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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.

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

Hon. Manual L. Real

**THE B&D PARTIES' NOTICE OF
MOTION AND 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 TO DEFENDANT/COUNTER-CLAIMANT WINDERMERE REAL
2 ESTATE SERVICES COMPANY (“WSC”) AND THEIR ATTORNEYS OF
3 RECORD:

4 PLEASE TAKE NOTICE THAT ON May 1, 2017, at 10:00 a.m. or as soon
5 thereafter as counsel may be heard, the Courtroom of the Honorable Manuel L. Real,
6 located at 255 East Temple Street, Los Angeles, California 90012,
7 Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc., Bennion &
8 Deville Fine Homes SoCal, Inc., Windermere Services Southern California, Inc., and
9 Counter-Defendants Robert L. Bennion and Joseph R. Deville (collectively referred
10 to herein as the “B&D Parties”), will and hereby do move this Court to grant their
11 Motion in *Limine* No. 2 to preclude Windermere Real Estate Service Company
12 (“WSC”) from introducing at trial exhibits, testimony, or other evidence relating to
13 any loans issued to the B&D Parties by any entity not a party to this suit.
14 Specifically, based on the Pre-Trial Conference Order, Plaintiffs seek to exclude
15 Defendant’s proposed trial exhibits:

16 WCL loans – Exs. 640, 641, 642, 643, 644, 677, 679, 684, 686, 687, 722,
17 767, 768

18 Carmed loans – Exs. 657, 658, 659, 660, 667, 668, 669, 670, 715, 750, 754,
19 779

20 JFF loans – Exs. 769, 772, 774, 775, 776

21 The above-listed exhibits relate to loans issued to B&D Parties by third parties
22 WCL, Carmed, and JFF. Because any debts owed to these third parties bear no
23 relation to the issues presented by this case, and would be used only to prejudice the
24 B&D Parties, this Court should exclude them or other references to the loans from
25 trial.

26 This motion is made under the provisions of Federal Rules of Evidence 401,
27 402, 403, and is based on this Notice of Motion and Motion, the attached
28

1 Memorandum of Points and Authorities, the declaration of Kevin A. Adams and
2 attached exhibits, the [Proposed] Order filed and lodged herewith, the pleadings and
3 papers on file in this action, and upon such argument and evidence as may be
4 presented at the hearing on this matter.

5 Dated: April 3, 2017

MULCAHY LLP

6
7 By: /s/ Kevin A. Adams

8 Kevin A. Adams

9 *Attorneys for Plaintiffs/Counter-Defendants*

10 *Bennion & Deville Fine Homes, Inc.,*

11 *Bennion & Deville Fine Homes SoCal, Inc.,*

12 *Windermere Services Southern California,*

13 *Inc., and Counter-Defendants Robert L.*

14 *Bennion and Joseph R. Deville*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc., Bennion
3 & Deville Fine Homes SoCal, Inc., Windermere Services Southern California, Inc.,
4 and Counter-Defendants Robert L. Bennion (“Bennion”) and Joseph R. Deville
5 (“Deville”) (collectively referred to herein as the “B&D Parties”) respectfully submit
6 this Memorandum of Points and Authorities 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 AND RELEVANT FACTUAL BACKGROUND**

11 The B&D Parties anticipate that WSC will attempt to introduce evidence,
12 testimony, argument, or comment on loans issued to Plaintiffs Joseph R. Deville or
13 Robert L. Bennion by entities not a party to this action.

14 In its list of proposed trial exhibits, WSC has listed several documents that
15 relate to loans to the B&D Parties issued by Washington Loan Company, Inc.
16 (“WCL”), Carmed, LLC (“Carmed”), and JFF, LLC (“JFF”) (collectively the
17 “Lenders”). [Final Pretrial Conference Order, D.E. 79, at 48-56.] None of the
18 Lenders are a party to this case. Moreover, and importantly, WSC is not a party to
19 any agreement between Bennion and Deville and the Lenders. The following list of
20 WSC’s proposed exhibits relate to loans to the B&D Parties by the Lenders:

- 21 WCL loans Exs. 640, 641, 642, 643, 644, 677, 679, 684, 686, 687, 722,
22 767, 768;
23 Carmed loans Exs. 657, 658, 659, 660, 667, 668, 669, 670, 715, 750, 754,
24 779;
25 JFF loans Exs. 769, 772, 774, 775, 776.

26 [Final Pretrial Conference Order, D.E. 79, at 48-56 (hereinafter referred to as “Third
27 Party Loan Exhibits”]; Decl. of Kevin A. Adams ISO Motion in *Limine* to Exclude
28 Exhibits and Other Evidence Concerning Parties to the B&D Parties from Third

1 Parties (“Adams Decl.”), ¶¶ 4, Exs. A-C.¹

2 **II. EVIDENCE OF LOANS ISSUED TO BENNION AND DEVILLE BY**
3 **THIRD PARTIES IS IRRELEVANT TO THIS CASE**

4 Evidence relating to loans that are not relevant to the performance of the
5 contracts at issue, and that were issued to the B&D Parties by entities that are not
6 parties to this action, is irrelevant. Under Federal Rule of Evidence (“FRE”) 401,
7 “[e]vidence is relevant if (a) it has any tendency to make a fact more or less probable
8 than it would be without the evidence; and (b) the fact is of consequence in
9 determining the action.” Fed. R. Evid. 403. “Irrelevant evidence is not admissible.”
10 Fed. R. Evid. 402. Consequently, irrelevant evidence may be properly excluded from
11 trial. *See Gribben v. United Parcel Service, Inc.*, 528 F.3d 1166, 1171 (2008)
12 (upholding exclusion of prior consent decree with EEOC as irrelevant in
13 employment discrimination case).

