged Failure To Provide Prompt Service And** 19 **To Deal Fairly And Honestly**

20 WSC’s First Amended Counterclaim (“FACC”) included a claim for breach
21 of the Area Representation Agreement against Services SoCal. [FACC, Dkt. No.
22 16, at 25.] This claim was predicated on the following four alleged breaches: (1)
23 failure to provide “prompt, courteous and efficient service” to Windermere
24
25

26
27 ² The “B&D Parties” refers to Plaintiffs/Counter-Defendants Bennion & Deville
28 Fine Homes, Inc., Bennion & Deville Fine Homes SoCal, Inc., and Services SoCal
and Counter-Defendants Robert Bennion and Joseph R. Deville.

1 franchisees; (2) failure to deal “fairly and honestly” with members of the
2 Windermere System; (3) failure to collect and remit fees from Windermere
3 franchisees; and (3) misuse of trademarks. [FACC, Dkt. No. 16, at 25-26.]

4
5 Services SoCal moved for summary judgment on this claim arguing that
6 WSC could not show damages flowing from the first two alleged breaches. [Mem.
7 ISO Plaintiffs’ Mot. Partial Summ. J., Dkt. No. 67, at 9-13.] The Court agreed,
8 finding that WSC did not show that it suffered any damages as a result of Service
9 SoCal’s alleged failure to provide prompt and fair service. [Order Granting in Part
10 and Denying in Part Plaintiffs’ Mot. for Partial Summ. J. (“Summ. J. Order”), Dkt.
11 No. 75, at 3.] As a result, summary judgment was entered in favor of Services
12 SoCal on this claim to the extent it was based on these two alleged breaches. [*Ibid.*]

13
14
15
16 **B. The ARA Requires That WSC Show A “Material Breach” By**
17 **Services SoCal To Terminate The ARA And To Avoid Paying The**
18 **Termination Obligation**
19

20 WSC and Services SoCal’s relationship is governed by the ARA. [Tr. Ex.
21 10.] The ARA includes at Section 4 the procedures allowing for termination of the
22 parties’ relationship. [*Id.*, § 4.] Pursuant to Section 4, the ARA may be terminated
23 either (a) at any time by mutual agreement of the parties; (b) without cause by
24 either party upon 180-days’ notice; (c) for cause by either party upon 90-days’
25 written notice of a “**material breach**,” provided that the “material breach”
26
27
28

1 described in the written notice is not cured within the 90-day period; and (d) by
2 either party if the other party is adjudicated bankrupt, assigns the benefit of the
3 agreement, abandons the business, or convicted of a violation of franchise or real
4 estate licensing laws. [*Id.*, § 4.1 (emphasis added)]

5
6 Furthermore, under Section 4.2 of the ARA, if either party terminates the
7 agreement without cause, the terminating party is required to pay the terminated
8 party “an amount equal to the fair market value of the Terminated Party’s interest
9 in the [ARA]” (the “Termination Obligation”). [*Id.*, § 4.2.] Section 4.2 further
10 provides that the Termination Obligation must not be paid if the termination “is
11 made in good faith based upon the **material breach**” of the ARA. [*Ibid.* (emphasis
12 added).]

13
14
15
16 During trial, WSC introduced evidence and testimony attempting to show
17 that Services SoCal failed to provide service to WHE. Now, the B&D Parties
18 anticipate that WSC will argue at closing (1) that it terminated the ARA for cause
19 based, in part, on Services SoCal’s failure to provide prompt, courteous, and
20 efficient service and failure to deal fairly and honestly with WHE and (2) that
21 Services SoCal is not entitled to the Termination Obligation for this same reason.
22 For the reasons set forth below, any such evidence, argument, or suggestion by
23 WSC during closing should not be allowed.
24
25
26
27
28

1 **III. LEGAL ANALYSIS**

2 WSC should be precluded from arguing or suggesting during its closing that
3 Services SoCal’s failure to provide prompt service and to deal fairly with WHE
4 was a material breach of the ARA. For the reasons set forth below, allowing it to
5 present this argument would confuse the issues, mislead the jury, and would be
6 unduly prejudicial to the B&D Parties.
7

8
9 In California, a breach of contract that does not cause any harm is not a
10 material breach as a matter of law. *Viacom Int'l Inc.*, 2016 WL 7448142, at *1
11 (“Normally, the question of whether a breach is material or not is a question of
12 fact; however, a breach that does not cause any harm is—as a matter of law—not a
13 material breach.”); *Boston LLC*, 245 Cal. App. at 87 (holding that alleged breach of
14 contract was not material where party could not show that the breach caused
15 harm). Here, as set forth above, the Court in this case has already found that WSC
16 did not suffer any damages for Services SoCal’s alleged failure to service WHE or
17 any Windermere franchisee. [Summ. J. Order, Dkt. No. 75, at 3.] Because the
18 Court has found that WSC cannot show damages, following the above judicial
19 precedent, this alleged breach cannot constitute a material breach of the ARA.
20
21
22
23
24

25 WSC has taken the position that it terminated the ARA for cause and that
26 Services SoCal is not entitled to the Termination Obligation. Under the express
27 terms of the ARA, however, WSC must show that this alleged breach was
28

1 “material” to show that it terminated the relationship for cause and to escape
2 liability for its failure to pay the Termination Obligation. [Tr. Ex. 10, §§ 4.1(c),
3 4.2.] Based on the Court’s holding on summary judgment and following California
4 law, WSC cannot show Services SoCal’s alleged failure to service WHE
5 constitutes a material breach of the ARA.
6

7
8 If WSC is allowed to make this argument in closing, the jury will be misled
9 to believe that these allegations justify WSC’s termination or that Services SoCal
10 is not entitled to the Termination Obligation. Fed R. Evid. 403. Moreover, such an
11 argument would confuse the issues and would unduly prejudice the B&D Parties.
12

13 *Id.* WSC should be estopped from taking a position wholly inconsistent and
14 contrary to Judge Real’s prior holdings. For these reasons, the B&D Parties
15 respectfully ask this Court to preclude WSC from arguing in closing that Services
16 SoCal’s alleged failure to service WHE or any other Windermere franchisee was a
17 material breach of the ARA or that it justifies its failure to pay the Termination
18 Obligation to Services SoCal.
19
20
21

22 ///

23 ///

24 ///

1 Dated: July 22, 2018

MULCAHY LLP

2 By: /s/ Kevin A. Adams

3 Kevin A. Adams

4 *Attorneys for Plaintiffs/Counter-*
5 *Defendants Bennion & Deville Fine*
6 *Homes, Inc., Bennion & Deville Fine*
7 *Homes SoCal, Inc., Windermere*
8 *Services Southern California, Inc.,*
9 *and Counter-Defendants Robert L.*
10 *Bennion and Joseph R. Deville*

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28