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

BENNION & DEVILLE FINE)	Case No. 5:15-cv-01921-R
HOMES, INC., a California	)	<i>Hon. Manual L. Real</i>
corporation, BENNION & DEVILLE)	
FINE HOMES SOCAL, INC., a	)	DECLARATION OF KEVIN A.
California corporation,	)	ADAMS ISO THE B&D PARTIES'
WINDERMERE SERVICES	)	OPPOSITION TO WINDERMERE
SOUTHERN CALIFORNIA, INC., a	)	REAL ESTATE SERVICES
California corporation,	)	COMPANY'S NOTICE OF
	)	OBJECTIONS TO THE B&D
Plaintiffs,	)	PARTIES' AMENDED WITNESS
	)	LIST
v.)	
)	
WINDERMERE REAL ESTATE)	
SERVICES COMPANY, a	)	Action Filed: September 17, 2015
Washington corporation; and DOES	)	Trial Date: None Set
1-10.)	
)	
Defendants.)	
)		
AND RELATED COUNTERCLAIMS)		
)		

1 I, Kevin A. Adams, declare 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-
6 named action. I am a member in good standing of the State Bar of California, and
7 duly admitted to practice law before all of the courts of the State of California,
8 including the United States District Court, Central District of California and the
9 United States Court of Appeals for the Ninth Circuit. I make this Declaration in
10 support of the B&D Parties’ opposition to Windermere Real Estate Services
11 Company’s (“WSC”) objections to the B&D Parties’ amended witness list.

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

16 3. On August 29, 2016, each of the parties filed their original witness
17 lists with the Court. [*See* D.E. 50, 53.] Since that time, the trial in this case has
18 been continued.

19 4. In the nine months that have passed since the parties filed their
20 original witness lists, they have engaged in significant additional discovery in the
21 case – including the depositions of percipient witnesses Fred Schuster, Mike
22 Teather, Greg Barton, Noelle Bortfeld, Michael Fanning, Brian Gooding, Rich
23 Johnson, and Mark Oster, the depositions of and receipt of documents from expert
24 witnesses Neal Beaton, Peter Wrobel, and David Holmes, and the receipt of
25 subpoenaed documents from several third-parties. Relevant to WSC’s objections,
26 Mr. Schuster’s deposition was not taken until September 7, 2016 and after the
27 B&D Parties’ initial witness list was filed with the Court.
28

1 5. Both parties contemplated the impending depositions and additional
2 discovery in the case would require further witness and exhibit identification for
3 trial. As such, the B&D Parties expressly “reserve[d] the right to amend, modify,
4 or supplement this witness list following the completion of expert discovery that
5 [was] underway.”[D.E. 50.] Similarly, WSC reserved in its witnesses list “the right
6 to amend, modify, or supplement [its] list upon the completion of discovery.” [D.E.
7 53.]

8 6. On December 14, 2015, the B&D Parties served their Federal Rule of
9 Civil Procedure (“FRCP”) 26(a)(1) Initial Disclosures. Fred Schuster (“Schuster”)
10 was included in the Initial Disclosures. A true and correct copy of the B&D
11 Parties’ Initial Disclosures is attached hereto as **Exhibit A**.

12 7. The parties in this action filed their respective initial proposed witness
13 lists on August 29, 2016. (Dkt. Nos. 50, 53.) Schuster was not deposed until
14 September 7, 2016, after the initial witness lists were filed.

15 8. On August 22, 2016, I deposed WSC’s General Counsel, Paul Drayna.
16 During his deposition, Mr. Drayna testified that WSC withheld funds paid by Rich
17 King to WSC, half of which were due to Windermere Services Southern
18 California, Inc. Attached hereto as **Exhibit B** is a true and correct copy of portions
19 of the transcript of the deposition of Mr. Drayna. In light of this and other
20 discovery produced by WSC in the case, we identified Mr. King as a witness in the
21 B&D Parties’ initial witness list.

22 9. WSC’s objection to the B&D Parties’ inclusion of Mr. King as a
23 potential witness in the case on the grounds that he was not identified in the B&D
24 Parties’ initial disclosures is made in bad faith as WSC has named three witnesses
25 in its witness list – *i.e.*, York Baur, Cass Herring, and Kendra Vita – that were not
26 included in WSC’s Initial disclosures. A true and accurate copy of WSC’s Initial
27 Disclosures is attached hereto as **Exhibit C**. Unlike the B&D Parties’ discovery of
28

King's significance to this case through discovery obtained from WSC, WSC's named witnesses are each employees of WSC, and their relevance to this action has been known to WSC since the filing of the Complaint. Thus, WSC's objection should be seen for what it is – gamesmanship – and be rejected. In the alternative, if King is excluded from the B&D Parties' witness list for not being included in the Initial Disclosures, then York Baur, Cass Herring, and Kendra Vita must all be excluded from WSC's witness list on the same grounds.

