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

13 BENNION & DEVILLE FINE) Case No. 5:15-cv-01921-R
 14 HOMES, INC., a California) *Hon. Manual L. Real*
 15 corporation, BENNION & DEVILLE)
 16 FINE HOMES SOCAL, INC., a) **THE B&D PARTIES' OPPOSITION**
 17 California corporation,) **TO WINDERMERE REAL ESTATE**
 18 WINDERMERE SERVICES) **SERVICES COMPANY'S NOTICE**
 19 SOUTHERN CALIFORNIA, INC., a) **OF OBJECTIONS TO THE B&D**
 20 California corporation,) **PARTIES' AMENDED WITNESS**
 21) **LIST**

22 Plaintiffs,

23 v.

24) Action Filed: September 17, 2015
 25) Trial Date: None Set

26 WINDERMERE REAL ESTATE)
 27 SERVICES COMPANY, a)
 28 Washington corporation; and DOES)
 1-10.)

Defendants.

AND RELATED COUNTERCLAIMS)
)

Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc.,
 Bennion & Deville Fine Homes SoCal, Inc., Windermere Services Southern

1 California, Inc., and Counter-Defendants Robert L. Bennion and Joseph R. Deville
2 (collectively, the “B&D Parties”) respectfully submit this Opposition to
3 Windermere Real Estate Services Company’s (“WSC”) Notice of Objections to the
4 B&D Parties’ Amended Witness List (“Objections”).

5 **I. INTRODUCTION**

6 On August 29, 2016, the parties filed their original witness lists with the
7 Court. [D.E. 50, 53.] In the nine months that have passed since the parties filed
8 their original witness lists, they have engaged in significant additional discovery in
9 the case – including the depositions of percipient witnesses Fred Schuster, Mike
10 Teather, Greg Barton, Noelle Bortfeld, Michael Fanning, Brian Gooding, Rich
11 Johnson, and Mark Oster, the depositions of and receipt of documents from expert
12 witnesses Neal Beaton, Peter Wrobel, and David Holmes, and the receipt of
13 subpoenaed documents from several third-parties. (Declaration of Kevin Adams
14 (“Adams Decl.”), ¶ 3.) Counsel for the B&D Parties also have recently
15 communicated with witness Gary Kruger – the creator and owner of Windermere
16 Watch – during which time Mr. Kruger represented that, although he lives outside
17 the subpoena power of this Court, he would make himself available at trial.
18 (Adams Decl., ¶ 8.) **This additional discovery and the extensive time that has**
19 **lapsed since the parties’ submission of the original exhibit lists compelled the**
20 **B&D Parties to update their exhibit list.**

21 On May 22, 2017, the B&D Parties filed an Amended Witness List (the
22 “Amended List”) thereby removing three names from their original witness list and
23 including two new names. [See D.E. 50, 128.] WSC now objects to the B&D
24 Parties’ Amended List and asks the Court to preclude the B&D Parties from calling
25 witnesses Gary Kruger, Fred Schuster, and Richard King at trial. [D.E. 131.]

26 As explained in detail below, WSC’s stated objections should be overruled
27 as they are disingenuous, unsupported by law, and amount to nothing more than
28 gamesmanship.

1 **II. WSC IS NOT PREJUDICED BY THE INCLUSION OF SCHUSTER**
2 **AS HE WAS IDENTIFIED IN WSC’S OWN WITNESS LIST**

3 First, WSC objects to the B&D Parties’ addition of Fred Schuster
4 (“Schuster”) in the Amended List notwithstanding WSC’s inclusion of Schuster in
5 its own witness list. [D.E. 53, p. 2:9.] Incredibly, WSC now argues that it would
6 somehow be harmed by the addition of Schuster in the Amended List because it
7 does not have sufficient time to prepare for his testimony. [D.E. 131, p. 3:3-6.]
8 This argument is disingenuous in light of (i) WSC’s own identification of Schuster
9 as a witness, and (ii) the trial continuance providing WSC with sufficient time to
10 prepare for additional witnesses at trial. Accordingly, WSC’s argument should be
11 summarily rejected.

