

EXHIBIT K

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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) Case No.
California corporation,) 5:15-CV-01921 R
WINDERMERE SERVICES SOUTHERN) (KKx)
CALIFORNIA, INC., a California)
corporation,)
)
Plaintiffs,)

vs.

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

DEPOSITION OF ROBERT L. BENNION
Irvine, California
Thursday, July 28, 2016
Volume II

Reported by:
Shari Stellhorn
CSR No. 2807
Job No. 2330920A
PAGES 93 - 227

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA
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5 BENNION & DEVILLE FINE HOMES,)
6 INC., a California)
7 corporation, BENNION & DEVILLE)
8 FINE HOMES SOCAL, INC., a) Case No.
9 California corporation,) 5:15-CV-01921 R
10 WINDERMERE SERVICES SOUTHERN) (KKx)
11 CALIFORNIA, INC., a California)
12 corporation,)
13)
14 Plaintiffs,)
15 vs.
16 WINDERMERE REAL ESTATE
17 SERVICES COMPANY, a Washington
18 corporation; and DOES 1-10,,
19 Defendants.
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Deposition of ROBERT L. BENNION, Volume II, taken on behalf of Defendant and Cross-Complainant, at 4 Park Plaza, Suite 1230, Irvine, California, beginning at 9:13 a.m. and ending at 12:45 p.m. on Thursday, July 28, 2016, before Shari Stellhorn, Certified Shorthand Reporter No. 2807.

1 APPEARANCES:
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12 Video Operator: Joann Yager
13 Also Present: Mike Teather
Joseph R. Deville
14 Kirk Gregor
15
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1 -- the third full paragraph, "As far as a legality
2 of what the Watch is doing, my least" -- I think he
3 meant to say my last -- "my least read of site about
4 two weeks ago still led me to conclude that they are
5 within First Amendment rights republishing documents 10:39:10
6 that are already a public record"; do you see that?

7 A Yes.

8 Q So at least as of this time, October 25th,
9 2012, your attorney, Mr. Sunderland, was of the
10 opinion that Mr. Kruger's activities were protected 10:39:21
11 by is Constitutional First Amendment right; correct?

12 A Yes.

13 Q Did -- from 2012 through 2015, did the
14 substance of the material that -- the substance of
15 the material that Mr. Kruger was producing, did that 10:39:49
16 change?

17 A In my opinion it did. I think it got more
18 personal attacking and more, you know, character
19 attacks or more defamation. I got so amped up about
20 it I actually did my own research to try and find my 10:40:06
21 own case law and I brought this up at one of the
22 meetings in Seattle. I did find some instances in
23 California, I told them I didn't know if this could
24 help Windermere as a whole and the whole system in
25 all the states, where this type of activity was 10:40:23

1 going on and if somebody said something on an
2 ongoing basis like this and defamed their character
3 and impacted their right to earn a living, the
4 person could be shut down, so --

5 Q And what was the response to that material 10:40:39
6 that you found?

7 A I don't -- I don't know what they did with
8 what I said. I mean, the evidence will show what
9 they did or didn't do. I don't think much was done.
10 I don't think anybody did anything. 10:40:55

11 Q Do you know whether or not there was ever a
12 disagreement among the lawyers regarding whether or
13 not anything could be done from a legal standpoint
14 to stop Mr. Kruger?

15 A I don't have knowledge to that, no. 10:41:07

16 Q We had talked before briefly about some of
17 the materials that were produced by Windermere in
18 response to the activities of Mr. Kruger. I don't
19 know the best way to go through this.

20 Let me show you this one first and then 10:41:56
21 I'll just ask you, is that the talking points, the
22 frequently asked questions that you were referring
23 to in your testimony before?

24 A Yes.

25 Q And do you know when these were produced 10:42:10

1 Q And what brought about this agreement
2 between you and Windermere Seattle?

3 A The issues with Windermere Watch.

4 Q And by this time the -- Mr. Kruger's
5 activities related to his website had changed and 11:14:07
6 started to be directed more at you and Mr. Deville;
7 correct?

8 A Yeah, he started in 2011 and it really
9 ramped up in '12, so, yes, this would be the correct
10 time frame. 11:14:24

11 Q And had that -- those activities had any
12 impact on the business that you were doing in
13 Southern California?

14 A Yes.

15 Q Did you lose agents as a result of the 11:14:35
16 Windermere Watch campaign?

17 A To my recollection, yes, we did.

18 Q Do you remember the names of those agents?

19 A I do not.

20 Q Who would have those names? 11:14:49

21 A Mr. Deville would.

22 Q Do you recall whether or not you lost any
23 potential franchisees in Southern California as a
24 result of Windermere Watch?

25 A As I recall, we did. 11:15:04

1 Q Do you know the names of those franchisees?
2 A No.
3 Q Do you know how many there were?
4 A No.
5 Q Can you estimate for me? 11:15:14
6 A Two to four.
7 Q What about the number of agents that you
8 lost, can you estimate that number for me?
9 A I cannot.
10 Q Were there listings that you lost or the 11:15:23
11 agents of yours lost in Southern California as a
12 result of Windermere Watch?
13 A To my recollection, yes.
14 Q Do you remember any of those listings
15 specifically? 11:15:35
16 A No.
17 Q Do you know how many listings were lost?
18 A No.
19 Q Can you estimate for me?
20 A No. 11:15:41
21 Q So after this Modification Agreement, do
22 you know whether or not you lost any agents as a
23 result of Windermere Watch?
24 A 2012 going forward?
25 Q Correct. 11:16:02

1 A I don't recall. Our efforts with the SEO
2 to push him back helped squelch the problem.

3 Q So you don't recall specifically if you did
4 or not lose agents?

5 A No. 11:16:17

6 Q Do you recall whether or not you lost any
7 potential franchisees after that time as a result of
8 Windermere Watch?

9 A My recollection is we did.

10 Q Do you know how many franchisees there 11:16:26
11 were?

12 A No.

13 Q Can you estimate for me?

14 A No.

15 Q Do you know whether or not you lost 11:16:32
16 listings as a result of Windermere Watch after the
17 date of the Modification Agreement?

18 A I believe we did. I recall that we did.

19 Q And do you have any idea how many listings
20 were lost? 11:16:44

21 A I do not.

22 Q Do you have any idea of the potential
23 dollar amount that was lost related to those
24 listings?

25 A I do not. 11:16:54

1 Q So the Modification Agreement, it covered a
2 number of issues; is that a fair statement?

3 A That and fees.

4 Q By that you mean Windermere Watch?

5 A I guess I'm on to fees, franchise fees. 11:17:27

6 Q Sorry. You said that and then you went
7 onto fees, and --

8 A I was thinking of the franchise fees in
9 negotiating the franchise fees to be paid.

10 Q And then up above that it does address 11:17:46
11 Windermere Watch as well?

12 A Yes, Windermere Watch.

13 Q Okay. And then continuing on --

14 A Those are the items that I see. Am I
15 missing something? 11:18:06

16 Q If you look on Page '12, WSC 1217; do you
17 see that?

18 A Yes.

19 Q Discusses ramp up and payment of fees for
20 April 2012 through present? 11:18:18

21 A Yes.

22 Q And then this was a provision that
23 retroactively applied a ramp up fee to some of
24 the -- some or all of the branches?

25 A Yes. 11:18:31

1 Q And then underneath that there is a
2 limitation and cap on future technology fees?

3 A Yes.

4 Q And you were able to negotiate that as
5 well? 11:18:40

6 A Yes.

7 Q And then the next two, one is a five-year
8 term and that provided that if you did not stay with
9 Windermere for a period of five years after this
10 agreement, then you would pay some amount back; is 11:18:58
11 that correct?

12 A Yes.

13 Q Yes?

14 A Yes.

15 Q And then the one below liquidated damages, 11:19:04
16 if you didn't stay five, the amount paid back, this
17 is how you would determine it?

18 A Yes.

19 Q And then the last one speaks of personal
20 guarantees that you and Mr. Deville had made for 11:19:17
21 debts of the Bennion & Deville entities?

22 A Yes.

23 Q And pursuant to this guarantee -- or excuse
24 me -- pursuant to this provision, Windermere Seattle
25 and the area representative agreed to waive any 11:19:33

1 personal liability you would have had for the
2 franchise fees that were forgiven in Section B
3 above; correct?

4 A Yes.

5 Q However, to the extent there were 11:19:47
6 additional fees that were incurred after April 1st,
7 2012, you would still be personally liable for
8 those; correct?

9 A I'd have to read that.

10 Q Okay. 11:20:01

11 A Where do you see that?

12 Q If you take a look under Section G --

13 A Yes.

14 Q -- the first sentence talks about relieving
15 you from liability -- personal liability from the 11:20:19
16 amounts that were forgiven?

17 A Yes.

18 Q It says, "All prior personal guarantees of
19 said amounts are hereby released."

20 A Yes. 11:20:28

21 Q "The personal guarantees set forth in the
22 license agreements and prior addenda thereto shall
23 continue to apply to amounts that became due and
24 owing under the license agreements on or after
25 April 1st, 2012." 11:20:39

1 A Yes.

2 Q So is it your understanding of that
3 provision that you would still be personally liable
4 for amounts that were incurred by the B & D entities
5 after April 1st, 2012? 11:20:50

6 A Yes.

7 Q Going back to page -- it's WSC 1216 where
8 it's talking about Windermere Watch --

9 A Yes.

10 Q -- under this provision Windermere Seattle 11:21:10
11 agreed to take -- I'll just read it. "WSC agrees
12 that it shall make commercially reasonable efforts
13 to actively pursue counter marketing and other
14 methods seeking to curtail the anti marketing
15 activities undertaken by Gary Kruger, his 11:21:29
16 associates, Windermere Watch and/or the agents of
17 the foregoing persons"; do you see that?

18 A Yes.

19 Q Did you have any discussions with anyone at
20 Windermere Seattle prior to signing this agreement 11:21:38
21 regarding what commercially reasonable efforts
22 meant?

23 A We never talked in terms of commercially
24 reasonable efforts. We had discussions on what
25 could or couldn't be done. 11:21:56

1 Q And what -- what did those -- what was
2 discussed during those times?

3 A That's when we talked about hiring a P.R.
4 firm, sending an outside independent person to try
5 and negotiate with him, what were our legal options, 11:22:13
6 you know, to sue him or not, all of the ideas that
7 we've discussed before earlier today.

8 Q Okay. Did you guys discuss at that time
9 SEO efforts?

10 A Yes. 11:22:33

11 Q And what was discussed with regard to that?

12 A What we were doing and they needed to
13 figure out how to do it, also.

14 Q So you were already doing it at that time?

15 A Yes. 11:22:44

16 Q And was Eric Forsberg in charge of those
17 efforts?

18 A Yes.

19 Q And he had been somewhat successful;
20 correct? 11:22:56

21 A Yes.

22 Q In terms of litigation, the next sentence
23 in that paragraph says, "Such efforts may include
24 litigation at WSC's discretion"; do you see that?

25 A Yes. 11:23:14

1 Q And so pursuant to this agreement, it was
2 up to Windermere Seattle whether or not they wanted
3 to initiate litigation?

4 A Yes, it was their brand to defend.

5 Q And you understood that with this 11:23:24
6 agreement, even if commercially reasonable efforts
7 were undertaken, that there still might not be any
8 favorable result that Gary Kruger's activities could
9 continue; correct?

10 A I did not think that far ahead. 11:23:43

11 Q Okay. As a part of the agreement, though,
12 you understood that Windermere Seattle was not
13 agreeing to solve the problem, it couldn't guarantee
14 that it would be solved; correct?

15 A We didn't talk in terms of guaranteeing. 11:23:57
16 We stayed on and continued and signed this agreement
17 because they were going to do everything they could
18 to fix the problem.

19 Q And what does that mean "do everything they
20 could"? Does that mean expend unlimited sums of 11:24:09
21 money to make it go away?

22 A Expend money to help mitigate or settle
23 with him.

24 Q What would be a reasonable amount of money
25 to expend in order do that? 11:24:23

1 A I do not have any idea.

2 Q In your mind, you -- you don't think -- you
3 don't have any number that you think would be
4 reasonable for them to set aside to expend on those
5 efforts? 11:24:37

6 A I think they'd have to evaluate the damage
7 he does to their overall brand and decide on their
8 own what that number should be, but they first
9 needed to at least find out what he wanted.

10 Q And the -- was the issue for you -- well, 11:24:47
11 strike that.

12 If you look then, go to the bottom of this
13 section, the last two sentences, "B & D acknowledges
14 that SC has not and cannot guarantee any particular
15 outcome of the efforts contemplated herein. The 11:25:12
16 failure of WSC to eliminate WindermereWatch.com
17 shall not constitute a breach of this agreement so
18 long as WSC has made commercially reasonable efforts
19 to curtail the impact of the activities of Kruger
20 and/or Windermere Watch"; do you see that? 11:25:30

21 A Yes.

22 Q Having read that, does that refresh your
23 recollection one way or the other whether or not
24 there was a guarantee made regarding Windermere's
25 efforts to stop Mr. Kruger? 11:25:44

1 I, the undersigned, a Certified Shorthand
2 Reporter of the State of California, do hereby
3 Certify:

4 That the foregoing proceedings were taken
5 before me at the time and place herein set
6 forth; that any witnesses in the foregoing
7 proceedings, prior to testifying, were
8 administered an oath; that a record of the
9 proceedings was made by me using machine
10 shorthand which was thereafter transcribed
11 under my direction; that the foregoing
12 transcript is a true record of the
13 testimony given.

14 Further, that if the foregoing pertains to
15 the original transcript of a deposition in
16 a Federal Case, before completion of the
17 proceedings, review of the transcript []
18 was [] was not requested. I further
19 certify I am neither financially
20 interested in the action nor a relative or
21 employee of any attorney or any party to
22 this action.

23 IN WITNESS WHEREOF, I have this date
24 Subscribed my name.

25 Dated: August 9, 2016



SHARI STELLHORN

CSR No. 2807

EXHIBIT I.

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12 *Attorneys for Plaintiffs and Counter-Defendants*

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

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

24 Plaintiffs,

25 v.

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

Defendant.

AND RELATED COUNTERCLAIMS

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

Hon. Manual L. Real

**PLAINTIFFS AND COUNTER-
DEFENDANTS' EXPERT WITNESS
DISCLOSURE PURSUANT TO
RULE 26 OF THE FEDERAL
RULES OF CIVIL PROCEDURE**

Courtroom: 8

Action Filed: September 17, 2015

Pretrial Conf.: September 19, 2016

Trial: October 18, 2016

1 TO DEFENDANT WINDERMERE REAL ESTATE SERVICES COMPANY
2 AND THEIR ATTORNEYS OF RECORD:

3 Plaintiffs and Counter-Defendants Bennion & Deville Fine Homes, Inc.
4 (“B&D Fine Homes”), Bennion & Deville Fine Homes SoCal, Inc. (“B&D
5 SoCal”), Windermere Services Southern California, Inc. (“Services SoCal”),
6 (collectively, “Plaintiffs”) and Counter-Defendants Robert L. Bennion and Joseph
7 R. Deville (all collectively referred to as the “B&D Parties” herein), by and
8 through its undersigned attorneys, and pursuant to Rule 26(a) of the Federal Rules
9 of Civil Procedure and stipulation of the parties, hereby provides the following
10 Expert Witness Disclosure:

11 1. The B&D Parties have retained Peter Wrobel (“Wrobel”) and his
12 company, Berkeley Research Group, LLC, as persons who may be used a trial to
13 present evidence under Rules 702, 703 or 705 of the Federal Rules of Evidence. A
14 written report (and supporting materials) prepared by Wrobel and Berkeley
15 Research Group, LLC, pursuant to Federal Rules of Civil Procedure 26(a)(2)(B), is
16 attached hereto, marked as “Exhibit A,” and incorporated herein by reference.

17 2. The B&D Parties also retain the right to utilize the testimony of any
18 expert retained by Defendant Windermere Real Estate Services Company.

19 3. The B&D Parties expressly reserves the right to identify other experts
20 as a supplement to these disclosures if discovery continues and/or as additional
21 individuals, documents or information are identified or obtained which are likely to
22 lead to possess or contain discoverable information, or as parties identify other
23 experts.

24 4. This disclosure is based upon information and facts now available
25 from The B&D Parties’ understanding of the issues, contentions and arguments
26 The B&D Parties intend to assert at the time of trial of this matter. This disclosure
27 is without prejudice to experts, facts, issues, and contentions subsequently learned
28 or discovered.

1 5. The B&D Parties shall supplement these disclosures when and as
2 required under the Federal Rules of Civil Procedure.

3
4
5 DATED: September 16, 2016

MULCAHY LLP

6
7 By: /s/ James M. Mulcahy

8 James M. Mulcahy

9 Kevin A. Adams

10 *Attorneys for Plaintiffs/Counter-*

11 *Defendants Bennion & Deville Fine*

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

13 *Homes SoCal, Inc., Windermere*

14 *Services Southern California, Inc.,*

15 *and Counter-Defendants Robert L.*

16 *Bennion and Joseph R. Deville*

EXHIBIT A



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Managing Director

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September 16, 2016

James M. Mulcahy, Esquire
Kevin A. Adams, Esquire
Mulcahy LLP
Four Park Plaza, Suite 1230
Irvine, California 92614

Re: **Bennion & Deville Fine Homes, Inc., et al. v. Windermere Real
Estate Services Company
United States District Court
Central District of California
Case 5:15-cv-0192-R-KK**

Dear Messrs. Mulcahy and Adams:

I was engaged on behalf of Plaintiffs and Counter-Defendants Bennion & Deville Fine Homes, Inc. ("BD Fine"), Bennion & Deville Fine Homes SoCal, Inc. ("BD SoCal") and Windermere Services Southern California, Inc. ("WSSC") in the above-referenced matter. I have been asked to calculate the amount of out-of-pocket damages, if any, suffered by these entities as a result of the certain alleged activities at issue in this matter. All work was or will be performed by me or by other employees of BRG LLC working at my direction. I have been requested to provide expert testimony regarding my opinions and prepare this report in accordance with FRCP Rule 26.

I. EXPERT OPINIONS

WSSC and BD SoCal have or will suffer at least \$4,237,999 in damages. See Schedule 1.

Damages consist of the following:

1	Net Value of WSSC as of January 2015	\$2,592,526
2	Settlement Amounts Improperly Withheld from WSSC	66,037
3	Past Losses and Future Lease Obligations – BD SoCal	1,431,482
4	Net Unreimbursed Windermere Watch Expenses	146,954
	Total	<u>\$4,237,999</u>

Net Value of WSSC as of January 2015

WSSC was an Area Representative of the Defendant Windermere Real Estate Services Company (“WSC”). BD SoCal and BD Fine were franchisees of WSC under the WSSC Area Representative umbrella. It is my understanding that WSC effectuated a constructive termination of the area representation relationship with WSSC by late summer 2014, and later provided WSSC a formal notice of termination in January 2015. In either event, it is my further understanding that the termination of the area representation relationship was without cause. This termination triggered a clause in the May 1, 2004 Agreement between WSC and WSSC which provided for the terminating party to pay the terminated party “an amount equal to the fair market value of the Terminated Party’s interest in the Agreement.” The value of WSSC, net of any subsequent earned income in 2015, was \$2,592,526. See Schedule 2A. This value was determined by discounting the future cash flows expected to be generated from WSSC for the years 2015 through 2019 and then capitalizing a terminal value for WSSC as of December 31, 2020.¹ This value was then adjusted for the cash flows earned by WSSC in 2015. The 2015 through 2019 cash flows were adjusted as a result of WSSC’s inability to open three additional franchises in 2014 due to the failure of WSC to properly register its Southern California Franchise Disclosure Document with the California Department of Business Oversight. The operating cash flow generated by WSSC in 2014 was \$379,079. This amount was adjusted to \$413,486 to reflect the expected income to be generated by the additional franchisees.² These adjustments to WSSC’s profit and loss statements are shown on Schedule 2B.

