

EXHIBIT A

David E. Holmes, Esq.
Franchise Expert Witness Services
2225 Exposition Drive, Unit 21
San Luis Obispo, California 93405

davidholmes@macservices.net

805-550-9323

September 16, 2016

John D. Vaughn, Esq.

Jeffrey A. Feasby, Esq.

Perez Wilson Vaughn & Feasby

Sent by Email: vaughn@perezwilson.com

Re: Report – *Bennion & Deville Fine Homes, Inc. et al. v. Windermere Real Estate Services Company* – United States District Court, Central District of California – Case No. 5:15-CV-01921 R (KKx)

Dear Messrs. Vaughn and Feasby:

This letter is in response to your request for a report relative to the above-referenced case.

I was asked to provide my opinion(s) with respect to various franchising-related matters as they may have arisen in this matter.

Specifically, I've been asked to provide my opinions with respect to the:

(a) business and strategic rationales, and related standards and practices, supporting a franchisor's decision to utilize an area representative model for territorial expansion, including the appropriateness of a decision to appoint an area representative in the business situation presented and whether, in that business situation, other franchisors might have followed the same strategy.

(b) respective roles, and industry standards and practices, for area representatives and franchisors, possibly including (but not limited to) those related to real estate-related franchises; and

(c) standards of care and practices regarding an area representative with respect to the sale of franchises and support of local franchisees, including considerations where an area representative is itself a franchisee of the franchisor.

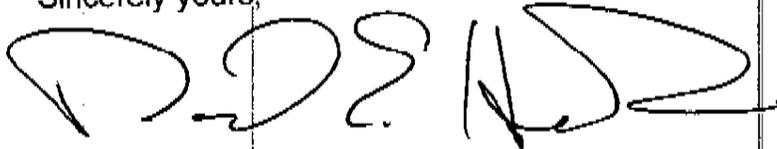
My opinions relating thereto are set forth in the attached Report.

In forming my opinions I have reviewed the documents set forth in the attached List of Materials Received and/or Reviewed, as forwarded to me by your firm or otherwise, as well as having drawn on my general experience in the domestic and international franchising field since 1975.

My biography, setting forth my qualifications, is attached. My compensation for expert witness services in this matter is at a rate of \$500 per hour and is not dependent on the outcome of this or any other legal action or otherwise, on the amount or terms of any judgment or settlement of any underlying legal action, nor on any contractual or other arrangements between your firm and any other person or party, including your clients.

I respectfully reserve the right to revise, supplement and/or amend the attached Report, including my conclusions and opinions, as additional documentation, deposition transcripts, opinions by other experts or otherwise become available.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'D. E. Holmes', written in a cursive style.

David E. Holmes

Report

1. Business and strategic rationales, and related standards and practices, supporting a franchisor's decision to utilize an area representative model for territorial expansion.

- a. Before discussing the business and strategic rationales supporting a decision to use the area representative model for territorial expansion, it's helpful to understand the structure of the area representative model in franchising and how it differs from other franchise business models. Note that the core business elements of the area representative model will generally remain constant irrespective of the specific business model for unit (or retail) level franchised businesses.
- b. The classic franchise business model, and the simplest in structure, involves a franchisor and one or more franchisees, each of whom will be operating retail or other businesses under the franchisor's brand.

In this classic (and often typical) model, the franchisor and the franchisee have a direct contractual and business relationship, generally not involving third parties, and usually embodied in a franchise agreement (and possibly other agreements, such as leases of real estate or equipment), with the franchisor licensing the franchisee to use the franchisor's brand, trademarks and system(s) of operation, marketing, administration, etc. and with the franchisee paying an initial franchise fee to the franchisor for such rights and, usually, a periodic royalty, generally based on sales by the franchisee to its customers. Often, the franchisor will also provide after-sales service and support directly to the franchisee.

- c. In the area representation model, a third party is introduced into the relationship between the franchisor and the franchisee and that third party is typically referred to as the "area representative" or, sometimes, the "region."
- d. In the area representation model, the operating franchisee still has a direct contractual arrangement with the franchisor, signing the franchise agreement directly with the franchisor. However, in this model, the franchisor will have also entered into an agreement (typically called an area representation – or area representative – agreement) with the area representative.

