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

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

16 Plaintiffs,

17 v.

18 **WINDERMERE REAL ESTATE**
SERVICES COMPANY, a Washington
19 corporation; and **DOES 1-10**

20 Defendant.

21
22
23 **AND RELATED COUNTERCLAIMS**
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Case No. 5:15-CV-01921 R (KKx)

Hon. Manual L. Real

**THE B&D PARTIES' OPPOSITION
TO WSC'S MOTION IN LIMINE TO
EXCLUDE EVIDENCE RELATED
TO DISMISSED CLAIMS**

Date: May 15, 2017

Time: 10:00 a.m.

Courtroom: 880

Action Filed: September 17, 2015

Trial: May 30, 2017

1 Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc. (“B&D Fine
2 Homes”), Bennion & Deville Fine Homes SoCal, Inc. (“B&D SoCal”), Windermere
3 Services Southern California, Inc. (“Services SoCal”), and Counter-Defendants Robert L.
4 Bennion (“Bennion”) and Joseph R. Deville (“Deville”) (all collectively, the “B&D
5 Parties”) respectfully submit this Opposition to Defendant/Counter-Plaintiff Windermere
6 Real Estate Services Company’s (“WSC”) Motion in *Limine* to Exclude Evidence Related
7 to Dismissed Claims.

8 **I. INTRODUCTION**

9 Without any real analysis, WSC seeks a wholesale exclusion of 66 of the B&D
10 Parties’ proposed trial exhibits on the basis that these exhibits are no longer relevant to the
11 case in light of the Court’s summary judgment rulings.¹ Although several of the exhibits
12 are no longer relevant to this dispute, the majority of exhibits identified in WSC’s motion
13 are highly relevant to issues in this case that were not disturbed by the Court’s prior
14 rulings.² As explained in detail in below, WSC’s motion in *limine* should be denied.

15 **II. EXHIBITS REFLECTING WSC’S POST-APRIL REGISTRATION OF ITS**
16 **FRANCHISE DISCLOSURE DOCUMENT WITH THE STATE OF**
17 **CALIFORNIA ARE HIGHLY RELEVANT TO THIS LITIGATION**

18 WSC is a real estate brokerage franchisor headquartered in Seattle, Washington.
19 (FAC, D.E. 31, ¶ 15.) Services SoCal became WSC’s area representative in Southern
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21
22 ¹ Interestingly, WSC has failed to include copies or descriptions of any of the exhibits
23 that it seeks to exclude by way of its *in limine* motion. This intentional omission appears
24 to be an attempt by WSC to mask the relevance of these exhibits to the remaining issues
25 in this case. To provide the Court with some clarity, a detailed summary of each of these
26 exhibits is set forth in the body of this Opposition.

27 ² The B&D Parties’ submission of an exhibit list occurred prior to the Court’s ruling
28 on the parties’ summary judgment motions. In light of the Court’s rulings, the B&D
Parties agree that the following exhibits are no longer relevant to the current issues in the
case: 26, 43, 46, 47, 60, 68, 69, 70, 79, 80, 81, 82, 83, 105, 106, 107, 109, 158, 159, 160,
182, 185, 188, 189, 190, 212, 276, 405, and 407. Accordingly, the B&D Parties hereby
withdraw these exhibits as proposed trial exhibits.

1 California in May 2004 when the parties entered into the Area Representation
2 Agreement (“ARA”). (FAC, D.E. 31 ¶ 25-28; Decl. of Joseph R. Deville in Oppo. to
3 WSC’s Application for Right to Attach Orders (“Deville Decl.”), D.E. 73-2, (“Deville
4 Decl.”), ¶ 52, Ex. 9.) As the Area Representative, Services SoCal was tasked with two
5 distinct roles; (i) the right to offer Windermere franchises to real estate brokerage
6 businesses to use the Trademark and the Windermere System in the Region, and (ii) to
7 provide certain support and auxiliary services to both incoming and existing
8 Windermere franchisees in Southern California. (Deville Decl., Ex. 9, §§ 2, 3.) In
9 exchange, Services SoCal was to share “*equally*” with WSC in “*all initiation and*
10 *licensing fees*” for (i) the seven existing Windermere franchises in Southern California,
11 and (ii) “all future Windermere offices” opened in Southern California. (*See id.*, Ex. A,
12 §§ 3, 10, Exhibit A, § 3 (emphasis added).)

