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13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

15 BENNION & DEVILLE FINE
HOMES, INC., a California
16 corporation, BENNION & DEVILLE
FINE HOMES SOCIAL, INC., a
17 California corporation, WINDERMERE
SERVICES SOUTHERN
18 CALIFORNIA, INC., a California
corporation,

19 Plaintiffs,

20 v.

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

23 Defendant.
24

25 AND RELATED COUNTERCLAIMS
26
27
28

Case No. 5:15-CV-01921 DFM

Hon. Douglas F. McCormick

**DEFENDANT AND
COUNTERCLAIMANT'S MOTION
IN LIMINE TO EXCLUDE
EVIDENCE AND ARGUMENT
RELATED TO CRIMINAL AND
CIVIL PENALTIES**

Courtroom: 6B

Complaint Filed: September 17, 2015

1 **I. INTRODUCTION**

2 In its October 2016 Order Granting Defendant’s Motion for Partial Summary
3 Judgment (“Order”), the Court granted partial summary judgment as to specific
4 allegations in Claims One through Six of Plaintiffs’ First Amended Complaint
5 (“FAC”) and granted summary judgment as to Plaintiffs’ Seventh Claim for Relief
6 in its entirety. (Dkt. 66.) This included the portion of Plaintiffs’ Fourth Cause of
7 Action for Breach of the Covenant of Good Faith and Fair Dealing, and in
8 particular, the allegations in paragraph 170(c) that WSC breached the covenant by
9 “soliciting Services SoCal’s participation in the offers and sales of franchises in
10 violation of the franchise laws.” (See Dkt. 66, p. 4, l. 16 0 p. 5, l. 4.) The Court
11 held that “Plaintiffs’ testimony that they have not been subjected to civil or criminal
12 liability as a result of violation of franchise laws show that Plaintiffs have not
13 suffered any damages.” (Dkt. 66, p. 4, ll. 16-20.)

14 Throughout trial thus far, Plaintiffs have gone out of their way to elicit
15 testimony regarding the potential criminal implications for violating California’s
16 franchise laws. Not only is this evidence irrelevant given the Court’s order granting
17 summary judgment on the issue, it is also highly prejudicial and is likely to inflame
18 and/or confuse the jury. Therefore, the Court should preclude any further evidence
19 or argument regarding the potential criminal or civil implications for violating
20 California’s franchise laws.

21 **II. EVIDENCE REGARDING POTENTIAL CRIMINAL LIABILITY**
22 **SHOULD BE EXCLUDED**

23 Evidence is relevant if it: (1) tends to make a fact more or less probable than
24 it would be without the evidence; and (2) the fact is of consequence to the action.
25 Fed. R. Evid. 401. Relevant evidence may be excluded if its probative value is
26 substantially outweighed by a danger of unfair prejudice, confusing the issue,
27 misleading the jury, or undue delay. Fed. R. Evid. 403.

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1 Plaintiffs' First Amended Complaint contains a number of allegations that
2 WSC subjected Plaintiffs to criminal and civil liability by violating California's
3 franchise laws. (See Dkt. 31, ¶¶ 83-103.) These allegations culminated in the
4 allegations in paragraph 170(c). In its Order, the Court dismissed this claim due to
5 Plaintiffs' failure to submit any admissible evidence that they had suffered damages
6 as a result of this alleged breach. (Dkt. 66, p. 4, l. 16 0 p. 5, l. 4.) Notwithstanding
7 the Order, Plaintiffs have repeatedly elicited testimony regarding the potential
8 criminal implications for violating California's franchise laws. However, because
9 the Court entered partial summary judgment on the portion of Plaintiffs' claim
10 related to potential criminal and civil liability, any additional testimony or evidence
11 related thereto should be excluded as irrelevant.¹

12 Further, because it has no probative value, evidence regarding the dismissed
13 claim regarding potential criminal and civil liability are substantially outweighed by
14 the danger that additional evidence or argument on this issue will cause unfair
15 prejudice, confusing the issues, misleading the jury, or causing undue delay. By
16 trying to introduce evidence on these issues, Plaintiffs are trying to inflame the jury
17 and relitigate issues already decided by the Court. Any evidence or argument
18 relating to these issues will unfairly prejudice WSC because it already prevailed on
19 these issues. Similarly, evidence regarding these dismissed claims will mislead the
20 jury into thinking they are relevant to the dispute and cause undue delay because
21 WSC will need to defend itself against claims that were already dismissed. *See U.S.*
22 *v. 87.98 Acres of Land More or Less in the County of Merced*, 530 F.3d 899, 906
23 (9th Cir. 2008) (exclusion of evidence pursuant to Rule 403 is appropriate when
24 there is a potential prejudicial effect and no probative value). Consequently, any
25 further testimony or argument regarding potential criminal or civil liability for
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27 ¹ The Court already granted WSC's motion *in limine* number 3 excluding as
28 irrelevant evidence related to FDDs.

1 violating California's franchise laws should be excluded because, lacking any
2 probative value, it is substantially outweighed by a danger of unfair prejudice, issue
3 confusion, undue delay, and misleading the jury.

4 **III. CONCLUSION**

5 For all of these reasons, WSC's motion should be granted in its entirety.

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7 DATED: July 15, 2018

PEREZ VAUGHN & FEASBY INC.

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By: /s/ Jeffrey A. Feasby

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