

**MULCAHY LLP**

James M. Mulcahy (SBN 213547)

*jmulcahy@mulcahyllp.com*

Kevin A. Adams (SBN 239171)

*kadams@mulcahyllp.com*

Douglas R. Luther (SBN 280550)

*dluther@mulcahyllp.com*

Four Park Plaza, Suite 1230

Irvine, California 92614

Telephone: (949) 252-9377

Facsimile: (949) 252-0090

*Attorneys for Plaintiffs and Counter-Defendants*

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

BENNION & DEVILLE FINE  
HOMES, INC., a California  
corporation, BENNION & DEVILLE  
FINE HOMES SOCAL, INC., a  
California corporation, WINDERMERE  
SERVICES SOUTHERN  
CALIFORNIA, INC., a California  
corporation,

Plaintiffs,

v.

WINDERMERE REAL ESTATE  
SERVICES COMPANY, a Washington  
corporation; and DOES 1-10

Defendant.

AND RELATED COUNTERCLAIMS

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

*Hon. Manual L. Real*

**DECLARATION OF KEVIN A.  
ADAMS IN SUPPORT OF THE  
B&D PARTIES' OPPOSITION TO  
WSC'S MOTION IN LIMINE TO  
EXCLUDE EVIDENCE RELATED  
TO DISMISSED CLAIMS**

**Date:** May 15, 2017  
**Time:** 10:00 a.m.  
**Courtroom:** 880

**Action Filed:** September 17, 2015  
**Disc. Cut-Off:** August 29, 2016  
**Pretrial Conf.:** November 15, 2016  
**Trial:** May 30, 2017

1 I, Kevin A. Adams, state as follows:

2 1. I am one of the attorneys of record for Plaintiffs/Counter-Defendants  
3 Bennion & Deville Fine Homes, Inc., Bennion & Deville Fine Homes SoCal, Inc.,  
4 Windermere Services Southern California, Inc., and Counter-Defendants Robert L.  
5 Bennion and Joseph R. Deville (collectively, the “B&D Parties”) in the above-named  
6 action. I am a member in good standing of the State Bar of California, and duly admitted  
7 to practice law before all of the courts of the State of California, including the United  
8 States District Court, Central District of California and the United States Court of  
9 Appeals for the Ninth Circuit. I make this Declaration in support of the B&D Parties’  
10 opposition to Windermere Real Estate Services Company’s (“WSC”) Motion in *Limine*  
11 to Exclude Evidence Related to Dismissed Claims.

12 2. As counsel for the B&D Parties, I am intimately familiar with the discovery  
13 that has taken place in this action, including the written discovery, documents produced,  
14 and deposition testimony. The written discovery requests, responses, and deposition  
15 transcripts have all been reviewed by me and are maintained at my office.

16 3. On August 22, 2016, I deposed Paul S. Drayna in Seattle, Washington.  
17 Attached hereto as **Exhibit A** is a true and correct copy of portions of the transcript of  
18 Mr. Drayna’s deposition.

19 I declare under penalty of perjury under the laws of the United States of America  
20 that the foregoing is true and correct and that this Declaration was executed this 24th day  
21 of April, 2017 in Irvine, California.

22 /s/ Kevin A. Adams

23 Kevin A. Adams

EXHIBIT A

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

---

BENNION & DEVILLE FINE HOMES, )  
INC., a California corporation, )  
BENNION & DEVILLE FINE HOMES )  
SOCAL, INC., a California )  
corporation, WINDERMERE SERVICES )  
SOUTHERN CALIFORNIA, INC., a )  
California corporation, )  
Plaintiffs, )  
vs. ) No.  
WINDERMERE REAL ESTATE SERVICES ) 5:15-cv-01921-R-KK  
COMPANY, a Washington ) VOLUME I  
corporation; and DOES 1-10, )  
Defendants, )  
)  

---

AND RELATED COUNTERCLAIMS )  

---

VIDEOTAPED DEPOSITION OF PAUL S. DRAYNA  
600 University Street, Suite 320  
Seattle, Washington  
Monday, August 22, 2016

REPORTED BY:  
CYNTHIA A. KENNEDY, RPR, CCR 3005  
JOB No. 2364301  
  
PAGES 1 - 354

1 APPEARANCES

2  
3 FOR THE PLAINTIFF:

4  
5 BY: KEVIN A. ADAMS, ESQ.

