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8  
9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**

11  
12 BENNION & DEVILLE FINE  
13 HOMES, INC., a California  
14 corporation, BENNION & DEVILLE  
15 FINE HOMES SOCAL, INC., a  
16 California corporation, WINDERMERE  
17 SERVICES SOUTHERN  
18 CALIFORNIA, INC., a California  
19 corporation,

20 Plaintiffs,

21 v.

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

25 Defendant.

26  
27 **AND RELATED COUNTERCLAIMS**  
28

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

*Hon. Manual L. Real*

**THE B&D PARTIES' NOTICE OF  
MOTION AND MOTION IN LIMINE  
TO PRECLUDE WSC FROM  
INTRODUCING EVIDENCE OF  
BREACH BY SERVICES SOCAL  
NOT IDENTIFIED IN THE NOTICE  
OF TERMINATION**

**[Motion in Limine # 1]**

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

1 TO DEFENDANT/COUNTER-CLAIMANT WINDERMERE REAL ESTATE  
2 SERVICES COMPANY (“WSC”) AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE THAT ON May 1, 2017, at 10:00 a.m. or as soon  
4 thereafter as counsel may be heard, the Courtroom of the Honorable Manuel L. Real,  
5 located at 255 East Temple Street, Los Angeles, California 90012, Plaintiffs/Counter-  
6 Defendants Bennion & Deville Fine Homes, Inc., Bennion & Deville Fine Homes  
7 SoCal, Inc., Windermere Services Southern California, Inc., and Counter-Defendants  
8 Robert L. Bennion and Joseph R. Deville (collectively referred to herein as the “B&D  
9 Parties”), will and hereby do move this Court to grant their Motion in *Limine* No. 1 to  
10 preclude WSC from introducing any evidence, testimony, argument, or comment that it  
11 terminated the Area Representation Agreement with Windermere Services Southern  
12 California, Inc. for any reason other than those grounds set forth in the notice of  
13 termination.

14 This motion is made under the provisions of Federal Rules of Evidence 402 and  
15 403, and is based on this Notice of Motion and Motion, the attached Memorandum of  
16 Points and Authorities, the Declaration of Joseph Deville and exhibits thereto, the  
17 [Proposed] Order filed and lodged herewith, the pleadings and papers on file in this  
18 action, and upon such argument and evidence as may be presented at the hearing on this  
19 matter.

20 DATED: April 3, 2017

**MULCAHY LLP**

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22  
23 By: /s/ Kevin A. Adams  
Kevin A. Adams  
24 *Attorneys for Plaintiffs/Counter-Defendants*  
25 *Bennion & Deville Fine Homes, Inc.,*  
26 *Bennion & Deville Fine Homes SoCal, Inc.,*  
27 *Windermere Services Southern California,*  
28 *Inc., and Counter-Defendants Robert L.*  
*Bennion and Joseph R. Deville*



1 material breach of the Agreement.”<sup>1</sup> [Deville Decl., Ex. C, p. 2.] Critically, the only  
2 “*material breach*” identified by WSC in the notice was Services SoCal’s alleged  
3 “**fail[ure] to collect and/or remit license and technology fees from licensees in**  
4 **[Services SoCal’s] area.**” [*Id.*]

5 Services SoCal contends that the material breach identified by WSC in the notice  
6 of termination is contrived and does not allow WSC to escape payment of the  
7 Termination Fee to Services SoCal as required by Section 4 of the Area Representation  
8 Agreement.

9 Recently, WSC has represented to the Court that it terminated the Area  
10 Representation Agreement “*for cause*” on a number of grounds beyond those identified in  
11 the February 26, 2015 notice of termination. In particular, WSC’s franchise expert has  
12 identified a litany of purported actions by Services SoCal that justified WSC’s  
13 termination of the Area Representation Agreement, including:

- 14 • Services SoCal did not deal “fairly and honestly” with franchisees  
15 [D.E. 82-2, Ex. A, p. 18, ¶ 5];
- 16 • Franchise owners were “disgruntled” with an affiliated company of  
17 Services SoCal opening an office in Encinitas [*id.* at p. 19, ¶ 9];
- 18 • Services SoCal did not collaborate with WSC sufficiently with regard  
19 to the closure of a Windermere office [*id.* at p. 20, ¶ 15];
- 20 • Services SoCal’s representatives made disparaging remarks to  
21 franchisees [*id.* at p. 20, ¶¶ 17-18];
- 22 • Services SoCal did not make a franchisee aware of certain software  
23 tools [*id.* at p. 21, ¶¶ 23-26];

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24  
25 <sup>1</sup> WSC’s February 26, 2015 letter followed WSC’s January 28, 2015 letter, titled  
26 “Notice of Termination,” in which WSC made clear that it was “exercising its right to  
27 terminate” the Area Representation Agreement without cause. (Deville Decl., Ex. B.)  
28 While not relevant to the instant motion, the January 28, 2015 termination – without  
cause or opportunity to cure – clearly triggered WSC’s obligation to pay Services SoCal  
the Termination Fee required under Section 4 of the Area Representation Agreement.

