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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.

AND RELATED COUNTERCLAIMS

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

*Hon. Manual L. Real*

**[PROPOSED] FINAL PRETRIAL  
CONFERENCE ORDER**

Courtroom: 8

Complaint Filed: September 17, 2015

Pursuant to Local Rule 16-7, Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc., Bennion & Deville Fine Homes SoCal, Inc., Windermere Services Southern California, Inc. (collectively, "Plaintiffs") and Counter-Defendants Robert L. Bennion ("Bennion") and Joseph R. Deville ("Deville")

1 (Plaintiffs, Bennion, and Deville are collectively referred to herein as the “B&D  
2 Parties”), on the one hand, and Defendant/Counter-Claimant Windermere Real  
3 Estate Services Company’s (“WSC”), on the other hand, by and through their  
4 undersigned counsel, hereby lodge with the Court their [Proposed] Final Pretrial  
5 Conference Order.

6 Following pre-trial proceedings, pursuant to Fed. R. Civ. P. 16 and L.R. 16, IT  
7 IS ORDERED:

8 **I. The Parties And Pleadings**

9 The parties to this action are as follows:

- 10 • Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc.,  
11 Bennion & Deville Fine Homes SoCal, Inc., Windermere Services  
12 Southern California, Inc.;
- 13 • Counter-Defendants Robert L. Bennion and Joseph R. Deville; and
- 14 • Defendant/Counter-Claimant Windermere Real Estate Services  
15 Company.

16 Each of these parties has been served and has appeared. All other parties  
17 named in the pleadings, including the DOES 1-10, and not identified in the  
18 preceding paragraph are now dismissed.

19 The pleadings which raise the issues are:

- 20 • First Amended Complaint (“FAC”) dated November 16, 2015 [D.E.  
21 31];
- 22 • First Amended Counterclaim (“FACC”) dated October 14, 2015 [D.E.  
23 16];
- 24 • Order Granting Joint Stipulation for (i) Plaintiffs to File First  
25 Amended Complaint, and (i) Counterclaimant Windermere Real  
26 Estate Services Company to Voluntarily Dismiss Counts Five, Six,  
27 and Seven of First Amended Counterclaim, dated November 12, 2015  
28 [D.E. 30];

- 1 • Answer to Amended Counterclaim by Robert L. Bennion, Bennion  
2 and Deville Fine Homes, Inc., Bennion and Deville Fine Homes  
3 SoCal, Inc., and Windermere Services Southern California, Inc., dated  
4 November 27, 2016 [D.E. 32];
- 5 • Answer to Amended Counterclaim by Joseph R. Deville, dated  
6 December 14, 2015 [D.E. 37];
- 7 • Answer to Amended Complaint by WSC, dated December 7, 2015  
8 [D.E. 34]

9 **II. Subject Matter Jurisdiction & Venue**

10 Federal jurisdiction and venue are invoked upon the following grounds:

11 **A. Jurisdiction & Venue Over the FAC**

12 Plaintiffs contend that diversity jurisdiction exists under 28 U.S.C. § 1332  
13 because the amount in controversy in the FAC exceeds the jurisdictional threshold  
14 of \$75,000, and because the Plaintiffs are all California corporations and WSC is a  
15 Washington corporation – thus, complete diversity exists.

16 Plaintiffs also contend that venue is also proper in this District in that WSC  
17 is subject to personal jurisdiction in this District, a substantial part of the events  
18 occurred in this District, and all parties specifically agreed to the Central District of  
19 California pursuant to a forum selection clause contained within a contract that is  
20 in dispute in this action. (*See* D.E. 31, Ex. G to FAC [Modification Agreement], §  
21 9.)

22 **B. Jurisdiction & Venue Over the FACC**

23 WSC contends that supplemental jurisdiction exists over Bennion and  
24 Deville because the FACC is a compulsory counterclaim under Rule 13(a) of the  
25 Federal Rules of Civil Procedure and that this Court may exercise  
26 supplemental/ancillary jurisdiction over Bennion and Deville pursuant to 28 USC §  
27 1367(a).

28 Bennion contends that because this case was brought as a diversity action,

1 and he is a resident of the State of Washington, supplemental jurisdiction over him  
2 cannot exist because such claims would destroy complete diversity. *See Exxon*  
3 *Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 546 (2005) (Supplemental  
4 jurisdiction under § 1367 does not apply to § 1332’s complete diversity  
5 requirement, “for incomplete diversity destroys original jurisdiction with respect to  
6 all claims, leaving nothing to which supplemental claims can adhere.”).

7 **III. Trial Estimate**

8 The trial is estimated to take 12 to 15 trial days.

9 **IV. Jury Trial**

10 The trial is to be a jury trial. At least seven (7) days prior to the trial date the  
11 parties shall file and serve by e-mail, fax, or personal delivery: (a) proposed jury  
12 instructions as required by L.R. 51-1 and (b) any special questions requested to be  
13 asked on voir dire.

14 **V. Admitted Facts And Stipulated Facts Subject To Objection**

15 The following facts are admitted and require no proof:

- 16 1. WSC is a Washington corporation with its principal place of business  
17 in Seattle, Washington.
- 18 2. Bennion & Deville Fine Homes, Inc. is a California Corporation with  
19 its principal place of business in Rancho Mirage, California.
- 20 3. Bennion & Deville Fine Homes SoCal, Inc. is a California  
21 Corporation with its principal place of business in Rancho Mirage,  
22 California.
- 23 4. Windermere Services Southern California, Inc. is a California  
24 Corporation with its principal place of business in Rancho Mirage,  
25 California.
- 26 5. Deville is a resident of the State of California.
- 27 6. WSC is the franchisor of the Windermere system of franchisees  
28 providing real estate brokerage services to customers seeking to buy,

1 sell or lease real property.

- 2 7. The Plaintiffs are each owned and operated by Bennion and Deville.  
3 8. Bennion and Deville are both experienced real estate brokers working  
4 in the real estate industry since 1988 and 1971, respectively.  
5 9. On August 1, 2001, Bennion, Deville, and their company Bennion &  
6 Deville Fine Homes, Inc., on the one hand, and WSC, on the other  
7 hand, entered into a “Windermere Real Estate License Agreement” for  
8 the Coachella Valley (hereafter referred to as the “Coachella Valley  
9 Franchise Agreement”).  
10 10. On May 1, 2004, Bennion and Deville, on behalf of their entity  
11 Windermere Services Southern California, Inc., on the one hand, and  
12 WSC, on the other hand, entered into a “Windermere Real Estate  
13 Services Company Area Representation Agreement for the State of  
14 California” (the “Area Representation Agreement”).  
15 11. On March 29, 2011, Windermere Services Southern California, Inc.,  
16 Bennion, Deville, Bennion & Deville Fine Homes SoCal, Inc., and  
17 WSC entered into the “Windermere Real Estate Franchise License  
18 Agreement” (the “SoCal Franchise Agreement”).  
19 12. On December 18, 2012, WSC and Plaintiffs amended the Coachella  
20 Valley Franchise Agreement and the SoCal Franchise Agreement by  
21 collectively entering into a document titled “Agreement Modifying  
22 Windermere Real Estate Franchise License Agreement” (the  
23 “Modification Agreement”).  
24 13. A Windermere Real Estate Services Franchise Disclosure for  
25 Southern California was never approved of by the California  
26 Department of Business Oversight for the 2014 year.  
27 14. On January 28, 2015, WSC General Counsel Paul Drayna sent a letter  
28 to Deville announcing that WSC was “exercising its right to terminate

1 [the] Area Representation Agreement dated May 1, 2004, pursuant to  
2 the 180-day notice provision of Paragraph 4.1,” and that Bennion and  
3 Deville’s “rights and responsibilities as Area Representative will  
4 terminate on Tuesday, July 28, 2015.”

5 **VI. Admitted Facts Subject To Evidentiary Objection**

6 The following facts, though stipulated, shall be without prejudice to  
7 evidentiary objections: None.

8 **VII. Parties’ Claims And Defenses**

9 **A. The B&D Parties’ Claims and Defenses:**

10 **1. Plaintiffs intend to pursue the following claims against**

11 **WSC:**

12 Claim 1: WSC breached the Coachella Valley Franchise  
13 Agreement with Bennion & Deville Fine Homes, Inc.;

14 Claim 2: WSC breached the Implied Covenant of Good Faith and  
15 Fair Dealing incorporated within the Coachella Valley  
16 Franchise Agreement with Bennion & Deville Fine  
Homes, Inc.;

17 Claim 3: WSC breached the Area Representation Agreement with  
18 Windermere Services Southern California, Inc.;

19 Claim 4: WSC breached the Implied Covenant of Good Faith and  
20 Fair Dealing incorporated within the Area Representation  
21 Agreement with Windermere Services Southern  
22 California, Inc.;

23 Claim 5: WSC breached the SoCal Franchise Agreement with  
24 Bennion & Deville Fine Homes SoCal, Inc.;

25 Claim 6: WSC breached the Implied Covenant of Good Faith and  
26 Fair Dealing incorporated within the SoCal Franchise  
27 Agreement with Bennion & Deville Fine Homes SoCal,  
28 Inc.; and

1           Claim 7:     WSC violated the California Franchise Relations Act  
2                                 (Cal. Bus. & Prof. Code § 20020).

3           2.     **The B&D Parties intend to pursue the following affirmative**  
4                                 **defenses:**

5           Affirmative Defense 1:    Failure to State a Cause of Action

6           Affirmative Defense 2:    Waiver

7           Affirmative Defense 3:    Estoppel

8           Affirmative Defense 4:    Offset

9           Affirmative Defense 5:    Justification

10           3.     **The elements required to establish Plaintiffs' claims are:**

11           ***Claim 1: Breach of the Coachella Valley Franchise Agreement***

12           The elements for a breach of contract claim are: (1) the existence of the  
13           contract; (2) performance by the plaintiff or excuse for nonperformance; (3) breach  
14           by the defendant; and (4) damages. *Castro v. Wells Fargo Bank, N.A.*, 2012 WL  
15           2077294, at \*1 (C.D. Cal. June 6, 2012) (citing *First Commercial Mtg. Co. v.*  
16           *Reece*, 89 Cal.App.4th 731, 108 Cal.Rptr.2d 23, 33 (Cal.Ct.App.2001)).

17           ***Claim 2: Breach of the Implied Covenant of Good Faith and Fair***  
18           ***Dealing incorporated within the Coachella Valley Franchise***  
19           ***Agreement***

20           The elements for a claim for breach of the implied covenant of food faith  
21           and fair dealing are: (1) a contract between plaintiff and defendant, (2) plaintiff's  
22           performance, (3) defendant's performance, (4) defendant's unfair interference with  
23           plaintiff's right to receive the benefits of the contract, and (5) defendant's conduct  
24           harmed plaintiff. *Walis v. Fernandez*, 2016 WL 1363428, at \*3 (C.D. Cal. Apr. 4,  
25           2016).

26           ***Claim 3: Breach of the Area Representation Agreement***

27           The elements for a breach of contract claim are: (1) the existence of the  
28           contract; (2) performance by the plaintiff or excuse for nonperformance; (3) breach  
by the defendant; and (4) damages. *Castro v. Wells Fargo Bank, N.A.*, 2012 WL

1 2077294, at \*1 (C.D. Cal. June 6, 2012) (citing *First Commercial Mtg. Co. v.*  
2 *Reece*, 89 Cal.App.4th 731, 108 Cal.Rptr.2d 23, 33 (Cal.Ct.App.2001)).

3 ***Claim 4: Breach of the Implied Covenant of Good Faith and Fair***  
4 ***Dealing incorporated within the Area Representation Agreement***

5 The elements for a claim for breach of the implied covenant of food faith  
6 and fair dealing are: (1) a contract between plaintiff and defendant, (2) plaintiff's  
7 performance, (3) defendant's performance, (4) defendant's unfair interference with  
8 plaintiff's right to receive the benefits of the contract, and (5) defendant's conduct  
9 harmed plaintiff. *Walis v. Fernandez*, 2016 WL 1363428, at \*3 (C.D. Cal. Apr. 4,  
10 2016).

11 ***Claim 5: Breach of the SoCal Franchise Agreement***

12 The elements for a breach of contract claim are: (1) the existence of the  
13 contract; (2) performance by the plaintiff or excuse for nonperformance; (3) breach  
14 by the defendant; and (4) damages. *Castro v. Wells Fargo Bank, N.A.*, 2012 WL  
15 2077294, at \*1 (C.D. Cal. June 6, 2012) (citing *First Commercial Mtg. Co. v.*  
16 *Reece*, 89 Cal.App.4th 731, 108 Cal.Rptr.2d 23, 33 (Cal.Ct.App.2001)).

17 ***Claim 6: Breach of the Implied Covenant of Good Faith and Fair***  
18 ***Dealing incorporated within the SoCal Franchise Agreement***

19 The elements for a claim for breach of the implied covenant of food faith  
20 and fair dealing are: (1) a contract between plaintiff and defendant, (2) plaintiff's  
21 performance, (3) defendant's performance, (4) defendant's unfair interference with  
22 plaintiff's right to receive the benefits of the contract, and (5) defendant's conduct  
23 harmed plaintiff. *Walis v. Fernandez*, 2016 WL 1363428, at \*3 (C.D. Cal. Apr. 4,  
24 2016).

25 ***Claim 7: Violation of the California Franchise Relations Act***  
26 ***(Cal. Bus. & Prof. Code § 20020)***

27 To establish a violation of Section 20020 of the California Franchise Relations  
28 Act (“CFRA”), the plaintiff franchisee must establish that (1) the franchisor  
terminated the franchise prior to the expiration of its term, and (2) the franchisor



1 terminated without good cause.

2 “Good cause shall be limited to the failure of the franchisee to substantially  
3 comply with the lawful requirements imposed upon the franchisee by the franchise  
4 agreement after being given notice at least 60 days in advance of the termination and  
5 a reasonable opportunity, which in no event shall be less than 60 days from the date  
6 of the notice of noncompliance, to cure the failure.” Cal. Bus. & Prof. Code § 20020.

7 **4. The elements required to establish the B&D Parties’**  
8 **affirmative defenses are:**

9 ***Affirmative Defense 1: Failure to State a Cause of Action***

10 The defense of failure to state a claim may be raised in any pleading under  
11 Rule 7(a), by motion under Rule 12(c), or even at trial. Fed. R. Civ. P. 12(h)(2).  
12 *Ear v. Empire Collection Authorities, Inc.*, 2012 WL 3249514, at \*2 (N.D. Cal.  
13 Aug. 7, 2012) (observing that failure to state a claim under Rule 12(b)(6) is the  
14 “paradigmatic example of a negative defense . . . [but] is more appropriately raised  
15 in motions to dismiss rather than” pleaded in the answer like an affirmative  
16 defense). *See also, Ganley v. County of San Mateo*, 2007 WL 902551 at \*3  
17 (N.D.Cal. Mar. 22, 2007) (treating the failure to state a claim as an affirmative  
18 defense).

19 ***Affirmative Defense 2: Waiver***

20 To successfully assert the affirmative defense of waiver, the B&D Parties  
21 must prove both of the following by clear and convincing evidence:

22 1. That WSC knew that certain members of the B&D Parties were  
23 required by the Coachella Valley Franchise Agreement and SoCal Franchise  
24 Agreement to pay fees by a specified date and to remain in the Windermere system  
25 for a specified term; and

26 2. That WSC freely and knowingly gave up these rights to have the  
27 B&D Parties perform these payment obligations in a timely manner and to remain  
28 in the Windermere system for a specified term.

1 A waiver may be oral or written or may arise from conduct that shows that  
2 WSC gave up that right.

3 If the B&D Parties prove that WSC gave up its right to the B&D Parties'  
4 performance of the timely payment obligations under the contracts, then the B&D  
5 Parties were not required to perform obligations within the timing confines of the  
6 contracts.

7 Judicial Council of California Civil Jury Instruction ("CACI") No. 336 (Dec.  
8 2015).

9 ***Affirmative Defense 3: Estoppel***

10 "The elements of the doctrine" of estoppel are "that (1) the party to be  
11 estopped must be apprised of the facts; (2) he must intend that his conduct shall be  
12 acted upon, or must so act that the party asserting the estoppel has a right to believe  
13 it was so intended; (3) the other party must be ignorant of the true state of facts;  
14 and (4) he must rely upon the conduct to his injury." *County of Los Angeles v. City*  
15 *of Alhambra*, 27 Cal. 3d 184, 196 (1980) (citing *City of Long Beach v. Mansell*, 3  
16 Cal. 3d 462, 488-89 (1970)).

17 ***Affirmative Defense 4: Offset***

18 The burden is on the B&D Parties to show that they, or any one of them, are  
19 entitled to an offset from WSC for any amounts owed to WSC. *See Jacobson v.*  
20 *Persolve, LLC*, 2014 WL 4090809, at \*9 (N.D. Cal. Aug. 19, 2014) (finding offset  
21 to be a viable affirmative defense).

22 ***Affirmative Defense 5: Justification***

23 WSC's first, second, and third claims are barred in part because the B&D  
24 Parties alleged failure to timely pay franchise and other fees was justified and were  
25 fair and reasonable under all the circumstances based upon a balancing of all  
26 factors related to the actions at issue.

27 WSC's fourth claim is barred in part because the B&D Parties' departure  
28 from the Windermere system before the conclusion of their five-year term was

1 justified and was fair and reasonable under all the circumstances based upon a  
2 balancing of all factors related to the actions at issue.

3 **4. In brief, the key evidence the B&D Parties rely on for each**  
4 **claim and affirmative defense is:**

5 ***Claim 1 – Breach of the Coachella Valley Franchise Agreement***

6 As the franchisor of the Windermere brand, WSC was obligated to make  
7 available for use by its franchisees and area representatives a fully functional  
8 Windermere franchise system. It is both the “system” and the brand that franchisees  
9 purchase at the time they contract with Windermere.

10 While WSC appears to have created a fully functional franchise system for  
11 use by its franchisees in the State of Washington – WSC’s home state – the system  
12 created by Windermere was not transferrable or applicable to franchisees operating  
13 in the State of California. For instance, the technology offered by Windermere to its  
14 franchisees and necessary for the day-to-day activities of real estate agents did not  
15 properly function in connection with California’s multiple listing real estate services  
16 (*i.e.*, the MLS) – the real estate directories relied upon by all real estate agents in  
17 California. Because of this, the B&D Parties were forced to create their own  
18 technology, use it in the operation of their businesses, and offer it to other  
19 Windermere franchisees in the region. WSC provided little or no support to its  
20 California affiliates other than allowing them to use the Windermere brand.  
21 Additionally, WSC failed to provide local and regional marketing and advertising  
22 support crucial to the success of any franchise system in a competitive marketplace.

