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Windermere Real Estate Services Company
12

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

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

19 Plaintiffs,

20 v.

21 WINDERMERE REAL ESTATE
22 SERVICES COMPANY, a Washington
corporation; and DOES 1-10
23

24 Defendant.

25 AND RELATED COUNTERCLAIMS
26
27
28

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

Hon. Douglas F. McCormick

**DEFENDANT AND
COUNTERCLAIMANT'S MOTION
IN LIMINE TO EXCLUDE NEWLY
DISCLOSED DAMAGES
EVIDENCE**

[FRCP 37, FRE 402, 403]

Complaint Filed: September 17, 2015

1 **I. INTRODUCTION**

2 On June 21, 2018, the Court granted Defendant’s Motion in Limine and
3 ordered that Plaintiffs’ damages expert, Peter Wrobel, could not testify about his
4 opinion regarding the “net value” of Plaintiff Windermere Services Southern
5 California, Inc. (“Services SoCal”). (Doc. No. 180, p. 5.) In its Order, the Court
6 correctly found that Wrobel had attempted to calculate the Termination Obligation
7 of the ARA and did so erroneously based on the unambiguous language of the Area
8 Representation Agreement (“ARA”). However, the Court also stated that “subject
9 to other rules of civil procedure and evidence, Plaintiffs may present other evidence
10 of damages.” (*Id.*) On July 6, four days before trial, Plaintiffs sent a five-page
11 exhibit they plan to present to the jury claiming the value of Services SoCal was
12 \$7.2 million. The following day, three days before trial, Plaintiffs sent a sixth page
13 to the proposed exhibit identifying \$2 million in expenses, reducing their estimate of
14 Services SoCal’s value to \$5.2 million¹. This was the first time Plaintiffs disclosed
15 this valuation. On July 9, 2018 at 7:28 pm, approximately 12 hours before trial
16 begins, Plaintiffs’ counsel sent another damages summary sheet they plan to display
17 to the jury during opening statement, further revising their damages model.
18 Plaintiffs’ 11th hour damages theory must be excluded.

19 The Court precluded Wrobel from presenting his calculation of the
20 Termination Obligation because it violated the express language of the ARA. (Doc.
21 No. 180, p. 4.) Plaintiffs’ last-minute disclosure again ignores the express language
22 of the ARA and includes several factors that cannot be considered when calculating
23 the Termination Obligation.

24 To the extent Plaintiffs’ newly disclosed damages model is attempting to
25 calculate something other than the Termination Obligation – such as the value or
26

27 ¹ Though it is not clear from the six-page PowerPoint presentation, this appears to
28 be only a portion of the damages Plaintiffs now seek in this case.

1 lost profits of Services SoCal – it should be excluded because it was not disclosed
2 until three days before trial. From the outset of the case, Windermere Real Estate
3 Company, Inc. (“WSC”) asked Plaintiffs to identify their claimed damages arising
4 out of WSC’s alleged breaches of the ARA. In their responses, Plaintiffs’ damages
5 claim relating to the termination of the ARA was limited to the Termination
6 Obligation.

7 Plaintiffs’ damages expert has now been precluded from testifying about that
8 damages component at trial, so Plaintiffs are scrambling to find a way to inflate their
9 damages model. As of June 21, 2018, Plaintiffs knew Wrobel could not testify as to
10 the Termination Obligation or a net value of Services SoCal. Plaintiffs waited over
11 two weeks (three days before trial) to disclose this new damages model. Incredibly,
12 this new damages model more than doubles any previous estimate provided by
13 Plaintiffs for the value of Services SoCal. This case has been pending for nearly
14 three years. Discovery has been closed for nearly two years. Plaintiffs should be
15 precluded from presenting any evidence related to this new damages model
16 disclosed for the first time on the eve of trial. Allowing Plaintiffs to present this
17 new damages model is the definition of trial by ambush.

18 Finally, this new damages model, presented without any supporting evidence,
19 is irrelevant, more prejudicial than probative, would confuse the jury, and should be
20 excluded. Plaintiffs first produced this six-page PowerPoint presentation on July 6
21 and 7, three days before trial, and followed up with a summary the night before trial.
22 Plaintiffs provided no supporting evidence for the numbers identified in the
23 documents, pointing instead to the financial records produced to date, some of
24 which show that Services SoCal rarely, if ever, was profitable. This new damages
25 model is unquestionably unfairly prejudicial and should be excluded.

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II. LEGAL ARGUMENT

A. Plaintiffs' Attempt to Admit Evidence Already Excluded by this Court

The Court already determined that the Termination Obligation must be limited to fees actually collected over the twelve months preceding the termination of the ARA from franchises that stayed with WSC following termination. (Doc. No. 164, p. 6.) Because Wrobel's calculation of the Termination Obligation ignored the unambiguous language of the ARA, the Court excluded that portion of his damages opinion. (Doc. No. 180, p. 5.) Now, Plaintiffs attempt to inflate their Termination Obligation number appears to use the same flawed calculations that led the Court to exclude Wrobel's opinion. This damages analysis must be excluded as a direct contradiction to the unambiguous language of the ARA.

The ARA is clear: to calculate Termination Obligation, only the fees received during the twelve months preceding the termination date from franchisees other than B&D Fine Homes and B&D Fine Homes SoCal² can be considered. The damages model produced on July 6, 7 and 9, attached to this motion as Exhibit A, ignores this unambiguous language. It includes the following:

- Annualized revenue owed, but not paid, by the B&D franchisees as of September 2015;
- 10 years of future revenue for B&D Franchisees;
- 10 years of future revenue from potential future owners that were not franchisees at the time of termination of the ARA;
- 10 years of future revenue from non-B&D Franchisees; and
- 5% annual interest on future revenue from non-B&D Franchisees.

None of these items are properly included when calculating the Termination Obligation under the ARA. Accordingly, Plaintiffs' revised Termination Obligation

² Bennion & Deville Fine Homes Inc. and Bennion & Deville Fine Homes SoCal Inc. are collectively referred to herein as the "B&D Franchisees."

1 calculation must be excluded.

2 Moreover, this new damages model is outrageous on its face and ignores all
3 accepted principals and methods for calculating a company's value or lost profits.
4 According to Plaintiffs' most recent damages analysis, WSC (the franchisor) should
5 pay Services SoCal (the area representative) \$4.2 million in revenues Services
6 SoCal might have received from the B&D Franchisees over the next 10 years. This
7 is based off of money that was *never paid* by the B&D Franchisees. In fact, the fees
8 calculated into the future are amounts that the B&D Franchisees will never have to
9 pay – and that Services SoCal would never be entitled to receive – because *the B&D*
10 *Franchisees terminated their franchise agreements* effective September 30, 2015.

11 Further, the B&D Franchisees *had not paid any fees* for the 15 months
12 preceding their termination of the franchise agreements. Said differently,
13 Services SoCal's new damages model asks WSC to pay millions of dollars in
14 franchise fees to Services SoCal for offices that *never paid fees to Services SoCal*,
15 had *not paid fees for 15 months* before they left Windermere, and *are still owned by*
16 *Bennion & Deville*. Then, Plaintiffs add nearly \$2.8 million in future revenue
17 hypothetically collected over 10 years from non-B&D Franchisees, including an
18 annual "Interest" of 5%. Finally, Plaintiffs assume Services SoCal would register
19 1.7 new owners per year, even though it only brought in one new owner during the
20 last four years of its tenure as area representative.