10. Finally, Gary Kruger was not identified in the B&D Parties' initial witness list because he is an out-of-state resident that could not be compelled through subpoena to testify at trial. On May 20, 2017, I spoke with Mr. Kruger – the creator and operator of windermerewatch.com – and learned that, although he is outside the subpoena power of this Court, he is likely to personally attend this trial during which time he may be called on to testify. Mr. Kruger's testimony is central to this case, and has been subject of many, if not most, of both parties' filings in this case. Both parties thoroughly discuss Mr. Kruger in their respective pleadings. (Dkt. No. 1, ¶¶ 51, 52, 92, 95; Dkt. Nos. 16, ¶¶ 70, 71, 73, 76, 78; Dkt. No. 31, ¶¶ 3, 45, 46, 47, 48, 49, 51, 57, 76, 77, 79.) WSC cannot claim that this is a surprise witness.

I declare under penalty of perjury under the laws of the State of California and the laws of the United States of America that the foregoing is true and correct and that this Declaration was executed this 26th day of May, 2017 at Irvine, California.

/s/ Kevin A. Adams
Kevin A. Adams

EXHIBIT A

1 Plaintiffs and Counter-Defendants Bennion & Deville Fine Homes, Inc., Bennion
2 & Deville Fine Homes SoCal, Inc., Windermere Services Southern California, Inc.,
3 Counter-Defendant Robert L. Bennion, and specially appearing Counter-Defendant
4 Joseph R. Deville (all collectively, the "B&D Parties"), by and through their undersigned
5 counsel of record, hereby set forth their initial disclosures pursuant to Federal Rule of
6 Civil Procedure 26(a). These disclosures are based on information currently available to
7 the B&D Parties and their counsel. The B&D Parties reserve the right to rely on
8 witnesses, documents and other information that may come to their or their counsel's
9 attention during the course of the litigation, through discovery, and trial preparation. The
10 B&D Parties reserve the right to modify or supplement these disclosures as discovery
11 proceeds.

12 **I. WITNESSES**

13 Based on their preliminary investigation, the B&D Parties believe the following
14 individuals, in addition to other potential officers, directors, and managing members of
15 Defendant Windermere Real Estate Services Company ("WSC"), may have information
16 within the scope of Rule 26(a)(1)(A)(i).

17 1. Robert L. Bennion – c/o Mulcahy LLP, 4 Park Plaza, Ste. 1230, Irvine, CA
18 92614; (949) 252-9377. Mr. Bennion is a party to this action and has discoverable
19 information relating to all claims and affirmative defenses asserted by the B&D Parties.

20 2. Joseph R. Deville – c/o Mulcahy LLP, 4 Park Plaza, Ste. 1230, Irvine, CA
21 92614; (949) 252-9377. Mr. Deville is a party to this action and has discoverable
22 information relating to all claims and affirmative defenses asserted by the B&D Parties.

23 3. Eric Forsberg – c/o Mulcahy LLP, 4 Park Plaza, Ste. 1230, Irvine, CA
24 92614; (949) 252-9377. Mr. Forsberg is the B&D Parties' Director of Technology and is
25 expected to testify regarding the technology and related services offered by WSC to its
26 Southern California franchisees, the efforts undertaken by the B&D Parties to combat
27 Windermere Watch's anti-marketing campaign, the technology and related services
28 created by the B&D Parties and offered to Windermere franchisees in Southern

1 California, and the communications with representatives of WSC regarding the
2 technology and related services WSC was providing.

3 4. Patrick Robinson – c/o Mulcahy LLP, 4 Park Plaza, Ste. 1230, Irvine, CA
4 92614; (949) 252-9377. Mr. Robinson is the B&D Parties' Director of Services and
5 accountant, and is expected to testify regarding certain details of the offer and sale of
6 Windermere franchises to prospective franchisees in Southern California, including but
7 not limited to the terms of the franchise agreements offered to those prospective
8 franchisees, and the increasing technology and administrative fees charged by WSC.

9 5. Paige Tyley – c/o Mulcahy LLP, 4 Park Plaza, Ste. 1230, Irvine, CA 92614;
10 (949) 252-9377. Ms. Tyley is the B&D Parties' Executive Assistant and is expected to
11 have information concerning WSC's failure to comply with its contractual obligations
12 relating to Windermere Watch and general unresponsiveness to the B&D Parties'
13 requests for assistance in the Southern California region.

14 6. Kirk Gregor – c/o Mulcahy LLP, 4 Park Plaza, Ste. 1230, Irvine, CA 92614;
15 (949) 252-9377. Mr. Gregor is the Director of Office Development for the B&D Parties
16 and is expected to have information regarding WSC's efforts to undermine the B&D
17 Parties' relationships with franchisees and agents in the Southern California region, the
18 harm caused to the region by Windermere Watch, and the strain that WSC placed on the
19 B&D Parties' sale of franchises in the Southern California region for not timely and
20 properly filing the franchise disclosure document in California.

21 7. Chris Anderson – c/o Mulcahy LLP, 4 Park Plaza, Ste. 1230, Irvine, CA
22 92614; (949) 252-9377. Mr. Anderson holds the title of General Manager for the B&D
23 Parties' real estate operations and is expected to have information on WSC's efforts to
24 undermine the B&D Parties' relationships with franchisees and agents in the Southern
25 California region, and the strain that WSC placed on the B&D Parties' sale of franchises
26 in the Southern California region for not timely and properly filing the franchise
27 disclosure document in California.