- e. Under the area representation agreement, the area representative will assume the obligation to perform various obligations or functions normally performed by the franchisor and typically limited to unit franchisees within a specified geographic area. Those obligations can include (among others) the marketing of franchises to prospective franchisees, the delivery to prospective franchisees of a Franchise Disclosure Document and other pre-sale/sale documents, initial and/or ongoing training of new franchisees, assistance (under some business models) to the new franchisee in finding a location, lease negotiations, pre-opening and opening assistance, assistance in the selection and training of the franchisee's employees, assistance in build-out of the franchisee's premises, ongoing inspection and audit of the franchisee's franchised business, ensuring compliance with the franchisor's standards including (among other things) operations and other manuals, answering inquiries and addressing complaints/concerns of franchisees, operational, marketing and other ongoing support of the franchisee and the franchised business, and other functions otherwise normally performed by the franchisor. The area representative can also serve as a conduit for communication (in both directions) between the franchisor and the franchisee, as well as serving a "business coaching" function with respect to franchisees.

- f. The area representative may also work with the franchisor and the franchisee in situations where the franchisee may be in default of its financial or other obligations.

- g. In some cases, the area representative will have an obligation to assist in soliciting the sale (and possibly assuring the opening) of a specified number of franchises in the territory over a defined period of time, such an obligation often being called a development schedule.

- h. In some cases, the area representative will also be allowed to own and operate one or more retail-level franchised businesses under the franchisor's brand. Such unit(s) may be used for training of new franchisees and their employees and/or for development and testing of new retail products and services.

- i. In many cases, the franchisor will provide services to the area representative related to its functions. These can include training the area representative's trainers and other personnel with respect to franchising principles and practices and (sometimes) with respect to the operation of the franchised businesses, providing and updating manuals, providing and placing retail advertising and marketing materials / programs, providing and placing advertising and marketing materials related to the offer and sale of franchises, development of new items for sale by franchisees to their customers, updating of retail-level facility standards, guidelines re location selection and build-out, and certain types of administrative support.

- j. The area representative may pay the franchisor an initial fee for its rights under the area representation agreement and will generally receive a portion of the royalty (and perhaps other) fees paid by the franchisee, in compensation for area representative's services. Those fees paid by the retail-level franchisee may be either paid directly to the franchisor, with some portion then remitted by the franchisor to the area representative, or may be paid by the franchisee to the area representative, which retains a portion of those amounts and remits the balance to the franchisor.

- k. Given the basic structure of the franchisor - area representative - franchisee relationship, the business and strategic rationales for a franchisor to enter into a franchisor - area representative relationship can include the following, noting that not all of these elements will necessarily be present in every franchisor - area representative relationship:
 - i. Reduced operating costs at the franchisor level: Since the area representative provides local support and services to the franchisees in its territory, which might otherwise be provided by the franchisor, the franchisor generally does not need to maintain such personnel and facilities at the local level, thereby possibly lowering operating costs and increasing its profitability.

 - ii. Where the area representative pays the franchisor an initial franchise fee for his rights, or is perceived to bring other significant sources of value to the relationship (such as franchise- or industry-specific skills and/or relationships,

including local knowledge and contacts), the franchisor may benefit accordingly.

- iii. More rapid system growth: If nation-wide (or even international) expansion is contemplated, multiple area representatives throughout the country can potentially result in faster sales of franchises than would be the case where the franchisor was only able to support marketing efforts in a few areas at a time, due to financial, human resources or other limitations. This can not only generate more income for the franchisor more quickly than with other models, but can have related benefits, including greater visibility and top-of-mind consumer awareness in the relevant markets, access to favorable sites for the franchised business, more beneficial relationships with vendors and expanded funds available for national and regional advertising.
- iv. In addition, the use of area representatives who are already (hopefully successfully) operating a franchised outlet in the general market area of potential franchisees can be a more effective franchise marketing strategy as opposed to use of franchise brokers (who have never operated such a unit themselves) or attempts by the franchisor to sell franchises where there are no currently operating stores in the market to validate the concept. A prospective franchisee, who may ask what a distant franchisor really knows about local market conditions and practices or even the potential for a new business model in the relevant industry, may feel more secure where a respected local individual or firm will be the area representative and where a franchised outlet is seen to be already successfully operating.
- v. Adjustments to local markets, business practices and regulations: To the extent that markets differ, or business practices vary by area, adaptation and adjustment of the business model may be more effective where a local area representative is aware of the need for such variations, whether as related to real-estate matters, cultural issues, customer preferences, retail or other marketing matters, competitive challenges, suppliers of goods or services, local regulations or otherwise.
- vi. Development and implementation of best practices via a bottom-up model: Where the area representative facilitates positive interchanges and communications among franchisees and with the franchisor, innovations and

responses to developments, opportunities or challenges in the relevant market(s) can be implemented more quickly and effectively, possibly even leading to development of superior best practices throughout the national franchise system, both as to operational matters and marketing tactics and strategy. Where the franchisees have developed a relationship with the area representative characterized by mutual respect and trust, operational, marketing and other suggestions and/or directives from the franchisor, when transmitted and supported by the area representative, may be more readily accepted by the local franchisees.