23 WSC’s real estate technology was mostly inapplicable and unusable in the  
24 Southern California region. In exchange for the technology fees that WSC received  
25 it was obligated to provide certain technology services needed by the real estate  
26 franchises and their agents to post and manage real property listings and to otherwise  
27 carry out their real estate business. However, WSC’s technology was inferior.  
28 Examples of the shortcomings of WSC’s technology include the following:

- 1 • Properties listed by the Windermere Southern California agents often  
2 did not properly display (if at all) on WSC's websites;
- 3 • WSC's technology team was inexperienced at best, often causing  
4 numerous unnecessary delays to the posting and visibility of Southern  
5 California real estate listings;
- 6 • Repeated listing syndication problems for agents' listings on third-party  
7 websites, often resulting in extended disruption in the syndication (i.e.,  
8 publishing) of the listings of Bennion and Deville's agents; and
- 9 • The windermere.com website failed to display the listings and/or  
10 pictures of real estate listing belonging to numerous Southern  
11 California agents.

12 As such, Plaintiffs were forced to create and offer their own technology  
13 services at significant cost and expense. Despite the numerous shortcomings of  
14 WSC's technology services and even though Plaintiffs had to use their own  
15 technology services, Plaintiffs continued to pay their monthly, non-trivial  
16 technology fees in an amount that far exceeded the services provided.

17 In light of WSC's short comings as a franchisor, WSC breached Section 1 of  
18 the Coachella Valley Franchise Agreement by failing to provide the promised  
19 "variety of services" designed to enhance Plaintiffs' "profitability".

20 Similarly, WSC breached Section 2 by failing to provide Plaintiffs with a  
21 viable "Windermere System" as defined in the agreement. Again, WSC breached  
22 both sections 1 and 2 by failing to provide those services required by the agreement  
23 and necessary for the success of a franchisee in a competitive marketplace.

24 In addition to WSC's failure to provide a viable franchise system, WSC also  
25 failed to protect its brand from the counter-marketing campaign of Windermere  
26 Watch. Windermere Watch severely damaged the Windermere brand in Southern  
27 California. Starting around 2005, Gary Kruger, a disgruntled former Seattle  
28 Windermere client, and his associates initiated an anti-marketing campaign under the

1 name “Windermere Watch,” which was specifically designed to direct defamatory  
2 statements, materials, and focused conduct against Windermere, and its franchisees  
3 and real estate agents via the website [www.windemerewatch.com](http://www.windemerewatch.com). The website has  
4 been (and continues to be) used by Kruger as a tool to generate and/or spread  
5 negative and derogatory articles and comments concerning Windermere’s purported  
6 business practices, litigation, owners, executives, brokers, agents, and general  
7 participation in the real estate market.

8 Windemerewatch.com is utilized and designed by Kruger to maximize its  
9 search engine presence. As a result, when internet users search for Windermere on  
10 Google and other internet search engines, windemerewatch.com has appeared as  
11 one of the top search results – often ahead of Windermere’s own website. The  
12 obvious (if not express) intent of Kruger is to use windemerewatch.com to turn  
13 potential clients, agents, and franchisees away from Windermere.

14 Although WSC was legally obligated under the terms of the Coachella Valley  
15 Franchise Agreement, the SoCal Franchise Agreement, and the Area Representative  
16 Agreement to take action to protect the Windermere System, trademark, and brand,  
17 and to prevent unfair competition against its franchisees and their businesses, WSC  
18 did virtually nothing to combat Windermere Watch’s anti-Windermere marketing  
19 campaign in Southern California.

20 The Windermere Watch anti-marketing campaign has had a significant and  
21 monetarily damaging effect on Plaintiffs’ businesses. Windermere’s competitors  
22 incorporate information from the site in pitches to both agents and clients. WSC’s  
23 failure to protect the brand in the face of the anti-marketing campaign regularly  
24 caused the loss of listings, clients, and agents.

25 Because of this, WSC breached Section 4 by failing to take necessary action  
26 (legal or otherwise) to prevent infringement of the Windermere trademark or the  
27 related unfair competition faced by Plaintiffs in the Southern California region as a  
28 result of the Windermere Watch websites. Similarly, WSC breached Section 3(A) of

1 the Modification Agreement failing to make commercially reasonable efforts to  
2 curtail Windermere Watch and related attacks on the Windermere brand in Southern  
3 California.

4 ***Claim 2 – Breach of the Implied Covenant of Good Faith and Fair***  
5 ***Dealing***

6 WSC breached the implied covenant of good faith and fair dealing in its  
7 Coachella Valley Franchise Agreement with Bennion & Deville File Homes, Inc.  
8 (“B&D Fine Homes”) and Windermere Services Southern California, Inc. (“Services  
9 SoCal”) by:

- 10 • Failing to provide adequate technology services in return for the  
11 excessive technology fees;
- 12 • Failing to provide a viable Windermere System to the Southern  
13 California region. To the extent WSC provided service or assistance, it  
14 was worthless;
- 15 • Improperly recruiting Plaintiffs’ sales agents and other employees to  
16 join WSC and other Windermere offices;
- 17 • Terminating Services SoCal as the Area Representative for the  
18 Southern California region and thereby negating Plaintiffs’ 50%  
19 reduction in franchise fees owed to WSC under the Coachella Valley  
20 Franchise Agreement; and
- 21 • Terminating Services SoCal as the Area Representative for the  
22 Southern California region (as discussed below) and not providing a  
23 comparable replacement.

24 WSC constructive termination of the Area Representation Agreement (as  
25 discussed below) along with its direct breaches of the Coachella Valley Franchise  
26 Agreement justified B&D Fine Homes’ discontinuation of payments to WSC under  
27 the Coachella Valley Franchise Agreement.

28 ***Claim 3 – Breach of the Area Representation Agreement***

1 WSC breached Section 2 of the Area Representation Agreement with Services  
2 SoCal by failing to provide Services SoCal with the uninterrupted right to offer  
3 Windermere franchised businesses in Southern California.

4 Under the Federal Trade Commission's ("FTC") Amended Franchise Rule,  
5 located at title 16, part 436 of the Code of Federal Regulations, a franchisor is  
6 required to disclose to prospective franchisees a franchise disclosure document  
7 ("FDD") that contains a copy of the form franchise agreement and twenty-three  
8 specific "Items" about the franchised business, including specific information about  
9 the franchisor's executives and managers, its relevant litigation history, the expected  
10 business of the franchisee, the costs and fees associated with the franchised business,  
11 the financial wellbeing of the franchisor, and the conditions in which the franchise  
12 can be terminated or renewed, among other things. 16 C.F.R. § 436.

13 The California Franchise Investment Law ("CFIL") builds upon the FTC's  
14 Amended Franchise Rule and serves as the primary vehicle for regulating the  
15 registration, offer, and sale of franchises in California. Under the CFIL, a franchisor  
16 must register a franchise application – including its current FDD – with the  
17 California Department of Business Oversight ("DBO") before a franchise can be  
18 offered or sold within the state.<sup>7</sup> Cal. Corp. Code §§ 31110, 31119. A franchisor's  
19 California registration must be renewed every year. Cal. Corp. Code § 31120. Once  
20 the franchise application is properly registered with – and approved by – the DBO,  
21 the FDD, together with copies of all proposed agreements and other exhibits, must  
22 be provided to any prospective franchisee at least 14 days before the earlier of the  
23 day the franchisee executes the franchise agreement or pays the franchisor any  
24 consideration for the franchised business. Cal. Corp. Code § 31119(a).

25 In 2013, WSC filed a franchise registration renewal for Northern California on  
26 April 19, 2013, but for unknown reasons, delayed in filing its Southern California  
27 franchise registration until June 17, 2013. Because of WSC's late Southern  
28 California franchise registration filing, it was statutorily prohibited from offering or

1 selling franchises in Southern California from April 21, 2013 to July 5, 2013, when  
2 the DBO approved of WSC's June 17, 2013. Thereafter, in 2014, WSC elected not  
3 to renew its Southern California offering, thereby precluding Services SoCal from  
4 bringing on any new franchises after April 20, 2014.

5 WSC similarly breached Section 7 by failing to promptly and diligently  
6 commence and pursue the preparation and filing of all franchise registration filings  
7 required under California law and/or the United States of America and in particular  
8 failing to maintain the registration of the Southern California FDD. WSC breached  
9 Section 10 by depriving Services SoCal of its right to offer new Windermere  
10 franchises rendering it unable to collect initial franchise fees and continuing license  
11 fees from new franchisees.

12 WSC breached Section 4.2 by failing to pay Services SoCal the termination  
13 fee – i.e. the fair market value of its interest in the Area Representation Agreement –  
14 following termination without cause.

15 WSC breached section 3 of Exhibit A by attempting to terminate the Area  
16 Representation Agreement under the pretense that Services SoCal was the  
17 “guarantor” of the franchise fees owed by the franchisees in the Southern California  
18 region. Under Section 3 of Exhibit A to the Area Representation agreement, it is  
19 specifically noted that Services SoCal would not be a guarantor.

20 WSC breached Section 2 by for failing to provide a viable “Windermere  
21 System” as defined in the agreement and discussed above. WSC breached Section 3  
22 by failing to provide servicing support in connection with the marketing, promotion  
23 and administration of the Trademark and Windermere System as described above.  
24 WSC breached Section 3 by failing to make available to Services SoCal competent  
25 “key people” necessary to assist Services SoCal in carrying out its obligations to  
26 offer and sell franchises as the Area Representative;

27 As discussed above, WSC breached Section 13 by failing to provide a  
28 technology system to support the operation and development of the franchise system



1 in Southern California, and for unilaterally increasing the technology fees to  
2 amounts that on information and belief bear no relationship to the amounts actually  
3 spent on Windermere’s technology system.

4 ***Claim 4 – Breach of the Implied Covenant of Good Faith and Fair***  
5 ***Dealing***

6 WSC breached the implied covenant of good faith and fair dealing in its Area  
7 Representation Agreement with Services SoCal by:

- 8 • Failing to provide a viable Windermere System in the Southern  
9 California region. To the extent WSC provided service or assistance, it  
10 was worthless;
- 11 • Taking action to interfere with and damage many of the relationships  
12 between Services SoCal and franchisees in the Southern California  
13 region;
- 14 • Soliciting Services SoCal’s participation in offers and sales of  
15 franchises in violation of the franchise laws;
- 16 • Making effort to acquire Services SoCal’s superior services and related  
17 technology; and
- 18 • Failing to act in good faith and conduct its business such that Plaintiffs  
19 received the benefits of being an Area Representative in the franchise  
20 system.

21 WSC’s material breaches of the Area Representation Agreement and the  
22 implied terms of that agreement constructively terminated the Area Representation  
23 Agreement during the summer of 2015.

24 ***Claim 5 – Breach of SoCal Franchise Agreement***

25 WSC breached Section 1 of the SoCal Franchise Agreement with Bennion &  
26 Deville Fine Homes SoCal, Inc. (“B&D SoCal”) and Services SoCal by failing to  
27 provide Plaintiffs with a viable “Windermere System” as defined in the agreement.  
28 WSC breached Section 3 by failing to provide the promised “guidance” to Plaintiffs

1 with respect to the “Windermere System.”

2 WSC breached Section 6 by failing to take necessary action (legal or  
3 otherwise) to prevent infringement of the Windermere trademark or the related  
4 unfair competition faced by Plaintiffs in the Southern California region as a result of  
5 the Windermere Watch websites. WSC similarly breached Section 3(A) of the  
6 Modification Agreement by failing to make commercially reasonable efforts to  
7 curtail Windermere Watch and related attacks on the Windermere brand in Southern  
8 California.

9 ***Claim 6 – Breach of the Implied Covenant of Good Faith and Fair***  
10 ***Dealing***

11 WSC breached the implied covenant of good faith and fair dealing in its  
12 SoCal Franchise Agreement with B&D SoCal and Services SoCal by:

- 13 • Failing to provide adequate technology services in return for the  
14 excessive technology fees;
- 15 • Failing to provide a viable Windermere System to the Southern  
16 California region. To the extent WSC provided service or assistance, it  
17 was worthless;
- 18 • Improperly recruiting Plaintiffs’ sales agents and other employees to  
19 join WSC and other Windermere offices;
- 20 • Terminating Services SoCal as the Area Representative for the  
21 Southern California region and thereby negating Plaintiffs’ 50%  
22 reduction in franchise fees owed to WSC under the SoCal Franchise  
23 Agreement; and
- 24 • Terminating Services SoCal as the Area Representative for the  
25 Southern California region and not providing a comparable  
26 replacement.

27 WSC constructive termination of the Area Representation Agreement (as  
28 discussed above) along with its direct breaches of the SoCal Franchise Agreement

1 justified B&D SoCal’s discontinuation of payments to WSC under the SoCal  
2 Franchise Agreement.

3 ***Claim 7 – Violation of the California Franchise Relations Act***

4 The California Franchise Relations Act (“CFRA”), at California Business &  
5 Profession Code § 20020, precludes WSC from terminating the Area Representation  
6 Agreement absent “good cause.” WSC’s termination (constructive or by written  
7 notice) of the Area Representation Agreement without good cause violated § 20020  
8 of the CFRA.

9 “Good cause shall be limited to the failure of the franchisee to substantially  
10 comply with the lawful requirements imposed upon the franchisee by the franchise  
11 agreement after being given notice at least 60 days in advance of the termination and  
12 a reasonable opportunity, which in no event shall be less than 60 days from the date  
13 of the notice of noncompliance, to cure the failure.” Cal. Bus. & Prof. Code § 20020.  
14 WSC did not fulfill the requirements of this statute for showing good cause.

15 ***Affirmative Defense 1 – Failure to State a Claim***

16 The B&D Parties have asserted failure to state a claim as an affirmative  
17 defense in order to preserve the defense for trial. The B&D Parties contend that the  
18 FACC fails to state a claim on the following grounds:

- 19 • WSC’s claim for breach of the Area Representation Agreement fails  
20 to state a claim for Services SoCal’s alleged failure to support the  
21 franchisees in its territory as WSC failed to provide (and plead) the  
22 contractual prerequisite notice and opportunity to cure WSC was  
23 required to provide to Services SoCal prior to asserting the claim;
- 24 • WSC’s claim for breach of the Modification Agreement fails to state a  
25 claim as this is not a separate contract but instead an addendum to th  
26 existing franchise agreements. Any alleged breach of the Modification  
27 Agreement should be subsumed within the franchise agreement claims  
28 and not constitute a separate claim; and

- 1           • WSC’s claim for breach of the Modification Agreement also fails to  
2           state a claim as to Services SoCal because the obligations identified in  
3           the claim are not obligations of Services SoCal nor does the FACC  
4           plead that they are.

5           ***Affirmative Defense 2, 3, and 5 – Waiver, Estoppel, and***  
6           ***Justification***

7           The B&D Parties’ affirmative defenses of waiver, estoppel and justification  
8           are predicated on the same core set of facts. Several of WSC’s claims allege that  
9           the B&D Parties failed to time pay or remit fees to WSC as required by the  
10          contracts. Over the course of the parties’ fifteen-year relationship, the payments  
11          submitted by the B&D Parties to WSC convinced with the seasonal highs and lows  
12          of the business (the summer months being a slow time for the B&D Parties’  
13          operations in the desert) and not consistent with the payment terms in the contracts.  
14          Because WSC accepted (and even encouraged) this conduct by the B&D Parties  
15          over such a protracted period of time, WSC is now precluded from contradicting  
16          this established course of conduct through its assertion of breach of contract claims  
17          to the contrary.

18          WSC is also precluded by these affirmative defenses from pursuing its  
19          breach of contract claim against Services SoCal for alleged failure to provide  
20          sufficient services to the franchisees in the Southern California region. The Area  
21          Representation Agreement governing the parties’ conduct requires WSC to provide  
22          Services SoCal advanced notice and an opportunity to cure prior to taking action  
23          for an alleged breach of the agreement. WSC did not provide any such notice or  
24          opportunity to cure and is therefore precluded from doing so now.

25          Finally, WSC’s fourth claim for breach of the Modification Agreement is  
26          barred because the B&D Parties’ departure from the Windermere system prior to  
27          the conclusion of the five-year term stated in the document was justified and was  
28          fair and reasonable in light of the symbiotic relationship between the B&D Parties’

1 franchise agreement and the Area Representation Agreement and WSC's  
2 termination (constructive or otherwise) of the Area Representation Agreement.

3 B. **WSC's Claims and Defenses:**

4 **1. WSC intends to pursue the following counterclaims against**  
5 **the B&D Parties:**

6 Counterclaim 1: Bennion & Deville Fine Homes breached the  
7 Coachella Valley Franchise Agreement with WSC

8 Counterclaim 2: Windermere Services Southern California, Inc.  
9 breached the Area Representation Agreement with  
10 WSC;

11 Counterclaim 3: Bennion and Deville Fine Homes Southern  
12 California, Inc. breached the Southern California  
13 Franchise Agreement with WSC;

14 Counterclaim 4: The B&D Parties breached the Modification  
15 Agreement with WSC;

16 Counterclaim 5: Open Book Account; and

17 Counterclaim 6: Accounting.

18 **2. WSC intends to pursue the following affirmative defenses:**

19 Affirmative Defense 1: Failure to State a Claim

20 Affirmative Defense 2: Statute of Limitations

21 Affirmative Defense 3: Third Party Actions

22 Affirmative Defense 4: Waiver

23 Affirmative Defense 5: Set-Off

24 Affirmative Defense 6: Detrimental Reliance

25 Affirmative Defense 7: Unclean Hands

26 Affirmative Defense 8: Estoppel

27 Affirmative Defense 9: Compliance with Applicable Laws

28 Affirmative Defense 10: Valid Business Purpose

1           Affirmative Defense 11: Consent

2           Affirmative Defense 12: Unjust Enrichment

3           **3.     The elements required to establish WSC's claims are:**

4           ***Claim 1: Breach of the Coachella Valley Franchise Agreement***

5           The elements for a breach of contract claim are: (1) the existence of the  
6 contract; (2) performance by WSC or excuse for nonperformance; (3) breach by  
7 Bennion & Deville Fine Homes; and (4) damages. *Wall Street Network, Ltd. v.*  
8 *New York Times Co.*, 164 Cal.App.4th 1171, 1178 (2008).

9           ***Claim 2: Breach of the Area Representation Agreement***

10          The elements for a breach of contract claim are: (1) the existence of the  
11 contract; (2) performance by WSC or excuse for nonperformance; (3) breach by  
12 Windermere Services Southern California; and (4) damages. *Wall Street Network,*  
13 *Ltd. v. New York Times Co.*, 164 Cal.App.4th 1171, 1178 (2008).

