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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' REPLY IN
SUPPORT OF MOTION IN LIMINE
TO PRECLUDE WSC FROM
INTRODUCING EVIDENCE OF
BREACH BY SERVICES SOCAL
NOT IDENTIFIED IN THE NOTICE
OF TERMINATION**

[Motion in Limine # 1]

Date: May 1, 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 Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc., Bennion &
2 Deville Fine Homes SoCal, Inc., Windermere Services Southern California, Inc.
3 (“Services SoCal”), 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 in *Limine* No. 1 to preclude Defendant/ Counterclaimant Windermere Real
6 Estate Services Company (“WSC”) from introducing any evidence, testimony, argument,
7 or comment that it terminated the Area Representation Agreement with Windermere
8 Services Southern California, Inc. for any reason other than those grounds set forth in
9 the February 26, 2015 notice of termination.

10 **I. INTRODUCTION**

11 It is undisputed that the Area Representation Agreement was terminated. Under the
12 contract, the parties could only terminate in one of four ways: (i) at any time by mutual
13 written agreement of the parties (not at issue here); (ii) by either party upon 180 days
14 written notice; (iii) by either party on 90 days written notice if the termination is for cause
15 based upon a material breach of the agreement described in the notice and not cured
16 within 90 days; and (iv) by either party without prior notice in the event of a bankruptcy
17 or other outcomes not relevant here. (Decl. of Joseph “Bob” Deville ISO Motion in
18 *Limine* No. 1 (“Deville Decl.”), Ex. A.) The agreement did not allow other means of
19 termination. (*See id.*)

20 If the contract was terminated without cause, the terminating party must pay the
21 Termination Obligation under § 4.2. (*Id.*) If it was terminated for cause, the terminated
22 party is required to provide written notice describing the alleged breaches, allowing 90
23 days to cure. (*Id.*) If WSC contends it terminated the Area Representation Agreement for
24 cause, they are limited to the alleged material breaches outlined in its February 26, 2015
25 notice of termination. (*Id.*, Ex. C.) Alleged breaches beyond that are not relevant, and if
26 allowed, would unfairly prejudice the B&D Parties, and would confuse the jury.
27 Accordingly, as outlined below, the alleged breaches other than those set forth in the
28 February 26, 2015 notice of termination should be excluded as irrelevant and prejudicial

1 under Federal Rules of Evidence 401, 402, and 403.

2 **II. WSC IGNORES THE REASONABLE NOTICE OF TERMINATION FOR**
3 **CAUSE PRESCRIBED BY THE AGREEMENT TO ARGUE RELEVANCE**

4 **A. The Area Representation Agreement Establishes What Reasonable**
5 **Notice Is Required To Negate The Termination Obligation**

6 WSC's Opposition conflates two distinct means of termination identified by the
7 Area Representation Agreement in an (erroneous) attempt to establish two distinct forms
8 of reasonable notice. However, under the contract, there is one means of giving
9 reasonable notice of material breaches and opportunity to cure. Under § 4.1(c), any party
10 may terminate upon 90 days written notice "for cause based upon a material breach of
11 the Agreement *described in the notice* and not cured within the ninety (90) day period."
12 (Deville Decl., Ex. A, § 4.2(c) (emphasis added).) The February 26, 2015 notice of
13 termination is the only notice that contains an alleged material breach. (*Id.*, Ex. B, C.)
14 Anything less than that is unreasonable under the contract. Consequently, alleged
15 breaches beyond those in the February 26th letter are irrelevant, and if allowed, would
16 unfairly prejudice the B&D Parties.

17 **B. Because Services SoCal Is Only Required To Cure Material Breaches**
18 **In The Written Notice, The Alleged Breaches Beyond Those Are**
19 **Irrelevant**

20 Under § 4.1(c) of the Area Representation Agreement, any party may terminate
21 upon 90 days written notice "for cause based upon a material breach of the Agreement
22 *described in the notice* and not cured within the ninety (90) day period." (Deville Decl.,
23 Ex. A, § 4.2(c) (emphasis added).) On February 26, 2015, WSC terminated the Area
24 Representation Agreement, listing as the lone "material breach," Services SoCal's
25 alleged "fail[ure] to collect and/or remit license and technology fees from licensees in
26 [Services SoCal's] area." (*Id.*, Ex. C.) Because this was the only breach identified in
27 WSC's notice of termination, any other grounds WSC's termination of the Area
28 Representation Agreement are not relevant to the instant dispute. Services SoCal
contends it did not breach of the agreement. At trial, if the jury decides that Services

1 SoCal did not breach the agreement as alleged in the February 26, 2015 notice, then the
2 termination was without cause. As a result, Services SoCal is entitled to the Termination
3 Obligation under § 4.2 of the agreement.