- vii. Incentivization: One of the benefits of a franchised business model can be that the franchisee, as the owner on his or her business, is highly incentivized to have it succeed, perhaps even more so than an employee with no ownership interest. That same dynamic can apply to the area representative in the operation of his or her area representation business (as compared to an individual who is either a broker or an employee of the franchisor), possibly increasing the chances of its success and the resulting success of the unit-level franchisees. This can be particularly true where the area representative (generally unlike a broker or franchise marketing or service employee of the franchisor) can participate in a royalty stream from the unit franchisees.

- viii. Similarly, use of a broker to market franchises may entail the disadvantage that the broker will be (generally) marketing a wide range of franchised opportunities, perhaps even competing ones, and will not be concentrated on marketing only one particular franchisor's franchises. Those issues are normally not present where an area representative is used.

- ix. Franchisor / Area Representative / Franchisee dynamics: Where the area representative is perceived by the unit-level franchisees as a positive source of support and assistance (both in the daily operation of their businesses and in terms of long-term strategic planning and results), and with the success of the unit-level franchisees being a paramount concern of the area representative, and where the area representative acts as an advocate to the franchisor on behalf of the unit-level franchisees in his or her territory, communications and accommodation between those franchisees and a geographically distant franchisor may be more effective. As a practical matter, suggestions by an

area representative with multiple unit-level franchisees in his or her territory may be more readily accepted by the franchisor than if those same suggestions had come from a single franchisee with only one or two operating units.

- I. Aside from the generally positive elements discussed above, area representative franchising can also present potential negatives, at least as viewed by a franchisor considering use of the area representative model for expansion.
 - i. If initial franchise fee, royalty and other payments flow from the unit level franchisee to the area representative (rather than directly from the unit level franchisee to the franchisor) and the area representative fails to promptly and fully remit those amounts to the franchisor, or fails to make appropriate efforts to collect and remit such fees, the franchisor may experience significant negative cash flow and profitability effects.
 - ii. Where the area representative receives or retains a portion of the initial franchise fee, royalty or other payments by unit-level franchisees, the franchisor's revenues may be reduced accordingly.
 - iii. If the area representative fails to collect and remit portions of initial franchise fees, royalties or other payments by unit-level franchisees, which portions are due the franchisor, the franchisor's revenues may be reduced accordingly.
 - iv. Similarly, if an area representative or group of area representatives in effect controls a substantial proportion of the franchisor's cash flow, their power within the franchise system can expand relative to the power and control of the franchisor.
 - v. If the area representative fails to provide proper support to unit level franchisees, or fails to enforce important system standards, the franchisor may face complaints from franchisees and/or retail level customers and possible loss of market share and/or diminishment of the value of its brand.
 - vi. When franchise marketing or support services are provided by someone other than the franchisor, the possibility exists that they will not be as well presented or performed as if they

had been the sole responsibility of the franchisor and its in-house staff. Inevitably, some area representatives will perform these functions less well than others, so the sometimes difficult issue of how to address any such shortcomings will necessarily arise. The possibility of such issues arising may be increased where the area representative has little or no prior experience performing franchisor-type functions or understanding the need for different management techniques than those often used in non-franchising business models. Substantive knowledge of the details of the underlying business model being franchised may not, by itself, be adequate where the area representative lacks an understanding of franchising principles and requirements.

- vii. If the area representative owns and operates more than one unit level franchised business (it's not unusual for an area representative to maintain a single unit level franchised business for franchise marketing, training and product/service development purposes), the area representative's human and financial resources may become more focused on the operation and success of its own operating units, with attention and human and other resources being directed away from the area representative's core mission: The support and success of all the franchisees in the territory.

