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

18 Plaintiffs,

19 v.

20
21 WINDERMERE REAL ESTATE
22 SERVICES COMPANY, a Washington
corporation; and DOES 1-10

23 Defendant.

24
25
26 **AND RELATED COUNTERCLAIMS**
27
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
REFERING TO THE B&D PARTIES
COLLECTIVELY**

[Motion in Limine # 7]

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. (“B&D SoCal”), Windermere Services Southern
8 California, Inc. (“Services SoCal”), and Counter-Defendants Robert L. Bennion and
9 Joseph R. Deville (collectively referred to herein as the “B&D Parties”), will and hereby
10 do move this Court to grant their Motion in *Limine* No. 7 to preclude WSC from
11 referring to B&D Fine Homes, B&D SoCal, and Services SoCal collectively.

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

17 DATED: April 17, 2017

MULCAHY LLP

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

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. 7 to preclude Defendant/ Counterclaimant Windermere Real
8 Estate Services Company (“WSC”) from referring to B&D Fine Homes, B&D SoCal,
9 and Services SoCal collectively.

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

11 The B&D Parties anticipate that WSC to attempt to create a false equivalency by
12 referring to B&D Fine Homes, B&D SoCal, and Services SoCal as a collective.
13 However, each of these parties have distinct agreements with WSC. WSC would attempt
14 to unify these entities hoping to prejudice the B&D Parties at trial. This prejudicial
15 attempt should be curtailed.

16 This case presents a complex set of facts and involves three distinct agreements.
17 Notably, there have been no alter ego allegations in this case. The three agreements are as
18 follows:

- 19 (1) B&D Fine Homes entered into a franchise agreement with WSC whereby
20 B&D Fine Homes would operate a Windermere real estate brokerage
21 franchise. (FAC, D.E. No. 31, Ex. A.)
22 (2) B&D SoCal entered into a franchise agreement with WSC whereby B&D
23 SoCal would operate a separate Windermere real estate brokerage franchise.
24 (FAC, D.E. No. 31, Ex. D.)
25 (3) Services SoCal entered into an Area Representative Agreement with WSC
26 whereby Services SoCal would act as an area representative in Southern
27 California to sell and service local franchisees, as well as collect the fees
28 owed to WSC from franchisees. (*See* FAC, D.E. No. 31 Ex. B.)

1 On September 16, 2016, WSC served its initial expert disclosure, containing the
2 expert report of Neil J. Beaton (“Beaton”). (Decl. of Kevin A. Adams ISO MIL #7
3 (“Adams Decl.”), ¶ 3, Ex. A.) Beaton, as WSC’s damages expert, was retained to form an
4 opinion of the “economic damages that may have been incurred by WSC as a result of
5 alleged violations of various partnership agreements between WSC and [B&D Fine
6 Homes], [B&D SoCal], and [Services SoCal], *collectively referred to as the ‘Bennion &
7 Deville Entities.’*” (*Id.*, Ex. A, ¶ 3.) The report refers to the “Bennion & Deville Entities”
8 throughout. (*See e.g., id.*, Ex. A, ¶¶ 9, 28, 36, 38.) For example, Beaton’s report states:

9 Although Bennion and Deville insisted that B&D Fine Homes and B&D
10 SoCal were struggling financially, and therefore requested various
11 reductions, waivers, delays, and forgiveness of franchise fees in addition to
12 requesting multiple personal loans from WSC, *Bennion & Deville Entities*
were paying millions of dollars of personal, non-business expenditures.

13 (*Id.*, Ex. A, ¶ 36.)

14 **II. ALLOWING WSC TO REFER TO THE B&D PARTIES COLLECTIVELY**
15 **WOULD BE UNFAIRLY PREJUDICIAL**

16 WSC should be precluded from referring to B&D Fine Homes, B&D SoCal, and
17 Services SoCal collectively because it would create a prejudicial false equivalency.
18 Federal Rule of Evidence (“FRE”) 403 states that a “Court may exclude relevant evidence
19 if its probative value is substantially outweighed by a danger of one or more of the
20 following: unfair prejudice, confusing the issues, misleading the jury, undue delay, [or]
21 wasting time...” *Old Chief v. U.S.*, 519 U.S. 172, 180-92 (1997).

22 In this case, WSC should be precluded by confusing and misleading the jury by
23 attempting to create a unified identify between B&D Fine Homes, B&D SoCal, and
24 Services SoCal. As outlined above, these entities have entered into distinct contracts with
25 WSC. Each contract carries with it distinct obligations. Consequently, the parties’
26 respective pleadings and claims therein are based upon each of these entities separate
27 obligations.
28

1 The claims under each contract should not rise or fall together. Each party has filed
2 claims for breach of the distinct contracts, and these claims should be proved
3 independently. WSC's only purpose in lumping these entities together would be in hopes
4 of using evidence that would only be probative as to its claims against one of the parties
5 against all of the B&D Parties. This is improper, and would be unfairly prejudicial to the
6 B&D Parties.

7 Beaton's report evidences how WSC would prejudice the B&D Parties at trial. By
8 lumping Services SoCal—the *area representative*—together with the franchisees, WSC
9 hopes to hold Services SoCal for the franchisees' obligations. (Adams Decl., Ex. A, ¶ 36
10 (“Although Bennion and Deville insisted that ***B&D Fine Homes and B&D SoCal*** were
11 struggling financially, and therefore requested various reductions, waivers, delays, and
12 forgiveness of franchise fees in addition to requesting multiple personal loans from WSC,
13 ***Bennion & Deville Entities*** were paying millions of dollars of personal, non-business
14 expenditures.”) Allowing WSC to refer to B&D Fine Homes, B&D SoCal, and Services
15 SoCal collectively would confuse and mislead the jury, and would unfairly prejudice the
16 B&D Parties. This type of argument and presentation of evidence should be precluded.

17 **III. CONCLUSION**

18 For the reasons stated above, the B&D Parties respectfully request that the Court
19 enter an order precluding WSC from referring to B&D Fine Homes, B&D SoCal, and
20 Services SoCal collectively.

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22 Dated: April 17, 2017

MULCAHY LLP

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24 By: /s/ Kevin A. Adams

25 Kevin A. Adams

26 *Attorneys for Plaintiffs and Counter-Defendants*
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