The value of WSSC is also consistent with contemporaneous valuations and offers to purchase WSSC, BD SoCal and BD Fine that were performed or made in 2014 and 2015. For example, CPA Gregory Barton calculated a value for WSSC of approximately \$3,200,000 as of August 2015.³ In addition, WSC attempted to purchase WSSC, BD SoCal and BD Fine in July 2015 for approximately \$12,700,000. Also, the Mentor Group valued BD SoCal and BD Fine (excluding WSSC) for \$9,800,000 in September 2014. Separately, Vincent and Nicholas Gattuso made an \$11 million cash offer for BD SoCal and BD Fine (excluding WSSC) in August 2015. Subtracting these amounts from WSC’s offer of \$12,500,000 implies a value of WSSC of \$1,500,000 or \$2,700,000. See Schedule 2C.

¹ The discount rate used is 18% and the capitalization rate is 16%. These rates, as well as growth rates and the general methodology utilized are also consistent with a contemporaneous valuation of BD Fine and BD SoCal that was performed in September 2014 by the Mentor Group.

² In addition, the failure to open the three additional franchises resulted in the loss of half of the initial franchise fee, or \$37,500.

³ Mr. Barton’s analysis of WSSC excluded franchisee fee revenue for franchises owned by Bennion and Deville companies. Mr. Barton subsequently restated WSSC profit and loss statements to include this source of revenue. These recasted profit and loss statements are summarized on Schedule 2B and Mr. Barton’s recasted valuation conclusion (using the recast data) is summarized on Schedule 2D.

Letter to Messrs. Mulcahy and Adams
September 16, 2016
Page 3

Settlement Amounts Improperly Withheld from WSSC

It is my understanding that WSC has improperly withheld WSSC's interest in settlements related to three franchisees no longer in operation. The Browne settlement was obtained in Bankruptcy Court and WSSC's interest was \$8,469. King and Kirksey have been making payments to WSC. The present value of WSSC's interest in the King and Kirksey payments are \$16,690 and \$40,878, respectively. See Schedules 3 and 4.

Past Losses and Future Lease Obligations – BD SoCal

It is my understanding that WSC induced WSSC to open two offices in the San Diego area – Encinitas and Little Italy. These offices have never been profitable and are expected to continue to lose money in the future. Damages consist of lost income through 2016 and the present value of their lease obligations through the end of their lease period.⁴ See Schedules 5, 6 and 7.

Net Unreimbursed Windermere Watch Expenses

It is my understanding that WSC has not fully reimbursed WSSC for expenses associated with WSSC's efforts to remedy the Windermere brand damage occasioned by the "Windermere Watch" websites from 2013 through 2015. The net amount of unreimbursed Windermere Watch expenses are \$146,954 and are summarized on Schedule 8.

II. DOCUMENTS CONSIDERED

A list of the documents I have considered in this matter is attached as Exhibit A.

III. QUALIFICATIONS OF PETER D. WROBEL, CPA/ABV, CFE

I am a Managing Director with Berkeley Research Group. A current copy of my resume is attached as Exhibit B. I have not written any publications in the last ten years.

IV. COMPENSATION

My hourly billing rate for deposition testimony is \$595 per hour.

⁴ The two offices are expected to continue to lose money in the future. The amount of these losses (which are projected and shown on Schedule 6) are expected to exceed their lease obligations (shown on Schedule 7). Accordingly, BD SoCal could mitigate their losses by closing both offices and continuing to make payments to their landlords.

Letter to Messrs. Mulcahy and Adams
September 16, 2016
Page 4

V. PRIOR EXPERT TESTIMONY

A listing of all cases in which I have testified as an expert at trial or in deposition within the preceding four years is attached as Exhibit C.

This report presents my opinions. It is my understanding that I may receive additional information. The opinions in this report are subject to modification based on additional facts that may surface from now through trial. This report is prepared and issued to counsel for Plaintiffs and Counter-Defendants solely for use in the above-referenced matter in connection with the representation of the Plaintiffs and Counter-Defendants.

Very truly yours,

A handwritten signature in black ink, appearing to read "P. Wrobel", with a stylized flourish at the end.

Peter D. Wrobel, CPA/ABV, CFE
Managing Director

PDW:com

Bennion & Deville Fine Homes, Inc. v. Windermere Real Estate Services Company

**Windermere Services Southern California ("WSSC")
Bennion & DeVille Fine Homes SoCal, Inc. ("BD SoCal")**

Summary of Damages and Valuation of WSSC

Net Value of WSSC as of January 2015		\$2,592,526
Settlement Amounts Improperly Withheld from WSSC		
King Settlement	\$16,690	
Kirksey Settlement	40,878	
Browne Settlement	8,469	
Subtotal		66,037
Past Losses and Future Lease Obligations - BD SoCal		
Encintas Office	724,375	
Little Italy Office	707,107	
Subtotal		1,431,482
Net Unreimbursed Windermere Watch Expenses		146,954
Total Damages and Value of WSSC		<u>\$4,236,999</u>

Bennion & Deville Fine Homes, Inc. v. Windermere Real Estate Services Company

Windermere Services Southern California ("WSSC")

Discounted Operating Cash Flows
Valuation as of January 2015

Date	Annual Operating Cash Flow	Initial Franchise Fees	Annual Operating Cash Flow + Franchise Fees	Present Value of Annual Operating Cash Flow + Franchise Fees	Terminal Cash Flow	Present Value of Terminal Cash Flow	Value of WSSC
12/31/15	\$413,486	\$37,500	\$450,986	\$415,166			
12/31/16	434,160	0	434,160	338,709			
12/31/17	455,868	0	455,868	301,394			
12/31/18	478,661	0	478,661	268,189			
12/31/19	502,594	0	502,594	238,643			
12/31/20	527,724	0	527,724		\$3,298,275	\$1,327,198	
				<u>\$1,562,101</u>		<u>\$1,327,198</u>	
Value of WSSC							\$2,889,299
Less: Net Income 2015							<u>(296,773)</u>
Damages							<u>\$2,592,526</u>

Bennion & Deville Fine Homes, Inc. v. Windermere Real Estate Services Company

Windermere Services Southern California ("WSSC")
Profit and Loss Statements (Recasted)
For the Years Ended December 31,

	2013		2014		2015	
Number of Branch Offices	30		33			
Revenue Growth			-3.4%		0.5%	
Revenue						
B&D Fine Homes CV & Coast Franchise Fee	\$390,000	78.7%	\$365,000	76.3%	\$270,000	56.2%
Third Party Revenue	105,260	21.3%	113,213	23.7%	210,756	43.8%
	<u>495,260</u>	100.0%	<u>478,213</u>	100.0%	<u>480,756</u>	100.0%
Expenses						
Advertising	2,289	0.5%	(115)	0.0%	(240)	0.0%
Bank Charges	351	0.1%	300	0.1%	300	0.1%
Business Taxes		0.0%	800	0.2%	1,161	0.2%
Dues and Subscriptions	260	0.1%	50	0.0%	50	0.0%
Legal and Professional Fees	14,533	2.9%	12,304	2.6%	88,211	18.3%
Meals and Entertainment		0.0%	370	0.1%	5,832	1.2%
Miscellaneous	597	0.1%	372	0.1%	43	0.0%
Office Salaries	52,650	10.6%	52,650	11.0%	52,650	11.0%
Office Expense		0.0%	123	0.0%	4	0.0%
Payroll Taxes	5,358	1.1%	5,358	1.1%	5,358	1.1%
Payroll Service Fees	2,634	0.5%	682	0.1%	682	0.1%
Postage	797	0.2%	947	0.2%	868	0.2%
Rent	14,953	3.0%	14,953	3.1%	14,953	3.1%
Telephone	4,512	0.9%	4,905	1.0%	3,184	0.7%
Travel	2,574	0.5%	5,462	1.1%	10,662	2.2%
Vehicle Expenses		0.0%	23	0.0%		0.0%
Subtotal	<u>101,508</u>	20.5%	<u>99,184</u>	20.7%	<u>183,718</u>	38.2%
Income from Operations	393,752	79.5%	379,029	79.3%	297,038	61.8%
Other Income (Expenses)						
Owners' salaries & payroll tax	(129,180)	-26.1%	(20,000)	-4.2%		0.0%
Depreciation & Amortization	(2,295)	-0.5%	(266)	-0.1%	(265)	-0.1%
Interest Income	30,095	6.1%		0.0%		0.0%
Interest Expense		0.0%		0.0%		0.0%
Subtotal	<u>(101,380)</u>	-20.5%	<u>(20,266)</u>	-4.2%	<u>(265)</u>	-0.1%
Net Income (Loss)	<u>\$292,372</u>	59.0%	<u>\$358,763</u>	75.0%	<u>\$296,773</u>	61.7%

Operating Cash Flow	\$379,029
Average Annual Operating Cash Flow per Branch Office	\$11,486
WSSC share of Initial Franchise Fee [(\$25,000 * 3) / 2]	\$37,500
Increase in Annual Operating Cash Flow with Three Additional Branch Offices	34,457
Adjusted Operating Cash Flow	<u>\$413,486</u>

WSSC Average Annual Net Revenue	
2014	478,213
January through July 2015	<u>280,441</u>
Total / Numerator	758,654
Denominator	1.58
WSSC Average Annual Net Revenue	<u>\$479,150</u>

Bennion & Deville Fine Homes, Inc. v. Windermere Real Estate Services Company

Windermere Services Southern California ("WSSC")
Bennion & Deville Fine Homes, Inc. ("BD Fine")
Bennion & Deville Fine Homes SoCal, Inc. ("BD SoCal")
Alternative Contemporaneous Valuations and Purchase Offers
2014 and 2015

Value of WSSC

"Potential WSSC Franchise Fee Valuation" - Recasted Values (August 2015) \$3,243,662

Value of WSSC, BD SoCal and BD Fine**"Letter of Intent" from Jill Jacobi Wood (July 2015)**

Cash			\$7,903,502	
Assumption of Liabilities				
Coast Note		\$230,530		
Coachella Valley Note		219,701		
Aggregate Franchise Fees		<u>646,267</u>		
			1,096,498	
Discounted Note Payable (discounted at 10%)				
8/15/2016	900,000	814,188		
8/15/2017	900,000	740,220		
8/15/2018	900,000	672,971		
8/15/2019	1,400,000	<u>951,738</u>		
Discounted Salaries (discounted at 10%)			3,179,117	
2016	100,000	91,534		
2017	100,000	83,218		
2018	100,000	75,658		
2019	100,000	<u>68,784</u>		
			319,194	
Value of WSSC, BD SoCal and BD Fine				<u><u>\$12,498,311 [A]</u></u>

Value of BD Fine and BD SoCal

Mentor Group (September 2014)	9,800,000 [B]	
Implied Value of WSSC [A] - [B]		<u><u>\$2,698,311</u></u>
Gottuso Offer (August 2015)	11,000,000 [C]	
Implied Value of WSSC [A] - [C]		<u><u>\$1,498,311</u></u>

Bennion & Deville Fine Homes, Inc. v. Windermere Real Estate Services Company

**Windermere Services Southern California ("WSSC")
Alternative Contemporaneous Valuations**

**"Potential WSSC Franchise Fee Valuation"
Prepared by Greg Barton, CPA - September 2015
Adjusted to Reflect Recasted Profit and Loss Statements**

	<u>Barton</u>	<u>Recasted</u>
WSSC Avg Annual Net Revenue (2014 & 2015 through July)	\$137,319	\$479,150
Historical Growth Rate	7.32%	7.32%
Discount Rate	18.00%	18.00%
Total Future Earnings	1,926,020	6,720,366
Present Value of Today's Earnings	929,611	3,243,662
Potential Business Value based on Assumptions above:	\$929,611	\$3,243,662

Year	Barton Original		With Recasted Data	
	Future Earnings	Discounted Value	Future Earnings	Discounted Value
1	\$137,319	\$137,319	\$479,150	\$479,150
2	147,368	124,888	514,213	435,774
3	158,152	113,582	551,842	396,324
4	169,725	103,300	592,225	360,446
5	182,146	93,949	635,563	327,816
6	195,475	85,444	682,072	298,140
7	209,779	77,709	731,985	271,150
8	225,131	70,674	785,551	246,604
9	241,605	64,276	843,036	224,280
10	259,285	58,457	904,728	203,976
	\$1,925,985	\$929,599	\$6,720,366	\$3,243,662
<i>Rounding</i>	35	12		
	\$1,926,020	\$929,611	\$6,720,366	\$3,243,662

*Bennion & Deville Fine Homes, Inc. v. Windermere Real Estate Services Company***Windermere Services Southern California ("WSSC")****Amounts Owed to WSSC From King Settlement
2015 - 2019**

Period Start	Period End	Payment	Present Value of Payment
11/15/15	08/31/16	\$4,332	\$4,332
09/01/16	09/30/16	1,083	1,083
10/01/16	10/31/16	1,083	1,083
11/01/16	11/30/16	1,083	1,083
12/01/16	12/31/16	1,083	1,083
01/01/17	01/31/17	1,083	1,075
02/01/17	02/28/17	1,083	1,059
03/01/17	03/31/17	1,083	1,044
04/01/17	04/30/17	1,083	1,028
05/01/17	05/31/17	1,083	1,012
06/01/17	06/30/17	1,083	997
07/01/17	07/31/17	1,083	982
08/01/17	08/31/17	1,083	967
09/01/17	09/30/17	1,083	952
10/01/17	10/31/17	1,083	938
11/01/17	11/30/17	1,083	924
12/01/17	12/31/17	1,083	910
01/01/18	01/31/18	1,083	896
02/01/18	02/28/18	1,083	883
03/01/18	03/31/18	1,083	870
04/01/18	04/30/18	1,083	857
05/01/18	05/31/18	1,083	844
06/01/18	06/30/18	1,083	831
07/01/18	07/31/18	1,083	818
08/01/18	08/31/18	1,083	806
09/01/18	09/30/18	1,083	794
10/01/18	10/31/18	1,083	782
11/01/18	11/30/18	1,083	770
12/01/18	12/31/18	1,083	758
01/01/19	01/31/19	1,083	747
02/01/19	02/28/19	1,083	736
03/01/19	03/31/19	1,083	725
04/01/19	04/30/19	1,083	714
		\$38,987	33,381

Percentage of Settlement Payments to WSSC: 50%

Amounts Owed to WSSC: \$16,690

Bennion & Deville Fine Homes, Inc. v. Windermere Real Estate Services Company

Windermere Services Southern California ("WSSC")

Amounts Owed to WSSC From Kirksey Settlement
2015 - 2020

Period Start	Period End	Payment	Present Value of Payment
11/09/15	08/31/16	\$14,187	\$14,187
09/01/16	09/30/16	1,773	1,773
10/01/16	10/31/16	1,773	1,773
11/01/16	11/30/16	1,773	1,773
12/01/16	12/31/16	1,773	1,773
01/01/17	01/31/17	1,773	1,760
02/01/17	02/28/17	1,773	1,734
03/01/17	03/31/17	1,773	1,709
04/01/17	04/30/17	1,773	1,683
05/01/17	05/31/17	1,773	1,658
06/01/17	06/30/17	1,773	1,633
07/01/17	07/31/17	1,773	1,608
08/01/17	08/31/17	1,773	1,583
09/01/17	09/30/17	1,773	1,559
10/01/17	10/31/17	1,773	1,536
11/01/17	11/30/17	1,773	1,513
12/01/17	12/31/17	1,773	1,490
01/01/18	01/31/18	1,773	1,467
02/01/18	02/28/18	1,773	1,445
03/01/18	03/31/18	1,773	1,424
04/01/18	04/30/18	1,773	1,403
05/01/18	05/31/18	1,773	1,382
06/01/18	06/30/18	1,773	1,361
07/01/18	07/31/18	1,773	1,340
08/01/18	08/31/18	1,773	1,320
09/01/18	09/30/18	1,773	1,300
10/01/18	10/31/18	1,773	1,280
11/01/18	11/30/18	1,773	1,261
12/01/18	12/31/18	1,773	1,242
01/01/19	01/31/19	1,773	1,223
02/01/19	02/28/19	1,773	1,205
03/01/19	03/31/19	1,773	1,187
04/01/19	04/30/19	1,773	1,169
05/01/19	05/31/19	1,773	1,152
06/01/19	06/30/19	1,773	1,134
07/01/19	07/31/19	1,773	1,117
08/01/19	08/31/19	1,773	1,100
09/01/19	09/30/19	1,773	1,083
10/01/19	10/31/19	1,773	1,067
11/01/19	11/30/19	1,773	1,051
12/01/19	12/31/19	1,773	1,035
01/01/20	01/31/20	1,773	1,019
02/01/20	02/29/20	1,773	1,004
03/01/20	03/31/20	1,773	989
04/01/20	04/30/20	1,773	974
05/01/20	05/31/20	1,773	959
06/01/20	06/30/20	1,773	945
07/01/20	07/31/20	1,773	930
08/01/20	08/31/20	1,773	916
09/01/20	09/30/20	1,773	902
10/01/20	10/31/20	1,773	889
11/01/20	11/30/20	1,773	875
12/01/20	12/31/20	1,773	862
		\$106,400	\$81,757

Percentage of Settlement Payments to WSSC: 50%

Amounts Owed to WSSC: \$40,878

*Bennion & Deville Fine Homes, Inc. v. Windermere Real Estate Services Company***Bennion & Deville Fine Homes SoCal, Inc.**

**Past Losses and Future Lease Costs to be
Incurred by Encinitas and Little Italy Offices
2014-2019**

Period Start	Period End	Period	Period Loss/Lease Cost	Present Value of Period Loss/Lease Cost
<i>Encinitas [1]</i>				
12/01/14	12/31/14	0.08	\$28,129	\$28,129
01/01/15	12/31/15	1.00	174,688	174,688
01/01/16	12/31/16	1.00	159,062	159,062
01/01/17	12/31/17	1.00	127,760	126,505
01/01/18	12/31/18	1.00	127,760	124,027
01/01/19	11/30/19	0.92	117,539	111,963
		5.00	734,939	724,375
<i>Little Italy [2]</i>				
06/02/14	12/31/14	0.58	140,003	140,003
01/01/15	12/31/15	1.00	241,681	241,681
01/01/16	12/31/16	1.00	272,377	272,377
01/01/17	06/01/17	0.42	53,265	53,047
		3.00	707,325	707,107
			<u>\$1,442,264</u>	<u>\$1,431,482</u>

Note:

[1] The Encinitas lease is assumed to expire on December 1, 2019.

[2] The Little Italy lease is assumed to expire on June 1, 2017.

Future Lease costs shaded.

*Bennion & Deville Fine Homes, Inc. v. Windermere Real Estate Services Company***Bennion & Deville Fine Homes SoCal, Inc.****Losses Incurred Related to the Little Italy and Encinitas Locations**

Year	Little Italy	Encinitas
2014	\$140,003	\$28,129
2015	241,681	174,688
2016 [1]	272,377	159,062
2017	114,398	159,062
2018		159,062
2019		146,337

Note:

[1] Annualized assuming that 60.2% of the losses were incurred in the first 8 months of 2016.

