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

12 BENNION & DEVILLE FINE) Case No. 5:15-cv-01921-R-KK
13 HOMES, INC., a California) *Hon. Manual L. Real*
14 corporation, BENNION & DEVILLE)
15 FINE HOMES SOCAL, INC., a) **PLAINTIFFS' AND COUNTER-**
16 California corporation,) **DEFENDANTS MEMORANDUM IN**
17 WINDERMERE SERVICES) **SUPPORT OF MOTION TO**
18 SOUTHERN CALIFORNIA, INC., a) **STRIKE DEFENDANTS AND**
19 California corporation,) **COUNTER-PLAINTIFFS'**
20) **REBUTTAL EXPERT REPORT**

Plaintiffs,)

21 v.)

22 WINDERMERE REAL ESTATE) Date: May 1, 2017
23 SERVICES COMPANY, a) Time: 10:00 a.m.
24 Washington corporation; and DOES) Courtroom: 880
25 1-10.) Action Filed: September 17, 2015
26) Trial: May 30, 2017

27 Defendants.)

28 AND RELATED COUNTERCLAIMS)

1 Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc.,
2 Bennion & Deville Fine Homes SoCal, Inc., Windermere Services Southern
3 California, Inc., and Counter-Defendants Robert L. Bennion and Joseph R. Deville
4 (collectively, the “B&D Parties”) respectfully submit this Memorandum of Points
5 and Authorities in Support of their Motion to Strike Defendants/Counter-Plaintiffs’
6 Rebuttal Expert Report.

7 **I. INTRODUCTION**

8 In clear contravention statutorily imposed deadlines, Windermere Real
9 Estate Services Company (“Windermere”) is attempting to ambush the B&D
10 Parties with a rebuttal expert report (and new expert opinions) that is more than
11 *five months overdue* and after the B&D Parties’ expert has already prepared for
12 trial. This should not be allowed. As set forth in detail below, Windermere’s
13 rebuttal expert report should be stricken as untimely, and its expert should be
14 precluded from introducing as evidence at trial the opinions outlined in the report.

15 **II. RELEVANT FACTUAL BACKGROUND**

16 The B&D Parties served their initial expert disclosure pursuant to Rule 26 of
17 the Federal Rules of Civil Procedure (“FRCP”) on September 16, 2016. (Decl. of
18 Kevin A. Adams ISO Motion to Strike Rebuttal Expert Witness Report (“Adams
19 Decl.”), ¶ 3, Ex. A.) The B&D Parties have not made any subsequent supplemental
20 or amended disclosures. (*Id.*) All rebuttal reports were due on or before October
21 17, 2016. No such reports were served. (*Id.*, ¶ 4.) Since that time, the B&D Parties
22 and their expert, Peter D. Wrobel (“Wrobel”), have prepared for trial under the
23 impression that all reports/expert opinions had been submitted. (*Id.*)

24 Recently, on March 3, 2017, Windermere served a rebuttal expert report for
25 its damages expert, Neil J. Beaton. (*Id.*, ¶ 5, Ex. B.) This rebuttal report is more
26 than *five months late* and should not be allowed.

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1 **III. WINDERMERE’S UNTIMELY REBUTTAL EXPERT REPORT**
2 **SHOULD BE STRIKEN**

3 Pursuant to Federal Rule of Civil Procedure (“FRCP”) 26(a)(2)(D)(ii),
4 rebuttal expert reports must be disclosed “within 30 days after the other party’s
5 disclosure.” The B&D Parties made their initial expert disclosure on September 16,
6 2016. (Adams Decl., ¶ 3, Ex. A.) For reasons unknown, Windermere waited until
7 March 3, 2017 to serve its rebuttal report. (*Id.*, Ex. B.) Windermere never sought
8 an extension of the due date, or asked the B&D Parties to stipulate to such a late
9 submission. Instead, it chose to keep the report to itself and spring it on the B&D
10 Parties after their trial preparation was nearing completion. (*Id.*) This results in
11 undue prejudice to the B&D Parties. Windermere’s sandbagging litigation tactics
12 should be curtailed, and, for the reasons set forth below, its untimely rebuttal
13 expert report stricken.

14 **A. Exclusion Of The Rebuttal Report Is Appropriate**

15 Given such an egregious violation of the expert disclosure timeline,
16 exclusion of the rebuttal expert report is appropriate. Pursuant to FRCP 37(c), “[i]f
17 a party fails to provide information . . . as required by Rule 26(a) . . . the party is
18 not allowed to use that information or witness to supply evidence . . . at a trial,
19 unless the failure was substantially justified or is harmless.” FRCP 37(c) provides a
20 self-executing sanction. Fed. R. Civ. P. 37(c) advisory committee’s note (1993)
21 (“The revision provides a self-executing sanction for failure to make a disclosure
22 required by Rule 26(a)”); *see also Lindner v. Meadow Gold Dairies, Inc.*, 249
23 F.R.D. 625, 641 (D. Haw. 2008). Where a party attempts to introduce expert
24 opinions in violation of the disclosure deadlines, the untimely reports should be
25 stricken and testimony about the report at trial excluded. *See Lindner*, 249 F.R.D.
26 at 641-42.