6 Mulcahy LLP

7 Four Park Plaza, Suite 1230

8 Irvine, CA 92614

9 (949) 252-9377

10 kadams@mulcahyllp.com

11  
12 FOR THE DEFENDANT:

13  
14 BY: JEFFREY A. FEASBY, ESQ.

15 Perez Wilson Vaughn & Feasby

16 Symphony Towers

17 750 B Street, 33rd Floor

18 San Diego, CA 92101

19 (619) 702-8044

20 feasby@perezwilson.com

21  
22 ALSO PRESENT:

23 JOSEPH DEVILLE

24 ROBERT BENNION (morning session only)

25 LUCAS CHEADLE, VIDEOGRAPHER

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

DEPOSITION OF PAUL S. DRAYNA

EXAMINATION INDEX

EXAMINATION BY	PAGE
Mr. Adams	15
Mr. Feasby	None

1           Q.     And you were tasked with preparing the  
2 Franchise Disclosure Document that Mr. Bennion and  
3 Mr. Deville would provide prospective franchisees,  
4 correct?

5           A.     Yes.

6           Q.     And you were tasked with registering that  
7 document with the California authorities, correct?

8           A.     Correct.

9           Q.     And did you ever consider that task of  
10 registering the franchise disclosure documents  
11 something that Mr. Bennion and Mr. Deville were  
12 supposed to take on on their own?

13          A.     No. I believe that that responsibility was  
14 ours.

15          Q.     And do you believe that that was an integral  
16 part of the obligations that Mr. Bennion and  
17 Mr. Deville were to take on as part of this Area  
18 Representation Agreement?

19          A.     I believe that the Area Representation  
20 Agreement speaks to that the parties would cooperate  
21 in preparing and filing those documents on an annual  
22 basis.

23          Q.     And what -- when you drafted this contract,  
24 what did you expect Mr. Bennion and Mr. Deville would  
25 do in connection with that cooperation?

1 on file with the department, correct?

2 A. Correct.

3 Q. And for 2010, did Windermere meet that

4 15-day renewal time period?

5 A. No.

6 Q. And in fact, there was a dark period for

7 selling or offering franchises in California from

8 April 20, 2010, until August 17, 2010, correct?

9 A. Yes.

10 Q. Was that a concern for you, that there was

11 this dark period?

12 A. I would -- sitting here today, I do not

13 remember the details of the 2010 renewal or why that

14 delay occurred. I would need to go back and refresh

15 my memory about -- about why the delay occurred. The

16 delay, in itself, does not concern me. The concern

17 would be if franchises were sold during the period

18 when there was not a registration in place.

19 Q. And do you know if there was any franchises

20 sold between April 20, 2010, and August 17, 2010?

21 A. I don't believe there were.

22 Q. Do you know if any franchises were offered

23 between August 17, 2010 -- I'm sorry.

24 Do you know if any franchises were offered

25 from April 20, 2010, to August 17, 2010?



1           A.       I don't know that.

2           Q.       Okay. Now, you're not concerned about this  
3 August 17th effective date because it was common for  
4 Windermere to renew their franchises late, correct?

5           A.       It was common that there were delays in the  
6 filing and processing of our renewals often related to  
7 delays in receipt of audited financial statements  
8 either from our own auditor or, more commonly, from  
9 Mr. Bennion and Mr. Deville.

10          Q.       But it was common, at least in recent  
11 history, for Windermere to file a registration with  
12 the department in California past the deadline to  
13 renew, correct?

14          A.       That has occurred.

15          Q.       And in fact, every registration since 2010  
16 was untimely, correct?

17          A.       I -- I don't remember that off the top of my  
18 head, sitting here. I assume you have documents that  
19 you are basing that assertion on.

