

1 John D. Vaughn, State Bar No. 171801  
Jeffrey A. Feasby, State Bar No. 208759  
2 Christopher W. Rowlett, State Bar No. 257357  
PEREZ VAUGHN & FEASBY Inc.  
3 600 B Street, Suite 2100  
San Diego, California 92101  
4 Telephone: 619-702-8044  
Facsimile: 619-460-0437  
5 E-Mail: vaughn@pvflaw.com

6 Jeffrey L. Fillerup, State Bar No. 120543  
Rincon Law LLP  
7 90 New Montgomery St  
Suite 1400  
8 San Francisco, California 94105  
Telephone: (415) 996-8199  
9 Facsimile: (415) 996-8280  
E-Mail: jfillerup@rinconlawllp.com

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11 Attorneys for Defendant and Counterclaimant  
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  
26

27 AND RELATED COUNTERCLAIMS  
28

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

Hon. Manuel L. Real

**OPPOSITION TO THE B&D  
PARTIES' MOTION *IN LIMINE* TO  
PRECLUDE WSC FROM  
INTRODUCING EVIDENCE OF  
THE PERSONAL WEALTH OF  
PLAINTIFFS BENNION OR  
DEVILLE**

**[Motion in Limine #3]**

Date: May 1, 2017

Time: 10:00 a.m.

Courtroom: 880

Complaint Filed: September 17, 2015

1     **I. INTRODUCTION**

2           With this motion, Counter-Defendants ask the Court to enter an order  
3 precluding Counterclaimant Windermere Real Estate Services Company (“WSC”)  
4 “from introducing evidence of the personal wealth of Plaintiffs (sic) Bennion or  
5 Deville.” Counter-Defendants never identify what evidence they are asking the  
6 Court to exclude, leaving the Court and WSC to guess. If, by “personal wealth,”  
7 Counter-Defendants mean references to net worth, WSC agrees that such  
8 information is not relevant to this matter. Neither Bennion nor Deville’s personal  
9 net worth was the subject of discovery in this matter. WSC does not know Bennion  
10 or Deville’s personal net worth and does not plan to introduce any evidence of same  
11 during this litigation. Consequently, if “personal wealth” means “personal net  
12 worth,” no order is necessary because WSC does not intend to present any such  
13 evidence to the jury.

14           If, however, Counter-Defendants seek to exclude evidence of the millions of  
15 dollars in wages and personal expenditures Bennion and Deville extracted from their  
16 related entities during the relevant time frame, the motion should be denied.  
17 Counter-Defendants Bennion and Deville own the remaining Counter-Defendant  
18 entities: Bennion & Deville Fine Homes, Inc. (“B&D Fine Homes”), Bennion &  
19 Deville Fine Homes SoCal, Inc. (“B&D Fine Homes SoCal”), and Windermere  
20 Services Southern California, Inc. (“WSSC”) (collectively the “B&D Entities”).  
21 B&D Fine Homes and B&D Fine Homes SoCal were franchisees of WSC that were  
22 owned and operated by Bennion and Deville. WSSC, also owned by Bennion and  
23 Deville, was the area representative responsible for collecting and remitting license  
24 and other fees from WSC’s franchisees in Southern California, including B&D Fine  
25 Homes and B&D Fine Homes SoCal (the “B&D Franchisees”).

26           It is undisputed that from July 2014 until September 2015, the effective date  
27 of Counter-Defendants’ termination of their franchise agreements with WSC,  
28 neither of the B&D Franchisees had paid any of the franchise or other fees owed to

1 WSC. During 2014 alone, Bennion and Deville paid themselves \$695,000 in wages  
2 from the B&D Franchisees and had those entities pay personal, non-business  
3 expenditures totaling over \$300,000.