21 This newly disclosed Termination Obligation calculation is contrary to the
22 facts and the law, is outrageous on its face, and should be excluded.

23 **B. Plaintiffs are Precluded From Offering Any Previously Undisclosed**
24 **Evidence**

25 1. Plaintiffs Failed to Disclose Their New Damages Model in Discovery

26 To the extent Plaintiffs are now attempting to present damages other than the
27 Termination Obligation, their new analysis must be excluded because it was not
28 disclosed in discovery, is irrelevant, would be more prejudicial than probative, and

1 would unnecessarily confuse the jury.

2 On March 3, 2016, WSC served Services SoCal with Interrogatories pursuant
3 to Rule 33 of the Federal Rules of Civil Procedure.³ (Ex. B.) Interrogatory No. 20
4 asked Services SoCal to “State all facts Relating to Your ‘actual damages’ suffered
5 as a result of ‘WSC’s Breaches of the Area Representation Agreement’ as alleged in
6 paragraph 164 of the” First Amended Complaint. (Ex. B, p. 9.) Services SoCal
7 responded on or about April 16, 2016.⁴ (Ex. C.) In response to Interrogatory No. 20,
8 Services SoCal identified 10 categories of damages, none of which relate to the net
9 value/lost profit analysis Plaintiffs are now pursuing:

- 10 1. “Its loss of real estate listings, customer, and agents.” (Ex. C, p. 24.)
11 Plaintiffs’ newly disclosed damages model does not identify any lost
12 listings, customers, or agents;
- 13 2. “Expenditure of funds to create and maintain the technology tools that
14 were to be provided by WSC needed to support the agents and
15 listings.” (Ex. C, p. 24.) Plaintiffs’ newly disclosed damages model
16 does not identify any technology expenses and deducts some
17 unidentified expenses from its revenue projections. Further, this claim
18 was dismissed pursuant to the Court’s ruling on WSC’s Motion for
19 Summary Adjudication (Doc. No. 66, p. 4) and is no longer a part of
20 Plaintiffs’ case (Doc. No. 181, p. 12-17);
- 21 3. “The expenses associated with the technology identified in response to
22 Interrogatory No. 1 above.” (Ex. C, p. 24.) Plaintiffs’ newly disclosed
23 damages model does not identify any technology expenses and deducts

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25 ³ All further Rule references are to the Federal Rules of Civil Procedure unless
otherwise noted.

26 ⁴ Services SoCal’s responses erroneously identified the interrogatory as no. 4 and
27 the response as no. 5. Services SoCal provided the same response to WSC’s
28 Interrogatory No. 24 requesting Services SoCal’s damages resulting from its claim
for breach of the covenant of good faith and fair dealing. (See Ex. C, p. 30.)

1 some unidentified expenses from its revenue projections. Further,
2 although it is not clear which “technology” Services SoCal is referring
3 to, claims related to provision of technology were dismissed pursuant
4 to the Court’s ruling on WSC’s Motion for Summary Adjudication
5 (Order Granting Motion for Summary Adjudication, Doc. No. 66, p. 4)
6 and are no longer a part of Plaintiffs’ case (Second Amended Pretrial
7 Conference Order, Doc. No. 181, p. 12-17);

8 4. “The expenditures associated with the development and maintenance of
9 a user friendly real estate website that provided the technology, tools,
10 and features that WSC’s website(s) failed to provide.” (Ex. C, pp. 24-
11 25.) Plaintiffs’ newly disclosed damages model does not identify any
12 expenses related to website development and deducts some unidentified
13 expenses from its revenue projections. Further, claims related to the
14 provision of technology were dismissed pursuant to the Court’s ruling
15 on WSC’s Motion for Summary Adjudication (Order Granting Motion
16 for Summary Adjudication, Doc. No. 66, p. 4) and are no longer a part
17 of Plaintiffs’ case (Second Amended Pretrial Conference Order, Doc.
18 No. 181, p. 12-17);

19 5. “Expenses associated with preparing its own operating system and
20 tools due to deficiencies in the Windermere System.” (Ex. C, p. 25.)
21 Plaintiffs’ newly disclosed damages model does not identify any
22 expenses related to preparation of its “system and tools” and deducts
23 some unidentified expenses from its revenue projections. Further,
24 claims related to the provision of technology and the “Windermere
25 System” were dismissed pursuant to the Court’s ruling on WSC’s
26 Motion for Summary Adjudication (Order Granting Motion for
27 Summary Adjudication, Doc. No. 66, p. 4) and are no longer a part of
28 Plaintiffs’ case (Second Amended Pretrial Conference Order, Doc. No.

181, p. 12-17);

6. “A reduced ability to obtain agents, clients, and listings because of Windermere Watch.” (Ex. C, p. 25.) Plaintiffs’ newly disclosed damages model does not identify any agents, clients, or listings it could not “obtain” because of Windermere Watch;
7. Expenditures in connection with the search engine optimization efforts undertaken by B&D Fine Homes to curtail the presence of Windermere Watch. (Ex. C, p. 25.) Plaintiffs’ newly disclosed damages model does not identify any search engine optimization expenses, but these damages are identified as Opinion No. 4 in Wrobel’s report (Doc. No. 168-2, p. 25);
8. “Lost fees and royalties for both those franchisees that reached settlement agreements with WSC and effective cut Services SoCal out of the arrangement, and those lost sales during WSC’s lapse or refusal to register to sell franchises in Southern California.” (Ex. C, p. 25.) Plaintiffs’ newly disclosed damages model does not identify any improperly withheld settlement amounts, but these damages are identified as Opinion No. 2 in Wrobel’s report. (Doc. No. 168-2, p. 25.) Plaintiffs’ newly disclosed damages model seeks revenue from hypothetical “new owners” for 10 years. (Ex. A, p. 3.) Plaintiffs’ damages related to failure to register the necessary Franchise Disclosure Documents are limited to 2014. (Second Amended Pretrial Conference Order, Doc. No. 181, p. 15);
9. “Constructively terminating the Area Representation Agreement thereby negating the 50% reduction in franchise fees enjoyed by the other Plaintiffs.” (Ex. C, p. 25) Plaintiffs’ newly disclosed damages model does not include any damages flowing to Services SoCal from negating the reduction in fees. Any reduction in franchise fees

1 necessary reduces revenue generated by Services SoCal. Neither of the
2 B&D Franchisees identified this “negating the 50% reduction in
3 franchise fees” in their responses to interrogatories (Ex. D, p. 14; Ex. E,
4 p. 10); and

5 10. “Failing to pay Services SoCal the termination fee.” (Ex. C, p. 25.) The
6 Court ruled that Wrobel’s opinion on damages for failure to pay the
7 Termination Obligation is excluded (Doc. No. 180, p. 5), and as
8 discussed above Plaintiffs’ newly disclosed damages model does not
9 abide by the unambiguous language of the ARA.

