

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

27 AND RELATED COUNTERCLAIMS  
28

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

Hon. Manuel L. Real

**DEFENDANT AND  
COUNTERCLAIMANT'S  
MEMORANDUM OF POINTS AND  
AUTHORITIES 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 its October 2016 Order Granting Defendant’s Motion for Partial Summary  
3 Judgment (“Order”), the Court granted partial summary judgment as to specific  
4 allegations in Claims One through Six of Plaintiffs’ First Amended Complaint  
5 (“FAC”), and granted summary judgment as to Plaintiffs’ Seventh Claim for Relief  
6 in its entirety. (Document No. 66.) Despite this Order, Plaintiffs’ Proposed Exhibit  
7 List includes 66 exhibits relating to claims upon which the Court granted partial  
8 summary judgment. (Document No. 51.)

9             Because these documents relate to claims upon which the Court already  
10 entered summary judgment, these proposed exhibits and testimony regarding these  
11 issues are irrelevant and should be excluded. Further, because this evidence has no  
12 probative value, it is substantially outweighed by a danger it will unfairly prejudice  
13 Defendant Windermere Real Estate Services Company (“WSC”), mislead the jury,  
14 cause undue delay, and confuse the issues remaining for trial. Consequently, all  
15 evidence and testimony related to dismissed claims should be excluded.

16     **II. FACTUAL BACKGROUND**

17             Plaintiffs and Counter-Defendants Joseph R. Deville, Robert L. Bennion,  
18 B&D Fine Homes, Inc., B&D Fine Homes SoCal, Inc., and Windermere Services  
19 Southern California, Inc. (“WSSC”) (collectively “Counter-Defendants”) filed their  
20 First Amended Complaint (“FAC”) in November 2015. Claims One through Six of  
21 their FAC allege breaches of contract and breaches of the covenant of good faith and  
22 fair dealing related to three separate agreements. Each of those Claims for Relief  
23 allege that WSC failed to, among other things, provide a viable “Windermere  
24 System” and failed to provide adequate technology. (*See, e.g.*, Document No. 31,  
25 FAC, ¶¶ 151(b), 158(a), 163(b), (i).) Counter-Defendants’ Fourth Claim for Relief  
26 also includes an allegation that WSC solicited WSSC’s participation “in offers and  
27 sales of franchises in violation of the franchise law.” *Id.* at ¶ 170(c). This allegation  
28 centers around the filing of required franchise disclosure documents with the

1 California Department of Business Oversight, and the requirement that prospective  
2 franchisees be provided a copy of the franchise disclosures prior to executing  
3 franchise agreements. *Id.* at ¶¶ 83-103. Finally, for purposes of this motion, the  
4 Seventh Claim for Relief alleges WSC violated the California Franchise Relations  
5 Act (Bus. and Prof. Code § 20020) by terminating the Area Representation  
6 Agreement without good cause. *Id.* at ¶¶ 183-186.

7 In October 2016, the Court granted WSC’s Motion for Partial Summary  
8 Judgment and significantly streamlined the issues remaining in the case. (Document  
9 No. 66, the “Order.”) In the Order, the Court granted partial summary judgment as  
10 to: (1) Counter-Defendants’ allegations in Claims One through Six that WSC failed  
11 to provide adequate technology or a viable “Windermere System;” (2) the  
12 allegations in Counter-Defendants’ Fourth Claim that WSC solicited WSSC’s  
13 “participation in offers and sales of franchises in violation of franchise law;” and (3)  
14 the entirety of Counter-Defendants’ Seventh Claim for violations of the California  
15 Franchise Relations Act. *Id.*

16 Despite the Order, Counter-Defendants intend to present evidence relating to  
17 these dismissed claims at trial. Their Proposed Exhibit List includes 66 exhibits  
18 regarding claims upon which the Court granted Summary Judgment. (Declaration  
19 of Christopher W. Rowlett (“Rowlett Decl.”), Exs. A, B.) These documents fall into  
20 two categories: (1) documents related to the technology and “Windermere System”  
21 provided to Counter-Defendants by WSC (Rowlett Decl., Ex. A); and (2) documents  
22 related to the annual Franchise Disclosure Document (“FDD”) filing for years other  
23 than 2014 (Rowlett Decl., Ex. B).<sup>1</sup> In addition to the proposed exhibits, Counter-  
24

---

25 <sup>1</sup> Counter-Defendants assert that WSC constructively discharged WSSC as the area  
26 representative by, among other things, failing to file a FDD in 2014. (Document  
27 No. 31, FAC ¶¶ 111-120.) Counter-Defendants’ proposed exhibit contains exhibits  
28 related to the 2014 FDD filing and WSC is not seeking to exclude those exhibits or  
other evidence related to that issue. Evidence related to FDD filings in all other  
years, however, was made irrelevant by the Court’s October 2016 Order.