- viii. Similarly, if the area representative owns and operates more than one unit level franchised business, those area representative-owned business may be perceived by potential or existing franchisees as having secured access to favorable locations/markets (thereby possibly precluding the opening of other franchisees' units in those potentially prime markets or areas), receiving special treatment and/or benefits or even being in actual or potential competition with the other franchisees. Note that, in such a case, perceptions may be critical to the relationship.

- m. In this case, if the franchisor had determined that the potential advantages of appointing an area representative (improved servicing of local franchisees, knowledge of the relevant market, a more effective franchise sales strategy, etc.) outweighed the

potential disadvantages of appointing an area representative (diversion of one-half of the revenue stream from local franchisees to the area representative, risks of failure by the area representative to properly service and support local franchisees, any failure to give best efforts to collection and remission of fees, any failure to direct appropriate levels of resources to the long-term success of local franchisees, etc.), then the decision to appoint an area representative would have been appropriate and would not be inconsistent with franchise industry standards as applied to forming area representative relationships. Also germane to any such decision might have been various considerations specifically related to the underlying franchised business model and the industry involved, as well as the stage of development of franchising as a distribution model in that industry. In my experience with Century 21, similar (although not identical) relationships seemed to have been generally successful. I would not be surprised if other franchisors in the same industry made a decision, after balancing positive and negative considerations, to appoint one or more area representatives.

2. Respective roles, and industry standards and practices, for area representatives and franchisors, possibly including (but not limited to) those related to real estate-related franchises.

- a. In the classical direct franchising model (franchisor – franchisee, with no area representative or similar entity involved), the franchisor will generally provide ongoing service and support to the unit-level (retail) franchisee. This ongoing service and support function will often be expected by the franchisee and can be vital to the success of both the franchisor and the franchisee.

Financially and operationally successful franchisees are more likely to be: able to pay royalties, advertising contributions and other amounts; potential purchasers and operators of additional franchised units; and positively inclined to validate the franchise system in response to inquiries from potential new franchisees considering the purchase of a franchise, than where franchisees do not experience such success. Therefore, the operational and financial success of the unit-level franchisees is a prime concern and focus of good franchisors (and area representatives) and is consistent with franchise industry standards and practices.

That financial and operational success can be enhanced by ongoing advice and assistance from the franchisor or area representative, including (among many other things) correction of operational and marketing issues at the franchisee level, sharing of best practices developed and/or used by the franchisor and other successful franchisees in the system, ongoing training (including on new products or services to be offered to the public), proactive responses to changing market conditions and competitive or other challenges, assuring consistency and appropriate levels of quality in dealing with customers, services and products delivered, and protection of the brand. All of these may involve ongoing training and support on a regular, and sometimes frequent, basis. In some franchise systems, this is referred to as “field support” and may be provided by persons called, among other things, “field service representatives.”

For most franchised business models, both franchisees and franchisors consider such support to be a vital ingredient in the possible success of both the franchisor and its franchisees.

As noted in Franchising for Dummies (written primarily for prospective franchisees), 2nd Edition; Seid and Thomas, © 2005, page 144:

“Operating a franchise in today’s economic climate means staying on your toes all the time. You can’t do that by yourself. As a franchisee you should expect the franchisor to provide you with more than initial training. After your franchise is open, expect the franchisor’s field staff to show up armed with operational, marketing, and organizational support. You should also expect the company’s help with the rollout of innovations, such as the preparation of new products or the operation of new equipment. The hallmarks of great franchisors are offering new products, updating research, implementing new-product development, installing state-of-the-art technology, introducing better methods of customer service, and repositioning franchises in the market. These services keep a company more than one step ahead of the competition . . .” [Emphasis added.]

In the franchisor – area representative – unit franchisee model, the area representative assumes primary responsibility for much of the role of the franchisor in providing ongoing, day-to-day support and assistance to the unit franchisee, as described above, and the factors discussed above generally apply to the area representative in performing his or her functions.

From a strategic and structural standpoint, that function of providing ongoing direct support to local franchisees from a locally-based area representative is precisely why the franchisor has appointed the area representative rather than simply hiring a franchise broker: to do more than merely solicit the purchase of a franchise by prospective franchisees (which a broker, or in-house sales staff, may be able to do very well and at lower cost to the franchisor) but also to take the burden from the franchisor of providing needed support services on a local level. In the absence of the area representative competently performing those functions, it's doubtful that an area representative model would have been used or that ongoing compensation to the area representative (and a resulting reduced share of royalties going to the franchisor) would have been core elements in the franchisor / area representative business arrangement.