10 Rule 26(a)(1)(A)(iii) required Plaintiffs to provide a “computation of each
11 category of damages,” as well as the “documents or other evidentiary material,
12 unless privileged or protected from disclosure, on which each computation is
13 based.” In addition to this requirement, WSC served interrogatories pursuant to
14 Rule 33 asking Plaintiffs to specify all facts relating to their damages. (Ex. B, p. 9.)
15 Rule 26(e) requires parties to supplement responses they learn are incomplete.
16 Plaintiffs’ did not disclose their new damages model until the eve of trial, nearly
17 three years after they filed their complaint and two years after the close of
18 discovery. (See Ex. C, p. 24-25; Ex. D, p. 14; Ex. E, p. 10.)

19 Under Rule 37(c)(1), “exclusion of evidence not disclosed is appropriate
20 unless the failure to disclose was substantially justified or harmless.” *Hoffman v.*
21 *Constr. Protection Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008). Plaintiffs bear
22 the burden of showing that their failure to disclose was substantially justified or
23 harmless. *R & R Sails, Inc. v. Ins. Co. of the State of Pennsylvania*, 673 F.3d 1240,
24 1246 (9th Cir.2012) The Court has broad discretion to preclude the presentation of
25 evidence not disclosed in discovery. *Id.* at 1180.

26 Plaintiffs’ failure to disclose their new damages model was neither
27 substantially justified nor harmless. Plaintiffs filed their complaint in September
28 2015, nearly three years ago. Plaintiffs served their discovery responses in April

2016. Discovery closed in August 2016. Plaintiffs produced their new damages disclosure between July 6 and 9, 2018; literally the eve of trial. Further, their new disclosure more than doubles what Plaintiffs previously claimed was the Termination Obligation or “net value” of Services SoCal as identified by Wrobel. Moreover, Plaintiffs plan to present this newly disclosed damages theory to the jury during opening statement. WSC would unquestionably be prejudiced by presentation of this evidence to the jury, particularly during opening statements without any foundation, before WSC has an opportunity to challenge the specious basis for this newly disclosed damages model. And, Plaintiffs did not even attempt to provide a justification or excuse for the 11th hour production of this new damages theory. Plaintiffs’ new damages theory should be excluded. *See Silver State Broadcasting, LLC v. Beasley FM Acquisition*, No. 11-cv-1789, 2016 WL 320110, at *4 (D. Nev., Jan. 25, 2016) (excluding all damages testimony at trial because plaintiffs failed to properly disclose during discovery and “requiring the defendants to proceed to trial without an understanding of what damages the plaintiffs are seeking, what evidence supports those damages, or how those damages were calculated is trial by ambush”).

2. Plaintiffs New Damages Model is Irrelevant

Evidence is relevant if it: (1) tends to make a fact more or less probable than it would be without the evidence; and (2) the fact is of consequence to the action. Fed. R. Evid. 401. Relevant evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issue, misleading the jury, or undue delay. Fed. R. Evid. 403.

Plaintiffs’ new damages theory is not relevant to any remaining claim in this case. Speculative, hypothetical revenue that Services SoCal may have generated between 2015 and 2025 is not relevant to any of Services SoCal’s remaining claims (failure to file a Franchise Disclosure Document in 2014; failure to pay the Termination Obligation; interfering with Service SoCal’s relationship with

1 franchisees in the Southern California region; failing to act in good faith; and
2 terminating the ARA “under pretense”). Further, Plaintiffs’ newly disclosed
3 damages model is not supported by admissible evidence. Importantly, the ARA
4 could be terminated by either party without cause on 180-days’ notice, which WSC
5 did on January 27, 2015. WSC subsequently terminated the ARA for cause on
6 February 26, 2015. The parties dispute whether the agreement was properly
7 terminated for cause. But either way, by agreement of the parties, the ARA was
8 terminated effective September 30, 2015. Plaintiffs’ completely speculative revenue
9 projection does not make a fact more or less probable than it would be without the
10 evidence. It is irrelevant and should be excluded.

11 Even if it were relevant, its limited probative value is substantially
12 outweighed by its risk of unfair prejudice. Plaintiffs plan to present this newly
13 disclosed damages theory to the jury in opening statement. WSC is still not aware at
14 this point, on the first day of trial, exactly what damages Plaintiffs will request from
15 the jury in opening statement. Does this newly disclosed damages model supplant
16 the remainder of Wrobel’s opinions? Does it supplement the remaining opinions?
17 Will Plaintiffs add any additional future revenue during trial? This is not the lottery;
18 where Plaintiffs can put up any numbers they want in front of the jury and see what
19 amount is awarded.

20 Finally, this newly disclosed damages model is contrary to the evidence and
21 will likely confuse the jury. The ever-shifting, pie-in-the-sky numbers will leave the
22 jury with more questions than answers. This is completely unacceptable for a nearly
23 three-year-old case.

24 Plaintiffs should be precluded from presenting any evidence or argument
25 about its newly disclosed damages model at trial.

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1 **III. CONCLUSION**

2 For all these reasons, WSC respectfully requests that the Court enter an Order
3 excluding all evidence and testimony related to the damages model disclosed on
4 July 6 and 7, 2018 and attached to this motion as Exhibit A.

5
6 DATED: July 11, 2018

PEREZ VAUGHN & FEASBY INC.

7
8 By: /s/ Jeffrey A. Feasby

9 Jeffrey A. Feasby

10 Attorneys for

11 Windermere Real Estate Services Company
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EXHIBIT A

Bennion & Deville Offices

September 2015

13 Offices

$$\begin{aligned} & \times \$2,500 \text{ per office} \\ & \hline & = \$32,500 \text{ per month} \\ & = \$384,000 \text{ per year} \end{aligned}$$

JRE REVENUE – Bennion & Deville Of

Coast 7 Offices = \$210,000 per year

+

Coachella Valley 7 offices = \$210,000 per year

=

\$420,000 Total Yearly Revenue

\$4.2 Million over 10 years

FUTURE REVENUE – INITIAL FRANCHISE

Initial Franchise Fee - \$25,000

$\frac{1}{2}$ = \$12,500 per new owners

\$12,500

x 1.7 new owners per year

\$21,250 per year

\$212,500 in future revenue

ANNUALIZED REVENUE – MONTHLY FRANCHISE FEE

2015 Annualized Revenue = \$210,756

YEAR	INTEREST	BALANCE
1.	\$10,537.79	\$221,293.79
2.	\$11,064.69	\$232,358.48
3.	\$11,617.93	\$243,976.41
4.	\$12,198.83	\$256,175.24
5.	\$12,808.76	\$268,984.00
6.	\$13,449.20	\$282,433.20
7.	\$14,121.66	\$296,554.86
8.	\$14,827.74	\$311,382.60
9.	\$15,569.13	\$326,951.73
10.	\$16,347.60	\$343,299.33

\$2,783,409.64

TOTAL FUTURE REVENUE

\$4.2 Million Bennion & Deville Office

\$212,500 Initial Franchise Fees

\$2,783,409 Monthly Franchise Fees

Total = \$7,195,909

FUTURE LOST PROFITS

\$7,195,909 (Total Future Revenue)
- \$2,014,854 (Total Future Expenses)

