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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 PLAINTIFFS
AND COUNTER-DEFENDANTS'
MOTION *IN LIMINE* TO
PRECLUDE DEFENDANT FROM
INTRODUCING EVIDENCE OF
WORK PERFORMED ON THE
SUNDBERG REPORT PRIOR TO
OCTOBER 2013**

Date: May 15, 2017

Time: 10:00 a.m.

Courtroom: 880

Complaint Filed: September 17, 2015

1 **I. INTRODUCTION**

2 With this improvidently filed motion, Counter-Defendants Bennion & Deville
3 Fine Homes, Inc., Bennion & Deville Fine Homes SoCal, Inc., Windermere Real
4 Estate Services Company Inc., Robert L. Bennion, and Joseph R. Deville
5 (collectively “Counter-Defendants”) ask the Court to make a *factual* determination
6 that is *directly contradicted* by both the testimony and documents generated during
7 discovery. Counter-Defendants would do well to revisit the proper and legal
8 purpose of an in limine motion. A motion in limine is a prophylactic tool to prevent
9 an opposing party from placing irrelevant and unfairly prejudicial evidence before a
10 jury. *Hana Financial, Inc. v. Hana Bank*, 735 F.3d 1158, 1162, n. 4 (9th Cir. 2013)
11 (“A motion in limine is a procedural mechanism to limit in advance testimony or
12 evidence in a particular area.”) “A motion in limine is not the proper vehicle for
13 seeking a dispositive ruling on a claim, particularly after the deadline for filing such
14 motions has passed.” *Id.* Nevertheless, Counter-Defendants want the Court to
15 preclude Defendant and Counterclaimant Windermere Real Estate Services
16 Company (“WSC”) from introducing evidence that WSC began work on a Report¹
17 prior to October 2013. Counter-Defendants make this request notwithstanding the
18 fact that the only witness deposed on this issue testified, to the best of his
19 recollection, that work began in the first or second quarter of 2013. As it turns out,
20 his recollection is supported by documents produced to Counter-Defendants by
21 WSC.

22 Rather incredibly, Counter-Defendants make multiple misrepresentations to
23 the Court in order to support their motion. Counter-Defendants argue, and counsel
24 for Counter-Defendants testifies under penalty of perjury, that WSC failed to
25 produce responsive documents relating to when the Report was created. (Document
26 No. 100, pp. 2, 3; Document No. 100-2, Adams Decl., ¶ 4.) This is false, and

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28 ¹ Explained and defined below as the “Sundberg Report.”

1 demonstrably so. In fact, WSC produced documents showing that work was
2 performed on the Report as early as April 2013. (Declaration of Jeffrey Feasby
3 (“Feasby Decl.”), Ex. B.) Counter-Defendants also misrepresent the testimony of
4 WSC’s witness, York Baur, regarding when he first contacted Mr. Sundberg.
5 (Document No. 100, pp. 2, 3.)

6 Even if Counter-Defendants’ misrepresentations about Mr. Baur’s testimony
7 and WSC’s document production were accurate (they are not), Counter-Defendants’
8 motion would still fail as unfounded and gratuitous. Mr. Baur testified to the best of
9 his recollection about an occurrence that took place nearly three and a half years
10 before his deposition. That he was only able to give a range of dates, rather than the
11 precise date, is no basis for the Court to make a factual finding contrary to his
12 testimony.

13 Counter-Defendants’ motion is a shameless waste of the Court’s resources.
14 Because the motion is based upon fiction and misrepresentations and is otherwise
15 legally untenable, WSC respectfully requests that Counter-Defendants’ motion to
16 preclude evidence of work performed on the Sundberg Report prior to October 2013
17 be denied in its entirety.