Bennion & Deville Fine Homes, Inc. v. Windermere Real Estate Services Company

Bennion & Deville Fine Homes SoCal, Inc.

Profit and Loss Statements for Little Italy and Encinitas Locations
2014 - 2016

	Little Italy						Encinitas			
	2014	Jan - Aug 2015	% of Total	Sep - Dec 2015	% of Total	2015	1/1 - 8/31/16	2014	2015	1/1 - 8/31/16
Income										
Agent Commissions	\$52,002	\$120,070	62.2%	\$72,871	37.8%	\$192,941	\$133,217	\$0	\$97,304	\$95,547
E&O Income										1,350
Uncategorized Income										250
Total Income	52,002	120,070	62.2%	72,871	37.8%	192,941	133,217	0	97,304	97,147
Expense										
Advertising	16,202	13,549	66.0%	6,974	34.0%	20,523	8,911		1,383	(25)
Alarm/Security	649	324	75.0%	108	25.0%	432	362		737	324
Arena to Mare - Fuel/Maint	2,228									
Auto Lease	422	787	23.5%	2,557	76.5%	3,344	2,595		0	0
Auto Expense	126	244	90.5%	26	9.5%	270	292		0	0
Auto Fuel & Maint	2,104	2,032	75.9%	647	24.1%	2,679	1,196		3,174	331
Bank Service Charges	121	176	70.7%	73	29.3%	249	100	595	0	0
Consulting				833		833				
Continuing Education							40			
Contributions/Donations	270	660	55.5%	530	44.5%	1,190	583		190	310
Dues/Memberships/Subscriptions	528	466	57.8%	340	42.2%	807	1,705		231	0
Equipment Expense	3,097	2,814	55.4%	2,270	44.6%	5,084	1,692		6,846	3,447
Insurance	6,698	12,029	69.2%	5,365	30.8%	17,394	11,596		0	0
Interest	6,512	6,923	86.1%	1,116	13.9%	8,039	2,672	1,135	12,194	7,178
License/Permits	4	(262)	165.6%	104	-65.6%	(158)	711		0	36
Meals & Entertainment	721	245	25.8%	705	74.2%	950	959		270	10
Moving/Storage	40	479	63.2%	279	36.8%	758	430		1,152	0
Office Cleaning	2,304	1,758	64.2%	980	35.8%	2,738	1,880		2,250	1,800
Office Expenses	4,528	2,199	41.4%	3,119	58.6%	5,317	3,574	503	5,191	877
Office Supplies	2,873	1,257	71.7%	497	28.3%	1,754	1,445		3,058	973
Payroll	41,571	109,166	66.6%	54,845	33.4%	164,011	108,045	16,525	101,505	75,000
Postage/Shipping	932	1,463	68.3%	679	31.7%	2,142	1,814		1,074	1,493
Printing	6,008	5,948	67.8%	2,824	32.2%	8,772	7,975		1,599	1,286
Professional Fees	6,109	10,083	21.2%	37,562	78.8%	47,645	38,027		7,369	3,902
Promotion/Events	950	1,245	86.5%	194	13.5%	1,440	149		0	
Rent	70,103	76,082	66.8%	37,870	33.2%	118,032	84,667	8,850	107,873	85,293
Repairs & Maint.	136	382	67.6%	183	32.4%	565	22	190	935	35
Sales & Use Tax	61	63	66.7%	31	33.3%	94	8		0	
Signage	3,543	432	34.4%	823	65.6%	1,255	3,986		1,023	3,447
Taxes	0	985	67.1%	483	32.9%	1,468	1,017		0	
Telephone	5,804	5,799	66.5%	2,925	33.5%	8,724	5,840	330	7,827	5,060
Travel	2,214	1,418	51.9%	1,314	48.1%	2,732	2,818		1,395	
Utilities	2,849	2,496	62.2%	1,519	37.8%	4,014	2,059		2,993	2,117
Windermere Services SoCal	2,300	4,325	76.9%	1,300	23.1%	5,625			1,725	
Total Expense	192,004	265,548	61.1%	169,073	38.9%	434,621	297,172	28,129	271,992	192,894
Net Ordinary Income	(\$140,003)	(\$145,478)	60.2%	(\$96,202)	39.8%	(\$241,681)	(\$163,955)	(\$28,129)	(\$174,688)	(\$95,747)

*Bennion & Deville Fine Homes, Inc. v. Windermere Real Estate Services Company***Windermere Services Southern California ("WSSC")****Unreimbursed Windermere Watch Expenses
2013 - 2015**

Year	Expenses	Credits	Net Expenses
2013	\$94,113	\$64,113	\$30,000
2014	85,999	21,167	64,832
2015	<u>52,122</u>	<u></u>	<u>52,122</u>
	<u>\$232,234</u>	<u>\$85,280</u>	<u>\$146,954</u>

Exhibit A

Documents and Information Considered

- WSC 1690 – 1727
- First Amended Complaint
- First Amended Counterclaim
- B&D0069221 – 0069393
- B&D0035688 – 0035689
- B&D0042551 – 0042552
- B&D0051403 – 0051466
- B&D0051468 – 0051485
- B&D0051487 – 0051577
- B&D0051581 – 0051584
- B&D0065246 – 0065248
- B&D0068516 – 0068518
- B&D0068539 – 0068889
- B&D0038816 – 0038817
- B&D0038957 – 0038958
- B&D0051578 – 0051580
- B&D0068896 – 0068897
- B&D0038795 – 0038796
- B&D0069414 – 0069529
- B&D0069546 – 0069710
- WSC055178 – 055440
- WSC055463 – 055562
- WSC0057265 – 0057266
- WSC0057269 – 0057270
- August 18, 2015 Purchase and Sale Agreement
- May 2015 Letter of Intent
- B&D0000906 – 0000907
- B&D0004639 – 0004656
- September 29, 2014 Appraisal prepared by the Mentor Group
- Windermere Services Southern California, Inc. recast financial statements
- May 1, 2014 email from Patrick Robinson to selinab@windermere.com
- Copy of Coast Tech Costs.xlsx
- Copy of CV Tech Costs.xlsx
- Summary of Windermere Watch Expenses
- WSC057572 – 057630
- WSC057658 – 057673
- Lease documents related to 265 W. Washington St.
- 2015 - August 2016 Profit and Loss Statements for Encinitas, Hillcrest and Little Italy locations
- WSC 1071 – 1075
- WSC 13816 – 13818
- WSC040949 – 040950
- Exhibit 137 (B&D Calculation of Total Owed)
- B&D0003410
- WSC044862 – 044863
- 2014 - 2015 Windermere Real Estate Franchise Disclosure Documents
- WSC025516 – 025534

Exhibit B

Peter D. Wrobel, CPA/ABV, CFE

Peter D. Wrobel is a Managing Director with Berkeley Research Group (“BRG”). With more than twenty years of forensic accounting and business valuation experience, Mr. Wrobel has testified as an expert in both Federal and State courts in cases involving business valuation, fraud, breach of contract, wrongful termination, and personal injury matters. He specializes in damage determination; statistical, economic and cost analysis; and mathematical modeling and database development. He has extensive experience in developing trial graphics and other exhibits.

Prior to BRG he was a Director of LECG LLC and Navigant Consulting, Inc. and a Managing Director of FTI Consulting, Inc. in Los Angeles. Prior to joining FTI Consulting, Mr. Wrobel was Senior Partner of Simpson LLP. Most of this work involved determining and analyzing damages. Prior to the formation of Simpson LLP, he was a Senior Manager in the Litigation Services practice in the Los Angeles office of Coopers & Lybrand (now known as PricewaterhouseCoopers LLP).

Mr. Wrobel holds an MBA with a concentration in Accounting from the University of Southern California and a BA and MA in History from UCLA. He is a Certified Public Accountant, and a Certified Fraud Examiner. Mr. Wrobel also holds the American Institute of Certified Public Accountants’ Accreditation in Business Valuation. Mr. Wrobel is a member of the American Institute of Certified Public Accountants and the Association of Certified Fraud Examiners.

Mr. Wrobel has participated in and taught various professional courses for the American Institute of Certified Public Accountants, the California Society of Certified Public Accountants and the Gould School of Law at the University of Southern California.

Exhibit C

Prior Expert Testimony of Peter D. Wrobel, CPA/ABV, CFE

- 09/12 *Jeffrey Nordella, MD v. Blue Cross of California*
04/13 [BC 444364] California Superior Court, Los Angeles County
(deposition and trial testimony)
- 10/12 *Richardson & Patel LLP v. David Coloris, Graham Phillips, et al. and related matters*
[BC 39259] California Superior Court, Los Angeles County
(deposition testimony)
- 10/12 *Artis Knox v. Goodwill Industries of Southern California, et al.*
[BC 450967] California Superior Court, Los Angeles County
(deposition testimony)
- 10/12 *Steven Rodriguez v. Hermosa Beach Chamber of Commerce, et al.*
[YC 064185] California Superior Court, Los Angeles County
(deposition testimony)
- 01/13 *Schlumberger Technology Corporation v. East Charleston, Inc., et al.*
[CV 11-02587 LHK] United States District Court, Northern District of California
(deposition testimony)
- 01/13 *Randy and Lisa Herman v. Shijin Kim*
[BC 462962] California Superior Court, Los Angeles County
(deposition testimony)
- 02/13 *Kathryn Johnston, et al. v. Pacific Hills Treatment Centers, Inc., et al.*
[30-2010-00429819] California Superior Court, Orange County
(deposition testimony)
- 02/13 *Palm Springs Pump, Inc. v. Peerless Insurance Company, et al.*
04/13 [INC 1109263] California Superior Court, Riverside-Inyo County
(deposition and trial testimony)
- 03/13 *SME Consolidated, Ltd. v. Sweet People Apparel, Inc.*
[13 130 Y] American Arbitration Association
(arbitration testimony)
- 06/13 *Dylan Ridgel v. United States of America, et al.*
[SACV 12-00071 JVS (MLGx)] United States District Court, Central District of California
(deposition testimony)
- 07/13 *Ronald Nelson, Jr. v. BNSF Railway Company, et al.*
[RG12644175] California Superior Court, Alameda County
(deposition testimony)
- 08/13 *Delton R. Fair v. BNSF Railway Company*
[11 CECG04269] California Superior Court, Fresno County
(deposition testimony)
- 10/13 *Charles Henley v. Union Pacific Railroad Company*
[RG 12633325] California Superior Court, Alameda County
(deposition testimony)
- 10/13 *Jennifer Anderson v. City of Torrance, et al.*
[YC066843] California Superior Court, Los Angeles County
(deposition testimony)

12/13 *Martha Aboulafia, et al. v. GACN, Inc., et al.*
[BC 469940] California Superior Court, Los Angeles County
(trial testimony)

01/14 *Lorie Valero v. City of Placentia, et al.*
[00513403] California Superior Court, Orange County
(deposition testimony)

02/14 *Estella Butler and Phillip Fikes v. Elsinore Valley Municipal Water District, et al.*
[5:12-cv-01900-PSG-OP] United States District Court, Central District of California
(deposition testimony)

02/14 *Wang v. Eden Rock, et al.*
[72 115 00021 12 HIIB] American Arbitration Association
(arbitration testimony)

02/14 *Onolia Rodriguez v. Caliente Farms, et al.*
[] California Superior Court, Los Angeles County
(deposition testimony)

03/14 *Kyle Brown v. Du Puy Mitek, Inc., et al.*
[BC 494993] California Superior Court, Los Angeles County
(deposition testimony)

03/14 *Lexjet Corporation v. Breathing Color*
[8:11-cv-02828-JSM-TBM] United States District Court, Middle District of Florida, Tampa Division
(deposition testimony)

04/14 *Debra Votta v. Red Alinsod, MD, et al.*

05/14 [30-2009-00323060-CU-PL-CJC] California Superior Court, Orange County
(deposition and trial testimony)

04/14 *Jeremiah J. Kerneen v. Wham-O, Inc., Frank Smith, et al.*

05/14 [72 160 00762 13 JOG3] American Arbitration Association
(deposition and arbitration testimony)

05/14 *Bhikhubhai C. Patel v. Clocktower Inn, Inc., et al. and related actions*

07/14 [YC067782] California Superior Court, Los Angeles County
(deposition and arbitration testimony)

06/14 *Crystal Thomas v. Union Pacific Railroad Company*
[12CECG02012] California Superior Court, Fresno County
(deposition testimony)

06/14 *Prowess Inc. v. Siemens Medical Solutions USA, Inc.*
[1100072826] JAMS Arbitration, County of San Francisco
(deposition testimony)

06/14 *Estate of Arturo Cabrales, et al. v. County of Los Angeles*
[ED CV 12-01900 PSG (OPx)] United States District Court, Central District of California
(deposition testimony)

07/14 *Pirooze Khebreh v. Scottsdale Indemnity Company*
[BS 147860] California Superior Court, Los Angeles County
(deposition testimony)

08/14 *DAYRO LLC and David Weisman v. Kais Almarzouk, et al. and related actions*

09/14 [BC 481423] California Superior Court, Los Angeles County
(deposition and trial testimony)

08/14 *Jazmyne Gurrola, et al. v. Los Angeles Unified School District, et al.*
[BC 501416] California Superior Court, Los Angeles County
(deposition testimony)

08/14 *Telesys Communications Corporation v. Inn Room Video, Inc., et al.*
[C12-00109] California Superior Court, Contra Costa County
(deposition testimony)

08/14 *Property ID Corporation v. Geoassurance, Inc., et al.*

09/14 [NC056013] California Superior Court, Los Angeles County
(deposition and trial testimony)

09/14 *Charta Group, Inc. v. Tony Sara, et al.*
[YC 060343] California Superior Court, Los Angeles County
(deposition testimony)

09/14 *Detta Ruth Cavanagh v. Eric Pfeifer*
[30-2011 00531828] California Superior Court, Los Angeles County
(deposition testimony)

10/14 *Izek Shomof v. Naty Saidoff, et al.*

11/14 [BC 499518] California Superior Court, Los Angeles County

12/14 (deposition and trial testimony)

12/14 *Gladys Vallone v. Taco Bell Corp., et al.*
[30-2013-00691532] California Superior Court, Orange County
(deposition testimony)

12/14 *Perry Mack, Jr., v. Union Pacific Railroad Company*

01/15 [NC058492] California Superior Court, Los Angeles County
(deposition and trial testimony)

02/15 *Mike Johar, et al. v. Richard Kelly, et al.*

03/15 [30-2013-00626770] California Superior Court, Orange County
(deposition and trial testimony)

02/15 *Corbin Northridge LP v. HBC Solutions, Inc., The Harris Corporation, Inc.*
[2:14-CV-02714-RGK-JC] United States District Court, Central Division California, Western Division
(deposition testimony)

02/15 *Jeffrey Boxer v. Christyne Buteyn, et al.*

03/15 [BC 522433] California Superior Court, Los Angeles County
(deposition and trial testimony)

04/15 *Burley Tompkins v. Union Pacific Railroad Company*
[2:12-CV-01481-JAM-GGH] United States District Court, Eastern District of California -- Sacramento
Division]
(deposition testimony)

05/15 *Joseph E. Blodgett v. Allstate Insurance Company*
[UIM Arbitration]
(deposition testimony)

05/15 *Brooke Harman v. Target Corporation, et al.*
[BC 489100] California Superior Court, Los Angeles County
(deposition testimony)

05/15 *Jeffrey Young v. Union Pacific Railroad Company*
[BC 54293] California Superior Court, Los Angeles County
(deposition testimony)

06/15 *Jose Sanguino v. George Benjamin, et al.*
[BC 509234] California Superior Court, Los Angeles County
(deposition testimony)

06/15 *Monarch Medical Group, Inc. v. Stacia Green*
[SC 122948] California Superior Court, Los Angeles County – West District
(deposition testimony)

07/15 *In the Matter of the Patton Family Lead Trust*
[P079997] California Superior Court, Ventura County
(deposition testimony)

08/15 *Cecilia Diego v. Pilgrim United Church of Christ*
[37-2011-00099381-CU-OE-CTL] California Superior Court, San Diego County
(deposition testimony)

09/15 *Silvia Gomez v. MagCo Drilling, Inc.*
[BC 534017] California Superior Court, Los Angeles County
(trial testimony)

09/15 *Jennifer Hendrickson v. Tracey Layana*
[BC514536] California Superior Court, Los Angeles County
(deposition testimony)

10/14 *Izek Shomof v. Naty Saidoff, et al.*

11/14 [BC 499518] California Superior Court, Los Angeles County

12/14 (deposition and trial testimony)

12/14 *Gladys Vallone v. Taco Bell Corp., et al.*
[30-2013-00691532] California Superior Court, Orange County
(deposition testimony)

12/14 *Perry Mack, Jr., v. Union Pacific Railroad Company*

01/15 [NC058492] California Superior Court, Los Angeles County
(deposition and trial testimony)

02/15 *Mike Johar, et al. v. Richard Kelly, et al.*

03/15 [30-2013-00626770] California Superior Court, Orange County
(deposition and trial testimony)

02/15 *Corbin Northridge LP v. HBC Solutions, Inc., The Harris Corporation, Inc.*
[2:14-CV-02714-RGK-JC] United States District Court, Central Division California, Western Division
(deposition testimony)

02/15 *Jeffrey Boxer v. Christyne Buteyn, et al.*

03/15 [BC 522433] California Superior Court, Los Angeles County
(deposition and trial testimony)

04/15 *Burley Tompkins v. Union Pacific Railroad Company*
[2:12-CV-01481-JAM-GGH] United States District Court, Eastern District of California – Sacramento
Division]
(deposition testimony)

05/15 *Joseph E. Blodgett v. Allstate Insurance Company*
[UIM Arbitration]
(deposition testimony)

05/15 *Brooke Harman v. Target Corporation, et al.*
[BC 489100] California Superior Court, Los Angeles County
(deposition testimony)

05/15 *Jeffrey Young v. Union Pacific Railroad Company*
[BC 54293] California Superior Court, Los Angeles County
(deposition testimony)

06/15 *Jose Sanguino v. George Benjamin, et al.*
[BC 509234] California Superior Court, Los Angeles County
(deposition testimony)

06/15 *Monarch Medical Group, Inc. v. Stacia Green*
[SC 122948] California Superior Court, Los Angeles County – West District
(deposition testimony)

07/15 *In the Matter of the Patton Family Lead Trust*
02/16 [P079997] California Superior Court, Ventura County
05/16 (deposition and trial testimony)

08/15 *Cecilia Diego v. Pilgrim United Church of Christ*
[37-2011-00099381-CU-OE-CTL] California Superior Court, San Diego County
(deposition testimony)

09/15 *Silvia Gomez v. MagCo Drilling, Inc.*
[BC 534017] California Superior Court, Los Angeles County
(trial testimony)

09/15 *Jennifer Hendrickson v. Tracey Layana*
02/16 [BC514536] California Superior Court, Los Angeles County
(deposition and trial testimony)

01/16 *Jose Figueroa v. United States of America*
[15-CV-00555JFW(ASx)] United States District Court, Central District of California
(deposition testimony)

03/16 *Ronald Farina v. Hilton Worldwide, et al.*
[BC 551918] California Superior Court, Los Angeles County
(deposition testimony)

04/16 *Kim Nguyen-Amour v. International Rectified Corporation, et al.*
[BC 565159] California Superior Court, Los Angeles County
(deposition testimony)

04/16 *Lani Gulmette, et al. v. City of Los Angeles, et al.*
[BC 523080] California Superior Court, Los Angeles County
(deposition and trial testimony)

05/16 *Charles and Karen Draper v. Loma Linda University Medical Center, et al.*
[CIVDS 1109299] California Superior Court, San Bernardino County
(deposition testimony)

05/16 *Planet Desert, Inc. v. Swajian & Swajian*
[INC 1107795] California Superior Court, Riverside County
(deposition testimony)

07/16 *HSV Realty Exchange LLC v. Construction Insurance Partners LLC, et al.*
[BC 530787] California Superior Court, Los Angeles County
(deposition testimony)

08/16 *Uisu Lai v. Sarah Seif*
 [30-2015-00779669] California Superior Court, Orange County
 (deposition testimony)

08/16 *Nancy Lynn v. Walmart Stores, Inc., et al.*
 [BC 539472] California Superior Court, Los Angeles County
 (deposition testimony)

08/16 *Shawn Bennett v. Rancho California Water District*
 [RIC 1218298] California Superior Court, Riverside County
 (deposition testimony)

09/16 *G.P.P., Inc. v. Guardian Protection Products, Inc.*
 [1:15-cv-00321 SKO] United States District Court, Eastern District of California
 (deposition testimony)

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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 **September 16, 2016** at Irvine, California.