\$5,181,055

LOST FUTURE PROFITS

	B&D Office Revenue	Initial Franchise Fees	Monthly Franchise Fees	Total Future Revenue	Lost Future Profits
	\$420,000	\$21,250	\$221,294	\$662,544	\$477,031
	420,000	21,250	232,358	673,608	484,998
	420,000	21,250	243,976	685,226	493,362
	420,000	21,250	256,175	697,425	502,146
	420,000	21,250	268,984	710,234	511,368
	420,000	21,250	282,433	723,683	521,052
	420,000	21,250	296,555	737,805	531,220
	420,000	21,250	311,383	752,633	541,896
	420,000	21,250	326,952	768,202	553,105
	<u>420,000</u>	<u>21,250</u>	<u>343,299</u>	<u>784,549</u>	<u>564,875</u>
al	\$4,200,000	\$212,500	\$2,783,410	\$7,195,909	\$5,181,0

EXHIBIT B

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6 Attorneys for Defendant and Counterclaimant
Windermere Real Estate Services Company
7

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

10 BENNION & DEVILLE FINE
11 HOMES, INC., a California
corporation, BENNION & DEVILLE
12 FINE HOMES SOCAL, INC., a
California corporation, WINDERMERE
13 SERVICES SOUTHERN
CALIFORNIA, INC., a California
14 corporation,

15 Plaintiffs,

16 v.

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

19 Defendant.
20

21 **AND RELATED COUNTERCLAIMS**
22

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

Hon. Manuel L. Real

**DEFENDANT AND
COUNTERCLAIMANT
WINDERMERE REAL ESTATE
SERVICES COMPANY'S
INTERROGATORIES
PROPOUNDED TO PLAINTIFF
AND COUNTERDEFENDANT
WINDERMERE SERVICES
SOUTHERN CALIFORNIA, INC.**

[SET ONE]

Courtroom: 6

23 PROPOUNDING PARTY: Windermere Real Estate Services Company

24 RESPONDING PARTY: Windermere Services Southern California, Inc.

25 SET NUMBER: ONE

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In answering these interrogatories, you are required to furnish all information which is known or reasonably available to you, including information in the possession of your attorneys and investigators, and not merely such information as is within your personal knowledge. If you cannot answer each interrogatory in full, after exercising due diligence to secure the information, you must so state, describe in full detail the efforts made to secure such information, and answer to the extent possible.

If an interrogatory calls for a description of a document or other item, describe the document or other item in sufficient detail so that it can be obtained from you by a motion for production or a subpoena. If you prefer, instead of describing the document or other item, simply attach to your answer a clear copy or photograph of the writing or thing to the extent permitted by FRCP Rule 33(d).

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1. “Services SoCal,” “You,” and/or “Your,” means Plaintiff and Counterdefendant Windermere Services Southern California, Inc., all predecessors, successors, predecessors-in-interest, successors-in-interest, subsidiaries, divisions, parents and/or affiliates, past or present, any companies that have a controlling interest in Services SoCal, and any current or former employee, officer, director, principal, agent, consultant, representative or attorney thereof, or anyone acting on Services SoCal’s behalf.

2. “FAC” means the “First Amended Complaint” for Case No. 5:15-cv-01921-R-KK, Docket No. 31, filed on November 16, 2015.

3. “FACC” means the “First Amended Counterclaim” for Case No. 5:15-cv-01921-R-KK, Docket No. 16, filed on October 14, 2015.

4. “Answer” means the “Answer to First Amended Counterclaim” filed by Plaintiff and Counterdefendant Bennion & Deville Fine Homes SoCal, Inc., Plaintiff and Counterdefendant Bennion & Deville Fine Homes, Inc., Plaintiff and

1 Counterdefendant Windermere Services Southern California, Inc., and
2 Counterdefendant Robert L. Bennion for Case No. 5:15-cv-01921-R-KK, Docket
3 No. 32, filed on November 27, 2015.

4 5. “Deville Answer” means the “Answer to First Amended
5 Counterclaim” filed by Counterdefendant Joseph R. Deville for Case No. 5:15-cv-
6 01921-R-KK, Docket No. 37, filed on December 14, 2015.

7 6. “Windermere” or “WSC” means Defendant and Counterclaimant
8 Windermere Real Estate Services Company or any one acting on Windermere’s
9 behalf.

10 7. “B&D Fine Homes” means Plaintiff and Counterdefendant Bennion &
11 Deville Fine Homes, Inc. or anyone acting on B&D Fine Homes’ behalf.

12 8. ”B&D SoCal” means Plaintiff and Counterdefendant Bennion &
13 Deville Fine Homes SoCal, Inc. or anyone acting on B&D SoCal’s behalf.

14 9. “B&D Parties” shall mean any or all of B&D Fine Homes, B&D
15 SoCal, Services SoCal, Bennion and/or Deville.

16 10. “Deville” means Counterdefendant Joseph R. Deville.

17 11. “Bennion” means Counterdefendant Robert L. Bennion.

18 12. “Windermere Watch” means the anti-Windermere marketing campaign
19 undertaken by Gary Kruger.

20 13. The terms “Franchisee” or “Franchisees” shall mean all actual or
21 prospective franchisees of the Windermere franchise system.

22 14. The terms “Prospective Franchisee” or “Prospective Franchisees” shall
23 mean all actual or prospective Franchisees that showed some level of interest in
24 joining the Windermere franchise system.

25 15. The “Coachella Valley Franchise Agreement” means the “Windermere
26 Real Estate License Agreement” and all schedules, exhibits, amendments, and
27 addenda thereto, entered into between B&D Fine Homes, Bennion, and Deville, on
28 the one hand, and Windermere, on the other hand, on or around August 1, 2001.

1 16. The “Area Representation Agreement” means the “Windermere Real
2 Estate Services Company Area Representation Agreement for the State of
3 California” and all schedules, exhibits, amendments, and addenda thereto, entered
4 into between Services SoCal and Windermere on or around May 1, 2004.

5 17. The “SoCal Franchise Agreement” means the “Windermere Real Estate
6 Franchise License Agreement” and all schedules, exhibits, amendments, and
7 addenda thereto, entered into between B&D SoCal, Bennion, and Deville, on the
8 one hand, and Windermere, on the other hand, on or around March 29, 2011.

9 18. The “Modification Agreement” means the “Agreement Modifying
10 Windermere Real Estate Franchise License Agreement” entered into between the
11 B&D Parties and Windermere on or around December 18, 2012.

12 19. “California FDD” means any and all Windermere franchise disclosure
13 documents prepared for California, including all Northern California and Southern
14 California versions.

15 20. “Region” means the region (State of California) within which Services
16 SoCal acted as Area Representatives pursuant to the Area Representation
17 Agreement.

18 21. The term “Franchise Agreement” means any Windermere license
19 agreement, franchise agreement, or agreement by any other name that creates a
20 “Franchise” as defined by Corporations Code § 31005.

21 22. “Document” is defined to be synonymous in meaning and equal in
22 scope to the usage of this term in FRCP Rule 34(a) including, without limitation,
23 electronically stored information. A draft or non-identical copy is a separate
24 document within the meaning of this term.

25 23. “Litigation” means the above-referenced action, Case No. 5:15-cv-
26 01921-R-KK, filed in the United States District Court of the Central District of
27 California.