1 8. Robert Sunderland – 11770 Bernardo Plaza Court, Suite 310, San Diego, CA
2 92128, (858) 675-7800. Mr. Sunderland has served as legal counsel for the B&D Parties
3 and is expected to have information regarding the discussions and negotiations between
4 the B&D Parties and WSC regarding Windermere Watch, and the meetings with
5 representatives of WSC regarding the Southern California region, generally.

6 9. Gerard P. Davey – 1301 Dove Street, Suite 900, Newport Beach, California
7 92660-2473; (949) 475-9300. Mr. Davey is expected to have information regarding
8 communications with WSC representatives regarding the termination of the B&D Parties'
9 Area Representative rights and responsibilities, and on various other communications
10 with representatives of WSC.

11 10. Rich Johnson – 16783 Bernardo Center Drive, Suite D-1, San Diego, CA
12 92128. Mr. Johnson is a former Windermere franchise owner in Southern California and
13 is expected to have information regarding the harm caused by Windermere Watch's anti-
14 marketing campaign in the Southern California region, and the inferior technology
15 services offered by WSC.

16 11. Brian Gooding – 6965 El Camino Real, Suite 107, Carlsbad, CA 92009. Mr.
17 Johnson is a former Windermere franchise owner in Southern California and is expected
18 to have information regarding the harm caused by Windermere Watch's anti-marketing
19 campaign in the Southern California region, and the inferior technology services offered
20 by WSC.

21 12. Paul Drayna – c/o Perez Wilson Vaughn & Feasby, 750 B Street, Ste. 3300,
22 San Diego, CA 92101. Mr. Drayna is the General Counsel and Secretary for WSC and is
23 expected to have information regarding WSC's compliance (or noncompliance, as the
24 case may be) with California's franchise registration and disclosure laws, including but
25 not limited to, the creation, filing, and registration of WSC's franchise disclosure
26 documents, communications with the California Department of Business Oversight
27 (formerly, the Department of Corporations) during the franchise disclosure registration
28 process, the differing franchise terms offered to prospective franchisees in the Northern

1 and Southern California regions, and his legal advice to members of the B&D Parties
2 regarding compliance with California's franchise laws. Mr. Drayna is also expected to
3 have information regarding the Notices of Termination of the Area Representation
4 Agreement, and WSC's failure to take necessary legal action to prevent infringement of
5 the Windermere name and mark by Windermere Watch.

6 13. Robert Sherrell – c/o Perez Wilson Vaughn & Feasby, 750 B Street, Ste.
7 3300, San Diego, CA 92101. Mr. Sherrell is the Senior Windows and Systems
8 Administrator for Windermere Solutions and is expected to have information regarding
9 the technology and related services offered by WSC to its franchisees in Southern
10 California.

11 14. Geoffrey P. Wood – c/o Perez Wilson Vaughn & Feasby, 750 B Street, Ste.
12 3300, San Diego, CA 92101. Mr. Wood is the Chief Executive Officer of WSC and is
13 expected to have information regarding WSC's efforts to combat the counter-marketing
14 campaign of Windermere Watch in Southern California, the termination of WSC's
15 agreements with the B&D Parties, the "variety of services" offered by WSC to the B&D
16 Parties and other Windermere franchisees in the Southern California region, WSC's
17 efforts to push the B&D Parties out of the Windermere system, and general
18 communications with the B&D Parties and others regarding the facts set forth in the First
19 Amended Complaint.

20 15. Jill Jacobi Wood – c/o Perez Wilson Vaughn & Feasby, 750 B Street, Ste.
21 3300, San Diego, CA 92101. Ms. Wood is the President and a Director of WSC. She is
22 expected to have information on WSC's efforts to reacquire the Southern California Area
23 Representative business from the B&D Parties.

24 16. John W. Jacobi – c/o Perez Wilson Vaughn & Feasby, 750 B Street, Ste.
25 3300, San Diego, CA 92101. Mr. Jacobi is the Founder, Director, and Chairman of the
26 Board for WSC and is expected to have information regarding WSC's historical
27 relationships with the B&D Parties, and the termination of WSC's agreements with the
28 B&D Parties.

1 17. John O. ("OB") Jacobi – c/o Perez Wilson Vaughn & Feasby, 750 B Street,
2 Ste. 3300, San Diego, CA 92101. Mr. Jacobi is one of the Directors of WSC and is
3 expected to have information regarding WSC's historical relationships with the B&D
4 Parties, and the termination of WSC's agreements with the B&D Parties.

5 18. Michael J. Teather – c/o Perez Wilson Vaughn & Feasby, 750 B Street, Ste.
6 3300, San Diego, CA 92101. Mr. Teather is the Senior Vice President of Client Services
7 for WSC and also a licensed attorney. He is expected to have information regarding
8 WSC's communications with Windermere franchisees and prospective franchisees in the
9 Southern California region, WSC's efforts to retake the Area Representative rights and
10 responsibilities from the B&D Parties, and WSC's approval of Windermere franchise
11 locations in Southern California during the 2014 and 2015 years. Mr. Teather is also
12 expected to have information regarding WSC's efforts to acquire the B&D Parties'
13 technology and related services and employees.

14 19. York Baur – c/o Perez Wilson Vaughn & Feasby, 750 B Street, Ste. 3300,
15 San Diego, CA 92101. Mr. Baur works (or worked) at Windermere Solutions and is
16 expected to have information regarding WSC's knowledge of the B&D Parties' extensive
17 efforts to combat Windermere Watch's anti-marketing campaign.