20          Q.       Do you know any time period since 2010 in  
21 which Windermere's Franchise Disclosure Document was  
22 renewed as of the April 20th deadline?

23          A.       Not off the top of my head. I don't have  
24 those documents in front of me.

25          Q.       And this wasn't a concern for Windermere

1 because, as you said earlier, if there was no  
2 franchises offered or sold, then you didn't need to be  
3 registered, correct?

4 A. It was our understanding that the  
5 registration was necessary to offer and sell  
6 franchises.

7 Q. And, therefore, if there was no prospects in  
8 the pipeline, then it wasn't a big concern if this  
9 registration was completed by the April 20th date.

10 A. Excuse me. I wouldn't characterize it -- I  
11 think that mischaracterizes what I said.

12 Again, there were often delays in the  
13 processing of our renewal applications. Those delays  
14 were, at least in some instances, caused by delays in  
15 receiving necessary information, particularly audited  
16 financial statements from Mr. Bennion and Mr. Deville.

17 Q. And do you recall why there was the delay,  
18 specifically, for this 2010 year?

19 A. I do not remember.

20 Q. Who's Carmed, LLC?

21 A. Carmed, LLC is a Washington limited  
22 liability company. It is a holding company owned by  
23 the Jacobi family.

24 Q. And are you familiar with the loan granted  
25 from Carmed, C-A-R-M-E-D, to Mr. Bennion and

1       responded.

2                               (Whereupon Exhibit 52 was  
3                               marked for the record.)

4           Q.       I'm handing you another document. This is  
5       single-page letter I've identified as Exhibit 52.  
6       This is another letter from the Department of Business  
7       Oversight to you dated April 28th, 2014.

8                       Do you recognize this letter?

9           A.       I do.

10          Q.       What -- why did you receive this letter?

11          A.       This is a letter confirming that the -- our  
12       application to renew our registration for our Northern  
13       California franchise offering had been approved.

14          Q.       And the Northern California offering was not  
15       effective until April 28th, 2014, correct?

16          A.       That's correct.

17          Q.       Did you ever register the disclosure  
18       document for Southern California in 2014?

19          A.       It was filed, but it was not registered.

20          Q.       Why not?

21          A.       The filing was submitted. First of all, the  
22       filing was not submitted until -- we did not receive  
23       the audited financial statements from Mr. Bennion and  
24       Mr. Deville until, I believe it was August. The  
25       filing was submitted at some point after that. And

1     this was around the time that discussions were ongoing  
2     about the potential for us to buy back, if you will,  
3     the area of representation rights for Southern  
4     California to negotiate a termination of the Area  
5     Representation Agreement.

6           Q.     But during those discussions, Mr. Bennion  
7     and Mr. Deville still had a contractual right to  
8     provide services in the Southern California region,  
9     correct?

10          A.     That's correct.

11          Q.     If I represented to you that you received  
12     the audited financials at the end of July 2014 for  
13     Mr. Bennion and Mr. Deville's business, would you --  
14     would that refresh your recollection as to when you  
15     received them?

16          A.     My recollection was that it was August, but  
17     the end of July may be correct.

18          Q.     And that you waited until the end of October  
19     to register anything with the California department?

20                 Does that -- does that refresh your  
21     recollection?

22          A.     I believe that that's correct.

23          Q.     And why did you wait such a long period of  
24     time before registering for the Southern California  
25     disclosure documents?

1 MR. FEASBY: Object to the extent it  
2 calls for disclosure of attorney/client  
3 communications.

4 THE WITNESS: It -- it does; however, I  
5 believe I did communicate to Mr. Sunderland during  
6 that time frame that although we had received the  
7 audited financials, they hadn't -- the renewal  
8 application had not yet been filed due to the ongoing  
9 negotiations, the understanding or expectation on our  
10 part that Mr. Bennion and Deville were no longer going  
11 to be the area representatives in Southern California.

12 BY MR. ADAMS:

13 Q. And you knew in August that Mr. Deville was  
14 talking with multiple prospects about becoming  
15 franchisees in the system, correct?