28 ///

1 24. “Communication(s)” means the transmittal of information in the form
2 of facts, ideas, inquiries, and any exchange or transfer of information whether
3 written, oral, electronic, or in any form, including any electronic recordings or other
4 wire taps.

5 25. “Person” means any natural person, and current or former agents,
6 representatives, attorneys or anyone acting or purporting to act on his/her behalf or
7 under his/her control.

8 26. “Entity” or “Entities” means, including without limitation, corporation,
9 company, firm, partnership, joint venture, association, governmental body or
10 agency, or persons other than a natural person.

11 27. “Third Party” or “Third Parties” means all persons who are not parties
12 to this Litigation, as well as their officers, directors, employees, agents and
13 attorneys.

14 28. “Correspondence” means both written and oral communications.
15 Correspondence includes any communication, whether in the form of a letter, note,
16 memorandum, electronic mail or other communication, whether You are the
17 originator, the recipient, or third-party observer of such correspondence.

18 29. “Identify” with respect to a natural Person means You are to provide
19 such Person’s full name, employer, last know address, and last known phone
20 number.

21 30. “Identify” with respect to an Entity means You are to provide the
22 entity’s full name, state of incorporation or creation of entity, address of its principal
23 place of business, its current and former parents, subsidiaries, affiliates,
24 predecessors, successors, employees, managers, members, officers, directors,
25 employees, partners, agents, representatives, accountants, attorneys, anyone acting
26 or purporting to act on its behalf, and the full name of the Person most
27 knowledgeable of the entity’s involvement.

28 ///

1 31. “Identify” with respect to Communications means You are to provide
2 the date, the subject matter, its type and the persons involved in the
3 Communications.

4 32. “And” and “or” shall be understood as either conjunctive or disjunctive,
5 whichever is more inclusive in content. The term “any” or “each” shall be
6 understood to include and encompass “all.”

7 33. “Relating to” means, in whole or in part, constituting, containing,
8 comprising, referring to embodying, connected to, reflecting, describing, analyzing,
9 showing, evidencing, discussing, identifying, illustrating, stating, regarding,
10 supporting, refuting, rebutting, responding to, commenting on, evaluating, about, in
11 respect of, mentioning, dealing with, or in any way pertaining to, either explicitly or
12 implicitly.

13 34. The use of a verb in any tense shall be construed as including the use of
14 the verb in all other tenses.

15 35. The singular form of any word shall be deemed to include the plural.
16 The plural form of any word shall be deemed to include the singular.

17 36. “Including” shall be construed to mean “including, without limitation”
18 or “including, but not limited to.”

19 **SPECIAL INTERROGATORIES**

20 **INTERROGATORY NO. 1:**

21 State all facts Relating to the B&D Parties’ contention that “WSC’s conduct
22 constituted a constructive termination of the Area Representation Agreement” as
23 alleged in paragraph 33 of the FAC.

24 **INTERROGATORY NO. 2:**

25 State all facts Relating to the “symbiotic relationship between the Coachella
26 Valley Franchise Agreement and the Area Representation Agreement” as alleged in
27 paragraph 37 of the FAC.

28 ///

1 **INTERROGATORY NO. 3:**

2 Identify each and every “agent” lost as a result of Windermere Watch as
3 alleged in paragraph 64 of the FAC.

4 **INTERROGATORY NO. 4:**

5 State all facts Relating to the B&D Parties’ contention that “WSC’s failure to
6 properly and timely renew its California franchise registration . . . negatively
7 impacted Services SoCal’s ability to offer new franchises under the Area
8 Representation Agreement” as alleged in paragraph 102 of the FAC.

9 **INTERROGATORY NO. 5:**

10 Identify each and every instance Your ability to offer new franchises under
11 the Area Representation Agreement was “negatively impacted” due to WSC’s
12 “failure to properly and timely renew its California franchise registration” as alleged
13 in paragraph 102 of the FAC.

14 **INTERROGATORY NO. 6:**

15 State all facts Relating to the B&D Parties’ contention that “by early 2014,
16 WSC had decide to remove Bennion & Deville as the Area Representative from the
17 Southern California region” as alleged in paragraph 105 of the FAC.

18 **INTERROGATORY NO. 7:**

19 Identify each and every employee that Teather attempted to solicit as alleged
20 in paragraph 125 of the FAC.

21 **INTERROGATORY NO. 8:**

22 Identify each and every sales agent that Teather attempted to solicit as alleged
23 in paragraph 125 of the FAC.

24 **INTERROGATORY NO. 9:**

25 Identify each and every sales agent that terminated his/her employment with
26 Bennion & Deville following the “relocation event” as alleged in paragraph 125 of
27 the FAC.

28 ///

1 **INTERROGATORY NO. 10:**

2 Identify each and every IT personnel solicited by WSC to join WSC's
3 operations in Seattle as alleged in paragraph 126 of the FAC.

4 **INTERROGATORY NO. 11:**

5 State all facts Relating to the B&D Parties' contention that Teather "was
6 telling [Southern California franchisees] that Bennion & Deville were 'giving up'
7 their rights to serve as Area Representative" as alleged in paragraph 129 of the FAC.

8 **INTERROGATORY NO. 12:**

9 Identify each and every franchisee who Teather spoke to, instructing them
10 that "all communications involving the region should be directed to him" as alleged
11 in paragraph 129 of the FAC.

12 **INTERROGATORY NO. 13:**

13 Identify the "existing franchisee" that Bennion & Deville "rejected for
14 legitimate business reasons" as alleged in paragraph 130 of the FAC.

15 **INTERROGATORY NO. 14:**

16 Identify each and every franchisee that Teather "secretly" told "that he, on
17 behalf of WSC, was taking over as the Area Representative" as alleged in paragraph
18 132 of the FAC.

19 **INTERROGATORY NO. 15:**

20 Identify each and every franchisee that "began to pirate customers and
21 agents" as alleged in paragraph 132 of the FAC.

22 **INTERROGATORY NO. 16:**

23 State all facts Relating to the B&D Parties' contention that Teather attempted
24 "to interfere with and undermine Bennion & Deville rights as Area Representative"
25 as alleged in paragraph 133 of the FAC.

26 ///

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1 **INTERROGATORY NO. 17:**

2 State all facts Relating to Your contention that WSC failed “to provide
3 Services SoCal with the uninterrupted right to offer Windermere franchise
4 businesses in Southern California” as alleged in paragraph 163.a. of the FAC.

5 **INTERROGATORY NO. 18:**

6 State all facts Relating to Your contention that WSC failed “to provide
7 servicing support in connection with the marketing, promotion and administration of
8 the Trademark and Windermere System” as alleged in paragraph 163.c. of the FAC.

9 **INTERROGATORY NO. 19:**

10 State all facts Relating to Your contention that WSC failed “to make available
11 to Services SoCal competent ‘key people’ necessary to assist Services SoCal in
12 carrying out its obligations to offer and sell franchises as the Area Representative”
13 as alleged in paragraph 163.d. of the FAC.

14 **INTERROGATORY NO. 20:**

15 State all facts Relating to Your “actual damages” suffered as a result of
16 “WSC’s breaches of the Area Representation Agreement” as alleged in paragraph
17 164 of the FAC.