18 20. Fred Schuster – 14677 Via Bettona, Ste. 120, San Diego, CA 92127. Mr.
19 Schuster is the former manager of a Windermere franchisee in Southern California and is
20 expected to have information regarding WSC's efforts to engage the Southern California
21 franchisees without the involvement of the B&D Parties.

22 21. John Schieber – address and contact information currently unknown to the
23 B&D Parties. Mr. Schieber is expected to have relevant information regarding WSC's
24 Northern California region and the franchise terms offered to the prospective franchisees
25 for that region.

26 22. Gretchen Pearson – address and contact information currently unknown to
27 the B&D Parties. Ms. Pearson was the Northern California Area Representative for a
28 period of time relevant to this litigation, and is expected to have relevant information

1 regarding WSC's Northern California region, the franchise terms offered to the
2 prospective franchisees for that region, and the support and services offered by WSC to
3 the franchisees in that region.

4 23. Mike Fanning – address and contact information currently unknown to the
5 B&D Parties. Mr. Fanning served as the WSC Northern California contact for a period of
6 time relevant to this litigation and is expected to have relevant information regarding
7 WSC's Northern California region and the franchise terms offered to the prospective
8 franchisees for that region.

9 24. Tara Scholl – address and contact information currently unknown to the
10 B&D Parties. Ms. Scholl was responsible for recruiting new franchisees in the Northern
11 California region for 2014 and is expected to have relevant information regarding WSC
12 franchise efforts in that region and the franchise terms offered to the prospective
13 franchisees for that region.

14 25. Person Most Knowledgeable of WSC – c/o Perez Wilson Vaughn & Feasby,
15 750 B Street, Ste. 3300, San Diego, CA 92101. This Person Most Knowledgeable is
16 expected to have discoverable information regarding WSC's counterclaims and
17 affirmative defenses.

18 26. WSC's Corporate Representative and records custodian pursuant to Fed. R.
19 Civ. P. 30(b)(6) – c/o Perez Wilson Vaughn & Feasby, 750 B Street, Ste. 3300, San
20 Diego, CA 92101. This witness or group of witnesses is expected to have information
21 regarding WSC's retention and storage of the written communications, contracts, and
22 other documents relevant to this action.

23 27. Any other witness identified by WSC.

24 Discovery is continuing and the B&D Parties reserve the right to supplement their
25 initial disclosure of witnesses once such information is learned.

26 **II. DOCUMENTS**

27 Based on their preliminary investigation, the B&D Parties believe the following
28 documents, electronically stored information, and/or tangible things that the B&D Parties

1 have in their possession, custody, or control may fall within the scope of Rule
2 26(a)(1)(A)(ii). Such documents are located at the B&D Parties' office in Rancho
3 Mirage, California.

4 1. Windermere Real Estate License Agreement dated August 1, 2001, and all
5 addenda thereto. Such documents are located at the B&D Parties' office in Rancho
6 Mirage, California.

7 2. Windermere Real Estate Services Company Area Representation Agreement
8 for the State of California dated May 1, 2004, and all addenda thereto. Such documents
9 are located at the B&D Parties' office in Rancho Mirage, California.

10 3. Windermere Real Estate Franchise License Agreement, dated March 29,
11 2011, and all addenda thereto. Such documents are located at the B&D Parties' office in
12 Rancho Mirage, California.

13 4. Agreement Modifying Windermere Real Estate Franchise License
14 Agreement dated December 18, 2012. Such documents are located at the B&D Parties'
15 office in Rancho Mirage, California.

16 5. Documents, including ESI, relating to the Windermere Watch's anti-
17 Windermere marketing campaign. Such documents are located at the B&D Parties' office
18 in Rancho Mirage, California.

19 6. Documents, including ESI, relating to communications between the B&D
20 Parties and representatives of WSC regarding WSC's efforts (or lack thereof) to combat
21 Windermere Watch's anti-Windermere marketing campaign. Such documents are located
22 at the B&D Parties' office in Rancho Mirage, California.

23 7. Documents, including ESI, relating to communications involving
24 Windermere franchisees regarding WSC's efforts (or lack thereof) to combat
25 Windermere Watch's anti-Windermere marketing campaign. Such documents are located
26 at the B&D Parties' office in Rancho Mirage, California.

1 8. Documents, including ESI, relating to the B&D Parties' competitors' use of
2 the Windermere Watch anti-Windermere marketing campaign. Such documents are
3 located at the B&D Parties' office in Rancho Mirage, California.

4 9. Documents, including ESI, relating to WSC's franchise registration and
5 renewal efforts in California. Such documents are located at the B&D Parties' office in
6 Rancho Mirage, California.

7 10. Documents, including ESI, relating to communications regarding the
8 disclosure of prospective franchisees in California with the Windermere franchise
9 disclosure documents. Such documents are located at the B&D Parties' office in Rancho
10 Mirage, California.

11 11. Documents, including ESI, relating to communications between the B&D
12 Parties and Paul Drayna regarding the registration and disclosure of Windermere's
13 franchise disclosure document for the Southern California region. Such documents are
14 located at the B&D Parties' office in Rancho Mirage, California.