10 By: 
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PROOF OF SERVICE

EXHIBIT M

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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

**PLAINTIFFS AND COUNTER-
DEFENDANTS' REBUTTAL
REPORT PURSUANT TO RULE 26
OF THE FEDERAL RULES OF
CIVIL PROCEDURE**

Courtroom: 8

Action Filed: September 17, 2015

Pretrial Conf.: October 3, 2016

Trial: October 18, 2016

1 TO DEFENDANT WINDERMERE REAL ESTATE SERVICES COMPANY
2 AND ITS ATTORNEYS OF RECORD:

3 Plaintiffs and Counter-Defendants Bennion & Deville Fine Homes, Inc.
4 ("B&D Fine Homes"), Bennion & Deville Fine Homes SoCal, Inc. ("B&D
5 SoCal"), Windermere Services Southern California, Inc. ("Services SoCal"),
6 (collectively, "Plaintiffs") and Counter-Defendants Robert L. Bennion and Joseph
7 R. Deville (all collectively referred to as the "B&D Parties" herein), by and
8 through their undersigned attorneys, and pursuant to Rule 26 of the Federal Rules
9 of Civil Procedure and stipulation of the parties, hereby provides the following
10 Rebuttal Report:

11 1. The B&D Parties have retained Marvin Storm ("Storm") as a person
12 who may be used a trial to present evidence under Rules 702, 703 or 705 of the
13 Federal Rules of Evidence. A written rebuttal report (and supporting materials)
14 prepared by Marvin Staorm, pursuant to Federal Rules of Civil Procedure
15 26(a)(2)(B), is attached hereto, marked as "Exhibit A," and incorporated herein by
16 reference.

17 2. The B&D Parties also retain the right to utilize the testimony of any
18 expert retained by Defendant Windermere Real Estate Services Company.

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1 3. This disclosure is based upon information and facts now available
2 from The B&D Parties' understanding of the issues, contentions and arguments
3 The B&D Parties intend to assert at the time of trial of this matter. This disclosure
4 is without prejudice to experts, facts, issues, and contentions subsequently learned
5 or discovered.
6

7 DATED: September 30, 2016

MULCAHY LLP

8
9 By: /s/ Kevin A. Adams

Kevin A. Adams

10 *Attorneys for Plaintiffs/Counter-*
11 *Defendants Bennion & Deville Fine*
12 *Homes, Inc., Bennion & Deville Fine*
13 *Homes SoCal, Inc., Windermere*
14 *Services Southern California, Inc.,*
15 *and Counter-Defendants Robert L.*
16 *Bennion and Joseph R. Deville*
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EXHIBIT A

Bennion & Deville Fine Homes, Inc., et al. v. Windermere Real Estate Services Company, et al.
Case No. 5:15-CV-01921 R (KKx)

EXPERT WITNESS REPORT

Prepared by:
Marvin L. Storm

I have been retained by the firm of Mulcahy, LLP to provide expert testimony on behalf of Bennion & Deville Fine Homes, Inc. et al.

This report includes:

- a complete statement of all opinions I will express;
- the basis for those opinions; and
- the facts and data I considered in forming those opinions.

The following documents accompany this report and are incorporated by reference:

- My qualifications to testify as an expert, including a list of all publications I authored in the previous 10 years (Attachment 1).
- A list of all cases in which I testified as an expert by trial or deposition during the last 4 years (Attachment 2).
- A list of documents I reviewed or considered in preparing this report (Attachment 3).
- All exhibits I will use to summarize or support my testimony (Attachment 4).

I am providing services at the rate of \$425 per hour for my analysis, research, trial preparation, expert witness report preparation, and testimony.

INTRODUCTION

I have been asked by Mulcahy, LLP to express opinions related to the Expert Witness Report submitted David E. Holmes, Esq., in the case *Bennion & Deville Fine Homes, Inc., et al. v. Windermere Real Estate Services Company, et al.*, Case No. 5:15-CV-01921 R (KKx). Accordingly, this report will specifically address and respond to the following topics:

1. Provide an analysis of the customary franchise industry standards that apply to the structure of an area representative and franchisor relationship, the roles and responsibilities that are customarily delegated to an area representative, and the roles and responsibilities that are customarily maintained by the franchisor in an area representative structure;
2. Review the roles and responsibilities of a franchisor in the area representative relationship described in the Windermere Southern California Area Representative Agreement;
3. Review the roles and responsibilities of an Area Representative in the area representative relationship described in the Windermere Southern California Area Representative Agreement;
4. Determine whether Windermere Real Estate Services Company fulfilled its roles and responsibilities as a franchisor in the Windermere Southern California Area Representative Agreement for the time period September 17, 2011 to September 30, 2015;
5. Determine whether Windermere Services Southern California, Inc. fulfilled its roles and responsibilities as an area representative in the Windermere Southern California Area Representative Agreement for the time period September 17, 2011 to September 30, 2015; and
6. Directly respond to any other findings and opinions identified by Mr. Holmes.

OPINIONS

I expect to express the following expert opinions while testifying as a witness in the above-entitled case:

1. Certain opinions in David E. Holmes' report are supported only by disputed facts and are contradicted by other facts that, if found to be true, would invalidate Mr. Holmes' opinion. These are discussed in detail in the section of this report labeled "Review of David E. Holmes' Report."
2. Pursuant to industry customs and practices, the structure of an area representative agreement is a delegatory relationship between the area representative and franchisor in which the franchisor delegates certain responsibilities and the area representative undertakes these responsibilities in order to implement the franchisor's system in its territory. There are certain roles and responsibilities that the franchisor does not delegate but for which the franchisor retains direct responsibility.
 - a. Customary roles and responsibilities that are delegated by the franchisor to an area representation structure broadly include recruiting franchisees, assistance in finding and opening locations, and ongoing operational and marketing support.
 - b. Customary roles and responsibilities retained by the franchisor broadly include responsibility to maintain, develop and enhance the franchise system and operating model; collection of franchise license fees, advertising and other fees; developing marketing materials; providing technology; approving or disapproving franchisee candidates; registering the Franchise Disclosure Document; and brand and trademark defense and protection.
 - c. Although there are customary roles and responsibilities for franchisor and area representative relationships, each franchise system and situation is different and contracts are separately negotiated

between the parties. These negotiated contracts governs the relationships between the parties.

3. In this case, the franchisor delegated most of the customary roles and responsibilities to the Area Representative and retained certain customary roles and responsibilities.
 - a. The one exception to franchise industry norms, customs and standards is the function of collection and accounting for all initial and ongoing franchise license fees, administrative fees, advertising going to contributions and other amounts due under the franchise licensing agreements.
 - b. In the Area Representative Agreement Section 3, Paragraph 2, the franchisor delegated the additional duty and “responsibility to receive, collect, account for all licensing fees, administrative fees, Advertising Fund contributions, and other amounts due under license agreements in the Region, and to remit to WSC its share of such fees.”
4. In my opinion, the franchisor delegated substantially all of the customary industry norms and standards. The inclusion of fee collections provisions included in the duties delegated to the Area Representative, as stated in the Area Representative Agreement dated May 1, 2004, is perfectly acceptable and clearly outlined in the Agreement.
5. Pursuant to industry customs and practices, the franchisor in a franchisor - area representative relationship undertakes the following responsibilities in order to carry out its contractual duties to the area representative:
 - a. To provide a proven business model.

A proven, tested, established system together with well-conceived and standardized operating procedures are essential in providing guidance and clear guidelines, in essence a well-oiled machine, that can be deployed by the area representative to create a consistent brand experience for the customer.

b. Grow the system.

To create brand awareness by prudently recruiting new franchisees to extend the franchise brand within existing markets and into new markets. The franchisor is responsible for creating a new franchise recruiting system. In an area representative structure, the responsibility for implementing the recruiting system is delegated to the Area Representative.

c. Provide training, business advisory and an ongoing support services system.

In an area representative structure, the responsibility for implementing training, business advisory and an ongoing support services are delegated to the Area Representative.

The franchisor retains the role of troubleshooting any problems that may arise with the implementation of its system, technical difficulties with its technology or inherent functional problems or defects with its products or services.

d. Continual innovation.

A franchisor shoulders the responsibility of innovating and staying ahead of the competition by developing new and updated products, including technology, and monitoring competitors and industry trends.

e. Brand reputation management.

One of the most important roles of the franchisor is the protection of its brand and trademark. The franchisor is responsible for maintaining the overall brand reputation, awareness, and development. The primary benefit for a franchisee to join a franchise system is for the value that the brand will bring in terms of customer

awareness, brand loyalty and the ability to get, keep and grow a customer base.

6. The franchisor in this case failed to carry out all of the duties specified above. In particular, the franchisor:
 - a. Failed to provide a proven, tested and established business model when it introduced technology that didn't properly function in Southern California.
 - b. Failed in its troubleshooting role to resolve technical difficulties concerning its technology in a timely manner while assessing and continually increasing technology fees which were intended to fund the maintenance, enhancement, development and improvement of its technology.
 - c. Failed in trademark, brand and reputation management by not more aggressively pursuing a resolution to the Windermere Watch public relations crisis experienced by its franchisees.
7. Pursuant to industry customs and practices, the area representative in a franchisor - area representative relationship undertakes the following responsibilities in order to carry out its contractual duties to the franchisor and franchisee:
 - a. Recruit franchise candidates to extend the franchisor's brand.
 - b. Provide training to new franchisees.
 - c. Provide ongoing support to new and existing franchisees.
 - d. Implement the franchisor's system including technology.
 - e. Assist franchisees in advertising and marketing.
8. The Area Representative in this case either carried out or facilitated the implementation of all of the duties specified above.

FACTS AND DATA

To form the opinions listed above, I considered, among other things, the following facts and data and made the following observations. The documents from which these facts and observations are drawn are listed in Attachment 3. To the extent that I relied upon facts (such as deposition testimony) not listed below, I will identify those facts in the “Basis and Reasons for Opinions” section of this report below.

1. The Area Representative Agreement entered into by the parties includes the following relevant terms:
 - a. In the Windermere Area Representative Agreement, the parties to the agreement are Windermere Real Estate Services Company (hereafter “WSC”) and Windermere Services Southern California, Inc. (hereafter “SoCal”).
 - b. I noted that the Area Representative Agreement was dated May 1, 2004. The Area Representative Agreement is in the form of a franchise licensing agreement and in Section 2 of the agreement the franchisor, more specially the licensor WSC, “grants to Area Representative, and Area Representative here by accepts the non-exclusive right to offer Windermere licenses to real estate brokerage businesses to use the Trademark and the Windermere System in the Region in accordance with the terms of the Windermere License Agreement.”
 - c. The reference to the Windermere System in this report is defined in Section 1.7 – Windermere System. The agreement states that the Windermere System shall mean “the standards, methods, procedures, techniques, specifications and programs developed by WSC for the establishment, operation and promotion of independently owned real estate brokerage offices, as those standards, methods, procedures, techniques, specifications and

programs may be added to, changed, modified, withdrawn or otherwise revised by WSC.”

- d. In Section 3 of the Area Representative Agreement, “the Area Representative hereby assumes the responsibility for the administration and supervision of the use and display of the Trademark by licensee in the region, and of the use by them of the Windermere System in the Region and the provision of support and auxiliary services to Windermere licensees in the Region in accordance with this Agreement and the policies and guidelines enunciated from time to time by WSC. Area Representative’s responsibilities will include marketing Windermere licenses in the Region; establishing and operating a training, education and professional development program for licensees under the License Agreement and for their respective salesperson; implementing the intra-system referral program; offering Windermere marketing programs and Premier Properties Programs; making available samples of Windermere forms and listing and marketing materials; administering, collecting and remitting contributions to the Windermere Foundation; monitoring licensees’ compliance with the errors and omissions and general liability insurance requirements; and coordination of advertising and public relations.”
- e. Furthermore, the delegated responsibilities by WSC to the Area Representative include “the responsibility to receive, collect, account for all licensing fees, administrative fees, Advertising Fund contributions, and other amounts due under license agreements in the Region, and to remit to WSC its share of such fees. It will be Area Representative’s responsibility to monitor and see that its licensees in the Region comply with and conform to the policies and guidelines enunciated by WSC, including those pertaining to the use of the Trademark, the use and display of the Trademark in accordance with standard or authorized formats, the quality of the image projected by licensees and the nature, type and quality of the services offered by licensees.

Area Representative agrees to give prompt, courteous and efficient service, and to be governed by the highest ethical standards of fair dealing and honesty when dealing with the public and all members of the Windermere System in order to preserve and enhance the identity, reputation, quality image and goodwill built by WSC and the value of the Trademark. Area Representative will comply with all applicable and valid laws and regulations in the conduct of its business.

Area representative agrees at its expense to have and maintain during the term of this Agreement adequate personnel and resources available to market and service the Trademarks and services and administer The Windermere System in the Region in accordance with the terms and provisions of this Agreement.

WSC will provide to Area Representative initial training for its personnel and will provide servicing support in connection with the marketing, promotion and administration of the Trademark and Windermere System. Specifically, WSC will make available to Area Representative its key people to the extent necessary to assist Area Representative in carrying out its obligations as set forth in this Agreement. WSC will bear the salary costs for its personnel in connection therewith; however, travel and out of pocket expenses for WSC personnel will be reimbursed by Area Representative.”

2. I relied upon the following facts in concluding that the franchisor failed to provide a complete system to the franchisees and Area Representative for the time period September 17, 2011 to September 30, 2015. To the extent that the facts are drawn from deposition testimony, my opinion is conditioned on the accuracy of the facts that are stated in that testimony.
 - a. In Mr. Gregor’s deposition, he points out that the Windermere’s technology, which is a part of the Windermere System, didn’t work in Southern California. (Gregor, Page 37, line 23-24). I understand that the Windermere technology referenced by Mr. Gregor never worked in Southern California.

- b. In his deposition testimony, Mr. Baur outlines some of the intricacies of working with the various MLS listing services because new data sharing agreements (Baur, Page 215, line 4-6) had to be executed with each MLS listing service in order for a data service provider such as Windermere Solutions to access the various MLS databases. In order for this to happen an agreement had to be in place with each MLS. This is complicated by the fact that many MLS listing services overlapped geographical areas and each have their own peculiarities (Baur, Page 215, Line 6). These circumstance created enormous practical and technical challenges. When new products were released, often these products or services did not work properly because of the data integration issues with the MLS listing services. Since access to the local MLS listing service is the life blood for real estate agents, when they couldn't get access to it, which happened frequently, they do become frustrated, upset and in some cases were financial impaired.
- c. Mr. Gregor further points out that the primary reason the technology products of Windermere were not working was the inability to access the California MLS listing directories. (Gregor, Page 38, line 2-4).
- d. The technology problems didn't only affect existing franchisees but also each new franchisee that opened a location which caused an immediate loss of creditability. (Gregor, Page 37, line 23-24; line 9-13). I understand this to be true prior to and throughout the September 17, 2017 to September 30, 2015 period.
- e. Mr. Lee, a Windermere franchisee, complained that the technology didn't work because the real estate listings didn't syndicate properly. (Gregor, Page 48, line 15; Page 2-5).
- f. The technology issue was an ongoing problem and a contributing cause for a number of franchisees leaving the Windermere franchise system, including but not limited to:

-Santa Barbara (Gregor, Page 67, line 23-24)

-Rancho Cucamonga/Ontario (Gregor, Page 68, line 5, 14-15, 23)

-Los Angeles (Gregor, Page 69, Line 14, 23)

-Lake Arrowhead (Gregor, Page 70, Line 14-15)

-Burbank (Gregor, Page 71, Line 7, 15)

- g. Even though its technology was having ongoing issues, the franchisor continued to increase the technology fees despite the fact that portions of the Windermere technology didn't work properly. This led to franchisees constantly complaining about the technology not working properly yet still being burdened with the requirement to pay technology fees that continued to increase over time. (Gregor, Page 45, line 19-22; Page 68, line 25; Page 68, line 1). I understand that these issues occurred prior to and during the September 17, 2011 to September 30, 2015 time period.
 - h. One of the reasons given in explaining to him why technology issues weren't being addressed by Windermere was the cost of making modifications for one (each) owner. (Gregor, Page 72, Line 17-20; Page 73, line 11-12).
 - i. The quality of the Windermere technology was an issue with the agents, agents' clients through their agent, office managers, and managing brokers. (Forsberg, Page 88, line 25; Page 89; Page 1-2).
 - j. "...over time -- over time we discovered -- as the tech fees continued to go up, that they did not speak to our market, or work in our market." (Dewille, Page 68, line 5-8). I understand this to be true prior to and throughout the September 17, 2017 to September 30, 2015 period.
3. I relied upon the following facts in concluding that the franchisor failed in its troubleshooting role to resolve technical difficulties concerning its technology in a timely manner while assessing and continually increasing technology fees which were intended to fund the maintenance,

enhancement, development and improvement of its technology. To the extent that the facts are drawn from deposition testimony, my opinion is conditioned on the accuracy of the facts that are stated in that testimony.

- a. Even though the earliest reported problems with the Windermere technology appeared as early as 2003 it continued through September 30, 2015.
(Bennion, Vo; II, Page 110, line 9)
 - b. Francine Finn, a franchisee in Southern California, complained to the franchisor about the “outlandish fees for corporate’s poorly constructed technology” (G. Wood, Page 224, line 2-3) and then she added, “Southern California is years ahead of the Northwest with programs and technology that is available for free or on an as needed basis.”
 - c. The corporate structure for Windermere Solutions is owned by the second generation Jacobi family and Long & Foster, an East Coast real estate brokerage company (Baur, Page 43, line 24-25; Page 44, line 1-3). They were the investors in the company. It is a privately funded company and as such has different corporate objectives than its sister company, Windermere Real Estate Services Company.
 - d. It is incumbent on Mr. Baur, as CEO, to produce a return on investment which requires that Windermere Solutions technology be sold widely and outside of the Windermere franchise system. (Baur, Page 120, line 24-25)
 - e. Mr. Baur reports to the board of director of Windermere Solutions.
(Baur, Page 134, line 8)
4. I relied upon the following facts in concluding that the franchisor failed in trademark, brand and reputation management by not more aggressively pursuing a resolution to the Windermere Watch public relations crisis experienced by its franchisees. To the extent that the facts are drawn from deposition testimony, my opinion is conditioned on the accuracy of the facts that are stated in that testimony.