14          ***Claim 3: Breach of the Southern California Franchise Agreement***

15          The elements for a breach of contract claim are: (1) the existence of the  
16 contract; (2) performance by WSC or excuse for nonperformance; (3) breach by  
17 Bennion & Deville Fine Homes Southern California; and (4) damages. *Wall Street*  
18 *Network, Ltd. v. New York Times Co.*, 164 Cal.App.4th 1171, 1178 (2008).

19          ***Claim 4: Breach of the Modification Agreement***

20          The elements for a breach of contract claim are: (1) the existence of the  
21 contract; (2) performance by WSC or excuse for nonperformance; (3) breach by  
22 the B&D Parties; and (4) damages. *Wall Street Network, Ltd. v. New York Times*  
23 *Co.*, 164 Cal.App.4th 1171, 1178 (2008).

24          ***Claim 5: Open Book Account***

25          The elements for an open book account common claim are: (1) WSC and the  
26 B&D Parties had financial transactions; (2) WSC kept an account of the credits and  
27 debits involved in the transactions; (3) that the B&D Parties owe WSC money on  
28 the account; and (4) the amount of money the B&D Parties owe WSC. CACI  
Instruction No. 372.

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***Claim 6: Accounting***

The elements for a common claim for an accounting are: (1) Windermere Services Southern California was acting as an agent for WSC when it entered into sales transactions with franchisees and collected fees due and owing from franchisees; and (2) WSC cannot accurately ascertain the full amount due and owing from Windermere Services Southern California without reviewing the B&D Parties' books and records. *Meixner v. Wells Fargo Bank NA*, 101 F. Supp. 3d 938, 961 (E.D. Cal. 2015).

**4. The elements required to establish the B&D Parties' affirmative defenses are:**

***Affirmative Defense 1: Failure to State a Claim***

The defense of failure to state a claim may be raised in any pleading under Rule 7(a), by motion under Rule 12(c), or even at trial. Fed. R. Civ. P. 12(h)(2). *Ear v. Empire Collection Authorities, Inc.*, 2012 WL 3249514, at \*2 (N.D. Cal. Aug. 7, 2012) (observing that failure to state a claim under Rule 12(b)(6) is the “paradigmatic example of a negative defense . . . [but] is more appropriately raised in motions to dismiss rather than” pleaded in the answer like an affirmative defense). *See also, Ganley v. County of San Mateo*, 2007 WL 902551 at \*3 (N.D.Cal. Mar. 22, 2007) (treating the failure to state a claim as an affirmative defense).

***Affirmative Defense 2: Statute of Limitations***

An action on “any contract, obligation or liability founded upon an instrument in writing must be commenced within four years after accrual of the action.” Cal. Code of Civ. Proc. section 337(1). The statute of limitations begins to run upon the occurrence of the last element necessary to the cause of action. *Solomon v. North American Life and Cas. Ins. Co.*, 151 F.3d 1132, 1138 (9<sup>th</sup> Cir. 1998). Therefore, to prevail on its affirmative defense of statute of limitations, WSC must establish that the B&D Parties' claims for breach of contract accrued

1 more than four years before they filed the present action.

2 ***Affirmative Defense 3: Third Party Actions***

3 To establish its affirmative defense of third party actions, WSC must prove  
4 that third party actions, namely those of Mr. Kruger and Windermere Watch, were  
5 the proximate cause of the injury the B&D Parties alleged incurred. *Schrimsher*  
6 *v. Bryson*, 58 Cal. App. 3d 660, 664 (1976).

7 ***Affirmative Defense 4: Waiver***

8 To successfully assert the affirmative defense of waiver, WSC must prove  
9 must prove both of the following by clear and convincing evidence:

10 1. That WSC agreed to undertake commercially reasonable efforts to  
11 combat the effect of Windermere Watch on the B&D Parties' Business;

12 2. That the B&D Parties freely and knowingly agreed that WSC had  
13 taken commercially reasonable efforts to combat the effects of Windermere Watch  
14 on their business; and

15 3. That WSC detrimentally relied on the B&D Parties' agreement that all  
16 commercially reasonable efforts had been taken WSC agreed to waive fees the  
17 B&D Parties owed and extend the terms of a promissory note.

18 A waiver may be oral or written or may arise from conduct that shows that  
19 the B&D Parties gave up that right.

20 If WSC proves that the B&D Parties gave up their right to any further  
21 performance under the contracts, then WSC was not required to further perform  
22 obligations.

23 Judicial Council of California Civil Jury Instruction ("CACI") No. 336 (Dec.  
24 2015); *adidas-Am., Inc. v. Payless Shoesource, Inc.*, 546 F.Supp.2d 1029, 1074 (D.  
25 Or. 2008).

26 ***Affirmative Defense 5: Set-Off***

27 To establish its Set-Off affirmative defense, WSC will need to prove the  
28 amounts the B&D Parties owe under the Coachella Valley Franchise Agreement,



1 the Southern California Franchise Agreement, and the Modification Agreement,  
2 and offset those amounts against any alleged damages the B&D Parties incurred. 2  
3 Cal. Affirmative Def. § 44:1 (2d ed.); *Harrison v. Adams*, 20 Cal.2d 646, 648  
4 (1942); *see also Jacobson v. Persolve, LLC*, 2014 WL 4090809, at \*9 (N.D. Cal.  
5 Aug. 19, 2014).

6 ***Affirmative Defense 7: Unclean Hands***

7 To prevail on its affirmative defense of unclean hands, WSC must show that  
8 the B&D Parties did not “act fairly in the matter for which [they] seek a remedy.”  
9 *Kendall-Jackson Winery, Ltd. v. Superior Court*, 76 Cal.App.4th 970, 978 (1999);  
10 *see also Civ. Code § 3517* (“no one can take advantage of his own wrong”). If  
11 the B&D Parties did not act fairly in their performance under the agreements, they  
12 will be denied relief, regardless of the merits of their claim. *Id.*

13 ***Affirmative Defense 8: Estoppel***

14 “The elements of the doctrine” of estoppel are “that (1) the party to be  
15 estopped must be apprised of the facts; (2) he must intend that his conduct shall be  
16 acted upon, or must so act that the party asserting the estoppel has a right to believe  
17 it was so intended; (3) the other party must be ignorant of the true state of facts;  
18 and (4) he must rely upon the conduct to his injury.” *County of Los Angeles v. City*  
19 *of Alhambra*, 27 Cal. 3d 184, 196 (1980) (citing *City of Long Beach v. Mansell*, 3  
20 Cal. 3d 462, 488-89 (1970)).

21 ***Affirmative Defense 9: Compliance with Applicable Laws***

22 To prevail on this affirmative defense, WSC must prove that it substantially  
23 complied with all applicable laws, including Cal. Bus & Prof. Code section 20020  
24 *et seq.*

25 ***Affirmative Defense 10: Valid Business Purpose***

26 To prevail on its affirmative defense of valid business purpose, WSC must  
27 establish that the actions taken during and throughout its 15-year relationship with  
28 the B&D Parties occurred pursuant to and were protected by a valid business

1 purpose.

2 ***Affirmative Defense 11: Consent***

3 To prevail on its consent affirmative defense, WSC must establish that the  
4 B&D Parties consented to the actions of which they now complain. *Am. Nat. Bank*  
5 *v. Stanfill*, 205 Cal. App. 3d 1089, 1093 (1988).

6 ***Affirmative Defense 12: Unjust Enrichment***

7 To prove its affirmative defense of unjust enrichment, WSC will establish  
8 that: (1) Plaintiffs received a benefit; and (2) unjust retained that benefit at the  
9 expense of WSC. *In re ConAgra Foods Inc.*, 908 F. Supp. 2d 1090, 1113 (C.D.  
10 Cal. 2012).

11 **4. In brief, the key evidence WSC relies on for each claim and**  
12 **affirmative defense is:**

13 ***Counterclaim 1 – Breach of the Coachella Valley Franchise***  
14 ***Agreement***

15 The following evidence supports WSC’s claim that Counter-defendants  
16 breached the Coachella Valley Franchise Agreement: (1) WSC performed all of its  
17 obligations pursuant to the Coachella Valley Franchise Agreement; (2) WSSC was  
18 the area representative and services provider for BDFH, so any allegedly  
19 unsatisfactory services were being provided by WSSC rather than WSC; (3) BDFH  
20 agreed to pay WSC franchise fees, technology fees, late fees, and interest pursuant to  
21 the Coachella Valley Franchise Agreement; (4) BDFH failed and refused to pay  
22 franchise fees, technology fees, late fees, and interest since July 2014; (5) BDFH  
23 terminated the Coachella Valley Franchise Agreement on September 30, 2015; (6)  
24 the Coachella Valley Franchise Agreement expressly prohibited BDFH from  
25 continuing to use the Windermere trademark following termination of the franchise  
26 agreement; (7) following their termination of the Coachella Valley Franchise  
27 Agreement, BDFH continued to use, misuse, and misrepresent the Windermere  
28 trademark by, among other things, using the “Windermere” name in their URL and

1 using the Windermere name and logo on their blog; and (8) Bennion and Deville  
2 personally guaranteed amounts owed under the Coachella Valley Franchise  
3 Agreement.

4 ***Counterclaim 2 – Breach of the Area Representation Agreement***

5 The following evidence supports WSC’s claim that Counter-defendants  
6 breached the Area Representation Agreement: (1) WSC performed all of its  
7 obligations pursuant to the Area Representation Agreement; (2) as the area  
8 representative, WSSC was required to collect and remit franchise fees, technology  
9 fees, late fees, and interest from Southern California franchisees; (3) WSSC did not  
10 make reasonable efforts to collect franchise fees, technology fees, late fees, and  
11 interest from its related entities, BDFH and BDFH So Cal; (4) WSSC failed to  
12 provide prompt, courteous, and efficient service to Southern California Windermere  
13 franchisees; (5) WSSC failed to educate Southern California franchisees about the  
14 technology, marketing, education, and training opportunities offered by WSC; (6)  
15 WSSC prohibited WSC employees from providing training to Southern California  
16 franchisees; (7) WSSC prohibited Southern California owners from accessing  
17 technology it was providing in its role as area representative; (8) WSSC, Bennion,  
18 and Deville, were competing against other Southern California franchisees for  
19 agents and real estate listings; (9) WSC terminated the Area Representation  
20 Agreement for cause on September 30, 2015; (10) the Area Representation  
21 Agreement expressly prohibited Counter-defendants from continuing to use the  
22 Windermere trademark following termination of the franchise agreement; and (11)  
23 following the termination of the Area Representation Agreement, BDFH continued  
24 to use, misuse, and misrepresent the Windermere trademark by, among other things,  
25 using the “Windermere” name in their URL and using the Windermere name and  
26 logo on their blog.

27 ***Counterclaim 3: Breach of Southern California Franchise Agreement***

28 The following evidence supports WSC’s claim that Counter-defendants

1 breached the Southern California Franchise Agreement: (1) WSC performed all of  
2 its obligations pursuant to the Southern California Franchise Agreement; (2) WSSC  
3 was the area representative and services provider for BDFH So Cal, so any allegedly  
4 unsatisfactory services were being provided by WSSC rather than WSC; (3) BDFH  
5 So Cal agreed to pay WSC franchise fees, technology fees, late fees, and interest  
6 pursuant to the Southern California Franchise Agreement; (4) BDFH So Cal failed  
7 and refused to pay franchise fees, technology fees, late fees, and interest since July  
8 2014; (5) BDFH So Cal terminated the Southern California Franchise Agreement on  
9 September 30, 2015; (6) the Southern California Franchise Agreement expressly  
10 prohibited BDFH So Cal from continuing to use the Windermere trademark  
11 following termination of the franchise agreement; (7) following their termination of  
12 the Southern California Franchise Agreement, BDFH So Cal continued to use,  
13 misuse, and misrepresent the Windermere trademark by, among other things, using  
14 the “Windermere” name in their URL and using the Windermere name and logo on  
15 their blog; and (8) Bennion and Deville personally guaranteed amounts owed under  
16 the Southern California Franchise Agreement.

17 ***Counterclaim 4: Breach of Modification Agreement***

18 The following evidence supports WSC’s claim that Counter-defendants  
19 breached the Modification Agreement: (1) Counter-Defendants executed the  
20 Modification Agreement on December 18, 2012; (2) WSC performed all of its  
21 obligations pursuant to the Modification Agreement; (3) pursuant to the  
22 Modification Agreement, Counter-defendants agreed to remain part of the  
23 Windermere System for five years; (4) Counter-defendants terminated their  
24 franchise agreements on September 30, 2015, with more than two years remaining  
25 on the five year term of the Modification Agreement; and (5) Counter-defendants  
26 failed and refused to repay the pro-rata share of the amounts outstanding at the time  
27 they terminated their franchise agreements.

28 ***Counterclaim 5: Open Book Account***

1           The following evidence supports WSC's claim that Counter-defendants owe  
2 WSC money pursuant to an Open Book Account: (1) Pursuant to the Coachella  
3 Valley and Southern California Franchise Agreement, Counter-defendants agreed to  
4 pay monthly franchise fees, technology fees, late fees, and interest; (2) Counter-  
5 Defendants executed the Modification Agreement on December 18, 2012 pursuant  
6 to which they agreed to repay the pro-rata amount of waived fees if they left the  
7 Windermere System before December 18, 2017; (3) Counter-defendants failed to  
8 make all necessary payments under these agreements; (4) WSC accounted for all  
9 fees due and owing by Counter-Defendants; (5) Counter-defendants owe WSC a  
10 sum certain that will be proven at trial.

11                           ***Counterclaim 6: Accounting***

12           The following evidence supports WSC's claim that Counter-defendants must  
13 provide WSC with an Accounting: (1) WSSC was responsible for collecting and  
14 remitting franchise fees, technology fees, late fees, and interest from all Southern  
15 California franchisees; (2) Counter-defendants kept books and records of all their  
16 sales, all fees owed by Southern California franchisees, and all fees collected from  
17 Southern California franchisees; (3) BDFH and BDFH So Cal did not pay any  
18 franchise fees, technology fees, interest or late fees after June 2014; and (4) WSC  
19 cannot determine exactly what Counter-defendants collected or owe without  
20 reviewing their accounts and records.

21                           ***Affirmative Defense 1: Failure to State a Claim***

22           To the extent Plaintiffs' allege that WSC violated franchise law by  
23 terminating the Area Representation Agreement, their claims fails to state a claim  
24 upon which relief can be granted. The Area Representation Agreement is not a  
25 franchise agreement, and therefore, rights and responsibilities given to franchisors  
26 and franchisees under applicable statutory and case law (including without  
27 limitation Cal. Bus. & Prof. Code section 20020 *et seq.*) do not apply to the Area  
28 Representation Agreement.

1                   ***Affirmative Defense 2: Statute of Limitations***

2           To the extent Plaintiffs' claims are based on WSC's provision of the  
3 Windermere System and the quality of the technology WSC provided, those claims  
4 are barred by the applicable statute of limitations. The parties entered into the  
5 Windermere Real Estate License Agreement for Coachella Valley on August 1,  
6 2001. To the extent any of the purported breaches occurred as set forth in  
7 paragraphs 151.a., b., and c., and 158a., and a. [sic] of the FAC, which WSC  
8 maintains it has not breached any terms of that agreement, those purported  
9 breaches would have first occurred at least four years prior to the commencement  
10 of this action.

11           The parties entered into the Windermere Real Estate Services Company  
12 Area Representation Agreement for The State of California on May 1, 2004. To  
13 the extent any of the purported breaches occurred as set forth in paragraphs 163.a.,  
14 b., c., d., and i., and 170.a. of the First Amended Complaint, which WSC maintains  
15 it has not breached any terms of that agreement, those purported breaches would  
16 have first occurred at least four years prior to the commencement of this action.

17           The parties entered into the Franchise License Agreement for Bennion & Deville  
18 Fine Homes SoCal., Inc. on March 29, 2011. To the extent any of the purported  
19 breaches occurred as set forth in paragraphs 175.a., b., and c., and 181.a. and e.  
20 [sic] of the First Amended Complaint, which WSC maintains it has not breached  
21 any terms of that agreement, those purported breaches would have first occurred at  
22 least four years prior to the commencement of this action.

23           Plaintiffs testified that the technology provided by WSC never met their  
24 standards, dating back to the commencement of the relationship in 2001.  
25 Consequently, any alleged breach occurred at least more than four years before the  
26 commencement of this action.

27                   ***Affirmative Defense 3: Third Party Actions***

28           Plaintiffs allege that WSC failed to take commercially reasonable actions to

1 counteract the impact of a negative marketing campaign conducted by a  
2 disgruntled former customer, Mr. Kruger. In December 2012, WSC agreed to  
3 discharge the approximately \$1 million debt owed by Plaintiffs and to make efforts  
4 to address Mr. Kruger's activities in exchange for Plaintiffs' express contractual  
5 commitment to remain Windermere franchisees for five (5) years. These  
6 agreements were memorialized in the parties' December 18, 2012 Agreement  
7 Modifying Windermere Real Estate Franchise License Agreements.

8 In or about February 2013, the parties, including at least two outside  
9 attorneys, participated in a substantive conference call in order to address what  
10 efforts should and should not be pursued to most effectively address Mr. Kruger's  
11 activities and the Windermere Watch website. During this call, all parties,  
12 including the outside attorneys, agreed that (1) litigation would be ineffectual; and  
13 (2) no money would be paid to Mr. Kruger. Indeed, Deville was adamant that Mr.  
14 Kruger not receive a single dime from WSC. Upon group discussion and  
15 consideration, the parties agreed that the best solution was to engage in search  
16 engine optimization efforts ("SEO") to essentially "bury" or "push" the  
17 Windermere Watch website to later and less relevant search engine pages. It was  
18 then determined that for any SEO efforts to be successful, they would need to be  
19 undertaken by Plaintiffs pursuant to their own IT platforms. This was entirely  
20 appropriate given WSSC's obligations under the Area Representation Agreement.

21 Later that year, during the summer of 2013, representatives of WSC flew down to  
22 San Diego to meet with another franchisee and discuss what was being done to  
23 address Mr. Kruger and his website. Bennion and Deville also attended this  
24 meeting as they were the area representative for this franchisee. During the  
25 meeting, Deville assured the franchisee that everything that could be done was  
26 being done, but that the only practical solution/remedy was the ongoing SEO  
27 efforts. This franchisee accepted Deville's position and, in fact, remains a  
28 Windermere franchisee.

