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Windermere Real Estate Services Company
12

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

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

19 Plaintiffs,

20 v.

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. Manuel L. Real

**OPPOSITION TO THE B&D
PARTIES' MOTION *IN LIMINE* TO
EXCLUDE EXHIBITS AND OTHER
EVIDENCE CONCERNING LOANS
TO PLAINTIFFS FROM THIRD
PARTIES**

[Motion in Limine # 2]

Date: May 1, 2017

Time: 10:00 a.m.

Courtroom: 880

Complaint Filed: September 17, 2015

1 **I. INTRODUCTION**

2 The relationship between the parties to this dispute is long and complex.
3 Until they terminated the franchise agreements as of September 2015, Counter-
4 Defendants Robert L. Bennion and Joseph R. Deville had worked for or with
5 Windermere Real Estate Services Company (“WSC”) in some capacity for almost
6 two decades. In 2001, Bennion and Deville became WSC franchisees in the
7 Coachella Valley under their corporation Bennion & Deville Fine Homes, Inc.
8 (“B&D Fine Homes”). In 2011, Bennion and Deville expanded their real estate
9 operations and became WSC franchisees in San Diego and the surrounding areas
10 under their corporation Bennion & Deville Fine Homes SoCal, Inc. (“B&D Fine
11 Homes SoCal”).¹

12 Over the course of the parties’ relationship, a pattern developed – WSC would
13 forgive, decrease, freeze, and/or defer millions of dollars in franchise and related
14 fees owed to WSC because Bennion and Deville claimed that the B&D Franchisees
15 were struggling financially. In addition, to further assist Counter-Defendants,
16 entities affiliated with WSC (i.e. owned by WSC’s owners and/or principals) loaned
17 \$1.25 million to Bennion and Deville between 2008 and 2011. On more than one
18 occasion, Bennion and Deville would later seek to either reduce their liability or
19 extend the repayment terms of these loans. Finally, in 2014, WSC broke the cycle
20 and refused to give Counter-Defendants any further relief from the fees they owed
21 WSC. When WSC forced Counter-Defendants to pay their outstanding fees, the
22 B&D Franchisees terminated their franchises and brought this action against WSC
23 in an effort to seek leverage to avoid all of their financial liabilities to WSC.

24 Evidence regarding the loans given to Bennion and Deville by WSC-affiliated
25 entities is relevant for two reasons: (1) the loans provide appropriate background
26

27 ¹ B&D Fine Homes and B&D Fine Homes SoCal are referred to collectively herein
28 as the “B&D Franchisees.”

1 and context for the long and complex relationship between the parties; and (2) the
2 renegotiation of one of these loans was conducted in conjunction with addressing a
3 negative marketing campaign, Windermere Watch, that has become a central issue
4 in this case. Absent evidence of these loans, the jury will not fully understand the
5 relationship between the parties, and WSC will be deprived of a key aspect of its
6 defense to one of Counter-Defendants' remaining claims.

7 **II. FACTUAL BACKGROUND**

8 In August 2007, WSC first granted Bennion and Deville's request for relief
9 from franchise and other fees owed by B&D Fines Homes. Specifically, WSC
10 waived all fees owed by B&D Fine Homes for 2006, which amounted to
11 approximately \$501,000. (Declaration of Paul Drayna ("Drayna Decl."), ¶ 4,
12 Ex. A.) As part of that same agreement, WSC agreed to defer all B&D Fine Homes'
13 2007 fees for a time, with final payment guaranteed by May 2013. (Drayna Decl.,
14 ¶ 5, Ex. B.) Despite these agreements, Counter-Defendants continued to struggle
15 financially and Bennion and Deville requested a loan. Through a related entity,
16 WSC loaned \$501,000 to Bennion and Deville individually in January 2009
17 (the "January 2009 Loan"). (Document No. 86-1, Adams Decl., Ex. B.) The
18 January 2009 Loan was originally to be paid in full by March 1, 2014. (*Id.*)

19 In February 2011, Bennion and Deville approached WSC seeking additional
20 financial assistance. They wanted start-up capital to open new Windermere
21 franchises in the San Diego area.² The same WSC-affiliated entity loaned Bennion
22 and Deville an additional \$500,000. (Document No. 86-1, Adams Decl., Ex. B.)
23 The principal of the loan was to be repaid in full by March 1, 2016. (*Id.*)

24 Four months later, in June 2011, Bennion and Deville requested an additional
25 \$250,000 loan, again under the guise of start-up capital for the San Diego area
26

27 ² Prior to this, all of Bennion and Deville's real estate offices were located in the
28 Coachella Valley.

1 offices. Once again, another WSC-affiliated entity loaned Bennion and Deville the
2 money. (Drayna Decl., ¶ 6, Ex. C.) Thus, between January 2009 and June 2011,
3 WSC, through affiliated entities, had loaned Bennion and Deville individually over
4 \$1.25 million dollars to support the B&D Franchisees' operations in
5 Coachella Valley and San Diego.