- a. In his deposition, Mr. Wood, CEO of Windermere Real Estate Services Company, acknowledged that as CEO of a franchise, it is important to protect the brand name of Windermere. (G. Wood, Page 97, line 6-8)
- b. He also acknowledges that the Windermere Franchise Agreement in Section 4 states: "The parties recognize the importance of the protection and maintenance of the quality image reputation associated with the name Windermere Real Estate and more importantly the requirement to protect the brand." (G. Wood, Page 98, line 23-25)
- c. The issues with Mr. Kruger as eventually manifested in Windermere Watch resulted from a real estate transaction gone bad well over a decade ago. As early as 2004 postcard mailing campaigns were targeting Windermere franchisee residences in their areas. (Bennion, Page 132, 12-14)
- d. Mr. Baur, the Chief Technology Officer, was hired in September of 2012. When asked in his deposition he knew if anything about what was being done about the Windermere Watch problem, he admitted he didn't know a lot of what was going on with Windermere Watch and its website, which is understandable for someone just starting with a company, but it wasn't until late October of 2013 that a plan was submitted by Mr. Sutherland, an outside consultant, proposing a global SEO strategy to attack the Windermere Watch website's Google ranking. (Baur, Page 61, line 22-25; Page 201, line 16-17)
- e. The names and real estate numbers of all agents were taken from the California Department of Real Estate database and uploaded to the Windermere Watch website. Windermere franchisees were concerned about the public perception of their names being listed on the website. Ms. Peterson was very upset by having her name on the Windermere Watch website and sent an email to Mr. Fanning which in part reads, "As a largely unknown in our marketplace, we don't want the public's first impression to be that of Windermere Watch. Accordingly, we very much appreciate whatever you can do from

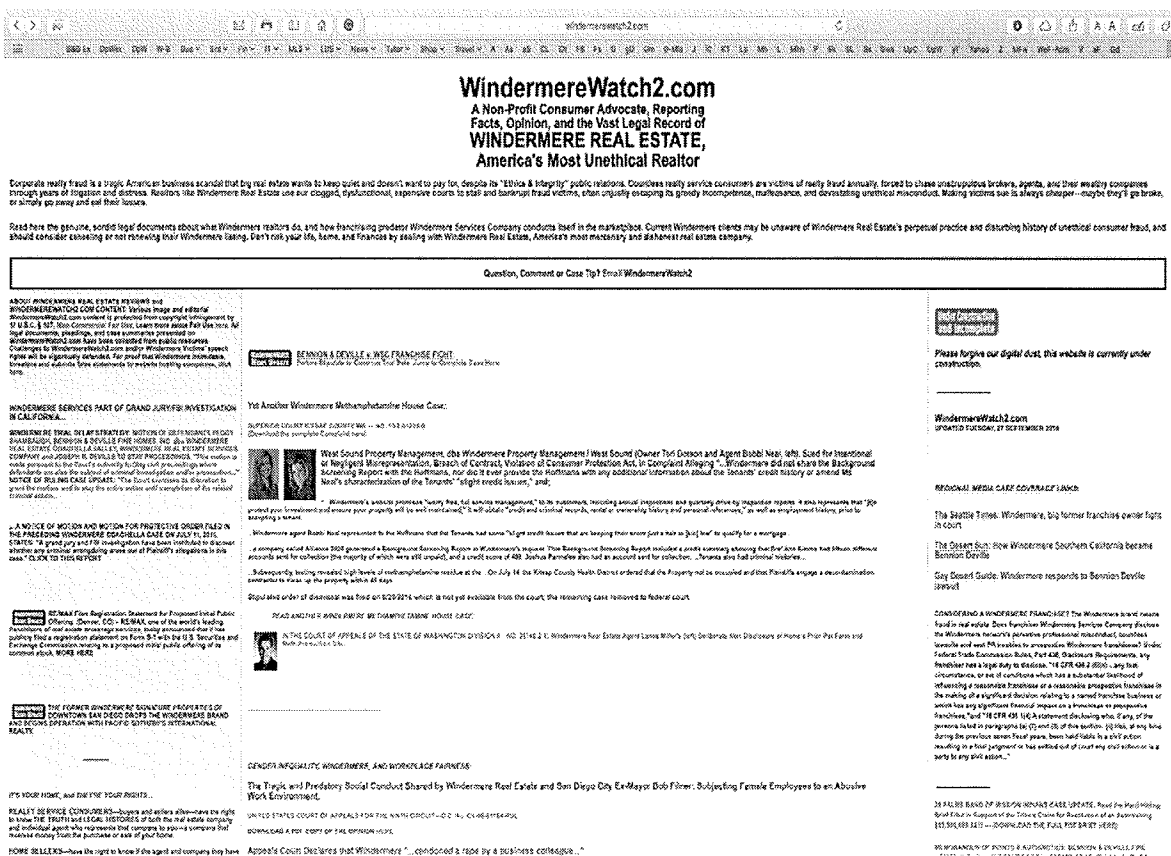
your end to mitigate the damage being caused.” (Fanning, Page 77, line 6-10)

- f. The attacks by Mr. Kruger became more personal over time. (Bennion, Page 144, line 17-10)
- g. The frustration was so intense that Bob Bennion began to consider filing his own lawsuit against Kruger because the continued constant nature of the attacks began to impact his ability to make a living. (Bennion, Page 144, line 19-21; Page 145, line 1-3)
- h. Not only was Windermere Watch causing public relations issues, but it caused the loss of agents and clients. (Bennion, Page 169, line 18-24)
- i. Listing were also lost as a result of Mr. Kruger’s Windermere Watch activities. (Bennion, Page 170, line 17)
- j. The constant distraction was impacting business because they were “continuing to have ongoing expenses....on the SEO, we were -- the problems persisted, continued, other events happened, things were
- k. getting worse instead of getting better. Mr. Kruger had escalated his attacks and figured out how to manipulate the SEO, he was being successful at it, he was doing a better job of pushing it out there and competitors were picking up on it, agents, clients, sellers, buyers. We were just being bombarded with issues on those fronts and our owners. Nothing had really changed. There was no viable plan. There didn't appear to be any commercially reasonable efforts being taken to stop this.” (Bennion, Page 187, line 10-25)The Windermere Watch website was published by Gary Kruger, who accessed publicly available court records, agent’s names and addresses and other publicly available records, and then positioning the website as a non-profit consumer advocate public service that reports “facts, opinion, and the vast legal record of Windermere Real Estate, America's most unethical realtor.”
- l. The Director of Services, Michael Teather, made the comment to Mr. Forsberg, the technology specialist for the Area Representative, “We

don't know what in the hell we are doing up here.” (Forsberg, Page 66, line 23-24).

m. Windermere Watch in 2011 began to list all of the Windermere offices, the agent's DRE or Cal BRE numbers, and their names. This created a situation in which a Google search for a Windermere agent in Southern California would return a result showing Windermere Watch. (Forsberg, Page 58, line 1-9)

n. Screen capture of the www.windermerewatch2.com website:



5 Mr. Teather attempted to recruit Mr. Forsberg to come to work for Windermere in Seattle. (Forsberg, Page 82, line 4-5).

6. The Windermere Watch campaign against Windermere and its franchisees caused franchisees to leave the system.

- a. Richard King left the system because of Windermere Watch and fees going up. (Gregor, Page 26, line 24-25; Page 27, line 6).
 - b. Ray and Francine Finn left the system because they were tired of dealing with the Windermere Watch issue and that it was impacting their ability to recruit agents. (Gregor, Page 26, line 20-21).
 - c. Joe Butler left the system in part because of Windermere Watch issues. (Gregor, Page 87, line 15).
 - d. The Windermere Watch website in 2011 began to list all of the Windermere offices, the agent's DRE or Cal BRE numbers their names. This created a situation when a Google search for a Windermere agent in Southern California would show Windermere Watch. (Forsberg, Page 58, line 1-9).
 - e. Regardless of the technological issues involved, the problem surfaced in real life when "a client would search for their own home when they're buying it and they would find Windermere Watch and they would vocalize their frustration to the agent." (Forsberg, Page 72, line 13-15).
 - f. Eric Forsberg was working on the issue of resolving the issues with the Windermere Watch. Michael Teather made the comment to Eric, "We don't know what in the hell we are doing up here." (Forsberg, Page 66, line 23-24). On another occasions this same sentiment of lack of technological savvy was repeated by Mr. Teather to Mr. Forsberg. (Forsberg, Page 70, line 19-23; Page 71, line 10-12).
 - g. The SEO efforts not only included attempts to out rank Windermere Watch but also was extended to the Windermere agents in Southern California because their names were listed on the website. (Forsberg, Page 74, line 1-3).
7. The overall quality of the technology was a concern for the agents, agents' clients through their agent, office managers, and managing brokers. (Forsberg, Page 88, line 25; Page 89; Page 1-2).

8. The marketing materials were not specific to California but had a Northwest look and feel. I understand that this issue began prior to the September 17, 2011 date and continued throughout the entire course of the parties' relationship.
 - a. The collateral material and online marketing venues were specific to the Pacific Northwest, where most or all of the materials were originated. This was an issue for franchisees in Southern California that marketing material was not more specific to regions in California. (Gregor, Page 40, line 19-22; Page 68, line 16-17).
 - b. The front of the website that we discussed earlier tended to feature pine trees and marketing materials that were centered around the Pacific Northwest. (Forsberg, Page 47, line 18-21)

BASIS AND REASONS FOR OPINIONS

I have reviewed the report of David E. Holmes. I disagree with some of the opinions he rendered, in part because some of the evidence upon which he relies in support of those opinions is taken out of context and because he disregards facts that are inconsistent with his opinions. Mr. Holmes bases his opinions on a selective view of the evidence that colors his conclusions, while looking at the evidence in context fails to support key opinions that he renders.

I formed my opinions by engaging in an analysis of the facts that are described above and reflected in the materials identified in Attachment 3 and applied those facts to the opinions express by Mr. Holmes. In forming my opinions, I applied my experience in franchising including being a franchisee, multi-unit franchise and area representative in multi-franchise concepts, and being a franchisor in two different franchise companies, serving on a board of directors and providing consulting services to franchisors.

To the extent that the opinions I provide in the Opinions section of this report are descriptive of how franchise - area representative relationships customarily work, my opinions are based on my experiences as described above. See, in particular, the opinions numbered 1, 4, and 6. To the extent that my opinions are based on

those factors as well as conclusions drawn from the evidence, my reasoning is set forth below.

1. Franchisor's Role in a franchisor - area representative relationship

Opinion 1 The franchisor's role in a franchisor - area representative relationship is defined both by the agreement and by customary practices in the industry. The relevant contract terms are quoted in Point 1 in the "Facts and Data" section of this report. The relevant practices that are customary in the industry include:

Pursuant to industry customs and practices, the structure of an area representative agreement is a delegatory relationship between the area representative and franchisor in which the franchisor delegates certain responsibilities and the area representative undertakes these responsibilities in order to implement the franchisor's system in its territory. There are certain roles and responsibilities that the franchisor does not delegate but retains direct responsibility.

- a. Customary roles and responsibilities that are delegated by the franchisor to an area representation structure.
 - i. Franchisee recruitment marketing;
 - ii. Interviewing, qualifying and presenting qualified franchise candidates to the franchisor for approval as franchisees;
 - iii. Franchisee location assistance;
 - iv. Opening, initial and ongoing training;
 - v. Ongoing franchisee support.
- b. Customary roles and responsibilities customarily retained by the franchisor are:
 - i. Responsibility to continue to maintain, develop and enhance the franchise system and operating model;

- ii. Collection and accounting for all initial and ongoing franchise license fees, administrative fees, advertising going to contributions and other amounts due under the franchise licensing agreements and remitting these to the franchisor;
- iii. Develop and provide marketing materials;
- iv. Approve or disapprove franchisee candidates.
- v. Provide and maintain technologies necessary in the franchisor's business to ensure that technology systems work and are enhanced over time;
- vi. Providing current and timely Franchise Disclosure Document registration;
- vii. Brand and trademark defense and protection.

Having identified the contractual and customary role of a franchisor in a franchisor - area representative relationship, I reviewed the evidence in this case to determine whether the franchisor in this case satisfied the responsibilities and obligations of that role. I then arrived at the following conclusions, supportive of the opinions stated in the Opinions section of this report.

- 2. The franchisor delegated most of the customary roles and responsibilities to the Area Representative and retained certain customary roles and responsibilities.

Opinion 2 in the Opinions section of this report is based on the following reasoning. I concluded, based on the facts mentioned above that the franchisor delegated the customary roles to the Area Representative.

- 3. Franchisor delegating royalty collection to the Area Representative.

Opinion 3 in the Opinions section of this report is based on the following reasoning. I concluded the franchisor's decision to delegate the collection of fees

by the Area Representative was included properly in the Windermere Real Estate Licensing Agreement.

4. The franchisor was deficient in discharging its obligations and responsibilities because it failed to provide a properly working technology platform.

Opinion 5 (a) in the Opinions section of this report is based on the following reasoning. I concluded, based on the facts mentioned above that the franchisor's failure to properly anticipate the intricacies in the real estate industry outside of Washington State lead to their inability to assess and anticipate the complexity of integrating their technology with the different MLS listing entities in California.

- a. The technology was not thoroughly tested and was released without properly taking into consideration the different MLS listing services that existed in California. (see point 2(c) in the "Facts and Data" section of this report)
- b. The franchisor failed to understand the intricacies working with the various MLS listing services because new data sharing agreements had to be executed with each MLS service in each community in order for a data service provider such as Windermere Solutions to access the MLS database and when the MLS listings would work properly franchise owner business was effected. (see point 2(b), 2(c), 2(d), 2(e) in the "Facts and Data" section of this report)
- c. The franchisor failed to provide franchisees with a competitive technological edge in the marketplace. In today's highly competitive marketplace, having proper technology tools that are up-to-date, that provide access to information that enable a franchisee to deliver a high level of service, and that reduce administrative time is essential for success both from a branding perspective and from a financial one. The financial burden of failed technology caused franchisees to leave the system. (see point 2(f) in the "Facts and Data" section of this report)

- d. The franchisor's continually increasing technology fees and the fact that the franchisor's lack of commitment to invest the money necessary to make each franchise location's technology compatible with local MLS directories led to financial difficulties for franchises and poor franchisor-franchise/area representative relationships. (see point 2(f), 2(g), 2(h), 2(i) in the "Facts and Data" section of this report)
- e. When asked about the reasons for not working to ensure that the MLS listing technology worked in California, the response given was that it cost too much. (see point 2 (g) in the fact and data section of this report) That was not an adequate or reasonable excuse, given the franchisor's responsibilities and obligations to area representatives and franchisees.

My conclusion and opinion is that the franchisor failed to deliver a proven, tested, well-oiled franchise system with respect to its technology platform to the Area Representative and its franchisees.

- 5. The franchisor failed in its troubleshooting role to resolve technical difficulties concerning its technology in a timely manner while assessing and continually increasing technology fees which were intended to fund the maintenance, enhancement, development and improvement of its technology.

Opinion 5 (b) in the Opinions section of this report is based on the following reasoning. I concluded, based on the facts mentioned above and my business experience as a CEO and board member of multiple franchise and technology companies, that the franchisor failed in its troubleshooting role to resolve technical difficulties experienced with its technology in a timely manner. I also concluded that this was caused in part by the board of directors' possible conflict of interest in maximizing the return on their investment in Windermere Solutions at the expense of Windermere franchisees.

The franchisor had little sense of urgency related to the technological problems they were facing in the Southern California market and had conflicting corporate goals for Windermere Solution.

- a. The problems with Windermere technology platform started as early as 2003 and continue to be an issue for over a decade and it is still a problem over ten years later. (see point 3 (a) in the fact and data section of this report).
- b. Mr. Baur arrived to assume his role of CEO of Windermere Solutions in September of 2012 and it wasn't until late October of 2013 that a plan was submitted for the technological strategy for attacking the SEO problems with the Windermere Watch. It appears there was little urgency with this issue internally with the franchisor. (see point 2 (b) in the fact and data section of this report).
- c. Windermere Solutions is owned by different shareholders, some of which are outside of the Jacobi family (see point 2 (d) in the fact and data section of this report).
- d. Mr. Baur is the CEO of Windermere Solutions and reports to the board of directors of the company. He is held responsible for financial performance, participates in setting strategy and goals, and has a duty to maximize revenue and profit for the company. Also, it is likely that his compensation ties to the revenue generation and profit of the company and he likely has a stock option plan. Stock option plans provides an incentive to create a path to the monetization of the company stock at some point in time. This monetization usually happens by positioning the company for a spinoff, merger, acquisition or going public. All of these goals are not bad or unexpected for the investors of Windermere Solutions. (see point 3 (e) in the fact and data section of this report).
- e. However, a monetization event might not be the best set of circumstances for the other stakeholder in the Windermere family of companies, the Windermere franchisees. Many of them have their livelihood tied up in their business. They are paying ever increasing technology fees, which in part is providing cash flow to develop technology products for competitors down the street. A new owner may not share the same value they have.

- f. It is hard to visualize that McDonald's, the premier franchise company that has set the gold standard for how a franchisor should act, would (for example) develop a priority French Fry cooking technology and sell it to Burger King and Wendy's to monetize the investment of second or third generation family shareholders. McDonald's is a purist franchisor. Everything it does is for the exclusive benefit of its primary stakeholder – the franchisee partners.
 - g. If and when Windermere Solutions is monetized, the shareholder of the company, the Jacobi family and Long and Foster, will monetize their investment and sell the company. Windermere franchisees will not share equally in the company they helped build.
6. The Area Representative in this case either carried out or facilitated the implementation all the contractual to the franchisor and franchises which included recruiting of new franchisees, providing training and ongoing support to new franchisees, implement the franchisor's technology, and assisted franchise with their advertising and marketing.

Opinion 7 in the Opinions section of this report is based on the following reasoning. The Area Representative was able to recruit new franchisees and through its affiliate entity Bennion and Deville Fine Homes of Southern California acquire franchises to fulfill its contractual duty in recruiting new franchise and extend the franchisor brand in Southern California. The Area Representative was also able to provide training and ongoing support to new franchises, implement the franchise technology as well as provide technology of its own and finally, assist franchisees, primarily through its own franchises, with their marketing and advertising.

7. The franchisor failed to manage the franchise's trademark, brand and reputation.

Opinion 5 (c) in the Opinions section of this report is based on the following reasoning. The franchisor failed to defend the trademark and brand against the defamatory activities of people, entities, activities and events that damaged the integrity of the trademark, such as www.windermerewatch.com and

www.windermerewatch2.com, direct mail campaigns and other such negative and brand damaging activities. The value of a brand is paramount to companies, especially for franchise companies.

- a. Mr. Wood, CEO of Windermere Real Estate Services Company, acknowledges the importance of the franchise brand and how important it is to protect the brand but does little to create a strategy to effectively address the problem. (see point 4(a), 4(b) in the fact and data section of this report).
- b. Mr. Gary Kruger, an aggrieved former client of a Windermere office in Seattle, began to actively market the www.windermerewatch.com website, in the early 2000s and even though the website was creating an enormous amount of distress among franchisees, the franchisor did little. The negative marketing campaigns began to escalate, and still the franchisor did little. (see point 2 (a) in the fact and data section of this report).
- c. Michael Teather, a senior executive at the franchisor, after being hired, assessed the status of the competency at Windermere Solutions at the time, and concluded that they didn't know what they were doing with respect to being able to effectively and tactically implement an SEO campaign designed to push Windermere Watch Google ranking lower. (see point 3 (m) in the fact and data section of this report).
- d. The area representative had in its employ a competent technology director by the name of Eric Forsberg who had been recruited and hired by Mr. Deville to address some of the issues that franchisor was unable to accomplish. In a phone conversation, after assessing the sorry state of affairs at Windermere Solutions, Mr. Teather offered Mr. Forsberg a job. (see point 5 in the fact and data section of this report).
- e. Kruger began to escalate his tactics by not only publishing court records on the Windermere Watch website, but all of the relators' names from each Southern California franchise office, causing an enormous amount of frustration from franchise owners, their agents and clients. He also became more personal in his attacks. (see point 3 (e) in the fact and data section of this report).