1 Defendants' rebuttal expert, Marvin Storm, offers multiple opinions regarding  
2 WSC's technology and the support provided in conjunction therewith. These  
3 proposed exhibits, and any testimony relating thereto, are irrelevant and should be  
4 excluded.

5 **III. EVIDENCE OF DISMISSED CLAIMS SHOULD BE EXCLUDED**

6 Evidence is relevant if it: (1) tends to make a fact more or less probable than  
7 it would be without the evidence; and (2) the fact is of consequence to the action.  
8 Fed. R. Evid. 401. Relevant evidence may be excluded if its probative value is  
9 substantially outweighed by a danger of unfair prejudice, confusing the issue,  
10 misleading the jury, or undue delay. Fed. R. Evid. 403.

11 In its Order, the Court dismissed the allegations in Counter-Defendants'  
12 claims one through six relating to WSC's alleged failure to provide adequate  
13 technology or a viable "Windermere System." (Document No. 66, p. 4.)  
14 Notwithstanding the Order, Counter-Defendants identified 19 exhibits relating to  
15 WSC's technology and the "Windermere System" (Document No. 51, Exs. 32, 43,  
16 46-47, 70, 98-99, 158-160, 182, 184, 185, 188-190, 192, 212; Rowlett Decl., Ex. A),  
17 and their rebuttal expert offers multiple opinions about WSC's technology and  
18 support. Because claims related to technology and the "Windermere System" are no  
19 longer at issue, evidence relating to those allegations is of no consequence to this  
20 action and should be excluded.

21 Similarly, the Court granted partial summary judgment as to Counter-  
22 Defendants' claims that WSC solicited Counter-Defendants' participation in offers  
23 and sales of franchises in violation of the applicable franchise law. (Document No.  
24 66, p. 5.) These claims are based on WSC's alleged untimely filing of required  
25 FDD. (Document No. 31, FAC ¶¶ 90-91.) Incredibly, and in spite of the Court's  
26 Order, Counter-Defendants include 47 exhibits related to FDD filings for years other  
27 than 2014 in their proposed exhibit list. (Document No. 51, Exs. 20-27, 33, 44, 59-  
28 65, 68, 69, 72, 75, 76, 78-84, 93, 105-109, 138, 242, 248, 251, 276, 277, 384, 404,

1 405, 407, 408; Rowlett Decl. Ex. B<sup>2</sup>.) Because the Court entered partial summary  
2 judgment on the portion of Counter-Defendants' claim related to these FDD filings,  
3 these exhibits and any testimony related thereto should be excluded as irrelevant.

4 Further, because it has no probative value, evidence regarding dismissed  
5 claims are substantially outweighed by their danger of causing unfair prejudice,  
6 confusing the issues, misleading the jury, or causing undue delay. By trying to  
7 introduce evidence related to WSC's technology, the "Windermere System," and  
8 non-2014 FDD filings, Counter-Defendants are trying to relitigate issues already  
9 decided by the Court. Any evidence or argument relating to these issues will  
10 unfairly prejudice WSC because it already prevailed on these issues. Similarly,  
11 evidence regarding these dismissed claims will mislead the jury into thinking they  
12 are relevant to the dispute and cause undue delay because WSC will need to defend  
13 itself against claims that were already dismissed. *See U.S. v. 87.98 Acres of Land*  
14 *More or Less in the County of Merced*, 530 F.3d 899, 906 (9th Cir. 2008) (exclusion  
15 of evidence pursuant to Rule 403 is appropriate when there is a potential prejudicial  
16 effect and no probative value). Consequently, all evidence related to dismissed  
17 claims should be excluded because, lacking any probative value, it is substantially  
18 outweighed by a danger of unfair prejudice, issue confusion, undue delay, and  
19 misleading the jury.

20 ///

21 ///

22 ///

23 ///

24 ///

---

25  
26 <sup>2</sup> Plaintiffs' Proposed Exhibits 107, 108, 276, and 277 are not included in Exhibit B  
27 to the Rowlett Declaration because they were not identified by Bates Number in  
28 Plaintiffs' proposed exhibit list so Counter-Defendants cannot be certain to which  
documents Plaintiffs are referring. From the description of the documents, however,  
it is clear the documents relate to franchise disclosure documents.

1 **IV. CONCLUSION**

2 For all of these reasons, WSC's Motion In Limine to Exclude Evidence  
3 Related to Dismissed Claims should be granted in its entirety.

4  
5 DATED: April 17, 2017 PEREZ VAUGHN & FEASBY INC.

6  
7 By: /s/ Jeffrey A. Feasby  
8 John D. Vaughn  
9 Jeffrey A. Feasby  
10 Attorneys for  
11 Windermere Real Estate Services Company  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28