

MULCAHY LLP

James M. Mulcahy (SBN 213547)

jmulcahy@mulcahyllp.com

Kevin A. Adams (SBN 239171)

kadams@mulcahyllp.com

Douglas R. Luther (SBN 280550)

dluther@mulcahyllp.com

Four Park Plaza, Suite 1230

Irvine, California 92614

Telephone: (949) 252-9377

Facsimile: (949) 252-0090

Attorneys for Plaintiffs and Counter-Defendants

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

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

Plaintiffs,

v.

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

Defendant.

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

Hon. Manual L. Real

**THE B&D PARTIES' REPLY IN
SUPPORT OF THEIR 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

Action Filed: September 17, 2015

Disc. Cut-Off: August 29, 2016

Pretrial Conf.: November 15, 2016

Trial: May 30, 2017

AND RELATED COUNTERCLAIMS

1
2 Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc. (“B&D
3 Fine Homes”), Bennion & Deville Fine Homes SoCal, Inc. (“B&D SoCal”),
4 Windermere Services Southern California, Inc., and Counter-Defendants Robert L.
5 Bennion (“Bennion”) and Joseph R. Deville (“Deville”) (collectively, the “B&D
6 Parties”) respectfully submit this Reply in Support of their Motion in *Limine* to
7 preclude Windermere Real Estate Service Company (“WSC”) from introducing at
8 trial evidence, testimony, argument, or comment relating to any loans issued to the
9 B&D Parties by any entity not a party to this suit.

10 **I. INTRODUCTION**

11 WSC attempts to bolster its (erroneous) relevance argument by tactfully
12 embedding the loans among facts actually relevant to this case. These loans,
13 however, are not relevant and are prejudicial to the B&D Parties. On those grounds,
14 WSC should be precluded from introducing at trial evidence, testimony, argument,
15 or comment relating to any loans issued to the B&D Parties by any entity not a party
16 to this suit.

17 **II. THE LOANS ARE NOT RELEVANT TO THIS CASE EVEN IF THEY**
18 **WERE ISSUED DURING THE PARTIES BUSINESS RELATIONSHIP**

19 Nobody disputes the existence or amounts of these loans. But, these loans are
20 not at issue in this case. At issue is WSC’s claims that B&D Fine Homes and B&D
21 SoCal did not pay fees associated with the franchise agreements. At issue is the
22 B&D Parties claims that WSC failed to provide several services under the same
23 agreements. The loans bear no relation to these claims.

24 The parties’ respective liability in this case does not rise or fall, or even
25 slightly depend upon the facts surrounding the loans subject of this motion. WSC,
26 however, attempts to create the impression that the loans are relevant to the issues
27 that remain to be tried in this case. By juxtaposing the loans with alleged fee waivers
28 relevant to the franchise agreements at issue, WSC hopes that the jury will consider

1 the fact that Bennion and Deville were given loans at different points in their
2 business relationship with WSC. It is this very optical illusion that the B&D Parties
3 seek to avoid here.

4 WSC concedes that these loans were issued (i) by third parties, (ii) to Bennion
5 and Deville individually. (Oppo. to the B&D Parties' Motion in *Limine* #2 ("Oppo"),
6 at 2 ("***Through a related entity***, WSC loaned \$501,000 to ***Bennion and Deville***
7 ***individually*** in January 2009." (emphasis added)); *id* ("***The same WSC-affiliated***
8 ***entity*** loaned ***Bennion and Deville*** an additional \$500,000." (emphasis added)); *id.*,
9 at 3 ("Once again, ***another WSC-affiliated entity*** loaned ***Bennion and Deville*** the
10 money." (emphasis added)). WSC attempts to strengthen its position by referring to
11 the issuing parties as "WSC-affiliated." However, they should be seen for what they
12 are—third parties that are not affiliated with this case.

