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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.

AND RELATED COUNTERCLAIMS

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

Hon. Manuel L. Real

DEFENDANT AND COUNTERCLAIMANT'S REPLY IN SUPPORT OF ITS MOTION *IN LIMINE* TO EXCLUDE EVIDENCE RELATED TO ITS OFFER TO PURCHASE PLAINTIFFS AND COUNTER-DEFENDANTS

Motion *in Limine* No. 4 of 4

Date: May 15, 2017
Time: 10:00 a.m.
Courtroom: 880

Complaint Filed: September 17, 2015

I. INTRODUCTION

Counter-Defendants Bennion & Deville Fine Homes, Inc. ("B&D Fine Homes"), Bennion & Deville Fine Homes SoCal, Inc. ("B&D SoCal"), Windermere Real Estate Services Company, Inc. ("WSSC"), Robert L. Bennion, and Joseph R. Deville (collectively "Counter-Defendants") seek to introduce offers to purchase their entire real estate operations, which included nearly 20 branch offices, a services company, an escrow company, and a title company, as evidence of the value of WSSC's interest in the Area Representation Agreement ("ARA"). Importantly, and contrary to Counter-Defendants' assertions, these offers were made by Defendant and Counterclaimant Windermere Real Estate Services Company's ("WSC") individual owners, ***not*** by WSC. Moreover, the offers did not attribute a specific purchase price to any entity included in the offers, nor did they include a separate valuation or appraisal of WSSC. Further, because the ARA includes a valuation methodology that was not used in formulating these offers, they are entirely irrelevant to determining WSSC's interest in the ARA. Consequently, offers to purchase by parties *other than* WSC that did *not* include an independent valuation or appraisal of WSSC accordingly to the methodology set forth in the ARA are not relevant and must be excluded.

Finally, these offers present a *significant* danger of unfair prejudice to WSC. WSC did not make the offers, the offers included vastly more than WSSC's interest in the ARA, and the offers did not include the valuation method required by the ARA. Therefore, any suggestion that WSC was willing to pay millions of dollars for WSSC is false, unsupported by the record, and unfairly prejudicial. Any evidence of these third-party offers to purchase must be excluded.

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II. EVIDENCE RELATED TO OFFERS TO PURCHASE IS IRRELEVANT AND PREJUDICIAL

A. Offers to Purchase Are Irrelevant to Determining WSSC's Interest in the ARA

Counter-Defendants mischaracterize the nature of the offer to purchase the B&D Entities and its relation to the ARA. Importantly, and contrary to Counter-Defendants' assertion, WSC never offered to purchase WSSC or any of the other B&D Entities.[1] In July and August 2015, WSC's owners offered to purchase the B&D Entities, in addition to related entities owned by Bennion and Deville, for approximately $13.5 million. (Document No. 111-1, Ex. A, B; Declaration of Jeffrey Feasby ("Feasby Decl."), Ex. A, pp. 137, 140-144.) Again, WSC was not offering to purchase real estate operations; its owners were. (Feasby Decl., Ex. A, p. 137.) This is critical is a critical distinction. Counter-Defendants' entire argument is based on these offers reflecting WSC's "valuation" and "appraisal" of the B&D Entities. Because these offers were made by four individuals *and not* WSC, the evidence simply does not reflect WSC's valuation or appraisal of WSSC or any other B&D Entity.

Further, the offers to purchase are in no way an appraisal of the value of WSSC. These offers did not distinguish between the amount paid for each entity being purchased in any way. (Document No. 111-1, Ex. A, B.) No specific value was attributed to WSSC, B&D Fine Homes, B&D SoCal or any other entity. (*Id.*) The offers did not appraise WSSC or any other B&D Entity. Calling the offers to purchase an appraisal is a wildly flagrant mischaracterization of the nature of the documents.

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[1] B&D Fine Homes, B&D SoCal, and WSSC are collectively referred to herein as the "B&D Entities."

Similarly, Counter-Defendants argue, rather unbelievably so, that the offers to purchase "served as WSC's valuation under Section 4.2" of the ARA. (Document No. 111, p. 2.) This statement is made without any citation because it is ***directly contradicted*** by the documents and relevant deposition testimony. Again, these offers were made by four individuals, *not* WSC. Further, the offers did not follow the valuation method required by the ARA, which is set forth in Section 4.2 and outlines a specifically agreed-upon methodology for determining the fair market value of the terminated party's interested in the ARA. (Document No. 111, p. 2.) Specifically, Section 4.2 requires any appraisal of the terminated party's interest in the ARA to be based on the gross revenues for the preceding 12 months from then existing licensees that remain with the terminating party, and *excludes* speculative factors such as future revenue. (*Id.*)

There is *nothing* in the offers that suggest any such appraisal was performed. (Document No. 111-1, Ex. A, B.) There is no reference in the offers to Section 4.2 or any other section of the ARA. (*Id.*) There is no reference to WSSC's gross revenues for the preceding 12 months, nor is there any analysis of which licensees would be staying with WSC following termination of the ARA. (*Id.*) Simply put, there is nothing whatsoever in the documents to support the assertion that the offers to purchase were in any way related to determining the Termination Obligation under the ARA.[2]

