

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

10  
11 Attorneys for Defendant and Counterclaimant  
Windermere Real Estate Services Company  
12

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

**OPPOSITION TO PLAINTIFFS  
AND COUNTER-DEFENDANTS'  
MOTION *IN LIMINE* TO  
PRECLUDE DEFENDANT FROM  
INTRODUCING EVIDENCE  
WITHHELD ON GROUNDS OF  
PRIVILEGE**

Date: May 15, 2017

Time: 10:00 a.m.

Courtroom: 880

Complaint Filed: September 17, 2015

1     **I. INTRODUCTION**

2           With this motion, Counter-Defendants Bennion & Deville Fine Homes, Inc.,  
3 Bennion & Deville Fine Homes SoCal, Inc., Windermere Real Estate Services  
4 Company Inc., Robert L. Bennion, and Joseph R. Deville (collectively “Counter-  
5 Defendants”) ask the Court to exclude *all* testimony and argument regarding  
6 Defendant and Counterclaimant Windermere Real Estate Services Company’s  
7 (“WSC”) alleged failure to update Counter-Defendants about its efforts to address  
8 Windermere Watch based on WSC’s in-house counsel’s responses to four questions  
9 about three emails. This overly broad request is not appropriate.

10           The parties discussed, and WSC affirmatively addressed, Windermere Watch  
11 for many years. The parties had several meetings and conference calls focused on  
12 this issue and exchanged numerous emails, letters, and other communications  
13 addressing Windermere Watch. Counter-Defendants do not present any of these  
14 communications to the Court. Instead, Counter-Defendants cherry-pick three emails  
15 to which WSC did not respond and ask the Court to find, as a matter of law, that  
16 WSC “failed to respond to the B&D Parties requests for updates concerning  
17 Windermere Watch” and, thus, preclude WSC from presenting any contrary  
18 evidence. As with Counter-Defendants’ other motions, the instant motion is based  
19 upon a misrepresentation of the record, requesting an inappropriate legal conclusion  
20 utterly unsupported by the evidence. The motion must be rejected.

21           Even if Counter-Defendants’ request were limited to the three emails  
22 identified in their motion, the motion still must be denied. During his deposition,  
23 WSC’s in-house counsel, Paul Drayna, was asked about three emails. As in-house  
24 counsel, Drayna protected his client’s attorney-client privilege and properly refused  
25 to answer four specific questions regarding WSC’s reasons for not responding to  
26 those specific emails. *However*, WSC’s President, Geoff Wood, was asked about  
27 two of those emails and did not invoke the attorney-client privilege. He answered  
28 every question he was asked regarding this issue. WSC should not be precluded

1 from presenting evidence regarding its numerous communications with Counter-  
2 Defendants regarding Windermere Watch simply because its in-house counsel  
3 properly protected his clients' privileged communications in response to four  
4 discrete questions.

5 Respectfully, Counter-Defendants' motion should be denied in its entirety.

6 **II. FACTUAL BACKGROUND**

7 By now, the Court is familiar with the story of Windermere Watch. In  
8 addition to claiming WSC did not make commercially reasonable efforts to negate  
9 the effects of Windermere Watch, Counter-Defendants now appear to claim that  
10 WSC did not adequately communicate its efforts to Counter-Defendants.  
11 (Document No. 101, p. 2.) In support of this claim, Counter-Defendants present the  
12 Court with three emails Counter-Defendants sent that they say went unanswered:  
13 (1) a March 29, 2013 email chain including Bennion, Deville, Drayna, and Wood;  
14 (2) an April 20, 2013 email from Deville to Drayna and Wood; and (3) a June 12,  
15 2013 email chain including Bennion, Deville, and Drayna. (Document No. 101-1,  
16 Exs. B-D.)