18 **INTERROGATORY NO. 21:**

19 State all facts Relating to Your contention that WSC took action “to interfere
20 with and damage many of the relationships between Services SoCal and franchisees
21 in the Southern California region” as alleged in paragraph 170.b. of the FAC.

22 **INTERROGATORY NO. 22:**

23 State all facts Relating to Your contention that WSC “solicited Services
24 SoCal’s participation in offers and sales of franchisees in violation of the franchise
25 laws” as alleged in paragraph 170.c. of the FAC.

26 **INTERROGATORY NO. 23:**

27 State all facts Relating to Your contention that WSC “fail[ed] to act in good
28 faith” as alleged in paragraph 170.e. of the FAC.

1 **INTERROGATORY NO. 24:**

2 State all facts Relating to Your “damages” suffered as a result of “WSC’s
3 breach of the implied covenant of good faith and fair dealing” as alleged in
4 paragraph 171 of the FAC.

5 **INTERROGATORY NO. 25:**

6 State all facts Relating to Your contention that WSC “unlawfully” terminated
7 the Area Representation Agreement as alleged in paragraph 186 of the FAC.

8
9 DATED: March 3, 2016 PEREZ WILSON VAUGHN & FEASBY

10
11 By: /s/ John D. Vaughn

12 John D. Vaughn

13 Jeffrey A. Feasby

14 Attorneys for Defendant and Counterclaimant

15 Windermere Real Estate Services Company
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Attorneys for Plaintiffs and Counter-Defendants

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

BENNION & DEVILLE FINE	)	Case No. 5:15-cv-01921-R-KK
HOMES, INC., a California	)	<i>Hon. Manual L. Real</i>
corporation, BENNION & DEVILLE)	
FINE HOMES SOCAL, INC., a	)	COUNTERDEFENDANT
California corporation,	)	WINDERMERE SERVICES
WINDERMERE SERVICES	)	SOUTHERN CALIFORNIA, INC.'S
SOUTHERN CALIFORNIA, INC., a	)	RESPONSES TO
California corporation,	)	DEFENDANT AND
	)	COUNTERCLAIMANT
Plaintiffs,	)	WINDERMERE REAL ESTATE
	)	SERVICES COMPANY'S
v.	)	INTERROGATORIES, SET ONE

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

Defendants.

AND RELATED COUNTERCLAIMS

1 Pursuant to Federal Rules of Civil Procedure (“FRCP”) Rule 33(b), Plaintiff and
2 Counter-Defendant Windermere Services Southern California, Inc. (“Services SoCal”)
3 hereby provides responses to Defendant and Counterclaimant Windermere Real Estate
4 Services’ (“WSC”) Interrogatories, Set One. Services SoCal expressly reserves the right
5 to supplement, amend or correct these responses.

6 7 **GENERAL OBJECTIONS**

8 Services SoCal objects to the definition of “Prospective Franchisee” or
9 “Prospective Franchisees” as it is vague and ambiguous as to what constitutes “some
10 level of interest.” Services SoCal will construe the phrases as encompassing entities and
11 persons who orally or through written request sought information regarding becoming a
12 franchisee.

13 Services SoCal objects to the definition of “Identify” with respect to an entity as
14 vastly overbroad. Services SoCal will provide the entity’s full name, address of its
15 principal place of business, contact phone number and the full name of the person most
16 knowledgeable of the entity’s involvement. Services SoCal objects to the other requested
17 categories of information.

18 19 **RESPONSES TO SPECIAL INTERROGATORIES**

20 **INTERROGATORY NO. 1:**

21 State all facts Relating to the B&D Parties’ contention that “WSC’s conduct
22 constituted a constructive termination of the Area Representation Agreement” as alleged
23 in paragraph 33 of the FAC.

24 **RESPONSE TO INTERROGATORY NO. 1:**

25 WSC neglected and/or intentionally refused to comply with its obligations under
26 the Area Representation Agreement. In order to effectively push Bennion and Deville out
27 of the Windermere system and constructively terminate the Area Representation
28 Agreement WSC implemented a plan that allowed it to (i) stop Bennion and Deville from

1 Drayna's advice and counsel is a clear contradiction of the law and could have
2 subjected Services SoCal and its owners, Robert Bennion and Joseph Deville, to civil and
3 criminal liability under the CFIL. Moreover, WSC's failure to timely register the 2013
4 Southern California FDD, and Drayna's subsequent intentional and malicious
5 misrepresentations to Plaintiffs concerning the substituted use of the Northern California
6 FDD constitute multiple breaches of the Area Representation Agreement, including
7 Section 3 which requires WSC to provide competent "key people to the extent necessary
8 to assist Area Representative in carrying out its obligations as set forth in this
9 Agreement."

10 Moreover, WSC did not renew its Southern California FDD for the 2014 year.
11 Nonetheless, on July 11, 2014, July 30, 2014, and December 2, 2014, WSC offered new
12 franchises to existing franchisees in the region. While neither Bennion nor Deville were
13 involved in the solicitation, negotiation, or sale of these new franchises, Drayna still
14 directed Deville to sign each of the agreements on behalf of Services SoCal. Again, these
15 offers and sales constitute the unlawful sale of an unregistered franchise under the CFIL.
16 Drayna's continued competent legal advice and direction breached Section 3 of the Area
17 Representative Agreement.

18 **INTERROGATORY NO. 4:**

19 State all facts Relating to Your "actual damages" suffered as a result of "WSC's
20 breaches of the Area Representation Agreement" as alleged in paragraph 164 of the FAC.

21 **RESPONSE TO INTERROGATORY NO. 5:**

22 At this stage in discovery, and without the benefit of WSC's discovery responses
23 or expert analysis following receipt of those records, Plaintiffs' "actual damages" are not
24 known. However, the nature of Service SoCal's actual damages relate to (1) its loss of
25 real estate listings, customers, and agents, (2) expenditure of funds to create and maintain
26 the technology tools that were to be provided by WSC needed to support the agents and
27 listings, (3) the expenses associated with the technology identified in response to
28 Interrogatory No. 1, above, (4) the expenditures associated with the development and

1 maintenance of a user friendly real estate website that provided the technology, tools, and
2 features that WSC's website(s) failed to provide, (5) expenses associated with preparing
3 its own operating system and tools due to deficiencies in the Windermere System; (6) a
4 reduced ability to obtain agents, clients, and listings because of Windermere Watch; and
5 (7) expenditures in connection with the search engine optimization efforts undertaken by
6 B&D Fine Homes to curtail the presence of Windermere Watch; (8) lost fees and
7 royalties for both those franchisees that reached settlement agreements with WSC and
8 effectively cut Services SoCal out of the arrangement, and those lost sales during WSC's
9 lapse or refusal to register to sell franchises in Southern California; (9) constructively
10 terminating the Area Representation Agreement thereby negating the 50% reduction in
11 franchise fees enjoyed by the other Plaintiffs; and (10) failing to pay Services SoCal the
12 termination fee. Discovery continues and this responding party will supplement its
13 response following the receipt and review of WSC's discovery responses and document
14 production.

15 Discovery continues.

16 **INTERROGATORY NO. 6:**

17 State all facts Relating to Your contention that WSC took action "to interfere with
18 and damage many of the relationships between Services SoCal and franchisees in the
19 Southern California region" as alleged in paragraph 170.b. of the FAC.