1 The balance on a personal loan taken by Bennion and Deville was due and  
2 owing in full on March 1, 2014. At about that time, Bennion and Deville requested  
3 a 36-month extension of the loan. They also claimed they had spent significant  
4 sums on SEO efforts and demanded reimbursement from WSC. In June 2014,  
5 WSC agreed, among other things, to extend the loan for 36 months and to allow  
6 Plaintiffs to take a credit of \$85,280.00 against past due franchise fees then due  
7 and owing to WSC as full reimbursement for the SEO and related Windermere  
8 Watch efforts. In exchange for these accommodations, Plaintiffs agreed, as is  
9 confirmed in June 3, 2014 correspondence, that WSC was not in breach of any  
10 obligations owed to Plaintiffs, that there was nothing more that WSC could or  
11 should be doing relative to Windermere Watch, and that Plaintiffs would bear the  
12 expense of any SEO efforts moving forward.

13 ***Affirmative Defense 4: Waiver***

14 Plaintiffs knowingly waived their claim that WSC failed to make  
15 commercially reasonable efforts to combat the effects of Windermere Watch on  
16 their business. To succeed on its Waiver affirmative defense, WSC must prove  
17 that Plaintiffs knew WSC was required to perform under the Modification  
18 Agreement, and knowingly waived any further performance. CACI Instruction  
19 No. 336.

20 In December 2012, WSC agreed to discharge the approximately \$1 million  
21 debt owed by Plaintiffs and to make efforts to address Mr. Kruger's activities in  
22 exchange for Plaintiffs' express contractual commitment to remain Windermere  
23 franchisees for five (5) years. These agreements were memorialized in the parties'  
24 December 18, 2012 Agreement Modifying Windermere Real Estate Franchise  
25 License Agreements.

26 In or about February 2013, the parties, including at least two outside  
27 attorneys, participated in a substantive conference call in order to address what  
28 efforts should and should not be pursued to most effectively address Mr. Kruger's



1 activities and the Windermere Watch website. During this call, all parties,  
2 including the outside attorneys, agreed that (1) litigation would be ineffectual; and  
3 (2) no money would be paid to Mr. Kruger. Indeed, Deville was adamant that Mr.  
4 Kruger not receive a single dime from WSC. Upon group discussion and  
5 consideration, the parties agreed that the best solution was to engage in search  
6 engine optimization efforts (“SEO”) to essentially “bury” or “push” the  
7 Windermere Watch website to later and less relevant search engine pages. After  
8 consultation with Bennion and Deville, WSC initially undertook the SEO efforts  
9 with the help of its affiliated company, Windermere Solutions. However, as a  
10 practical matter, it was soon determined that for any SEO efforts to be successful,  
11 they would need to be undertaken by the B&D Parties pursuant to their own IT  
12 platforms. This was entirely appropriate given Windermere Services Southern  
13 California, Inc.’s obligations under the Area Representation Agreement.

14 Later that year, during the summer of 2013, representatives of WSC flew  
15 down to San Diego to meet with another franchisee and discuss what was being  
16 done to address Mr. Kruger and his website. Bennion and Deville also attended  
17 this meeting as they were the area representative for this franchisee. During the  
18 meeting, Deville assured the franchisee that everything that could be done was  
19 being done, but that the only practical solution/remedy was the ongoing SEO  
20 efforts. This franchisee accepted Deville’s position and, in fact, remains a  
21 Windermere franchisee.

22 The balance on Bennion and Deville’s January 2009 \$501,000.00 personal  
23 loan was due and owing in full on March 1, 2014. At about that time, Bennion and  
24 Deville requested a 36-month extension of the loan. They also claimed they had  
25 spent significant sums on SEO efforts and demanded reimbursement from WSC.  
26 In June 2014, WSC agreed, among other things, to extend the loan for 36 months  
27 and to allow Plaintiffs to take a credit of \$85,280.00 against past due franchise fees  
28 then due and owing to WSC as full reimbursement for the SEO and related

1 Windermere Watch efforts. In exchange for these accommodations, Plaintiffs  
2 agreed, as is confirmed in June 3, 2014 correspondence, that WSC was not in  
3 breach of any obligations owed to Plaintiffs, that there was nothing more that WSC  
4 could or should be doing relative to Windermere Watch, and that Plaintiffs would  
5 bear the expense of any SEO efforts moving forward. Consequently, Plaintiffs  
6 waived any claim that WSC had not taken commercially reasonable efforts to  
7 combat the effect of Windermere Watch on their business.

8 ***Affirmative Defense 5: Set-Off***

9 The B&D Parties owe WSC over \$1.2 million dollars in unpaid fees  
10 pursuant to the agreements. Those amounts must be offset against any alleged  
11 damages the B&D Parties suffered.

12 ***Affirmative Defense 7: Unclean Hands***

13 With regard to Windermere Watch, the filing of franchise disclosure  
14 documents, and the use of WSC's trademarks following the termination of the  
15 franchise agreements, principles of fairness dictate that Plaintiffs shall not recover  
16 anything from these alleged wrongs.

17 In December 2012 WSC agreed to discharge the approximately \$1 million  
18 debt owed by Plaintiffs and to make efforts to address Mr. Kruger's activities in  
19 exchange for Plaintiffs' express contractual commitment to remain Windermere  
20 franchisees for five (5) years. These agreements were memorialized in the parties'  
21 December 18, 2012 Agreement Modifying Windermere Real Estate Franchise  
22 License Agreements.

23 In or about February 2013, the parties, including at least two outside  
24 attorneys, participated in a substantive conference call in order to address what  
25 efforts should and should not be pursued to most effectively address Mr. Kruger's  
26 activities and the Windermere Watch website. During this call, all parties,  
27 including the outside attorneys, agreed that (1) litigation would be ineffectual; and  
28 (2) no money would be paid to Mr. Kruger. Indeed, Deville was adamant that Mr.

1 Kruger not receive a single dime from WSC. Upon group discussion and  
2 consideration, the parties agreed that the best solution was to engage in search  
3 engine optimization efforts (“SEO”) to essentially “bury” or “push” the  
4 Windermere Watch website to later and less relevant search engine pages. After  
5 consultation with Bennion and Deville, WSC initially undertook the SEO efforts  
6 with the help of its affiliated company, Windermere Solutions. However, as a  
7 practical matter, it was soon determined that for any SEO efforts to be successful,  
8 they would need to be undertaken by the B&D Parties pursuant to their own IT  
9 platforms. This was entirely appropriate given Windermere Services Southern  
10 California, Inc.’s obligations under the Area Representation Agreement.

11 Later that year, during the summer of 2013, representatives of WSC flew  
12 down to San Diego to meet with another franchisee and discuss what was being  
13 done to address Mr. Kruger and his website. Bennion and Deville also attended  
14 this meeting as they were the area representative for this franchisee. During the  
15 meeting, Deville assured the franchisee that everything that could be done was  
16 being done, but that the only practical solution/remedy was the ongoing SEO  
17 efforts. This franchisee accepted Deville’s position and, in fact, remains a  
18 Windermere franchisee.

19 The balance on Bennion and Deville’s January 2009 \$501,000.00 personal  
20 loan was due and owing in full on March 1, 2014. At about that time, Bennion and  
21 Deville requested a 36-month extension of the loan. They also claimed they had  
22 spent significant sums on SEO efforts and demanded reimbursement from WSC.  
23 In June 2014, WSC agreed, among other things, to extend the loan for 36 months  
24 and to allow Plaintiffs to take a credit of \$85,280.00 against past due franchise fees  
25 then due and owing to WSC as full reimbursement for the SEO and related  
26 Windermere Watch efforts. In exchange for these accommodations, Plaintiffs  
27 agreed, as is confirmed in June 3, 2014 correspondence, that WSC was not in  
28 breach of any obligations owed to Plaintiffs, that there was nothing more that WSC

1 could or should be doing relative to Windermere Watch, and that Plaintiffs would  
2 bear the expense of any SEO efforts moving forward.

3 With regard to the registration of the 2013 and 2014 FDDs for Southern  
4 California, the California Department of Business Oversight would not approve the  
5 renewal of WSC's Southern California registration without audited financial  
6 statements from WSC's Area Representative, Windermere Services Southern  
7 California, Inc. In 2013 and 2014, Windermere Services Southern California, Inc.  
8 did not provide its audited financial statements on a timely basis despite repeated  
9 requests from WSC. Accordingly, delays in submitting the renewal franchise  
10 applications for Southern California in 2013 and 2014 were due, at least in part, to  
11 Windermere Services Southern California, Inc.'s failure to timely provide its  
12 audited financial statements.

13 Finally, Plaintiffs continued to use, misuse, and misappropriate WSC's  
14 trademarks after they terminated the franchise agreements. WSC made multiple  
15 demands that Plaintiffs cease and desist their misuse of WSC trademarks, but  
16 Plaintiffs continued to misuse the marks in direct contravention of the express  
17 requirements of the franchise agreements.

18 ***Affirmative Defense 8: Estoppel***

19 Plaintiffs agreed that all commercially efforts had been taken to combat the  
20 effects of Windermere Watch, and any delay in filing required franchise disclosure  
21 documents was caused by Plaintiffs' failure to timely provide audited financial  
22 statements. Consequently, Plaintiffs are estopped from seeking any damages  
23 regarding either Windermere Watch or franchise disclosure documents.

24 In December 2012 WSC agreed to discharge the approximately \$1 million  
25 debt owed by Plaintiffs and to make efforts to address Mr. Kruger's activities in  
26 exchange for Plaintiffs' express contractual commitment to remain Windermere  
27 franchisees for five (5) years. These agreements were memorialized in the parties'  
28 December 18, 2012 Agreement Modifying Windermere Real Estate Franchise

1 License Agreements.

2 In or about February 2013, the parties, including at least two outside  
3 attorneys, participated in a substantive conference call in order to address what  
4 efforts should and should not be pursued to most effectively address Mr. Kruger's  
5 activities and the Windermere Watch website. During this call, all parties,  
6 including the outside attorneys, agreed that (1) litigation would be ineffectual; and  
7 (2) no money would be paid to Mr. Kruger. Indeed, Deville was adamant that Mr.  
8 Kruger not receive a single dime from WSC. Upon group discussion and  
9 consideration, the parties agreed that the best solution was to engage in search  
10 engine optimization efforts ("SEO") to essentially "bury" or "push" the  
11 Windermere Watch website to later and less relevant search engine pages. After  
12 consultation with Bennion and Deville, WSC initially undertook the SEO efforts  
13 with the help of its affiliated company, Windermere Solutions. However, as a  
14 practical matter, it was soon determined that for any SEO efforts to be successful,  
15 they would need to be undertaken by the B&D Parties pursuant to their own IT  
16 platforms. This was entirely appropriate given Windermere Services Southern  
17 California, Inc.'s obligations under the Area Representation Agreement.

18 Later that year, during the summer of 2013, representatives of WSC flew  
19 down to San Diego to meet with another franchisee and discuss what was being  
20 done to address Mr. Kruger and his website. Bennion and Deville also attended  
21 this meeting as they were the area representative for this franchisee. During the  
22 meeting, Deville assured the franchisee that everything that could be done was  
23 being done, but that the only practical solution/remedy was the ongoing SEO  
24 efforts. This franchisee accepted Deville's position and, in fact, remains a  
25 Windermere franchisee.

26 The balance on Bennion and Deville's January 2009 \$501,000.00 personal  
27 loan was due and owing in full on March 1, 2014. At about that time, Bennion and  
28 Deville requested a 36-month extension of the loan. They also claimed they had

1 spent significant sums on SEO efforts and demanded reimbursement from WSC.  
2 In June 2014, WSC agreed, among other things, to extend the loan for 36 months  
3 and to allow Plaintiffs to take a credit of \$85,280.00 against past due franchise fees  
4 then due and owing to WSC as full reimbursement for the SEO and related  
5 Windermere Watch efforts. In exchange for these accommodations, Plaintiffs  
6 agreed, as is confirmed in June 3, 2014 correspondence, that WSC was not in  
7 breach of any obligations owed to Plaintiffs, that there was nothing more that WSC  
8 could or should be doing relative to Windermere Watch, and that Plaintiffs would  
9 bear the expense of any SEO efforts moving forward.

10 With regard to the registration of the 2013 and 2014 FDDs for Southern  
11 California, the California Department of Business Oversight would not approve the  
12 renewal of WSC's Southern California registration without audited financial  
13 statements from WSC's Area Representative, Windermere Services Southern  
14 California, Inc. In 2013 and 2014, Windermere Services Southern California, Inc.  
15 did not provide its audited financial statements on a timely basis despite repeated  
16 requests from WSC. Accordingly, any delay in submitting the renewal franchise  
17 applications for Southern California in 2013 and 2014 was due to Windermere  
18 Services Southern California, Inc.'s failure to timely provide its audited financial  
19 statements.

20 ***Affirmative Defense 9: Compliance with Applicable Laws***

21 WSC substantially complied with all applicable laws with respect to the  
22 various franchise disclosure filings alleged in Plaintiffs' FAC, including without  
23 limitation Cal. Bus. & Prof. Code § 20020 et seq.

24 ***Affirmative Defense 10: Valid Business Purpose***

25 WSC believes that much of its conduct occurring during and throughout its  
26 15-year relationship with Plaintiffs including, but not limited to, the marketing and  
27 sale of franchises in the Southern California Region, its interactions with third  
28 parties such as third-party franchisees in the Southern California Region as well as

1 individuals like Gary Kruger, its administrative and regulatory functioning, and its  
2 direct interactions and various agreements with Plaintiffs, occurred pursuant to and  
3 protected by a valid business purpose.

4 ***Affirmative Defense 11: Consent***

5 When a Plaintiff consents to the action of which they now complain, they  
6 will be estopped from claiming that action breached any duty owed by the  
7 defendant. *Am. Nat. Bank v. Stanfill*, 205 Cal. App. 3d 1089, 1093 (Ct. App.  
8 1988). Plaintiffs consented to the actions taken in response to Mr. Kruger's  
9 negative marketing campaign, and consequently are now estopped from arguing  
10 they were somehow damaged by the very conduct they previously consented to. In  
11 December 2012 WSC agreed to discharge the approximately \$1 million debt owed  
12 by Plaintiffs and to make efforts to address Mr. Kruger's activities in exchange for  
13 Plaintiffs' express contractual commitment to remain Windermere franchisees for  
14 five (5) years. These agreements were memorialized in the parties' December 18,  
15 2012 Agreement Modifying Windermere Real Estate Franchise License  
16 Agreements.

17 In or about February 2013, the parties, including at least two outside  
18 attorneys, participated in a substantive conference call in order to address what  
19 efforts should and should not be pursued to most effectively address Mr. Kruger's  
20 activities and the Windermere Watch website. During this call, all parties,  
21 including the outside attorneys, agreed that (1) litigation would be ineffectual; and  
22 (2) no money would be paid to Mr. Kruger. Indeed, Deville was adamant that Mr.  
23 Kruger not receive a single dime from WSC. Upon group discussion and  
24 consideration, the parties agreed that the best solution was to engage in search  
25 engine optimization efforts ("SEO") to essentially "bury" or "push" the  
26 Windermere Watch website to later and less relevant search engine pages. After  
27 consultation with Bennion and Deville, WSC initially undertook the SEO efforts  
28 with the help of its affiliated company, Windermere Solutions. However, as a

1 practical matter, it was soon determined that for any SEO efforts to be successful,  
2 they would need to be undertaken by the B&D Parties pursuant to their own IT  
3 platforms. This was entirely appropriate given Windermere Services Southern  
4 California, Inc.'s obligations under the Area Representation Agreement.

5 Later that year, during the summer of 2013, representatives of WSC flew  
6 down to San Diego to meet with another franchisee and discuss what was being  
7 done to address Mr. Kruger and his website. Bennion and Deville also attended  
8 this meeting as they were the area representative for this franchisee. During the  
9 meeting, Deville assured the franchisee that everything that could be done was  
10 being done, but that the only practical solution/remedy was the ongoing SEO  
11 efforts. This franchisee accepted Deville's position and, in fact, remains a  
12 Windermere franchisee.

13 The balance on Bennion and Deville's January 2009 \$501,000.00 personal  
14 loan was due and owing in full on March 1, 2014. At about that time, Bennion and  
15 Deville requested a 36-month extension of the loan. They also claimed they had  
16 spent significant sums on SEO efforts and demanded reimbursement from WSC.  
17 In June 2014, WSC agreed, among other things, to extend the loan for 36 months  
18 and to allow Plaintiffs to take a credit of \$85,280.00 against past due franchise fees  
19 then due and owing to WSC as full reimbursement for the SEO and related  
20 Windermere Watch efforts. In exchange for these accommodations, Plaintiffs  
21 agreed, as is confirmed in June 3, 2014 correspondence, that WSC was not in  
22 breach of any obligations owed to Plaintiffs, that there was nothing more that WSC  
23 could or should be doing relative to Windermere Watch, and that Plaintiffs would  
24 bear the expense of any SEO efforts moving forward.

25 ***Affirmative Defense 12: Unjust Enrichment***

26 Plaintiffs consented to the actions taken in response to Mr. Kruger's  
27 negative marketing campaign, and consequently are now estopped from arguing  
28 they were somehow damaged by the very conduct they previously consented to. In



1 December 2012 WSC agreed to discharge the approximately \$1 million debt owed  
2 by Plaintiffs and to make efforts to address Mr. Kruger's activities in exchange for  
3 Plaintiffs' express contractual commitment to remain Windermere franchisees for  
4 five (5) years. These agreements were memorialized in the parties' December 18,  
5 2012 Agreement Modifying Windermere Real Estate Franchise License  
6 Agreements.

7 In or about February 2013, the parties, including at least two outside  
8 attorneys, participated in a substantive conference call in order to address what  
9 efforts should and should not be pursued to most effectively address Mr. Kruger's  
10 activities and the Windermere Watch website. During this call, all parties,  
11 including the outside attorneys, agreed that (1) litigation would be ineffectual; and  
12 (2) no money would be paid to Mr. Kruger. Indeed, Deville was adamant that Mr.  
13 Kruger not receive a single dime from WSC. Upon group discussion and  
14 consideration, the parties agreed that the best solution was to engage in search  
15 engine optimization efforts ("SEO") to essentially "bury" or "push" the  
16 Windermere Watch website to later and less relevant search engine pages. After  
17 consultation with Bennion and Deville, WSC initially undertook the SEO efforts  
18 with the help of its affiliated company, Windermere Solutions. However, as a  
19 practical matter, it was soon determined that for any SEO efforts to be successful,  
20 they would need to be undertaken by the B&D Parties pursuant to their own IT  
21 platforms. This was entirely appropriate given Windermere Services Southern  
22 California, Inc.'s obligations under the Area Representation Agreement.

