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

25 BENNION & DEVILLE FINE) Case No. 5:15-cv-01921-R (KKx)

26 HOMES, INC., a California) *Hon. Manual L. Real*

27 corporation, BENNION & DEVILLE)

28 FINE HOMES SOCAL, INC., a) **JOINT RULE 26(f) REPORT**

California corporation,)

29 WINDERMERE SERVICES) Complaint filed: September 17, 2015

30 SOUTHERN CALIFORNIA, INC., a)

31 California corporation,) First Amended Complaint filed:

32) November 16, 2015

33 Plaintiffs,)

34 v.) First Amended Counterclaim filed:

35) October 14, 2015

36 WINDERMERE REAL ESTATE)

1 SERVICES COMPANY, a)
2 Washington corporation; and DOES)
3 1-10.)
4 Defendants.)
5 _____)
6 AND RELATED COUNTERCLAIMS)
7 _____)

8 Plaintiffs/Counter-Defendants Bennion & Deville Fine Homes, Inc., Bennion &
9 Deville Fine Homes SoCal, Inc., Windermere Services Southern California, Inc.,
10 Counter-Defendant Robert L. Bennion (collectively, the “B&D Parties”), and
11 Defendant/Counter-Claimant Windermere Real Estate Services Company’s (“WSC”)
12 hereby submit their Joint Rule 26(f) Report after meeting and conferring on November
13 19, 2015.

14 **1. Factual Summary of Case, Claims, and Defenses**

15 **A. *The B&D Parties’ Statement of the Case***

16 WSC is the franchisor of real estate brokerage companies operating under the
17 Windermere name and marks. Beginning in 2001, the B&D Parties – first as Windermere
18 franchisees and, later, the Windermere Southern California Area Representative –
19 successfully expanded the Windermere brand in Southern California by opening
20 franchised offices in a geographic area stretching from San Diego to the Coachella
21 Valley.

22 Notwithstanding its initial success, the real estate system offered by WSC to the
23 Southern California franchisees became antiquated and irrelevant. The real estate
24 technology and related services that WSC continued to offer were outdated, unstable, and
25 no longer a viable option for its franchisees in the Southern California region. WSC has
26 also failed to provide local and regional marketing and advertising support crucial to the
27 success of any franchise system in a competitive marketplace. This lack of marketing and
28 brand support was only exacerbated by the highly active and visible anti-Windermere
marketing campaign known as “Windermere Watch.”

1 By late 2012, the growing Windermere Watch anti-marketing campaign – coupled
2 with WSC’s failure to make any serious effort to combat the anti-marketing campaign in
3 Southern California – nearly forced the B&D Parties out of the Windermere system. In
4 an effort to convince the B&D Parties to stay, WSC agreed to make “commercially
5 reasonable efforts” against Windermere Watch and its anti-marketing campaign, and to
6 alleviate some of the financial burden that Windermere Watch had caused the B&D
7 Parties. On December 18, 2012, the parties’ franchise agreements were amended to
8 reflect these changes.

9 Unfortunately, these amendments did little to change WSC’s indifference toward
10 the Southern California region. As the evidence will show, WSC continued to ignore its
11 contractual obligations to the B&D Parties (along with other franchisees in the Southern
12 California region) by failing to (1) properly and timely renew the Windermere California
13 franchise registration, (2) provide competent assistance to the B&D Parties in lawfully
14 navigating California’s franchise laws, and (3) take any action whatsoever to counteract
15 the negative marketing campaign of Windermere Watch. These breaches caused serious
16 harm to the B&D Parties, most notably, the loss of clients, real estate listings, and agents,
17 and also seriously depressed the values of the B&D Parties’ businesses.

18 Notwithstanding the affirmative harm caused by WSC’s numerous breaches of the
19 parties’ agreements, the B&D parties were able to ameliorate many of these problems
20 through their significant financial investment into the region along with the devotion of
21 countless hours cultivating relationships with franchisees, agents and clients, improving
22 Windermere brand recognition and goodwill, and developing tried and tested regional
23 business model and technology services that allowed the Southern California region to
24 continue as an overall success through the 2013 year.

25 By 2014, WSC had decided that it wanted to reacquire the Area Representative
26 rights to the Southern California region in order to reap all of the benefits – most notably,
27 the B&D Parties’ right to 50% of all initial franchise fees and monthly licensing fees paid
28 by the franchisees in Southern California – coming from that region. After the B&D

1 Parties refused to turn over their Area Representative rights without just compensation,
2 WSC implemented a plan that (i) precluded the B&D Parties from bringing on new
3 “friendly” franchisees, (ii) would allow WSC to surreptitiously acquire the B&D Parties’
4 superior technology and system, and (iii) drove a wedge between the B&D Parties and
5 the franchisees in their region in order to harm those relationships. WSC’s execution of
6 this plan throughout the 2014 year resulted in a constructive termination of the Area
7 Representation Agreement in violation of the Area Representation Agreement and the
8 California Franchise Relations Act (California Business & Profession Code § 20020).