16 A. I believe that Patrick indicated that, yes.

17 (Whereupon Exhibit 53 was  
18 marked for the record.)

19 Q. I'm handing you a document I've marked as  
20 Exhibit 53. This is a multi-page email chain between  
21 you, Mr. Drayna, and Mr. Robinson. If you look at the  
22 second page of the document, you are told by  
23 Mr. Robinson that he should have included this last  
24 week with the audited.

25 Now, did you understand that Mr. Robinson

1 was referring to the consent letter?

2 A. I see. Yes, it appears that -- it appears  
3 that the audit had been sent prior to this date, but  
4 that he neglected to attach the auditor's consent  
5 letter. And he was sending this in follow up to  
6 provide it to me.

7 Q. And so the -- strike that.

8 And then in your response you asked  
9 Mr. Robinson, "Do you have any prospective franchisees  
10 in the pipeline that require us to rush in, getting  
11 the FDD filed? If so, let me know."

12 Do you remember writing that?

13 A. I do.

14 Q. And Mr. Robinson says, yes, that "Bob is  
15 talking to two owners at this time."

16 Do you remember him informing you of that?

17 A. Yes, I do.

18 Q. Okay. We're in August of 2014. And you  
19 learned, in response to your request, that Mr. Deville  
20 was talking to prospects about becoming franchisees in  
21 the region?

22 A. Yes.

23 Q. You still didn't take action to file the  
24 disclosure document at that time?

25 A. No.

1 Q. Did you inform Mr. Robinson that Windermere  
2 had decided not to register the disclosure document at  
3 this time?

4 A. I think that mischaracterizes my testimony.  
5 The -- no, I don't believe that I responded to  
6 Patrick; although, as I indicated, I believe I did  
7 send an email to Robert Sunderland at some point in  
8 which that information was conveyed.

9 Q. When did you send that email?

10 A. I believe it was in September-ish.

11 Q. Okay. So August -- so assuming that's true,  
12 August 11th you ask if they have any prospects.  
13 You're in a position to submit the Southern California  
14 disclosure document. And you still wait until  
15 September to communicate that to Mr. Sunderland; is  
16 that right?

17 A. That is correct.

18 Q. Why?

19 A. I don't believe I can answer that question  
20 without disclosing privileged communications with my  
21 clients.

22 Q. And in the meantime, Mr. Deville has these  
23 prospects and he cannot sell franchises, right?

24 A. That is true, that he was not able to sell  
25 franchises. Whether or not he had prospects or how

1 serious they were, we don't know -- or I don't know.

2 Q. Were they serious enough to sign Item 23

3 Receipts?

4 A. I don't know.

5 Q. Would you consider a prospect that signs an

6 Item 23 Receipt to be a serious prospect?

7 A. Not necessarily. I -- I think, over the

8 years, we have had an awful lot of Item 23 Receipts

9 signed that did not ultimately turn into franchises.

10 Q. With Mr. Bennion and Mr. Deville's track

11 record of getting prospects to sign Item 23 Receipts

12 and then converting them into franchisees, do you

13 believe that these prospects that signed Item 23

14 Receipts were serious prospects?

15 A. First of all, I'm not -- I'm not aware --

16 MR. FEASBY: Objection. Form.

17 THE WITNESS: Sorry.

18 I -- I'm not aware that Item 23 Receipts

19 were signed. They're not -- that is not a thing I'm

20 aware of.

21 BY MR. ADAMS:

22 Q. You knew that they had prospects?

23 A. That's what Patrick's email said.

24 Q. And you did nothing?

25 A. That's not what I said. I -- we filed the



1 application in October.

2 Q. Windermere chose to do nothing until October  
3 despite knowledge that Mr. Deville had prospects?

4 A. Based on the discussions that were ongoing  
5 at that time, that would have resulted in Mr. Deville  
6 no longer being the area representative.

7 Q. And those discussions concerned Windermere's  
8 taking over of services, correct?

9 A. It -- it regarded a proposal to enter into  
10 an agreement for the mutual termination of the Area  
11 Representation Agreement with some other terms  
12 packaged into that transaction.