23 Later that year, during the summer of 2013, representatives of WSC flew  
24 down to San Diego to meet with another franchisee and discuss what was being  
25 done to address Mr. Kruger and his website. Bennion and Deville also attended  
26 this meeting as they were the area representative for this franchisee. During the  
27 meeting, Deville assured the franchisee that everything that could be done was  
28 being done, but that the only practical solution/remedy was the ongoing SEO

1 efforts. This franchisee accepted Deville's position and, in fact, remains a  
2 Windermere franchisee.

3 The balance on Bennion and Deville's January 2009 \$501,000.00 personal  
4 loan was due and owing in full on March 1, 2014. At about that time, Bennion and  
5 Deville requested a 36-month extension of the loan. They also claimed they had  
6 spent significant sums on SEO efforts and demanded reimbursement from WSC.  
7 In June 2014, WSC agreed, among other things, to extend the loan for 36 months  
8 and to allow Plaintiffs to take a credit of \$85,280.00 against past due franchise fees  
9 then due and owing to WSC as full reimbursement for the SEO and related  
10 Windermere Watch efforts. In exchange for these accommodations, Plaintiffs  
11 agreed, as is confirmed in June 3, 2014 correspondence, that WSC was not in  
12 breach of any obligations owed to Plaintiffs, that there was nothing more that WSC  
13 could or should be doing relative to Windermere Watch, and that Plaintiffs would  
14 bear the expense of any SEO efforts moving forward.

15 Plaintiffs were unjustly enriched by the agreement in June 2014. WSC  
16 agreed to extend the term of the \$501,000 personal loan and allowed Plaintiffs to  
17 take a credit of \$85,280 in fees to offset the costs of their SEO efforts, all in  
18 exchange for Plaintiffs' agreements that WSC had fulfilled its contractual  
19 obligations as it relates to Mr. Kruger's negative marketing campaign.

20 **VIII. Evidence of Issues Remaining To Be Tried**

21 **The B&D Parties' Statement**

22 The B&D Parties reserve all rights to amend the following pending the  
23 outcome of pending motions and/or the resolution of any motions in limine:

- 24 1. Whether the B&D Parties can prove by a preponderance of the evidence  
25 that WSC failed to provide the "variety of services";
- 26 2. Whether the B&D Parties can prove by a preponderance of the evidence  
27 that WSC failed to provide a viable "Windermere System";
- 28 3. Whether the B&D Parties can prove by a preponderance of the evidence

1 that WSC failed to take necessary action to prevent infringement of the Windermere  
2 trademark by Windermere Watch;

3 4. Whether the B&D Parties can prove by a preponderance of the evidence  
4 that WSC failed to make “commercially reasonable” efforts to curtail Windermere  
5 Watch’s negative marketing campaign;

6 5. Whether WSC has waived or is otherwise precluded from pursuing the  
7 liquidated damages provided for in Section 3(F) of the Modification Agreement in  
8 light of its breaches of the franchise agreements and Area Representation  
9 Agreement;

10 6. Whether the B&D Parties can prove by a preponderance of the evidence  
11 that WSC failed to provide adequate technology to the franchisees in the Southern  
12 California region;

13 7. Whether the B&D Parties can prove by a preponderance of the evidence  
14 that WSC improperly recruited employees and sales agents of the B&D Parties;

15 8. Whether the B&D Parties can prove by a preponderance of the evidence  
16 that WSC improperly terminated the Area Representation Agreement without proper  
17 notice;

18 9. Whether WSC provided a comparable area representative for the  
19 Southern California region after terminating Services SoCal’s status as the area  
20 representative;

21 10. Whether the B&D Parties can prove by a preponderance of the evidence  
22 that WSC failed to provide Services SoCal with the uninterrupted right to offer  
23 Windermere franchises in Southern California;

24 11. Whether the B&D Parties can prove by a preponderance of the evidence  
25 that WSC failed to timely register the Southern California Franchise Disclosure  
26 Document following receipt of Services SoCal’s audited financials in July 2014;

27 12. Whether the B&D Parties can prove by a preponderance of the evidence  
28 that WSC failed to provide adequate servicing support in connection with the

1 marketing, promotion, and administration of the Windermere name and system;

2 13. Whether the B&D Parties can prove by a preponderance of the evidence  
3 that WSC failed to make available competent “key people” necessary to assist  
4 Services SoCal in carrying out its obligations under the Area Representation  
5 Agreement;

6 14. Whether the B&D Parties can prove by a preponderance of the evidence  
7 that WSC terminated the Area Representation Agreement without cause, and in  
8 doing so, was obligated to pay Services SoCal the fair market value of that business;

9 15. Whether the B&D Parties can prove by a preponderance of the evidence  
10 that WSC failed to promptly and diligently commence and pursue the preparation  
11 and filing of all franchise registration filings required under California and/or federal  
12 law;

13 16. Whether the B&D Parties can prove by a preponderance of the evidence  
14 that WSC failed to provide a technology system that could support the development  
15 of the franchise network in Southern California;

16 17. Whether the B&D Parties can prove by a preponderance of the evidence  
17 that WSC’s termination of the Area Representations Agreement was done under the  
18 pretense that Services SoCal was the guarantor of the franchise fees owed by the  
19 franchisees in Southern California region;

20 18. Whether the B&D Parties can prove by a preponderance of the evidence  
21 that WSC interfered with the relationships between Services SoCal and Windermere  
22 franchisees within the Southern California region;

23 19. Whether the B&D Parties can prove by a preponderance of the evidence  
24 that WSC solicited the Service SoCal to participate in conduct that violated  
25 California’s franchise laws;

26 20. Whether the B&D Parties can prove by a preponderance of the evidence  
27 that WSC was surreptitiously engaged in efforts to acquire the B&D Parties’  
28 superior services and technology;

1           21. Whether the B&D Parties can prove by a preponderance of the evidence  
2 that WSC failed to act in good faith and to conduct its business such that Services  
3 SoCal received the benefit of being an area representative of WCS;

4           22. Whether the B&D Parties can prove by a preponderance of the  
5 evidence that WSC violated the CFRA by terminating (or taking action to terminate)  
6 the Area Representation Agreement without cause;

7           23. Whether the B&D Parties can prove by a preponderance of the evidence  
8 that they were justified in terminating the franchise agreement in light of WSC's  
9 termination of the Area Representation Agreement;

10          24. Whether the B&D Parties were commercially justified in discontinuing  
11 all association with the Windermere mark after September 30, 2015;

12          25. Whether the B&D Parties were justified in discontinuing payment  
13 under the franchise agreements in light of WSC's conduct;

14          26. Whether the B&D Parties are entitled to attorneys' fees and costs as  
15 provided for in the contracts;

16           **WSC's Statement**

17          WSC reserves the right to amend and supplement the following pending  
18 outcome of any pending motions and/or motions in limine:

19           1. Whether WSC can prove by a preponderance of the evidence that it  
20 performed its obligations under the Coachella Valley Franchise  
21 Agreement, or was excused by performance;

22           2. Whether WSC can prove by a preponderance of the evidence that the  
23 B&D Parties breached their obligation to, among other things, pay  
24 franchise fees pursuant to the Coachella Valley Franchise Agreement;

25           3. The amount of damage WSC incurred pursuant to the B&D Parties  
26 breach of the Coachella Valley Franchise Agreement;

27           4. Whether WSC can prove by a preponderance of the evidence that it  
28 performed its obligations under the Area Representation Agreement, or

1 was excused by performance;

2 5. Whether WSC can prove by a preponderance of the evidence that the  
3 B&D Parties breached their obligations pursuant to the Area  
4 Representation Agreement;

5 6. The amount of damage WSC incurred pursuant to the B&D Parties  
6 breach of the Area Representation Agreement;

7 7. Whether WSC can prove by a preponderance of the evidence that it  
8 performed its obligations under the Southern California Franchise  
9 Agreement, or was excused by performance;

10 8. Whether WSC can prove by a preponderance of the evidence that the  
11 B&D Parties breached their obligation to, among other things, pay  
12 franchise fees pursuant to the Southern California Franchise  
13 Agreement;

14 9. The amount of damage WSC incurred pursuant to the B&D Parties  
15 breach of the Southern California Franchise Agreement;

16 10. Whether WSC can prove by a preponderance of the evidence that it  
17 performed its obligations under the Modification Agreement, or was  
18 excused by performance;

19 11. Whether WSC can prove by a preponderance of the evidence that the  
20 B&D Parties breached their obligations pursuant to the Modification  
21 Agreement;

22 12. The amount of damage WSC incurred pursuant to the B&D Parties  
23 breach of the Modification Agreement;

24 13. Whether WSC is entitled to an accounting of all fees received and paid  
25 by Windermere Services Southern California during the term of the  
26 Area Representation Agreement;

27 14. Whether WSC can prove by a preponderance of the evidence that the  
28 B&D Parties waived any claim that WSC failed to take commercially

1 reasonable efforts to curtail the negative marketing campaign of  
2 Windermere Watch;

3 15. Whether WSC was entitled to terminate the Area Representation  
4 Agreement for cause based on the B&D Parties' failure to collect and  
5 remit all franchise fees owed by franchisees in their area;

6 16. Whether WSC was entitled to terminate the Area Representation  
7 Agreement for cause based on the B&D Parties' failure to provide  
8 adequate services to franchisees in their area;

9 17. Whether WSC can prove by a preponderance of the evidence that some  
10 or all of Plaintiffs' claims are barred by the applicable statutes of  
11 limitation;

12 18. Whether the Area Representation Agreement was a franchise  
13 agreement; and

14 19. Whether WSC is entitled to attorneys' fees and costs as provided in the  
15 agreements.

16 **IX. Statements Regarding Discovery**

17 **Expert discovery is not complete. The parties anticipate the taking of**  
18 **expert depositions through the month of September 2016.**

19 **The B&D Parties are also pursuing a motion to compel discovery and**  
20 **request for sanctions in light of WSC's failure to produce responsive materials**  
21 **and failure to comply with the Court's order compelling the production of**  
22 **such documents. [See D.E. 46.]**

23 **X. Disclosures And Exhibits**

24 All disclosures under F.R.Civ.P.26(a)(3) have been made. The parties have  
25 agreed to available at trial all of their respective employees that have been  
26 identified in the witness lists filed with the Court.

27 The parties' have filed unilateral exhibits lists and are working on a  
28 combined joint exhibit list. The joint exhibit list will be filed upon the conclusion

1 of expert discovery. Unless all parties agree that an exhibit shall be withdrawn, all  
 2 exhibits will be admitted without objection at trial except those exhibits identified  
 3 by the parties below:

4 **The B&D Parties object to WSC's following proposed trial exhibits:**

Ex.	Description	Objections
600.	First Amended Counterclaim by Defendant and Counterclaimant Windermere Real Estate Services Company for Damages and Injunctive Relief	Fed. R. Evid. 801, 802. <sup>1</sup>
601.	Answer of Defendant Windermere Real Estate Services Company to Plaintiffs' First Amended Complaint	801, 802
602.	Declaration of Robert Sherrell in Support of Counterclaimant Windermere Real Estate Services Company's Ex Parte Application for Temporary Restraining Order and Order to Show Cause re: Preliminary Injunction	801, 802
603.	Supplemental Declaration of Robert Sherrell in Support of Counterclaimant Windermere Real Estate Services Company's Ex Parte Application for Temporary Restraining Order and Order to Show Cause re: Preliminary Injunction	801, 802
604.	Screen shot of WHOIS website reflecting ownership of windermeresocal.com as of November 3, 2015 (Ex. B to Supplemental Declaration of Robert Sherrell in Support of Counterclaimant	602, 801, 802, 901

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 28 <sup>1</sup> Unless otherwise stated, all rules identified below reflect the Federal Rules of Evidence.



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	Windermere Real Estate Services Company's Ex Parte Application for Temporary Restraining Order and Order to Show Cause re: Preliminary Injunction)	
605.	Expert Report of David Holmes	602, 901
606.	Materials Relied Upon by David Holmes	602, 901
607.	Expert Report of Neil Beaton	602, 901
608.	Materials Relied Upon by Neil Beaton	602, 901
609.	Franchise Fee Proposal Windermere Real Estate Coachella Valley (Ex. 21 to Deville Deposition)	602, 801, 802, 901
610.	Excel Spreadsheet re Fees Reported by Windermere Services Southern California, Inc. 1/2012 – 9/2015 (WSC055606-056485)	403, 401, 402, 602, 611(a), 901
612.	Letter from Geoff Wood (WSC 1633)	602, 801, 802, 901
616.	Hard Copy Materials from WSC's WORC Site (WSC02609-11690)	401, 403, 611(a), 602, 901
624.	11/10/2003 Memo from Geoff Wood to Bob Bennion and Bob Deville re Southern California (SoCal) Services Agreement (WSC 1963-1964)	801, 802, 805
625.	12/30/2003 Email from Maria Bunting to Bennion and Deville re Answer to you 10/23/03 memo (Ex. 35 to Deville Deposition)	801, 802, 805
640.	10/5/2006 Letter from Washington Loan Company to Bennion & Deville Fines Homes, Inc. (Ex. 38 to Deville Deposition)	401, 402, 403
641.	12/14/2006 Email from David Odom re Agenda for our meeting next Monday (WSC 27)	401, 402, 403, 801, 802, 602, 901
642.	1/25/2007 Email from Lansing Teal re Bennion mtg synopsis (WSC 25-26)	401, 402, 403, 801, 802, 805, 602, 901

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643.	2/23/2007 Email from Lansing Teal re Coachella Valley (WSC 24)	401, 402, 403, 801, 802
644.	3/7/2007 Email from Lansing Teal re Coachella Valley & Services SoCA followup (WSC 41-42)	401, 402, 403, 801, 802
645.	4/12/2007 Email from Bob Bennion (WSC 43)	401, 402, 403, 602, 901
652.	2/14/2008 Letter from Geoff Wood re Fee accommodation for 2008 (WSC13697)	801, 802, 805
653.	5/1/2008 Memorandum re Gary Kruger (WSC 1637-1638)	801, 802, 805
654.	11/17/2008 Letter from Paul Drayna to Joseph R. Deville (Ex. 27 to Deville Deposition)	602, 801, 802, 901
657.	1/13/2009 Loan Agreement (Ex. 39 to Deville Deposition)	401, 402, 403
658.	1/13/2009 Promissory Note (Ex. 40 to Deville Deposition)	401, 402, 403
659.	1/13/2009 Assignment Agreement (Ex. 41 to Deville Deposition)	401, 402, 403
660.	1/13/2009 Security Agreement All Personal Property Assets (Ex. 42 to Deville Deposition)	401, 402, 403
662.	4/15/2009 Email from Bob Deville re SOCal UFDD (B&D0019553-0019557)	801, 802, 805
664.	12/21/2009 Email from Don Riley to Bob Deville re Windermere CV (Ex. 31 to Deville Deposition)	401, 402, 403, 801, 802, 805
667.	2/16/2011 Loan Agreement (Ex. 43 to Deville Deposition)	401, 402, 403
668.	2/16/2011 Promissory Note – Line of Credit (Ex. 44 to Deville Deposition)	401, 402, 403
669.	2/16/2011 Assignment Agreement (Ex.	401, 402, 403

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	45 to Deville Deposition)	
670.	2/16/2011 Security Agreement All Personal Property Assets (Ex. 46 to Deville Deposition)	401, 402, 403
673.	6/17/2011 Email from Bob Deville to Robert Sunderland and Tim Pestotnik re FW: Windermere data (w/ attachment)	801, 802, 805
677.	4/11/2012 Email from Kendra Vita re WLC – So-Cal LOC Loan (Ex. 47 to Deville Deposition)	401, 402, 403, 801, 802, 805
678.	4/25/2012 Email from Tim Pestotnik re Payments (WSC046084-046086)	801, 802, 805
679.	5/7/2012 Email from Kendra Vita re payment for Washington loan company (Ex. 48 to Deville Deposition)	401, 402, 403, 801, 802, 805
681.	5/25/2012 Email from Mary Lynn Thompson re: Weekly Update – Owners Retreat (WSC015061)	401, 402, 801, 802
682.	5/29/2012 Email from Geoff Wood re Yesterday’s meeting (WSC015070-015071)	801, 802, 805
683.	6/15/2012 Email from Geoff Wood re Yesterday’s meeting (WSC015317-015319)	801, 802, 805
684.	6/21/2012 Email from Kenra Vita re WLC – So-Cal Loan (Ex. 49 to Deville Deposition)	401, 402, 403
686.	8/29/2012 Email from Kendra Vita re Note – WA Loan Co./B&D (WSC0057312-0057315)	401, 402, 403, 801, 802
687.	8/30/2012 Email from Kendra Vita re	401, 402, 403

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	Washington Loan Payment (WSC00573318)	
688.	9/25/2012 Email from Kendra Vita re ADDL MONIES DUE (WSC0057325-0057326)	401, 402, 403
689.	10/11/2012 Email from Kendra Vita re WLC Payment (Ex. 50 to Deville Deposition)	401, 402, 403, 801, 802
691.	11/2/2012 Email from Geoff Wood re Dialogue (WSC015899)	801, 802
693.	11/6/2012 Email from Paul Quinn re Email Blocks (WSC015909)	801, 802
695.	11/7/2012 Email from Paul Quinn re Email Blocks (WSC015970-015972)	801, 802
696.	11/8/2012 Email from Paul Quinn re SoCal Exchange/email block question (WSC015992-015993)	801, 802
697.	11/15/2012 Email from Geoff Wood re Phone call (WSC016387)	801, 802
698.	11/27/2012 Email from Geoff Wood (WSC016577)	801, 802
701.	12/7/2012 Email from Geoff Wood re License Agreement Addendum (WSC016624)	801, 802
703.	12/17/2012 Email from Pau Drayna re Finalizing the paperwork (B&D0001152-0001153)	801, 802, 805
706.	1/3/2013 Email from Patrick Robinson re Welcome Julia Jordan, and here come the UFDD's (B&D0016387-	801, 802, 805