- f. The franchisees' businesses were being seriously impacted by the constant negative campaign by Mr. Kruger and Windermere Watch. The issue was a distraction. Competitors were picking up on the issue and using it to get listings from Windermere agents. Listings were lost, clients were leaving, agents were leaving franchisees for other brokerage offices. (see point 3 (f), 3(g), 3(h), 3(i), 3(j), 3(k), 3(l) in the fact and data section of this report).
- g. Client search their own property and are redirected to the Windermere Watch website see point 5 (e), in the fact and data section of this report). Even when agents began leaving the system, the franchisor did little. (see point 5 in the "Facts and Data" section of this report)

8. Area Representative Support of Franchises.

- a. Mr. Holmes' opinion (Page 18, Section 7), references a portion of the deposition of Mr. Deville (Vol. I; page 31; line 12), where Mr. Deville, after being asked what he considered to be the obligations of an area representative in providing services to franchisees in Southern California, responded that an area representative was to "grow the region and to act as a conduit between the owners and Seattle, collect fees."

Mr. Holmes then asked Mr. Deville, is there "Anything else that you can think of now?"

Mr. Deville responded, "No."

- b. Mr. Holmes goes on to say (Page 18, Section 8) that "standard franchising practices for area representatives include more than simply marketing franchises, acting as a 'conduit' between the franchisor and the unit franchisees and collecting fees. Those practices include, among other things discussed in more detail above, assuring general system compliance by franchisees (not only trademark compliance), establishing and operating a training, education and professional development program for franchisees and their employees, and a proactive 'coaching' model to assist franchisees in becoming financially and operationally successful."

- c. Mr. Holmes fails to take into consideration in his analysis of the list of standard franchising practices for area representatives the additional testimony by Mr. Deville about the other support activities provided by himself and his staff to assist franchisees in becoming financially and operationally successful, such as establishing a training, education and professional development program for franchisees and their employees. This training, education and professional development program is detailed in the same deposition of Mr. Deville as follows:
- i. How to get a listing or sale and how to make things happen (page 191; line 13-15);
 - ii. How to do an open house (page 191; line 19);
 - iii. How to get price reduction (page 191; line 19-20);
 - iv. How to hold firm on commissions (page 191; line 20);
 - v. If franchisees couldn't come to the classes held at their offices, he would send staff to their offices to hold classes for franchisees and their agents at their office or a nearby office (page 191; line 24-25);
 - vi. Had an attorney on retainer to teach classes/symposiums on risk management classes for franchisees in their areas (page 192; line 3-4; 9/10) at least twice a year (page 201; line 15);
 - vii. All classes were at no cost for franchisees (page 192; line 1-2).
- d. In the same deposition, Mr. Deville was asked to further detail the standard practices and activities provided to franchisees, Mr. Deville answered (Deville Deposition, Vol. I; page 189; line 22-23) "we would assist and give guidance for new offices" and "we would either go there and spend a week with them" or "they would come with us," which is a reference to the fact that franchisees would often visit Mr. Deville's offices and ride along with

him, the other agent/brokers or one of this employee support staff members (Deville Deposition, Vol. I; page 189; line 24-25).

- e. Again, in the same deposition, Mr. Deville enumerates other support services that were provided to franchisees in Southern California including:
 - i. Help with finance, accounting and office procedures (page 190; line 1-2);
 - ii. Help getting vendors (page 190; line 3);
 - iii. Get the best deals from these vendors because they knew where they (the vendors) were (page 190; line 1-2);
 - iv. Allow franchisees to use their contracts in order to get discounts from the vendors (page 190; line 6-7);
 - v. Discounts on advertising and newsprint allowing them to use their own ads but obtaining deeper discounts than they could get on their own (page 190; line 7-8);
 - vi. Allow franchisees to place a full-page advertisement in their quarterly real estate magazine (page 192; line 13-14) for no cost and if they wanted to purchase an additional page, they were allowed to purchase this additional page for \$400 which would cost at least \$1,000 retail (page 192; line 18-19) and shipped a bundle of these magazines to franchises for their use (page 192; line 14-16).
- f. In Mr. Gregor's deposition, he testified that he was a part of a team that supported franchises: "I was part of the team ... when there was a concern or need, we would check in with them on a regular basis as a team when there was a concern or need, we would discuss how to ... get the problem solved." (Gregor, Page 29, line 13-24)
- g. Mr. Gregor and members of the team "checked in monthly via email, phone and in person." (Gregor, Page 30, line 27) The team consisted of Page Kylie,

Patrick Robinson, Eric Forsberg, Todd banks and Joe Gemma. (Gregor, Page 31, Line 23-24)

- h. In his opinion, Mr. Holmes infers that Mr. Deville simply focused on marketing franchises, acting as a conduit between the franchise or and the unit franchisees and collecting fees. Based on the facts presented above, I disagree with Mr. Holmes' conclusions and opinions and conclude that, in fact, Mr. Deville met the standards in franchising for an area representative.

9. Area Representative Responsibilities Regarding Payment of Fees

- a. Mr. Holmes' report (Page 19, Section 11) references Mr. Gregor's deposition testimony and a statement Mr. Gregor made to the effect, "That was beyond my pay grade at that time." Based on his statement, Mr. Holmes concludes that "standard franchising practices for area representatives would not include franchise sales staff who might have issues with respect to a prospective franchisee's possible inability to pay required fees failing to alert the area representative's management to such concerns. On the contrary, the payment of required fees is a prime concern for all responsible franchisors or area representatives."
- b. If Mr. Gregor's statement had been made in the context of a general discussion, Mr. Holmes' conclusion would be reasonable, but given the context of the line of questioning, the facts do not support his opinion that standard franchise practices were not met by the area representative and his staff.
- c. The context of the topics that were being addressed when Mr. Gregor responded to the question was not a general discussion about the roles of an area representative field support person. Mr. Gregor's comment was made while Mr. Gregor was discussing accompanying Mr. Deville while they made sales presentations to prospective franchisees.
- d. To understand Mr. Gregor's testimony, in the context of his role as a field support representative, it is important to understand Mr. Gregor's role with

the area representative at the time this comment was made and the area representative's role in the area representative organization.

The roles and responsibilities in an area representative organization depends on the size and sophistication of the area representative entity. There are generally two main roles of an area representative:

- i. the recruiting of new franchisees, which includes finding potential franchisee candidates, the presentation, the interview and awarding process,
 - ii. the operational support role which includes training, ongoing operational, marketing, financial and other in field support functionsThese two roles are commonly referred to as the sales role and the support role, respectively.
- e. Franchise organization vary in size and scope.
 - i. In some smaller area representative entities, there may be only the area representative. In these types of organizations, the area representative will often fill both the sales and support roles.
 - ii. In mid-level area representative entities, it is common that the principal owner(s) of the entity will fill one of the two roles (sales and support) and delegate the other role.
 - iii. In larger, more established area representative entities, the duties of both the sales and support roles are delegated. The area representative fills the role of an executive manager of the organization, most often limiting its duties to the interviewing of potential franchisee candidates, meeting with existing franchisees on an as-needed basis, and attendance at company meetings as well as overseeing and managing the organization.
- f. I conclude from the documents that I have been requested to review, Windermere Services of Southern California, Inc., the Area Representative, operated functionally as a mid-level area representative entity and as such

the sales role was filled by Bennion and Deville and the support role was delegated to a franchisee support team consisting of Kirk Gregor, Patrick Robinson, Eric Forsberg, Todd Banks, Joe Gemma and Paige Tyley (Gregor Deposition; Page 29, line 20-25), each of whom was responsible for various franchisee support functions.

- g. Mr. Gregor's duties were both in the area of sales and support. In sales, he was tasked with finding and recruiting franchisee candidates. He did this by networking with title and escrow companies and lenders (Gregor Deposition; Page 31, line 19-23). He would make initial contact with potential franchisee candidates and, upon vetting these people for experience, integrity (Gregor Deposition; Page 85, line 5) and being financially sound (Gregor Deposition; Page 29, line 9) with the ability to pay franchise related fees (Gregor Deposition; Page 29, line 9, 12), he set up a meeting with Mr. Deville (Gregor Deposition; Page 18, line 5-6, 9-10) to be interviewed, further qualified and for a sales presentation to view the Windermere system and tools including technology, marketing and advertising (Gregor Deposition; Page 19, line 9, 16, 22). Mr. Gregor would accompany Mr. Deville to these sales presentations (Gregor Deposition; Page 18; line 15).
- h. In this situation, and in his support role to the area representative, Mr. Gregor was the subordinate to Mr. Deville as he made the sales presentations to franchisee candidates (Gregor Deposition; Page 85, line 21-23). In his support role, it was not for Mr. Gregor to make the final determination of the financial qualifications of these candidates, having only provided candidates for Mr. Deville's review that Mr. Gregor had previously qualified as financially sound and able to pay franchise fees, as noted above. The final financial determination was Mr. Deville's role as area representative.
- i. In this context, Mr. Gregor was asked, "And if there was an issue in your mind about whether or not these owners could pay the fees they were required to pay under the Franchise Agreement, would you speak up and make that known to Mr. Deville?"

- j. In my opinion, Mr. Holmes' conclusion that standard franchising practices "would not include franchise support staff who might have issues with respect to a prospective franchisee's possible inability to pay required fees failing to alert the area representative's management to such concerns" is true in a general sense but does not apply to this specific situation because Mr. Gregor had already determined the financial ability of the franchisee candidate prior to arranging a meeting with Mr. Deville, the area representative, and he was only deferring to Mr. Deville to make the final determination as to the financial qualifications of the franchisee candidate, which was definitely beyond Mr. Gregor's pay grade at that time.

10. Favoritism Regarding Payment of Fees

- a. In Mr. Holmes' Expert Report (Findings, Sections 13 and 14), Mr. Holmes points out that the franchisee Bennion & Deville Fine Homes SoCal, Inc., a Windermere franchisee for multiple locations in Southern California, was delinquent in its royalties. Bennion and Deville, through their entity, Windermere Services Southern California, Inc., were also the area representative for Windermere in Southern California. Mr. Holmes infers that an area representative who also owns franchises, which in this case was the situation, should not show favoritism regarding payment of fees and that it is not standard franchise industry practice for area representatives to pay fees on units owned and operated by them according to their legal obligations.
- b. Mr. Robinson, who was the person in charge of monitoring monthly sales reports and collecting royalties for all franchisees, including franchises owned by Bennion and Deville, testified that he followed up with all franchisees, including franchises owned by Bennion and Deville, on a regular basis.
- c. The process for collection of royalties that Mr. Robinson followed was to compile the monthly statistical reports and log payments from franchisees. If franchises were delinquent, Mr. Robinson would reach out to the franchise owner by email or phone call about their delinquent payments (Robinson, Page 36, line 3-14). The same process was followed for franchises owned by Bennion and Deville with the exception that Mr.

Robinson would contact the controller for Bennion and Deville, Maria Wooten, and Thomas Lang about delinquent payments (Robinson, Page 37, line 7-24).

- d. There is no dispute that all franchisees are contractually obligated to pay their fees per their franchise agreement. The issue Mr. Holmes raises seems to imply that in their role as an area representative, they are taking advantage of their supervisory role by not paying royalties on the franchises that Bennion and Deville operated, purposely deferring or otherwise becoming delinquent in their royalty payments on the Bennion and Deville franchise operations, thereby to create an unfair advantage (favoritism) over the other franchisees in the region while providing no support for this inference.
- e. In fact, the documents I was asked to review imply that there was no favoritism as an area representative with regards to their own operations that Bennion and Deville operated and time and time again, in their role as an area representative they were strong advocates for their franchisees and made available their Bennion and Deville franchise operations for the benefit of the franchisees in the region. (See: REVIEW OF DAVID E. HOLMES' REPORT, Sections 2, 3, 5 above)

11. Gooding's Concerns about Support, Collaboration, and Competition

- a. In his report in Findings #15, Mr. Holmes cites situations in Mr. Gooding's testimony, that if proven true, he believes would be not be consistent with applicable standards in area representative franchising. Mr. Holmes points out a number of comments that Mr. Gooding made in his deposition alleging that the Area Representative was not collaborative, provided no support and became a competitor.
- b. In a situation where an area representative is both a franchisee and area representative, there is always an issue of self-interest of the area representative, whether real or perceived. Since there are no provisions in the Area Representative Agreement precluding the area representative from being a Windermere franchisee, Bennion and Deville were within their rights to apply for a franchise.

- c. For these reasons, the franchisor retains the control and responsibility of ensuring that franchise candidates who make an application for a franchise are qualified and that the location or area granted to the franchise is appropriate. Ultimately, if any franchise were to be granted in north San Diego County to either Messrs. Bennion and Deville's entity, Bennion & Deville Fine Homes SoCal, Inc., or to Gooding and Johnson, or to anyone else for that matter, the franchisor retained the authority to make that decision.
- d. In franchise systems where territories have specific geographical boundaries, territory lines generally restrict opening of offices or stores outside of the boundaries of a territory, which generally precludes encroachment on other franchise territory offices or the development of offices that are too close to other locations, thereby providing some protection against direct conflicts and competition from other franchisees in the area, or in the case of an area representative also being a franchisee, not directly competing, intentionally or unintentionally, with a neighboring franchisee.
- e. Most area representative structures, including Windermere, provide for an area representative to make recommendations on the qualifications, the suitability of a franchisee, and the territory being requested, to the franchisor. Since the franchisor is the final authority on granting a franchise, whereas the area representative is not, the franchisor needs to ensure that relevant key items such as the financial qualification and the location of the franchise fit predetermined criteria.
- f. In a franchise structure such as Windermere's, with no territorial boundaries, a franchisor must be especially aware of and concerned about these issues. The franchisor must exercise due care and conduct the necessary research before granting franchise rights and territory to ensure that other franchisees in the area are protected and that awarding a new franchise will not be a detriment or create conflict with other franchisees in the area.

- g. In the northern part of San Diego County where franchisees existed in close proximity with each other (less than a mile – Gooding, Page 130, line 9) for some time, a single incident appears to have been the first domino to fall that led to a failed relationship between Gooding and Johnson and the area representative, Mr. Deville.
- h. This incident occurred when Mr. Deville’s office in Solano Beach was closed (Gooding, Page 129, line 25; Page 130, line 1-3). Gooding and Johnson were not notified of the closure and only learned of the closure later (Gooding, Page 130, line 4-5). The office closure resulted in agents calling Gooding and Johnson’s nearby offices to inquire about joining their Windermere team.
- i. Since Gooding and Johnson weren’t notified of the Solano Beach office being closed, they were caught unawares. This upset them and put them in an uncomfortable position (Gooding, Page 134, line 7). Although they ended up only hiring four or five agents (Gooding, Page 134, line 13-14), they were frustrated with the lack of communication surrounding the Solano Beach office closure and being caught unawares when agents from Solano Beach called their office.
- j. As a franchise, Mr. Deville had no contractual obligation to notify Messrs. Gooding and Johnson about the Solano Beach office closing, in fact there is no contractual obligation under their Area Representative Agreement to do so either. But as a businessman that has owned multiple businesses, large and small, it is my opinion that the timing of location closures, layoffs and other major changes in a business that impact the lives of people that have been loyal to the company, sometimes for years if not decades, involves a delicate balance between being compassionate and not having people fleeing the ship when it is announced that the business is moving, closing or downsizing.
- k. The franchise agreement requires a 6-month notice to terminate the franchise. If this notice was given too far in advance, any business that agents had in the pipeline would quickly dry up and agents would be leaving, costing the franchise owner thousands if not tens of thousands of dollars in lost revenue. It is my opinion that the non-notice by Bennion and

Deville's franchise in Solano Beach was a reasonable business judgment motivated by the balancing act discussed above. News of the closure was likely premature, a case of the cat getting out of bag before they had a chance to notify Gooding and Johnson.

- l. Mr. Holmes also references Gooding's concerns and dissatisfaction by pointing out that Mr. Deville refused to participate in a "double truck" (which is a pair of facing pages, usually in a newspaper or magazine, with content that stretches over both pages).
- m. As previously stated (See 5 (d), (e), (f) above), it was the practice of Bennion and Deville, as franchisees, to include other franchisees in the region in ads that they were running in local magazines and newspapers at no cost. Also, Bennion and Deville purchased large amounts of advertising and freely passed their volume advertising discounts onto franchises. This is a practice that Bennion and Deville successfully used over a period of years.
- n. Mr. Gooding acknowledges "we were allowed to go into that advertising if we wished." (Page 153, line 16-17) However, Gooding and Johnson were looking to implement a different advertising strategy in which they were seeking to brand their company as opposed to participating with Bennion and Deville. In my opinion, this is a case of two successful businessmen having a difference of opinion on advertising strategy rather than a case of non-support by an area representative.
- o. In fact, the Franchise Disclosure Documents filed with the State of California did not include a requirement for franchises or for the area representative to participate in a cooperative advertising, marketing or branding fund on a local or regional level. Since this provision did not exist, there is no contractual obligation for either franchisees to collaborate with other franchisees, and more specifically for the area representative to facilitate any such activities simply because there were no funds to make this possible. In fact, it is my opinion based on my participation in numerous other franchise systems, that without such a provision or requirement to contractually contribute to such a fund, it is virtually impossible for cooperative or collaborative advertising to take place.

- p. In fact, as franchisees, Bennion and Deville enable cooperative advertising to happen among franchises at little or nominal cost to them. Of course, it was Bennion and Deville acting as franchisees, not in their role as an area representative, that this advertising took place. Franchises got the benefit of lower cost advertising under the Windermere brand at the expense of not being able to promote their individual companies, which is what Gooding and Johnson wished to do. When another franchise elected not to participate with them in their strategy, they felt that their area representative was not being collaborative, when in fact the area representative had little to do with being able to facilitate cooperative advertising because there was no methodology or system for funding in place to make this happen. In this case, the area representative was a victim of the way in which regional advertising was mandated by the franchise agreement of the franchisor.
- q. When Gooding and Johnson first became Windermere franchisees, it appears they “were enthusiastic aboutworking with Bob Deville and Bob Bennion” (Gooding, Page 56, 9-11), but the relationship soured because of structural inadequacies concerning the franchise structure. As some of the issues cited above began to surface, the relationship between franchisees Gooding and Johnson, franchisees Bennion and Deville, and the Area Representative, Windermere Services Southern California, began to rapidly deteriorate. This is exemplified when Mr. Gooding sent an email to his partner Mr. Johnson and his CFO, Mr. Schuster, expressing his frustration by calling Mr. Deville a “prick.” (Gooding, Page 157, line 9).
- r. It has been my experience as franchisee, multi-unit franchisee, an area representative in multiple franchise concepts and a franchisor in two, that when emotions rise to this level, communication slows down and eventually stops altogether, escalating the probability for further misunderstanding and conflict.
- s. This is what appears to have happened when in another email Mr. Gooding sent to Mr. Johnson and Mr. Schuster, he continued to vent his frustration toward Mr. Deville, the franchisee, which seems to have risen to the level of fiery anger, when he writes, "Let's not ask anything else of them and proceed to kick their tails (Bennion and Deville, franchisees) in North

County." (Page 155, Line 1-2) and again, "I am over them. I mean it. I do not want to ask any of them anything of them (most likely referring to Windermere Services Southern California, Inc. – the Area Representative). It's pathetic." (Page 156, line 18-20). When either party gets to the point of "not having anything to do" with the other in a relationship, the ability for the parties to work together is minimal. In this case, Mr. Deville's role as a franchise, on issues such as cooperative advertising, i.e., the "double truck" ads, and as their Area Representative to perform support functions become difficult, if not impossible, to execute.

