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

21 Defendant.

22
23
24 **AND RELATED COUNTERCLAIMS**
25
26
27
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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 ITS OFFER TO PURCHASE
PLAINTIFFS AND COUNTER-
DEFENDANTS**

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* requesting an order
7 excluding evidence of offers WSC and/or its principals’ made to purchase B&D Fine
8 Homes, B&D SoCal and Services SoCal (collectively, the “B&D Entities”).

9 **I. INTRODUCTION**

10 WSC seeks to exclude two letters of intent dated July 27, 2015 and August 2, 2015
11 (exhibits 249 and 250, respectively). Both letters show that *prior to litigation* WSC
12 offered to purchase the B&D Entities for approximately \$12.5 million. This evidence is
13 directly relevant to (1) WSC’s obligation to appraise Services SoCal pursuant to Section
14 4.2 of the Area Representation Agreement; and (2) the B&D Parties’ expert Peter
15 Wrobel’s valuation of Services SoCal. The market value of Services SoCal is one
16 category of damages in this action. As such, the probative value far exceeds any prejudice
17 that would arise from admission of these exhibits.

18 **II. EXHIBITS 249 & 250 ARE HIGHLY RELEVANT TO THIS ACTION**

19 Services SoCal became WSC’s area representative in Southern California in May
20 2004 when the parties entered into the Area Representation Agreement (“ARA”). (FAC,
21 D.E. 31 ¶ 25-28; Decl. of Joseph “Bob” Deville ISO the B&D Parties’ Oppo. to WSC’s
22 Mot. in *Limine* No. 1 (“Deville Decl.”), ¶ 52, Ex. 9.) The ARA provided for termination
23 procedures. (*Id.*, § 4.) If the ARA was terminated without cause, the terminated party
24 was entitled to compensation. (*Id.*, § 4.2.) The ARA states, in relevant part:

25 **In the event either party elects to terminate the Agreement [without**
26 **cause], it is agreed that the [Terminated Party] will be paid an amount**
27 **equal to the fair market value of the Terminated Party’s interest in the**
28 **Agreement []**, in accordance with the provisions of this Agreement. The fair
market value of the Terminated Party’s interest in the Agreement will be

1 determined by mutual agreement of the parties or, if unable to reach
2 agreement, by each party selecting an appraiser and the two appraisers
3 selecting a third appraisers. The fair market value of the Terminated Party's
4 interest will be determined by the appraisers without consideration of
5 speculative factors including, specifically, future revenue. The appraisers
6 shall look at the gross revenues received under the Transaction during the
7 twelve months preceding the termination date from then existing licensees
8 that remain with or affiliate with the Terminating Party. The median
9 appraisal of the three appraisers shall determine price, and each party agrees
10 to be bound by the determination.

11 (*Id.*) (emphasis added).

12 Section 4.2 of the ARA states that WSC was to provide an appraisal of Services
13 SoCal following termination. This appraisal was made in WSC's \$12.5 million offers. In
14 making these offers, WSC not only appraised Services SoCal but the other B&D
15 Entities. The offers served as WSC's valuation under Section 4.2 and therefore are
16 directly probative of damages for WSC's failure to pay the termination obligation.

17 To the extent that WSC would argue that the offers were not an official appraisal
18 under Section 4.2, the offers would still be relevant to the B&D Parties' expert Peter
19 Wrobel's conclusion that the net value of Services SoCal as of the termination date was
20 \$2,592,526. (Decl. of Peter Wrobel ISO the B&D Parties' Oppo. to WSC's Mot. in
21 *Limine* No. 1 ("Wrobel Decl."), ¶ 4). Wrobel compares the \$12.5 million offers for all
22 the B&D Entities to the offers made for all the entities minus Services SoCal as one of
23 the ways to calculate a value for Services SoCal. Namely:

24 WSC attempted to purchase [Services SoCal], BD SoCal and BD Fine in
25 July 2015 for approximately \$12,500,000. Third, the Mentor Group valued
26 BD SoCal and BD Fine (excluding [Services SoCal]) for \$9,800,000 in
27 September 2014. Fourth, Vincent and Nicholas Gattuso made an \$11
28 million cash offer for BD SoCal and BD Fine (excluding [Services SoCal])
in August 2015. Subtracting the Mentor Group and Gattuso offers from
WSC's offer of \$12,500,000 implied a value of [Services SoCal] of
\$1,500,000 or \$2,700,000.

(*Id.* at ¶ 12.) In conjunction with the other offers, the WSC offer is probative of Services
SoCal's valuation.

1 A contemporaneous appraisal of Services SoCal is directly relevant to Wrobels'
2 evaluation of the fair market value of Services SoCal. (*Id.* at ¶ 13.) Wrobel is able to use
3 WSC's offers to evaluate the value of Services SoCal. In that regard, Wrobel writes:

4 It is appropriate, and in fact essential, for any valuation professional to
5 consider contemporaneous appraisals of the target valuation company. Not
6 only is this common sense, it is particularly appropriate to consider WSC's
7 offer because WSC would presumably have more information about the
8 nature of the business of [Services SoCal] than an independent party such
9 as the Mentor Group or Vincent and Nicholas Gattuso. The professional
10 valuation literature supports this assessment: "[e]ven if not accepted, a bona
11 fide offer, particularly if submitted in writing, can at least corroborate the
12 value [of the company being valued]."

(*Id.*)

13 Relevant case law also supports that WSC's offers are probative of fair market
14 value. "The fair market value is the price at which the property would change hands
15 between a willing buyer and a willing seller, neither being under any compulsion to buy
16 or to sell and both having reasonable knowledge of relevant facts." *United States v.*
17 *Cartwright*, 411 U.S. 546, 551 (1973). The sales price offered is admissible evidence of
18 fair market value even though the transaction contemplated was never completed. *See*
19 *Schonfeld v. Hilliard*, 218 F.3d 164, 179 (2d Cir. 2000); *see also Ellis v. Mobil Oil*, 969
20 F.2d 784, 786 (9th Cir. 1992) ("When a third party's offer is in the form of a single
21 transaction for cash, the court can justifiably infer that the amount of an arms' length
22 offer represents the value of the [asset]."); *People v. Schwarz*, 78 Cal. App. 561, 581
23 (1926) ("there is an abundance of authority upholding the use of evidence of actual sales
24 and offers for sale to establish 'market value,' or 'market price.'") For these reasons, the
25 offers are relevant to the fair market value of Services SoCal,

26 Even setting aside the relevance of exhibits 249 and 250, there is no prejudice.
27 The jury is more than capable of understanding that these offers, which preceded any
28 litigation, were not for purpose of settlement but instead attempts to buy the business.
Further, the jury will not be misled because an offer by a willing buyer is valid evidence
supporting a valuation.

1 **III. CONCLUSION**

2 As the probative value of the B&D Parties' exhibits 249 and 250 far outweighs
3 any prejudice, there is no basis for exclusion. For the reasons stated above, WSC's
4 Motion in *Limine* requesting an order excluding evidence of offers WSC and/or its
5 principals' made to purchase the B&D Entities should be denied.

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7 Dated: April 24, 2017

MULCAHY LLP

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9 By: /s/ Kevin A. Adams

10 Kevin A. Adams

11 Attorneys for Plaintiffs/Counter-Defendants
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