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8
9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**

11
12 BENNION & DEVILLE FINE
13 HOMES, INC., a California
14 corporation, BENNION & DEVILLE
15 FINE HOMES SOCAL, INC., a
16 California corporation, WINDERMERE
17 SERVICES SOUTHERN
18 CALIFORNIA, INC., a California
19 corporation,

20 Plaintiffs,

21 v.

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

25 Defendant.

26
27 **AND RELATED COUNTERCLAIMS**
28

Case No. 5:15-CV-01921 R (KKx)

Hon. Manual L. Real

**THE B&D PARTIES' NOTICE OF
MOTION AND MOTION IN LIMINE
TO PRECLUDE WSC FROM
INTRODUCING EVIDENCE AND
ARGUING THAT B&D FINE
HOMES WAS OBLIGATED TO
TRANSFER DOMAINS AND
EVIDENCE OF EXPENSES FOR
OBTAINING DOMAIN NAMES**

[Motion in Limine # 4]

Date: May 15, 2017
Time: 10:00 a.m.
Courtroom: 880
Action Filed: September 17, 2015
Pretrial Conf.: November 15, 2016
Trial: May 30, 2017

1 TO DEFENDANT/COUNTER-CLAIMANT WINDERMERE REAL ESTATE
2 SERVICES COMPANY (“WSC”) AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE THAT ON May 15, 2017, at 10:00 a.m. or as soon
4 thereafter as counsel may be heard, the Courtroom of the Honorable Manuel L. Real,
5 located at 255 East Temple Street, Los Angeles, California 90012, Plaintiffs/Counter-
6 Defendants Bennion & Deville Fine Homes, Inc. (“B&D Fine Homes”), Bennion &
7 Deville Fine Homes SoCal, Inc., Windermere Services Southern California, Inc., and
8 Counter-Defendants Robert L. Bennion and Joseph R. Deville (collectively referred to
9 herein as the “B&D Parties”), will and hereby do move this Court to grant their Motion
10 in *Limine* No. 4 to preclude WSC from introducing any evidence, testimony, argument,
11 or comment that B&D Fine Homes was obligated to transfer of the Windermere mark,
12 and evidence of expenses associated with retrieving domain names.

13 This motion is made under the provisions of Federal Rules of Evidence 401, 402,
14 and 403, and is based on this Notice of Motion and Motion, the attached Memorandum
15 of Points and Authorities, the Declaration of Joseph Deville and exhibits thereto, the
16 [Proposed] Order filed and lodged herewith, the pleadings and papers on file in this
17 action, and upon such argument and evidence as may be presented at the hearing on this
18 matter.

19 DATED: April 17, 2017

MULCAHY LLP

21 By: /s/ Kevin A. Adams

22 Kevin A. Adams

23 *Attorneys for Plaintiffs/Counter-Defendants*
24 *Bennion & Deville Fine Homes, Inc.,*
25 *Bennion & Deville Fine Homes SoCal, Inc.,*
26 *Windermere Services Southern California,*
27 *Inc., and Counter-Defendants Robert L.*
28 *Bennion and Joseph R. Deville*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc. (“B&D Fine
3 Homes”), Bennion & Deville Fine Homes SoCal, Inc. (“B&D SoCal”), Windermere
4 Services Southern California, Inc. (“Services SoCal”), and Counter-Defendants Robert
5 L. Bennion and Joseph R. Deville (collectively referred to herein as the “B&D Parties”)
6 respectfully submit this Memorandum of Points and Authorities in Support of their
7 Motion in *Limine* No. 4 to preclude Defendant/ Counterclaimant Windermere Real
8 Estate Services Company (“WSC”) from introducing any evidence, testimony, argument,
9 or comment that B&D Fine Homes was obligated to transfer of the Windermere mark,
10 and evidence of expenses associated with retrieving domain names.

11 **I. INTRODUCTION & RELEVANT FACTUAL BACKGROUND**

12 The B&D Parties anticipate that WSC to attempt to admit evidence, or otherwise
13 argue or comment that B&D Fine Homes was obligated to transfer the Windermere mark
14 and will attempt to admit evidence of costs it incurred reacquiring domain names. B&D
15 Fine Homes, however, was not obligated to transfer the mark upon the termination of its
16 franchise agreement. As a result, evidence, testimony, argument, or comment that B&D
17 Fine Homes was obligated to transfer of the Windermere mark, and evidence of expenses
18 associated with retrieving domain names is not relevant and, if introduced, would be
19 prejudicial to B&D Fine Homes. This evidence should be excluded.