20 **RESPONSE TO INTERROGATORY NO. 21:**

21 This responding party contends that by May 2014, WSC – through its agent Mike
22 Teather – had begun bypassing Services SoCal as the Area Representative for the region
23 and dealing directly with current and prospective Windermere franchisees. While
24 unbeknownst to Plaintiffs at the time, they have since learned that during his direct
25 communications with the Southern California franchisees, Teather was telling them that
26 Bennion and Deville were "giving up" their right to serve as Area Representative in the
27 Southern California region, and that all communications involving the region should be
28 directed to him. Teather also ingratiated himself to the existing franchisees by approving

1 State all facts Relating to Your contention that WSC “unlawfully” terminated the
2 Area Representation Agreement as alleged in paragraph 186 of the FAC.

3 **RESPONSE TO INTERROGATORY NO. 25:**

4 After April 20, 2014, Services SoCal was deprived of one of its primary benefits
5 under the Area Representation Agreement – *i.e.*, the right to 50% of all franchise fees and
6 subsequent royalties paid by all new Windermere franchisees in the Southern California
7 region. (See Ex. B to FAC, §§ 2, 3.) WSC’s unilateral termination of Service SoCal’s
8 right and ability to solicit and sell new Windermere franchises – in addition to WSC’s
9 efforts to usurp and interfere with Plaintiffs’ franchise relationships, pirate their
10 employees, and otherwise fail to provide any affirmative support in combating
11 Windermere Watch’s negative marketing campaign – resulted in the premature,
12 constructive termination of the Area Representation Agreement, without just cause of
13 sufficient notice.

14
15 Dated: April 13, 2016

MULCAHY LLP

16
17 By: /s/ Kevin A. Adams
18 Kevin A. Adams
19 *Attorneys for Plaintiffs & Counter-*
20 *Defendants*
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EXHIBIT D

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Attorneys for Plaintiffs and Counter-Defendants

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

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

Plaintiffs,

v.

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

Defendants.

AND RELATED COUNTERCLAIMS

) Case No. 5:15-cv-01921-R-KK
) *Hon. Manual L. Real*
)
) **BENNION & DEVILLE FINE**
) **HOMES, INC.'S RESPONSES TO**
) **WINDERMERE REAL ESTATE**
) **SERVICES COMPANY'S**
) **INTERROGATORIES, SET ONE**

1 Pursuant to Federal Rules of Civil Procedure (“FRCP”) Rule 33(b), Plaintiff and
2 Counter -Defendant Bennion & Deville Fine Homes, Inc. (“B&D Fine Homes”) hereby
3 provides responses to Defendant and Counterclaimant Windermere Real Estate Services’
4 Interrogatories, Set One. B&D Fine Homes expressly reserves the right to supplement,
5 amend or correct these responses.
6

7 **GENERAL OBJECTIONS**

8 B&D Fine Homes objects to the definition of “Prospective Franchisee” or
9 “Prospective Franchisees” as it is vague and ambiguous as to what constitutes “some
10 level of interest.” B&D Fine Homes will construe the phrases as encompassing entities
11 and persons who orally or through written request sought information regarding
12 becoming a franchisee.

13 B&D Fine Homes objects to the definition of “Identify” with respect to an entity as
14 vastly overbroad. B&D Fine Homes will provide the entity’s full name, address of its
15 principal place of business, contact phone number and the full name of the person most
16 knowledgeable of the entity’s involvement. B&D Fine Homes objects to the other
17 requested categories of information.
18

19 **RESPONSES TO SPECIAL INTERROGATORIES**

20 **INTERROGATORY NO. 1:**

21 State all facts Relating to the B&D Parties’ contention that WSC’s “real estate
22 technology and related services” have become “outdated, unstable, and no longer a real
23 option for its franchisees in the Southern California region” as alleged in paragraph 2 of
24 the FAC.

25 **RESPONSE TO INTERROGATORY NO. 1:**

26 The technology provided by WSC has become outdated, unusable and no longer a
27 viable option for franchisees for at least the following reasons:
28

1 **INTERROGATORY NO. 14:**

2 Identify any and all instances in which You contend that WSC failed “to take
3 necessary action (legal or otherwise) to prevent infringement of the Windermere
4 trademark” as alleged in paragraph 151.c. of the FAC.

5 **RESPONSE TO INTERROGATORY NO. 14:**

6 Objection. This responding party objects to the request on the grounds that it is
7 vague, ambiguous and calls for speculation to respond.

8 Without waiving these objections, and in the interest of discovery, this responding
9 party responds as follows: The “instances” at issue involve Windermere Watch’s
10 continued, unchecked operation of a counter-marketing campaign from December 2012
11 forward.

12 **INTERROGATORY NO. 15:**

13 State all facts Relating to Your “actual damages” as a result of WSC’s “breaches of
14 the Coachella Valley Franchise Agreement” as alleged in paragraph 152 of the FAC.

15 **RESPONSE TO INTERROGATORY NO. 15:**

16 At this stage in discovery, and without the benefit of WSC’s discovery responses
17 or expert analysis following receipt of those records, Plaintiffs’ “actual damages” are not
18 known. However, the nature of B&D Fine Home’s actual damages relate to (1) its loss of
19 real estate listings, customers, and agents, (2) expenditure of funds to create and maintain
20 the technology tools that were to be provided by WSC needed to support the agents and
21 listings, (3) the expenses associated with the technology identified in response to
22 Interrogatory No. 1, above, (4) the expenditures associated with the development and
23 maintenance of a user friendly real estate website that provided the technology, tools, and
24 features that WSC’s website(s) failed to provide, (5) expenses associated with preparing
25 its own operating system and tools due to deficiencies in the Windermere System; (6) a
26 reduced ability to obtain agents, clients, and listings because of Windermere Watch; and
27 (7) expenditures in connection with the search engine optimization efforts undertaken by
28 B&D Fine Homes to curtail the presence of Windermere Watch. Discovery continues

1 and this responding party will supplement its response following the receipt and review
2 of WSC's discovery responses and document production.

3 **INTERROGATORY NO. 16:**

4 State all facts Relating to Your contention that WSC failed "to provide adequate
5 technology services" as alleged in paragraph 158.a. of the FAC.

6 **RESPONSE TO INTERROGATORY NO. 16:**

7 *See Response to Interrogatory No. 1, above.*

8 ///

9
10 **INTERROGATORY NO. 17:**

11 State all facts Relating to Your contention that WSC's technology fees were
12 "excessive" as alleged in paragraph 158.a. of the FAC.

13 **RESPONSE TO INTERROGATORY NO. 17:**

14 In short, the technology fees charged by WSC were excessive because the tools
15 and features provided by WSC either did not work or were wholly inadequate. This
16 sentiment was echoed by Mike Teather in early 2015 when he informed Plaintiffs'
17 principals that their tools and technology was superior to that of WSC. A list of the flaws
18 in WSC's technology is set forth in response to Interrogatory No. 1, above.

19 **INTERROGATORY NO. 18:**

20 State all facts Relating to Your contention that WSC's service or assistance (to the
21 extent provided by WSC) "was worthless" as alleged in paragraph 158.a. [sic] of the
22 FAC.