13 Q. And you -- strike that.

14 What services were Mr. Schuster and  
15 Mr. Gooding and Mr. Johnson unhappy with that were  
16 being provided by Mr. Bennion and Mr. Deville?

17 MR. FEASBY: Objection. Form.

18 THE WITNESS: The majority of those  
19 communications, I was not directly involved in the  
20 majority of the communications with Rich and Brian.

21 I -- to the best of my recollection, I  
22 had one -- I can remember having one conversation with  
23 Rich Johnson. It was actually in person at the  
24 Windermere owners' retreat in Hawaii. That was --  
25 must have been 2014 -- yes, it was 2014. I had one

1 face-to-face conversation with Rich Johnson at that  
2 event, where he expressed some dissatisfaction. Most  
3 of the other communications were with other people.

4 BY MR. ADAMS:

5 Q. And what dissatisfaction was expressed at  
6 that time?

7 A. I don't remember exact words of the  
8 conversation, but the overall theme was that they felt  
9 like they were be treat -- being treated as  
10 competitors, not customers.

11 Q. And would you agree that Mr. Bennion and  
12 Mr. Deville had no obligation to treat Mr. Gooding and  
13 Mr. Johnson as customers in connection with  
14 Mr. Deville and Mr. Bennion's operation of their own  
15 licensed businesses?

16 A. I believe that as the area representative,  
17 they had an obligation to treat them as customers.

18 And I acknowledge that they wore both of  
19 those hats, and that -- so, yes, I would acknowledge  
20 that the franchise agreements did not obligate them to  
21 play nice with anyone, but the Area Representation  
22 Agreement most certainly did.

23 Q. And as franchisees, they were free to engage  
24 in their own marketing without including other  
25 franchisee, correct?

1           A.     As franchisees, that's true.

2           Q.     And did you have a problem with Mr. Bennion  
3     and Mr. Deville engaging in marketing without  
4     including other franchisees?

5           A.     I -- I'm not sure how to answer the  
6     question, if I had a problem. I think the question  
7     was, whether Mr. Johnson and Mr. Gooding had a  
8     problem. And the answer is, they certainly did.

9           Q.     Yeah. But did Windermere have a problem  
10    with Mr. Bennion and Mr. Deville engaging in marketing  
11    activities on behalf of their franchise locations and  
12    not including other Windermere franchisees?

13          A.     As franchisees, no. Windermere had a  
14    problem with Mr. Bennion and Mr. Deville failing to  
15    discharge their duties as area representatives, based  
16    on --

17          Q.     And what duties were they not discharging?

18          A.     We could refer back to the Area  
19    Representation Agreement and go through it line by  
20    line. But overall, there's an obligation to provide  
21    prompt and courteous service.

22                 I think -- I'm paraphrasing from memory.  
23    But the -- the overall theme of what I heard from Rich  
24    Johnson, in the one conversation I had with him  
25    personally, was that they no longer felt like they

1     were being treated as customers at all, but they were  
2     being treated a competitors and they were unhappy with  
3     that.

4           Q.     Do you have any specific instances in which  
5     Mr. Bennion and Mr. Deville were treating Mr. Johnson  
6     and Mr. Schuster and Mr. Gooding as competitors and  
7     not customers?

8           A.     Yes.

9           Q.     Please provide those.

10          A.     One specific issue that I know -- one thing  
11     that I -- I recall was an issue was Rich and Brian  
12     wanted to open a new office. I don't remember where.  
13     But it was in an area where Mr. Bennion and  
14     Mr. Deville also wanted to open a new office. And  
15     there was some disagreement or dispute about who would  
16     have -- who would have the opportunity to open a new  
17     office in this area.

18                 And in that interaction specifically,  
19     Mr. Deville was necessarily wearing the hat as area  
20     representative because as of -- as a franchisee, he  
21     had no say in who got to open offices where. As an  
22     area representative, he did. And Mr. Johnson felt  
23     that the -- I remember that that was one issue where  
24     there was a feeling that they were being treated as  
25     competitors and not customers.

1           Q.       Isn't it true that Mr. Deville had already  
2       laid the groundwork for that location that was opened  
3       up?