13 The contractual right to offer and sell Windermere franchises (and the financial
14 benefit that the sales derived) was the principal benefit to Services SoCal under the
15 ARA. (Deville Decl., ¶ 62, Ex. 9 § 2.) In order for Services SoCal to be able to offer
16 Windermere franchises in California, WSC was required to have a current Franchise
17 Disclosure Document (“FDD”) filed with the California Department of Business
18 Oversight (“DBO”), formerly the California Department of Corporations. It was WSC’s
19 sole responsibility to prepare and register the FDD with the DBO. (Decl. of Kevin A.
20 Adams ISO the B&D Parties’ Oppo. to WSC’s Mot. in *Limine* No. 3 (“Adams Decl.”),
21 Ex. A at 64:1-14.)

22 From 2004 through 2013, WSC registered its FDD with the DBO on an annual
23 basis. (*Id.*, Ex. A at 130:2-14.) This annual registration would typically occur at the
24 request of Services SoCal and only after Services SoCal was in discussions with an
25 interested prospective franchisee. (*Id.*, Ex. A at 129:10 – 131:16.) Importantly, the FDD
26 registration materials submitted to the DBO were required to include the audited
27 financials for both WSC and Services SoCal. Services SoCal had historically only
28

1 submitted its audited financial statements to WSC for submission to the DBO after
2 Services SoCal learned of an interested prospective franchisee. (*See id.*)

3 In 2014, WSC failed (and refused) to register its FDD in California. (*Id.*, Ex. A at
4 309:17 – 310:5) WSC’s failure to register the FDD in 2014 precluded Services SoCal
5 from being able to lawfully offer or sell any Windermere franchises. (Deville Decl., ¶
6 63.) This right was never restored to Services SoCal. (*Id.*) WSC’s unilateral termination
7 of Services SoCal’s right and ability to offer and sell Windermere franchises resulted in
8 the premature, constructive termination of the Area Representation Agreement. This
9 constructive termination is a significant part of the lawsuit.

10 WSC’s constructive termination of the ARA triggered the fair market valuation
11 provision at Section 4 in the ARA, and resulting in damages to Services SoCal of more
12 than \$2 million. In an effort to avoid a constructive termination finding by the jury,
13 WSC will argue at trial that its failure to register the FDD in California in 2014 was the
14 fault of Services SoCal, and not WSC. Specifically, WSC will argue that Services SoCal
15 was late in providing its audited financials to WSC, and that Services SoCal’s audited
16 financials were needed in *April 2014* for WSC to register its FDD with the State of
17 California.

18 WSC’s argument that Services SoCal’s audited financials were untimely is
19 contravened by many of the very exhibits that WSC now seeks to exclude through its *in*
20 *limine* motion. This includes the following exhibits that are part of WSC’s motion:

- 21 • Exhibit 20 - April 19, 2011 letter from WSC to California Department of
22 Corporations acknowledging that WSC was “still awaiting receipt of [its]
23 audited financial statements for 2011.”
- 24 • Exhibit 21 - May 2, 2012 email chain showing that WSC had not received its
25 audited financials until after May 2, 2012.
- 26 • Exhibit 22 - May 10, 2012 email chain showing that the late filing of the
27 franchise registration in California is “not a big deal” if the B&D Parties “don’t
28 have any current prospects in the pipeline.”

