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10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 BENNION & DEVILLE FINE) Case No. 5:15-cv-01921-R-KK
13 HOMES, INC., a California) *Hon. Manual L. Real*
14 corporation, BENNION & DEVILLE)
15 FINE HOMES SOCAL, INC., a) **PLAINTIFFS AND COUNTER-**
16 California corporation,) **DEFENDANTS' REPLY IN**
17 WINDERMERE SERVICES) **SUPPORT OF MOTION TO**
18 SOUTHERN CALIFORNIA, INC., a) **STRIKE DEFENDANTS AND**
19 California corporation,) **COUNTER-PLAINTIFFS'**
20) **REBUTTAL EXPERT REPORT**
21 Plaintiffs,)
22)

23 v.)

24 WINDERMERE REAL ESTATE)
25 SERVICES COMPANY, a)
26 Washington corporation; and DOES)
27 1-10.)

28 Defendants.)

AND RELATED COUNTERCLAIMS)

Date: May 1, 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.,
2 Bennion & Deville Fine Homes SoCal, Inc., Windermere Services Southern
3 California, Inc., and Counter-Defendants Robert L. Bennion and Joseph R. Deville
4 (collectively, the “B&D Parties”) respectfully submit this Reply in Support of their
5 Motion to Strike Defendants/Counter-Plaintiffs’ Rebuttal Expert Report.

6 **I. INTRODUCTION**

7 Windermere Real Estate Services Company’s (“Windermere”) opposition
8 can be boiled down to: *no harm, no foul*. The B&D Parties, however, were
9 prejudiced by Windermere’s significantly delayed disclosure of its rebuttal expert
10 report. Moreover, Windermere’s own chronology makes it clear that it was *five*
11 *months* late with no excuse. For the reasons set forth below, Windermere’s rebuttal
12 expert report should be stricken as untimely, and its expert should be precluded
13 from introducing as evidence at trial the opinions outlined in the report.

14 **II. WINDERMERE’S UNTIMELY EXPERT DISCLOSURE WAS NOT**
15 **HARMLESS TO THE B&D PARTIES**

16 The B&D Parties would be prejudiced if Windermere’s untimely rebuttal
17 expert report is not stricken and testimony about it is allowed.¹

18 As Windermere’s own chronology indicates, it did not contemplate a
19 rebuttal report until *after* the trial was continued on January 9, 2017. On October 3,
20 2016, the trial was continued to January 31, 2017. (Windermere’s Oppo. to Mtn. to
21 Strike Rebuttal Expert Report (“Oppo.”), at 2; D.E. No. 63.) Then, on January 9,
22 2017, the trial was continued to May 30, 2017. (Oppo., at 2; D.E. No. 78.) As of
23 January 9th, twenty-one days before what was to be the beginning of trial,
24 Windermere had not served the rebuttal expert report. It was not until almost two
25 months later, on March 3, 2017, that Windermere served the rebuttal report. Had

26 ¹ Pursuant to Federal Rule of Civil Procedure (“FRCP”) 26(a)(2)(D)(ii), rebuttal
27 expert reports must be disclosed “within 30 days after the other party’s disclosure.”
28 Because the initial disclosures were exchanged on September 16, 2016, all rebuttal
expert reports were due by October 17, 2016. (Decl. of Kevin A. Adams ISO
Motion to Strike Rebuttal Expert Witness Report (“Adams Decl.”), ¶3, Ex. A.)

1 the Court not continued the trial, the rebuttal report would not have been available
2 for trial on January 30, 2017.

3 Moreover, Windermere had all evidence and deposition testimony relating to
4 the “Recast Profit & Loss” by October 19, 2017, the date of the deposition of Greg
5 Barton. (Oppo., 2-3.) Had Windermere intended to serve a rebuttal report, it would
6 have done so in time for the January 30, 2017 trial date on calendar until January 9,
7 2017. It is evident, then, that Windermere did not intend to serve a rebuttal report
8 until after the trial was continued. The B&D Parties would be prejudiced if
9 Windermere is allowed to exploit the Court’s trial date continuance to add a
10 rebuttal expert report it had not contemplated before.

11 Windermere’s authority is distinguishable and highlights the egregiousness
12 of its disregard for disclosure timelines imposed by the FRCP. In *Pineda v. City*
13 *and County of San Francisco*, 280 F.R.D. 517 (N.D. Cal. 2012), the plaintiff timely
14 disclosed the identity of its expert witnesses, but did not serve the witness’ reports
15 until 11 days later. 280 F.R.D. at 518-19. Here, on the other hand, Windermere (i)
16 did not timely identify a rebuttal expert, or (ii) serve a rebuttal report, until 137
17 days after the deadline. Such a delay, where the B&D Parties considered expert
18 disclosure complete as of months prior, is prejudicial to the B&D Parties.
19 Accordingly, Windermere’s untimely rebuttal expert disclosure is not harmless and
20 should be stricken.