4           A.       I -- I don't know that.

5           Q.       Do you know any of the background facts as  
6       to Mr. Deville's effort to build out and open that  
7       location?

8           A.       I do not.

9           Q.       All that you know is what Mr. Johnson told  
10      you and you've relayed here, correct?

11          A.       That is the limit of my knowledge, yes.

12          Q.       Okay. Do you have any other specific  
13      instances or examples in which Mr. Deville and  
14      Mr. Bennion were not providing proper services as area  
15      representatives?

16          A.       I know that there was also an issue that at  
17      some point -- and I don't remember the timing of this  
18      precisely. But I know that prior to some date,  
19      Mr. Bennion and Deville had a domain name  
20      WindermereSoCal.com, and the website published at that  
21      address not only listed their own office locations,  
22      but the office locations of all other franchisees in  
23      Southern California, and that that website was part of  
24      what I understand to be a number of technology related  
25      services that Mr. Bennion and Deville provided to all

1 of the franchisees in their region and that at some  
2 point they made the decision that that website would  
3 no longer be used to market for the good of the order,  
4 if you will, all of the franchisees of Southern  
5 California, but only themselves.

6 Q. And did you understand that Mr. Bennion and  
7 Mr. Deville had an obligation to provide a website to  
8 the franchisees in their territory?

9 A. I -- again, no, I don't believe there's any  
10 specific obligation to that effect in the Area  
11 Representation Agreement. It does speak more  
12 generally to providing marketing services and to  
13 providing assistance and so forth.

14 Q. And did you believe that Mr. Bennion and  
15 Mr. Deville had to front the expense associated with  
16 making available the technology and website for other  
17 franchisees in their region?

18 A. Not at all. Mr. Bennion and Mr. Deville,  
19 that's why they were entitled to retain 50 percent of  
20 franchisee fees paid by the licensees in their region,  
21 specifically to fund those kinds of services that they  
22 were obligated to provide under the Area  
23 Representation Agreement.

24 Q. So they were obligated to use the 50 percent  
25 of the fees to pay for a website and other technology

1 for other franchisees to use in their region?

2 A. The 50 percent of the franchise fees that  
3 they were entitled to retain, yes, was -- was  
4 intended to fund the provision of services to other,  
5 not -- obviously, not all of it. The assumption was  
6 that they would use some of that money to provide the  
7 services required under the Area Representation  
8 Agreement, and some portion of it they would be  
9 entitled to keep as their reasonable profit for their  
10 activities.

11 Q. What was wrong with Windermere's website?

12 A. I beg your pardon?

13 MR. FEASBY: Objection.

14 BY MR. ADAMS:

15 Q. What was wrong with Windermere's website?  
16 Why did these franchisees want to be on Bennion &  
17 Deville's website?

18 MR. FEASBY: Objection. Form.

19 THE WITNESS: I don't know that there  
20 was anything wrong with our website. I think that  
21 Mr. Bennion and Mr. Deville, to their credit, have  
22 done a good job of developing goodwill in the  
23 Windermere.SoCal.com domain name. And that was  
24 something that had been widely publicized and marketed  
25 throughout the region, and that other people saw some

1 value in -- not that they didn't see value in our  
2 website, but they definitely saw value in his. And  
3 I -- rightfully so. I think it was a really -- to his  
4 credit, I would say it was a beautiful and well --  
5 well-designed and functional website.

6 BY MR. ADAMS:

7 Q. Do you have any other specific instances in  
8 which Mr. Bennion and Mr. Deville were not providing  
9 the services required of them as area representatives?

10 A. There were issues more globally around the  
11 questions speaking of websites, around the issue of  
12 technology. The Area Representation Agreement spoke  
13 specifically to the issue of technology and the need  
14 for technology -- further investment in technology,  
15 the need for technology fees to be increased, and the  
16 obligation of the area representative -- area  
17 representatives to cooperate with Windermere Services  
18 in making those improvements. And that is something  
19 that, I think, was an issue.