9 The B&D Parties now bring the instant action seeking compensatory and statutory
10 damages for the harm caused by WSC’s unlawful conduct.

11 **B. WSC’s Statement of the Case**

12 Founded by John Jacobi over 40 years ago, WSC is the franchisor of the
13 Windermere System of franchisees providing real estate brokerage services to customers
14 seeking to buy, sell or lease real property. Beginning with a single office and eight (8)
15 real estate agents in Seattle Washington, Windermere Real Estate grew to a network of
16 approximately 300 offices and more than 7000 agents throughout the Western United
17 States. Windermere is the largest real estate brand in the Pacific Northwest.

18 WSC began its relationship with counterdefendants Robert L. Bennion and Joseph
19 R. Deville in 2001. They had been Windermere agents in the Seattle area for some time,
20 but in 2001 they became owners of a Windermere franchise in the Coachella Valley.
21 Bennion and Deville grew their business quickly, opening fourteen (14) franchised
22 locations between 2001 and 2010.

23 However, it became clear that the B&D Parties exercised poor business judgment
24 in growing faster than their cash flow could support. By 2007 and moving forward, WSC
25 began to forgive the B&D Parties’ Franchise Fees, decrease or freeze their Technology
26 Fees, and/or defer other fees relative to the franchise relationship – all in an effort to
27 support a struggling franchise.
28

1 In 2009, Bennion and Deville asked WSC for a personal loan of \$501,000.00 as
2 “an emergency cash infusion” to their Coachella Valley business, indicating that without
3 this loan the company would soon be insolvent. One of WSC’s affiliated entities made
4 the loan, which was due in full in 2014. Unable to repay the loan on time, Bennion and
5 Deville asked for a three year extension to the loan term, which was granted. The loan
6 remains outstanding at this time.

7 In 2011, WSC’s affiliated entities provided Bennion and Deville with additional
8 personal loans in the total amount of \$750,000.00, to finance their expansion to the San
9 Diego area. One of these loans remains outstanding. And in 2012, WSC agreed to waive
10 \$1,151,060.00 of past due Franchise and Technology Fees.

11 Despite this extraordinary support, the B&D Parties’ earlier successes could not be
12 duplicated. The parties’ relationship deteriorated. After the B&D Parties gave notice that
13 they wanted their franchise agreements to expire, they indicated they would be willing to
14 sell their Southern California operations to WSC. The parties were unable to reach an
15 agreement on the terms of such a sale, however, resulting in the B&D Parties’ decision to
16 begin operating as an independent brokerage.

17 The B&D Parties stopped paying WSC their Franchise Fees in July 2014. Through
18 September 2015, the B&D Parties owe WSC more than \$1.2 million pursuant to the
19 parties’ various franchise and franchise related agreements.

20 For these reasons, WSC now comes before this Court seeking compensatory
21 damages, statutory damages, and the recovery of its attorneys’ fees and costs associated
22 with this action.

23
24 **2. Subject Matter Jurisdiction**

25 ***A. The B&D Parties’ Statement of Jurisdiction for the Complaint***

26 The B&D Parties contend that this Court has jurisdiction over the claims asserted
27 in the First Amended Complaint under diversity of citizenship jurisdiction, 28 U.S.C. §
28 1332. Defendant WSC is a Washington corporation with its principal place of business in

1 Seattle, Washington. Plaintiffs Bennion & Deville Fine Homes, Inc., Bennion & Deville
2 Fine Homes SoCal, Inc., and Windermere Services Southern California, Inc., are all
3 California corporations with their principal places of business in Rancho Mirage,
4 California. Further, the matter in controversy exceeds the sum or value of \$75,000,
5 exclusive of interest and costs. Thus, the matter at issue in the First Amended Complaint
6 is between citizens of different states and exceeds the jurisdictional threshold of this
7 Court.

8 **B. *WSC's Statement of Jurisdiction for the counterclaims***

9 WSC contends that this Court has jurisdiction over the claims asserted in the First
10 Amended Counterclaim pursuant to 28 USC § 1367(a). Because diversity jurisdiction
11 exists as to the First Amended Complaint and claims asserted therein, and because the
12 claims set forth in WSC's First Amended Counterclaim are compulsory and/or related to
13 claims asserted in the First Amended Complaint forming part of the same constitutional
14 case or controversy, this Court may exercise supplemental/ancillary jurisdiction.