- t. Additional exchanges could be presented in Mr. Gooding's 315-page deposition that would illustrate how an event, such as the circumstances surrounding the closing of the Solano Beach office, had a domino effect that significantly reduces and then eventually completely cuts off civil communication, escalates feelings and causes real and/or perceived problems to become more pronounced.
- u. Without commenting on the validity of each of the issues that Mr. Holmes references in Section 15, which in most cases involve a large degree of subjectivity, it is my opinion that Mr. Holmes' findings on this issue overlook evidence that the conflict became a two-way street and not entirely a one-sided affair caused by Mr. Deville's alleged failure to provide support as an Area Representative.
- v. Evidence that Mr. Holmes overlooks supports the conclusion that it became impossible for Mr. Deville to provide support as an Area Representative because of the heightened emotions of Gooding and Johnson when they began to reduce and completely cut off communications with Mr. Deville as their Area Representative and Bennion and Gooding as a Windermere franchise.
- w. Based on my review of Mr. Gooding's testimony, I have concluded that Mr. Deville as an Area Representative did meet the standards consistent with area representative franchising as far as Gooding and Johnson allowed them to perform their role as an area representative.

12. Johnson's Concerns about the Area Representative

- a. Mr. Holmes addresses Mr. Johnson's concern at two levels, both of which are inconsistent with factual aspects of the relationship of the parties. In his report, Mr. Holmes states that Mr. Johnson has expressed concern or dissatisfaction with respect to what he perceived as (among other things): that his franchise was "instead of having a mutually beneficial relationship, that they were, in fact competing against 'SoCal', and that this was causing some challenges between our relationship" and apparently relating that perception to issues regarding "advertising and the competition about recruiting agents."
- b. Mr. Holmes failed to acknowledge or draw a distinction between the franchisee and the Area Representative. Mr. Johnson cannot compete against "SoCal" – the Area Representative. "SoCal" is not a franchise. It is the Area Representative and as such does not own a franchise. Bennion & Deville Fine Homes Southern California, Inc. is the Windermere franchisee.
- c. This case is about the Area Representative being in breach of its Agreement. Yet, time and time again, allegations are made in multiple depositions that the Area Representative "SoCal" is competing against Windermere franchisees by recruiting agents and non-collaboration on advertising, as referenced in Section 17 of Mr. Holmes' Findings where it appears that he doesn't understand that the franchisee is Bennion & Deville Fine Homes Southern California, Inc. and not "SoCal" or Windermere Services Southern California, Inc.
- d. It is my opinion, the Area Representative, Windermere Services Southern California, Inc., did not compete "against SoCal", refuse to cooperate on "advertising", or compete "for agents" with Windermere franchisees, and that Mr. Holmes erred in his characterizations by classifying "SoCal" as a franchisee vs. the Area Representative.
- e. The other items referenced in Section 17 of the report related to communications are the same issues as previously referenced in Section 38 and 40 above.

13. Limitation of Communication with Franchisees

- a. Mr. Holmes' report (Section 19, Page 21) characterizes Mr. Fanning's testimony as claiming "that the Area Representative told him what he could and could not speak to franchisee about." In fact, in his deposition testimony, when asked, "and what did he tell you could not talk about?," Mr. Fanning answers, "... I don't want you talking about something if you don't know if it's going to work." (Page 31, line 23-24)
- b. One of the big issues concerning Windermere's deployment of its technology was the complexity of the California MLS listing service. There is not one MLS for California, there are literally dozens of them, each with their intricacies, overlaps and ability to interact properly to allow data to flow from the MLS into the Windermere technology. Real estate agents are not generally technologists. What they expect is when you turn on a computer, laptop or iPad and log onto a program, the information will magically appear. When it didn't and not knowing what to do, they would begin calling their Area Representative who is also not a technologist.
- c. When this is multiplied by a several hundred agents in Southern California, it is a real headache for the Area Representative and his staff to deal with. This type of issue happened repeatedly. Mr. Deville always met with Mr. Fanning when he came to that area to introduce new technology. A prudent businessperson always wants to be proactive and anticipate problems and seek ways to minimize them, which was the reason for the meetings. If Mr. Fanning would indicate that there may be a problem, Mr. Deville did not want to deal with the fallout which was inevitable.
- d. Mr. Holmes is too hasty in concluding that simply because Mr. Deville wanted to know what was going to be introduced before authorizing Mr. Fanning to deploy technology that was going to generate calls, his instructions caused frustration and a feeling by the franchisees that Windermere didn't know what it was doing, which is not the case. The instructions merely delayed communication about this technology until it could be deployed in a manner that would increase franchisee satisfaction rather than causing the opposite result. This is no different than a parent telling their teenager that they can drive once they have passed Driver's Ed.

because experience has taught them to err on the side of caution vs. being too hasty because the consequences are unpredictable and problematic.

- e. I disagree with Mr. Holmes' conclusion that this limitation imposed by an Area Representative is not of a type that is typical or consistent with standard franchise industry practices. In fact, it is my opinion that the narrow limitation on this specific communication is just the opposite and shows prudence in anticipating problems that would be likely to damage the franchisor – franchisee relationship.
- f. In Section 21, Page 21 of his report, Mr. Holmes references Mr. Fanning's testimony that he did not have the opportunity to come and teach the agents in the region because he was asked to stop coming.
- g. However, in further testimony, Mr. Fanning discusses specific opportunities where he made trips in December of 2013 to Riverside where he "trained their offices on how to use the tools." (Fanning, Page 35, line 3-4). He was also in the office of Gooding and Johnson in 2014 (Fanning, Page 38, line 11-13) where there was a discussion about setting up future trainings for their offices. Several training sessions were set up at that time.
- h. Windermere also sent out bulletins via emails to all franchisees in the system notifying them of training events. (Fanning, Page 36, Line 19-23)
- i. I disagree with Mr. Holmes' conclusion that Mr. Fanning did not have the opportunity to teach agents in the region because he was asked to stop coming when he did make trips to the region and train franchisees. Also, franchisees received ongoing notifications of training classes via email where they were made aware of technology training classes.
- j. In Mr. Holmes' report (Section 31, Page 22), Mr. Holmes points out that Ms. Bortfeld and others said "we weren't allowed to talk to anyone in Southern California."
- k. In further testimony, Ms. Bortfeld when asked "Did Mr. Deville specifically tell you that you were not allowed to talk to franchisees in the Southern California region?" responded, "I was instructed by someone and I don't

recall who, to respect his wishes." Ms. Bortfeld was asked several times again if she could recall who had specifically told her to not talk to anyone in the Southern California region. (Bortfeld, Page 89, line 8-25)

- I. In my review of dozens of emails between Mr. Deville and Ms. Bortfeld, it is obvious that for whatever reasons, Ms. Bortfeld and Mr. Deville did not get along and that her choice to not talk to people in Southern California is because he had instructed her to go through him. In my opinion, this issue surrounding Ms. Bortfeld and Mr. Deville appears to relate more to personality issues and personal style rather than a systemic problem caused by policies or practices of the Area Representative. (Bortfeld, Page 89, 8-25)

14. Brand Compliance and Non-Approved Vendors

- a. In Section 27, Page 22 of Mr. Holmes' report, Mr. Holmes states that the use of non-approved vendors would not be consistent with franchise industry standards. The reason vendors are vetted by franchise companies is to control the consistency and quality of materials used, the presentation of the logo in various media, and pricing considerations where funneling purchases by franchises from specific vendors generally has the effect of reducing cost due to volume purchasing.
- b. In reviewing the deposition testimony of Ms. Bortfeld as well as reviewing email correspondence related to this issues (See Bates: WSC015242, attached hereto as Exhibit A), I noted that in an email sent by Mr. Bennion to Pat Grim, a Windermere franchisee, in which Ms. Bortfeld was copied, dated May 31, 2012, Mr. Bennion makes the following points:
 - i. "I am in charge of marketing and branding."
 - ii. "if you walk into one of our offices you will find every Windermere business card displayed in the front legal with them the brand constraints."
 - iii. "we are brand police ALL the time;
 - iv. "our marketing departments are constantly 'guiding and reigning in' our agents. It is a full-time job;"

- v. "Our ads, physical offices, signage in anything we do is with the pride of the Windermere brand"
 - vi. "we are proud of the brand and work extremely hard at all GREAT EXPENSE to maintain the brand both in California and here in Seattle;"
 - vii. "Pat for you to send an email ... with those kind of accusations based on ONE business card an agent brought you from the Desert is well I can't think of another word for it, but is just plain stupid;"
 - viii. "Thank you for The reference for the 'standards of Practice' addendum. I think I helped write them years ago."
- c. Any reader of this email can see the passion which Mr. Bennion expresses concerning the Windermere brand and the effort that is taken to enforce brand compliance.
- d. In another letter in this email chain, from Mr. Bennion to Ms. Bortfeld, dated June 1, 2012 (See Bates: WSC0156, attached hereto as Exhibit B), he points out that they spend between \$3,000 - \$4,000 a month just for business cards for agents and that Ptarmigan Press, which is their preferred vendor, has the specs and this is how they control the brand for the cards.
- e. The primary reason a franchisor wants to have approved vendors is to control the brand. Given the fact that Mr. Bennion has been a franchisee with Windermere for well over a decade and was involved in the actual drafting of the brand standards, I am confident in expressing an opinion that Mr. Bennion used his best efforts to conform to the brand standards of Windermere and that the likelihood of non-compliance to brand standard is minimal, and may even exceed system-wide compliance, and the only violation of Windermere's brand standards is a technical one as opposed to a blatant violation with any significant real world implications other than consolidating purchasing with an approved vendor.
- f. In Section 29, Page 22 of his report, Mr. Holmes states that Ms. Bortfeld testified that Messrs. Gooding and Johnson:

- i. “were unaware of a lot of the marketing materials that are branded for us;
 - ii. “They were just completely unaware of who we were --the programs that we have;
 - iii. “they were clearly clueless about the services that my department provides;”
 - iv. “they were just so shocked at what they found on the worksite. They said we had no idea all this stuff was available;”
 - v. “It was almost like bringing on a new franchise, bringing through an orientation. And they’re, like, this is great, wish we knew about this.” (Page 82, line 22 through Page 83, line 8; Page 86, line 11 through line 17.)
- g. In attempting to understand how a successful franchisee in the Windermere system could be so far out of the loop of what was going on in a franchise, based on my experience, these type of situations are generally a result of one of three things:
 - i. First, successful entrepreneurs often become so busy with managing their business they have little time for the details of the business and focus on bring in the bacon vs. managing the details, which often pile up;
 - ii. They are not detail oriented and ignore mail, email and other mundane administrative details of the business, often to their detriment;
 - iii. They have entrepreneurial A.D.D. and are always focusing on the big picture, making deals and creating something out of nothing.
- h. What I found was that Windermere has a good system of publishing events, activities and newsworthy happenings in the company to the franchise community. Whether the franchisees take the time to read the steady flow of information coming to them in emails, snail mail and other forms of announcements is another thing. In my experience, sometimes too much communication has the opposite effect of the important things getting buried amongst the trivial. Even when an appropriate amount of information is communicated, as was the case here, an Area Representative

cannot be held responsible for the failure of franchisees to acquaint themselves with that information.

- i. As I said, Windermere has an internal marketing department that is charged with the responsibility to inform franchisees of important events. When it comes to items related to training, technology and seminars available to franchises, the amount of information is almost overwhelming for a successful franchise owner who manages dozens, if not hundreds of agents. For example, here is just a small sample of the emails that were sent to all franchisee in the Windermere franchise system in 2013 and 2014. On top of these emails were others related to other sales, policy, changes, employee changes, etc.
 - i. Technology Summit Announcement (5 page, email announcement) – October 30, 2013; Exhibit 217, Gooding deposition
 - ii. Ninja Installation Seminar; November 19-21, 2013 (3 page, email announcement); December 3-6, 2013; Exhibit 218, Gooding deposition
 - iii. Ninja Installation – Business Plan, December 3-6, 2013, (3 page, email announcement, Exhibit 218, Gooding deposition
 - iv. Windermere Education Online Courses, (2 page, email announcement); Exhibit 220, Gooding deposition
 - v. Ninja Installation, January 21-24, 2014; (3 page, email announcement); Exhibit 221, Gooding deposition
 - vi. Employee Change Notification Ninja Installation, January 20, 2014; (2 page, email announcement); Exhibit 223, Gooding deposition
 - vii. Ninja Installation, March 11-14, 2014; (3 page, email announcement); Exhibit 224, Gooding deposition

- viii. Ninja Training for Staff and Assistants, May 12, 2014; (3 page, email announcement); Exhibit 231, Gooding deposition
 - ix. Ninja Installation, September 9/12, 2014, September 30 – October 4, 2014, October 28-21, 2014; (3 page, email announcement); Exhibit 221, Gooding deposition
 - x. Email Fred Schuster re: attending training, 5/12/14. Exhibit 282 Schuster deposition.
- j. In my opinion, franchisees Gooding and Johnson may have been unaware of the wide variety of services offered by Windermere and may have in fact been like “new franchisees.” If so, that was not the fault of Windermere the franchisor or the Area Representative. I believe the franchisees are the victims of their own success.

15. Forwarding Leads

- a. In Mr. Holmes’ report (Section 35, Page 23), it is alleged that leads were not forwarded on to franchisees by the Area Representative. I have reviewed the “Referral from Windermere Direct” spreadsheet and have noted that all of the leads that came through the wre.com website or directly from Seattle were disbursed to the offices in Southern California. There did not appear to be any leads that weren’t properly disbursed per this log sheet. If there were other records that tracked the lead flow, I am not aware of them and reserve the right to change my opinion.
- b. In my opinion, from the records of leads that I have reviewed, all leads sent by the wre.com website and Seattle appear to have been properly disbursed to franchisees in Southern California.

CONCLUSION

It is my summary opinion that the expert report of David E. Holmes attempts to shift blame to area representatives for problems that should have been addressed by (or were caused by) the franchisor. For the reasons stated more fully above, I believe the Holmes report also takes evidence out of context, ignores other


evidence, overinflates problems that he attributes to area representatives, and pays insufficient attention to the practical realities of the franchisor - area representative relationship in forming his opinions.

Review of the facts leads me to conclude that the franchisor in this matter failed to discharge its duties and responsibilities to area representatives and franchisees, most significantly by supplying technology that did not work in Southern California, by failing to provide the technical support that was needed to overcome the technology failure, and by failing to address the adverse publicity associated with Windermere Watch in a way that protected the trademark, brand and reputation of the franchise.

It is also my opinion that a reasonable franchisor abiding by industry customs would have taken proactive measures to assure that those problems would not have a significant negative impact on area representatives and franchises. The franchisor in this case failed to meet that standard. I conclude that the area representatives, on the other hand, met the obligations imposed upon them by the contract and industry standards.

The opinions described above are based on the evidence known to me as of the date of this report. I reserve the right to add opinions, to revise my opinions, or to clarify opinions if new or different information is made known to me prior to or during the trial of this matter. I hold the opinions stated above to a reasonable degree of certainty.

Marvin L. Storm

A handwritten signature in black ink, appearing to read 'Marvin L. Storm', with a stylized, cursive script.

Date: September 30, 2106

Attachment 1

**Marvin L. Storm CFE
Curriculum Vitae**

Executive Summary:

- Founded Control Financial Group, an equipment leasing company in 1977.
- Became an Area Representative and franchisee of The Handle With Care Packaging Store in 1985.
- Founded Blackstone Hathaway Corporation, a franchise management and marketing company in 1989.
- Became an Area Representative and franchisee for Takeout Taxi in 1990.

Became an Area Representative and franchisee for Handyman Connection in 1995.

- Acquired The Packaging Store, a franchisor, in 1999.
- Founded Navis Pack and Ship Franchise Systems, a franchisor, in 2002.
- Became an Area Representative to ArcPoint Franchise Systems in 2008.
- Became an Area Representative and franchisee to 101 Mobility Franchise Systems in 2012.
- Founded Business Visa Solutions Group in 2015.

Detailed CV:

Marvin L. Storm founded Control Financial Group, an equipment leasing company in 1977, after graduating from Brigham Young University in 1975 and accepting a position with Touche Ross, a national accounting firm.

After leaving the accounting profession, Marv became franchisee of The Packaging Store in 1985 and later an Area Representative for this franchise. From 1985 to 1989 Marv acquire seven franchisees, opened seven franchise locations in the San Francisco Bay Area, and developed another 25 franchise locations as an area representative.

In 1989, after completing the franchise development schedule for The Packaging Store, Marv founded Blackstone Hathaway Corporation, a franchise management and marketing company and sought to secure franchise development rights for franchisors located in the central and eastern part of the US who had little experience and understanding of developing their franchise systems in the western states.

In 1990, Marv became an Area Representative and later a franchisee for Takeout Taxi, a restaurant delivery franchise located in Herndon, VA. During the next four years, through Blackstone Hathaway, Marv awarded 40 franchise agreements for Takeout Taxi in California. During this time, Blackstone Hathaway continued as an Area Representative for The Packaging Store and franchises while developing Takeout Taxi Area Representative territory and operating Takeout Taxi franchises.

In 1995, Blackstone Hathaway became an Area Representative and franchisee for Handyman Connection for California and Nevada and awarded 44 franchises, which included four franchise locations operated by Blackstone Hathaway. Blackstone Hathaway continue to operate the Handle With Care Packaging Store and Takeout Taxi Area Representative area and associated franchises.

In 1999, an opportunity presented itself to acquire The Packaging Store franchise company. Partnering with a mezzanine fund, Marv acquired The Packaging Store franchise. Over the next few years, the Area Representative franchise rights and related franchise operations were sold in order to focus on the development of The Packaging Store franchise system.

As a part of the franchise development strategy for the packaging, shipping and logistics market segment, Marv founded Navis Pack and Ship Franchise Systems, a business-to-business franchise company in 2002, as a part of a global strategy to capture both the retail and business market segments. This strategy proved to be successful and in 2004, The Packaging Store franchise system was sold. In 2006, as a part of an exit strategy, the Navis Pack and Ship franchise system was sold.

After a brief hiatus, Blackstone Hathaway became the area representative for the AccuDiagnostic Franchise Systems, later rebranded to ArcPoint Franchise Systems in 2008 for California and Nevada. In 2012, Blackstone Hathaway became an Area Representative and franchisee to 101 Mobility Franchise Systems in 2012. By 2015, both the ArcPoint and 101 Mobility franchise systems were reacquired by the franchisors.

In late 2015, founded Business Visa Solutions Group, a franchise and business consultancy focused visa business advisory services for an international clientele.

Marv is the author of the book *Transitioning From Employee to Entrepreneur – A Road Map for Aspiring Entrepreneurs*.