20 This case involves three distinct agreements with distinct obligations. B&D Fine
21 Home entered into a separate franchise agreement with WSC (the “Coachella Valley
22 FA”). (Decl. of Joseph “Bob” Deville ISO MIL #4 (“Deville Decl.”), ¶ 3, Ex. A.) Under
23 the Coachella Valley FA, B&D Fine Homes was not obligated to transfer the
24 Windermere mark or domains upon termination of the agreement. (*See generally id.*, Ex.
25 A.)

26 During the term of the contract, B&D Fine Homes registered and owned several
27 domains to utilize in the operation of the franchise. (*Id.*, ¶ 4.) Only B&D Fine Homes
28 owned and operated its domains. (*Id.*) Neither B&D SoCal nor Services SoCal ever

1 owned or operated any of the domains that B&D Fine Homes owned and operated. (*Id.*)

2 **II. EVIDENCE THAT B&D FINE HOMES WAS OBLIGATED TO**
3 **TRANSFER THE DOMAINS IS IRRELEVANT**

4 Federal Rule of Evidence (“FRE”) 401 provides that “evidence is relevant if (a) it
5 has any tendency to make a fact more or less probable than it would be without the
6 evidence; and (b) the fact is of consequence in determining the action.” *See Huddleston v.*
7 *U.S.*, 485 U.S. 681, 682-92 (1988). Evidence that does not meet this relevancy threshold is
8 inadmissible pursuant to (“FRE”) 402.

9 As explained above, B&D Fine Homes entered into a separate franchise agreement
10 with WSC. Pursuant to the Coachella Valley FA, B&D Fine Homes was not obligated to
11 transfer the Windermere mark. (*See generally* Deville Decl., Ex. A.) It was, therefore, not
12 obligated to transfer domains that it owned and operated independently from the other
13 parties to this action. As a result, all evidence of any costs that WSC incurred in
14 reacquiring domains owned by B&D Fine Homes is of no consequence to this case.
15 Accordingly, all evidence or comment that B&D Fine Homes was obligated to transfer
16 domains it owned, and evidence or comment of costs that WSC incurred in reacquiring the
17 domains at issue should be precluded as irrelevant under FRE 402.

18 **III. IN THE ALTERNATIVE, EVIDENCE THAT B&D FINE HOMES WAS**
19 **OBLIGATED TO TRANSFER THE DOMAINS SHOULD BE EXCLUDED**
20 **UNDER RULE 403**

21 To the extent that the Court finds that comment and evidence about expenses
22 WSC incurred in reacquiring domains that B&D Fine Homes owned is relevant (*it is*
23 *not*), such evidence and comment should still be excluded under FRE 403. Rule 403
24 states that a “Court may exclude relevant evidence if its probative value is substantially
25 outweighed by a danger of one or more of the following: unfair prejudice, confusing the
26 issues, misleading the jury, undue delay, [or] wasting time...” *Old Chief v. U.S.*, 519
27 U.S. 172, 180-92 (1997).

28 Here, Rule 403 requires the preclusion of evidence or comment about the
expenses WSC incurred in reacquiring domains that B&D Fine Homes owned

1 independent of the other parties to this action. As set forth above, the Coachella Valley
2 FA does not require B&D Fine Homes to transfer the Windermere mark, which includes
3 the domains. If allowed, this evidence would prejudice B&D Fine Homes, and would
4 confuse and mislead the jury. WSC will utilize this evidence to mislead the jury to
5 believe that B&D Fine Homes, or the B&D Parties collectively, are liable to WSC; they
6 are not. The evidence has no place in this already complex case. Thus, exclusion under
7 Rule 403 is proper.

8 **IV. CONCLUSION**

9 For the reasons stated above, the B&D Parties respectfully request that the Court
10 enter an order precluding WSC from introducing any evidence, testimony, argument, or
11 comment that B&D Fine Homes was obligated to transfer of the Windermere mark, and
12 evidence of expenses associated with retrieving domain names.

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14 Dated: April 17, 2017

MULCAHY LLP

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16 By: /s/ Kevin A. Adams
17 Kevin A. Adams
18 *Attorneys for Plaintiffs and Counter-Defendants*
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