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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

26 AND RELATED COUNTERCLAIMS
27
28

Case No. 5:15-CV-01921 R (KKx)

Hon. Manuel L. Real

**DEFENDANT AND
COUNTERCLAIMANT'S REPLY
IN SUPPORT OF ITS MOTION *IN*
LIMINE TO EXCLUDE EVIDENCE
RELATED TO DISMISSED
CLAIMS**

Motion *in Limine* No. 3 of 4

Date: May 15, 2017

Time: 10:00 a.m.

Courtroom: 880

Complaint Filed: September 17, 2015

1 **I. INTRODUCTION**

2 In their response to Defendant and Counter-Claimant Windermere Real Estate
3 Services Company’s (“WSC”) motion, Counter-Defendants Bennion & Deville Fine
4 Homes, Inc., Bennion & Deville Fine Homes SoCal, Inc., Windermere Services
5 Southern California, Inc. (“WSSC”), Robert L. Bennion, and Joseph R. Deville
6 (collectively “Counter-Defendants”) agree that 29 of the exhibits WSC identified in
7 its motion are irrelevant and properly excluded. (Document No. 113, p. 1, n. 2.)
8 Obviously, these exhibits must be excluded per Counter-Defendants’ express
9 concession.

10 Counter-Defendants, however, wrongly assert that documents relating to
11 franchise disclosure registrations for years 2011-2013 and 2016 are relevant. This is
12 false. Counter-Defendants’ argument is based on (1) a fictional position attributed
13 to WSC fabricated by Counter-Defendants from whole cloth, and
14 (2) mischaracterizations of the deposition testimony of WSC’s representatives.

15 WSC’s position is, and always has been, that it did not register franchise
16 disclosure documents in 2014 because the parties were negotiating termination of
17 the Area Representation Agreement. Contrary to Counter-Defendants’ false
18 position created solely in hopes of making that which is irrelevant relevant, WSC
19 does not claim that WSSC’s untimely delivery of audited financial statements
20 prevented it from registering the 2014 franchise disclosure documents.
21 Accordingly, the 23 exhibits included in Counter-Defendants’ Proposed Exhibit List
22 (identified by number in fn. 1 below) relating to franchise disclosure filings in 2011-
23 2013 and 2016 are entirely irrelevant to the present dispute and are properly
24 excluded.

25 **II. DOCUMENTS RELATED TO FRANCHISE DISCLOSURE**
26 **REGISTRATIONS IN 2011-2013 AND 2016 ARE IRRELEVANT**

27 As established by the relevant deposition testimony, in order to sell
28 Windermere franchises in California, WSC was and is required to file an annual

1 Franchise Disclosure Document (“FDD”) with the California Department of
2 Business Oversight (“DBO”). (Document No. 113-1, Ex. A, p. 130-131.) And in
3 order to file the FDD, WSC required audited financial statements from WSSC as its
4 Area Representative. Accordingly, pursuant to the Area Representation Agreement
5 (“ARA”), WSSC was required to provide WSC with a copy of its audited financial
6 statements from the previous year by no later than March 1. While WSC had the
7 ultimate responsibility to file the FDD, WSC was unable to do so without WSSC’s
8 cooperation in preparing and filing the documents. (Document No. 113-1, Ex. A,
9 p. 64.)

10 WSSC provided audited financial statements in July or August 2014, months
11 after the March 1 deadline set by the ARA. (Document No. 113-1, Ex. A, p. 309-
12 310.) After receiving WSSC’s audited financial statements, WSC filed the FDD in
13 October 2014. (*Id.* at p. 314-315.) WSC did not complete the registration because,
14 during the second half of 2014, the parties were in negotiations to mutually
15 terminate the ARA. (Document No. 113-1, Ex. A, pp. 310-311, 315.) WSC’s
16 position regarding the 2014 FDD is, and has always been, that it was not registered
17 because the parties were negotiating termination of the ARA and WSSC would no
18 longer be the area representative for Southern California. (*Id.*)

19 Despite this clear and consistent testimony, Counter-Defendants contend that
20 “WSC will argue ... that [WSSC’s] audited financials were needed in April 2014 for
21 WSC to register its FDD with the State of California.” (Document No. 113, p. 3.)
22 Counter-Defendants offer no citation for this claim because it is completely contrary
23 to the record. Further, Counter-Defendants mischaracterize the deposition
24 testimony of Paul Drayna, WSC’s General Counsel, multiple times. They argue that
25 “it was WSC’s sole responsibility to prepare and register the FDD with the DBO.”
26 (Document No. 113, p. 2.) Drayna actually testified that, per the ARA, “the parties
27 would cooperate in preparing and filing those documents on an annual basis.”
28 (Document No. 113-1, Ex. A, p. 64.) Counter-Defendants also argue that the annual

1 FDD registration “would typically occur at the request of [WSSC] and only after
2 [WSSC] was in discussions with an interested prospective franchisee.” (Document
3 No. 113, p. 2.) *Nowhere* does Drayna state the FDD would be registered at WSSC’s
4 request nor does he testify that registration would occur only after WSSC was in
5 discussions with an interested prospective franchisee. (Document No. 113-1, Ex. A,
6 p. 129-131.) That simply never happened. Finally, Counter-Defendants argue
7 WSSC “had historically only submitted its audited financial statements to WSC for
8 submission to the DBO only after [WSSC] learned of an interested prospective
9 franchise.” (Document No. 113, pp. 2-3.) But, again, Counter-Defendants cite to
10 portions of Drayna’s deposition testimony that do not even *address* WSSC’s reasons
11 for submitting their audited financial statements to WSC. (Document No. 113-1,
12 Ex. A, p. 129-131.)

13 In short, Counter-Defendants have invented a false position regarding the
14 2014 FDD registration, supported by mischaracterizations of deposition testimony,
15 in an effort to make irrelevant exhibits relevant. WSC’s actual position, supported
16 by Drayna’s deposition testimony, is that the 2014 FDD was not registered because
17 the parties were negotiating the termination of the ARA. (Document No. 113-1, Ex.
18 A, pp. 310-311, 315.) Because the circumstances surrounding the 2014 FDD
19 registration were unique, and had nothing to do with WSSC’s delay in providing
20 audited financial statements, documents relating to FDD registrations in other years
21 have no bearing whatsoever on the 2014 FDD registration, are irrelevant, would
22 unnecessary delay and confuse the proceedings and should therefore be excluded.¹

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27 ¹ Counter-Defendants’ Exhibits relating to FDD filings in 2011-2013 and 2016
28 which WSC seeks to exclude are comprised of the following: Exhibits 20-25, 27, 33,
44, 59, 61-63, 72, 76, 78, 93, 108, 248, 277, 384, 404, and 408.

1 **III. CONCLUSION**

2 For the foregoing reasons, and the reasons provided in its moving papers,
3 Defendant and Counterclaimant Windermere Real Estate Services Company
4 respectfully requests that the Court grant its Motion *in Limine* to Exclude Evidence
5 Related to Dismissed Claims, and exclude Counter-Defendants' Exhibits 20-27, 33,
6 43, 44, 46, 47, 59-63, 68-70, 72, 76, 78-83, 93, 105-109, 158-160, 182, 185, 188-
7 190, 212, 248, 276, 277, 384, 404, 405, 407 and 408.

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9 DATED: May 1, 2017 PEREZ VAUGHN & FEASBY INC.

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11 By: /s/ Jeffrey A. Feasby
12 Jeffrey A. Feasby
13 Attorneys for
14 Windermere Real Estate Services Company
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