20 The Area Representation Agreement also  
21 speaks of the Windermere Foundation and obligates the  
22 area representative to support and participate in the  
23 Windermere Foundation Program. And I know that was an  
24 issue, ongoing issue, over a period of years.

25 Q. And you're talking about the Windermere



1 Foundation in the sense that that is an example in  
2 Bennion & Deville did not provide proper services to  
3 franchisees in their region?

4 A. I believe you were asking -- I'm sorry.  
5 Maybe I misunderstood the question. I thought you  
6 were asking, were there -- what were the issues that  
7 constituted what we viewed as breaches under their  
8 area representative agreement. And that, yes, I think  
9 that the Area Representation Agreement obligated them  
10 to promote, support and implement the Windermere  
11 Foundation Program in Southern California for the  
12 benefit of their region and its franchisees.

13 Q. Were you aware of franchisees complaining  
14 about the amount sent to them that they had  
15 contributed to the Windermere Foundation?

16 A. I was not aware of that.

17 Q. Were you aware that franchisees were  
18 concerned that they were contributing a certain amount  
19 to the Windermere Foundation and that that amount,  
20 when it was all said and done, was not ultimately  
21 forwarded on to the foundation of their choice?

22 A. I was not aware of that.

23 (Whereupon Exhibit 54 was  
24 marked for the record.)

25 Q. I'm handing you a document that's been

1 marked as Exhibit Number 54. It's a single-paged  
2 document with an email from Mr. Deville to you on  
3 October 28th, 2014.

4 Do you recognize this email?

5 A. I do.

6 Q. Do you remember receiving it from  
7 Mr. Deville?

8 A. I do.

9 Q. In the email, Mr. Deville asks or -- strike  
10 that.

11 In the email, Mr. Deville states that he  
12 "Asked about four weeks ago when would you have the  
13 new Franchise Disclosure Document. I have two  
14 prospects and need to have it for them to sign the  
15 receipt. Please advise when we have the new UFDD."

16 Do you see that?

17 A. I do.

18 Q. And did you understand Mr. Deville was  
19 referring to the Southern California Franchise  
20 Disclosure Document?

21 A. Yes.

22 Q. After receiving this email, what did you do?

23 A. I believe after we received this email, we  
24 submitted the application to the State of California  
25 to register that document.

1 Q. And from the looks of this email, it appears  
2 pretty clear that Mr. Deville was intent on continuing  
3 to operate as a services provider for Windermere,  
4 correct?

5 A. It says that he has two prospects.

6 Q. And he's intent on selling franchises to  
7 them?

8 A. He has two prospects, who he -- I would  
9 agree that it appears he has two prospects, who he  
10 wants to continue working with.

11 Q. And that was one of his obligations or one  
12 of his entity's obligations, under the area represent  
13 -- representative agreement, to find and sell to new  
14 prospects, correct?

15 A. That's correct.

16 (Whereupon Exhibit 55 was  
17 marked for the record.)

18 Q. I'm handing you a fairly large document I've  
19 marked as Exhibit 55.

20 This document appears to be a draft of the  
21 Southern California Franchise Disclosure Document  
22 dated October 31st, 2014, with a cover email between  
23 you and Mr. Deville and others.

24 Do you see that?

25 A. I do.

1 Q. And in your email, which is dated October  
2 31st, you say to Mr. Deville, "Attached is a copy of  
3 the UFDD for Southern California, which was sent to  
4 filing today to the California Department of  
5 Corporations."  
6 Do you see that?  
7 A. I do.  
8 Q. And you're referring to, of course, the  
9 Department of Business Oversight?  
10 A. Yes. I --  
11 Q. Okay.  
12 A. -- misspoke.  
13 Q. And you said "Their processing time is  
14 usually seven to ten days," correct?  
15 A. Yes.  
16 Q. But this disclosure document was not  
17 processed in seven to ten days, was it?  
18 A. It was not approved, no.  
19 Q. It was never approved?  
20 A. That's true.  
21 Q. And you, in fact, did send it to the  
22 Department of Business Oversight on October 31st?  
23 A. I believe I did, yes.  
24 Q. And in response, you received a comment  
25 letter from the department, correct?