27 To find that the exclusion sanction is appropriate, courts must consider: “1)
28 the public's interest in expeditious resolution of litigation; 2) the court's need to

1 manage its docket; 3) the risk of prejudice to the defendants; 4) the public policy
2 favoring disposition of cases on their merits; 5) the availability of less drastic
3 sanctions.” *Lindner*, 249 F.R.D. at 642 (citing *Wendt v. Host Int'l, Inc.*, 125 F.3d
4 806, 814 (9th Cir. 1997)). “Exclusion of expert testimony is an appropriate remedy
5 for failing to fulfill the required disclosure requirements of Rule 26(a).” *AZ*
6 *Holding, L.L.C. v. Frederick*, No. CV-08-0276-PHX-LOA, 2009 WL 2432745, at
7 *4 (D. Ariz. Aug. 10, 2009) (limiting testimony of untimely disclosed expert to
8 rebuttal testimony due to prejudice from disclosure that was one month late).

9 In this case, Windermere’s grossly untimely rebuttal report disclosure “flies
10 in the face of the purpose of the mandatory expert disclosure requirements
11 delineated in Rule 26(a)(2).” *AZ Holding, L.L.C.*, 2009 WL 2432745, at *5. It
12 would be unjust to allow Windermere to disregard the disclosure timeline in this
13 manner. Moreover, Windermere’s untimely disclosure is distinguishable from the
14 scenarios contemplated by the Advisory Committee’s notes. Each of the exemplary
15 circumstances therein are based upon all parties having knowledge of the omitted
16 content. *See* Fed. R. Civ. P. 37(c) advisory committee’s note (1993) (“Limiting the
17 automatic sanction to violations ‘without substantial justification,’ coupled with
18 the exception for violations that are ‘harmless,’ is needed to avoid unduly harsh
19 penalties in a variety of situations: *e.g.*, the inadvertent omission from a Rule
20 26(a)(1)(A) disclosure of the name of a potential witness known to all parties; the
21 failure to list as a trial witness a person so listed by another party; or the lack of
22 knowledge of a pro se litigant of the requirement to make disclosures.”) Here,
23 however, the B&D Parties were unaware of Windermere’s rebuttal report until it
24 was served in March 2017.

25 An analysis of the *Wendt* factors support exclusion as a sanction. The first
26 and second factors are focused on judicial economy. Courts cannot tolerate such a
27 vagrant disregard of statutorily imposed deadlines. As a policy matter, an
28 unjustified five-month delay in disclosing expert testimony should be intolerable in

1 any case. The first and second factors, namely expeditious resolution of litigation
2 and docket management, then both support exclusion.

3 The B&D Parties would be severely prejudiced if Windermere is allowed to
4 introduce the rebuttal report. (Adams Decl., ¶ 6.) The B&D Parties have
5 considered expert disclosures to be complete as of late 2016. (*Id.*) Now, having
6 received the rebuttal report, the B&D Parties and their expert have to scurry to
7 prepare for and otherwise compensate for the untimely opinions contained within
8 the report. (*Id.*) As a result, they have incurred, and will continue to incur, expert
9 costs and attorney fees that could have been avoided had these disclosures been
10 timely served. (*Id.*) Accordingly, the third factor supports exclusion of the report.

11 The fourth factor, the public policy in favor of disposition of cases on their
12 merits, is of no concern here. The report is in rebuttal to a B&D Party expert's
13 opinion. Moreover, the rebuttal report was prepared by Beaton. Beaton is
14 Windermere's expert for its case-in-chief. (Adams Decl., Ex. B.) Exclusion of this
15 report or testimony concerning its contents would, then, not amount to a
16 termination sanction. Beaton can testify concerning the issues contained in his
17 expert report. Accordingly, exclusion of the rebuttal report would not adversely
18 affect the public policy in favor of disposition of cases on their merits.

19 Finally, no less drastic sanction is available to effectuate the purpose of
20 disclosure deadlines imposed by the FRCP. The only way to address such an
21 egregious violation of expert disclosure timelines is to exclude the rebuttal report.

22 In sum, Windermere's untimely expert report would unjustifiably prejudice
23 the B&D Parties. Importantly, excluding the rebuttal report would not amount to a
24 dispositive sanction upon Windermere. Accordingly, Beaton's rebuttal expert
25 report should be stricken and any testimony concerning the contents thereof
26 excluded from trial.

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1 **V. CONCLUSION**

2 For the aforementioned reasons, the B&D Parties respectfully request that
3 the Court enter an order striking Beaton’s rebuttal expert report and precluding
4 testimony about this report at trial.

5 Dated: April 3, 2017

MULCAHY LLP

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8 By: /s/ Kevin A. Adams
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12 *Homes, Inc., Bennion & Deville Fine*
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14 *Services Southern California, Inc.,*
15 *and Counter-Defendants Robert L.*
16 *Bennion and Joseph R. Deville*
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