15 12. Documents, including ESI, relating to the materially different contract terms
16 offered by WSC to its Northern California prospective franchisees from the terms that it
17 offered to its Southern California prospective franchisees. Such documents are located at
18 the B&D Parties' office in Rancho Mirage, California.

19 13. Documents, including ESI, relating to violations and contractual breaches by
20 WSC of the license agreements and Area Representation Agreement. Such documents are
21 located at the B&D Parties' office in Rancho Mirage, California.

22 14. Documents, including ESI, relating to WSC's efforts to acquire the B&D
23 Parties' technology and related services. Such documents are located at the B&D Parties'
24 office in Rancho Mirage, California.

25 15. Documents, including ESI, relating to WSC's interference with the B&D
26 Parties' relationships with prospective and existing franchisees in the Southern California
27 region. Such documents are located at the B&D Parties' office in Rancho Mirage,
28 California.

1 16. Documents, including ESI, relating to the success the B&D Parties had
2 while members of the Windermere system. Such documents are located at the B&D
3 Parties' office in Rancho Mirage, California.

4 17. Documents, including ESI, relating to the contributions of the B&D Parties
5 to the Windermere system. Such documents are located at the B&D Parties' office in
6 Rancho Mirage, California.

7 18. Documents, including ESI, relating to WSC's failure to provide adequate
8 technology and related services to the Southern California region. Such documents are
9 located at the B&D Parties' office in Rancho Mirage, California.

10 19. Documents, including ESI, relating to any delay in payment of franchise fees
11 and other fees required by the contracts by the B&D Parties. Such documents are located
12 at the B&D Parties' office in Rancho Mirage, California.

13 20. Documents, including ESI, relating to the B&D Parties use of the
14 Windermere name and trademark, including any efforts by them to discontinue use of the
15 name and mark following the termination of the parties' relationships. Such documents
16 are located at the B&D Parties' office in Rancho Mirage, California.

17 21. Documents, including ESI, relating to WSC's failure to provide a viable
18 "Windermere System" for the Southern California region. Such documents are located at
19 the B&D Parties' office in Rancho Mirage, California.

20 22. Documents, including ESI, relating to WSC's efforts to reacquire the Area
21 Representative rights and duties for the Southern California region. Such documents are
22 located at the B&D Parties' office in Rancho Mirage, California.

23 23. Documents, including ESI, relating to the B&D Parties' loss of franchise
24 fees and license fees as a result of WSC's conduct. Such documents are located at the
25 B&D Parties' office in Rancho Mirage, California.

26 24. Documents, including ESI, relating to the artificially depressed value of the
27 B&D Parties' businesses as a result of WSC's failures to comply with the express and
28

1 implied terms of the parties' agreements. Such documents are located at the B&D Parties'
2 office in Rancho Mirage, California.

3 25. Documents, including ESI, relating to WSC's failure to make available to
4 the B&D Parties competent "key people" necessary to assist them in carrying out the
5 obligations to offer and sell franchises as the Area Representative in the Southern
6 California region. Such documents are located at the B&D Parties' office in Rancho
7 Mirage, California.

8 26. Documents, including ESI, relating to WSC's termination of the Area
9 Representative Agreement in violation of the California Franchise Relations Act. Such
10 documents are located at the B&D Parties' office in Rancho Mirage, California.

11 27. Documents, including ESI, relating to WSC's attempts to recruit the B&D
12 Parties' sales agents and other employees to join WSC and other Windermere offices.
13 Such documents are located at the B&D Parties' office in Rancho Mirage, California.

14 28. Documents, including ESI, relating to WSC's failure to take necessary
15 action (legal or otherwise) to prevent infringement of the Windermere trademark or the
16 related unfair competition in the Southern California region as a result of the Windermere
17 Watch websites. Such documents are located at the B&D Parties' office in Rancho
18 Mirage, California.

19 29. Documents, including ESI, relating to the support the B&D Parties provided
20 to the Windermere franchisees in the Southern California region. Such documents are
21 located at the B&D Parties' office in Rancho Mirage, California.

22 30. Documents, including ESI, relating to the remittance of franchise fees
23 collected by the B&D Parties as Area Representative to WSC. Such documents are
24 located at the B&D Parties' office in Rancho Mirage, California.

25 31. Documents, including ESI, relating to the loans by WSC to the B&D Parties,
26 and any subsequent repayment of those loans. Such documents are located at the B&D
27 Parties' office in Rancho Mirage, California.

1 32. Documents, including ESI, relating to the parties' performance under the
2 terms of the various agreements. Such documents are located at the B&D Parties' office
3 in Rancho Mirage, California.

4 33. Documents, including ESI, relating to the damages the B&D Parties are
5 claiming in this action. Such documents are located at the B&D Parties' office in Rancho
6 Mirage, California.