- b. I note that Section 2 of the Windermere Real Estate Services Company Area Representation Agreement for the State of California (the "Area Representation Agreement") provides, in part, that "Area Representative agrees that during the entire term of this Agreement, including the period of notice of expiration of the term, Licensee will in good faith actively and with Area Representative's best efforts engage in the business described herein using the Trademark . . . "
- c. I note from Section 3 of the Area Representation Agreement that such agreement provides for the area representative to perform a number of such functions, including: "responsibility for the administration and supervision of the use and display of the Trademark . . . the provision of support and auxiliary services to Windermere licensees in the Region . . . marketing Windermere licenses in the Region . . . establishing and operating a training, educational and professional development program for licensees . . . implementing the intra-system referral program . . . offering Windermere marketing programs . . . making available samples of Windermere forms and listing and marketing materials . . . administering, collecting and remitting contributions to the Windermere Foundation . . . coordination of advertising and public relations . . . the responsibility to receive, collect, account for all license 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 . . . 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 . . . and the nature, type and quality of the services offered by licensees.”

Section 3 of the Area Representation Agreement goes on to provide that:

“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 good will built by WSC and the value of the trademark . . . 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.”

Section 12 of the Area Representation Agreement goes on to provide that:

“Area Representative will implement the Windermere Foundation program with the licensees under this Agreement and their respective sales agents, in accordance with the written guidelines established by WSC or the Windermere Foundation from time to time and applicable and applied consistently to all WSC licensees and their respective licensed sales agents.”

Allowing for elements specific to the business model being franchised and the related industry, as well as elements related to the specific circumstances of the parties to the Area Representation Agreement, such provisions are consistent with standards and practices in area representative franchising. (Note that an arrangement whereby fees are paid by Franchisees to the Area Representative, rather than to the Franchisor directly, may not be typical in area representative franchising.) A failure to comply or perform the Area Representative’s obligations undertaken under such provisions (including but not limited to those involving collection and remission of fees) would not be consistent with standards and practices in area representative franchising.

- d. Both in the case of the classical direct franchising model (franchisor – franchisee, with no area representative involved) and the

franchisor – area representative – unit franchisee model, a paramount concern is the success of unit level franchisees, for the reasons described above. A franchise system where franchisees feel that their short- and long-term financial and other interests are subordinated to the financial success of the franchisor or the area representative can face significant negative internal stress, potentially damaging the brand and having a negative effect on future franchise sales, among other things.

If franchisees perceive the franchisor or the area representative as not being committed to the success of the franchisees or, worse, being in active and damaging competition with the franchisees, those negative effects will be increased, franchisees may even decide to leave the system and will almost surely fail to provide positive validation when contacted by prospective franchisees inquiring about how existing franchisees are treated.

- e. There is, in the area representative/franchisee relationship, a need for a high level of concern for, and commitment to, the success of unit level franchisees. This commitment, and its implementation, are related to the development of franchising-specific management skillsets by the area representative, which may significantly differ from management methodologies used in non-franchising business models, even in the same industry. By definition, franchising involves the franchisee financing, owning and operating his or her own individual unit, in which franchisees generally take great pride. Franchisees cannot be ordered about like employees and almost always cannot be “fired” without cause, so other management tools must be used. Therefore, many of the management skills needed at the franchisor level should also be present at the area representative level.

So, the area representative must develop, if he or she does not already have them, the skills necessary to convince franchisees not only of the area representative’s sincere interest in the unit franchisee’s success, and the area representative placing that interest in a paramount position above any competitive or other scenarios between the area representative and the franchisee, but also to convince the franchisee to take operational, marketing or other steps in that franchisee’s long-term best interest even though there may be short-term costs, inertia or other challenges for the franchisee.

In this sense the area representative is fundamentally a business “coach,” skilled in both the details of the franchised business model

and the distinct elements of a franchise relationship, firmly committed to the franchisee's business success, and neither a "boss" nor a largely disinterested, uninvolved and generally absent observer, and not a competitor or someone operating to exclude franchisees from prime locations or markets.

