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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
WITHHELD ON GROUNDS OF
PRIVILEGE**

[Motion in Limine # 6]

Date: May 15, 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 15, 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. (“B&D Fine Homes”), Bennion &
7 Deville Fine Homes SoCal, Inc., Windermere Services Southern California, Inc., and
8 Counter-Defendants Robert L. Bennion and Joseph R. Deville (collectively referred to
9 herein as the “B&D Parties”), will and hereby do move this Court to grant their Motion
10 in *Limine* No. 6 to preclude WSC from introducing any evidence, testimony, argument,
11 or comment regarding WSC’s failure to respond to the B&D Parties’ requests for updates
12 concerning Windermere Watch.

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

18 DATED: April 17, 2017

MULCAHY LLP

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20
21 By: /s/ Kevin A. Adams
Kevin A. Adams
22 *Attorneys for Plaintiffs/Counter-Defendants*
23 *Bennion & Deville Fine Homes, Inc.,*
24 *Bennion & Deville Fine Homes SoCal, Inc.,*
25 *Windermere Services Southern California,*
26 *Inc., and Counter-Defendants Robert L.*
27 *Bennion and Joseph R. Deville*
28

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., and
4 Counter-Defendants Robert L. Bennion and Joseph R. Deville (“Deville”) (collectively
5 referred to herein as the “B&D Parties”) respectfully submit this Memorandum of Points
6 and Authorities in Support of their Motion in *Limine* No. 4 to preclude Defendant/
7 Counterclaimant Windermere Real Estate Services Company (“WSC”) from introducing
8 any evidence, testimony, argument, or comment regarding WSC’s failure to respond to
9 the B&D Parties’ requests for updates concerning Windermere Watch.

10 **I. INTRODUCTION & RELEVANT FACTUAL BACKGROUND**

11 The B&D Parties anticipate that WSC to attempt to admit evidence, or otherwise
12 argue or comment explaining why it did not respond to the B&D Parties’ repeated
13 requests for updates concerning WSC’s efforts to curtail Windermere Watch. WSC,
14 however, asserted the attorney-client privilege and confidentiality to refuse to answer the
15 B&D Parties’ questions. WSC should not now be allowed to provide an explanation. This
16 evidence should be excluded.

17 Beginning in 2006, a disgruntled former Seattle client of WSC began an anti-
18 marketing campaign under the name “Windermere Watch.” (Decl. of Joseph “Bob”
19 Deville in support of Plaintiffs and Counter-Defendants’ motion in *limine* to preclude
20 WSC from introducing evidence of work performed on the Sundberg prior to October
21 2013 (“Deville Decl.”), ¶ 3.) The campaign was designed to distribute defamatory
22 statements and materials against Windermere, its franchisees and agents. (*Id.*)
23 Windermere Watch had a substantial impact on the B&D Parties’ businesses. (*Id.*) The
24 effects of Windermere Watch were visible on the field. (*Id.*)

25 The B&D Parties communicated their concern about Windermere Watch to WSC.
26 (*Id.*, ¶ 4.) Under the several contracts at issue here, WSC had the obligation to protect the
27 Windermere system and mark.

28 On December 21, 2012, the B&D Parties entered into an agreement modifying the

1 three contracts at issue here (“Modification Agreement”). (*Id.*, ¶ 5, Ex. A.) As part of the
2 Modification Agreement, WSC agreed that it “shall make commercially reasonable
3 efforts to actively pursue counter-marketing, and other methods seeking to curtail the
4 anti-marketing activities undertaken by . . . Windermere Watch.” (*Id.*, Ex. A § 3(A).)