12 Moreover, even if Schuster was not identified in WSC’s witness list, the
13 B&D Parties should still be permitted to call him in their case-in-chief. As part of
14 their original witness list, the B&D Parties expressly reserved in the right to
15 identify further witnesses following the completion of discovery.¹ [D.E. 50.]
16 Schuster was not deposed until September 7, 2016 – after the parties’ original
17 witness lists were filed with the Court. (Adams Decl., ¶ 4.) The B&D Parties’
18 inclusion of Shuster in the Amended List is consistent with both parties’ express
19 reservation of rights and does not harm WSC. To the extent WSC has not already
20 prepared for Schuster’s trial testimony, the trial continuances in this case –
21 including the Court’s order of May 25, 2017 vacating the most recent trial date –
22 provide WSC with plenty of time to prepare for Schuster’s trial testimony. [See
23 D.E. 132.] Because WSC has more than sufficient time to prepare for a witness in

24 _____
25 ¹ Specifically, the B&D Parties contemplated the impending depositions and
26 additional discovery in the case and, as a result, the B&D Parties expressly
27 “reserve[d] the right to amend, modify, or supplement this witness list following
28 the completion of expert discovery that [was] underway.”[D.E. 50.] Similarly,
WSC reserved in its witnesses list “the right to amend, modify, or supplement [its]
list upon the completion of discovery.” [D.E. 53.]

1 advance of trial, it will not be prejudiced by the B&D Parties' inclusion of Schuster
2 in the Amended List.

3 Tellingly, WSC fails to cite any legal authority in support of its flawed
4 objection. On the contrary, the Advisory Committee Notes to Rule 37 of the
5 Federal Rules of Civil Procedure ("FRCP") make clear that the type of sanction
6 WSC's seeks would be an "unduly harsh penalt[y]" in light of WSC's
7 identification of Schuster in its own witness list.

8 In short, WSC does not (*and cannot*) articulate any harm caused to it by the
9 B&D Parties' inclusion of Shuster in the Amended List. Accordingly, WSC's
10 objection should be overruled.

11 **III. KRUGER HAS ALWAYS BEEN A KEY FIGURE IN THE CASE;**
12 **THIS IS SUPPORTED BY WSC'S OWN PLEADINGS**

13 Next, WSC seeks to exclude Gary Kruger ("Kruger") on the feigned premise
14 that it was unaware that Kruger was "a person with potentially relevant
15 information." [D.E. 131, p. 2:23.] Again, WSC is being disingenuous with the
16 Court. Kruger has been reference in nearly every pleading submitted by both WSC
17 and the B&D Parties throughout this action. [*See e.g.*, D.E. 1, 11, 16, 31.] This
18 includes WSC's identification of Kruger, by name, ten times in its Counterclaim
19 [D.E. 11 ¶¶ 70, 71, 73, 76, 78], and ten more times in its Amended Counterclaim.
20 [D.E. 16, ¶¶ 70, 71, 73, 76, 78.] The B&D Parties also address Kruger, and his
21 Windermere Watch campaign, more than 30 times in the Complaint and First
22 Amended Complaint. [D.E. 1, ¶¶ 51, 52, 92, 95; D.E. 31, ¶¶ 3, 45, 46, 47, 48, 49,
23 51, 57, 76, 77, 79.] WSC's claimed "surprise" is without any justification and
24 should be disregarded.

25 As a practical matter, Kruger was not identified in the B&D Parties' initial
26 witness list because he is an out-of-state resident that could not be compelled
27 through subpoena to testify at trial. (Adams Decl., ¶ 10.) *See* Fed. R. Civ. P. 45.
28 Recently, however, Kruger contacted the B&D Parties' counsel and represented

1 that he would be present at the trial. (Adams Decl., ¶ 10.) This new information
2 about Kruger’s willingness to appear at trial should be sufficient, in itself, for the
3 B&D Parties to amend their witness list to include Kruger.

4 It is well established that Kruger’s involvement and operation of
5 Windermere Watch is a central component of this case. Evidence concerning
6 Kruger and Windermere Watch will be presented at trial in the form of testimony
7 and exhibit. Any preparation for trial by WSC would naturally have been
8 completed with Kruger and Windermere Watch in mind. This witness is in no way
9 a surprise to anyone in this case. Accordingly, WSC’s objection to the B&D
10 Parties’ inclusion of Kruger in the Amended List should be overruled.