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707.	1/8/2013 Email from Bob Deville re Bill Toth (B&D0001119-0001121)	801, 802, 805
708.	1/14/2013 Email from Robert Bennion re Conference Call (WSC053020)	801, 802, 805
709.	1/14/2013 Email from Paul Drayna re Conference Call (B&D0022635-0022636)	801, 802, 805
711.	1/24/2013 Email from Bob Deville re Yesterday's meeting (B&D0003155-0003158)	801, 802, 805
714.	3/18/2013 Email from Bob Deville re Brea Termination (B&D0003092-0003096)	801, 802, 805
715.	3/21/2013 Email from Geoff Wood (WSC017357)	401, 402, 403, 801, 802
717.	3/27/2013 Email from Bob Deville re Brea Termination (B&D0003058-0003062)	801, 802, 805
718.	3/27/2013 Email from Paul Drayna re Brea Termination (B&D0002563-0002567)	801, 802, 805
719.	4/11/2013 Email from Geoff Wood re Update (WSC017418)	801, 802
721.	4/22/2013 Email from Noelle Bortfeld re Winder Watch Mtg. (WSC017438)	801, 802
722.	5/8/2013 Email from Nellie DeBruyn re Bennion & Deville CoCal LOC – UPDATE (WSC024633-024634)	401, 402, 403, 801, 802
724.	7/3/2013 Email from Paul Drayna re	801, 802, 805

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	Santaluz License Agreement (WSC043596-043612)	
725.	7/4/2013 Letter from Richard Johnson (WSC13740-13760)	801, 802, 805
730.	8/1/2013 Email from Bob Deville re Fees for 2013 UFDD (B&D0002900- 0002903)	801, 802, 805
731.	8/27/2013 Email from Geoff Wood re Meeting (WSC018972)	801, 802
733.	10/1/2013 Email from York Baur re great meeting you (B&D0022896)	801, 802, 805
734.	10/3/2013 Email from Fred Schuster to Shelley Rossi, Rich Johnson, Brian Gooding, Bob Deville and Bob Bennion re Re: Windermere Watch Letter	801, 802, 805
735.	10/3/2013 Letter from Shelly Rossi to Rich Johnson, Brian Gooding, Bob Deville, Fred Schuster and Bob Bennion re Windermere Watch Letter	801, 802, 805
738.	11/18/2013 Email from Bob Deville re Email Migration Update Message (WSC019822-019827)	801, 802, 805
739.	11/18/2013 Email from OB Jacobi re Email Migration Update Message (B&D0000910-0000916)	801, 802, 805
741.	12/17/2013 Email from Paul Quinn re Accounts Staying with windermere.com (WSC020122-020124)	801, 802, 805
744.	1/16/2014 Email from Geoff Wood re Advertising in the Puget Sound Business Journal (Ex. 53 to Deville	801, 802

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	Deposition)	
748.	3/3/2014 Letter from Geoff, Jill and OB to Bennion & Deville (Ex. 55 to Deville Deposition)	801, 802, 805
750.	4/10/2014 Email from Robert Sunderland re B&D (B&D0000751-0000753)	401, 402, 403
754.	6/3/2014 Email from Paul Drayna re Amendment to promissory note (Ex. 57 to Deville Deposition)	401, 402, 403, 801, 802, 805
757.	6/10/2014 Email from Paul Drayna re Amendment to promissory note (WSC 1674-1678)	401, 402, 403
758.	6/18/2014 Email from Fred Schuster re Checking in (WSC026467-026468)	801, 802, 805
761.	7/23/2014 Email from Fred Schuster to Mike Teather re Updated Social numbers	801, 802
762.	7/23/2014 Email from Fred Schuster to Mike Teather re Follow-up info	801, 802
763.	7/24/2014 Email from Fred Schuster to Mike Teather re Follow up	801, 802
767.	8/27/2014 Email from Paul Drayna re Draft documents (WSC039899-039909)	401, 402, 403, 801, 802
768.	9/9/2014 Email from OB Jacobi to Fred Schuster re Re: Social Update	801, 802, 805
769.	9/10/2014 Email from Robert Sunderland re Draft documents (WSC039923-039924)	401, 402, 403, 801, 802, 805
770.	9/22/2014 Email from Paul Drayna re	401, 402, 403, 801,

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	Draft documents (WSC039925-039927)	802, 805
771.	9/23/2014 Email from Paul Drayna re Updated Financials (WSC039928-039930)	801, 802, 805
772.	9/24/2014 Email from Paul Drayna re JFF accounting (WSC039934-039938)	401, 402, 403, 801, 802, 805
774.	10/1/2014 Email from Robert Sunderland re JFF accounting (WSC039939-039948)	401, 402, 403
775.	10/1/2014 Email from Robert Sunderland re JFF accounting (WSC039952-039957)	401, 402, 403
776.	10/2/2014 Email from Paul Drayna re JFF accounting (WSC039958-039964)	401, 402, 403
778.	10/3/2014 Email from Robert Sunderland re JFF accounting (WSC039970-039975)	401, 402, 403
779.	10/3/2014 Amendment to Promissory Note (Ex. 58 to Deville Deposition)	401, 402, 403
781.	10/6/2014 Email from Mike Teather to Bob Deville, Bob Bennion, Rich Johnson, Brian Gooding and Fred Schuster re Meeting Notes	801, 802
795.	11/4/2014 Email from Mike Teather to Bob Deville, Bob Bennion, Rich Johnson, Briand Gooding and Fred Schuster re RE: SoCal	801, 802
796.	11/7/2014 Union Tribune Article re Windermere Real Estate Southern California Poised for Continued Growth	602, 901
797.	11/9/2014 Email from Fred Schuster re	801, 802



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	Windermere Social advertisements (WSC029374)	
801.	12/22/2014 Email from Mike Teather re CDAR Sweep (B&D0003277-0003279)	801, 802, 805
805.	1/22/2015 Email from Mike Teather re Southern California Services (WSC033077-033078)	801, 802
808.	1/26/2015 Email from Mike Teather re Bob's (WSC033194)	801, 802
809.	1/27/2015 Email from Mike Teather re Response (WSC033228)	801, 802
811.	1/28/2015 Email from Rich Johnson to Mike Teather re Re: Newspaper article – Social	801, 802
812.	1/28/2015 Email from Brian Gooding to Fred Schuster re Re: Newspaper article - Social	801, 802, 805
813.	1/28/2015 Email from Fred Schuster to Mike Teather re Newspaper article – SoCal	801, 802, 805
816.	2/3/2015 Union Tribune Article re With Six Offices Open in San Diego County and Two in Orange County, Windermere SoCal Has a Blueprint for Success	602, 901
817.	2/6/2015 Email from Mike Teather (WSC033479)	801, 802, 805
818.	2/6/2015 Email from Mike Teather (WSC033485)	801, 802, 805
819.	3/3/2015 Email from Mike Teather re	801, 802

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	Southern California (WSC033365)	
820.	3/12/2015 Email from Fred Schuster to Mike Teather re FW: Industry Announcement Scan	801, 802
822.	3/26/2015 Email from Brian Gooding to Mike Teather and Others re Fwd: Re: Social agent reached out to me	801, 802, 805
824.	5/26/2015 Letter from Paul Drayna to Gerard Davey (WSC1986)	801, 802
825.	6/19/2015 Email from OB Jacobi re Recruiting Emails (WSC035130-035131)	801, 802, 805
826.	7/8/2015 Email from Jill Wood re Trip to Orange County (WSC060366-060367)	801, 802
829.	7/28/2015 Email from Paul Drayna re Letter of Intent (WSC041040-041045)	801, 802, 805
831.	7/31/2015 Email from Paul Drayna re Further Revised Letter of Intent (WSC041192-041215)	801, 802, 805
832.	8/2/2015 Letter from Jill Wood to Bob Bennion and Bob Deville re Letter of Intent (B&D0004647-0004556)	801, 802
834.	8/3/2015 Email from Paul Drayna re Final Letter of Intent with Selective Binding Terms (WSC041309-041311)	801, 802, 805
835.	8/12/2015 Email from Richard King re Franchise expiration confirmation (WSC041342-041345)	801, 802, 805
836.	8/25/2015 Email from Bob Deville re Wednesday Noon Meeting in OC	801, 802, 805

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	(WSC037629)	
837.	8/25/2015 Email from Bob Deville re Wednesday Noon Meeting in OC (WSC037651-037652)	801, 802, 805
838.	8/2/2015 Email from Gerard Davey re Final Letter of Intent with Selective Binding Terms (WSC041240-041262)	801, 802, 805
839.	8/26/2015 Email from OB Jacobi re Wednesday Noon Meeting in OC (WSC037667-037669)	801, 802, 805
840.	WSC Statements for Southern California 1/2012 – 9/2015 (WSC56459-57058)	401, 402, 602, 611(a), 901
843.	Domain Status Notifications from GoDaddy from October 22, 2015 to October 22, 2015 (Ex. C to Declaration of Robert Sherrell in Support of Counterclaimant Windermere Real Estate Services Company’s Ex Parte Application for Temporary Restraining Order and Order to Show Cause re: Preliminary Injunction)	602, 901
844.	GoDaddy screen shot taken on October 27, 2015 (Ex. B to Declaration of Robert Sherrell in Support of Counterclaimant Windermere Real Estate Services Company’s Ex Parte Application for Temporary Restraining Order and Order to Show Cause re: Preliminary Injunction)	602, 901
845.	GoDaddy screen shot taken on October 28, 2015 (Ex. A to Declaration of Robert Sherrell in Support of Counterclaimant Windermere Real	602, 901

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	Estate Services Company's Ex Parte Application for Temporary Restraining Order and Order to Show Cause re: Preliminary Injunction)	
847. (erroneously identified as 601)	5/8/2012 Email from Paul Drayna to Bob Bennion and Bob Deville re reinstating \$25 admin fee (B&D 6311)	801, 802, 805
850. (erroneously identified as 604)	10/14/2009 Email from Bob Deville to Don Riley re leaving Windermere (B&D 52028-52029)	801, 802, 805
851. (erroneously identified as 605)	3/27/2013 Email from Bob Deville to Paul Drayna re payment of fees by other Southern California owners (B&D 2563 – 2567)	801, 802, 805
852. (erroneously identified as 606)	1/24/2013 Email from Bob Deville to Paul Drayna re increasing Southern California technology fees for other owners (B&D 3155-3158)	801, 802, 805
858. (erroneously identified as 612)	10/14/2009 Email from Bob Deville to Don Riley re notice of termination (B&D 52033-52034)	801, 802, 805
859. (erroneously identified as 613)	10/31/2014 Email from Mike Teather to Bob Deville re UFDD (B&D 3596)	801, 802, 805
860. (erroneously identified as 614)	10/31/2014 Email from Bob Deville to Mike Teather re Satellite Offices (B&D 3594-3595)	801, 802, 805
861. (erroneously identified as 615)	11/18/2013 Email from OB Jacobi to Bob Deville re tech fee increase (B&D 20914-20920)	801, 802, 805
862.	12/3/2014 Email from Cass Herrin re	801, 802, 805

1	(erroneously identified as 616)	Example Agent Missing Listing (B&D 3473-3474)	
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3	863. (erroneously identified as 617)	10/27/2014 Email from Mike Teather to Bob Deville re CDAR sweep (B&D 3275-3276)	801, 802, 805
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6	864. (erroneously identified as 618)	Transcript from November 3, 2015 online chat session with GoDaddy customer support (Ex. A to Supplemental Declaration of Robert Sherrell in Support of Counterclaimant Windermere Real Estate Services Company's Ex Parte Application for Temporary Restraining Order and Order to Show Cause re: Preliminary Injunction)	403, 801, 802
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13	865. (erroneously identified as 619)	1/21/2016 Letter from Charles Siriani to Gerard Davey Re: JFF, LLC/Bennion and Deville Fine Homes SoCal, Inc.	401, 402, 403, 801, 802
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16	866. (erroneously identified as 620)	Video and Audio Materials from WSC's WORC Site Produced 4/1/2016	401, 402, 602, 801, 802, 901
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**WSC object to the B&D Parties' following proposed trial exhibits:**

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21	3.	Oct 23, 2003 email from Bob Deville to Bill Feldman RE: "FW: Southern CA Services" (WSC 1959-1960) (Ex. 34)	Fed. R. Evid. 602, 801, 802, 901 <sup>2</sup>
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24	19.	Nov 2, 2007 letter from Pat Grimm to All Windermere Owners/Managers/Agents RE:	401, 402, 403, 801, 802, 901
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<sup>2</sup> Unless otherwise stated, all rules identified below reflect the Federal Rules of Evidence.

1		“Postcards and Mailings from the Rat Man” (Ex. 71) (WSC 1635-1636)	
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3	24.	June 11, 2012 letter from Rafael Lirag to Paul Drayna RE: "Applicant: Windermere Real Estate Services Company (Northern California) (WSC11943)	801, 802
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8	25.	June 11, 2012 letter from Rafael Lirag to Paul Drayna RE: "Applicant: Windermere Real Estate Services Company (Southern California) (WSC12212)	801, 802
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13	29.	Aug 16, 2012 email from Bob Deville to Carol Cianfarani RE: "FW: Windermere Watch in San Diego" (B&D0047620-0047622)	801, 802
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17	30.	Aug 20, 2012 email from Bob Deville to Bob Bennion RE: "Windermere Watch in San Diego" (B&D0034943-0034945)	801, 802
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20	31.	Aug 21, 2012 email from Paul Drayna to Bob Deville RE: "Gary Kruger - Reno, Nevada" (B&D0006269-0006270)	801, 802
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24	34.	Oct 25, 2012 email from Bob Deville to Geoff Wood, Paul Drayna, and Don Riley RE: "FW: Windermere Watch" (Ex. 67) (WSC052665-052666)	801, 802
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28	35.	Oct 25, 2012 email from Bob Deville to	801, 802

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	Robert Sunderland RE: "FW: Bennion and Deville" (B&D0033675-0033676)	
36.	Oct 29, 2012 email from Bob Deville to Geoff Wood, Paul Drayna, and Don Riley RE: "FW: Another Windermere Watch..." (B&D0021434)	801, 802
41.	June 9, 2011 letter from Rafael Lirag to Paul Drayna RE: "Windermere Real Estate Services Company"	801, 802
42.	Aug 8, 2011 letter from Rafael Lirag to Paul Drayna RE: "Windermere Real Estate Services Company (Services Company)"	801, 802
45.	Jan 19, 2012 email from Bob Deville to Brian Gooding RE: "Touching Base"	801-802
46.	Jan 30, 2012 email from Bob Deville to Kirk Gregor RE: "touchCMA Update & Free Trial Offer" (B&D0045353-0045355)	801-802
48.	March 29, 2012 email from Kirk Gregor to Bob Deville RE: "FW: RE: Windermere Watch" (B&D0034427-0034429)	801, 802
49.	April 11, 2012 email from Noelle Bortfeld to Michael Fanning RE: "FW: Windermere Watch" (WSC014649)	801, 802
54.	Feb 10, 2010 letter from Debra Carnes and Shari Campbell to Geoff Wood and	801, 802

1		Noelle Bortfeld RE: "Mitigating attacks from dissatisfied homebuyers" (B&D0000656-0000658)	
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4	56.	Aug 17, 2010 letter from Rafael Lirag to Paul Drayna RE: Order on application filed on August 12, 2010	801, 802
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7	57.	Aug 17, 2010 letter from Anthony Colbert to Paul Drayna RE: Order on application filed on July 23, 2010	801, 802
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10	59.	June 12, 2013 email from Paige Tyley to Bob Deville and Patrick Robinson RE: "UFDD for Northern California" (B&D0004012)	801, 802
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14	61.	June 14, 2013 email from Patrick Robinson to Bob Deville RE: "UFDD for Southern California" (B&D0004005)	801, 802, 901, 1002
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17	66.	June 20, 2013 email from Patrick Robinson to Paige Tyley RE: "FW: Meeting of the Minds today - Windermere Homes and Estates" (B&D0056437-0056441)	801, 802, 901, 1002
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22	69.	June 25, 2013 email from Patrick Robinson to Paul Drayna RE: "FW: UFDD for Southern California" (B&D0056334-0056336	901, 1002
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26	71.	July 4, 2013 email from Richard Johnson to Bob Deville RE: "Windermere Watch & Real Living"	801, 802
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	(B&D0034112-0034113)	
72.	July 5, 2013 letter from Rafael Lirag to Paul Drayna RE: Order on Southern California application filed on June 17, 2013 (WSC12551)	801, 802
73.	July 5, 2013 email from Fred Schuster to Craig Bernardi RE: "Follow-up" (B&D0056124-0056125)	801, 802
74.	July 8, 2013 email from Bob Deville to Robert Sunderland RE: "FW: Windermere Watch & Real Living" (B&D0033521-0033524)	801, 802
78.	July 16, 2013 email from Patrick Robinson to Paige Tyley RE: "FW: Santaluz License Agreement" (B&D0056060-0056062)	801, 802
79.	July 16, 2013 email from Patrick Robinson to Paul Drayna RE: "Executed Franchise agreement - N CA – Santaluz" (B&D0056050)	901, 1002
80.	July 4, 2013 letter from Richard Johnson to Bob Deville RE: "Franchise License Agreement" (WSC13740-13756)	801, 802
81.	July 16, 2013 email from Julia Jordan to Patrick Robinson RE: "FW: Disclosure Document - Socal - Item 23" (WSC043909-043910)	901, 1002
84.	July 16, 2013 email from Patrick	801, 802

1		Robinson to Paige Tyley RE: "FW: S.	
2		CA Franchise Agreement"	
3		(B&D0056043-0056044)	
4	85.	July 17, 2013 email from Fred Schuster	801, 802
5		to Paige Tyley and Rich Johnson RE:	
6		"Dave Henderson" (B&D0056012-	
7		0056015)	
8	86.	July 25, 2013 email from Bob Bennion	801, 802
9		to Rosie Rothrock and Bob Deville	
10		(B&D0034097-0034098)	
11	87.	Nov 13, 2012 email from Mike Teather	801, 802
12		to Geoff Wood and Michael Fanning	
13		RE: "Your many calls to Gary Kruger"	
14		(WSC016054-016056)	
15	91.	Dec 19, 2012 email from Bob Deville to	801, 802
16		nickicrawford@gmail.com RE: "FW:	
17		Real Estate License Addendum (MS	
18		Word Version)" (B&D0033649-	
19		0033651)	
20	94.	Jan 8, 2013 email from Bob Deville to	801, 802
21		Curtis Barlow RE: "W-111;	
22		Windermere" (B&D0034889-0034890)	
23	95.	Jan 14, 2013 email from Paul Drayna to	801, 802
24		Bob Deville RE: "Conference Call"	
25		(B&D0022635-0022636)	
26	96.	Jan 24, 2013 email from Troy McFadin	801, 802
27		to collette@windermertower.com RE:	
28		Employee handbook (B&D0055280)	