14 Here, Windermere seeks to introduce at trial evidence pertaining to loans that
15 have no relevance to the instant action. In the First Amended Counterclaim
16 (“FACC”), Windermere asserts that *its affiliate entities* provided loans to the B&D
17 Parties. (FACC, D.E. 16, at 12, 13.) Neither WLC, Carmed, nor JFF, however, are
18 parties to this case.

19 Moreover, and importantly, none of these exhibits are of any consequence to
20 the claims in this case. The scope of relevance is set by the parties’ pleadings.
21 Windermere’s counterclaim sets forth claims for breach of contract based upon
22 contracts that are distinct and unrelated to the Lenders’ loans. (*See* FACC, D.E. 16,
23 at 23-35.) Importantly, WSC does not assert any claim or damage resulting from the
24 loans issued by WLC, Carmed, or JFF. (*See generally id.*) The parties’ contract
25 claims arise out of the franchise and area representation agreements. (*Id.*; First

26
27 ¹ To the extent any of the proposed exhibits are marked confidential pursuant to the
28 protective order entered in this case, a placeholder page is submitted. A copy of the
proposed exhibit will be provided at the hearing.

1 Amended Compl. (“FAC”), D.E. 31, at 38-46.) Thus, only evidence relating to the
2 performance of the franchise and area representation agreements, as well as WSC’s
3 fulfilment of its obligations under the CFRA, are relevant. Payment or nonpayment
4 of the Lenders’ loans has no effect on the obligations of the parties to the relevant
5 agreements. A review of the proposed exhibits makes it clear that the documents
6 offer no probative value to the remaining issues in this case. (Adams Decl., Exs. A,
7 B, C.) Accordingly, the above-listed exhibits and all testimony relating to the third
8 party loans should be excluded as irrelevant.

9 **III. EVIDENCE RELATING TO LOANS TO BENNION AND DEVILLE**
10 **FROM THE LENDERS CARRIES THE DANGER OF UNFAIR**
11 **PREJUDICE**

12 To the extent that the Court finds that evidence relating to the loans have some
13 nominal relevance to the instant dispute (*it should not*), all evidence involving the
14 loans should still be excluded because it is highly prejudicial. Under FRE 403, “[t]he
15 court may exclude relevant evidence if its probative value is substantially
16 outweighed by a danger of one or more of the following: unfair prejudice, confusing
17 the issues, misleading the jury, undue delay, wasting time or needlessly presenting
18 cumulative evidence.” Evidence creates a danger of unfair prejudice where it leads
19 to “an undue tendency to suggest decision on an improper basis, commonly, though
20 not necessarily, an emotional one.” *Cohn v. Papke*, 655 F.2d 191, 194 (9th Cir. Cal.
21 1981) (quoting Notes of Advisory Committee on Rules).

22 Here, evidence relating to third party loans is highly prejudicial and should be
23 excluded under FRE 403. Evidence relating to the loans could lead the jury to make
24 a decision based upon the B&D Parties’ alleged failure to pay unrelated debt. Any
25 evidence purporting to show that the B&D Parties untimely paid their debts,
26 however, bears no relation to the issues in this action, as outlined above. Given the
27 danger of the jury’s reliance on this evidence, and the lack of any probative value
28 whatsoever, this evidence is unfairly prejudicial and should be excluded.

1 Accordingly, this Court should exclude the above-listed exhibits, and should
2 preclude WSC and its witnesses from testifying about the third party loans.

3 **IV. CONCLUSION**

4 For the Foregoing reasons, the B&D Parties respectfully ask that this Court
5 grant its motion *in limine* and issue an order barring WSC from presenting any
6 evidence referring to or regarding the loans issued by WLC, Carmed, and JFF, and
7 to exclude the following list of proposed trial exhibits from trial:

- 8 WCL loans Exs. 640, 641, 642, 643, 644, 677, 679, 684, 686, 687, 722,
9 767, 768;
10 Carmed loans Exs. 657, 658, 659, 660, 667, 668, 669, 670, 715, 750, 754,
11 779;
12 JFF loans Exs. 769, 772, 774, 775, 776.

13 DATED: April 3, 2017

MULCAHY LLP

14
15 By: /s/ Kevin A. Adams

16 Kevin A. Adams
17 *Attorneys for Plaintiffs/Counter-*
18 *Defendants Bennion & Deville Fine*
19 *Homes, Inc., Bennion & Deville Fine*
20 *Homes SoCal, Inc., Windermere*
21 *Services Southern California, Inc.,*
22 *and Counter-Defendants Robert L.*
23 *Bennion and Joseph R. Deville*
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