7 **III. DAMAGES**

8 The B&D Parties seek compensatory damages suffered as a result of WSC's
9 breaches of the express and implied terms of the parties' agreements. While the full
10 extent of these damages is not yet known, they include, but are not limited to:

- 11 1. The fair market value of the Area Representative business at the
12 time of termination by WSC;
- 13 2. 50% of all franchise and license fees, including those resulting
14 from a settlement of said fees, acquired by WSC and owed to
15 the B&D parties pursuant to the terms of the Area
16 Representative Agreement;
- 17 3. The non-reimbursed expenditures by the B&D Parties on
18 technology and SEO optimization to combat the anti-
19 Windermere marketing efforts of Windermere Watch;
- 20 4. The depressed value of the franchise and Area Representative
21 businesses as a result of WSC's failure to comply with the
22 express and implied terms of the parties' agreements;
- 23 5. The damages incurred by the B&D Parties in connection with
24 the failed operation of the Solana Beach franchised location;
25 and
- 26 6. The damages to the B&D Parties in connection with the
27 numerous lost agents and listings resulting from WSC's
28 breaches of its express and implied obligations under the
parties' agreements.

1
2 The B&D Parties' claim for damages will be supplemented upon receipt of
3 additional information through discovery and investigation. Further, a financial expert
4 will be required to conduct a fair market value for the Area Representative business and
5 the depressed value of the B&D Parties' businesses as a result of WSC's unlawful
6 conduct.

7 The documents which establish the nature and extent of injuries suffered include,
8 but are not limited to the parties' agreements, the B&D Parties' financials, and all other
9 records reflecting the B&D Parties' non-reimbursed expenditures on technology and SEO
10 optimization to combat the anti-Windermere marketing efforts of Windermere Watch.

11 The B&D Parties also seek a judicial determination and declaration that WSC did
12 not have cause to terminate the Area Representation Agreement.

13 In addition to the foregoing, the B&D Parties intend to seek an award of attorneys'
14 fees and costs provided for in the parties' agreements and incurred during the prosecution
15 of this action, to be determined at trial, as well as other damages as may be appropriate as
16 the action proceeds.

17 **IV. INSURANCE AGREEMENTS**

18 The B&D Parties are not aware of any insurance agreement that may be used to
19 satisfy part or all of a judgment in this case. However, the B&D Parties will timely
20 supplement its *Fed. R Civ. Proc.* 23(a)(1)(A)(iv) disclosure if they learn of any such
21 insurance policy.
22

23 ///

24
25 ///

1 DATED: December 14, 2015

MULCAHY LLP

2
3 By: /s/ James M. Mulcahy

4 James M. Mulcahy

5 Kevin A. Adams

6 *Attorneys for Plaintiffs/Counter-Defendants*

7 *Bennion & Deville Fine Homes, Inc.,*

8 *Bennion & Deville Fine Homes SoCal, Inc.,*

9 *Windermere Services Southern California,*

10 *Inc., and Counter-Defendants Robert L.*

11 *Bennion and Joseph R. Deville*

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1 with Federal Express on that same day in the ordinary course of business for overnight
2 delivery with delivery costs thereon fully prepaid by sender, at Irvine, California.

3 [] BY MESSENGER SERVICE – I served the documents by placing them in an envelope or
4 package addressed to the persons at the addresses listed herein and providing them to a
5 professional messenger service for service. A declaration by the messenger service will be
6 filed separately.

7 I declare under penalty of perjury under the laws of the State of California and the United
8 States of America that the above is true and correct.

9 Executed on **December 14, 2015** at Irvine, California.

10 By: /s/ Barbara Calvert
11 Barbara Calvert
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PROOF OF SERVICE

EXHIBIT B

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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 the agreement without cause triggered the payment of
2 the fair market value of the business, correct?

3 A. That which -- as set forth in paragraph 4.2.
4 You said 4(b), and I did not know what you were
5 referring to by 4(b).

6 Q. Terminating the relationship without cause
7 triggers the payment of the fair market value to the
8 terminated party, correct?

9 A. Pursuant to paragraph 4.2, as we discussed
10 previously, yes.

11 Q. Thank you.

12 Has Windermere collected any fees from
13 franchisees that previously operated in Mr. Bennion
14 and Mr. Deville's region that have not been forwarded
15 on to Mr. Bennion and Mr. Deville pursuant to this
16 contract?

17 MR. FEASBY: Objection. Form.

18 THE WITNESS: I'm sorry. I don't
19 understand the question.

20 BY MR. ADAMS:

21 Q. Sure. Has Windermere collected any fees
22 from Rich King that have not been forwarded on to
23 Mr. Bennion and Mr. Deville?

24 A. There have been payments received from
25 Mr. King since his departure. The portion owed to

1 Mr. Bennion and Mr. Deville have been applied as
2 offsets against the amounts that they owe us.

3 Q. And how much has been collected by
4 Windermere from Mr. King that has been not forwarded
5 on?

6 A. Not a great deal. Mr. King -- just about
7 the same time that Mr. Bennion and Mr. Deville
8 departed, Mr. King's departure was happening at
9 essentially the same time. He did agree to sign a
10 Promissory Note for the amounts that he owed, and he
11 is currently in default of those obligations.

12 We have sent him a Notice of Default, to
13 which he responded indicating that he is trying to get
14 caught back up; he's had a few rough months, and --
15 but the -- I do not know off the top of my head how
16 much we've received from him so far. It's not a great
17 deal. He's -- he is a number of months in arrears at
18 this point.