15 **3. Legal Issues**

16 **A. *The B&D Parties' Statement of Legal Issues***

17 The principal issues in this case concern whether: (i) WSC has breached both the
18 express and implied terms of the Coachella Valley Franchise Agreement, the SoCal
19 Franchise Agreement, and the Area Representation Agreement; (ii) WSC's material
20 breaches of the Area Representation Agreement constructively terminated that
21 agreement; (iii) WSC complied with California's franchise laws under the California
22 Franchise Investment Laws and/or the California Franchise Relations Act; and (iv) the
23 B&D Parties were excused from their obligations under the various agreements as a
24 result of WSC's prior breach of that agreement.

25 By identifying the principal issues, the B&D Parties do not waive their rights to
26 pursue any other issues, claims and defenses in the action.

1 **6. Settlement Discussions to Date and Recommended Settlement Procedure**

2 To date, the parties have not had any substantive settlement discussions. Pursuant
3 to Local Rule 26-1(c), the parties elect to utilize the Settlement Procedure No. 3 of Local
4 Rule 16-15.4, whereby the parties will participate in a private dispute resolution
5 proceeding.

6 **7. Discovery Plan**

7 The parties propose that discovery be conducted at the time and in the manner
8 prescribed by the Federal Rules of Civil Procedure and will not be conducted in phases.

9 ***A. Date for Disclosure Required by Rule 26(a)(1)***

10 The Parties agree to provide the Initial Disclosures required by Rule 26(a)(1) on or
11 before December 14, 2015.

12 ***B. Rule 26(f)(3)(B): Fact Discovery***

13 1. Discovery Subjects

14 Both parties intend to (1) propound written discovery requests; (2) take depositions
15 of the other parties and certain third parties; and (3) designate witnesses to serve as expert
16 witnesses in the case. The parties agree that interrogatories, requests for production,
17 requests for admission, and depositions may commence on December 21, 2015, and will
18 otherwise be conducted in accordance with the Federal Rules of Civil Procedure.

19 ***C. Timing and Conduct of Discovery***

20 The parties do not believe that fact and damages discovery should be conducted in
21 phases, except with respect to timing of expert discovery, wherein expert discovery is to
22 be completed after fact discovery described below.

23 The parties jointly propose a schedule which reflects timing of discovery under
24 Rule 26 as follows:

- 25 i. Factual Discovery Cut-Off Date (final date all discovery must be served):
26 July 1, 2016;
- 27 ii. Initial Expert Disclosures/Reports: August 1, 2016;
- 28 iii. Rebuttal Expert Disclosures/Reports: August 15, 2016;

- 1 iv. Completion of Expert Depositions: September 9, 2016; and
2 v. Final Motion Cut-Off Date (final hearing date for all motions): October
3 17, 2016.

4 **D. Depositions**

5 The parties agree to take depositions in accordance with the Federal Rules of Civil
6 Procedure and the Local Rules of this Court.

7 **E. Rule 26(f)(3)(C): Electronically Stored Information**

8 The parties anticipate that this case will involve production of electronically stored
9 information (“ESI”) and will endeavor to negotiate stipulated terms for data preservation
10 and production as issues arise.

11 **F. Rule 26(f)(3)(D): Privilege and Protection**

12 The Parties identify the following issues regarding claims of privilege or of
13 protection:

14 1. Privilege Log

15 The parties agree to meet and confer to develop an appropriate protocol for the
16 creation and submission of a privilege log, including the types of documents that will be
17 logged and the information to be provided on the log (*e.g.* how email threads need to be
18 logged, how attachments will be handled, and the like). The parties have agreed that
19 communications between the parties and their litigation counsel need not be entered into
20 the privilege log.

21 2. Protective Order

22 The parties believe that a protective order is necessary in this case, which the
23 parties will endeavor to negotiate and submit to the Court for entry in the near future.

24 **G. Rule 26(f)(3)(E): Limitations on Discovery**

25 The Parties believe that no changes are needed in the limitations imposed by the
26 Federal Rules of Civil Procedure other than as set forth below:

27 ///

28 ///

1 DATED: December 4, 2015

PEREZ WILSON VAUGHN & FEASBY

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3 By: /s/ Jeff Feasby
4 John D. Vaughn
5 Jeff Feasby
6 Attorneys for Defendant and Counterclaimant
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