4 In its opposition, WSC concedes that the alleged breaches other than those set
5 forth in the February 26, 2015 notice of termination are only relevant to deciding
6 whether Services SoCal is entitled to the Termination Obligation under § 4.2 of the Area
7 Representation Agreement. (Oppo. to the B&D Parties' Motion in Limine No. 1
8 ("Oppo."), at 3-6.) As outlined below, because WSC characterized its January 28th
9 notice of termination as "without cause," any alleged breaches are irrelevant to Services
10 SoCal's entitlement to the Termination Obligation under § 4.2.

11 **C. Because The January 28th Termination Was Without Cause, WSC**
12 **Cannot Claim That The Additional Alleged Breaches Are Relevant**

13 Under § 4.1(b), either party may terminate upon 180 days written notice to the
14 other party. (Decl. of Joseph R. "Bob" Deville ISO Motion in Limine No. 1 ("Deville
15 Decl."), Ex. A, §§ 4.1(b).) Where a party terminates pursuant to § 4.1(b), the Terminated
16 Party is entitled to "be paid an amount equal to the fair market value of the Terminated
17 Party's interest in the Agreement" ("Termination Obligation"). (Deville Decl., Ex. A, §
18 4.2.) However, there is no Termination Obligation if the termination is "based upon the
19 material breach of the obligations of the Terminated Party . . . continuing *after*
20 *reasonable notice and opportunity to cure.*" (*Id.*) On January 28, 2015, terminated the
21 Area Representation Agreement pursuant to § 4.1(b), setting the date of termination on
22 July 28, 2015. (Deville Decl., Ex. B.) Importantly, in its February 26, 2015 notice of
23 termination, discussed *supra*, ***WSC's counsel characterized the January 28th***
24 ***termination as "without cause."*** (Deville Decl., Ex. C.) Specifically, the February 26th
25 letter states:

26 On January 28, 2015, WSC provided [WSSC] with notice of
27 termination As you are aware, paragraph 4.1 of the Agreement
28 provides that either party may terminate the Agreement ***without cause*** upon
180 days' notice. The Agreement will, therefore, ***terminate without cause***
on July 28, 2015. [¶] Without waiver of WSC's right to terminate the

1 Agreement *without cause*, this letter constitutes notice of WSC’s intent to
2 terminate the Agreement with cause due to [Services SoCal’s] material
3 breach of the Agreement.

4 (Emphasis added.) Because WSC’s January 28th termination is without cause, therefore,
5 Services SoCal is entitled to the Termination Obligation.

6 Even if the Court interprets the Area Representation Agreement to require a lesser
7 form of notice than that outlined in § 4.1(c) (it should not), WSC itself characterized its
8 termination under § 4.1(b) as without cause. For WSC to be relieved of its obligation to
9 pay Services SoCal the Termination Obligation, Services SoCal must fail to cure
10 material breaches of which it had reasonable notice. (Deville Decl., Ex. A, § 4.2.) WSC
11 characterized its January 28th notice as termination without cause. This negates any
12 possible reasonable notice required for Services SoCal to cure. WSC cannot now attempt
13 to re-characterize its January 28th notice of termination. The alleged breaches are not
14 relevant to adjudicating whether Services SoCal is entitled to the Termination Obligation
15 under § 4.2.

16 The B&D Parties anticipate that WSC will conflate the two distinct means of
17 termination outlined above just like the Opposition does here. WSC mixes the analysis
18 of Services SoCal’s entitlement to the Termination Obligation—relevant only to the
19 January 28th notice—with the analysis of Services SoCal’s opportunity to cure the
20 alleged breach in the February 28th notice. In so doing, WSC misleads the Court, as it
21 would the jury, into an incorrect analysis of Services SoCal’s entitlement under § 4.2.
22 Because the alleged breaches are not relevant, would only be substantially prejudicial to
23 the B&D Parties, and would confuse the jury, WSC should be precluded from
24 attempting to introduce any evidence, testimony, argument, or comment that it
25 terminated the Area Representation Agreement for any reason other than those grounds
26 set forth in the February 26, 2015 notice of termination.

27 **III. CONCLUSION**

28 For the reasons stated above, and those outlined in the moving documents, the
B&D Parties respectfully request that the Court enter an order precluding WSC from

1 attempting to introduce any evidence, testimony, argument, or comment that it
2 terminated the Area Representation Agreement for any reason other than those grounds
3 set forth in the February 26, 2015 notice of termination.
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5 Dated: April 17, 2017

MULCAHY LLP

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7 By: /s/ Kevin A. Adams

8 Kevin A. Adams

9 *Attorneys for Plaintiffs and Counter-Defendants*
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