19 Q. Can you estimate for me?

20 A. Honestly, I can't.

21 Q. More than \$10,000?

22 A. I -- I honestly don't know.

23 Q. Who would know at Windermere?

24 A. Mark Oster would be able to give you the
25 exact numbers.

CERTIFICATE

STATE OF WASHINGTON)
) ss.
COUNTY OF KITSAP)

I, the undersigned Washington Certified Court Reporter, hereby certify that the foregoing deposition upon oral examination of PAUL S. DRAYNA was taken stenographically before me on August 22, 2016, and thereafter transcribed under my direction;

That the witness was duly sworn by me pursuant to RCW 5.28.010 to testify truthfully; that the transcript of the deposition is a full, true, and correct transcript to the best of my ability; that I am neither attorney for nor a relative or employee of any of the parties to the action or any attorney or financially interested in its outcome;

I further certify that in accordance with CR 30(e), the witness was given the opportunity to examine, read, and sign the deposition, within 30 days, upon its completion and submission, unless waiver of signature was indicated in the record.

IN WITNESS WHEREOF, I have hereunto set my hand and 6th day of September, 2016.

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

EXHIBIT C

1 John D. Vaughn, State Bar No. 171801
2 Jeffrey A. Feasby, State Bar No. 208759
3 PEREZ WILSON VAUGHN & FEASBY
4 750 B Street, Suite 3300
5 San Diego, California 92101
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9 E-Mail: feasby@perezwilson.com

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

12
13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**
15

16 BENNION & DEVILLE FINE
17 HOMES, INC., a California
18 corporation, BENNION & DEVILLE
19 FINE HOMES SOCIAL, INC., a
20 California corporation, WINDERMERE
21 SERVICES SOUTHERN
22 CALIFORNIA, INC., a California
23 corporation,

24 Plaintiffs,

25 v.

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

Defendant.

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

Hon. Manuel L. Real

**PLAINTIFF AND
COUNTERCLAIMANT
WINDERMERE REAL ESTATE
SERVICES COMPANY'S INITIAL
DISCLOSURES**

[F.R.C.P. 26(a)(1)]

Courtroom: 6

AND RELATED COUNTERCLAIMS

1 Plaintiff and Counterclaimant Windermere Real Estate Services Company
2 (“WSC”) hereby submits its initial disclosures pursuant to Federal Rule of Civil
3 Procedure 26(a)(1). The following disclosures are based on information currently
4 known to WSC. WSC reserves the right to correct, modify, and/or supplement these
5 disclosures in accordance with Federal Rule of Civil Procedure 26(e).

6 **(i) The name and, if known, the address and telephone number of**
7 **each individual likely to have discoverable information—along with the**
8 **subjects of that information—that the disclosing party may use to support its**
9 **claims or defenses, unless the use would be solely for impeachment.**

10 Pursuant to Federal Rule of Civil Procedure 26(a)(1)(A)(i), WSC presently
11 believes that the following individuals are likely to have discoverable information
12 that WSC may use to support its claims or defenses, excluding persons to be used
13 solely for impeachment:

Name	Address and Telephone Number	Subject of Information
Joseph R. Deville	c/o counsel for Plaintiffs and Counterdefendants	All aspects of this litigation.
Robert L. Bennion	c/o counsel for Plaintiffs and Counterdefendants	All aspects of this litigation.
Patrick Robinson	c/o counsel for Plaintiffs and Counterdefendants	Plaintiffs’ allegations and WSC’s defenses to those claims.
Eric Forsberg	c/o counsel for Plaintiffs and Counterdefendants	Plaintiffs’ IT structure and capabilities and their ownership and/or use of relevant web domains. Also issues related to windermerewatch.com and Plaintiffs’ SEO efforts.

Name	Address and Telephone Number	Subject of Information
Robert Sunderland	Sunderland and McCutchan LLP 11770 Bernardo Place Ct, Suite 310 San Diego, CA 92128	The parties' negotiation of various agreements and related documents and historical disputes between the parties.
John Jacobi	c/o counsel for WSC	The various agreements between the parties and the negotiation of those agreements. Discussions between the parties regarding the matters alleged in the First Amended Complaint and First Amended Counterclaim.
Geoff Wood	c/o counsel for WSC	The various agreements between the parties and the negotiation of those agreements. Discussions between the parties regarding the matters alleged in the First Amended Complaint and First Amended Counterclaim.
Jill Jacobi Wood	c/o counsel for WSC	The various agreements between the parties and the negotiation of those agreements. Discussions between the parties regarding the matters alleged in the First Amended Complaint and First Amended Counterclaim.
John "OB" Jacobi	c/o counsel for WSC	The various agreements between the parties and the negotiation of those agreements. Discussions between the parties regarding the matters alleged in the First Amended Complaint and First Amended Counterclaim.

Name	Address and Telephone Number	Subject of Information
Paul Drayna	c/o counsel for WSC	The various agreements between the parties and the negotiation of those agreements. Discussions between the parties regarding the matters alleged in the First Amended Complaint and First Amended Counterclaim.
Noelle Bortfeld	c/o counsel for WSC	WSC's marketing efforts, and historic communications between the parties regarding marketing efforts in Southern California.
Michael Teather	c/o counsel for WSC	Discussions between the parties regarding the matters alleged in the First Amended Complaint and Counterclaim.
Mark Oster	c/o counsel for WSC	Amounts owing to WSC, loans to Counter-Defendants, and other financial matters relevant to the litigation.
Michael Fanning	c/o counsel for WSC	Services offered by WSC to its franchisees and Plaintiffs' history of refusing to accept assistance from WSC when offered.
Don Riley	c/o counsel for WSC	History of dealings between the parties, their past negotiations, and other matters alleged in the First Amended Complaint, and Counterclaim.
Robert Sherrell	c/o counsel for WSC	Counter-Defendants' ownership and/or use of relevant web domains.