- 1 • Exhibit 23 - June 1, 2012 email chain showing that WSC just received its
2 audited financials for filing the franchise application with the State of
3 California.
- 4 • Exhibit 24 - June 11, 2012 letter from the California Department of
5 Corporations showing that WSC's franchise registration for Northern
6 California was not effective until June 11, 2012.
- 7 • Exhibit 25 - June 11, 2012 letter from the California Department of
8 Corporations showing that WSC's franchise registration for Southern
9 California was not effective until June 11, 2012.
- 10 • Exhibit 27 - August 7, 2012 email chain showing that Services SoCal,
11 consistent with the parties' course of dealing, did not provide an Audit Consent
12 letter to WSC for filing the franchise registration with the State of California
13 until August 7, 2012.
- 14 • Exhibit 33 - October 2, 2012 email from WSC's General Counsel suggesting
15 that WSC's FDD was not approved by the State of California until October 2,
16 2012.
- 17 • Exhibit 44 - January 12, 2012 email from WSC's General Counsel to the B&D
18 Parties showing that it was acceptable for the B&D Parties to provide Services
19 SoCal's audited financials after the April 2012 deadline.
- 20 • Exhibit 59 - June 12, 2013 email chain showing that WSC's FDD for Southern
21 California was not yet filed with the State of California as of June 12, 2013.
- 22 • Exhibit 61 - June 14, 2013 email from WSC's General Counsel showing that
23 WSC's FDD for Southern California was not filed with the State of California
24 until June 14, 2013.
- 25 • Exhibit 62 - June 14, 2013 letter from WSC to the California Department of
26 Corporations containing WSC's submission of a franchise registration
27 application and related materials.
- 28 • Exhibit 63 - WSC's Franchise Disclosure Document reflecting a submission

1 date (bottom right-hand corner) to the State of California of June 13, 2013.

- 2 • Exhibit 72 - July 5, 2013 letter from the California Department of Corporations
3 showing that WSC's franchise registration for Southern California was not
4 effective until July 5, 2013.
- 5 • Exhibit 76 - July 12, 2013 email from WSC's General Counsel showing that
6 WSC did not receive approval from the State of California for the WSC FDD
7 until July 12, 2013.
- 8 • Exhibit 78 - July 11, 2013 email from WSC's General Counsel showing that
9 WSC did not have the approval from the State of California for WSC's FDD
10 until after July 11, 2013.
- 11 • Exhibit 93 - January 3, 2013 email from WSC's General Counsel to the B&D
12 Parties indicating that FDD filings in the State of California could be submitted
13 after the April deadline.
- 14 • Exhibit 108 - May 29, 2013 email from WSC's General Counsel to
15 representative of the B&D Parties regarding receipt of Service SoCal's audited
16 financials after April and WSC's filing of the FDD with the State of California
17 after May 20, 2013.
- 18 • Exhibit 248 - Windermere Real Estate Franchise Disclosure Document
19 showing that, even after the ARA terminated, WSC registered its FDD in July
20 2015, and well after the April deadline.
- 21 • Exhibit 277 - August 5, 2016 letter from the Department of Business Oversight
22 to WSC's General Counsel showing that WSC's FDD was not effective in the
23 State of California until August 5, 2016.
- 24 • Exhibit 384 - Draft letter from Paul Drayna to the California Department of
25 Corporations showing that WSC often submitted its franchise application to
26 the State of California before its audited financials were prepared.
- 27 • Exhibit 404 - March 27, 2013 email from WSC's General Counsel to the B&D
28 Parties indicating that FDD filings in the State of California could be submitted

1 after the April deadline with “some down time.”

- 2 • Exhibit 408 - June 21, 2013 email exchange between WSC’s General Counsel
3 and representatives of the B&D Parties regarding WSC’s submission of the
4 FDD to the State of California after June 21, 2013.

5 The above exhibits show that through the years, WSC and Services SoCal always
6 prepared and finalized their audited financials and FDD filings well after the annual
7 April deadline, thereby negating WSC’s anticipated argument at trial. As a result, these
8 exhibits are highly relevant to the constructive termination issue that is very much alive
9 in this case.