6 By December 2012, the B&D Franchisees were once again behind on their
7 franchise and related fee payments. This time, Bennion and Deville blamed their
8 inability to pay, at least in part, on Windermere Watch. Windermere Watch is an
9 internet and mail-based negative marketing campaign conducted by a former
10 disgruntled Windermere customer that targets Windermere brokers and agents
11 throughout the western United States attempting to convince consumers to use a
12 different real estate company.

13 To address Bennion and Deville's concerns about Windermere Watch and the
14 claimed inability of the B&D Franchisees' to pay their fees, the parties entered into
15 an Agreement Modifying Windermere Real Estate Franchise License Agreements
16 ("Modification Agreement"). (Drayna Decl., ¶ 7, Ex. D.) Pursuant to the
17 Modification Agreement, WSC once again agreed to waive unpaid fees and forgive
18 the balance of the promissory note associated with unpaid fees from 2007. (*Id.*) In
19 total, \$1,151,060 in unpaid fees were waived pursuant to the Modification
20 Agreement. (*Id.*) In exchange for waiving over one million dollars in fees, the
21 B&D Franchisees agreed to remain Windermere franchisees for five years from
22 effective date of the agreement. (*Id.* § 3(E).) If the B&D Franchisees terminated
23 their franchise agreements prior to December 2017, they would owe a pro-rata
24 amount of the waived fees. (*Id.* § 3(F).) Regarding Windermere Watch, WSC
25 agreed to "make commercially reasonable efforts ... to curtail the anti-marketing
26 activities undertaken by ... Windermere Watch." (*Id.* § 3(A).)

27 In 2014, Bennion and Deville again sought additional financial concessions.
28 Specifically, they wanted to extend the repayment deadline of the January 2009

1 Loan. At that time, the parties were attempting to mitigate the effects of
2 Windermere Watch’s online anti-marketing campaign by improving their own
3 online presence and search results. Specifically, Counter-Defendants were
4 attempting to ensure that when someone searched for “Bennion,” “Deville” or one
5 of their entities online, Counter-Defendants’ entities would appear at the top of the
6 search result list, thereby pushing the Windermere Watch results down to the bottom
7 of the search results. This is a process known as Search Engine Optimization or
8 “SEO.” Counter-Defendants claimed they had incurred expenses related to their
9 SEO efforts and also sought reimbursement of those expenses from WSC.

10 In exchange for agreeing to extend the repayment deadline of the January
11 2009 Loan three years and reimbursing \$85,280 in SEO expenses, Counter-
12 Defendants agreed that WSC had taken all commercially reasonable efforts to
13 combat Windermere Watch and was relieved of their responsibilities in this regard
14 under the Modification Agreement. (Drayna Decl. ¶¶ 8-9, Ex. E.) On June 3, 2014,
15 Mike Teather, WSC’s Senior Vice President – Client Services, confirmed this
16 agreement in a letter to Counter-Defendants’ attorney.³ (Drayna Decl. ¶ 9, Ex. E.)
17 Importantly, WSC would not have agreed to extend the term of the January 2009
18 Loan if Counter-Defendants did not agree that WSC had fulfilled its obligations
19 under the Modification Agreement. (Document No. 72-8, Teather Decl., ¶ 5.)

20 As alleged, the B&D Franchisees breached the Modification Agreement when
21 they terminated their franchise agreements prior to December 2017.
22 (Document No. 16, First Amended Counterclaim, p. 29-30.) As a defense to this
23

24 ³ During his deposition, Deville initially testified that the June 3, 2014 letter
25 accurately reflected the parties’ agreement at the time. (Feasby Decl., Ex. E, Deville
26 Dep. pp 370-374.) However, after conferring with his counsel over lunch, Deville
27 changed his testimony and said the letter did not accurately reflect the parties’
28 agreement. (Feasby Decl., Ex. E, Deville Dep. 377.) Nevertheless, as outlined in
the June 2014 letter, Bennion, Deville, and the WSC-affiliated entity ultimately
signed an amendment to the January 2009 Loan that extended the payment of the
loan through May 2017. (Feasby Decl., Ex. F.)

1 claim, Counter-Defendants have asserted that WSC failed to take commercially
2 reasonable efforts to combat Windermere Watch, relieving them of their obligation
3 to stay for the entire term of the agreement.