- f. Certain elements present in the real estate profession can raise issues of possible competition between an area representative operating its own office(s) and the offices of the franchisees to be supported by the area representative. Where the area representative's brokerage office(s) is/are in the same general market area serviced by one or more of the offices of the franchisees, there is at least the potential for competition between such offices, whether for listings, representation of potential buyers and/or the services of particularly productive agents. Therefore, the area representative would, under applicable industry standards and when possible, take appropriate steps to minimize such competition and, if he or she fails to do so, it may negatively impact the relationship between the area representative and those franchisees, making it more difficult for the area representative to effectively support those same franchisees. Similar to situations where a franchisor is operating a number of company-owned units in markets where franchisees also have units, serious consideration would normally be given by the area representative as to any potential negative impact of intra-brand competition from the area representative and its effect on existing and future franchisees.
- g. Where a franchisor is seeking to enter a new market, or a market where it has relatively little existing presence or brand recognition, a core objective for the franchisor and its franchisees will normally be to build the value of the brand in the eyes of potential franchisees, existing franchisees and customers. This is sometimes referred to by business people as "brand equity." Actions by the area representative that might diminish brand equity, whether by failure to appropriately support existing franchisees or by engaging in competition with them, could diminish brand equity and, among other things, damage new sales of franchises and the profitability of existing franchisees, all of which would be inconsistent with franchise industry standards.

3. Standards of care and practices regarding an area representative with respect to the sale of franchises and support of local franchisees, including considerations where an area representative is itself a franchisee of the franchisor.

- a. In general, see the information presented above, many elements of which it would be redundant to repeat here and which reflect franchise industry standards. The principles laid out above will, in most instances, inform and support the standards of care and daily business practices of an area representative.
- b. An effective and ethical area representative will realize that, with time, the total investment in their franchised businesses by franchisees may exceed the investment by the area representative in its business, simply because there may be more unit franchisees. A failure to adequately support, or (worse) to negatively impact, unit-level franchisees would be considered unacceptable in successful franchise systems and inconsistent with industry standards. Such actions or omissions by an area representative, if they took place, could potentially damage the value of the franchised brand, restrict future growth of the franchised system through sales of franchises or existing franchisees opening additional units, harm the profitability of franchised units, and result in increased discord and loss of trust, with franchisees leaving the system and even possible litigation.
- c. Similarly, such actions or omissions by an area representative, if they took place, could potentially negatively impact franchise sales (thereby potentially reducing short-term revenue in the form of initial franchise fees and long-term revenue in the form of royalties or otherwise), whether within the area representative's region and/or elsewhere in the system, since prospective franchisees may contact existing franchisees prior to making their purchase decision, could receive negative validation regarding the possible purchase (due to perceived or actual issues regarding the area representative) and then decide to purchase a competing franchise offering or not to purchase any franchise at all. The risk of the later outcome is greater where, as is generally true in real estate franchising, the prospective franchisee is already licensed to and is doing business in the industry and the local market, a franchising model known as "conversion franchising."
- d. Given those possible negative effects, responsible area representatives devote maximum efforts to fully supporting franchised units, proactively reaching out to unit franchises, both on an individual and group basis, and seeing how the area representative can assist the franchisees. As noted above, the area representative's proper role is that of an active "coach," never undermining franchisees' opportunities for success. Simply waiting

for franchisees to call for help, or only inspecting units for possible violations of system standards, does not meet the industry standard for proper performance of an area representative's functions. On the other hand, pro-active support of unit-level franchisees would be consistent with industry standards and can increase the franchisees' opportunities for success and support of the brand, and to minimize potential discord, franchisees leaving the system or not validating it to potential purchasers, and even possible litigation.

- e. In sum, for the ethical and effective area representative following franchise industry standards, the success of the franchisees he or she is responsible for supporting is the over-riding objective of that area representative and would be an even higher priority than the success of any units owned and operated by the area representative or its affiliates.

Findings

In my review of various materials in this matter (see the attached List of Materials Received and/or Reviewed), I made the following observations and/or findings:

1. Section 3 of the Windermere Real Estate Services Company Area Representation Agreement for the State of California (the "Area Representation Agreement" or "Area Representative Agreement") provides, in Section 3, for various duties and obligations of the Area Representative, including those with respect to the "licensees" (franchisees) in the "Region."
2. Those duties and obligations of the area representative with respect to franchisees are, in broad measure, substantially similar to such duties and obligations of area representatives in franchising generally, putting to one side duties and obligations particular to the real estate industry and its related business models.
3. A substantial failure by an area representative to properly perform such duties and obligations would not be consistent with standard practices in franchising, as applied to area representatives.

