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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 OF
WORK PERFORMED ON THE
SUNDBERG PRIOR TO OCTOBER
2013**

[Motion in Limine # 5]

Date: May 15, 2017

Time: 10:00 a.m.

Courtroom: 880

Action Filed: September 17, 2015

Disc. Cut-Off: August 29, 2016

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. 5 to preclude WSC from introducing any evidence, testimony, argument,
11 or comment of work that was performed on the Sundberg Report prior to October 2013.

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

18 DATED: April 17, 2017

MULCAHY LLP

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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc., Bennion &
3 Deville Fine Homes SoCal, Inc., Windermere Services Southern California, Inc., and
4 Counter-Defendants Robert L. Bennion and Joseph R. Deville (collectively referred to
5 herein as the “B&D Parties”) respectfully submit this Memorandum of Points and
6 Authorities in Support of their Motion in *Limine* No. 5 to preclude Defendant/
7 Counterclaimant Windermere Real Estate Services Company (“WSC”) from introducing
8 any evidence, testimony, argument, or comment of work that was performed on the
9 Sundberg Report prior to October 2013.

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

11 The B&D Parties anticipate that WSC to attempt to admit evidence, or otherwise
12 argue or comment about work performed on the report submitted by Greg Sundberg
13 (“Sundberg Report”) prior to October 2013. WSC, however, did not produce any drafts or
14 documents that evidence that any work was performed prior to October 2013. Moreover,
15 WSC’s witnesses could not testify as to when the work was performed, or identify any
16 work performed prior to October 2013. As a result, evidence, testimony, argument, or
17 comment about work on the Sundberg Report prior to October 2013 would be prejudicial
18 to the B&D Parties. This evidence should be excluded.

19 Beginning in 2006, a disgruntled former Seattle client of WSC began an anti-
20 marketing campaign under the name “Windermere Watch.” (Decl. of Joseph “Bob”
21 Deville ISO Mot. in *Limine* # 5 (“Deville Decl.”), ¶ 3.) The campaign was designed to
22 distribute defamatory statements and materials against Windermere, its franchisees and
23 agents. (*Id.*) Windermere Watch had a substantial impact on the B&D Parties’ businesses.
24 (*Id.*) The effects of Windermere Watch were visible on the field. (*Id.*)

25 The B&D Parties communicated their concern about Windermere Watch to WSC.
26 (*Id.*, ¶ 4.) Under the several contracts at issue here, WSC had the obligation to protect the
27 Windermere system and mark.
28

1 On December 21, 2012, the B&D Parties entered into an agreement modifying the
2 contracts at issue here (“Modification Agreement”). (*Id.*, ¶ 5, Ex. A.) As part of the
3 Modification Agreement, WSC agreed that it “shall make commercially reasonable
4 efforts to actively pursue counter-marketing, and other methods seeking to curtail the
5 anti-marketing activities undertaken by . . . Windermere Watch.” (*Id.*, Ex. A § 3(A).)

6 In response to the Modification Agreement, WSC hired Sundberg to prepare a
7 report to battle the effects of Windermere Watch. Sundberg produced the report to the
8 B&D Parties on October 17, 2013, ten months after the modification agreement. (*See*
9 Decl. of Kevin A. Adams ISO Mot. in *Limine* No. 5 (“Adams Decl.”), Ex. A, 206:7-25.)

10 On August 26, 2016, counsel for the B&D Parties deposed York Baur (“Baur”),
11 WSC’s Chief Information Officer. (Adams Decl., Ex. A, 16:3-4.) During the deposition,
12 Baur was repeatedly asked to establish when Sundberg was hired to prepare the report.
13 (*Id.*, Ex. A, 71:17 -72:24, 175:22 – 181:6.) Baur was also asked to establish when the
14 work began on the Sundberg Report. (*Id.*) Baur repeatedly testified that he did not recall
15 when Sundberg was hired or when the work on the Sundberg Report began. (*Id.*) His
16 responses varied from the first quarter of 2013 to September 2013. (*Id.*, Ex. A, 72:9-13,
17 205:13-19.) Additionally, although requested, no materials concerning the date WSC
18 hired Sundberg or when Sundberg began his work on the Sundberg Report were
19 produced. (*Id.*, ¶ 4, Ex. A, 205:20-25.)

20 **II. EVIDENCE OR COMMENT OF WORK PERFORMED ON THE**
21 **SUNDBERG REPORT PRIOR TO OCTOBER 2013 IS PREJUDICIAL TO**
22 **THE B&D PARTIES**

23 It would be patently unfair and prejudicial to the B&D Parties to allow WSC to
24 introduce evidence or comment concerning information that was not produced during
25 discovery. Federal Rule of Evidence (“FRE”) 403 states that a “Court may exclude
26 relevant evidence if its probative value is substantially outweighed by a danger of one or
27 more of the following: unfair prejudice, confusing the issues, misleading the jury, undue
28 delay, [or] wasting time...” *Old Chief v. U.S.*, 519 U.S. 172, 180-92 (1997). Where a party
is disadvantaged by another party’s failure to produce materials and information during

1 discovery, exclusion from trial is the proper remedy. *Hostnut.Com, Inc. v. Go Daddy*
2 *Software, Inc.*, No. CV05-0094-PHX-DGC, 2006 WL 2573201, at *1 (D. Ariz. Sept. 6,
3 2006). *C.f.* Fed. R. Civ. P. 37(d).

4 As explained above, in December 2012, WSC agreed to make commercially
5 reasonable efforts to curtail the effects of Windermere Watch. (Deville Decl., Ex. A.) The
6 Sundberg Report was not produced to the B&D Parties until October 17, 2013. (Adams
7 Decl., Ex. A, 206:7-25.) Ten months passed between when WSC agreed to take action and
8 when the B&D Parties received the Sundberg Report. Counsel for the B&D Parties
9 repeatedly asked Baur to specify or identify the date Sundberg was hired, or when the
10 work began on the Sundberg Report. Time after time, Baur testified that he did not recall
11 the dates for either. In fact, his responses varied from the first quarter of 2013 to
12 September 2013. (*Id.*, Ex. A, 72:9-13, 205:13-19.) Additionally, although requested, no
13 materials concerning the date WSC hired Sundberg or when Sundberg began his work on
14 the Sundberg Report were produced. (*Id.*, ¶ 4, Ex. A, 205:20-25.) The B&D Parties tried
15 to obtain this information through discovery, which efforts were thwarted by Baur's
16 inability to testify to the dates. Allowing WSC to introduce any evidence or comment that
17 any work was performed on the Sundberg Report prior to October 2013 would, then, be
18 highly prejudicial to the B&D Parties. They would be unfairly surprised at trial,
19 notwithstanding their efforts to obtain the information. This contravenes the purpose of
20 the rules governing discovery. On those grounds, WSC should be precluded from
21 introducing any evidence, testimony, argument, or comment of work that was performed
22 on the Sundberg Report prior to October 2013.

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1 **III. CONCLUSION**

2 For the reasons stated above, the B&D Parties respectfully request that the Court
3 enter an order precluding WSC from introducing any evidence, testimony, argument, or
4 comment of work that was performed on the Sundberg Report prior to October 2013.

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6 Dated: April 17, 2017

MULCAHY LLP

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8 By: /s/ Kevin A. Adams
9 Kevin A. Adams
10 *Attorneys for Plaintiffs and Counter-Defendants*
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