4 **III. EVIDENCE OF THE LOANS IS RELEVANT AND NOT UNDULY**
5 **PREJUDICIAL**

6 Evidence of loans made to Bennion and Deville provide important context for
7 the long and complex relationship between the parties. Moreover, this evidence is
8 directly relevant to WSC's claim for breach of the Modification Agreement.
9 Evidence is relevant if it: (1) tends to make a fact more or less probable than it
10 would be without the evidence; and (2) the fact is of consequence to the action.
11 Fed. R. Evid. 401. Relevant evidence may be excluded if its probative value is
12 substantially outweighed by a danger of unfair prejudice, confusing the issue, or
13 misleading the jury. Fed. R. Evid. 403.

14 The relationship between the parties to this dispute is long and complex. It
15 spanned more than 20 years and included multiple agreements between various
16 entities. To support and grow their business relationship, WSC-related entities
17 loaned Counter-Defendants more than \$1.25 million dollars. Each of those loans
18 was made to Bennion and Deville personally by entities owned by the principals of
19 WSC. As Counter-Defendants point out in their moving papers, "the scope of
20 relevance is set by the parties' pleadings." (Document No. 86, p. 5.) In its
21 First Amended Counterclaim, WSC specifically alleges the loans from WSC-
22 affiliated entities because it is an important aspect of the relationship between the
23 parties. (Document No. 16, FACC ¶¶ 7-10.) The loans provide relevant, probative
24 background of the relationship between the parties and excluding this evidence
25 blinds the jury to a vital aspect of this case. *See Ohio Six Limited v. Motel 6*
26 *Operating L.P.*, No. 11-08102, 2013 WL 12125747, at *13 (C.D. Cal. Aug. 7, 2013)
27 (evidence the fleshes out the full background of the parties' relationship and
28 provides context for the dispute at issue is relevant and admissible).

1 Moreover, evidence regarding the January 2009 Loan is directly relevant to
2 WSC's claim that Counter-Defendants breached the Modification Agreement.
3 Multiple witnesses for WSC will testify that the repayment terms of the January
4 2009 Loan were extended, and Counter-Defendants were reimbursed for some SEO-
5 related expenses, solely in exchange for Counter-Defendants' agreement that WSC
6 had fulfilled its obligations under the Modification Agreement as they related to
7 Windermere Watch. (*See, e.g.*, Document No. 72-8, Teather Decl., ¶ 5.) Deville
8 initially confirmed under oath that this was the agreement between the parties, but
9 later changed his story after conferring with his counsel. (Feasby Decl., Ex. E,
10 Deville Dep., pp 370-377.) The existence of the January 2009 Loan and its
11 repayment terms are an essential and unavoidable aspect of this case.

12 Further, Counter-Defendants' argument that evidence of the loans should be
13 excluded because the lenders are not parties is baseless. Although WSC is not suing
14 for breach of these agreements, the fact that WSC repeatedly forgave hundreds of
15 thousands of dollars in fees owed by the B&D Franchisees and that WSC-affiliated
16 entities loaned Bennion and Deville \$1.25 million in order to keep the
17 B&D Franchisees running is relevant to WSC's claims. Any suggestion that
18 evidence of the loans is irrelevant because the lenders are not parties to this dispute
19 is a red herring.

20 Finally, citing Rule 403, Counter-Defendants argue that evidence of the loans
21 "could lead the jury to make a decision based upon [Counter-Defendants'] alleged
22 failure to pay unrelated debt," which would be highly prejudicial.
23 (Document No. 86, p. 6.) "Rule 403 favors admitting evidence, and permits its
24 exclusion only where the probative value of evidence is *substantially* outweighed by
25 the unfair prejudice that may result from admitting it." *Ohio Six Limited*, 2013 WL
26 12125747, at * 7 (emphasis original) (*citing Deters v. Equifax Credit Info. Services,*
27 *Inc.*, 202 F.3d 1262, 1274 (10th Cir. 2000)). Counter-Defendants' argument
28 mischaracterizes the evidence and why WSC seeks to introduce evidence of the

1 loans. WSC is not seeking to introduce evidence that Counter-Defendants failed to
2 repay the loans or that their loan repayment history shows that Counter-Defendants
3 “untimely paid their debts.” In fact, as alleged in the First Amended Counterclaim,
4 only one loan remains outstanding and the others have been repaid.
5 (Document No. 16, ¶ 10.) Moreover, as established above, this evidence is relevant
6 to provide the jury with a complete understanding of the parties’ history as well as
7 to assist them in determining the parties’ respective contentions regarding WSC’s
8 claim that the B&D Franchisees breached the Modification Agreement. Thus, there
9 can be no danger the jury could determine that Counter-Defendants did not repay
10 these loans and, therefore, no unfair prejudice.

11 **IV. CONCLUSION**

12 For all of these reasons, The B&D Parties’ Motion *In Limine* to Exclude
13 Exhibits and Other Evidence Concerning Loans to Plaintiffs from Third Parties
14 should be denied in its entirety.

15
16 DATED: April 10, 2017 PEREZ VAUGHN & FEASBY INC.

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21 Attorneys for
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