1           A.       Yes, I did.

2           Q.       And the comment letter had numerous comments  
3 and problems that the department saw with your filing,  
4 correct?

5           A.       It had some questions, yes.

6                               (Whereupon Exhibit 56 was  
7                               marked for the record.)

8           Q.       Okay. And I've just handed you a document  
9 we've marked as Exhibit 56. This appears to be a  
10 letter from you to the Department of Business  
11 Oversight concerning the Southern California filing,  
12 right?

13          A.       This would be appear to be the cover letter  
14 that was sent with my filing on October 31st, yes.

15          Q.       And this is just the cover letter.

16                               But with this cover letter, were all of  
17 those 10 items identified in the letter, correct?

18          A.       Yes.

19          Q.       And you did send this to the Department of  
20 Corporations -- strike that.

21                               You did send this to the Department of  
22 Business Oversight, correct?

23          A.       Yes, that was a mistake on my part.

24                               (Whereupon Exhibit 57 was  
25                               marked for the record.)

1           Q.     I'm handing you the next document we've  
2 marked as Exhibit 57.

3           A.     Thank you.

4           Q.     This is the comment letter you received back  
5 from the Department of Business Oversight?

6           A.     Yes, it is.

7           Q.     And this identifies 24 different comments  
8 concerning the contents of the Southern California  
9 filing, correct?

10          A.     Yes, it does.

11          Q.     Have you ever received that many comments  
12 from an examiner before?

13          A.     No, I don't believe we had received that  
14 many comments before.

15          Q.     Why did this one have so many?

16          A.     I --

17                   MR. FEASBY:  Objection.  Form.

18                   THE WITNESS:  I have -- don't know that  
19 I can answer that, other than I believe that this was  
20 the -- the corporation's counsel identified in this  
21 letter, Dorothy Eshelman, I believe was a -- new to  
22 our file.  And -- and I think we had the experience in  
23 the past, both in California and in other states,  
24 where when there's a change in the examiner, sometimes  
25 that results in questions or issues being raised that

1 had never been raised before.

2 BY MR. ADAMS:

3 Q. And this letter was sent by the Department  
4 of Business Oversight on or around November 7th and  
5 received by you sometime thereafter, correct?

6 A. Yes.

7 Q. And when you received this comment letter,  
8 you knew or had known that Mr. Deville had prospects  
9 for his region, correct?

10 A. Yes.

11 Q. Did you tell Mr. Deville or Mr. Bennion that  
12 the Southern California filing had been rejected?

13 A. I don't believe I did.

14 Q. Why not?

15 A. The -- I don't believe I can answer that  
16 question without disclosing privileged communications  
17 with my clients.

18 Q. And you never -- strike that.

19 You didn't respond to the Department of  
20 Business Oversight's letter during the 2014 year, did  
21 you?

22 A. No, I did not.

23 Q. You just ignored it?

24 A. I didn't ignore it, but I did not respond to  
25 it.

1 Q. Did you engage in any phone communications  
2 with the department about this letter?

3 A. Not in 2014.

4 Q. Did you engage in any communications with  
5 the department, in any manner, regarding this November  
6 7th, 2014 comment letter?

7 A. Subsequently, yes.

8 Q. In 2014?

9 A. Not in 2014.

10 Q. And subsequently, you informed the  
11 department that you had withdrawn the letter -- strike  
12 that.

13 Subsequently, Windermere, through you,  
14 informed the department that they had withdrawn their  
15 Southern California filing, correct?

16 A. That's correct.

17 (Whereupon Exhibit 58 was  
18 marked for the record.)

19 Q. I'm handing you a single-page document that  
20 appears to be a letter that you drafted and delivered  
21 or had delivered on January 28th, 2015, titled Notice  
22 of Termination.

23 Do you recognize this document?

24 A. I do.

25 Q. And is it something you put together?



- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

Cynthia A. Kennedy, RPR  
NCRA Registered Professional Reporter  
Washington Certified Court Reporter No. 3005  
License expires November 16, 2016.