4. Such a failure by an area representative could: operate to damage the relationships between the franchisor and its franchisees; affect the ability of the franchisor to award future franchises (or additional franchises to existing franchisees); result in existing franchisees leaving the franchised system; and/or possibly negatively impact the value of the franchised brand, to the potential detriment of both the franchisor and its franchisees.

5. The First Amended Counterclaim by Defendant and Counterclaimant Windermere Real Estate Services Company for Damages and Injunctive Relief (the "Counterclaim") alleges [references are to page and line numbers of the Counterclaim] that the area representative: a) "did not provide prompt, courteous and efficient service to franchisees" (page 11; line 7); b) "did not deal fairly and honestly" with franchisees (page 11; line 8); c) did not offer the same support to other franchisees as they provided to offices owned by the area representative or an affiliated company (page 11; lines 9-10); competed against other franchisees (page 11; line 16); attempted to solicit agents who worked for other franchises to leave their current employment and work for the area representative of an affiliated company (page 11; lines 18 – 22); and failed to collect and remit various fees from franchisees to the franchisor (page 11; lines 25-27).

6. If proven, such acts or omissions by an area representative would not be consistent with standard practices in franchising, as applied to area representatives.

7. In the deposition of Mr. Deville (Vol. I; page 31; line 12), after being asked what he considered to be the obligations of the area representative in providing services to franchisees in Southern California, and responding that they were to "grow the region and to act as a conduit between the owners and Seattle, collect fees," and then being asked if he could think of anything else, he responded "No."

8. As detailed above, 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.

9. In the deposition of Mr. Deville (Vol. II; page 414; lines 1 - 15), Mr. Deville states that certain franchise owners were “disgruntled” as a result of the area representative (or an affiliate) opening an office in Encinitas.
10. The type of reaction by franchisees discussed by Mr. Deville would not be unusual, nor unanticipated, in franchising where the franchisees affected believed that the location or market was a favorable one and that they could successfully operate a franchised unit at that location or in that market.
11. In the deposition of Mr. Gregor (page 85; line 20), Mr. Gregor states, after being 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?”, Mr. Gregor responded “That was beyond my grade at that time.”
12. 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.
13. In the deposition of Mr. Robinson, at a number of points the deponent addresses questions relating to the area representative’s (or its affiliate’s) alleged failure to pay (or being delinquent in paying) franchise fees. [See page 33; lines 20 – 24; page 35; lines 6 – 9; page 40; lines 4 – 9.]
14. A franchisor would reasonably expect that an area representative would not show favoritism regarding payment of fees by offices owned and operated by it or an affiliated company, as compared to offices owned and operated by other franchisees. Standard franchise industry

practice is for area representatives to pay fees on units owned and operated by them according to their legal obligations.

15. In the deposition of Mr. Gooding, he expresses concern or dissatisfaction with respect to what he perceived as (among other things): the area representative not collaborating with him with respect to closure of a Windermere office and possible opportunities to retain agents from that office within the Windermere system (page 132, line 12 - page 136, line 13); a lack of willingness on the part of the area representative to collaborate on “double truck” or similar joint advertising (page 153, line 9 – page 154, line 15); a lack of “collaboration” and “help” from the area representative (page 157, lines 1 – 3; page 158. Lines 14 – 17); a lack of support or collaboration re various training or other functions (page 162, line 16 through page 163, line 19; page 164, line 19 through page 166, line 25; page 206, lines 15 – 22; page 207, lines 8 - 13); the relationship with the area representative having become a competitive one rather than collaborative (page 185, line 19 – 22; page 187, line 17 through page 190, line 19; page 192, lines 2 – 12; page 247, lines 3 - 7).
16. In general, conduct by an area representative as testified to by Mr. Gooding, if such testimony accurately reflects the facts, would not be consistent with applicable standards in area representative franchising.
17. In the deposition of Mr. Johnson, he expresses concern or dissatisfaction with respect to what he perceived as (among other things): feeling that his franchise was “instead of having a mutually beneficial relationship, that we were, in fact, competing against SoCal, and that was causing some challenges between our relationship” and apparently relating that perception to issues regarding “advertising and the competition about recruiting agents” (page 175, line 9 – Page 176 3; page 176, line 6 – page 4; page 192, lines 15 – 21; page 233, lines 4 - 13); possibly disparaging comments by the area representative re the franchisee (page 178, lines 2 – 19; page 180, lines 4 - 18; page 186, lines 5 – 7); issues regarding communication and/or collaboration (page 191, line 22, page 192, lines 9 – 12; page 193, lines 9 – 16; page 230, lines 1 - 6).
18. In general, conduct by an area representative as testified to by Mr. Johnson, if such testimony accurately reflects the facts, would not be consistent with applicable standards in area representative franchising.