4 WSC claims that it had good cause to terminate the parties' agreement due to  
5 WSSC's breach of the agreement by, *inter alia*, failing to act in "good faith" and use  
6 its "best efforts" to collect and remit franchise and other fees from their related  
7 WSC franchisees. As support for these claims, WSC will offer evidence of the  
8 wages and personal expenditures Bennion and Deville took out of the  
9 B&D Franchisees while simultaneously failing and refusing to pay the franchise and  
10 related fees owed to WSC. This evidence is unquestionably relevant and should be  
11 presented to the trier of fact. To the extent Counter-Defendants' vague and  
12 ambiguous request to exclude evidence of "personal wealth" includes evidence of  
13 the wages and personal expenditures Bennion and Deville extracted from the  
14 B&D Franchisees, the motion *in limine* should be denied.

15 **II. FACTUAL BACKGROUND**

16 On May 1, 2004, WSC and WSSC entered into an Area Representation  
17 Agreement ("ARA"), under which WSSC undertook to act as WSC's representative  
18 for its franchisees in Southern California. WSSC's duties included, as is relevant to  
19 this motion, the collection of license/franchise fees and other fees due to from  
20 WSC's Southern California franchisees under their franchise agreement, and the  
21 payment to WSC its portion of those fees. (*See* Document No. 85-1, Deville Decl.,  
22 Ex. A, Section 3.) Although WSSC was not the guarantor of uncollectable fees, it  
23 was required to act "in good faith" and "with [its] best efforts" in engaging as  
24 WSC's Area Representative (*id.* at Section 2), "and to be governed by the highest  
25 ethical standards of fair dealing and honesty" when dealing with WSC (*id.* at  
26 Section 3).

27 The B&D Franchisees terminated their franchise agreements with WSC  
28 effective September 2015. At the time of termination, those entities had not paid

1 any fees owed to WSC since July 2014, which totaled nearly \$1,000,000 in  
2 outstanding fees and interest. (Feasby Decl. Ex. B, Robinson Dep. pp. 31-35.) As  
3 WSC's area representative, WSSC was responsible for collecting and remitting the  
4 fees owed by the B&D Franchisees. (See Document No. 85-1, Deville Decl., Ex. A,  
5 Section 3.) When asked why WSSC was unable to collect the amounts owed by the  
6 B&D Franchisees, Bennion and Deville claimed that those entities were struggling  
7 financially and unable to meet their obligations. (Feasby Decl. Ex. C, Bennion Dep.  
8 pp. 123-124.)

9       However, during 2014, when the B&D Franchisees were allegedly struggling  
10 financially and stopped paying their fees altogether, Bennion and Deville paid  
11 themselves \$695,000 in wages from the B&D Franchisees and charged over  
12 \$300,000 worth of discretionary expenses to those entities. These discretionary  
13 expenses included \$123,000 in payments for a motor home, over \$46,000 in lease  
14 payments for a Bentley, almost \$14,000 in lease payments for a Cadillac, and over  
15 \$29,000 in costs related to a private plane. (Feasby Decl., ¶ 6, Ex. D, Beaton Report  
16 ¶¶ 37-39, Schedule 3.)

17       WSC terminated the ARA for cause due in part to WSSC's failure to act in  
18 good faith and use its best efforts to collect the fees owing from the  
19 B&D Franchisees. (Document No. 85-1, Deville Decl., Ex. C.) WSSC claims it  
20 complied with all terms of the ARA and that WSC did not have proper cause to  
21 terminate the ARA. (Document No. 31, First Amended Complaint ¶¶ 162-163.)  
22 Whether or not WSC properly terminated the ARA for cause is an important issue in  
23 this case because WSSC's damages claims depend largely upon application of the  
24 ARA's Termination Obligation, which WSSC's expert opined to be \$2,592,526.  
25 However, that provision does not apply if WSC properly terminated the agreement  
26 for cause. (See Document No. 85-1, Deville Decl., Ex. A, Section 4.2.)