21 **III. EXCLUSION IS THE APPROPRIATE SANCTION IN THIS CASE**

22 Windermere’s argument that exclusion is inappropriate because the B&D
23 Parties are in the same position had the rebuttal report been produced in a timely
24 manner is incorrect. As shown above, Windermere would not have prepared or
25 served this report had the Court not continued the trial date on January 9, 2017.
26 Instead, it was Windermere which was in the position to prepare and serve the
27 rebuttal expert and report in a timely manner. It chose not to; it should not now be
28 allowed to gain from the Court’s continuance.

1 The B&D Parties have, and will continue to incur costs and fees as a result
2 of Windermere's untimely disclosure. The time and resources expended on
3 bringing the instant motion are not the only prejudicial costs. The B&D Parties will
4 necessarily be compelled to analyze the rebuttal report and expand the scope of its
5 deposition of Windermere's expert Neil Beaton ("Beaton") to include the contents
6 of the rebuttal report and disclosure. Given the recent disclosure at issue here, the
7 B&D Parties have already been forced to postpone Beaton's deposition until the
8 report is analyzed.

9 Windermere's authority in support of its (incorrect) assertion that the B&D
10 Parties will not be prejudiced are distinguishable in important ways. In *Vihn*
11 *Nguyen v. Radiant Pharmaceutical*, No. 11-0406, 2013 WL 12149214 (C.D. Cal.
12 July 19, 2013), the defendant did not serve an initial expert disclosure. *Id.*, 2013
13 WL 12149214, at *1. The defendant designated a rebuttal expert shortly after
14 receiving the plaintiff's initial disclosure. *Id.* Moreover, the defendant limited its
15 expert's testimony to rebuttal of the plaintiff's expert. *Id.*, 2013 WL 12149214, at
16 *1-2. The court held that given the defendant's limitation, it would not exclude the
17 report. *Id.* In this case, no such limitation is practicable. Beaton is already
18 testifying as to his opinions in the timely initial disclosure. Consequently, no lesser
19 sanction is available here than to strike, and preclude testimony of, the late report.

20 *United States v. 14.3 Acres of Land, more or less, situated in San Diego*
21 *Cty., Cal.*, No. CIV 07CV886-W(NLS), 2009 WL 249986, at *8 (S.D. Cal. Jan. 30,
22 2009) concerns two motions to exclude untimely rebuttal expert reports, both of
23 which were granted. *United States*, 2009 WL 249986, at *8. Consequently,
24 Windermere's authority supports the B&D Parties position.

25 *Fahmy v. Jay Z*, No. 07-5715, 2015 WL 5680299 (C.D. Cal. Sep. 24, 2015)
26 is distinguishable. In that case, the plaintiff sought to exclude testimony concerning
27 evidence (not a report and designation) that was not timely disclosed. *Id.*, 2015 WL
28 568029, at *6-7. During the expert's deposition, he disclosed only a portion of the

1 evidence upon which he relied to render his testimony that had not been included
2 in his report. *Id.* Finding that the expert’s “reliance on the new [evidence] was
3 disclosed to plaintiff,” the court denied exclusion. *Id.* In this case, however,
4 Windermere is not attempting to add new bases for its expert’s rebuttal opinion in
5 an untimely manner; ***it is attempting to introduce its entire rebuttal report*** even
6 though it was five months overdue. Consequently, this case is far more egregious
7 than only failing to disclose additional bases for a timely served expert disclosure.

8 In *Galentine v. Holland Am. Line-Westours, Inc.*, 333 F. Supp. 2d 991, 994
9 (W.D. Wash. 2004), the party served its report “only eleven days” late.

10 Additionally, the court there imposed sanctions, allowing the other party to
11 “inform the jury of the fact that Plaintiff’s expert saw Defendant’s expert report
12 before producing his own report” to address the prejudice the defendant was
13 concerned with. *Id.*, 333 F. Supp. 2d at 994-95. In this case, the prejudice that the
14 B&D Parties would suffer would not be ameliorated by such an instruction to the
15 jury. Windermere should not be allowed to exploit the continuance of the trial to
16 introduce, for the first time, a rebuttal expert report five months after it should (*and*
17 *could*) have disclosed. Accordingly, given the high level of prejudice that the B&D
18 Parties would suffer, and the reasons outlined in the moving documents, exclusion
19 of Beaton’s rebuttal report and all testimony about the report is appropriate.

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1 **V. CONCLUSION**

2 For the aforementioned reasons, and the reasons outlined in the moving
3 documents, the B&D parties respectfully request that the Court enter an order
4 striking Beaton’s rebuttal expert report and precluding testimony about this report
5 at trial.

6 Dated: April 17, 2017

MULCAHY LLP

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9 By: /s/ Kevin A. Adams
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15 *Services Southern California, Inc.,*
16 *and Counter-Defendants Robert L.*
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