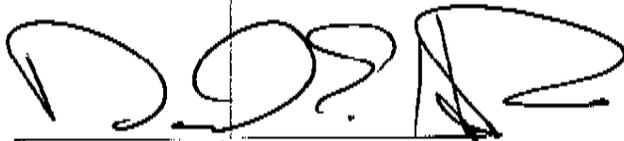
19. In the deposition of Mr. Fanning, he testified that: the area representative told him what he could and could not speak to franchisees about (page 30, line 22 through page 31, line 25.)
20. Such a limitation or direction by an area representative would not, in general, be typical in franchising or consistent with standard franchise industry standards and practices.
21. In the deposition of Mr. Fanning, he testified that: he did not have an opportunity to teach agents in the region because he was asked to stop coming.
22. Such a limitation or direction by an area representative would not, in general, be typical in franchising or consistent with standard franchise industry standards and practices.
23. In the deposition of Mr. Fanning, he testified that: at least one franchisee in the region was not aware that various software tools were available to them, nor did they have ample training on how to use them.
24. Such a situation would not be typical in franchising or consistent with standard franchise industry standards and practices.
25. In the deposition of Mr. Fanning, he testified that: other regions were “more than happy to have us come into their region and help [educate those agents.]”
26. The approach of such other regions is typical in franchising, would normally be expected and is consistent with standard franchise industry standards and practices.

27. In the deposition of Ms. Bortfeld, she testified that: she had concerns regarding use, by agents working for Bennion and Deville, of the Windermere logo, business cards (including use of a non-approved vendor) (page 21, line 1 through Page 29, line 9.)
28. Inappropriate use of a logo, or of non-approved suppliers, would not be consistent with franchise industry standards.
29. In the deposition of Ms. Bortfeld, she testified that: Messrs. Gooding and Johnson “were unaware of a lot of the marketing materials that are branded for us . . . They were just completely unaware of who we were - - the programs that we have . . . They just - - they were clearly clueless about the services that my department provides. . . . they were just so shocked at what they found on the worksite. They said we had no idea all this stuff was available. . . . 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.)
30. Franchisees being unaware of the materials or services available from a franchisor is not consistent with franchise industry standards.
31. In the deposition of Ms. Bortfeld, she testified that: “We weren’t allowed to talk to anybody in Southern California. I wasn’t allowed to talk to any be (*sic*) in Southern California . . . Mr. Deville requested that we do not discuss - - we do not have conversations with his owners. . . . I respected his wishes. “ (Page 86, line 23 through Page 87, line 6)
32. A franchisor being asked to not communicate with its franchisees is not typical in franchising or consistent with franchise industry standards.
33. In the deposition of Ms. Bortfeld, she testified that: There were instances of Mr. Deville involving “unpleasant encounters” and which resulted in employees coming into “my office in tears or visibly shaken after an interaction” and an employee telling her that Mr. Deville “was yelling at me, and I felt attacked” . . . “every interaction I’ve ever had has been extremely unpleasant. So you just don’t go to the hornet’s

nest too often.” (Page 90, lines 5 – 10; lines 20-21; Page 95, lines 5 – 7.)

34. Such encounters as those described are not consistent with franchise industry standards.
35. In the deposition of Ms. Bortfeld with respect to the topic of the region possibly failing to support franchisees in Southern California, she testified with respect to: non-disbursal of leads supplied by the franchisor, (Page 107, line 21 through Page 127, line 4); matters relating to customization of marketing materials and franchisee’s lack of knowledge re materials (Page 116, line 16 through Page 118, Line 5); franchisee’s lack of “access to radio spots, print ad templates, TV spots, billboard, any of the advertising . . .” (Page 118, line 11 through Page 120, line 14.)
36. Not providing unit franchisees with materials and resources generally available from the franchisor is not consistent with standard franchise industry practice.

David E. Holmes

A handwritten signature in black ink, appearing to read 'D. E. Holmes', written over a horizontal line.

Date: September 16, 2016