11 **IV. KING WAS INCLUDED IN THE B&D PARTIES’ INITIAL**
12 **WITNESS LIST; WSC’S ARGUMENT IS DISINGENUOUS**

13 Finally, WSC confusingly objects to the B&D Parties’ inclusion of third-
14 party witness Rich King (“King”) in the Amended List even though they also
15 identified him in their initial witness list. (Dkt. No. 50, Proposed Witness No. 12.)
16 None the less, for reasons omitted from WSC’s filing, it has waited nearly nine
17 months to object to the B&D Parties’ identification of King as a witness in the
18 case. This ill-timed objection is predicated upon the B&D Parties’ alleged failure
19 to identify King in their Initial Disclosures at the onset of the case. WSC’s
20 argument should be rejected on several, independent grounds.

21 First, the objection is in bad faith as WSC has named three witnesses in its
22 witness list – *i.e.*, York Baur, Cass Herring, and Kendra Vita – that were not
23 included in WSC’s Initial disclosures. (Adams Decl., ¶ 9, Ex. C.) Unlike the B&D
24 Parties’ discovery of King’s significance to this case through discovery obtained
25 from WSC, WSC’s named witnesses are each employees of WSC, and their
26 relevance to this action has been known to WSC since the filing of the Complaint.
27 Thus, WSC’s objection should be seen for what it is – gamesmanship – and be
28 rejected. In the alternative, if King is excluded from the B&D Parties’ witness list

1 for not being included in the Initial Disclosures, then York Baur, Cass Herring, and
2 Kendra Vita must all be excluded from WSC's witness list on the same grounds.

3 Next, WSC is admittedly not harmed by the inclusion of King in the B&D
4 Parties' witness list. In its moving papers, WSC admits that it has prepared for trial
5 using the B&D Parties initial witness list. In other words, WSC has prepared for
6 trial for nine months knowing that King was identified as a witness for trial. If
7 WSC truly felt it was prejudiced in its trial preparation by the inclusion of King in
8 the initial list, then WSC would have objected to this long ago. WSC's delay in
9 objecting to King's inclusion as a witness in the case is not a case of "trial by
10 ambush," as WSC claims, but instead, an effort to suppress evidence that is
11 damaging to their position in the case. This should not be allowed.

12 Third, the legal authority cited by WSC does not support WSC's objection.
13 Rule 26(a)(1) requires a party to disclose "the name . . . of each individual likely to
14 have discoverable information." At the time the B&D Parties served their Initial
15 Disclosures, they did not know King had discoverable information. It was not until
16 discovery that the B&D Parties learned that WSC was collecting and retaining fees
17 from King that should have been forwarded to the B&D Parties. If anything, WSC
18 should be sanctioned for failing to disclose King in their Initial Disclosures as they
19 knew the facts surrounding his significance in the case and failed to disclose it.
20 WSC's current attempt to hold the B&D Parties accountable for WSC disclosure
21 violations should not be permitted.

22 Fourth, even if WSC did not withhold the information on King, the B&D
23 Parties were not required to supplement their Initial Disclosures to include him as
24 Rule 26(e)(1) only requires a party to supplement its Initial Disclosures "***if the***
25 ***additional or corrective information has not otherwise been made known to the***
26 ***other parties during the discovery process or in writing.***" Fed. R. Civ. P.
27 26(e)(1)(A) (emphasis added); *see also* Fed. R. Civ. P. 26 (Adv. Comm. Notes on
28 1993 Amendments) ("There is, however, no obligation to provide supplemental or

1 corrective information that has been otherwise made known to the parties in
2 writing or during the discovery process, as when a witness not previously disclosed
3 is identified during the taking of a deposition ...”). Here, the significance of King
4 was made known during discovery. As an example, during the deposition of Paul
5 Drayna, WSC’s General Counsel, he testified that WSC withheld funds paid by
6 King to WSC, half of which were due to Windermere Services Southern
7 California, Inc. (*See Adams Decl., Ex. B, at 79:12 – 80:18.*) Through this
8 testimony of WSC’s general counsel and other discovery of WSC, B&D Parties
9 learned that King had relevant information in the case. Thus, under Rule 26(e)(1),
10 the B&D Parties were not obligated to supplement their initial disclosures.

11 Because WSC’s attempt to exclude the testimony of King is not supported
12 by the law or the facts of this case, it must be rejected. WSC’s objection should be
13 overruled.

14 **V. CONCLUSION**

15 For the aforementioned reasons, the B&D Parties respectfully request that
16 WSC’s objections be summarily denied, and that the B&D Parties’ Amended List
17 be permitted and that Fred Schuster, Richard King, and Gary Kruger be allowed to
18 testify at trial.

19 Dated: April 3, 2017

MULCAHY LLP

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21
22 By: /s/ Kevin A. Adams
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