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1 **III. EVIDENCE OF BENNION AND DEVILLE’S WAGES AND**  
2 **DISCRETIONARY EXPENDITURES IS RELEVANT AND NOT**  
3 **UNDULY PREJUDICIAL**

4 The wages and personal, discretionary expenditures Bennion and Deville took  
5 from the B&D Entities is relevant to each of the parties’ claims regarding the  
6 termination of the ARA, will clarify issues for the jury, and is not substantially  
7 outweighed by a danger of unfair prejudice. Evidence is relevant if it: (1) tends to  
8 make a fact more or less probable than it would be without the evidence; and (2) the  
9 fact is of consequence to the action. Fed. R. Evid. 401. Relevant evidence may be  
10 excluded if its probative value is substantially outweighed by a danger of unfair  
11 prejudice, confusing the issue, or misleading the jury. Fed. R. Evid. 403.

12 As stated above, the B&D Franchisees stopped paying franchise and other  
13 fees to WSC in 2014. (Feasby Decl. Ex. B, Robinson Dep. pp. 31-35.) Bennion  
14 and Deville claim the B&D Franchisees could not meet their contractual obligations  
15 to WSC because they were struggling financially. (Feasby Decl. Ex. C, Bennion  
16 Dep. pp. 123-124.) Bennion and Deville claim that as a result, despite WSSC’s  
17 reasonable efforts to collect fees owed by the B&D Franchisees during this time,  
18 there was no money for it to collect. At the same time, however, Bennion and  
19 Deville paid themselves over \$1,000,000 in wages and discretionary expenses in  
20 2014 alone. This evidence is clearly relevant to the parties’ claims and defenses in  
21 this matter. (Feasby Decl., ¶ 6, Ex. D, Beaton Report, ¶¶ 37-39, schedule 3.)

22 To determine the veracity of Counter-Defendants’ claims that the  
23 B&D Franchisees were struggling financially, the jury must be given a complete  
24 financial picture of those entities. This necessarily includes identifying the  
25 compensation those entities paid to their owners, Bennion and Deville, as well as the  
26 personal, discretionary expenses Bennion and Deville charged to those entities.  
27 Further, as WSC’s damages expert states in his expert report, “Bennion & Deville  
28 took excess compensation and discretionary expenses during years when they

1 requested that WSC forgive franchise fees and make loans and failed to pay  
2 franchise and other fees owed to WSC.” (Feasby Decl., ¶ 6, Ex. D, Beaton Report,  
3 ¶ 40.)

4       Because this information is clearly relevant to the resolution of this case, it  
5 can only be excluded if its relevance is “substantially outweighed” by a danger of  
6 unfair prejudice of jury confusion. Fed. R. Evid. 403. Counter-Defendants claim  
7 introducing “evidence of wealth” would “appeal to class prejudice” and “could lead  
8 the jury to make a decision based upon their ability to pay a judgment.”  
9 (Document No. 87, p. 2.) This claim is unfounded and lacks any evidentiary  
10 support. The wages and personal expenses Bennion and Deville took out of their  
11 entities is not an appeal to class prejudice. It is an aspect of the B&D Franchisees’  
12 financial picture that Counter-Defendants made relevant when they claimed the  
13 B&D Franchisees were unable to meet their contractual obligations to WSC despite  
14 their claims that WSSC was making reasonable efforts to collect the outstanding  
15 fees. And, because WSC is not introducing evidence of Bennion or Deville’s  
16 personal net worth, the jury will not be given information sufficient to determine  
17 whether they could “pay a judgment.”

18       Although it remains unclear what evidence Counter-Defendants are asking the  
19 Court to exclude, evidence of Bennion and Deville’s wages and personal expenses  
20 charged to their business entities is clearly relevant and not substantially outweighed  
21 by a danger of unfair prejudice.

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1 **IV. CONCLUSION**

2 For all of these reasons, The B&D Parties' Motion *In Limine* to Preclude  
3 WSC from Introducing Evidence of the Personal Wealth of Plaintiffs Bennion or  
4 Deville should be denied in its entirety.

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6 DATED: April 10, 2017 PEREZ VAUGHN & FEASBY INC.

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By: /s/ Jeffrey A. Feasby

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John D. Vaughn

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Jeffrey A. Feasby

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Attorneys for

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Windermere Real Estate Services Company

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