10 Incredibly, WSC also seeks to exclude two key communications between itself
11 and the DBO showing that WSC did not make any real effort to register the FDD in
12 2014. Exhibits 242 and 251 are letters between the DBO and WSC’s General Counsel
13 specifically addressing WSC’s failure (i) to renew the FDD in 2014, or (ii) respond to
14 the DBO’s comment letter addressing the numerous problems with WSC’s half-baked
15 submission. Exhibits 242 and 251 also show that WSC has removed any reference to
16 Services SoCal as WSC’s area representative in the FDD before WSC claims the
17 relationship was actually terminated. These exhibits are highly relevant to the
18 constructive termination issue in the case and should not be kept from the jury.

19 Finally, the B&D Parties have asserted the affirmative defenses of offset and
20 justification based on these dealings of the parties and the constructive termination of the
21 ARA without cause, notice, or opportunity to cure. Each of the above exhibits is relevant
22 to these affirmative defenses. Accordingly, WSC’s attempt to exclude these exhibits
23 should be rejected.

24 **III. EXHIBITS REFLECTING WINDERMERE WATCH ARE HIGHLY**
25 **RELEVANT TO THIS LITIGATION**

26 The B&D Parties were going to leave the Windermere system but for WSC’s
27 agreement to take commercially reasonable effort to combat Windermere Watch.
28 (Deville Decl., D.E. 73-2, ¶ 20.) WSC’s failure to take any effort until October 2013,

1 and subsequent failure to take commercially reasonable efforts, was a key contributor to
2 the B&D Parties' decision to stop paying fees to WSC and to leave the Windermere
3 franchise system early. (Deville Decl., D.E. 73-2, ¶¶ 50, 78, 85.) Moreover, WSC's
4 failure to take action breached a material provision of the franchise agreements as
5 amended by the Modification Agreement and resulted in significant harm to the B&D
6 Parties. WSC's breach excused the B&D Parties from any further performance under the
7 agreements. Moreover, even if the B&D Parties' performance was not excused, the
8 damages suffered by the B&D Parties should offset the amount of the writs that WSC
9 now seeks.

10 The Court has already found that "the evidence shows that WSC took no action to
11 address the Windermere Watch concerns until October 2013 and that only involved one
12 avenue of response, search engine optimization. This Court finds that such minimal,
13 delayed action is unlikely to qualify as a 'commercially reasonable effort.' WSC also
14 went to great lengths to dispute the evidence relied upon by the B&D Parties in its
15 opposition. This Court need not address those concerns because it is apparent based
16 solely on the deposition testimony of WSC's own employees and officers that it did not
17 make a 'commercially reasonable effort' to combat Windermere Watch." (D.E. 80, p. 5.)

18 WSC now seeks to exclude exhibits 75 and 138, each of which support the B&D
19 Parties' claim and the Court's finding regarding the issues with Windermere Watch and
20 WSC's failure to take "commercially reasonable efforts" to combat Windermere Watch.

21 Exhibits 75 and 138 can be summarized as follows:

- 22 • Exhibit 75 - July 5, 2013 email from franchisee to representatives of WSC and
23 the B&D Parties identifying concerns over "Windermere Watch."
- 24 • Exhibit 138 - August 2, 2013 email exchange between representatives of the
25 parties regarding the "recent Windermere Watch issues" and the support
26 provided by Services SoCal for the franchisees in its region.

27 WSC should not be permitted to exclude these highly relevant exhibits from the
28 jury. Accordingly, WSC's motion should be denied.

1 **IV. EVIDENCE OF THE SERVICES SOCAL'S SUPPORT OF OTHER**
2 **FRANCHISEES IS HIGHLY RELEVANT TO THIS LITIGATION**

3 WSC has argued since the onset of this lawsuit that Services SoCal failed to offer
4 support to franchisees in their region as required by the ARA. [See D.E. 16, ¶¶ 52-54.]
5 The following exhibits contradict WSC's argument and show that Services SoCal went
6 above and beyond in supporting the franchisees in its region.

7 In light of WSC's allegations, these exhibits are highly relevant to this action and
8 WSC's motion to exclude them should be rejected.