- 1 • Services SoCal told representatives of WSC not to contact franchisees  
2 [id. at p. 22, ¶¶ 31-32]; and
- 3 • Services SoCal’s representatives were “unpleasant.” [Id. at pp. 22-23,  
4 ¶¶ 33-35.]

5 WSC now claims that “all of the opinions” of its expert, including those identified above,  
6 “support WSC’s contention that it was justified in terminating the Area Representation  
7 Agreement *for cause*.” [D.E. 83, p. 10 (emphasis added); see also D.E. 83, p. 12  
8 (“Holmes’ opinions that [Services SoCal] fell below industry standards in a number of  
9 areas as WSC’s area representative are directly relevant to WSC’s claims it had good  
10 faith bases [sic] to terminate the Area Representation Agreement for cause.”).] However,  
11 because Services SoCal was not notified of these purported grounds for termination or  
12 provided an opportunity to cure, WSC cannot now rely upon them in avoiding payment  
13 of the Termination Fee.

14 Accordingly, the B&D Parties respectfully request an order precluding WSC from  
15 introducing any evidence, testimony, argument, or comment that it terminated the Area  
16 Representation Agreement for any reason other than those grounds set forth in the  
17 February 26, 2015 notice of termination.

18 **II. ANY BREACH BY SERVICES SOCIAL NOT IDENTIFIED IN THE**  
19 **TERMINATION NOTICE SHOULD BE EXCLUDED UNDER RULE 402**

20 Federal Rule of Evidence 401 provides that “evidence is relevant if (a) it has any  
21 tendency to make a fact more or less probable than it would be without the evidence; and  
22 (b) the fact is of consequence in determining the action.” See *Huddleston v. U.S.*, 485 U.S.  
23 681, 682-92 (1988). Evidence that does not meet this relevancy threshold is inadmissible  
24 pursuant to Federal Rule of Evidence 402.

25 As explained above, to avoid payment of the Termination Fee under Section 4 of  
26 the Area Representation Agreement, WSC was required to first provide Services SoCal  
27 notice of the material breach giving rise to the termination and 90 days to cure. The only  
28 breach identified by WSC in the February 26, 2015 notice of termination was Services

1 SoCal’s alleged “fail[ure] to collect and/or remit license and technology fees.” (Deville  
2 Decl., Ex. C.) Because this was the only breach identified in WSC’s notice of termination,  
3 any other grounds WSC’s termination of the Area Representation Agreement are not  
4 relevant to the instant dispute – *i.e.*, whether WSC must pay Services SoCal the  
5 Termination Fee required by the Area Representation Agreement. Any breaches claimed  
6 by WSC and not identified in the notice of termination are irrelevant to the instant dispute.

7 Because WSC’s stated termination of the Area Representation Agreement for cause  
8 is limited to Services SoCal’s alleged failure to collect and remit fees, all other alleged  
9 conduct by Services SoCal in violation of the Area Representation Agreement is irrelevant  
10 and should be excluded from trial under Rule 402.

11 **III. IN THE ALTERNATIVE, ANY BREACH BY SERVICES SOCIAL NOT**  
12 **IDENTIFIED IN THE TERMINATION NOTICE SHOULD BE EXCLUDED**  
13 **UNDER RULE 403**

14 To the extent that the Court finds Services SoCal’s alleged breaches of the Area  
15 Representation Agreement not set forth in the notice of termination to have some  
16 relevance to the instant dispute (*they do not*), argument and evidence of these purported  
17 breaches should still be excluded under Rule 403 of the Federal Rules of Evidence. Rule  
18 403 states that a “Court may exclude relevant evidence if its probative value is  
19 substantially outweighed by a danger of one or more of the following: unfair prejudice,  
20 confusing the issues, misleading the jury, undue delay, [or] wasting time...” *Old Chief v.*  
21 *U.S.*, 519 U.S. 172, 180-92 (1997).

22 Here, Rule 403 requires the preclusion of evidence any alleged breach by Services  
23 SoCal not identified in the notice of termination as this would only confuse the issues  
24 presented to the jury. Evidence of other purported breaches by Services SoCal would  
25 suggest to the jury that WSC relied upon this alleged conduct of Services SoCal to  
26 terminate the Area Representation Agreement *for cause*. Because the contract required  
27 WSC to provide prior notice and opportunity to cure before terminating the Area  
28 Representation Agreement for cause, any evidence of alleged breaches by Services

1 SoCal not identified in the notice of termination should be excluded from trial. Services  
2 SoCal could not have been given the opportunity to cure defaults of which it was not  
3 properly notified. This evidence and argument would only confuse the relevant issues in  
4 the case, waste the Court's time and otherwise cause undue delay. Thus, exclusion under  
5 Rule 403 is proper.

6 **IV. CONCLUSION**

7 For the reasons stated above, the B&D Parties respectfully request that the Court  
8 enter an order precluding WSC from attempting to introduce any evidence, testimony,  
9 argument, or comment that it terminated the Area Representation Agreement for any  
10 reason other than those grounds set forth in the February 26, 2015 notice of termination.  
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12 Dated: April 3, 2017

**MULCAHY LLP**

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14 By: /s/ Kevin A. Adams  
15 Kevin A. Adams  
16 *Attorneys for Plaintiffs and Counter-Defendants*  
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