13 The purpose for the loans is equally unrelated to this dispute. Even if Bennion
14 and Deville utilized the funds from the loans on expenses related to running or
15 starting Windermere, they are not relevant to deciding the issues in this action. WSC
16 claims that the parties' relationship is long and complex. (Oppo., at 1, 5.) There is no
17 need to further complicate this case and confuse the issues by allowing WSC to
18 present irrelevant evidence.

19 The claims that remain to be decided all center on the parties' respective
20 liabilities arising out of the franchise agreements and the Area Representation
21 Agreement. The fact that third parties issued loans to Bennion and Deville
22 individually does not make any fact of consequence in determining the action more
23 or less probable than it would be without the evidence. Fed. R. Evid. 401.
24 Accordingly, WSC should be barred from presenting any evidence referring to or
25 regarding the loans issued by WLC, Carmed, and JFF.

26 **III. WSC WISHES TO INTRODUCE THE EVIDENCE TO PREJUDICE** 27 **THE B&D PARTIES**

28 In the Opposition, WSC carefully discusses the loans alongside its claims that

1 it forgave fees arising out of the contracts at issue. In so doing, WSC hopes to create
2 an association between the B&D Parties' alleged failure to pay fees with the B&D
3 Parties' alleged (and irrelevant) need for financial assistance. From that association,
4 WSC will hope that the jury in this case will infer that because they needed financial
5 assistance, the B&D Parties must not have paid their fees. This inference is an
6 improper basis for the jury to decide this case, and is the very prejudice that is the
7 aim of Rule 403 of the Federal Rules of Evidence. *See Cohn v. Papke*, 655 F.2d 191,
8 194 (9th Cir. Cal. 1981) (quoting Notes of Advisory Committee on Rules) ("Unfair
9 prejudice' within its context means an undue tendency to suggest decision on an
10 improper basis, commonly, though not necessarily, an emotional one.")

11 WSC's reliance on a purported agreement dependent on one of the loans is
12 unavailing. WSC attempts to justify its desire to present evidence of **three** separate
13 loans by referencing an alleged agreement whereby WSC agreed to extend the loan
14 term on **one** loan. (Oppo., at 6.) However, the only arguably relevant fact is the
15 existence of the January 2009 loan. Neither the purpose behind the January 2009
16 loan, nor the existence of the two additional loans provide any probative value.
17 Moreover, the substantial prejudicial effect outlined above far outweighs whatever
18 nominal probative value the other loans, or anything beyond the existence of the
19 January 2009 loan may offer. The proposed exhibits, and discussion beyond the
20 existence of the January 2009 loan has no place in this trial, and if allowed would
21 unfairly prejudice the B&D Parties. Accordingly, WSC should be barred from
22 presenting any evidence referring to or regarding the loans issued by WLC, Carmed,
23 and JFF, beyond discussing the existence of the January 2009 loan.

24 **IV. CONCLUSION**

25 For the Foregoing reasons, the B&D Parties respectfully ask that this Court
26 grant its motion in *limine* and issue an order barring WSC from presenting any
27 evidence referring to or regarding the loans issued by WLC, Carmed, and JFF
28 beyond discussing the existence of the January 2009 loan, and to exclude the

1 following list of proposed trial exhibits from trial:

2 WCL loans Exs. 640, 641, 642, 643, 644, 677, 679, 684, 686, 687, 722,
3 767, 768;

4 Carmed loans Exs. 657, 658, 659, 660, 667, 668, 669, 670, 715, 750, 754,
5 779;

6 JFF loans Exs. 769, 772, 774, 775, 776.

7 DATED: April 17, 2017

MULCAHY LLP

8
9 By: /s/ Kevin A. Adams

Kevin A. Adams

10 *Attorneys for Plaintiffs/Counter-*
11 *Defendants Bennion & Deville Fine*
12 *Homes, Inc., Bennion & Deville Fine*
13 *Homes SoCal, Inc., Windermere*
14 *Services Southern California, Inc.,*
15 *and Counter-Defendants Robert L.*
16 *Bennion and Joseph R. Deville*

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