18 **II. FACTUAL BACKGROUND**

19 In or about 2002, an individual named Gary Kruger filed a lawsuit against a
20 Windermere franchisee in the Seattle, Washington area. (Document No. 16, First
21 Amended Counterclaim, ¶ 70.) After he lost the lawsuit, Mr. Kruger began to voice
22 his negative opinions regarding Windermere. (*Id.*) He created and launched a
23 campaign he named “Windermere Watch,” consisting initially of postcards and
24 other materials sent through the US mail and via fax. (*Id.*) Eventually, Mr. Kruger
25 registered the domain name “windermerewatch.com,” and published a website at
26 that address to disparage the Windermere name and its franchisees. (*Id.*)

27 In late 2012, Bennion and Deville threatened they would terminate their
28 agreements with Windermere, citing problems they were ostensibly having with

1 Windermere Watch. (*Id.* at ¶ 71.) Negotiations between WSC and Counter-
2 Defendants ensued, culminating in Counter-Defendants’ promise to remain with
3 Windermere for an additional five years in exchange for WSC waiving significant
4 unpaid franchise and technology fees, and agreeing to make “commercially
5 reasonable efforts” to curtail the Windermere Watch negative marketing campaign.
6 (Document No. 100-1, Deville Decl., Ex. A, § 3.)

7 As part of WSC’s efforts to combat Windermere Watch, it approached its
8 technology division, Windermere Solutions, to determine what steps could be taken
9 from a technology perspective. (Feasby Decl., Ex. A, p. 62.) York Baur was and is
10 the Chief Executive Officer of Windermere Solutions, now known as Moxi Works.
11 (Feasby Decl., Ex. A, p. 15.) Sometime during the first quarter of 2013, WSC’s
12 General Counsel, Paul Drayna, approached Mr. Baur about the online Windermere
13 Watch efforts. (Feasby Decl., Ex. A, p. 62.) Mr. Baur researched what had been
14 done by Windermere Solutions in the past and how Search Engine Optimization
15 (“SEO”) efforts might address the online Windermere Watch campaign.
16 (Feasby Decl., Ex. A, p. 70-71.) He determined that SEO efforts could help local
17 franchisees improve their search engine visibility which would, in turn, blunt the
18 negative effects of Windermere Watch. (Feasby Decl., Ex. A, p. 70-71.) To help
19 identify the best course of action, Mr. Baur hired one of the foremost SEO experts in
20 the country, Greg Sundberg, to advise Counter-Defendants how they could improve
21 their search engine visibility. (Feasby Decl., Ex. A, p. 70-71.) Mr. Sundberg
22 ultimately generated a report identifying specific actions Counter-Defendants could
23 take to improve their search engine visibility and address the online Windermere
24 Watch campaign (the “Sundberg Report”). (Feasby Decl., Ex. A, p. 78.)

25 During his deposition, Mr. Baur did not recall the exact date Mr. Sundberg
26 was retained to generate the Sundberg Report, but he believed it was sometime
27 during the first six months of 2013. (Feasby Decl., Ex. A, p. 71-72, 178-180.)
28 Directly contrary to Counter-Defendants’ assertion (Document No. 100, pp. 2, 3

1 (Mr. Baur’s “responses varied from the first quarter of 2013 to September 2013”),
2 Mr. Baur never testified that work on the Sundberg Report began in September
3 2013. The deposition testimony Counter-Defendants cite reads as follows:

4 Q: So it’s possible Mr. Sundberg could have been engaged
5 in September of 2013. You just don’t recall, correct?

6 A: I suspect it was before then, but, yeah, I don’t recall the
7 exact engagement date. I could certainly go find out, by
8 the way. I mean, it’s – I have a record of my exchanges
9 with him, I’m sure.

10 (Feasby Decl., Ex. A, p. 205.) Plainly, asserting that Mr. Baur testified that work
11 began on the Sundberg Report in September 2013 is both reckless and misleading.

