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Windermere Real Estate Services Company
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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 SOCAL, 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 R (KKx)

Hon. Manuel L. Real

**WINDERMERE REAL ESTATE
SERVICES COMPANY'S NOTICE
OF OBJECTIONS TO THE B&D
PARTIES' AMENDED WITNESS
LIST**

Date: May 15, 2017

Time: 10:00 a.m.

Courtroom: 880

Complaint Filed: September 17, 2015

1 On August 29, 2016, the parties filed witness lists pursuant to the Court’s
2 initial scheduling order. (Document Nos. 50, 53). On May 22, 2017, three weeks
3 before trial and nearly nine months after the close of non-expert discovery, Plaintiffs
4 and Counter-Defendants Bennion & Deville Fine Homes, Inc., Bennion & Deville
5 Fine Homes SoCal, Inc., Windermere Services Southern California, Inc., Robert L.
6 Bennion and Joseph R. Deville (collectively “Counter-Defendants”) filed an
7 amended witness list that included new witnesses not disclosed in their original list
8 and not disclosed pursuant to Fed. R. Civ. Proc. 26. (Document No. 128). Counter-
9 Defendants did not seek, nor where they granted, leave to file an amended witness
10 list. Defendant and Counterclaimant Windermere Real Estate Services Company
11 (“WSC”) prepared for trial based on Counter-Defendants’ original witness list. It
12 identified exhibits, prepared witness examinations, and filed motions in limine based
13 on the witness and exhibit lists Counter-Defendants filed pursuant to the Court’s
14 scheduling order. WSC is severely and unfairly prejudiced by this eleventh hour
15 addition of new witnesses. This gamesmanship cannot be rewarded. Counter-
16 Defendants’ untimely and inappropriate amended witness list should be stricken in
17 its entirety.

18 If the Court does not reject Counter-Defendants’ entire amended witness list
19 as it should, the witnesses that were not properly disclosed pursuant to Fed. R. Civ.
20 Proc. 26 and/or not on the original witness list (Messrs. King, Krueger, and
21 Schuster) should be precluded from testifying at trial. Counter-Defendants served
22 their Rule 26 Initial Disclosures on December 14, 2015, identifying 24 individuals
23 likely to have discoverable information they anticipated using to support their
24 claims or defenses. (Exhibit A.) Messrs. King and Krueger were not identified as
25 witnesses with potentially relevant information. (*Id.*, p. 2-7.) Counter-Defendants
26 never supplemented those disclosures. Counter-Defendants’ original witness list,
27 filed on the day non-expert discovery closed, included Mr. King but not Mr.
28 Krueger. (Compare Document No. 50.) Counter-Defendants’ amended witness list,

1 filed three weeks before trial and nine months after the close of discovery, included
2 Mr. King, and added Mr. Krueger and a third witness (Fred Schuster) that was not
3 identified in their original witness list. All three of these witnesses should be
4 excluded from trial.

5 Counter-Defendants are perpetrating a trial by ambush. By including Messrs.
6 King and Krueger on their amended witness list, Counter-Defendants believe these
7 individuals have discoverable information relevant to the claims or defenses in this
8 matter. Consequently, Counter-Defendants were required to identify these
9 individuals pursuant to Rule 26(a) or supplement their disclosures in a timely
10 manner pursuant to Rule 26(e). Rule 37(c)(1) “forbids the use at trial of any
11 information required to be disclosed by Rule 26(a) that is not properly disclosed.”
12 *Neurovision Medical Products, Inc. v. NuVasive, Inc.*, No. 09-6988, 2013 WL
13 12112578, at *1 (C.D. Cal. April 29, 2013) (quoting *R&R Sails, Inc. v. Ins. Co. of*
14 *Pa.*, 673 F.3d 1240, 1246 (9th Cir. 2012) and excluding witnesses that were not
15 properly disclosed pursuant to Fed. R. Civ. Proc. 26.)

16 Counter-Defendants did not meet their Rule 26 disclosure obligations. They
17 did not identify Messrs. King and Krueger as potential witnesses during discovery
18 and never disclosed the subject matter of their supposedly relevant information.
19 They did not identify Mr. King as an individual with potential relevant information
20 until they filed their original witness list on the last day of non-expert discovery, and
21 never disclosed the subject matter of the allegedly relevant information Mr. King
22 possesses. (See Exhibit A; see also Document No. 50.) As for Mr. Krueger,
23 Counter-Defendants identified him as a person with potentially relevant information
24 *for the first time* when they filed their amended witness list on May 22, 2017, *three*
25 *weeks before trial* and nearly nine months after non-expert discovery closed.
26 (Document No. 128.) Furthermore, Counter-Defendants’ failure was neither
27 substantially justified nor harmless because they knew the identity if these
28 individuals since the start of this litigation, and waited until non-expert discovery

1 closed to prevent the individuals from being deposed. As the court recognized in
2 *Neurovision*, automatic exclusion is required under these circumstances.
3 *Neurovision*, 2013 WL 12112578, at *1. Finally, Mr. Schuster must be excluded
4 because he was not included in the original witness list and added only three weeks
5 before trial, as WSC was completing its trial preparation and the applicable motion
6 deadlines had passed.

7 For all of the aforementioned reasons, the Court should reject Counter-
8 Defendants amended witness list (Document No. 128) in its entirety, or in the
9 alternative, preclude Messrs. King, Krueger, and Schuster from testifying at trial.

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DATED: May 24, 2017 PEREZ VAUGHN & FEASBY INC.

By: /s/ Jeffrey A. Feasby
Jeffrey A. Feasby
Attorneys for
Windermere Real Estate Services Company