1		Mar 7, 2013 email from Bob Deville to	801, 802
2	98.	Geoff Wood and Paul Drayna RE: "FW:	
3		tech fee addendum" (B&D0044679-	
4		0044680)	
5		Feb 13, 2013 email from Bob Deville to	801, 802
6	99.	Francine Finn RE: "WRE Technology	
7		Fee Increase - Downtown SD"	
8		(B&D0044687-0044688)	
9		Mar 29, 2013 email from Bob Deville to	801, 802
10	100.	Troy McFadin RE: "FW: Windermere –	
11		EPLI" (B&D0047555-0047556)	
12		Mar 29, 2013 email from Bob Bennion	801, 802
13	101.	to Bob Deville RE: "Windermere –	
14		EPLI" (B&D0044615-0044616)	
15		Apr 1, 2013 email from Chuck Vargas	801, 802, 901, 1002
16	102.	to Scott Mitchelson and Michael	
17		Fanning RE: "What do you know about	
18		this" (WSC017392)	
19		Apr 20, 2013 email from Bob Deville to	801, 802
20	103.	Paul Drayna, Geoff Wood, and Robert	
21		Sunderland RE: "WRE Watch"	
22		(B&D0044612)	
23		Apr 20, 2013 email from Bob Deville to	801, 802
24	104.	Eric Forsberg RE: "Windermere watch -	
25		new content" (B&D0033622-0033625)	
26		May 10, 2013 letter from Rafael Lirag	801, 802
27	106.	to Paul Drayna RE: Order on Northern	
28		California application filed on April 19,	

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	2013 (WSC058588)	
110.	Feb 3, 2014 email from Bob Deville to Robert Sunderland RE: "FW: Windermere Watch – postcards" (B&D0033321)	801, 802
118.	March 25, 2014 email from Fred Schuster to Brian Gooding (WSC025465-025468)	801, 802
121.	Apr 21, 2014 email from Eric Forsberg to Robert Sunderland, Bob Deville, and Bob Bennion RE: "Mike Teather, Sr. Vice President, Client Services – Privileged Attorney-Client Communication" (B&D0069837)	801, 802
124.	May 1, 2014 email from Patrick Robinson to selinab@windermere.com RE: "Dec – Mar Fees – Addl – CV & SoCal"	801, 802
125.	May 20, 2014 email from Cheri Rice to Paige Tyley RE: "Agents to add to SoCal Site" (B&D0055642-0055647)	801, 802
132.	Aug 11, 2014 email from Carey Guthrie to Bob Deville RE: "Windermere Watch" (B&D0042687)	801, 802
134.	Aug 11, 2014 email from Robert Sunderland to Mike Teather RE: "Urgent" (WSC026842-026844)	801, 802
136.	Aug 20, 2014 email from Robert	801, 802

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	Sunderland to Mike Teather RE: "Bennion & Deville" (WSC0274490927451)	
138.	Aug 2, 2013 email from Patrick Robinson to Paige Tyley RE: "FW: Fees for 2013 UFDD" (B&D0055969- 0055973)	801, 802
139.	Aug 10, 2013 email from Bob Deville to Rich Johnson RE: "Windermere Watch" (B&D0020936-0020937)	801, 802
140.	Aug 10, 2013 email from Brian Gooding to Rich Johnson RE: "Windermere Watch" (WSC018258-018259)	801, 802
142.	Aug 24, 2013 email from Bob Deville to Brian Gooding RE: "FW: URGENT RE: WINDERMERE WATCH" (B&D0033461-0033462)	801, 802
143.	Aug 27, 2013 email from Bob Deville to Robert Sunderland RE: "FW: URGENT RE: WINDERMERE WATCH" (B&D0033454-0033456)	801, 802
144.	Aug 27, 2013 email from Fred Schuster to Robert Sunderland RE: "Windermere watch - postcard" (WSC018970)	801, 802
146.	Aug 28, 2013 email from Tech Support to Rich Johnson RE: "Phone Call -- Issues with "Windermere Watch" (WSC018992-018994)	801, 802

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150.	Sep 4, 2013 email from Bob Deville to Bob Bennion RE: "FW: Foundation, Windermere Watch" (B&D0033427-0033428)	801, 802
151.	Sep 17, 2013 email from Fred Schuster to Brian Gooding and Rich Johnson RE: "Notes from meeting with Windermere" (WSC019276)	801, 802
152.	Sep 24, 2013 email from Fred Schuster to Geoff Wood RE: "Windermere Watch - draft letter" (WSC019444)	801, 802
155.	Oct 8, 2013 email from York Baur to Eric Forsberg RE: "Windermere Watch" (WSC019492)	801, 802
157.	Bennion & Deville Reputation Management Project October 2013 (WSC019602-019604)	901, 1002
160.	Dec 27, 2013 email from Lori King to Paige Tyley RE: "MLS problem" (B&D0054230)	801, 802
161.	Jan 2, 2014 email from Brian Gooding to Fred Schuster and Rich Johnson RE: "Windermere watch" (WSC020397)	801, 802
164.	Jan 20, 2014 email from Cheri Rice to Paige Tyley RE: "Deletion from Del Mar Roster" (B&D0055733-0055734)	801, 802
165.	Jan 22, 2014 email from Fred Schuster to Bob Deville RE: "FW: Grand	801, 802

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	Opening party - Launch event" (WSC024558-024561)	
166.	Jan 22, 2014 email from Fred Schuster to Paige Tyley RE: "South Carlsbad – Aviara roster" (B&D0055714-0055716)	801, 802
167.	Jan 25, 2014 email from Fred Schuster to Rich Johnson and Brian Gooding RE: "FW: Windermere Watch - letter to Geoff Wood" (WSC024594-024595)	801, 802
168.	Jan 27, 2014 email from Fred Schuster to Geoff Wood and OB Jacobi RE: "Windermere Watch" (B&D0047073)	801, 802
169.	Jan 24, 2014 letter from Fred Schuster to Geoff Wood RE: "Windermere Watch" (B&D0042747)	801, 802
172.	Jan 31, 2014 email from Fred Schuster to Rich Johnson and Brian Gooding RE: "Rancho Bernardo Grand Opening" (WSC024943-024944)	801, 802
173.	Sep 23, 2014 email from Paul Drayna to Robert Sunderland RE: "FW: Updated Financials" (B&D0033287-0033291)	
174.	Sep 23, 2014 Item 23: Receipts signed by John Johnson (B&D0064625)	901
176.	Outline for the Services Owners faxes from Kirk Gregor (B&D0051134)	801, 802, 901, 1002
181.	Oct 6, 2014 email from Brian Gooding to Mike Teather RE: "Meeting Notes"	801, 802

1		(B&D0047245-0047246)	
2	183.	Oct 14, 2014 Item 23: Receipts signed by Maria Gutierrez (B&D0064630)	901
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4	184.	Oct 14, 2014 email from Eric Forsberg to Paige Tyley RE: "FW: Issues with Windermere.com" (B&D0054949- 0054952)	801, 802
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8	188.	Oct 22, 2014 email from Bob Deville to Mike Teather, Bob Bennion, and Robert Sunderland RE: "FW: Unhappy Agents!" (B&D0003611)	801, 802
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12	189.	Oct 22, 2014 email from Mike Teather to Bob Deville RE: "CDAR Sweep" (B&D0038249-0038251)	801, 802
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15	190.	Oct 22, 2014 email from Mike Teather to Bob Deville RE: "CDAR Sweep" (B&D0038246-0038248)	801, 802
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18	192.	Oct 29, 2014 email from Mike Teather to Bob Deville RE: "FW: CDAR Sweep" (B&D0038241-0038243)	801, 802
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21	193.	Oct 29, 2014 email from Bob Deville to Robert Sunderland and Paige Tyley RE: "Fwd: Re:" (B&D0055557-0055558)	801, 802
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24	194.	Oct 30, 2014 email from Bob Deville to Paige Tyley RE: "Opportunity and Change" (B&D0055550-0055552)	801, 802
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27	196.	Oct 31, 2013 email from Bob Deville to Robert Sunderland, Patrick Robinson	801, 802
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1		and Bob Bennion RE: "FW: UFDD"	
2		(B&D0003959)	
3	202.	Nov 7, 2014 comment letter from	801, 802
4		Dorothy Eshelman to Paul Drayna RE:	
5		"Issuer: Windermere Real Estate	
6		Services Company (Southern CA)"	
7		(WSC13169-13172)	
8	208.	Nov 24, 2014 email from Fred Schuster	801, 802
9		to Mike Teather RE: "CONFIDENTIAL	
10		- Financial Statements" (WSC029641-	
11		029642)	
12	209.	Nov 25, 2014 email from Kirk Gregor to	801, 802
13		Paige Tyley RE: "Your voice mail to	
14		Bob" (B&D0055524-0055526)	
15	215.	Dec 19, 2014 email from Cheri Rice to	801, 802
16		Paige Tyley RE: "Job description	
17		requested" (B&D0055485-0055486)	
18	216.	Dec 24, 2014 Item 23: Receipts signed	901
19		by Tim Gayda (WSC13583)	
20	217.	Aug 19, 2015 letter from Jan Lynn	801, 802
21		Owen to Paul Drayna RE: Order on	
22		Southern California application filed	
23		Nov 3, 2014 (WSC13173-13174)	
24	218.	Aug 28, 2015 email from Bob Deville to	801, 802
25		Paige Tyley RE: Collette Lee in	
26		Riverside (B&D0054750)	
27	220.	Sept 1, 2015 email from Rich Johnson	801, 802
28		to Paul Drayna RE: "Coachella Valley"	

1		(WSC037840)	
2	221.	Sep 3, 2015 comment letter from Dorothy Eshelman to Paul Drayna (WSC13500-13501)	801, 802
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5	225.	Sep 29, 2015 letter from Dorothy Eshelman to Paul Drayna RE: Order on application filed on April 8, 2015 (WSC13510)	801, 802
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9	226.	Oct 1, 2015 Item 23: Receipts signed by Benjamin Leaskou (WSC058548-058549)	901
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12	227.	Oct 6, 2015 Item 23: Receipt signed by Leslie Ryan (WSC058568)	901
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14	228.	Oct 6, 2015 Exhibit G Disclosure of Negotiated Sales signed by Leslie Ryan(WSC058566)	901
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17	233.	Feb 2, 2015 letter from Gerard Davey to Paul Drayna RE: "Windermere Services Southern California, Inc. – Area Representation Agreement, dated May 1, 2004" (WSC1931-1932)	801, 802
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22	234.	Feb 11, 2015 email from Brent Lee to Paige Tyley RE: "New Agent Orientation Packages" (B&D0054888-0054889)	801, 802
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26	237.	Mar 25, 2015 email from Kirk Gregor to Bob Deville RE: "Socal agent reached out to me" (B&D0000480-0000481)	801, 802
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1		Mar 27, 2015 letter from Gerard Davey	801, 802
2		to Paul Drayna RE: “Termination of	
3		Windermere Real Estate Franchise	
4		License Agreement, dated March 29,	
5		2011 (San Diego and Orange Counties,	
6	238.	California offices), as such Franchise	
7		License Agreement may have been	
8		amended, and all other related	
9		agreements, between Windermere Real	
10		Estate Services Company and Bennion	
11		& Deville Fine Homes SoCal, Inc.”	
12		[D.E. 16-13, pages 2-4]	
13		Mar 27, 2015 letter from Gerard Davey	801, 802
14		to Paul Drayna RE: “Termination of	
15		Windermere Real Estate License	
16		Agreement, dated August 1, 2001	
17		(Coachella Valley, California offices),	
18	239.	as such License Agreement may have	
19		been amended, and all other related	
20		agreements, between Windermere Real	
21		Estate Services Company and Bennion	
22		& Deville Fine Homes, Inc. (WSC	
23		1728-1730)	
24		May 4, 2015 comment letter from	801, 802
25	242.	Dorothy Eshelmen to Paul Drayna RE:	
26		comments on application (WSC13497-	
27		13499)	
28	247.	Jun 23, 2015 letter from Rich Johnson to	801, 802

1		Geoff Wood RE: "Branch Approval request - Scripps Ranch" (WSC13701)	
2			
3	270.	<a href="http://windermerewatch.com">http://windermerewatch.com</a> (electronic website)	602, 801, 802, 901, 1002
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5	271.	Various printouts of windermerewatch.com	602, 801, 802, 901, 1002
6			
7	273.	Oct 2, 2014 12:30 p.m. Notes from Meeting (B&D0069839-0069840)	602, 801, 802, 901, 1002
8			
9	274.	Sampling of postcards sent by windermerewatch.com	602, 801, 802, 901, 1002
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11	277.	Aug 5, 2016 letter from Dorothy Eshelman to Paul Drayna RE: Order on application filed on April 19, 2016	801, 802
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14	278.	Expert report of Peter Wrobel	602, 901
15	279.	File of expert witness Peter Wrobel	602, 901
16	280.	Expert report of franchise expert	602, 901
17	281.	File of franchise expert	602, 901
18	282.	Expert report of rebuttal expert	602, 901
19	283.	File of rebuttal expert	602, 901
20			
21	284.	Documents produced by Brian Gooding in response to subpoena dated Aug 2, 2016	602, 801, 802, 901, 1002
22			
23	285.	Documents produced by Rich Johnson in response to subpoena dated Aug 2, 2016	602, 801, 802, 901, 1002
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26	286.	Documents produced by Fred Schuster in response to subpoena dated Aug 2, 2016	602, 801, 802, 901, 1002
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1		Documents produced by Benjamin	602, 801, 802, 901,
2	287.	Leaskou in response to subpoena dated	1002
3		Aug 10, 2016	
4		January 19, 2012 email from Richard	801, 802
5	288.	Johnson to Bob Deville RE: "Touching	
6		Base"	
7		July 12, 2013 letter from Fred Schuster	801, 802
8	291.	to Bob Deville RE: "Branch approval –	
9		Carlsbad" (WSC13737)	
10		July 12, 2013 letter from Fred Schuster	801, 802
11	292.	to Bob Deville RE: "Branch approval -	
12		Del Mar" (WSC13736)	
13		July 12, 2013 letter from Fred Schuster	801, 802
14	293.	to Bob Deville RE: "Branch approval -	
15		Rancho Bernardo" (WSC13735)	
16		July 18, 2013 email from Fred Schuster	801, 802
17	294.	to Paige Tyley RE: "Windermere	
18		Services Rates" (B&D0056006-	
19		0056007)	
20		July 30, 2013 Franchise License	
21	295.	Agreement signed by Rich Johnson and	
22		Brian Gooding (WSC13719-13734)	
23		Aug 23, 2013 email from Fred Schuster	801, 802
24	296.	to Rich Johnson RE: "Windermere	
25		Watch" (WSC018932-018934)	
26		Aug 27, 2013 email from Paul Drayna	801, 802
27	297.	to Robert Sunderland RE: "Windermere	
28		Watch - San Diego Home and Estates,	

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	Inc." (WSC053071-053072)	
298.	Aug 28, 2013 email from Cheri Rice to Raymond Brown, Rich Johnson, and Fred Schuster RE: "Windermere Watch Letter" (WSC018995)	801, 802
299.	Aug 29, 2013 email from Raymond Brown to Brian Gooding RE: "Windermere Watch Letter" (WSC019074-019075)	801, 802
300.	Sep 23, 2013 email from Fred Schuster to Cheri Rice RE: "Letters from Geoff Wood" (WSC019427)	801, 802
301.	Oct 3, 2013 email from Paul Drayna to Robert Sunderland RE: "FW: Windermere Watch Letter" (B&D0022464)	801, 802
302.	Dec 23, 2013 email from Fred Schuster to Bob Deville RE: "Windermere Watch" (B&D0033918-0033919)	801, 802
303.	March 24, 2014 email from Fred Schuster to Bob Deville RE: "Meeting" (WSC025453)	801, 802
304.	Apr 12, 2014 email from Fred Schuster to Bob Deville RE: "Carlsbad Request by Windermere Homes & Estates" (B&D0047058-0047059)	801, 802
305.	May 30, 2014 email from Brian Gooding to Bob Deville and Kirk	801, 802

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	Gregor RE: "Fwd: Fw: See Who Joined Us" (WSC026248-026249)	
311.	July 11, 2014 email from Fred Schuster to Paul Drayna RE: "New branch location" (B&D0055583-0055584)	801, 802
315.	July 23, 2014 email from Fred Schuster to Mike Teather RE: "Updated Socal numbers" (WSC026704)	801, 802
316.	July 24, 2014 email from Fred Schuster to Mike Teather RE: "Follow up" (WSC026706-026707)	801, 802
317.	July 24, 2014 email from Fred Schuster to Paul Drayna RE: "2013 Financial reporting" (WSC026708)	801, 802
318.	July 25, 2014 Office Announcement RE: "New Branch Office" (WSC 305)	801, 802
319.	July 30, 2014 Office Announcement RE: "Branch Office" (WSC 306)	801, 802
323.	Oct 7, 2014 email from Fred Schuster to Mike Teather RE: "FW: Follow-up info" (WSC028176-028177)	801, 802
332.	Nov 17, 2014 email from Fred Schuster to Mike Teather RE: "New branch office request - La Jolla" (WSC029536-029537)	801, 802
334.	Nov 25, 2014 email from Kirk Gregor to Bob Deville RE: "message from Fred Schuster" (B&D0055529-0055530)	801, 802

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335.	Dec 1, 2014 email from Fred Schuster to Kirk Gregor RE: "Your voice mail to Bob" (B&D0003499-0003500)	801, 802
336.	Dec 1, 2014 email from Fred Schuster to Mike Teather RE: "Skyslope" (WSC029765)	801, 802
343.	Jan 28, 2015 email from Rich Johnson to Mike Teacher RE: "Newspaper article - Socal" (WSC033242-033243)	801, 802
344.	Mar 9, 2015 - Office Announcement - New Branch Office-Rancho Bernardo - The Plaza (B&D0000641)	801, 802
345.	Mar 10, 2015 email from Fred Schuster to Paul Drayna RE: "2014 Financial reporting" (WSC033721)	801, 802
349.	Jun 23, 2015 email from Rich Johnson to Mike Teacher and Paul Drayna RE: "Windermere Homes & Estates Update" (WSC035698-035699)	801, 802
350.	Jun 24, 2015 email from Rich Johnson to Mike Teacher and Paul Drayna RE: "Amended Branch Office Request" (WSC035704)	801, 802
532.	Sept 12, 2015 email from Brian Gooding to Mike Teather RE: "I haven't even read this yet because I wanted to get it to you asap" (WSC038655-038657)	801, 802