12 Mr. Baur *did* recall that Mr. Sundberg started working on Counter-
13 Defendants’ SEO issue shortly after he was retained. (Feasby Decl., Ex. A, p. 72.)
14 As it turns out, Mr. Baur’s memory was accurate. Mr. Sundberg sent a draft of his
15 report to Mr. Baur on April 30, 2013. (Feasby Decl., Ex. B.) WSC produced that
16 email to Counter-Defendants on April 25, 2016. (Feasby Decl. Ex. C.) The final
17 Sundberg Report was delivered to Counter-Defendants via email on October 17,
18 2013. (Feasby Decl., Ex. A p. 206.)

19 Despite Mr. Baur’s testimony and the documents produced in this case
20 demonstrating that work began on the Sundberg Report prior to April 30, 2013,
21 Counter-Defendants inexplicably ask the Court to preclude any evidence that work
22 was performed on the Sundberg Report before October 2013.

23 **III. LEGAL ANALYSIS**

24 Mr. Baur testified repeatedly that he retained Mr. Sundberg during the first
25 half of 2013 and Mr. Sundberg started working on the report shortly after he was
26 retained. (Feasby Decl., Ex. A, p. 71-72, 178-180.) That testimony is supported by
27 documents WSC produced during discovery showing that Mr. Sundberg sent
28 Mr. Baur a draft report in April 2013. (Feasby Decl., Ex. B.) Counter-Defendants

1 now ask the Court to find, as a matter of law and contrary to the evidence, that no
2 work began on the Sundberg Report until October 2013. This improper request
3 should be denied.

4 **A. WSC Produced Evidence Showing Mr. Sundberg Worked on the**
5 **Report in April 2013**

6 Counter-Defendants' argue that because Mr. Baur could not recall during his
7 August 2016 deposition the exact date in 2013 on which he retained Mr. Sundberg,
8 the Court should determine that no work was performed on the Sundberg Report
9 before October 2013. (Document No. 100, pp. 2, 3.) Counter-Defendants claim that
10 "it would be patently unfair and prejudicial to the B&D Parties to allow WSC to
11 introduce evidence or comment concerning information that was not produced
12 during discovery." (Document No. 100, p. 2.) In support of this argument, Counter-
13 Defendants' counsel testified, under penalty of perjury, that they "did not receive
14 any other materials during discovery relating to when Sundberg was hired, or when
15 the Sundberg report was created." (Document No. 100-2, Adams Decl. ¶ 4.) This is
16 untrue. As a matter of fact, an email communication demonstrating that
17 Mr. Sundberg sent Mr. Baur a draft of the Sundberg Report on April 30, 2013 was
18 produced to Counter-Defendants on April 25, 2016 - four months before Mr. Baur's
19 deposition and nearly one year before Counter-Defendants' counsel declared under
20 oath that no such documents were produced. (Feasby Decl., Ex. C; ¶ 5.) Rather
21 than ask Mr. Baur about this email during his deposition, Counter-Defendants chose
22 to test Mr. Baur's memory in a vacuum and disingenuously complain about his
23 inability to recall exact dates.² The April 30, 2013 email fully supports Mr. Baur's
24 testimony that he first contacted Mr. Sundberg in the "late first or second quarter" of
25 2013. (Feasby Decl., Ex. A, p. 71.)

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27 ² "The B&D Parties tried to obtain this information through discovery, which
28 efforts were thwarted by Baur's inability to testify to the dates." (Document
No. 100, p. 3.) As demonstrated above, Counter-Defendants' hyperbole amounts to
utter nonsense.