5 After the Modification Agreement, the B&D Parties requested that Paul Drayna
6 (“Drayna”), WSC’s general counsel, provide an update on the status of WSC’s efforts to
7 battle the effects of Windermere Watch. Deville sent emails to Drayna on three separate
8 occasions. On March 29, 2013, Deville asked Drayna for an update. (Decl. of Kevin A.
9 Adams ISO MIL #6 (“Adams Decl.”), Ex. B.) On April 20, 2013, Deville again emailed
10 Drayna asking for an update. (*Id.*, Ex. C.) On June 12, 2013, Deville asked Drayna for an
11 update for the third time. (*Id.*, Ex. D.) The emails went unaddressed.

12 On August 22, 2016, counsel for the B&D Parties deposed Drayna. (Adams Decl.,
13 ¶ 3.) During the deposition, the B&D Parties’ counsel asked Drayna to explain why
14 Deville’s email requests went unanswered. (*Id.*, Ex. A, 230:16 – 231:3, 231:21-23,
15 233:20 – 234:5.) Each time Drayna was asked to explain the circumstances regarding
16 WSC’s failure to respond, Drayna asserted the attorney client privilege. (*Id.*) Drayna did
17 not testify as to why WSC did not respond. (*Id.*)

18 **II. EVIDENCE WITHHELD UNDER PRIVILEGE SHOULD BE EXCLUDED** 19 **FROM TRIAL**

20 It would be patently unfair and prejudicial to the B&D Parties to allow WSC to
21 withhold relevant and important information during discovery only to introduce it at trial.
22 Federal Rule of Evidence (“FRE”) 403 states that a “Court may exclude relevant evidence
23 if its probative value is substantially outweighed by a danger of one or more of the
24 following: unfair prejudice, confusing the issues, misleading the jury, undue delay, [or]
25 wasting time...” *Old Chief v. U.S.*, 519 U.S. 172, 180-92 (1997). “A party cannot make
26 factual assertions based on a supposedly privileged document, and then deny its adversary
27 an opportunity to uncover the foundation for those assertions in order to contradict them.
28 In a similar vein, a party cannot introduce a document as evidence while denying the

1 opponent sufficient discovery with respect to the ‘surrounding circumstances and
2 substance’ of the document.” *Morris v. Long*, No. 1:08-CV-01422-AWI, 2012 WL
3 1498889, at *5 (E.D. Cal. Apr. 27, 2012) (citing *Merisant Co. v. McNeil Nutritionals,*
4 *LLC*, 242 F.R.D. 303, 311 (E.D.Pa.2007)). A holder of the attorney-client privilege “may
5 elect to withhold or disclose, but after a certain point his election must remain final.”
6 *Weil v. Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, 24 (9th Cir.
7 1981)

8 Here, WSC has elected to withhold its response as to the circumstances surrounding
9 its failure to respond to Deville’s requests for updates. (Adams Decl., Ex. A, 230:16 –
10 231:3, 231:21-23, 233:20 – 234:5.) It would be unfair to allow it to stonewall the B&D
11 Parties during discovery only to allow it to introduce the evidence at trial. *Morris*, 2012
12 WL 1498889, at *5; *Weil*, 647 F.2d at 24. This form of unfair surprise at trial is what the
13 discovery process is purposed to prevent. The B&D Parties requested the information and
14 WSC decided to withhold it. It would be highly prejudicial to the B&D Parties to allow
15 WSC to wait until trial to answer the questions. On those grounds, WSC should be
16 precluded from introducing any evidence, testimony, argument, or comment regarding
17 WSC’s failure to respond to the B&D Parties’ requests for updates concerning
18 Windermere Watch.

19 **III. CONCLUSION**

20 For the reasons stated above, the B&D Parties respectfully request that the Court
21 enter an order precluding WSC from introducing any evidence, testimony, argument, or
22 comment regarding WSC’s failure to respond to the B&D Parties’ requests for updates
23 concerning Windermere Watch.

24
25 Dated: April 17, 2017

MULCAHY LLP

26
27 By: /s/ Kevin A. Adams
28 Kevin A. Adams
Attorneys for Plaintiffs and Counter-Defendants