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

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

Plaintiffs,

v.

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

Defendant.

Case No. 5:15-CV-01921-DFM

Hon. Douglas F. McCormick

**PLAINTIFFS’ SECOND SET OF
SUPPLEMENTAL PROPOSED
SPECIAL JURY INSTRUCTIONS**

Complaint Filed: September 17, 2015

Counterclaim Filed: October 13, 2015

AND RELATED COUNTERCLAIMS

Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc.,
Bennion & Deville Fine Homes SoCal, Inc., Windermere Services Southern
California, Inc., Counter-Defendants Robert L. Bennion and Joseph R. Deville (all
collectively, the “B&D Parties”) respectfully submit the following second

1 supplemental list of proposed special jury instructions for the above-captioned
2 matter. The B&D Parties reserve the right to submit further and additional
3 instructions as may be required by the Court's ruling or the presentation of
4 evidence at trial.

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6 **INDEX OF SPECIAL JURY INSTRUCTIONS**
7

No.	Title	Source	Page
5	Windermere Services Southern California, Inc.'s Audited Financials Were Not Required For Windermere Real Estate Services Company To File And Register Its 2014 Franchise Disclosure Document	Special Instruction No. 5.	4
6	Material Breach Excuses Performance By Non-Breaching Party	Special Instruction No. 7.	5
7	Windermere Services Southern California, Inc. Cannot Disclose A Potential Franchisee In Southern California Using The Franchise Disclosure Document From Northern California	Special Instruction No. 8.	6

23
24 DATED: July 19, 2018

MULCAHY LLP

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26 By: /s/ Kevin A. Adams
27 Kevin A. Adams
28 *Attorneys for Plaintiffs/Counter-Defendants Bennion & Deville Fine*

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*Homes, Inc., Bennion & Deville Fine
Homes SoCal, Inc., Windermere
Services Southern California, Inc.,
and Counter-Defendants Robert L.
Bennion and Joseph R. Deville*

1 **The B&D Parties Proposed SPECIAL INSTRUCTION NO. 5 –**
2 **WINDERMERE SERVICES SOUTHERN CALIFORNIA, INC.’S AUDITED**
3 **FINANCIALS WERE NOT REQUIRED FOR WINDERMERE REAL**
4 **ESTATE SERVICES COMPANY TO FILE AND REGISTER ITS 2014**
5 **FRANCHISE DISCLOSURE DOCUMENT**

6 Franchise Disclosure Documents filed with the California Department of
7 Business Oversight must be renewed every year. It is undisputed that the Franchise
8 Disclosure Document of Windermere Real Estate Services Company
9 (“Windermere”) expired on April 20, 2014.

10 The audited financial statements of Windermere Services Southern
11 California, Inc. (the Area Representative) were not required for Windermere to
12 renew its Franchise Disclosure Document for the Southern California region.

13 Given as proposed _____

14 Given as modified _____

15 Refused _____

16 Withdrawn _____

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18 **STATEMENT OF LAW**

19 Order Granting Defendant’s Motion for Partial Summary Judgment, Dkt. No. 66,
20 at 7; 16 C.F.R. 435(u) & (v) (a franchisor must “[i]nclude separate financial
21 statements for the franchisor and any subfranchisor, as well as for any parent that
22 commits to perform post-sale obligations for the franchisor or guarantees the
23 franchisor’s obligations.”); Cal. Corp. Code §§ 31110, 31119, 31120.

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1 **The B&D Parties Proposed SPECIAL INSTRUCTION NO. 6 – MATERIAL**
2 **BREACH EXCUSES PERFORMANCE BY NON-BREACHING PARTY**

3 Every contract contains an implied agreement by each party to do nothing
4 that will hinder, prevent, or interfere with the performance of the contract by the
5 other party. If one party proves by a preponderance of the evidence that the other
6 party has breached, interfered with or prevented the non-breaching party from
7 benefiting under the contract, then the non-breaching party is excused from
8 performing its subsequent duties under the contract.