Because the offers to purchase are neither appraisals nor valuations of WSSC under Section 4.2 of the ARA, they are irrelevant to determining the fair market

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[2] Counter-Defendants' argument is also unsupported by the deposition testimony in this case. Jill Wood, the signatory of the offers to purchase, was asked about these documents during her deposition. (Feasby Decl., Ex. A, pp. 137, 140-144.) She testified that the letters were part of a negotiation to purchase all of Bennion and Deville's related real estate businesses. (*Id.*) She made no reference to the ARA and never testified that the offers were meant to reflect WSSC's value in in its interest in the ARA. (*Id.*)

value of WSSC's interest in the ARA pursuant to the methodology agreed upon by the parties.

Next, Counter-Defendants argue that the offers to purchase are relevant to verify their damages expert's valuation of WSSC. (Document No. 111, p. 2.) As established by WSC's Motion *in Limine* No. 1, the testimony and opinion of Counter-Defendants' damages expert, Peter Wrobel, regarding the value of WSSC's interest in the ARA is unreliable because it is based on the wrong methodology, among other things, and his ultimate opinion is irrelevant because it is not the value of WSSC's interest in the ARA, but WSSC's "net value." As such, his opinion should be excluded in its entirety. (Document No. 103.)

Nevertheless, Counter-Defendants argue that Wrobel used the offers to purchase, which did not attribute a specific value to any of the B&D Entities or allocate the purchase price among the B&D Entities, in conjunction with purchase offers from other unrelated parties, to verify his own valuation of WSSC. (Document No. 111, p. 2-3.) This argument also relies on the patently false assumption that the offers to purchase were an appraisal of WSSC and ignores the contractual obligation to value WSSC's interest in the ARA pursuant to the specific methodology outlined therein. (*See* Document No. 111, p. 3 ("A contemporaneous appraisal of [WSSC] is directly relevant to Wrobels' (sic) evaluation of the fair market value of [WSSC].")[3] Again, because the offers to purchase were not made by WSC, did not appraise the value of WSSC, and did not use the valuation method

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[3] Counter-Defendants' argument also relies upon easily distinguishable case law. While the cited authorities involve using an offer to purchase as a factor in determining an asset's value, none of them involve valuation in a context such as this *where the valuation method is set by mutual agreement of the parties*. *U.S. v. Cartwright*, 411 U.S, 546, 551 (1973) (property valuation in the context of estate tax refund); *Schonfeld v. Hilliard*, 218 F.3d 164, 179 (2d Cir. 2000) (determining market value of exclusive programming license); *Ellis v. Mobil Oil*, 969 F.2d 784, 786 (9th Cir. 1992) (using an offer by the defendant to determine the fair market value of a gas station); *People v. Schwarz*, 78 Cal.App. 561, 581 (1926) (criminal case involving valuation of stock in corporation).

agreed upon by the parties in the ARA, they cannot be used to verify Wrobel's analysis of WSSC's "net value."

B. Offers to Purchase Are Unfairly Prejudicial

Counter-Defendants gratuitously argue without any support whatsoever that "there is no prejudice" because an offer to purchase is valid evidence supporting a valuation. (Document No. 111, p. 3.) This position is absurd for multiple reasons. First, as stated above, the offers were made by *third parties*, not WSC. Second, *nothing* in the offer to purchase attributes a specific valuation to WSSC. Third, the "valuation" at issue in this case is the fair market value of *WSSC's interest in the ARA* as determined by the methodology identified in the ARA, *not* WSSC's "net value," which is Wrobel's opinion. (Document No. 103-2, Ex. A, § 4.2.) Therefore, the offers to purchase are extremely irrelevant and patently prejudicial to WSC.

Completely lacking in probative value, the offers to purchase are properly excluded if they present any danger of unfair prejudice. *See U.S. v. 87.98 Acres of Land More or Less in the County of Merced*, 530 F.3d 899, 906 (9th Cir. 2008) (exclusion of evidence pursuant to Rule 403 is appropriate when there is a potential prejudicial effect and no probative value). The *third-party* offers to purchase present a *massive* danger of unfair prejudice to WSC, which *never* made an offer to purchase, and which is subject to a specific contractual valuation methodology. Introduction of this evidence will confuse the issues and unfairly prejudice WSC. Accordingly, any evidence of these offers to purchase must be excluded.

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III. CONCLUSION

For all the foregoing reasons, and the reasons addressed in its moving papers, Defendant and Counterclaimant Windermere Real Estate Services Company respectfully requests that the Court grant its Motion *in Limine* to Exclude Evidence or Testimony Related to Offers to Purchase Counter-Defendants.

DATED: May 1, 2017 PEREZ VAUGHN & FEASBY INC.

By: /s/ Jeffrey A. Feasby
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