Name	Address and Telephone Number	Subject of Information
Rich Johnson	16783 Bernardo Center Drive, Suite D-1 San Diego, CA 92128 (858) 487-5110	Lack of service and support provided by Plaintiffs, as well as actions by Plaintiffs that were harmful to a franchise they were supposed to be supporting.
Brian Gooding	6965 El Camino Real, Suite 107 Carlsbad, CA 92009 (760) 683-8626	Lack of service and support provided by Plaintiffs, as well as actions by Plaintiffs that were harmful to a franchise they were supposed to be supporting.

WSC reserves the right to rely upon information from additional persons as such individuals come to its attention through further discovery and investigation, to rely upon evidence obtained from any persons identified by Plaintiffs and/or Counterdefendants, and to rely upon evidence obtained from the foregoing individuals with respect to any subject. WSC does not consent to or authorize any communications with any of its current or former employees, who should only be contacted through the undersigned counsel for WSC.

(ii) A copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.

Pursuant to Federal Rule of Civil Procedure 26(a)(1)(A)(ii), the following categories encompass documents, electronically stored information, and tangible things that WSC presently believes may be used to support its claims or defenses, excluding those used solely for impeachment:

1. Documents related to the preparation of the agreements at issue;

///

1 2. Documents related to communications between the parties
2 regarding the agreements at issue;

3 3. Documents related to communications between the parties
4 regarding Windermere Watch; and

5 4. Documents related to loans to Counterdefendants.

6 These documents, to the extent located to date, are located at WSC's premises
7 or offsite storage, of the law offices of Pérez Wilson Vaughn & Feasby, 750 B
8 Street, Suite 3300, San Diego, California 92130. WSC reserves the right to rely
9 upon any additional documents obtained through further discovery and
10 investigation, and any documents identified or disclosed by Plaintiffs and/or
11 Counterdefendants.

12 **(iii) A computation of each category of damages claimed by the**
13 **disclosing party—who must also make available for inspection and copying as**
14 **under Rule 34 the documents or other evidentiary material, unless privileged**
15 **or protected from disclosure, on which each computation is based, including**
16 **materials bearing on the nature and extent of injuries suffered.**

17 WSC seeks damages for Counterdefendants' breach of various agreements in
18 the amount of \$1,208,655.43 plus pre and post-judgment interest thereon as allowed
19 by the parties' agreements and/or applicable law.

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1 (iv) For inspection and copying as under Rule 34, any insurance
2 agreement under which an insurance business may be liable to satisfy all or
3 part of a possible judgment in the action or to indemnify or reimburse for
4 payments made to satisfy the judgment.

5 WSC is currently not aware of any insurance policies that may be liable to
6 satisfy all or part of a possible judgment in the action or to indemnify or reimburse
7 for payments made to satisfy the judgment.

8
9 DATED: December 14, 2015 PEREZ WILSON VAUGHN & FEASBY

10
11 By: /s/ John D. Vaughn

12 John D. Vaughn

13 Attorneys for

14 Windermere Real Estate Services Company

15 John D. Vaughn

16 Attorneys for

17 Windermere Real Estate Services Company
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1 **CERTIFICATE OF SERVICE**

2 I am an attorney with the law firm of Pérez Wilson Vaughn & Feasby, whose
3 address is 750 B Street, Suite 3300, San Diego, California 92101. I am over the age
4 of eighteen years, and am not a party to this action.

5 On December 14, 2015, served the following:

6 **1. PLAINTIFF AND COUNTERCLAIMANT WINDERMERE REAL**
7 **ESTATE SERVICES COMPANY'S INITIAL DISCLOSURES**
8 **[F.R.C.P. 26(a)(1)]**

8 on the interested parties in this action by:

9 **ELECTRONIC MAIL:** I caused to be transmitted via electronic means to
10 the electronic mail address(es) noted below a true and correct copy of the
11 aforementioned document(s) from feasby@perezwilson.com on the date
12 ascribed below. The transmission was reported as complete without error.
I am aware that the form of original signature must be maintained and
must be available for review and copying on the request of the court or any
party to this action.

13 by serving:

14 MULCAHY LLP
15 James M. Mulcahy (SBN 213547)
16 jmulcahy@mulcahyllp.com
17 Kevin A. Adams (SBN 239171)
18 kadams@mulcahyllp.com
Douglas R. Luther (SBN 280550)
dluther@mulcahyllp.com
Four Park Plaza, Suite 1230
Irvine, California 92614

Attorneys for Plaintiffs and
Counter-Defendants

19 XX **(FEDERAL):** I declare under penalty of perjury under the laws of the
20 United State of America that I am a member of the Bar of this Court.

21 Executed at San Diego, California on December 14, 2015.

22
23 /s/Jeffrey A. Feasby
24 Jeffrey A. Feasby
25
26
27
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