9 Given as proposed _____
10 Given as modified _____
11 Refused _____
12 Withdrawn _____

13
14 **STATEMENT OF LAW**

15 *Brown v. Grimes*, 192 Cal. App. 4th 265, 277 (2011) (“When a party's
16 failure to perform a contractual obligation constitutes a material breach of the
17 contract, the other party may be discharged from its duty to perform under the
18 contract.”); *Sanchez v. County of San Bernardino*, 176 Cal. App. 4th 516, 530
19 (2009) (“A reasonable jury could conclude that the County's breach of the
20 confidentiality provision excused any further performance by Sanchez.”) (citing 1
21 Witkin, Summary of Cal. Law, Contracts, § 813, p. 906; *County of Solano v.*
22 *Vallejo Redevelopment Agency*, 75 Cal.App.4th 1262, 1275 & fn. 6 (1999) (“Due
23 to the Agency's anticipatory breach, Solano County was excused from fulfilling
24 any conditions, whether precedent or concurrent, under the contract.”); *see also*
25 CACI 303 “Sources and Authority.”
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1 **The B&D Parties Proposed SPECIAL INSTRUCTION NO. 7 –**
2 **THE “NORTHERN CALIFORNIA” FRANCHISE DISCLOSURE**
3 **DOCUMENT CANNOT BE USED TO DISCLOSE PROSPECTIVE**
4 **FRANCHISEES IN OTHER STATES OR REGIONS**

5 A franchisor must provide to each prospective franchisee a Franchise
6 Disclosure Document (“FDD”) prior to the parties’ entry into a franchise
7 relationship. The purpose of the FDD is to provide every prospective franchisee
8 with the details about the franchisor, the anticipated fees and expenses, the
9 franchise system and the agreements they will be asked to sign to go forward with
10 the franchise relationship.

11 Windermere Real Estate Services Company’s FDD for the Northern
12 California region could not be used to properly disclose the franchise opportunity
13 to prospective franchisees in the Southern California region.

14 Given as proposed _____

15 Given as modified _____

16 Refused _____

17 Withdrawn _____

18 **STATEMENT OF LAW**

19 Under the Federal Trade Commission’s Amended Franchise Rule, located at
20 16 C.F.R. 436 (the “FTC Rule”), a franchisor must provide to each prospective
21 franchisee a Franchise Disclosure Document (“FDD”). The purpose of the FDD is
22 to provide every prospective franchisee with the details about the franchisor, the
23 franchise system and the agreements they will need to sign, in order to allow them
24 to make an informed decision. As such, the terms in the FDD must not differ from
25 the terms that will apply during the franchise relationship in the even the
26 prospective franchisee signs the franchise.

27 For this reason, Windermere Services Southern California, Inc. could not
28 provide a prospective franchisee in Southern California with Windermere Real
Estate Services Company’s (“WSC”) Northern California FDD. As shown below,
the content in the Northern California FDD was materially different from the
content in the Southern California FDD.

Southern California FDD	Northern California FDD
“Southern California” – Footnote on each page	“Northern California” – Footnote on each page
Lists Windermere Services Southern California, Inc. as an Area Representative in Item 1 and Robert Bennion and Joseph R. Deville as the Area Representative Principals in Item 2. (Tr. Ex. 316-016)	Does not include an Area Representative in Item 1 or in Item 2. (Tr. Ex. 228-004 – 228-007.)
States that there is no Marketing Fee in Southern California in Item 6. (Tr. Ex. 316-021.)	The Marketing Fee is set as \$25 per agent per month in Item 6. (Tr. Ex. 228-008.)
Includes Area Representative in instructions to prospective franchisees throughout FDD. (<i>See e.g.</i> Tr. Ex. 316-021, 316-023, 316-025, 316-031.)	Instructions do not include an Area Representative.

Thus, a Northern California FDD could not have been used to disclose the Windermere franchise opportunity to prospective franchisees in Southern California.