23 **RESPONSE TO INTERROGATORY NO. 18:**

24 The Coachella Valley Franchise Agreement defines the "Windermere System" to
25 be "the standards, methods, procedures, techniques, specifications and programs
26 developed by WSC for the establishment, operation and promotion of independently
27 owned real estate brokerage offices, as those standards, methods, procedures, techniques,
28 specifications and programs may be added to, changed, modified, withdrawn or otherwise

1 the agents and listings, (3) the expenses associated with the technology identified in
2 response to Interrogatory No. 1, above, (4) the expenditures associated with the
3 development and maintenance of a user friendly real estate website that provided the
4 technology, tools, and features that WSC's website(s) failed to provide, (5) expenses
5 associated with preparing its own operating system and tools due to deficiencies in the
6 Windermere System; (6) a reduced ability to obtain agents, clients, and listings because
7 of Windermere Watch; and (7) expenditures in connection with the search engine
8 optimization efforts undertaken by B&D Fine Homes to curtail the presence of
9 Windermere Watch. Discovery continues and this responding party will supplement its
10 response following the receipt and review of WSC's discovery responses and document
11 production.
12

13 DATED: April 13, 2016

MULCAHY LLP

15 By: /s/ Kevin A. Adams
16 Kevin A. Adams
17 *Attorneys for Plaintiffs & Counter-*
18 *Defendants*
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EXHIBIT E

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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.

Defendants.

AND RELATED COUNTERCLAIMS

) Case No. 5:15-cv-01921-R-KK

) *Hon. Manual L. Real*

)

) **COUNTERDEFENDANT BENNION**

) **& DEVILLE FINE HOMES SOCAL,**

) **INC.'S RESPONSES TO**

) **DEFENDANT AND**

) **COUNTERCLAIMANT**

) **WINDERMERE REAL ESTATE**

) **SERVICES COMPANY'S**

) **INTERROGATORIES, SET ONE**

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1 Pursuant to Federal Rules of Civil Procedure (“FRCP”) Rule 33(b), Plaintiff and
2 Counter -Defendant Bennion & Deville Fine Homes SoCal, Inc. (“B&D SoCal”) hereby
3 provides responses to Defendant and Counterclaimant Windermere Real Estate Services’
4 Interrogatories, Set One. B&D SoCal expressly reserves the right to supplement, amend
5 or correct these responses.
6

7 **GENERAL OBJECTIONS**

8 B&D SoCal objects to the definition of “Prospective Franchisee” or “Prospective
9 Franchisees” as it is vague and ambiguous as to what constitutes “some level of interest.”
10 B&D SoCal will construe the phrases as encompassing entities and persons who orally or
11 through written request sought information regarding becoming a franchisee.

12 B&D SoCal objects to the definition of “Identify” with respect to an entity as
13 vastly overbroad. B&D SoCal will provide the entity’s full name, address of its principal
14 place of business, contact phone number and the full name of the person most
15 knowledgeable of the entity’s involvement. B&D SoCal objects to the other requested
16 categories of information.
17

18 **RESPONSES TO SPECIAL INTERROGATORIES**

19 **INTERROGATORY NO. 1:**

20 State all facts Relating to the B&D Parties’ contention that “Windermere Watch
21 had severely impacted Plaintiffs’ ability to function in Southern California” as alleged in
22 paragraph 64 of the FAC.

23 **RESPONSE TO INTERROGATORY NO. 1:**

24 Objection. This responding party objects to the request on the grounds that it is
25 vague, ambiguous, and overly broad as to both scope and time. The request also calls for
26 information that is not reasonably calculated to lead to the discovery of admissible
27 evidence.
28

1 consultations by telephone or in person, or by other means of communication.” It was
2 also understood that WSC would develop, implement, and improve components of the
3 Windermere System, including the addition of optional programs to enhance Plaintiffs’
4 businesses. Notwithstanding these contractual obligations and understandings, WSC
5 failed to provide any such services after January 1, 2012.

6 **INTERROGATORY NO. 9:**

7 State all facts Relating to Your “actual damages” suffered as a result of WSC’s
8 “breaches of the SoCal Franchise Agreement” as alleged in paragraph 176 of the FAC.

9 **RESPONSE TO INTERROGATORY NO. 9:**

10 At this stage in discovery, and without the benefit of WSC’s discovery responses
11 or expert analysis following receipt of those records, Plaintiffs’ “actual damages” are not
12 known. However, the nature of B&D SoCal’s actual damages relate to (1) its loss of real
13 estate listings, customers, and agents, (2) expenditure of funds to create and maintain the
14 technology tools that were to be provided by WSC needed to support the agents and
15 listings, (3) the expenses associated with the technology identified in response to
16 Interrogatory No. 1, above, (4) the expenditures associated with the development and
17 maintenance of a user friendly real estate website that provided the technology, tools, and
18 features that WSC’s website(s) failed to provide, (5) expenses associated with preparing
19 its own operating system and tools due to deficiencies in the Windermere System; (6) a
20 reduced ability to obtain agents, clients, and listings because of Windermere Watch; and
21 (7) expenditures in connection with the search engine optimization efforts undertaken by
22 B&D SoCal to curtail the presence of Windermere Watch. Discovery continues and this
23 responding party will supplement its response following the receipt and review of WSC’s
24 discovery responses and document production.

25 **INTERROGATORY NO. 10:**

26 State all facts Relating to Your “damages” suffered as a result of “WSC’s breach
27 of the implied covenant of good faith and fair dealing” as alleged in paragraph 182 of the
28 FAC.

1 agreements. WSC's failure to perform the obligations it had a duty to perform under the
2 agreements relieved Plaintiffs from having to perform under the agreements.

3 B&D SoCal continues to conduct an investigation and discovery. Consequently, it
4 is likely further facts will be known at a later time.

5 **INTERROGATORY NO. 18:**

6 State all facts Relating to the B&D Parties' Eighth Affirmative Defense of
7 "Damages Caused by Others."

8 **RESPONSE TO INTERROGATORY NO. 18:**

9 B&D SoCal has asserted applicable or potentially applicable affirmative defenses
10 to preserve its rights consistent with the Federal Rules of Civil Procedure. WSC has
11 asserted counterclaims against Services SoCal arising out of alleged failures of Services
12 SoCal to remit certain fees, paid by franchisees, to WSC. However, this claim fails to the
13 extent that the fees were never remitted to Services SoCal by the franchisees. Although
14 Services SoCal was responsible for collecting the fees from the franchisees and remitting
15 50% to WSC, Services SoCal was not a guarantor of any of the fees. (See Ex. B to FAC,
16 §§ 3, 11-13, Exhibit A, § 3 – "It is understood that collection of fees will be the
17 responsibility of Area Representative, but Area Representative will not be responsible for
18 payment of uncollectable fees.") To the extent WSC seeks reimbursement of these fees as
19 part of their counterclaims in this case, Services SoCal are not responsible for damages
20 caused by the franchisees failure to pay WSC.

21 B&D SoCal continues to conduct an investigation and discovery. Consequently, it
22 is likely further facts will be known at a later time.

23 DATED: April 13, 2016

MULCAHY LLP

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