17 Drayna and Wood were asked a series of questions about these emails during  
18 their depositions. As WSC's General Counsel, Drayna asserted his client's  
19 attorney-client privilege on four occasions when asked questions regarding these  
20 three emails:

- 21 • When asked who within WSC was tasked with responding to Deville's  
22 March 29, 2013 email (Declaration of Jeffrey Feasby ("Feasby Decl.")  
23 Ex. A, p. 230);
- 24 • When asked whether he had reason to believe anyone responded to  
25 Deville's March 29, 2013 email before April 20, 2013 (Feasby Decl.  
26 Ex. A, pp. 230-231);

27 ///

28 ///

- 1 • When asked if he was “just ignoring” the emails from Counter-  
2 Defendants regarding Windermere Watch (Feasby Decl., Ex. A,  
3 p. 231); and
- 4 • When asked why he did not respond to the June 12, 2013 email  
5 (Feasby Decl., Ex. A, pp. 233-234).

6 Wood only received two of the emails (March 29 and April 20, 2013)  
7 identified in Counter-Defendants’ motion. Importantly, when asked about those  
8 emails, Wood did not assert any attorney-client privilege. Wood did not recall  
9 receiving the March 29, 2013 email chain, did not recall why he did not respond,  
10 and did not instruct WSC employees not to respond to Deville’s Windermere Watch  
11 emails. (Feasby Decl., Ex. B, pp. 237-239.) Regarding the April 20, 2013 email,  
12 Wood testified that he did not recall responding to the email and did not know why  
13 no one responded. (Feasby Decl. Ex. B, pp. 242-243.)

### 14 **III. LEGAL ANALYSIS**

15 As an initial matter, precluding WSC from presenting *any* evidence regarding  
16 its responses to Counter-Defendants’ requests for Windermere Watch updates based  
17 on three emails is patently overbroad. Over the course of their long relationship, the  
18 parties frequently communicated about Windermere Watch via email, phone, and  
19 letter. If the broad relief requested in Counter-Defendants’ motion is granted, WSC  
20 will be unable to present any evidence regarding those communications simply  
21 because it did not respond to three emails over a four-month span. Counter-  
22 Defendants’ requested relief is overbroad and should be denied.

23 Further, even if Counter-Defendants’ request were limited to the three emails  
24 identified in its motion, the motion still fails. Any privilege that attaches to  
25 communications between a corporation’s attorneys and its employees belongs to the  
26 corporation. *Mattel, Inc. v. MGA Entertainment, Inc.*, 2010 WL 11463907, at \*2  
27 (C.D. Cal., 2010). “Only the corporation can waive the protections of the attorney-  
28 client privilege, even as to conversations between employees and the corporation’s

1 attorneys.” *Id.* “[T]he power to waive the corporate attorney-client privilege rests  
2 with the corporation's management and is normally exercised by its officers and  
3 directors.” *U.S. v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996). Consequently, as in-  
4 house counsel, Drayna did not have the power to waive WSC’s attorney-client  
5 privilege.

6 As WSC’s attorney, Drayna properly asserted his client’s attorney-client  
7 privilege to specific questions about three documents. However, when asked about  
8 those emails, WSC’s President did not assert the attorney-client privilege. He  
9 answered the questions he was asked. Although Counter-Defendants chose not to  
10 ask Wood the same questions Drayna was asked, Wood never invoked the attorney-  
11 client privilege in response to any questions regarding the subject emails. There is  
12 no danger of unfair surprise or prejudice. Drayna correctly protected his client’s  
13 privileged communications while Wood willingly answered all questions regarding  
14 WSC’s alleged failure to respond to Counter-Defendants about Windermere Watch.  
15 Consequently, Counter-Defendants’ overbroad request should be denied.

16 **IV. CONCLUSION**

17 For all the aforementioned reasons, Defendant and Counterclaimant  
18 Windermere Real Estate Services Company respectfully requests that Counter-  
19 Defendants’ Motion *in Limine* to Preclude Defendant from Introducing Evidence  
20 Withheld on Grounds of Privilege should be denied in its entirety.

21  
22 DATED: April 24, 2017 PEREZ VAUGHN & FEASBY INC.

23  
24 By: /s/ Jeffrey A. Feasby  
25 Jeffrey A. Feasby  
26 Attorneys for  
27 Windermere Real Estate Services Company  
28