1 Counter-Defendants’ manufactured whining that WSC is somehow planning a
2 trial by ambush is unfounded. Similarly, Counter-Defendants’ reliance on
3 *Hostnut.com, Inc. v. Go Daddy Software, Inc.*, 2006 WL 2573201 (D. Ariz. 2006) is
4 misplaced. In *Hostnut*, the plaintiff submitted evidence in opposition to a motion
5 for summary judgment that was not produced during discovery. *Id.* at *2. In fact,
6 the plaintiff had not responded to any document requests or produced any
7 documents during discovery. *Id.* Excluding the documents, the court in *Hostnut*
8 held that plaintiff’s “complete disregard of its obligations under [Fed. R. Civ. Proc.]
9 34 requires exclusion of the documents that should have been produced under that
10 rule.” *Id.* Here, WSC participated fully in the discovery process, including the
11 production of documents which *include* communications related to the Sundberg
12 Report that fully support Mr. Baur’s testimony. *Hostnut* is inapposite. Counter-
13 Defendants’ motion should be denied.

14 **B. Evidence Regarding the Sundberg Report is not Unfairly**
15 **Prejudicial**

16 Evidence relating to when Mr. Sundberg performed work on the
17 Sundberg Report is relevant and not substantially outweighed by a danger of unfair
18 prejudice. Evidence is relevant if it: (1) tends to make a fact more or less probable
19 than it would be without the evidence; and (2) the fact is of consequence to the
20 action. Fed. R. Evid. 401. Relevant evidence may be excluded if its probative value
21 is substantially outweighed by a danger of unfair prejudice, confusing the issue, or
22 misleading the jury. Fed. R. Evid. 403.

23 Counter-Defendants apparently intend to argue at trial that WSC did not make
24 “commercially reasonable efforts” to combat Windermere Watch because WSC and
25 its agents did not start working on the Sundberg Report until October 2013.
26 (*See* Document No. 100, p. 2.) Thus, when WSC contacted Mr. Sundberg and when
27 he began working on the Report is relevant to the claims and defenses of *all* parties.
28 Fed. R. Evid. 401, 402. Consequently, to exclude this evidence, Counter-

1 Defendants must show that the probative value of this evidence is “substantially
2 outweighed” by the danger of unfair prejudice. Fed. R. Evid. 403; *Ohio Six Limited*
3 *v. Motel 6 Operating L.P.*, 2013 WL 12125747, at *7 (C.D. Cal. 2013) (“Rule 403
4 favors admitting evidence, and permits its exclusion only where the probative value
5 of evidence is *substantially* outweighed by the unfair prejudice that may result from
6 admitting it”) (emphasis in original). Counter-Defendants cannot meet this burden.
7 There simply exists no plausible scenario, based in fact, fiction, or otherwise,
8 wherein Counter-Defendants are unfairly prejudiced by properly produced evidence
9 that Mr. Sundberg started work on his Report prior to April 30, 2013 – evidence that
10 Counter-Defendants have had for nearly a year and evidence they chose to ignore
11 during their deposition of Mr. Baur. (Feasby Decl., ¶¶ 4-5, Exs. B, C.)

12 Moreover, even if these documents supporting Mr. Baur’s testimony did not
13 exist, Counter-Defendants’ request would remain entirely inappropriate. Mr. Baur
14 testified to the best of his recollection regarding when he engaged Mr. Sundberg
15 nearly three and a half years after the fact. (Feasby Decl. Ex. A, p. 205.) That his
16 best testimony was a range - the first six months of 2013 (Feasby Decl., Ex. A,
17 p. 71-72, 178-180) - certainly does not support a conclusion that no work was
18 performed on the Sundberg Report until October 2013. The very notion is absurd.
19 Counter-Defendants cite no authority for this position because none exists.

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1 **IV. CONCLUSION**

2 For all these reasons, Defendant and Counterclaimant Windermere Real
3 Estate Services Company respectfully requests that Counter-Defendants' Motion to
4 Preclude WSC From Producing Evidence of Work Performed on the Sundberg
5 Report Prior to October 2013 be denied in its entirety.

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7 DATED: April 24, 2017 PEREZ VAUGHN & FEASBY INC.

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By: /s/ Jeffrey A. Feasby
Jeffrey A. Feasby
Attorneys for
Windermere Real Estate Services Company

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