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353.	Sept 12, 2015 email from Brian Gooding to Mike Teather RE: "The Desert" (WSC038658-038659)	801, 802
354.	Sept 12, 2015 email from Brian Gooding to Rich Johnson RE: "Windermere Homes and Estates to open in Desert" (WSC038662-WSC038663)	801, 802
355.	Sept 15, 2015 email from Matt Carroll to OB Jacobi RE: "Premature Solicitation" (WSC038762-WSC038763)	801, 802
356.	Sept 29, 2015 email from Holly Reville to Rich Johnson and Brian Gooding RE: "Ads" (WSC039154)	801, 802
388.	March 29, 2012 email from Kirk Gregor to Bob Deville RE: "FW: RE: Windermere Watch" (B&D0034427-0034429)	801, 802
395.	Nov 29, 2012 email from Bob Deville to Paul Drayna RE: windermere watch (B&D0021896-0021897)	801, 802
411.	Feb 11, 2014 email from Paul Drayna to Robert Sunderland RE: "Windermere Watch" (WSC043312-043313)	801, 802
415.	Oct 3, 2013 email from Fred Schuster to Shelley Rossi, Rich Johnson, Brian Gooding, Bob Deville, and Bob Bennion	801, 802

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	RE: "Windermere Watch Letter"	
417.	Jan 30, 2014 email from Geoff Wood to Fred Schuster RE: "Voice mail"	801, 802
418.	March 1, 2014 email from Geoff Wood to Fred Schuster RE: "Windermere Watch - postcards"	801, 802
423.	July 11, 2014 email from Fred Schuster to Paul Drayna RE: "New branch location"	801, 802
424.	July 15, 2014 email from Fred Schuster to Paul Drayna RE: "New branch location"	801, 802
425.	July 22, 2014 email from Fred Schuster to Mike Teather RE: "Meeting next week"	801, 802
427.	July 23, 2014 email from Fred Schuster to Mike Teather RE: "Updated Socal numbers"	801, 802
428.	July 24, 2014 email from Fred Schuster to Mike Teather RE: "Follow up"	801, 802
429.	July 24, 2014 email from Fred Schuster to Paul Drayna RE: "2013 Financial reporting"	801, 802
430.	July 29, 2014 email from Fred Schuster to Mike Teather RE: "Checking in"	801, 802
433.	Aug 4, 2014 email from Fred Schuster to Mike Teather RE: "checking in"	801, 802
435.	Aug 9, 2014 email from Fred Schuster	801, 802

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	to Michael Fanning RE: "Ninja Teaser dates"	
439.	Sep 16, 2014 email from Fred Schuster to Paul Drayna RE: "Updated Financials"	801, 802
441.	Sep 23, 2014 email from Fred Schuster to Paul Drayna RE: "2013 Income Taxes"	801, 802
442.	Sep 25, 2014 email from Fred Schuster to Mike Teather RE: "Any update?"	801, 802
443.	Sep 29, 2014 email from Fred Schuster to Paul Drayna RE: "Updated financials, etc."	801, 802
446.	Oct 2, 2014 Gooding/Johnson/Fred Sch/Teacher	602, 801, 802, 901, 1002
447.	Oct 6, 2014 email from Brian Gooding to Mike Teather RE: "Meeting Notes"	801, 802
448.	Oct 7, 2014 email from Fred Schuster to Mike Teather RE: "FW: Follow-up info" (WSC062158-062171)	801, 802
449.	Oct 7, 2014 email from Fred Schuster to Patrick Robinson RE: "September 2014 - Franchise Report" (WSC062332-062357)	801, 802
451.	Oct 7, 2014 email from Fred Schuster to Mike Teather RE: "FW: Follow-up info"	801, 802
453.	Oct 16, 2014 email from Fred Schuster to Michael Fanning RE: "Hawaii	801, 802

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	Owners Retreat"	
454.	Oct 21, 2014 email from Fred Schuster to Mike Teather RE: "Updates"	801, 802
455.	Nov 1, 2014 email from Fred Schuster to Bob Deville RE: "Follow-up meeting"	801, 802
458.	Nov 5, 2014 email from Fred Schuster to Bob Deville RE: "New branch office request - Fallbrook"	801, 802
460.	Nov 7, 2014 email from Fred Schuster to Mike Teather, Bob Deville, and Bob Bennion RE: "Conference call today"	801, 802
461.	Nov 7, 2014 email from Fred Schuster to Patrick Robinson RE: "Franchise report - October 2014" (WSC062119-062144)	801, 802
463.	Nov 9, 2014 email from Brian Gooding to Fred Schuster and Rich Johnson RE: "FW: Invitation to Meet and Greet" (WSC062193-062195)	801, 802
464.	Nov 17, 2014 email from Fred Schuster to Mike Teather and Bob Deville RE: "New branch office request - La Jolla" (WSC062273-062274)	801, 802
465.	Nov 18, 2014 email from Paige Tyley to Mike Teather RE: "FW: Real Estate Updates in SD Union-Tribune" (WSC062179-062180)	801, 802

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466.	Nov 19, 2014 email from Paige Tyley to Mike Teather RE: "Article with photos from 9/7/14 SD Union-Tribune" (WSC062100-062101)	801, 802
468.	Nov 19, 2014 email from Brian Gooding to Fred Schuster RE: "FW: New branch office request - La Jolla"	801, 802
470.	Nov 24, 2014 email from Fred Schuster to Mike Teather RE: "CONFIDENTIAL - Financial Statements"	801, 802
471.	Nov 24, 2014 email from Fred Schuster to Mike Teather RE: "CONFIDENTIAL - Financial Statements" (WSC062102-062115)	801, 802
473.	Nov 25, 2014 email from Kirk Gregor to Fred Schuster RE: "Your voice mail to Bob" (WSC062358-062360)	801, 802
474.	Nov 26, 2014 email from Fred Schuster to Mike Teather RE: "Next week"	801, 802
475.	Dec 1, 2014 email from Fred Schuster to Kirk Gregor RE: "Your voice mail to Bob"	801, 802
477.	Dec 1, 2014 email from Fred Schuster to Kirk Gregor RE: "Your voice mail to Bob" (WSC062325-062331)	801, 802
478.	Dec 1, 2014 email from Fred Schuster to Mike Teather RE: "Skyslope"	801, 802
479.	Dec 2, 2014 email from Fred Schuster to	801, 802

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	Mike Teather RE: "meeting Wednesday"	
481.	Dec 8, 2014 email from Fred Schuster to Patrick Robinson RE: "November Franchise Report" (WSC062275-062277)	801, 802
482.	Dec 8, 2014 email from Fred Schuster to Christine Wood RE: "Foundation fees"	801, 802
484.	Jan 28, 2015 email from Brian Gooding to Fred Schuster RE: "Newspaper article - Socal"	801, 802
485.	Jan 28, 2015 email from Rich Johnson to Mike Teather RE: "Newspaper article - Socal"	801, 802
487.	Mar 10, 2015 email from Fred Schuster to Rob Corcoran and Brian Gooding RE: "Influence Partner Agreement" (WSC060839-WSC060849)	801, 802
488.	Mar 10, 2015 email from Fred Schuster to Paul Drayna RE: "2014 Financial reporting" (WSC060602-WSC060605)	801, 802
489.	March 10, 2015 email from Fred Schuster to Paul Drayna RE: "2014 Financial reporting"	801, 802
490.	Mar 11, 2015 email from Fred Schuster to Patrick Robinson RE: "Franchise report - February 2015" (WSC060645-WSC060703)	801, 802

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491.	March 11, 2015 email from Fred Schuster to Mike Teather RE: "Relocation affiliation"	801, 802
492.	March 12, 2015 email from Fred Schuster to Mike Teather RE: "FW: Industry Accouncement Scan"	801, 802
493.	March 26, 2015 email from Brian Gooding to Mike Teather, Fred Schuster, and Rich Johnson RE: "Fwd: Re: Social agent reached out to me"	801, 802
494.	Apr 2, 2015 email from Leo Nicolet to Alana Hardy and Rich Johnson RE: "PR for you" (WSC060850-WSC060852)	801, 802
495.	April 10, 2015 email from Fred Schuster to Mike Teather RE: "Couple of things"	801, 802
496.	April 27, 2015 email from Fred Schuster to Mike Teather RE: "Catch up - Symposium"	801, 802
497.	April 28, 2015 email from Donna Nicksich to Fred Schuster, Rich Johnson, and Brian Gooding RE: "FW: 4907 Patina Ca., Oceanside, CA 92057" (WSC061998-062005)	801, 802
499.	May 7, 2015 email from Lora Wilson to Fred Schuster RE: "Windermere Homes and Estates - Monthly Statistical Report"	801, 802
500.	May 7, 2015 email from Ray Brown to	801, 802

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	Rich Johnson and Brian Gooding RE: "Broker Market Share data" (WSC060957-WSC060971)	
501.	May 7, 2015 email from Fred Schuster to Lora Wilson RE: "Windermere Homes and Estates - Monthly Statistical Report"	801, 802
502.	May 11, 2015 email from Fred Schuster to Patrick Robinson RE: "Office address change"	801, 802
503.	May 11, 2015 email from Fred Schuster to Patrick Robinson RE: "Office address change" (WSC061319-WSC061321)	801, 802
504.	Jun 4, 2015 email from Cheri Rice to Rich Johnson, Brian Gooding Fred Schuster and others RE: "Current Roster" (WSC061167-WSC061184)	801, 802
505.	June 11, 2015 email from Skye Henry to Fred Schuster RE: "2015-2016 E&O Proposal" (WSC061185-WSC061282)	801, 802
506.	June 12, 2015 email from Pam O'Donnell to Brian Gooding RE: "Pagni's and Press Release." (WSC061941-061942)	801, 802
507.	Jun 18, 2015 email from Rich Johnson to Bob Deville and Kirk Gregor RE: "Recruiting Emails" (WSC062049- WSC062050)	801, 802



1		June 23, 2015 email from Rich Johnson	801, 802
2	508.	to Mike Teather and Paul Drayna RE:	
3		"Windermere Homes & Estates Update"	
4		(WSC062091-062094)	
5		June 23, 2015 email from Rich Johnson	801, 802
6	509.	to Mike Teather and Paul Drayna RE:	
7		"New Branch Offices Request"	
8		(WSC061313-WSC061314)	
9		July 13, 2015 email from Rich Johnson	801, 802
10	510.	to Mike Teather and Paul Drayna RE:	
11		"New Branch Offices Request"	
12		(WSC061311-WSC061312)	
13		Sep 2, 2015 email from Brian Gooding	801, 802
14	511.	to Shelley Rossi RE: "SoCal	
15		PR/Communications - Please Review"	
16		(WSC062041-062043)	
17		Sep 2, 2015 email from Brian Gooding	801, 802
18	512.	to Mike Teather, Noelle Bortfeld, and	
19		Rich Johnson RE: "Palm Springs Palm	
20		Desert area startup costs" (WSC061943-	
21		061945)	
22		Sept 9, 2015 email from Jim Berns to	801, 802
23	513.	Rich Johnson and Brian Gooding RE:	
24		"Bennion & Deville Fine Homes, Full	
25		Page Ad: Sunday Sept. 6, 2015"	
26		(WSC060944-WSC060945)	

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1 **XI. Witnesses**

2 Witness lists of the parties have heretofore been filed with the Court. [D.E.  
3 50, 53.] Only the witnesses identified in the lists will be permitted to testify (other  
4 than solely for impeachment).

5 Each party intending to preserve evidence by way of deposition testimony  
6 has marked such depositions in accordance with L.R. 16-2.7. For this purpose, the  
7 following depositions shall be lodged with the Clerk as required by L.R. 32-1:

8 None.

9 **XII. Law And Motion Matters**

10 The following law and motion matters and motions *in limine*, and no others,  
11 are pending or contemplated:

12 **The B&D Parties' Law and Motion Matters**

13 1. Pending Motions

14 a. There are no pending motions.

15 2. Contemplated Motions

16 a. The B&D Parties motion *in limine* to preclude WSC from  
17 introducing evidence or argument that the Area Representative  
18 relationship between WSC and Services SoCal is not a  
19 franchise under the state and federal franchise laws;

20 b. The B&D Parties motion *in limine* to preclude WSC from  
21 offering any witness testimony that expresses the opinion that  
22 the Area Representation relationship is not a franchise as such  
23 testimony would be impermissible legal opinion;

24 c. The B&D Parties motion *in limine* to preclude WSC from  
25 introducing evidence or argument that any of its employees  
26 responded to Deville's 2013 emails regarding Windermere  
27 Watch or the reasons for not responding in light of WSC's  
28 employees' reliance upon the attorney/client privilege to

1 withhold such testimony at deposition;

2 d. The B&D Parties motion *in limine* to preclude WSC from  
3 introducing evidence or argument that the Sandberg report  
4 regarding Windermere Watch was created prior to October  
5 2014 because WSC failed to produce any earlier draft of the  
6 document during discovery nor could WSC identify if an when  
7 an earlier draft was created;

8 e. The B&D Parties motion *in limine* to preclude WSC from  
9 offering evidence or argument of the personal wealth of  
10 Bennion or Deville as irrelevant and unfairly prejudicial;

11 f. The B&D Parties motion *in limine* to preclude WSC from  
12 offering any evidence, argument, or comment as to the sexual  
13 orientation of any of the witnesses as irrelevant and unfairly  
14 prejudicial;

15 g. The B&D Parties motion *in limine* to preclude WSC from  
16 offering any evidence, comment, argument or testimony by  
17 WSC's witnesses and counsel concerning the alleged  
18 representations of any non-testifying Windermere franchisee as  
19 impermissible hearsay;

20 h. The B&D Parties motion *in limine* to preclude WSC from  
21 offering or inducing any evidence, comment or argument  
22 WSC's witnesses and counsel concerning allegations that any  
23 member or employee of the B&D Parties mistreated any  
24 secretaries or staff members of WSC as impermissible hearsay;

25 i. The B&D Parties motion *in limine* to preclude WSC from  
26 introducing any emails or letters drafted by its officers,  
27 directors, and employees as impermissible hearsay;

28 j. The B&D Parties motion *in limine* to preclude WSC from

1 offering evidence or argument that it was Services SoCal's  
2 obligation as the area representative to provide a Multiple  
3 Listing Service residential real estate feed as such  
4 representations are inconsistent with the obligations set forth in  
5 the Area Representation Agreement;

6 k. The B&D Parties motion *in limine* to preclude WSC from  
7 introducing or eliciting testimony that WSC representatives  
8 provided client leads to Services SoCal for distribution to the  
9 franchisees in the Southern California region as the data and  
10 documentation identifying such leads was not produced by  
11 WSC during discovery in violation of the Court's discovery  
12 order;

13 l. The B&D Parties motion *in limine* to preclude WSC from  
14 offering testimony, evidence or argument concerning any loans  
15 provided to any of the B&D Parties from any non-parties to  
16 this action as these loans are irrelevant to this action and  
17 unfairly prejudicial;

18 m. The B&D Parties motion *in limine* to preclude WSC from  
19 offering evidence or argument concerning Services SoCal's  
20 alleged failure to provide "prompt, courteous and efficient  
21 service" to Windermere franchisees as unfairly prejudicial and  
22 because no damages have been identified by WSC for any  
23 such breach;

24 n. The B&D Parties motion *in limine* to preclude WSC from  
25 offering evidence or argument concerning Services SoCal's  
26 alleged failure to deal "fairly and honestly" with members of  
27 the Windermere System as unfairly prejudicial and because no  
28 damages have been identified by WSC for any such breach;

- 1 o. The B&D Parties motion *in limine* to preclude WSC from  
2 offering any argument, evidence, or suggestion of lack of  
3 support or corroboration by Services SoCal with any  
4 franchisee in the Southern California region as WSC failed to  
5 provide Service SoCal with the necessary notice and  
6 opportunity to cure said conduct before pursuing its claims;
- 7 p. The B&D Parties motion *in limine* to preclude WSC from  
8 offering any argument, testimony, comment or other evidence  
9 that the Area Representation Agreement was terminated for  
10 any reason not express stated in the termination notice as any  
11 such argument, testimony, comment or other evidence would  
12 be irrelevant and unfairly prejudicial;
- 13 q. The B&D Parties' motion for judgment as a matter of law on  
14 their claims, WSC's counterclaims, and the B&D Parties'  
15 affirmative defenses; and
- 16 r. Daubert Motion to exclude WSC's purported experts from  
17 testifying on topics that do not constitute or require expert  
18 opinion.

19 **WSC's Law and Motion Matters**

20 1. Pending Motions

- 21 a. None.

22 2. Contemplated Motions

- 23 a. Motion for Summary Judgment regarding Plaintiffs' claim that  
24 WSC breached the franchise and area representation  
25 agreements based on the applicable statute of limitations and  
26 whether or not the Area Representation Agreement was a  
27 franchise agreement;
- 28 b. Motion *in Limine* to preclude any evidence or testimony

1 regarding the recruiting of Brian Gooding and Rich Johnson,  
2 and the subsequent execution of the franchise agreement(s)  
3 between WSC and Windermere Homes and Estates;

4 c. Motion *in Limine* to preclude any evidence or testimony related  
5 to the depositions of Brian Gooding, Rich Johnson, and Fred  
6 Schuster because those depositions were taken after discovery  
7 cut-off;

8 d. Motion *in Limine* to preclude any evidence or testimony  
9 relating to WSC's alleged violations of California franchise law  
10 related to franchise disclosure documents for 2012 and 2013;

11 e. Motion *in Limine* to preclude any evidence or testimony  
12 relating to responsive documents withheld from production  
13 until the final day of discovery; and

14 f. Motion *in Limine* to preclude any evidence or testimony  
15 relating to any alleged civil or criminal liability for alleged  
16 violations of California franchise law.

17 **XIII. Bifurcation**

18 Bifurcation of the following issues for trial is ordered: None.

19 **XIV. Final Pretrial Conference Order Statement**

20 The foregoing admissions having been made by the parties, and the parties  
21 having specified the foregoing issues remaining to be litigated, this Final Pretrial  
22 Conference Order shall supersede the pleadings and govern the course of trial of  
23 this case, unless modified to prevent manifest injustice.

24 Dated:

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26 \_\_\_\_\_  
27 Hon. Manual L. Real  
28 United States District Judge

1 Approved as to form and content:

2 **MULCAHY LLP**

3  
4 By: /s/ Kevin A. Adams

5 Kevin A. Adams

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

9 *Services Southern California, Inc., and Counter-Defendants*

10 *Robert L. Bennion and Joseph R. Deville*

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12  
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14 FEASBY**

15 By: /s/ John D. Vaughn

16 John D. Vaughn

17 *Attorneys for Windermere Real Estate*

18 *Services Company*