He has lectured at various International Franchise Association (IFA) conferences, taught continuing education classes for the CFE certification courses and has been a feature speaker at IFA regional events through the country.

He has served as a seminar facilitator for Management 2000, one of the premier international franchise consulting firms.

He holds the Certified Franchise Executive (CFE) certificate.

Articles & Publications

A Tale of Two Franchise Expansion Strategies - *There's More Growth in Area Representation Than Meets the Eye*

Issue I, 2008

Avoiding Rookie Mistakes - *Three Gaffes New Franchisors Can't Afford To Make With Area Representatives*

Issues II, 2008

The "Big Three" Stupid Mistakes - *Even Old Pros Can Be Guilty of These*

Issue III, 2008

Charged with Leadership - *Franchise Execs Rise to Ever-New Challenges*

Issue IV, 2008

The 7 Best-Kept Secrets of Area Representation - *"Sage ol' pros" offer advice born of experience*

Issue IV, 2008

Full Speed Ahead - *Now Is the Time to Rev Up Your Growth Engine*

Q1 2009

Crafting a Strategy for the Times - *Area Representation Delivers the Resources For Continued Growth*

Q1 2009

Funding Strategies for Area Representation - *Five Key Elements Are Essential To Success*

Q2 2009

Replicating Your DNA - *Area Reps: Your Best Bet For Development Success*

Q4 2009

Strength In Numbers-*Leveraging AR Marketing Dollars*

Q1 2010

Mythbusting - Separating AR Facts From AR Fictions
Q1 2011

Competitive Advantage-Deploy An AR Strategy For Market Dominance
Q2 2010

The Time 2 Transition Blog at <http://time2transition.com/blog>

Attachment 2

I have not testified in any trials in the last four years.

Attachment 3

List of Materials Received

1. First Amended Counterclaim by Defendant and Counterclaimant - Bennion & Deville Fine Homes, Inc. *et al.* v. Windermere Real Estate Services Company *et al.*; USD Ct Central District of California Case. No. 5;15-CV-01921 R (KKx) [hereinafter "Windermere Case."]
2. Answer Of Defendant Windermere Real Estate Services Company To Plaintiffs' First Amended Complaint
3. First Amended Counterclaim By Defendant And Counterclaimant Windermere Real Estate Services Company For Damages And Injunctive Relief
4. Answer Of Counter-Defendants Bennion & Deville Fine Homes, Inc., Bennion And Deville Homes So Cal, Inc., Windermere Services Southern California, Inc., And Robert L. Bennion To First Amended Counterclaim
5. Declaration Of Joseph R. Deville In Support Of Plaintiffs' Opposition To Defendants Motion For Partial Summary Judgment

6. Plaintiffs' Opposition To Defendants Windermere Real Estate Services Company's Notice Of Motion And Motion For Partial Summary Judgment
7. Exhibits 1-22 to Deville Decl 60-2
8. Deposition of Robert L. Bennion; July 28, 2016 – Volume I
9. Deposition of Robert L. Bennion; July 28, 2016 – Volume II
10. Deposition of Joseph R. Deville; July 26, 2016 – Volume I
11. Deposition of Joseph R. Deville; July 27, 2016 – Volume II
12. Deposition of Kirk Gregor; July 28, 2016
13. Deposition of Eric Forsberg; July 29, 2016
14. Deposition of Paul Drayna; Volumes I, August 22, 2016
15. Deposition of Paul Drayna; Volumes II, August 23, 2016
16. Deposition of Michael Fanning; August 31, 2016.
17. Deposition of Noele Bortfeld; August 31, 2016
18. Deposition of Brian Gooding; September 6, 2016
19. Deposition of Richard Johnson; September 9, 2016.
20. Deposition of Fred Schuster, September 7, 2016
21. Deposition of Richard Johnson: September 9, 2016
22. Deposition of Brian Gooding, September 6, 2016
23. Deposition of Michael Teather Volume I, August 23, 2016
24. Deposition of Michael Teather Volume II, August 24, 2016

25. Deposition of Jill Wood, August 24, 2016
26. Deposition of Geoffery P. Wood, August 25, 2016
27. Deposition of Robert Sherrell, August 26, 2016
28. Deposition of Mark Oster, August 30, 2016
29. Deposition of John O'Brien Jacobi, August 30, 2016
30. Deposition of Patrick Robinson, August 29, 2016
31. Referrals From Windermere Direct (Lead Report)
32. Franchise Business Economic Outlook for 2016, International Franchise Association Educational Foundation, By: IHS Economics - January 2016
33. Coldwell Banker FDD
34. Sotheby FDD

Windermere Exhibits 1

2364301_Exhibit_1_PaulSDrayna
2364301_Exhibit_2_PaulSDrayna
2364301_Exhibit_3_PaulSDrayna
2364301_Exhibit_4_PaulSDrayna
2364301_Exhibit_5_PaulSDrayna
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2364301_Exhibit_63_PaulSDrayna
2364301_Exhibit_64_PaulSDrayna
2372224_Exhibit_65_PaulDraynaVol2
2372224_Exhibit_66_PaulDraynaVol2
2372224_Exhibit_67_PaulDraynaVol2
2372224_Exhibit_68_PaulDraynaVol2
2372224_Exhibit_69_PaulDraynaVol2
2372224_Exhibit_70_PaulDraynaVol2
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2372224_Exhibit_74_PaulDraynaVol2
2372224_Exhibit_75_PaulDraynaVol2
2372224_Exhibit_76_PaulDraynaVol2
2372224_Exhibit_77_MichaelTeatherVol1
2372224_Exhibit_78_MichaelTeatherVol1
2372224_Exhibit_79_MichaelTeatherVol1
2372224_Exhibit_80_MichaelTeatherVol1
2372224_Exhibit_81_MichaelTeatherVol1
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2372225_Exhibit_92_MichaelTeatherVol2
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2372225_Exhibit_95_MichaelTeatherVol2
2372225_Exhibit_96_MichaelTeatherVol2
2372225_Exhibit_97_MichaelTeatherVol2
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2372226_Exhibit_126_GeoffreyWood
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2372227_Exhibit_133_YorkBaur
2372227_Exhibit_134_YorkBaur
2372227_Exhibit_135_YorkBaur
2372227_Exhibit_136_RobertSherrell
2372235_Exhibit_148_MichaelFanning
2372235_Exhibit_149_MichaelFanning
2372235_Exhibit_150_MichaelFanning
2372235_Exhibit_151_MichaelFanning
2372235_Exhibit_152_NoelBortfeld
2372235_Exhibit_153_NoelBortfeld
2372235_Exhibit_154_NoelBortfeld
2372235_Exhibit_155_NoelBortfeld
2372235_Exhibit_156_NoelBortfeld
2372236_Exhibit_137_MarkOster
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2372236_Exhibit_141_MarkOster
2372236_Exhibit_142_MarkOster
2372236_Exhibit_143_MarkOster
2372236_Exhibit_144_JohnOBrienJacobi
2372236_Exhibit_145_JohnOBrienJacobi
2372236_Exhibit_146_JohnOBrienJacobi
2372236_Exhibit_147_JohnOBrienJacobi

Windermere Exhibits 2

2330918_Exhibit_47_JosephRDevilleVolII
2330918_Exhibit_48_JosephRDevilleVolII
2330918_Exhibit_49_JosephRDevilleVolII
2330918_Exhibit_50_JosephRDevilleVolII
2330918_Exhibit_51_JosephRDevilleVolII
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2330918_Exhibit_60_JosephRDevilleVolII
2330918_Exhibit_61_JosephRDevilleVolII
2330918_Exhibit_62_JosephRDevilleVolII
2330918_Exhibit_63_JosephRDevilleVolII
2330918_Exhibit_64_RobertBennionVolI
2330920_Exhibit_65_RobertBennionVolII
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2330921_Exhibit_78_EricForsberg
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2330922_Exhibit_1_JosephRDeville
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2372235_Exhibit_148_MichaelFanning

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2372235_Exhibit_152_NoelBortfeld
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2372235_Exhibit_155_NoelBortfeld
2372235_Exhibit_156_NoelBortfeld

Separate Exhibits

(This space left intentionally Blank – See next Page Below for Exhibits)

Exhibit A

From: Bob Bennion <bbennion@windermere.com>
Date: Thu, 31 May 2012 23:28:03 -0400
To: patgrim@windermere.com<patgrim@windermere.com>; 'Bob Deville'<bdeville@windermereocal.com>; Jill Wood<jwood@windermere.com>
Cc: Noelle Bortfeld<noelle.bortfeld@windermere.com>; Paige Tyley<ptyley@windermereocal.com>
Subject: RE: RE: scan of Palm Springs business card

Ok I have to chime in here. I am in charge of our branding and marketing so you have rung my bell and I am as mad as hornet!

This is probably an email I shouldn't send today but I have had a bad day and I am looking for someone to fight with and sense you through the first punch here goes. Get ready.

Really? I mean really? Of COURSE we police the brand ALL the time! You really think we just sit back and let the agents do whatever they want? If you walk in one of our offices you will find every Windermere business card displayed in the front legal with in the brand constraints.

Our marketing departments is constantly "guiding and reining in" our agents. It is a full time job!

Our ads, physical offices, signage anything we do is with the pride of the Windermere brand. For you to insinuate we sit back and do nothing while the Windermere brand is "denigrated" (your word) under our watch is offensive and I take issue with it. We are very proud of the brand and work extremely hard at GREAT EXPENSE to maintain the brand both in California and here in Seattle. We have taken enormous risk and worked ourselves to death to plant the Windermere brand in Southern California over the past 11 years. I like to see you give it a shot. If you think we have done such a crummy job feel free to apply for my job.

For you to state in your email that we just "allow this to happen" as if we sit around on our ass all day and do nothing is irresponsible Pat.

Are agents trying to constantly step out of the box? Yes of course. That is what agents do. Do they have their own personal marketing cards they try to hide from us? Sure they do as agents do here in Seattle. Your naive if you think they don't including agents in your own office.

Bob D I commend you for your short response and restraint but this email has pushed my cheese off my cracker! As you can see I am not the bigger person today.

Pat for you to send us an email like with those kind of accusations based on ONE business card an agent brought you from the Desert is well I can't think another word for it, but is just plain stupid.

Thank you for the reference for the "Standards of Practice" addendum. I think I help write them years ago.

Noelle and Jill if you agree with Pat feel free to tell me so.

Best,

Bob B.

Exhibit B

From: Noelle Bortfeld
Sent: Thursday, May 31, 2012 9:42 PM
To: Bob Bennion; patgrimm@windermere.com; 'Bob Deville'; Jill Wood
Cc: 'Paige Tyley'
Subject: Re: RE: scan of Palm Springs business card

Omg. That is music to my ears!!! And thank you for alleviating the concern. And most of all, thank you for contributing to the "data driven" conversation. We appreciate that insight. We can look at this example as one of the others that happens in our area as well. (We all know it happens...just our job to rat each other out!). Thank you. Sleep well all.

Sent on the Sprint® Now Network from my BlackBerry®

From: Bob Bennion <bbennion@windermere.com>
Date: Fri, 1 Jun 2012 00:25:10 -0400
To: Noelle Bortfeld<noelle.bortfeld@windermere.com>;
 patgrimm@windermere.com<patgrimm@windermere.com>; 'Bob Deville'<bdeville@windermereocal.com>;
 Jill Wood<jwood@windermere.com>
Cc: 'Paige Tyley'<ptyley@windermereocal.com>
Subject: RE: RE: scan of Palm Springs business card

Thanks Noelle,

The data your probably not seeing is our business card orders are through Ptarmigan Press and run \$3000-\$4000 per month just for business cards for the our Company for our agents. The agents order them through us at Ptarmigan and we bill the agents back on their monthly statement. This is our preferred vendor for the our business cards for our agents. They have the specs and this is how we control the brand for the cards. We started with Ptarmigan as Windermere's preferred vendor and they have been good to us and we are loyalist.

Agents can use the E store if they wish but we promote and support Ptarmigan Press.

You don't need to be concerned we have it covered.

TX Bob

From: Noelle Bortfeld [mailto:noelle.bortfeld@windermere.com]
Sent: Thursday, May 31, 2012 9:11 PM
To: Bob Bennion; patgrim@windermere.com; 'Bob Deville'; Jill Wood
Cc: Paige Tyley
Subject: Re: RE: scan of Palm Springs business card

Bob. You know I love you and your support of Windermere. You are an amazing leader and advocate of our brand. Truly. And when you speak, we listen. And we execute because we respect your opinion immensely. And I speak for my entire team. We are blessed to have you as part of our organization.

But emotions and love are one thing. (I wish it were so in business. :)). The data speaks otherwise. I will forward the sales on Business cards for SO CAL so we can have a more data driven conversation. I think it will help you understand our concern.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address 4 Park Plaza, Suite 1230, Irvine, CA 92614.

On September 30, 2016, I served document(s) described as **PLAINTIFFS AND COUNTER-DEFENDANTS' REBUTTAL REPORT PURSUANT TO RULE 26 OF THE FEDERAL RULES OF CIVIL PROCEDURE** on the following person at the addresses and/or facsimile number below:

Pérez Wilson Vaughn & Feasby
John Vaughn
750 B. Street, 33rd Floor
San Diego, CA 92101
vaughn@perezwilson.com

- ☐ VIA FACSIMILE – Based on an agreement by the parties to accept service by fax transmission, I faxed the documents from a fax machine in Irvine, California, with the number 949-252-0090, to the parties and/or attorney for the parties at the facsimile transmission number(s) shown herein. The facsimile transmission was reported as complete without error by a transmission report, issued by the facsimile transmission upon which the transmission was made, a copy of which is attached hereto.
- ☒ BY ELECTRONIC SERVICE – Based on a court order or agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed herein on the above referenced date. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.
- ☒ BY MAIL - I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day, with postage thereon fully prepaid, at Irvine, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- ☐ BY CERTIFIED MAIL - I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day, with postage thereon fully prepaid, at Irvine, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- ☐ BY FEDERAL EXPRESS – I am readily familiar with the firm's practice of collection and processing correspondence for Federal Express. Under that practice it would be deposited

PROOF OF SERVICE

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 **September 30, 2016** at Irvine, California.

10 By: /s/ Barbara Calvert
11 Barbara Calvert
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EXHIBIT N

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA

3 BENNION & DEVILLE FINE HOMES,)
4 INC., a California corporation,)
BENNION & DEVILLE FINE HOMES)
5 SOCAL, INC., a California)
6 corporation, WINDERMERE SERVICES)
SOUTHERN CALIFORNIA, INC., a)
7 California corporation,)
8 Plaintiffs,)
vs.) No.
9 WINDERMERE REAL ESTATE SERVICES) 5:15-cv-01921-R-KK
10 COMPANY, a Washington)
11 corporation; and DOES 1-10,)
12 Defendants,)
AND RELATED COUNTERCLAIMS)

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14
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16
17 Videotaped Deposition of JOHN O'BRIEN JACOBI,
18 taken at 600 University Street, Suite 320,
19 Seattle, Washington, commencing at 1:07 P.M.,
20 Tuesday, August 30, 2016, before CYNTHIA A.
21 KENNEDY, RPR, CCR 3005.

22
23
24 JOB No. 2372236B
25 PAGES 1 - 163

1 APPEARANCES

2
3 FOR THE PLAINTIFF: BY: KEVIN A. ADAMS, ESQ.
4 Mulcahy LLP
5 Four Park Plaza, Suite 1230
6 Irvine, CA 92614
7 (949) 252-9377
8 kadams@mulcahyllp.com
9

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DEPOSITION OF JOHN O'BRIEN JACOBI

EXAMINATION INDEX

EXAMINATION BY	PAGE
Mr. Adams	8
Mr. Feasby	None

EXHIBITS

EXHIBITS FOR IDENTIFICATION	PAGE
Exhibit 2 Amended Notice of Deposition of Windermere Real Estate Services Company Pursuant to Federal Rules of Civil Procedure, Rule 30(b)(6)	pre
Exhibit 80 Email dated July 23, 2014, from Fred Schuster to Mike Teather, Subject: Follow-up info, WSC026803	pre
Exhibit 97 Email chain dated January 21-22, 2015, between Mike Teather and Bob Bennion, Bob Deville, Subject: Southern California Services, B&D0000618-619	pre
Exhibit 99 Email chain dated January 30, 2012, between Bob Deville and Kirk Gregor, B&D0045353-55	pre

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 JOHN O'BRIEN JACOBI was taken stenographically before me on August 30, 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 14th day of September 2016.

<%signature%>

Cynthia A. Kennedy, RPR

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

1 to implement in the October, November, December time
2 frame in Coachella Valley.

3 Q. Not before that?

4 A. No.

5 Q. All right. Back to the deposition notice in
6 which you've been identified as a corporate
7 representative to specific categories, one of those
8 categories is category number 22 in which you've been
9 identified to testify as to all efforts undertaken by
10 Windermere to prevent or disrupt Windermere Watch's
11 anti-Windermere marketing campaign.

12 Now, are you aware that you've been
13 identified as a corporate representative as to this
14 category?

15 A. I am.

16 Q. And what, if any, efforts are you aware of
17 undertaken by Windermere to prevent or disrupt
18 Windermere Watch?

19 A. I think, like -- like I said before, I'm
20 aware that we met with legal counsel from a multitude
21 of firms to discuss what we could be doing legally. I
22 am aware that there was a conversation and -- about
23 trying to buy off Mr. Kruger. I am aware that we met
24 with one and possibly two PR firms to talk about what
25 can be done. I'm aware that there were documents

1 created, I want to say, by our marketing department
2 with help from the PR department on FAQs, scripting,
3 and, you know, verbiage you can use when in
4 communication with a seller who gets a postcard or
5 prelisting a home.

6 I think that's about the extent of it.

7 Q. Okay. When did the PR department create
8 these FAQs?

9 A. I -- I'm -- I have no idea. Sorry.

10 Q. If I represent to you that it was in 2010,
11 would you have any reason to believe that it was not
12 in 2010?

13 A. I would not.

14 Q. Do you have any reason to believe that it
15 occurred in 2011?

16 A. I don't have any recollection or
17 involvement.

18 Q. What was the name of the marketing firm?

19 A. I have no idea.

20 Q. How are you aware that the marketing firm
21 even undertook any efforts with respect to Windermere
22 Watch?

23 A. Just through conversations. I'm only aware
24 from hearsay, if you will.

25 Q. Okay. And you don't recall when those

1 conversations occurred?

2 A. No, I do not.

3 Q. Are you -- as you sit here, are you aware of
4 any efforts undertaken by Windermere during the 2013
5 time period with respect to Windermere Watch?

6 A. I am not aware on time frames. Again, I
7 don't know if that was the year -- like I said, I was
8 part of a conversation on, can we buy off Mr. Kruger.
9 I was aware of things that went down the road of how
10 do we engage with Mr. Kruger, how do we -- I want to
11 say somebody talked to him and that he was willing to
12 discuss payout, but he had to have it all in writing,
13 and we were worried everybody involved, both
14 Mr. Bennion and Mr. Deville and Windermere Services in
15 Seattle and whomever else, that he could use those
16 documents against us. I was aware of those things,
17 but I was not in meetings that discussed how much or
18 how are we going to go and do it or any of those kind
19 of aspects of it.

20 Q. Okay. Are you familiar with the marketing
21 firm JayRay, J-A-Y-R-A-Y?

22 A. No.

23 Q. Okay. Please take a look at Exhibit 108 for
24 me, and then we'll follow with the exhibits right
25 after that.