- 9 • Exhibit No. 84 - July 16, 2013 email from a franchisee to representatives of
10 the B&D Parties thanking the B&D Parties for support.
- 11 • Exhibit No. 138 - August 2, 2013 email exchange between representatives of
12 the parties regarding the "recent Windermere Watch issues" and the support
13 provided by Services SoCal for the franchisees in its region.
- 14 • Exhibit No. 98 - March 7, 2013 email between the parties reflecting the B&D
15 Parties support of franchisees in their region.
- 16 • Exhibit No. 99 - February 13, 2013 email exchange between Deville and
17 franchisee reflecting the B&D Parties' support of the franchisee
- 18 • Exhibit No. 184 - October 14, 2014 email chain between representatives of the
19 B&D Parties and franchisee in Services SoCal's region reflecting the support
20 provided by Services SoCal to the franchisee.
- 21 • Exhibit No. 192 - October 29, 2014 email exchange between the parties
22 reflecting the extensive support representatives of the B&D Parties were
23 providing to franchisees and brokers in their region.

24 **V. EXHIBIT 32 IS HIGHLY RELEVANT TO THE B&D PARTIES'**
25 **DECISION TO DISCONTINUE PAYMENTS TO WSC**

26 The relevance of **Exhibit 32** was stated plainly to the Court in a prior declaration
27 of Deville. (Deville Decl., D.E. 72-3, ¶ 79, Ex. 12.) In short, this July 18, 2012 memo to
28 all "Owners and Managers" alerted the B&D Parties that WSC and its sister company,

1 Windermere Solutions, were exploring the sale of their TouchCMA product to “non-
2 competing real estate brokerages outside of the Windermere footprint.” (*Id.*) This was a
3 highly debated topic because WSC touted TouchCMA as its flagstaff resource that
4 helped to put Windermere owners and agents above the competitors in the same market.
5 (*Id.*, ¶ 80.) Naturally, the sale of this item to competing brokerages would have been
6 harmful to the Windermere brokers and agents, explaining why WSC represented that
7 the technology would only be offered to those competitors outside of the geographies of
8 Windermere’s owners and agents. (*Id.*)

9 While WSC’s offering of TouchCMA to other real estate brokers proved to be a
10 contentious topic between Windermere representatives in Southern California and WSC,
11 WSC’s sale and offering of this product to non-Windermere brokerages was not known
12 to be an issue for some time. (*Id.* at ¶ 81.) Then, in August 2014, the B&D Parties
13 learned that WSC was offering TouchCMA to non-Windermere brokerages in their
14 “footprint” – *i.e.*, territory. (*Id.*, ¶ 82.) In particular, the B&D Parties learned that WSC
15 had entered into an agreement with the California Association of Realtors – the largest
16 membership of real estate agents in California – and that this technology was now being
17 used in direct competition with the B&D Parties in Southern California. (*Id.*)

18 During the deposition of Windermere Solutions CEO, York Baur, the B&D
19 Parties learned that WSC immediately began negotiating the sale of WSC’s technology
20 to competitors within the B&D Parties’ geographic region in late 2012 and in direct
21 contravention of the representations of WSC in Exhibit 32. (*Id.*, ¶ 83.)

22 It was the discovery of this information regarding TouchCMA, among other
23 things, that led the B&D Parties to discontinue their payments to WSC under the parties’
24 respective agreements. (*Id.*, ¶ 85.) Because WSC has filed contract claims against the
25 B&D Parties for discontinuing the payment of fees, this exhibit 32 is highly relevant to
26 that issue and should not be excluded from the jury.

27 **VI. CONCLUSION**

28 For the reasons stated above, each of the above exhibits is highly relevant to this

1 lawsuit notwithstanding the Court's partial summary judgment rulings. According,
2 WSC's motion in *limine* to exclude these proposed exhibits identified by the B&D
3 Parties should be denied.

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5 Dated: April 24, 2017

MULCAHY LLP

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7 By: /s/ Kevin A. Adams
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9 Attorneys for Plaintiffs/Counter-Defendants
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